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IN HONOUR OF
IUS ET LEX

**SOME THOUGHTS
ON SPEAKING ABOUT LAW**

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George P. Fletcher
In Honour of „Ius” et „Lex”. Some Thoughts on Speaking about Law



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1. THE SCOPE OF ARTICLE

As we travel across Europe we encounter two distinct terms for the English “law”. There is typically one term to refer to statutory law and another to refer to law in a broader inclusive sense encompassing principles of justice as well as rules laid down by the legislature. The former is captured by the terms *Gesetz*, *loi*, *ley*, *legge*, and *zakon*, the latter by ideas of *Recht*, *droit*, *derecho*, *diritto*, *pravo*. In broader strokes, we may think of the first set of terms as referring to law legitimated by the authority of the legislature, and to the second set, as law legitimated by its inherent reasonableness. In short, the distinction is between law-as-enacted-law and law-as-principle. In less charitable terms, the distinction might be put as that between law-as-power and law-as-reason. In the West we first encounter this distinction in the Latin terms *lex* and *ius*. The *lex* is laid down by the powers that be. The *ius* lays claims to intrinsic merit. As a tribute to the new journal “Ius et Lex”, it is appropriate to reflect on the intriguing and subtle distinctions between these two terms for law.

Reflecting on the differences between *lex* and *ius* also unexpectedly provides a point of correspondence between the language used in this article and the language spoken by the editors primarily responsible for the new journal, namely between English and Polish. At one time English employed the term Right to mean what German mean by *Recht*. In a famous seventeenth century case Lord Coke wrote that a statute was invalid because it violated the principles of “common Right or reason”. This sense of Right fell into disuse, certainly by the nineteenth century. As a result, we never American lawyers cultivate a systematic ambiguity when we use the term “law” or phrases like the “rule of law”. Do we mean to refer to law as *Gesetz* or law as *Recht*. Is the point of the rule of law to celebrate a *Gesetzesstaat* – a state based on the laws laid

down – or a *Rechtsstaat* – a state based on higher principles of justice. In my opinion, some people mean to refer to one and some to the other. Maintaining the ambiguity may have its political reasons. Constantly shifting back and forth between law-as-power and law-as-reason can mask the use of power and lend force to the claims of reason. But those of us who seek to understand the philosophical nuances of the law can hardly applaud the confusion caused by the absence of relevant distinctions.

The word “law”, of course, derives from *lex* and *loi*. The term Right corresponded to the Germanic root *Recht*. The Latin root eventually drove out the Germanic derivative. Law drove out the Right. If I had to hazard a guess why this happened, I would hypothesize that in the history of the common law, the term “law” came to be associated with the idea of good or just law. There was no difference between common right, as Lord Coke referred to it, and the common law, as Blackstone wrote about it in the mid-eighteenth century. Both common right and the common law stood for the idea of law as reason.

As I understand the situation in the Polish legal language, the evolution might have been just the opposite. The Russian language worked out the distinction between *zakon* and *zakonodatelstvo*, on the one hand, and *pravo*, on the other. But in current Polish usage, I am told, there is no term corresponding to *zakon* and its various derivatives. The cognates to the term *pravo* has occupied the field. For example, the term for legality is typically based on *Gesetz* (*Gesetzlichkeit*) or *zakon* (*zakonnost'*), but in Polish the idea of legality turns out to be a cognate of *pravo* (*praworzadnosc*). Why this happened and what the implications of this asymmetry between Russian and Polish might be – these are problems best left to my Polish colleagues.

The important point is that both English and Polish represent interesting deviations from the norm of maintaining a clear linguistic marking of the difference between the law laid down, on the one hand, and the law that appeals to us as a matter of principle, on the other. I present these two poles as extremes, as ideal types. Think of standing at the end of a spectrum marked by the numbers 0 and 100. *Lex* stands at 0. *Ius* stands at 100. In any particular legal culture or at some phase of historical development, *lex* might move toward *ius* or *ius* might move toward *lex*. When *lex* moves toward *ius*, the idea of *lex* begin to encompass

principles of justice. The law for which it stands becomes worthy of respect. When *ius* move toward *lex*, the opposite occurs. The honorific conception of law becomes relatively more positivized. The positivist program can be expressed as the reduction of *ius* to *lex*, *Recht* to *Gesetz*. As we shall see, this is move made by those who seek to reduce a body of law to finite and fixed set of legislatively enacted words.

As the discussion proceeds, I wish to present *lex* and *ius*, or *Gesetz* and *Recht*, as ideal types for these two extreme forms of law. I am mindful of the risk of oversimplification and where some cases deviate from ideal types, I will try to point these out.

2. THE LOCAL, THE UNIVERSAL AND "IUS"

There is a temptation to translate *ius* by appealing to its linguistic offspring “justice”. There is a similar mistake in common efforts to render Kant’s *Rechtsphilosophie* as the philosophy of justice. Justice represents as idea radically different from *ius* or *Recht*, and there is no better of showing this than reflecting on the local and the universal in legal thought.

Lex is a purely local idea. Indeed in resolving disputes in international private law (conflicts of law), we routinely apply the *lex* where the transaction is grounded. For example, the *lex loci delicti* refer to the law of the place where the tort occurred. The traditional approach to choosing the law for transnational tort disputes is to apply the *lex* of the place where the accident or injury occurred. (Note that in this phrase *lex* might have a broader connotation that the statutory law. It would include the entire body of applicable law). The important point about applying the *lex* of a foreign state is that the law is accepted and applied as the law of another jurisdiction. This is what it means to say that *lex* is purely local.

Ius, by contrast, knows no boundaries. When Americans incorporated the *ius soli* in the Fourteenth Amendment – the principle that all persons born in the United States would become citizens of the country – they were not transplanting or implanting the law of another place. They were simply recognizing the intrinsic appeal of the principle that the location of birth – the soil on which the birth occurs – should determine citizenship.

It may be true that the English developed the *ius soli* as appropriate to an island society where there was no distinction between the inhabitants and those born on the soil. But the reason Americans incorporated the *ius soli* in the Fourteenth Amendment (anyone born in the United States is an American citizen) is not because the rule was English but because the rule made sense as the right rule. This is what it means to say while *lex* is always local, *ius* knows no boundaries.

Yet the idea of *ius* falls short of being a universal. There are many countries that do not recognize the *ius soli*. Continental Europeans prefer the *ius sanguinis*. Blood, they think, is more important than soil. Perhaps it is. But there is no need to decide which side is right. In the field of *ius* we can celebrate pluralism. We can tolerate diverse approaches to the problem of determining citizenship. Both principles, both *ius soli* and *ius sanguinis*, are plausible or reasonable.

To illustrate the idea of a universal, think of the criteria of “justice”. Though there may be some controversy about this, I should think that “justice” is the kind of standard that remains fixed and permanent. It does vary with time and place. We may debate the requirements of justice but we do not recognize local deviations in deciding what is just and what is not. We need a standard of this sort to express our condemnation of regimes we refuse to tolerate. Slavery is unjust wherever it occurs. There will be some who say that we cannot judge the customs of another people. They will say that is what is just for the American North need not be just for the American South. People who think this way abandon the possibility of thinking critically about not only foreign institutions but about their own institutions.

Would not the supporters of capital punishment be pleased if they could take refuge in a relativistic theory of justice. The Europeans may dislike it but the vast majority of Americans favor the death penalty. But it is not a defense of injustice to claim that most people in a particular place hold a particular opinion. The standard of justice must be considered universal – at least if we are to make sense of recent extradition decisions in Canada and Europe refusing to extradite suspects for trial in the United States when they might be exposed to the injustice of state-sanctioned executions.

The idea of “human rights” represent another universal. Whatever the minimal context of these rights may be, they apply to everyone on

the planet – to every *human* being. It would not do to argue that in this field, we should cultivate diversity and pluralism. Either female circumcision violates the rights of women or it does not. The whole point of the doctrine is to override the judgment of communities that resist the dominant judgment of those who claim access to the truth on these matters.

It should be noticed, therefore, that *ius* occupies a middle position between the purely local concept of *lex* and the universal concept of justice. And the same should be said about the all the modern concepts of law that correspond to *ius* – namely *Recht*, *droit*, *derecho*, *diritto*, *pravo*.

3. VARIATIONS IN THE CONCEPT OF "IUS"

The idea of *Recht* or *ius* exists in many legal cultures outside the limited domain of Indo-European languages. The distinction between law-as-statute and law-as-principle is found not only in the Romance and Germanic languages but in the more exotic habitats of Hungarian, Hebrew, Japanese, and Chinese.

In most of these languages, the term for law-as-principle is the same as the term for personal rights. Thus we can distinguish between objective Right and subjective rights, *objektives Recht* in the singular and *subjektive Rechte* in the plural. This is true in Hungarian as well as the Indo-European languages. Indeed in the West, the notion of subjective rights developed before the term

Right took on the connotation of objective Right or Law. As I understand it, the notion of objective Right did not emerge until roughly the sixteenth century. The entry of this new concept into the pantheon of legal ideas accounts for the fate of *ius*. The progeny of *ius* are elevated to the universal vision of justice, and the work of accounting for law on the ground is left to the notion of Right.

The idea of Right derives from the notion of the straight and level. And in all these cases in which the idea of law-as-principle derives from personal rights, there is a convergence with the idea of the right hand. The left hand may be devious (*sinistra* in Italian) but the right hand is “on the level”.

This pattern of development contrasts sharply with ancient legal cultures where the concept of law typically developed without a foundation in the idea of individual rights. In these culture, the idea of duty to the group preceded, by centuries, the individualistic notion that individual can invokes rights as trumps against the claims of collective welfare. The idea of law-as-principle found its source, therefore, in other values prominent in the legal culture.

The Hebrew term for law-as-principle, *mishpat*, derives from the word for judge – *chuffed*. Good law is the law rendered by a good judge. In the famous biblical dispute about the fate of Sodom and Gomorrah, Abraham challenges God to spare the city if there are minimum number of innocents found there. To make his case more persuasively, Abraham challenges God to render a *mishpat* – to render a proper judgment, to do law in the sense we expect of a good judge. The Bible has no concept of rights but it does have this concept of just law, which entered the vocabulary of Jewish law many centuries before individualism and personal rights take hold in the society. The word for rights, *zchut* derives from the ancient word for assets or property.

With regard the distinction between *Recht* and *Gesetz*, it is not surprising that this distinction eventually emerged in Jewish law as well. Maimonides recognized the difference between rules of conduct others that had an apparent explanation and those that did not. The former were *mishpatim* and the later, *hukim*. This distinction appears in modern Hebrew as the difference between law-as-principle and the law-as-enacted. In the singular, a *mishpat* refers to either to a trial or a judgment – that is, to the work of a judge. A *hok* is a statute. A cognate of this term, *hak*, appears in Arabic as the basic word for law and, following the Western model for association, for individual rights as well.

The pattern in Chinese and Japanese differs. For the Chinese the source of value is not the idea of the good judge but the notion of *Dao* – the way. Yet *dao* seems to have suffered a fate analogous to *ius*, both eventually elevated to universal ideas transcending the law of any particular place or time. The *Dao* became “the way” of Daoism. The term that took its place, namely *Fa*, has become the standard word for law-as-principle in all the languages that rely on Chinese characters. The same character has become *Ho* in Japanese. The character is based on the radical for water — that is, it is classified in the language as based

on the idea of water – and it is not clear why. One explanation is that as all carpenters know, water at rest will always assume a horizontal position. This may be another way of stressing the idea of Right or *Recht* – namely the realization of the strait and level. Another possibility might be that water establishes a path. It flows in channels, and thus replicates the idea of the *Dao*. The basic character for law-as-principle – *Fa* or *Ho* – becomes the law enacted or written down when it is supplemented by another character to make *Falü* in Chinese or *Horitsu* in Japanese.

The notion of individual rights did not enter these Far Eastern languages until after the Meiji Restoration in 1861. The story is that Emperor decided to adapt the Japanese legal system to Western practices and therefore he sent experts to France, Germany, and England to study their ways. The report came back the Western used this curious individualistic term “rights”, which prompted the Japanese to coin a word, *Kenri*, to mean what the Westerners mean by rights. The term found its way into Chinese, where it is pronounced in Mandarin as *Chenli*. The Chinese bequeathed the character for law to the Japanese and the latter returned the favor, much later in history, by coining a word for “rights” and exporting it to China.

4. USING THE TERMS FOR LAW

There are several legal contexts that reveal the subtleties of the distinction between *Recht* and *Gesetz*. Let us examine these differences by referring to the English phrases relying on “law” that camouflage the distinction:

A. TO STUDY LAW

What precisely does one study in a faculty of law? Is it *ius* or *lex*, *Recht* or *Gesetz*? Many outsiders to the study of law think that the law we teach and cultivate consists in nothing more than the collected statutes of the legislature and decisions of the courts. Unfortunately, many students think the same thing. All that is worth learning is the positive law, enacted by the local legislature. In fact, in virtually every country

of the world, the object of study in a law faculty is *Recht*, *droit*, *derecho*, *diritto*, *mishpatim*. Sometime the field is expressed as legal knowledge or legal science, *pravoznanie* in Russian or *Hogaku* in Japanese. The idea is that we teach and students are supposed to learn the basic principles of law, the principles that appeal to us by virtue of their intrinsic reasonableness. The single exception to this pattern is Italy where the faculty of law is often called *la facoltà di legge*. *Legge* derives, of course, from *Lex* and correlates, therefore, with *Gesetz* rather than *Recht*. This is a good example of the thesis expressed above that there are cultures in which the term for statutory law takes on some of the normative qualities of *Recht*. But it is also true that Italy's legal culture is highly positivistic and therefore it is not entirely surprising that the country should focus on *Legge* instead of *Diritto* in formulating the object of legal studies.

There is one context, however, where no country in the world would use the term for enacted law to describe a body of law, and that is the convention for describing specific fields of law. Let us turn, therefore, to that set of expressions.

B. CRIMINAL LAW, CONSTITUTIONAL LAW, PRIVATE LAW, PUBLIC LAW

The term for “law” in these expression is, I dare say, always based on the conception of law as a body of principle. This is true whether we the source of law is a code or a body of case law. The *Code civil* is a statute, properly described as *lex*, *Gesetz*, *loi*, etc. But the body of law generated by the Code is called *Droit privé*. The same is true of all Western languages. The body of law that derives from a statutory source is always labeled with the honorific term used for law as a body of principle. Criminal law is typically based on a code or a statute, but criminal law is not translated as equivalent to a statutory set of prescriptions. Criminal law is always defined as *Recht*, *droit*, *jog*, *derecho*, *pravo*, *mishpat*, *Ho* or *Fa*.

The reasons for this are clear. A body of law is never exhausted by statutory language. It always includes principles that inferred from the words on the legislative document. The more tightly drafted the code, the more coherent its structure, the more likely are courts and scholars to infer principles immanent in the very enactment of the code. This method of inference is referred to in German as *Rechtsanalogie* – from

a pattern of two or three statutory rules commentators may reason by analogy that the specific instances in the code reveal an underlying principle.

The practice of *Rechtsanalogie* is quite familiar to jurists in the common law tradition, for this is the way that we infer principles from precedents. We also employ this method in constitutional interpretation, as evidenced by the line of cases recognizing the protection of privacy as a principle implicit in the due process clause. There are several specific provisions in the Bill of Rights that protect privacy without using the word privacy. These include the prohibition of unreasonable searches and seizure and the privilege against self-incrimination. From these specific instances, the Supreme Court inferred a right to marital privacy, which led to the conclusion that a state's prohibiting the sale of contraception violated the due process clause of the Fourteenth Amendment.

Surprisingly, the practice of *Rechtsanalogie* in reading statutes is more controversial in the United States than it is on the Continent. We fail to make a clear distinction between the Constitution and constitutional law. The Constitution is *lex*. It consists in a finite set of word written on a document signed in Philadelphia in 1787 and amended 27 times. Constitutional law is *Ius*. It is a changing body of principles derived from the finite and fixed set of words constituting the Constitution. One school of constitutional interpretation in the United States holds that constitutional law should never exceed the plain meaning of the words on the document. This is the so-called “originalist” school of interpretation. It holds that *Ius* should collapse into *Lex*, *Recht* into *Gesetz*.

It is hard to know the text to which language itself shapes and informs views of this sort. Would the originalists take a different line if they saw, on the face of their language, the difference between *Lex* and *Ius*. Perhaps, but there is plenty of evidence that language hardly inhibits the impulse to reduce the notion of *Recht* to the legislative sources. This is apparent in Hans Kelsen's jurisprudence of norms validated by being traced to a single *Grundnorm*. The title of Kelsen's leading work, *Die Reine Rechtslehre*, signals an effort to analyze *Recht* as a self-contained system free of the influence of morality or extrinsic sources of value. The vocabulary at our disposal does not constrain our options. We can

always add a word if needs be, but the existing stock of concepts may well incline us to favor or reject certain jurisprudential propositions.

C. COURTS MAKE LAW

This proposition was a favorite of the legal realists. It was meant to express the creative function of the courts. But precisely does it mean? Is it a proposition that we can translate into a language that distinguishes clearly between *Recht* and *Gesetz*? One way to interpret the phrase in German would be: *Die Gerichte machen (or erlassen) Gesetze*. This is an odd proposition because the notion of *Gesetz* is conceptually tied to the competence of legislatures. Perhaps the correct translation is: *Die Gerichte bestimmen das Recht*. This is a slightly more coherent proposition but it is hardly a radical claim. Everyone assumes that courts participate in the activity of shaping the law. It might be extreme to claim the courts as the exclusive factor shaping or defining the Right, but they are certainly a factor.

The political significance of saying that “courts make law” is to claim that the courts have more authority than legislatures in shaping the binding norms of the legal system. The German translation, *Die Gerichte bestimmen das Recht*, strikes a different target. In the German or Continental frame of reference, the courts are not in competition with the legislature (whose authority is limited to stipulating *Lex*) but with scholars who since thirteenth century Bologna have borne the burden of shaping the contours of *Ius* in Continental legal thought. The important point is that as “courts make law” gets translated in a language that distinguishes between *Recht* and *Gesetz*, the meaning of the proposition shifts its focus. Instead of stressing the power of the courts relative to the legislature, the translated proposition highlights the power of the courts relative to the scholarly tradition.

D. NATURAL LAW, MORAL LAW

One would think that the proper translation of “natural law” would invoke the concept of *Recht* or *Ius*. Natural law is the species of law *par excellence* that appeals to us by virtue of its intrinsic reasonableness. And indeed the literature does refer to *Naturrecht (Ius naturale)*. That is

why it is particularly surprising that in his moral philosophy uses the term *Naturrecht* when he refers to a law of nature. This usage reflects an important point about Kantian philosophy. The “law of nature” that Kant has in mind is not one that is discovered by virtue of its intrinsic reasonableness but rather one that autonomous self legislates and to which it submits itself at the same time. That indeed is the critical point about autonomy. The self is capable of giving a law to itself. It is auto-nomos. This act of law-giving requires the use of the term *Gesetz* rather than *Recht*. The self lays down the law to which it submits itself. Kant’s use of the phrase “moral law” runs parallel. The moral law is always a *Gesetz* legislated by the faculty of reason.

E. VALIDITY AND ITS COUNTERPART

The concepts of *Gesetz* and *Recht* bring them specific associations of terms that are used to describe when the particular conception of law takes hold. The critical question for a *Gesetz* is whether it is valid in the logical, formal sense. Validity depends on derivation from higher order norms that specify the **competence** of the law-giver. The content of the law has not bearing on validity, at least so far as the law does not offend constitutional principles protecting individual liberty. For purposes of assessing *Recht*, the question is not validity but, as the Germans say, *Geltung*. This term is usually rendered as “efficacy”. The inquiry in fact the norms of *Recht* are realized in the particular legal culture. This distinction between formal validity and substantive efficacy is suggested by the subtitle of Jürgen Habermas’s recent book: *Zwischen Faktizität und Geltung*. The factual component of law is realized by the formal question of validity; the degree of realization is captured in the notion of efficacy or *Geltung*.

There are, in fact, two distinct perspectives on whether a principle of *Recht* comes to apply in a legal culture. From the standpoint of the participant in the culture, the assessment of *Geltung* requires an personal judgment of value. As a participant, I can assert the value of free speech, of privacy, or human dignity or any other constitutional value. I can make this claim even as a dissenter in the legal culture, and my assertion can vary in degrees. It might be the case that I regard my asserted principle, say, of free speech as an absolute or merely as a presumption.

As a presumption it can be outweighed by other considerations. Whether my preferred value is counterbalanced or not is a matter of personal judgment. The assertion of the principles stands for a subjective assessment of the law.

As an observer of a legal culture, I can make relatively more objective claim about the degree to which the principle of free speech applies, or is realized, in a particular culture. I can say, for example, that Americans take free speech more seriously than do Canadians or Germans. This objective claim about *Geltung* still falls short of a purely formal claim of validity. My description of the culture must still acknowledge that some principles enjoy a greater degree of force or realization than do others. This is what Dworkin meant when he said that principles – as opposed to rules – have a dimension of weight.

F. BEING BOUND BY LAW

The German Basic Law or Constitution contains two articles that requires us to ponder the distinction between *Gesetz* and *Recht*.

Art. 97(1) provides: *Die Richter sind unabhängig und nur dem Gesetze unterworfen* (Judges are independent and subject only to the statutory law).

Art. 20(3) provides, in part: *Die vollziehene Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden* (The executive authority and the judicial development of the law are bound by statutory law and principles of Right).

The conflict is obvious. The judges are subject only to the statutory law but they are “bound” as well by principles of *Recht*. How is this possible? And what does the disparity tell us about the concepts of *Gesetz* and *Recht*? The difference is partly historical. Art. 97 is the older provision dating back to earlier German constitutions. Art. 20 stands for a new idea. To avoid the slavish judicial excesses of the Third Reich, judges are bound not only by the Constitution but by the principles of Right. Let us assume, however, that the two provisions stand in conceptual harmony. How are we to make sense of this relationship?

The place to begin is with the verbs. *Gesetz* takes the verbal phrase “being subject to”. *Recht* (as well as *Gesetz*) take the verb “being bound by”. Both of these are physical images connoting restraint. The German

verb for “being subject to” invokes a picture of being sat upon. The German, *dem Gesetze unterworfen*, suggest being thrown under or dominated. The judge is thrown under the law and controlled by it. The term “being bound by” (*gebunden an*) conveys the idea of being chained down, being roped in by the tentacles of obligation.

The second point of comparison is the context in which the proposition is made. The notion of “being subject exclusively” to the statutory law responds to the problem of defining judicial independence. The claim about judges being bound by *Recht* as well as *Gesetz* addresses the basic values of the constitutional order. The other provisions of Article 20 define the nature of the Federal Republic (a federal social democracy), the grounding of state power in the people, and the right of all Germans to defend the constitutional order against treasonous efforts to undermine it.

It is not clear, however, that these points of comparison enable us to answer the question why in one context the Basic Law refers to just *Gesetz* and in the other to *Gesetz* and *Recht*. Let us take the problem of judicial independence. The physical imagery of being “thrown under” the statutory law (*dem Gesetze unterworfen*) suggests that for judges to be independent, they must allow themselves to be physically constrained by the law. They must become, in Montesquieu’s famous phrase, *less bouches de la loi* – mouthpieces of the law. It cannot be the case, however, that the only independent judges are those who function as puppets with the strings left in the hands of the law-giver. They need not become – in a popular phrase coined during the impeachment of Richard Nixon – “potted plants”. Independence need not imply that judges respond solely to external stimuli as a plant grows naturally in its pot, that they should just react but never act.

The relevant question should be: what evil does this definition of independence seek to counteract? Judicial corruption occurs when judges take bribes or submit to orders from political figures who are external to formal mechanism for issuing valid legal norms. The point of judicial independence, therefore, is insulate judges from these outside influences. Party officials may try to institute “telephone justice”, but the independence of the judges requires that they pay no attention.

Whether judges are independent is not a matter of physical restraint. It is a state of mind. They become independent if they think independently. And what does that require? Independence requires a negative as well

as a positive attitude in deciding cases under the law. Negatively, judges may not heed extra-systemic demands for particular decisions. This is a second-order judgement about the kinds of imperatives by which they should allow themselves to be guided. It is right to be guided by commands of the legislature but not right to be commanded by ad hoc directives from party officials. Positively, the required attitude is one of submission to the rules of the legal system, and that requires a willingness to focus exclusively on the rules at the moment of decision.

The structure of judicial independence turns out, therefore, to be very much like Kant’s notion of autonomy. Autonomy or self-legislation requires a union of negative and positive freedom. Negative freedom consists in the exclusion of all sensual stimuli. Positive freedom consist in submission to the moral law (*Gesetz*). Submission means that at the time of acting the actor focus exclusively on the law-like nature (*Gesetzlichkeit*) of his universalized maxim.

The judicial analogue to negative freedom is disciplined indifference to extra-systemic orders and temptations. The counterpart to positive freedom is submission to the statutory law. The language of Art. 97 makes sense against this background of Kantian autonomy. The parallel structure is readily visible in the following chart:

	Autonomy	Independence
Negative	No sensual stimuli	No directive outside the statutory law
Positive	An exclusive focus on the moral law	An exclusive focus on the statutory law

The important point about both autonomy and independence is that both are purely formal qualities. They do not depend on substantive values that arise in the dispute before the court. In the context of judging, this implies a purely deductive model of deciding cases. The law is major premise, and the facts represent the minor premise.

It looks like we have made some progress but I am not sure. It is not clear to me how judges can be “bound by *Recht*” if they must submit to the statutory law and focus exclusively on the rules of the system at the

time of the decision. Would it have made sense to add the word *Recht* to Article 97 so that judges are subject to *Recht* as well as *Gesetz*?

I don’t think so. The notion of being “subject to” does not readily take *Recht* as its object. The positive freedom of being “subject to” a rule means that one can decide by thinking of nothing but the rule. If we recall that the assessment of principles requires a judgment of weight, a judge cannot simply allow himself to be guided by the principle. There is no way of knowing how the principle of protecting free speech or not punishing the innocent should affect the decision without adverting to the values implicit in the principle. The judge has to gauge the impact of the basic value on the facts of the case. Free speech is important, but how important is it if there are values in play? That is not a decision that can be made on purely formal grounds, but thinking just of the rule. And therefore the ideal of independence cannot determine what it means to be bound *Recht* as well *Gesetz*.

Perhaps the problem is overly rigorous demands on the notion of judicial independence. It might be sufficient to think of independence in purely negative terms. Judges should ignore extra-systemic influences. The principles of *Recht* are part of the system, and therefore judge do compromise their independence by being bound by these principles.

An even less demanding definition of independence would restrict the prohibited extra-systemic influences to the commands of politicians who are clearly not authorized to issue instructions to the judge. According to this view, values and principles that judge seeks to take into account do not compromise his or her independence. We cannot derive this result simply from the language of Art. 97, but reflecting on the nature of judicial independence may be the only way to solve the conundrum posed by Articles 20(3) and 97.

5. CONCLUSION

The problem of clarifying the concepts of *Lex* and *Ius*, *Gesetz* and *Recht*, have taken us to the heart of jurisprudential controversy. There could be no more fitting title, therefore, for a new journal, that seeks to explore the foundations of legal thought and culture. May *Ius et Lex* long flourish and may the concepts thus invoked retain the richness of their associations and depth of their inner secrets.

