DEL VECCHIO'S IDEALISTIC PHILOSOPHY OF LAW VIEWED IN THE LIGHT OF A TRANSCENDENTAL CRITIQUE OF PHILOSOPHICAL THOUGHT

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I

Some years ago the second revised and amplified German edition appeared of GIORGIO DEL VECCHIO's *Lezioni di Filosofia del Diritto,* translated and introduced by the well-known German philosopher of law, F. DARMSTAEDTER. The German title is *Lehrbuch* der *Rechtsphilosophie.*

On different grounds this voluminous work (627 pp. text) deserves particular attention. DEL VECCHIO, professor at the University of Rome, is the Nestor of the Italian philosophers of law and doubtless the most representative contemporary Italian thinker in this branch of philosophy. His numerous works have rightly acquired an international reputation.

The first Italian edition of the present work has appeared in 1930 and was followed by six later editions (7th ed. 1950). It has been translated in different languages (German, Spanish, French, English,Turkish, Japanese, Rumanish, Portuguese).

In addition this work confronts us with a system of philosophy of law which is still inspired by the mind of a transcendental idealism in its most classical Humanist sense. As such it seems to stand outside of the prevailing currents of contemporary thought. For this idealism with its strong belief in human reason was supposed to have been definitively conquered since the first world-war. The Kantian critique of knowledge which sought the *a priori* conditions of mathematical natural science in a system of transcendental logical categories of the human understanding, in their synthesis with time and space as forms of sensory perception, could not stand the test of the recent development of physics and mathematical science. The historical mode of thought, initially closely connected with post-Kantian idealism, had already completely emancipated itself from the latter in the second half of the last century and developed into a Historicism leaving no room for any belief in supra-historical eternal ideas or thought forms. Depth-psychology destroyed the idealistic view concerning the dominating position of the rational conscious functions in human life. A historicistic or vitalistic "*Lebensphilosophie*" revived in a new sense the old Heraclitean adage of the continual movement of the creative stream of life. And finally the fundamental spiritual crisis of Western culture gave rise to a powerful development of existentialistic philosophy and irrationalistic phenomenology, which completely broke with the clas-

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sical tradition in Western thought and dethroned the abstract reason as the ultimate point of reference of human existence.

The whole recent crisis of philosophical thought is characterized by a fundamental suspicion with respect to the certitudes and axioms of the traditional modes of thought. The reason is that this crisis does no longer concern particular problems of philosophy, but much rather the deeper religious pre-suppositions of Western philosophy as a whole since the time of Renaissance. It is in the first place a crisis of belief, which is not to be overcome with the aid of rational philosophical arguments.

DEL VECCHIO's work is not affected by this crisis, it is not even concerned with it. To him the Kantian critique of pure reason is still the definitive solution of the epistemological problems concerning mathematics and natural science. His confrontation of transcendental idealism with positivism and historicism is essentially oriented to the philosophical situation of the XIXth century. Neither the new turn in historicism since WILHELM DILTHEY, nor the rise and powerful development of modern phenomenology and existentialism play a part in this philosophical confrontation. His view of sociology is equally oriented to the situation of this science in the last century and does not take into account its development in recent time.

But this does not detract from the high value of DEL VECCHIO's work as a classical system of philosophy of law, which from a transcendental idealistic viewpoint offers a synthesis of the classical natural law tradition with the historical approach to human society and law formation.

This is all the more remarkable since neither in the neo-Kantian, nor in the neo-Hegelian philosophy of law which developed in Germany during the first decennaries of the XXth century, there was question of a revival of the classical natural law tradition. The tidal wave of Historicism and positivism had destroyed the belief in material legal principles and material standards of justice whose content was supposed to be rooted in an eternal natural ethical order of practical reason or in the rational-ethical nature of man. The neo-Kantians considered KANT's material *a priori "Vernunftrecht"* to be incompatible with his critical method both in epistemology and ethics. For this method implied a sharp distinction between the *a-priori forms* of theoretical and practical reason and the empirical changeable *matter* of experience and ethical norms of human behaviour.

RUDOLPH STAMMLER, who was the first to apply this critical method to the theory of law, sharply distinguished the transcendental logical concept of law and the transcendental Idea of justice. The first was supposed to be the formal transcendental condition of any variable experience of legal phenomena; the latter was only considered to be a transcendental form of theoretical judging positive law after the measure of justice, whose content was viewed to be completely conditioned by the empirical historical situation. In this sense STAMMLER spoke of a natural law idea with changing contents. He circumscribed his transcendental idea of justice as "the community of freely willing men". The formal principles which he derived from this "transcendental ideal of justice" were exclusively oriented to the Kantian ethical idea of man as an autonomous end in itself which does not permit itself to be made into a mere means for the purpose of other men.

KELSEN even rejected this formal-critical idea as a supposed universally

valid standard of ethical judgment of positive law. He held to a general axiological relativism and to a critical, "strictly scientific" positivism from which any "ethico-political postulates" were eliminated in principle. STAMMLER oriented his philosophy of law both to KANT's critique of pure reason, *i.e.* KANT's epistemology, and to KANT's critique of practical reason, *i.e.* to his transcendental ethics, though in fact STAMMLER's idea of justice was rather conceived as a theoretical logical method of judging positive law than as a normative principle in the sense of KANT's categorical imperative. KELSEN's concern, in contrast, was merely of an epistemological character.

The so-called Baden school of neo-Kantian philosophy of law rightly considered that KANT's critical epistemology was exclusively oriented to natural science and did not permit itself to be extended to jurisprudence as a science related to values and norms. It made a sharp distinction between empirical reality, or the realm of nature, which it considered to be constituted in conformity with the Kantian epistemology, and the supra-temporal realm of values. But just like KANT in his critique of teleological judgment had attempted to find a subjective link between the realm of empirical reality and that of the supra-sensory and supra-temporal ethical ideas, the Baden school of neo-Kantianism sought in the faculty of judgment an intermediate sphere between reality and values.

This intermediate sphere was supposed to be that of *meaning*, constituted by a subjective *a priori* relating of empirical reality to values and an individualizing mode of thought, in contrast to the generalizing mode of natural science which views the phenomena apart from any relation to values. In this way HEINRICH RICKERT tried to establish a fundamental methodological distinction between natural and cultural science. This attempt clearly revealed the influence of FICHTE's methodological approach to history in his last period. From a quite other viewpoint, *viz.* that of a historicist *"Lebensphilosophie"*, WILHELM DILTHEY had made a sharp distinction between natural science and *Geisteswissenschaft*. According to him, this distinction is founded in the contrast between the objectifying attitude of the former and the subjectifying attitude of the latter, and this latter should be based on a *"geisteswissenschaftliche Psychologie"*. The *"Geisteswissenschaften"*, which are all related to phenomena involved in the *"Erlebnisstrom"* of historical consciousness, should approach their subject-matter by "empathy" *("Einfühlung")* and replace the causal explanation by a hermeneutical method of understanding. Both the neo-Kantian view of cultural science, defended by RICKERT, and DILTHEY's view of the *Geisteswissenschaften* gave rise to a fundamental break with the natural-scientific method in the social sciences, especially in history and sociology. But the Diltheyan conception, in contradistinction to the neo-Kantian standpoint of RICKERT and his followers, meant a complete abandonment of transcendental idealism. DILTHEY paved the way for a new irrationalistic view of human life. Because of his ascribing a gnoseological function to spiritual feeling he stimulated the rise of a second trend in modern phenomenology, which was sharply opposed to the rationalist trend of EDMUND HUSSERL. This irrationalist phenomenology was also applied by existentialistic philosophy. The neo-Kantian philosophy of law, on the other hand, which was oriented to RICKERT's philosophy

of values and his idea of cultural science, had no more room for the classical natural law tradition than STAMMLER or KELSEN had. It resigned to a theoretical explanation of the possible systems of values and of the different rank which the value of justice has in them, leaving the choice to everybody's personal decision.

Philosophy should abstain from preaching any life- and world-view and be satisfied with the rôle of a theory of the different life-and world-views. As such it was obliged to hold to a theoretical axiological relativism. This standpoint was, for example, adhered to in GUSTAV RADBRUCH's *Grundzüge der Philosophie des Rechts.*

Neo-Hegelian philosophy of law, finally, whose chief German representative was JULIUS BINDER, held to a universalist Idea of law oriented to HEGEL's idea of the State, which it supposed to be realized in history. This "objective idealism" was equally incompatible with the classical natural law doctrine, it did not even accept a natural law with changeable contents in STAMMLER's sense. Its only concern was to show the *„Vernünftigkeit"* of positive law as the objective historical form of appearance of the Idea. From this standpoint BINDER developed a system of the *"Rechtsvernunft"* which explains the ideal-rational sense of the most important institutions of positive law in which the Idea of law unfolds itself as the meaning–giving principle.

Besides to the neo-Kantian and neo-Hegelian trends we may point to the influence of HUSSERL's phenomenology upon German philosophy of law during the first decennaries of the XXth century. In a remarkable way HUSSERL's influence even revealed itself within KELSEN's school. But here it remained restricted to the attempt to project an eidetic juridical logic oriented to HUSSERL's *Logische Untersuchungen,* which preceded the development of his later conception of phenomenology. Both FRITZ SCHREIER and FELIX KAUFMANN sought in this way to lay bare the formal-logical structure of any possible positive legal norm by means of *"Wesensschau"*. In fact this method did not exceed the limits of KELSEN's critical positivism. Only the intuitionist approach to the supposed *a priori* formal-logical *"Wesensgesetze"* of positive law was an indication of the decay of the critical idealist belief in "pure reason" as the ultimate origin of the *a priori* categories of legal experience.

In ADOLF REINACH's remarkable book *Die apriorischen Grundlagen des Bürgerlichen Rechts,* we were confronted with a real phenomenological inquiry into *material a priori* essential principles lying at the foundation of the legal phenomena within the area of civil law. This author completely broke with the critical transcendental-idealist supposition of an *a priori constitution* of the legal field of enquiry which the so-called "transcendental-logical subject" was assumed to perform by means of transcendental categories of thought.

Whereas HUSSERL himself in his later development clearly turned to a transcendental idealist foundation of his phenomenological inquiry into the intentional acts of experience, REINACH emphatically held to a *phenomenological realism.* According to him the phenomena of legal experience are founded in a sphere of ideal *being* which is completely independent of human knowledge and of positive law. He thinks such phenomena as a juridical promise, a legal claim, or an obligation, are

accessible to an inquiry into their *a priori "Wesensgesetzlichkeiten"* independently of a transcendental concept of law in its general sense. In the same way he tried to establish by means of phenomenological *"Wesensschau"* the *a priori* essential characteristics of *iura in rē*, such as property, the right of pledge, *etc.* Though at first sight it could seem that in this way a kind of natural law system was developed, it was in fact not the classical idea of natural law which inspired this phenomenological theory of the *a priori* principles of civil law. There is no question here of innate human rights, of freedom and equality of men as such, independent of nationality, race, *etc.*

Rather REINACH's book betrayed the spirit of a rigid *a priori "Begriffsjurisprudenz"*. In addition, the value of the *a priori* foundations of civil law which he supposed to have discovered, was seriously affected by his statement that positive law is completely free to deviate from them and that these *a priori* essential judgments are not even able to be generally applied in the case of gaps in a positive legal system.

This meant that positive law was completely abandoned to a radical positivistic view, whereas the *a priori* phenomenological foundations were considered to be a complex of judgments which lack any intrinsic ethical value and were viewed as logical *"Wesensnotwendigkeiten"* only.

So we may conclude that neither the short lived revival of idealistic philosophy of law in Germany both in its neo-Kantian and neo-Hegelian trends, nor the influence of HUSSERL's phenomenology has in general led to a revival of the classical natural-law tradition which in KANT's *Metaphysische Anfangsgründe der Rechtslehre* had found a new transcendental-idealistic foundation. It is true that KANT's *"Vernunftrecht"* continued to exercise some influence upon two rather isolated philosophers of law, *viz,* DARMSTAEDTER and LEONARD NELSON. But both of them shrinked from accepting a self-contained system of natural law norms founded only in supra-temporal ideal postulates of practical reason, independent of the concrete relations of human society and historical development. And this is exactly what DEL VECCHIO wants to do.

But if it should be supposed that such an idealistic *"Vernunftrecht"* has been definitively conquered in our days, this supposition would be certainly premature. It may be that DEL VECCHIO's transcendental idealistic system of philosophy of law stands in different respects outside of the prevailing philosophical tendencies of our time. But on the other hand it should be borne in mind that after the second world-war a rather important revival of the natural law doctrine has revealed itself, which is not restricted to the neo-Thomistic trend, but is also found in Humanistic philosophers of law. In this situation it is exactly DEL VECCHIO's *firm belief* in the *a priori* principles of autonomous practical human reason which gives his idealistic system a particular character amidst the general crisis of this belief in its Humanistic sense. For in general the recent revival of natural law is not characterized by this belief.

Even HELMUT COING, professor in Frankfort am Main, who, just like DEL VECCHIO, intends to revive the classical natural law tradition, does no longer found it in *a priori* postulates of *reason;* and he speaks only of a fragmentary human knowledge of the principles of justice. Therefore he denies the possibility of a closed system of natural law norms. Our

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knowledge of the ethically necessary contents of law is, according to him, only sufficient to save us from an unlimited relativism [1]). He points to the inevitable difficulties of arriving at ethical knowledge. This knowledge lacks the exactness of natural scientific methods and the convincing character of a logical or mathematical deduction. It can only be gained from a description of our own feeling of values: its ultimate foundation is the inner human experience *(Erleben)*. The possibility of mistaking is consequently great [2]). It is not the Kantian or Fichtean transcendental idealism but rather a phenomenology of ethical feelings and values in the sense of SCHELER and NICOLAI HARTMANN by which he seeks to approach the *a priori* foundations of law. And natural law is, according to him, not to be derived from these *a priori* foundations (implied in the ethical Idea of law) alone. It must relate the ethical requirements of the Idea of law to general typical social situations which always return in the historical development of human society. In this sense the natural law principles, although they lay claim to a supra-temporal validity, exceed the realm of pure ethics. They have an intermediate position between the ethical Idea of law and positive law [3]).

This standpoint is quite different from that of DEL VECCHIO's transcendental idealism.

Can the latter suffice the requirements of a really *critical* philosophical theory of the supra-arbitrary foundations of law and justice?

We will try to answer this question by an ample analysis of DEL VECCHIO's system in the light of our transcendental critique of theoretical thought. The reader should remember that this critique seeks to lay bare the necessary presuppositions of every possible philosophical theory from the inner nature and structure of the theoretical attitude of thought itself. As such it cannot accept any philosophical *axiom* which is supposed to be withdrawn from this radical transcendental critique. Especially the dogma concerning the autonomy of theoretical and practical reason is subjected by this critique to a critical ἐποχή (*i. e.*, restraining from accepting it as a theoretical axiom), by which it is made into a *transcendental* problem. This is in accordance with the contemporary crisis of the supposed certitudes and axioms of a former period of philosophical reflection, without implying any involvement of our own standpoint in the fundamental relativism which gave rise to this crisis.

Such a criticism can indeed do justice to the philosophical system under investigation. For it does not consider it from the standpoint of the critic but tries to penetrate to the hidden ultimate starting-point of this system itself, which may be masked through the semblance of being unprejudiced.

Before engaging in a more detailed analysis of DEL VECCHIO's system we shall first pay attention to the spiritual background of his transcendental-idealist philosophical standpoint in general. This might seem to be superfluous for the readers of this review who are already acquainted with the ample transcendental critique of this standpoint developed in the first and partly in the second volume of my *A New Critique of Theoretical Thought*. But it is certainly not permissible to suppose that my highly

[1]) *Grundzüge der Rechtsphilosophie* (Berlin 1949), p. 148.
[2]) *Op. cit.* p. 107.
[3]) *Op. cit.* p. 151.

estimated collegue at the university of Rome is familiar with this manner of approaching a philosophical trend of thought.

In addition a brief investigation into the spiritual background of a transcendental idealism which holds to the self-sufficiency of human reason in philosophical questions, is indispensable to understand its significance in the development of modern philosophical thought and the reason why it has lost its dominating position in recent times.

And finally, our introductory considerations give us occasion to point to some fundamental problems which already arise at the outset of DEL VECCHIO's explanations.

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In the introduction of his book DEL VECCHIO raises the primordial problem concerning the concept and the task of philosophy of law. As its name clearly indicates, the latter is that branch of philosophy which is concerned with law. Philosophy, however, is directed to the investigation of totality. Consequently DEL VECCHIO establishes that philosophy of law has to investigate its subject-matter *with respect to totality ("das All").*

Here we are confronted with the first problem of a transcendental critique of philosophical thought. What does this author understand by the term "totality" *(das All)*? According to him, philosophy in its most general sense may also be defined as an inquiry into the first principles. For these very principles *(Grundsätze)* may lay claim to the property of totality. The first *"Grundsätze"*, however, may pertain either to reality *(das Sein)* and knowledge, or to action. On this distinction is based the division of philosophy into a theoretical and a practical part. Theoretical philosophy is concerned with the first principles of reality and knowledge and is divided into the following branches: ontology or metaphysics (which also embraces philosophy of religion and that of history), gnoseology or epistemology, logic, psychology and aesthetics. Practical philosophy, on the other hand, has to investigate the first principles of action, and is divided into moral philosophy and philosophy of law. Practical philosophy is often also called ethics in the broader sense in which it embraces both moral philosophy and philosophy of law. But DEL VECCHIO observes that this term is also often used in a more restricted sense in which it is identical with moral philosophy. DEL VECCHIO thinks that through the above explanation the systematical position of philosophy of law is determined in a sufficient way.

But his answer given to the question: What is to be understood by the philosophical idea of totality? is certainly not satisfactory. This idea is a transcendental basic idea of philosophical thought, *i. e.* a necessary condition of the latter, which alone makes philosophy possible.

Philosophy is, just like any special science, bound to the theoretical attitude of thought. As shown in my transcendental critique of theoretical thought, this attitude is distinguished from the pre-theoretical attitude of naïve experience by a typical antithetical relation in which the logical aspect of our act of thinking is opposed to the non-logical aspects of our temporal experiential horizon. This temporal horizon of human experience embraces in the first place a great diversity of fundamental experiential

modi or *modal aspects* which are irreducible to one another, but nevertheless are arranged in an indissoluble coherence of meaning. The juridical aspect is *one* of these different experiential modi and its fundamental modal meaning can only be grasped in the total coherence of this aspect with *all* the others.

In the theoretical attitude of thought we are obliged to a theoretical abstraction of this modal aspect from the *continuity* of its meaning-coherence with all the other modalities of our experience, in order to get it in the grip of a theoretical concept. This is done by *analysing* it from the inter-modal total meaning-coherence. And this is not possible without the antithetical relation of thought in which the juridical experiential aspect is opposed to the logical aspect of our act of thinking and in this way is made into a *theoretical problem.* The juridical aspect, which as such is of a non-logical character, *resists* our attempt at theoretical analysis. And it is this very resistance of our juridical mode of experience which gives rise to the philosophical problem: *What is law in its irreducible modal meaning?*

In the pre-theoretical attitude of thought which is characteristic of our naïve experience, this antithetical relation between the logical and the non-logical modi of experience is lacking in principle. Here our experiential acts occur in the integral, consequently uninterrupted, coherence of all its modal aspects. But the result is that we have only an *implicit* awareness of the latter and lack any *explicit* concept of them. Pre-theoretical experience is much rather directed to concrete things, occurrences and social relations in their *typical structures of totality* which function in principle in all modal aspects together but group them in typically different manners into the concrete unity of a *particular whole.*

Theoretical thought has as such no immediate access to this integral experience of totality. The theoretical attitude of thought is bound to a theoretical discontinuity of the different modal aspects of our experiential horizon which in the antithetical basic relation mentioned above are set asunder in an analytical way. As soon as this theoretical discontinuity of the modal aspects would be abandoned, we would return to the pre-theoretical attitude of naïve experience in which no single theoretical philosophical problem can arise.

Nevertheless, philosophical thought is by its inner nature directed to the total meaning-coherence of our temporal horizon of experience. Therefore it needs a theoretical Idea of this totality in which the universal unbreakable meaning-coherence between the different modal aspects is approached in a theoretical, *i. e.* discontinuous way. This transcendental basic Idea of philosophy is indispensable also to philosophy of law since the juridical aspect of experience can reveal its irreducible meaning only in its inter-modal total coherence with all of the other experiential aspects. For this coherence expresses itself in the modal structure of each of them.

DEL VECCHIO has not paid attention to the necessary relation of this transcendental basic Idea of totality to the modal aspects of our experiential horizon. Instead, he identifies the philosophical idea of totality with that of the first fundamental principles, which he distinguishes according to their pertaining either to reality and knowledge or to action. This

distinction is not clear. Does action not belong to reality? And is the so-called practical philosophy not directed to knowledge of its first fundamental principles?

The time-honoured opposition between theoretical and practical philosophy has from the outset caused a serious confusion, since by its inner nature all philosophical thought is of a theoretical character. This opposition was introduced in ancient Greek thought by the Sophists, who denied a general standard of truth. According to them, objective theoretical knowledge is impossible both with respect to nature and to politics and ethics. Philosophy should, therefore, only be considered according to its practical utility. But in fact this sophistic philosophy, with its sceptical epistemology, was no less theoretical than the preceding philosophy of nature and metaphysics, whose gnoseological value it denied. The theoretical character of philosophic thought cannot be dependent upon the particular subject-matter which it tries to conceive in the theoretical glance of totality. Irrespective of the question whether philosophic thought is particularly directed to the mathematical aspects, to the energy-aspect, to the biotical aspect, to the psychical aspect of feeling, to the logical, or the historical aspect, or the modal aspect of social intercourse, to the lingual, the aesthetic, the economic, the juridical, the moral or the faith–modalities of our experiential horizon,–it is always bound to the antithetical basic relation which is characteristic of the theoretical attitude of thinking.

Meanwhile the opposition between theoretical and practical philosophy acquires a particular meaning from the supra-theoretical religious basic motive which, as the hidden ultimate starting-point of philosophic thought, rules its transcendental idea of totality.

That such a supra-theoretical basic motive is a necessary condition of philosophic thought has been shown by our transcendental critique in an as yet unrefuted way.

In Greek thought it was the basic motive of matter and form which gave rise to the opposition between theoretical and practical philosophy. And this motive originated from an irreconcilable conflict between the older religion of life and death, which was a religion of the formless, ever flowing stream of vital becoming and decay, and the younger cultural religion of the Olympian gods, which was a religion of form, measure and harmony. PROTAGORAS, the founder of the sophistic school, conceived both nature and the human perception of it as completely subject to the continuously flowing and changing matter-principle. He denied any constant form of being and human knowledge, and therefore, any norm of truth. But he ascribed primacy to the form-principle of the cultural religion, whose bearer was the Greek *polis*. Therefore his interest was entirely concentrated on the cultural activity of the state. It is only the *nomos* of the *polis* which gives form to human nature. *Physis* is as such form-less, abandoned to the matter-principle. And thus philosophy should be practical, as a pedagogical instrument to form man into a good citizen of the *polis,* and should not seek for theoretical truth. Apart from the *polis* man is a brute, lacking the cultural form which elevates him above the animals.

In KANT's critical transcendental idealism it is the modern Humanist

basic motive of nature and freedom which gives the contradistinction between theoretical and practical philosophy a particular meaning.

The secularization of the radical basic motive of the Christian religion, *i. e.* that of creation, fall into sin and redemption by Jesus Christ, which occurred during the period of Renaissance, gave rise to a religion of the human personality in its autonomous creative freedom. As the counterpart of this freedom-motive here arose a new religious view of nature as the macrocosmic world of the new autonomous mankind, which should also be liberated from the medieval belief in supra-natural influences (cf. the adage: *Deus sive natura).* The Biblical freedom-motive referred to the religious root, the radical unity of the human I-ness, as the *imago Dei,* which transcends the temporal horizon with its diversity of modal aspects, and concentrates all the temporal functions of human existence to the service of God. The fall into sin obscured this creaturely image of God in man and deprived man of the radical freedom originating from the communion with his Divine Creator. But this freedom is regained by the rebirth of the "heart", the religious root and centre of human existence, which makes man into a member of the "body of Christ".

The secularized religious idea of "renascimento", which gave rise to the modern Humanist religion of the human personality, transformed this Christian freedom-motive in its fundamentals. The Copernican revolution which altered the astronomic image of the world was also carried through in the view of the relation between God and man. The autonomous human personality construed God after its own image. In KANT the idea of God becomes a postulate of the autonomous practical reason. And since any knowledge of the true radical unity of the human I-ness was lost, modern man sought the centre of his existence in the temporal horizon with its diversity of modal aspects. In conformity with the classical Greek tradition, "reason" was viewed as the centre of human nature. But "reason" is a complex of functions which as such lacks the radical unity of the human I. It displays different modal aspects. Classical Greek philosophy already distinguished theoretical from practical reason. When the Humanist freedom-motive sought its point of reference in human reason, it was thus confronted with the question in which of its different modal functions the central seat of the autonomous freedom of man's personality is to be found. In the first period of the development of modern Humanist philosophy "primacy" was ascribed to "theoretical reason", *i. e.* to the theoretical-logical function of thought in its synthetical union with the mathematical aspects of our experiential horizon.

In contradistinction to the Greek and medieval view, mathematical thought was considered to be provided with a creative power.

DESCARTES' analytical geometry and LEIBNIZ' differential and integral calculus paved the way for the modern development of mathematical analysis which was directed to the domination of nature. GALILEO and NEWTON laid the foundations for modern mathematical natural science. Grasping the phenomena of nature exclusively according to their mathematical aspects and their physical aspect of energy, in a system of functional causal relations, natural science actually showed the way to a theoretical domination of nature.

In its relation to scientific thought the Humanist freedom-motive was

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from the outset penetrated by a Faustian impulse to gain an autonomous control over nature. Consequently it is quite understandable that Humanist philosophy embraced the new mathematical scientific method with a religious passion, and elevated it to a universal pattern for philosophical thought. The secularised creation-motive inspired the rationalist thinkers to a new metaphysical picture of world and life, which was sharply opposed to that of the middle ages. The methodical demolishment of all given structures of human experience and the reconstruction of the cosmos by means of exact concepts of mathematical and natural scientific thought was the program both of DESCARTES' and HOBBES' philosophy. As long as the primacy in the dialectical freedom-motive was ascribed to "theoretical reason", nature, as the macrocosmic counterpart of the free human personality, was viewed as a closed mechanical system of functional-causal relations. The new science-ideal also ruled the new Humanist natural law doctrine and ethics, which were developed *more geometrico*. As the supposed centre of autonomous human freedom, mathematical thought was considered to be the true guide of ethical action.

But now the religious dialectic of the basic-motive of nature and freedom revealed itself. If the new science-ideal was consistently carried through, there remained in the world-picture, construed after its pattern of thought, not any room for an autonomous human freedom. "Nature" and "freedom" proved to be involved in an irreconcilable conflict. This gave rise to a dialectical process in the development of Humanist thought. From a psychologistic sensualistic epistemological point of view DAVID HUME attacked the fundamentals of the mathematical science-ideal, the objective validity of the new functional causality-concept and that of the new metaphysical substance-concept laid at the foundation of the Cartesian view of body and soul. ROUSSEAU depreciated the new science-ideal and ascribed the religious primacy to the freedom-motive. In the Humanist natural law doctrine this movement led to a general opposition against the absolutist concept of the state's sovereignty. BODIN had laid this concept at the foundation of the modern state-idea and GROTIUS, HOBBES and PUFFENDORF had tried to justify it by means of the mathematical construction of a social contract between free and autonomous individuals.

This initial trend in the Humanist natural law doctrine was completely inspired by the domination–motive inherent in the mathematical science–ideal. In its epistemology and ontology the new Humanist philosophy began with a methodical demolition of all the given structures of our experiential world; similarly the natural law doctrine began with a methodical demolishment of the given structures of human society. *More geometrico* the latter was dissolved in its supposed elements, the free and autonomous individuals. From these elements the state was construed synthetically by means of a social contract, and the aim of this mathematical construction was a free creation of the state, as a perfect instrument to dominate human society, a true "Leviathan", as HOBBES styled it.

But as soon as the religious primacy was shifted from the nature-motive to the freedom-motive, the doctrine of the inalienable human rights and that of the inalienable rights of the citizen arose. The construction of a social contract was provided with clausules to guarantee these rights against the sovereign state.

In this critical state of affairs KANT's critical transcendental idealism is to be considered an *actio finium regundorum* with respect to the two antagonistic motives of dominating nature and autonomous freedom of the human personality. In accordance with ROUSSEAU he ascribed religious primacy to the freedom-motive in its application to the ethical volitional function of man, which KANT subsumed under "practical reason".

Therefore it was necessary to limit the claims of the mathematical and mechanistic science–ideal, whose fundamentals KANT tried to defend against the epistemological criticism of Hume. The metaphysical ontology, however, which was built up on the basis of mathematical and natural scientific thought, especially the Leibnitzian–Wolffian metaphysics, which formerly KANT himself had adhered to, should be demolished by a transcendental critique of pure theoretical reason; the latter was at the same time pointed against any other theoretical metaphysics, especially against the scholastic Aristotelian ontology, rational psychology and natural theology. By destroying the metaphysical claims of the deterministic mathematical science-ideal KANT paved the way for an ethical metaphysics of the *homo noumenon* whose autonomous freedom, as a normative Idea, could no longer be threatened by the mechanical causality-concept of natural scientific thought.

Was this critical epistemology really *critical* in a transcendental sense? In our work *A New Critique of Theoretical Thought* we have tried to show that this was certainly not so. KANT's criticism began with an obvious dogmatic prejudice. He did not raise the primordial transcendental basic problem: How is a well-founded epistemology possible? Which are its necessary transcendental conditions? Instead, he started from the dogmatical prejudice concerning the autonomy of theoretical thought in its critical self-reflection, without having tested it to the intrinsic structure of the theoretical attitude of thinking in its confrontation with that of the pretheoretic attitude of naive experience. There is no question in his *Critique* of a serious critical inquiry into the real structure of our temporal horizon of experience with its transcendental diversity of irreducible modal aspects. Instead, he starts his critique with the unwarranted statement that experience is nothing but a formation, by logical understanding, of a raw material of sensory impressions, received in the sensory perception of objects, so that these impressions are shaped into a knowledge of objects. Thereby the modal dimension of our experiential horizon was from the outset reduced to two modal aspects, *viz*, the sensory psychological aspect of perception and the logical aspect of thought. The further enquiry concerning the question as to whether all our kinds of knowledge originate exclusively from (sensory) experience or if there are *a priori* kinds of knowledge which are not dependent on sensory perception–is completely prejudiced by the dogmatical assumption that our faculty of knowledge is restricted to the sensory and logical functions.

In fact KANT's epistemology was from the outset ruled by the dialectical basic motive of nature and freedom in its religious Humanist sense, which *implied a methodical demolition of the integral transcendental structure of the temporal horizon of human experience.* The result was that his manner of positing the gnoseological problems was determined by the

claims of the Humanistic science-ideal on the one hand, and those of the Humanistic personality-ideal, with its postulate of ethical freedom and autonomy, on the other. The significance of the so-called "Copernican revolution" which KANT's critique brought about in epistemology cannot be sought in his thesis that the human understanding itself by means of its *a priori* mathematical and dynamical categories is the formal legislator of nature. For this idea was in itself completely in line with the philosophical implications of the Humanist science-ideal; DESCARTES sought already his Archimedean point in the subjective *cogito*. Much rather this significance is to be found in KANT's critical demolition of the metaphysics based on this science-ideal, in which in the last instance the new mathematical–deterministic picture of the world, construed after the pattern of this ideal, was ascribed to a divine intellect, the divine geometer, as LEIBNIZ styled it. By restricting the gnoseological function of the so-called transcendental-logical categories to their *a priori* relation to sensory impressions, received in the *a priori* forms of time and space, the creative autonomy of the theoretic-logical function of thought was limited to the immanent, merely phenomenal world of human sensory experience. By relating the synthetical judgments *a priori* to a supposed ultimate transcendental logical unity of the act of thinking (the *cogito*), HUME's psychologism was replaced by a transcendental idealism. The objective universal validity of the mathematical and natural scientific judgments which exceed the limits of sensory perception, seemed to be saved by founding them in an *a priori* synthesis of the formative transcendental logical categories with the *a priori* forms of sensory perception, time and space.

The typical Humanist belief in the self-sufficiency of theoretical reason with respect to the constitution of the experiential world, seemed in this way to be confirmed by a supposedly unprejudiced critical inquiry into the transcendental conditions of an ordered experience. But empirical reality is in KANT's conception reduced to the abstract theoretical image of nature based on NEWTON's mathemathical physics. The transcendental categories which, according to KANT, order the raw sensory material of experience, are exclusively conceived of as categories of mathematics and physics. By ascribing to them a transcendental-*logical* character, KANT eliminates the irreducible modal meaning of the mathematical aspects and the physical energy-aspect of our experiential horizon. In addition, KANT's table of categories is meant to be *exhaustive*. It leaves no room for a transcendental idea of totality which is really oriented to the fundamental modal diversity of human experience.

It is this rich variety of modal aspects which in principle determines the different viewpoints under which the special sciences investigate empirical reality. But KANT's transcendental idealist view of the latter excludes any attempt at introducing fundamentally different tables of constitutive logical categories which might be supposed to constitute different modi of experience.

Some neo-Kantian philosophers of law tried to transfer KANT's critical method to the juridical experiential modus and sought to discover specific juridical categories of thought lying at the foundation of any possible experience of legal phenomena. But by so doing they ignored the exclusive character of the Kantian view of experience and empirical reality.

The epistemological form-matter scheme, in which KANT conceived the latter, excluded in principle any diversity of experiential *modi*. It had a particular meaning and intention. It was taken over from Greek thought, but its sense was fundamentally changed in line with the modern Humanist basic motive of nature and freedom. Consequently it must at the same time confirm and limit the autonomous freedom and constitutive power of logical thought with respect to the mathematic-mechanical image of nature. As to its sensory matter human experience is only receptive, but in its formative transcendental logical function it has a spontaneous free and autonomous power to impose *a priori* laws upon nature of a universal validity, since these laws are viewed as transcendental conditions of our *total* experience. If there should be assumed *other* experiential modi than the natural-scientific, there would arise unsoluble antinomies with respect to KANT's epistemological form-matter scheme. In this case KANT's table of categories would lose its necessary and exclusive *a priori* relation to the sensory matter of experience. And if, as STAMMLER supposed, the matter of juridical experience should be sought in an *historical-economic* material of facts, it could not be a raw and un-ordered experiential matter; for the adjective "historical-economic" implies two conditioning *modi* of experience which are not to be ascribed to an experiental *matter* as such. Consequently, if to the transcendental logical function is ascribed the power to constitute different modi of experience by means of different kinds of categories, the epistemological form-matter scheme loses its univocal sense and dissolves itself.

In the Aristotelian conception of the form-matter scheme a lower form may become "matter" with respect to a higher *morphè*. But apart from the fact that here the form-matter motive has a quite different meaning from that of the Kantian scheme, Aristotle explicitly assumed that the lower form is *destroyed* if it is made into "matter" for a higher form.

From the Kantian viewpoint it is meaningless and contradictory to speak of an historical-economic matter of experience related to specific juridical categories. KANT's transcendental Idea of totality with respect to human experience is exclusively related to the table of categories which he supposed to be the *a priori* conditions of mathematical natural science. His epistemological form-matter scheme stands and falls with the assumption of one and the same experiential matter and one and the same kind of formative categories.

It is true that this scheme is also handled in the *Critique of Practical Reason*. But here it has not any epistemological meaning, but is only serviceable to maintaining the unbridgeable gulf between nature and freedom in the supra-sensory sphere of the normative ethical Ideas. Here we are confronted with the true intrinsic meaning of KANT's separation of theoretical and practical reason and of his ascription of primacy to the latter. This separation, which contradicts both the integral intermodal coherence of our experiential horizon and KANT's repeatedly stressed assumption of the intrinsic *unity* of human reason, was nothing but the consequence of his critical insight into the antagonistic relation between the two components of the Humanist basic motive. Because of its turning away from the radical unity of the human I, as the religious root and centre of human existence, the freedom motive had given rise to two

competing ideals, the mathematical science-ideal and the personality-ideal, which both were grounded in an absolutization of specific aspects of our temporal experiental horizon. Therefore they must necessarily been involved in an irreconcilable conflict, which in the last instance was of a religious character, just as the form-matter motive of Greek thought.

Meanwhile the inner dialectic of the Humanist basic motive could not be stopped at KANT's critical stage resulting in the separation of the natural scientific image of nature and the normative noumenal sphere of ethics, ruled by the practical Idea of freedom.

Post-Kantian freedom-idealism strove after bridging this critical gulf. Starting from the primacy of the freedom-motive, freedom and nature should by thought together in a dialectical synthesis, uniting the antithetical motives to a higher unity. And this synthesis should be accomplished by means of a supposedly autonomous dialectical thought in which *Reason* should overcome the rigid *principium contradictionis,* inherent in the logic of the limited analytical *understanding.* This implied a different transcendental Idea of totality from that which the critical dualist transcendental idealism of KANT allowed of. In "nature" itself the hidden trace of freedom should be discovered in its dialectical union with the mechanical necessity implied in the mechanist-mathematical pattern imposed by the deterministic science-ideal. On the other hand, the autonomous freedom of human personality should be dialectically united with a hidden necessity of nature lying all the foundation of the historical development of human society.

This endeavour to synthesize the antagonistic motives of nature and freedom was uncritical when viewed from the standpoint of a really transcendental critique of theoretic thought. For a theoretical synthesis presupposes a startingpoint in human consciousness which transcends the antithetical basic relation of the theoretic attitude of thinking. This startingpoint is only to be discovered in the transcendental way of concentrating our theoretic act of thinking on the I. But this concentric direction of theoretic thought is not to be explained from the intrinsic structure of the latter which, on the contrary, binds it to the divergence of the antithetically opposed modal aspects of our experiential horizon. It can only originate from the religious basic motive which rules the I-ness as the religious concentration-point of human existence. Nevertheless, the structure of theoretic thought *appeals* to a supra-theoretical concentration-point in human consciousness, since theoretical thinking cannot form any concept of a non-logical aspect without a theoretic synthesis between the latter and the logical aspect. As the religious basic motive itself is the real starting-point of any possible theoretical synthesis, theoretic thought can never be able to overcome an antithesis present in this basic motive. Nevertheless, so long as the belief in the autonomy of reason is unaffected, we ever again encounter such attempts at solving a conflict in the religious starting-point by means of a dialectical mode of thinking. Greek philosophy, too, offers many examples of such attempts at solving the intrinsic antithesis in the basic motive of form and matter.

The dialectical process in the development of post-Kantian idealism led to an irrationalist turn in the freedom-motive, which also resulted in a new irrationalist view of nature. KANT's ethical conception of freedom

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remained rationalistic insofar as he identified the true *autos* of *human* personality with the general formula of the ethical *nomos, i. e.* the categorical imperative. This view left no room for an ethical appreciation of the subjective individuality of man. It implied an individualistic conception of human society which was completely in line with that of the pre-Kantian natural law doctrine insofar as it developed under the primacy of the mathematical science-ideal. KANT's view of the state as a collection of human individuals under the rule of juridical laws was a striking evidence of this rationalist individualism, whose conception of the individual lacked any moment of qualitative *individuality.*

The irrationalist turn in post-Kantian freedom-idealism reversed the relation between *autos* and *nomos* in the idea of ethical autonomy. The *nomos* was made into an expression of the individuality of the subjective *autos.* In early Romanticism this led to a general opposition to KANT's bourgeois legalistic idea of morality. A morality of genius was proclaimed which elevated the individual disposition and vocation to the true ethical rule and standard of a person's action. But this revolutionary trend in early Romanticism fell outside of the limits of post-Kantian freedom-idealism. The latter opposed to the rationalistic ethical individualism an irrationalist universalism in which the individual personality was viewed as a member of an individual community *(Gemeinschaft),* whose transpersonal mind and will was supposed to determine his own true individuality. The idea of the individual national mind *(Volksgeist),* already developed by the Italian thinker VICO and the German thinker HERDER, entered the transcendental idealist philosophy after KANT. The new irrationalist and universalist conception of the freedom-motive gave rise to a new science-ideal which was sharply opposed to the mathematical and mechanist pattern of thought ruling the rationalistic philosophy from DESCARTES up to the Leibnitzian-Wolffian school. History was viewed as the objective temporal unfolding of the eternal Idea which in the historical process of development reveals creative individuality in the national communities and the individual personalities embedded in them. History should not be approached in the rationalist causal way characteristic of the science-ideal of the Enlightenment. It is not to be conceived as a succession of facts ruled by general abstract causal laws, a view corresponding to the mathematical-mechanist image of nature. Rather it should be approached in a dialectical, *"geisteswissenschaftlich"* conceived manner of thinking as an individual development of national potencies in which a hidden natural necessity, inherent in the national mind and character, is combined with the autonomous freedom of a nation to bring forth its culture without any mechanical coercion from outside. The aim of the historical process was conceived by SCHELLING as a complete realization of the autonomous freedom of Mind in humanity, in an aesthetic harmony of the sensuous and the ethical functions. And instead of being subject to general abstract laws, this process was considered to be ruled by a hidden law of Providence, which in a more pagan formulation was called "destiny" *(Schicksal).* This view of history, already announcing itself in FICHTE in his last period, was completely elaborated in SCHELLING's system of transcendental idealism. In the Hegelian system it was only seemingly rationalized in the rigid scheme of a dialectical logic of the

unfolding process of the Idea which replaced FICHTE's and SCHELLING's appeal to a hidden Providence. In fact this logic was a universalist logic which by means of a dialectical Idea of totality, unfolding itself in a continual process of antithesis and synthesis of its moments, tried to show the *"Vernünftigkeit"* of temporal reality in its displaying of individualities determined by de Idea of the whole. But this Idea of totality was indeed nothing but the Idea of a pseudo-radical unity in which the dialectical basic conflict between nature and freedom was not really overcome.

Meanwhile the Kantian distinction and separation between theoretical and practical reason made no longer sense in this dialectical idealism, no more than the Kantian form-matter scheme. The new historical mode of thought was elevated to a new science-ideal which was no more compatible with the fundamental structures of the temporal horizon of experience than the mathematical science-ideal of the rationalist trends in humanist philosophy. The latter created an image of reality after its own pattern. Similarly the former created a historicist image of temporal reality of an irrationalistic and universalistic character. The modal historical aspect of our experiential horizon was made into the basic denominator to which all other modal aspects were reduced as its modalities.

The Historical School of law applied this Historicism to its view of law and human society. This view was as such not compatible with the individualist natural law tradition. But it would be a fundamental error to identify its historical conception of law with that of a legal positivism. This view was strongly influenced by SCHELLING's transcendental idealism. The national mind *(Volksgeist)* was viewed as an individual historical potence, an individual revelation of the absolute Idea in time. And it was conceived as a normative standard of the developmental process of positive law in its dialectical combination of natural necessity and freedom. VON SAVIGNY's introductory article in the *Zeitschrift für geschichtliche Rechtswissenschaft* (1815) gives a clear expression to this irrationalist idealistic standpoint. Therefore the Historical School sharply combated the view that positive law is an artificial product of human arbitrariness. Its organological idea of historical development was an irrationalist normative standard for the judgment of positive law. The Germanistic wing in the Historical School, which DEL VECCHIO does not discuss in the historical part of his work, even made a compromise with the classical Idea of natural law. Its chief leader, OTTO v. GIERKE, warned in an almost prophetic way against the legal positivism defended in LABAND's and GERBER's theory of constitutional law.

Meanwhile it clearly appeared that the Humanist philosophical conception of *Reason*, as the self-sufficient basis of any order within the temporal horizon of our experiential world, was ruled by its religious basic motive which, because of its dialectical character, could lead to very different and mutually opposed cosmonomic Ideas. The dialectical process in which this basic motive had involved modern philosophy, could not be stopped, neither by KANT's critical transcendental idealism, nor by the post-Kantian dialectical idealism. The historicist science-ideal, evoked by the irrationalist and universalistic turn in the freedom-motive, had the inner tendency to emancipate itself from the belief in eternal Ideas of reason.

COMTE's positivistic philosophy, which introduced sociology as the highest level in the encyclopaedical system of sciences, aimed at a synthesis between the deterministic science-ideal of the Enlightenment with the universalistic historical mode of thought of the Restoration. The latter was now viewed as the highest and most intricate level of the natural scientific method, and as the specific method of sociology. Consequently the irrationalist view of historical development, explained in SCHELLING's transcendental idealism and taken over by the Historical School of law, was emancipated from its idealistic basis, and rationalized in the sense of the naturalist and determinist science-ideal. This implied that the aim of historical science was once again viewed to be the tracing of general causal laws of development. Nevertheless the anti-individualistic, universalist view of human society was maintained, which implied intrinsic antinomies in this positivistic philosophy. Historicism began to reveal here its first attempt at a fundamental relativizing of Ideas which in the period of Enlightenment had been viewed as eternal ethical principles of Reason. The law of the three stages, which COMTE viewed as the fundamental general law of historical development, implied that the natural law ideas of the so-called metaphysical stage were considered to belong to a specific historical phase of human society. The innate and unalienable rights of man and the citizen which KANT's *"Vernunftrecht"* had accepted in principle as postulates of human freedom based in practical reason, were now depreciated to ideas of an overcome stage of social development, just like those of the theological stage. And this was done from the standpoint of a historicist science-ideal which as well was assumed to be founded in autonomous human reason.

It was of no avail for a critical transcendental idealism to object that the ethical validity of the Idea of human freedom cannot be dependent on its causal historical genesis in human mind. This argument, which is also alleged by DEL VECCHIO, overlooks the main point at issue.

For, KANT's practical Idea of freedom was indeed rooted in a religious absolutization of the normative moral and juridical aspects of temporal human existence. This absolutization destroyed their intrinsic meaning-coherence with the historical and the pre-logical aspects of the temporal horizon of human experience. It may be that in his special treatise devoted to history KANT has tried to relate the aim of historical development to a juridical postulate of practical Reason, *viz.* the institution of an impartial international jurisdiction. But this was only a teleological judgment of history which in KANT's critical philosophy could not lay claim to objective validity. And it could not detract from KANT's view that both the moral categorical imperative and the postulates of his *"Vernunftrecht"* are *absolute, i. e.* exempt from the inter-modal meaning-coherence of our experiential horizon. This so-called practical metaphysical view, rooted in KANT's religious basic motive, could not be defended with a simple appeal to the difference between the ethical viewpoint of validity of practical Ideas and the historical viewpoint of their causal genesis. It is certainly true that moral and juridical normative ideas do not permit themselves to be reduced to historical phenomena. But this does not mean that the moral and juridical principles have an absolute validity apart from the intrinsic meaning-coherence of the modal aspects of our experiential

horizon in the all-embracing temporal order. Such an assumption, based on a supposedly autonomous and self-sufficient human reason, is contradictory since it maintains at the same time the difference between the moral and the juridical principles. Any modal difference presupposes an inner *relation* between the modalities which are compared with one another. This means that neither the moral nor the juridical principles can be *absolute.* Absoluteness can only be ascribed to the religious meaning-totality of all temporal modalities, which *transcends* the temporal horizon with its intrinsic modal diversity. For it *concentrates* the latter on a *radical unity,* in which all temporal modalities find their *fulfillment of meaning.* But in the modal dimension of our experiential horizon such a religious concentration-point is only to be found in the way of a metaphysical absolutization. And the latter, when carried through consistently, deprives the absolutized modal aspects of their *meaning.* The reason is that "meaning" always points beyond and above itself and thus never permits itself to be absolutized. Any absolutization is an expression of the spirit of apostasy which leads to "Nothingness".

In COMTE's philosophy the beginning relativizing of supposedly eternal Humanist ideas of reason by a positivistic Historicism was certainly not carried through consistently. The law of the three stages stopped the developmental process of mankind at the positivistic stage, which was viewed as the final phase and end of history. The positivistic Ideas were viewed as the true Ideas of reason which cannot be conquered in a further phase of history. This Ideas were oriented to the science-ideal and rooted in the belief of Enlightenment in the *progress* of mankind by the liberating power of increasing scientific knowledge. The new ethics and "religion of mankind" which COMTE projected for the positivistic stage of human history, clearly showed that with him Historicism had not yet arrived at its ultimate consequences. Neither was such the case in the Darwinistic evolutionism, which in HERBERT SPENCER's positivist philosophy even led to a revival of an individualistic natural law doctrine as the naturalistic counterpart of KANT's idealistic *"Vernunftrecht".* DEL VECCHIO repeatedly points to this striking resemblance in the contents of two natural law conceptions which started from polarly opposed philosophical standpoints. According to him this testifies to the fact that the natural law ideas concerned must have a supra-arbitrary foundation in human reason. I cannot agree with this argument. KANT and SPENCER were both adherents of the old political liberalism. Consequently, it is no wonder that they arrived at similar results with respect to the juridical conception of human freedom versus the State. I do not dispute that the classical natural law ideas concerning the juridical freedom and equality of men have a constant and supra-arbitrary foundation in the *inner nature of common private law* in the sense of the Roman *ius gentium,* and that in addition they display an essential public communal legal sense in the constitutional law of every democratic State. But if they were really founded in an autonomous human reason, it would be unexplainable that from an antiliberalist universalistic viewpoint COMTE denied these principles of freedom and equality, though he, too, appealed to the autonomous human reason.

Historicism could maintain its belief in the latter, so long as its religious basic motive was not yet undermined. Both Darwinist evolutionism and

Marxian historical materialism (which only reversed the basic tenet of the Hegelian dialectical idealism) remained rooted in a firm belief in the liberating power of the Humanist science-ideal.

But as soon as this belief, too, was sapped by the radical consequences of Historicism, the process of spiritual uprooting of Western thought began to reveal itself. From different standpoints NIETZSCHE's philosophy of the "super-man" and KIERKEGAARD's existentialism announced this process, resulting in a fundamental abandonment of the belief in autonomous reason in its classical-Humanist sense. Both depreciated the science-ideal as well as the ideal of personality which had originated from the dialectical religious basic motive of Humanist philosophy. The two world-wars, the increasing massification of men as a consequence of a mighty technical progress not balanced by an intensification of religious life, accelerated the process of spiritual uprooting. From a radical historicist standpoint SPENGLER predicted the unavoidable decline of Western culture. Existentialism, historicistic "*Lebensphilosophie*", and logical positivism or "logical empiricism" (which announced itself as a "philosophy of modesty") became the opposite prevailing trends in recent secularized thought. There is doubtless a search for a new basis of certitude. But it is no longer a self-sufficient human reason in which this basis is sought. Even in neo-scholastic thought there is to be observed a remarkable shifting with respect to the confidence in natural reason which in the Thomistic tradition had played such an important part, though "reason" was conceived here in a scholastic-Aristotelian sense. But here the turning to existentialism and irrationalist phenomenology occurred within the frame of the basic motive of nature and grace, *i. e.* the old religious synthesis-motive of scholastic Christian thought. The Christian belief of these neo-scholastic thinkers was not affected by the process of spiritual uprooting, which revealed itself in the recent Humanist philosophical trends.

This is in general the spiritual situation of contemporary philosophy. The above brief sketch of the dialectical developmental process of Humanist thought may suffice to elucidate the rôle which transcendental idealism has played in this process and the deeper grounds of its losing a dominant influence in our days.

We shall now engage in a more detailed analysis of DEL VECCHIO's system of philosophy of law.

(Will be continued)

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DEL VECCHIO'S IDEALISTIC PHILOSOPHY OF LAW VIEWED IN THE LIGHT OF A TRANSCENDENTAL CRITIQUE OF PHILOSOPHICAL THOUGHT

BY

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II

DEL VECCHIO is of the opinion that philosophy of law is confronted with three different problems which he terms "logical" ,"phenomenological" and "deontological" (*i. e.* axiological) respectively. The first embraces the question concerning the fundamental concept of law in its "logical totality". The special branches of positive jurisprudence are not able to answer this question: What is law in respect to the totality of its essential characteristics? The reason is that these specific branches of juridical investigation are bound to particular legal systems which display different traits with different nations and in different times. A philosophical inquiry into the fundamental concept of law, which is the *a priori* formal-logical condition of all juridical experience, is in fact of an epistemological character.

The second problem which DEL VECCHIO calls "phenomenological" has nothing to do with the problems of modern phenomenology in its Husserlian sense. Much rather it is oriented to VICO's idea of an "eternal ideal history of mankind in which occurs the historical development of all nations in time", and in which the fundamental equality of the rational human nature, as the origin of all eternal truths of reason, reveals itself. This was indeed an idea characteristic of the period of Enlightenment, though VICO himself fundamentally deviated from the latter by his conception of a circular course of history with forward and backward directed movements (*corsi e recorsi*).

DEL VECCHIO understands by a phenomenology of law a philosophical inquiry into the legal history of the entire mankind. Positive law is, according to him, not the result of particular and incidental causes, but it is a phenomenon which is common to all nations in all times, *i. e.* it is a necessary result of the human nature. A phenomenology of law in this sense has to offer a total picture of the phenomenon positive law in its total historical development, which exceeds the boundaries of any particular national legal history. It has to show the common origin and the general traits of the historical development of law. Thus it has to conceive law with respect to the totality of its historical realization.

The third problem of philosophy of law, which DEL VECCHIO calls "deontological", embraces the question concerning the ideal of law, or the

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Idea of justice, expressing itself in a natural law system, and the criticism of positive legal systems after the standard of pure reason.

The nature and task of a philosophy of law can consequently be resumed as follows: "Philosophy of law is the science which defines law according to its logical totality, investigates the origin and general properties of its historical development, and evaluates it according to the ideal of justice derived from pure reason". (*Op. cit.* p. 43).

This circumscription is remarkable in different respects. First it strikes us that DEL VECCHIO does not hesitate to speak of philosophy of law as a "science".

This implies a fundamental deviation from the critical idealist view of KANT and makes DEL VECCHIO's distinction between theoretical and practical philosophy all the more problematic. We have seen that epistemology, ontology, and philosophy of history were considered to belong to theoretical philosophy, and that philosophy of law and ethics in its narrower sense were classed among practical philosophy. But now it appears that philosophy of law embraces at least two fields of research (*viz.* an epistemological and a philosophical-historical) which completely break through this distinction.

In the second place DEL VECCHIO introduces a distinction between the gnoseological concept of law and the axiological Idea of justice. The first is supposed to refer to law in its „empirical reality", the latter to law as it "ought to be". In itself this distinction seems to be clear and in line with the neo-Kantian standpoint of STAMMLER. But it appears from DEL VECCHIO's further explanations that he ascribes a different sense to it. For, according to him the transcendental-logical concept of law itself refers to normative values; it is a particular logical form of ethical evaluation of human actions according to a normative principle: Even according to its logical concept "law never gives expression to physical, but ever to metaphysical truths. Consequently it represents a truth which is superior to the reality of natural phenomena, an ideal primary pattern (*Urbild*) which strives after its realization in this empirical reality; in short it is a principle of evaluation, more precisely it is a principle for practical evaluation, since it is related to human activity, to human acts (*Op. cit.* p. 362). From our own viewpoint, according to which the transcendental concept of law must be related to the doubtless normative modal meaning of the juridical aspect of experience, this axiological conception of the epistemological problem of law encounters no difficulty [4]). But from a critical idealist point of view it must give rise to different questions. Here is no room for a fundamental distinction between the logical and the juridical modus of experience. Rather it is assumed that the latter is constituted by a particular transcendental-*logical* form which is identified with the theoretical concept of the juridical experiential modus. In this sense STAMMLER considered the legal mode of experience to be constituted by a specific transcendental logical form of ordering the "economic-historical matter" of experience according to the teleological relation of end and means,

[4]) We do not accept a concept of positive law which makes the latter independent of the supra-arbitrary normative principles implied in the modal structure of the legal aspect. The idea of justice is a dynamical idea oriented to the anticipatory legal principles, in which the meaning-coherence of law and morality reveals itself.

which he identified with the logical (not psychological) form of volition. "Willing", conceived in this "logical" function, was not taken in an axiological or normative sense. Rather the normative viewpoint was exclusively reserved for the *Idea* of law which, in sharp contrast to the transcendental *concept*, has the rôle of a formal guide for our judging positive legal rules according to their *"Richtigkeit"*. *"Sollen"* is according to STAMMLER a *"richtiges Wollen"*. It cannot belong to the epistemological concept of law which has to embrace all positive legal phenomena, irrespective of their justness or injustness. He only assumed that all positive law is to be considered a coercive attempt to realize just law.

KELSEN, starting from the wrongly supposed logical form of the positive legal rule, conceived the latter as a hypothetical logical sentence of the form: If A ... (*i. e.* if a certain legal fact is present) ..., then *ought* to follow B (*i. e.* a certain sanction as legal consequence). But with him the normative relation implied in the term "ought to follow" does not have any really axiological sense. It has been denatured into an empty logical form of thought conceived apart from any "ethico-political postulates" concerning the contents of the legal order.

The neo-Kantian philosophers of law belonging to the school of WINDELBAND and RICKERT conceived the positive legal rule as a psychical imperative sanctioned by physical constraint, but related by our teleological judgment to the supra-temporal value of justice. By this relation the psychical imperative was supposed to assume the meaning of a positive norm belonging to the realm of "culture". Nevertheless, this "normative meaning" resulting from the subjective relating of the empirical legal rules to the supra-temporal value of justice was not considered to imply any "ethical evaluation" of these rules as to their contents, and in consequence neither of the human acts which are judged after these rules. Both the cultural scientific and the philosophical standpoint were supposed to be incompatible with such evaluations which should be left to the personal choice of a hierarchically ordered system of values.

None of these neo-Kantian conceptions can be ascribed to DEL VECCHIO. This appears from his utterance quoted earlier, according to which law by virtue of its logical essence is a principle of practical evaluation. "The juridical rule", so he emphatically declares, "does not derive the ground of its validity from the natural phenomena; (just as the ethical law) it does not give expression to that what *is*, but to that what *ought to be*" (ib. p. 360). And some pages before he says: "The concept of law belongs to the realm of values" (p. 358).

All these statements seem to contradict the sharp distinction between the concept and the Idea of law which was laid at the foundation of DEL VECCHIO's division of the field of investigation of his legal philosophy. But the author tries to evade this contradiction by having recourse to the Kantian form-matter scheme. The concept of law is supposed to concern only the *form* of ethical evaluation; the Idea of law, on the contrary, refers to the *material contents* of the latter.

In his introductory article, entitled *G. Del Vecchio und der deutsche Rechtsidealismus*, F. DARMSTAEDTER fully agrees with this solution. But I do not understand how he can do so from his own epistemological standpoint, which is oriented to the neo-Kantian school of RICKERT. For,

viewed from this standpoint, the gnoseological concept of law can only belong to the realm of culture, but by no means to the metaphysical realm of values.

Leaving alone this neo-Kantian view we must establish that it is impossible to conceive the normative character of a legal rule as a purely formal characteristic apart from its axiological content, without a fundamental denaturation of the meaning of the term "norm". According to KELSEN the logical form of a legal norm may even embrace measures of pure violence as in the case of the measures enacted by the Bolchevist dictatorship aiming at an oppression of the capitalistic class with all means.

Is this also DEL VECCHIO's opinion? In discussing the notion of positive law and its sources (p. 18) he expressly remarks that the logical form of law embraces both ideal and positive legal rules in all of their possible kinds. With respect to the concept of positivity the inner *"Wertgehalt"* of the system of legal norms is, in his opinion, without any importance. A legal norm may be completely unjust, it may be entirely contrary to the ideal standard of justice or "natural law" without losing on this ground its legal positivity. This positivity does not imply anything but the condition that the norm is factually imposed and guaranteed by a controlling social will, *i. e.* by a sufficient power enforcing the obedience to it. Therefore, the question concerning the ideal standard of law must be sharply separated from that concerning the positive *"Wesensgehalt"* of a legal system.

Nevertheless, the logical form of our legal experience is supposed to be the common transcendental condition both of natural (or ideal) and positive law.

What then is meant by this "logical form", and how can it belong to the realm of values while at the same time, as a purely gnoseological concept, it must be indifferent to the inner normative value of the positive rules?

Can DEL VECCHIO succeed in solving the antinomy which is clearly revealed in this ambiguous rôle of his law-concept?

In order to receive an answer to this crucial question we shall follow DEL VECCHIO in his analysis of the concept of law. First he observes that this concept exclusively refers to human actions. This actions are viewed by him as natural facts belonging to the "physical world", but which at the same time are of a psychical character in so far as they are volitional declarations ascribed to a subject. This view of human acts seems to be completely in line with the Kantian conception of "empirical reality" as a "physico-psychical" reality, an immanent world of *phenomena* related to "inner" and "outer" sensuous perception, and sharply separated from the *noumenal* world of the pure, free and autonomous ethical will and its ideal norms of morality and legality. But KANT did not distinguish between a transcendental logical concept and an Idea of law. His well-known definition of law was indeed a normative Idea, which did not lay claim to embrace all possible empirical legal rules. He denied in principle that human experience includes any normative aspect.

If, however, our temporal experiential horizon does include a juridical aspect of an intrinsically normative modal character relating to human acts, it is impossible to conceive the empirical reality of these acts in an exclusively physico-psychical sense, as is done by DEL VECCHIO. In this

case we must agree that these acts themselves have a juridical aspect as *legal* facts and *that this aspect belongs to their integral empirical reality.* For every modal aspect in which the integral empirical reality functions has a law-side and a subject-side (or a subject-object side), of which the latter is subject to the former without being reducible to it.

The traditional physico-psychical concept of human acts is not serviceable in jurisprudence. This is evident when we consider that delicts can be committed by an omission as well as by a positive act and that the psychological concept of volition is quite different from the legal. It is true that the legal aspect of a concrete volitional act cannot be conceived apart from its inter-modal meaning-coherence with the psychical, biotical and physical modal functions. But any attempt at a reduction of the juridical aspect of volition to the non-juridical modalities lands in insoluble antinomies, which have already been laid bare by KELSEN, be it from an unsatisfactory logicist viewpoint.

DEL VECCHIO rightly combats the opinion that the legal order is only concerned with so-called "external" actions and not with the so-called "internal" acts of volition and thought. He rightly argues that purely physical (external) human acts cannot occur. But he does not consider that human acts could never function in the legal aspect of our experience if their empirical reality should be restricted to the physical and psychical aspects. A human act functions in the juridical aspect only as a subjective *legal* fact and such a fact is never given in the physico-psychical aspects of empirical reality. The juridical mode of experience is founded in a series of modal aspects which are earlier arranged in our experiential horizon, especially the cultural-historical aspect and that of symbolical signification. The whole of juridical life rests on a symbolical foundation. The juridical aspect of a volitional act implies its expression in a legal volitional declaration that may occur either in a direct or in an indirect form. This is why a legal act can only be established by means of a juridical interpretation. And since the legal aspect of experience is also founded in the modal aspect of social intercourse, this juridical interpretation is bound to the requirements of *legal* intercourse, *i. e.* a social analogy in the structure of the juridical mode of experience. And these requirements of legal intercourse are in turn bound to their historical-cultural foundation.

Thus the legal function of a volitional act is of a very intricate meaning-structure which is completely disregarded if the concept of law is supposed to refer directly to the physical and psychical aspects of human actions. Consequently, when DEL VECCHIO (p. 355) appeals to different texts of Roman law and modern Italian law which give precedence to the will or the intention of the acting persons instead of to the external effects of the act or the verbal formulation of the volitional declaration, it should be realized that it is not the psychical aspect of volition which is at issue here. Naturally the legal volitional function is not to be conceived *apart from* the latter. But these two aspects of the volitional act should not be confounded.

The juridical aspect of experience has not only a *norm*-side but also a *factual* (subjective-objective) side. DEL VECCHIO has not overlooked this. In connection with the problem of interpretation (p. 388) he very rightly observes that the juridical meaning of a legal norm may not be restricted

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to the intention of them who have enacted it. The jurists have the task to interprete the positive norm in such a way that it may also be applied to new situations which could not be foreseen at the time of its enactment.

On the other hand they have also to establish the corresponding legal meaning of the facts to which the norms are to be applied.

These excellent observations contain an implicit refutation of DEL VECCHIO's view that law refers to the psychical will of the acting subjects. Neither the expressed will of the legislator nor the volitional act of a private subject in its juridical aspect can be identical with the psychical mode of volition. The will of the legislator is an organized legal ordering will [5]), the legal will of a private subject is a responsible volitional function liable to juridical imputation. Both of them are to be established only on the basis of legal interpretation.

The psychical process of volition on the other hand, belongs to a pre-normative aspect of experience and cannot be subject to legal norms.

But now DEL VECCHIO will doubtless object that I misinterpret his conception of the psychical world in a naturalist way. And this objection seems at first sight to be justified. In his explanation of the relations between philosophy of law and psychology (pp. 49–51). DEL VECCHIO starts from a definition of psychology as the science which investigates the "*Tatsachen des menschlichen Geistes und ihre Gesetze*". As such he considers psychology to be a part of theoretical philosophy. Law, so he argues here, is a fact of the human mind, it is the result of convictions (*i. e.* psychical facts) and evaluations performed by socialized man. He refers to VICO's words: "This civil society has been certainly created by man, and therefore its principles must be refound in our human mind". In addition he observes that positive law addresses its norms to the consciousness of the human individual and demands his obedience to them. So it readdresses itself to this very mind which has produced it. In consequence law is supposed to occur completely within the world of psychical facts and to this world belong also the ideals to which the positive legal norms are to be tested.

I have not overlooked these explanations, but they cannot undo my criticism. Apparently DEL VECCHIO's conception of the "physical" and the "psychical world" is oriented to the dualist view of body and soul; consequently, at first sight the terms "physical" and "psychical" cannot have our modal sense in his philosophical system. Since he expressly holds to the view of psycho-physical parallelism (p. 353), it is clear that "physical" must mean here „material and corporeal", and "psychical" all what belongs to the "immaterial human mind". But this whole conception is of a naturalist-metaphysical origin and is incompatible with a really transcendental view of human experience. For, if the "human mind" is supposed to include the I-ness as the central point of reference of all human experience, this "mind" can never be paralleled with a "material world" of corporeal things since the latter is included in the transcendental temporal horizon

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[5]) In a later context (p. 529) DEL VECCIO himself remarks: "Der Wille als ein blosz psychologisches Gebilde oder als Ausdruck der reinen Willkür, kann nicht über sich selbst hinauswachsen und sich derart in ein Gesetz im eigentlichen Sinne verwandeln". This implies that the will of the legislator cannot have a psychological sense.

of human experience. If, on the other hand, the "mind" should be considered to include nothing but the phenomena of the "inner sense", as conceived in the Kantian epistemology, it cannot exceed the boundaries of the psychical aspect in our sense. In this case it can never embrace the "noumenal world" in its Kantian sense which DEL VECCHIO also accepts.

It is well known that the theory of psycho-physical parallelism in its modern sense has originated from the problems inherent in the Cartesian view of body and mind as two substances which are only accidently united [6]). This dualist view was ruled by the dialectical Humanist basic motive of nature and freedom, which in principle excluded an insight into the integral intermodal meaning-coherence of our temporal experiential horizon. At present we know that the human body cannot be identified with its physico-chemical aspect but in principle functions in all the modal aspects of experience without any exception. So it is meaningless to assume that we could divide our temporal horizon of experience into a "physical" and a "psychical" world, corresponding to a supposed dichotomy of the temporal human existence. There exists doubless a kingdom of inorganic things distinct from the kingdoms of plants and animals. But even the inorganic things display a typical total-structure of individuality in which the physico-chemical function has only the rôle of the *qualifying* function of the individual whole. In addition these things function in a typical object-function (indissolubly bound to corresponding modal subject-functions) in all the post-physical aspects of human experience; and we cannot eliminate these object-functions from the concrete empirical reality of inorganic things without destroying this reality.

It is true that the human body has a material substratum. But its typical total structure of individuality is that of an intricate whole embracing the so-called *act-structure* which is typical *human* and makes this whole into a *"Leib"* quite different from an animal or vegetable body.

Human acts can only occur because the human body is characterized by this act-structure which is indissolubly bound to the human I, as the supra-modal centre of human existence and the transcending point of reference of the whole of our temporal horizon of experience.

From this it follows that human acts can no more be understood from the dichotomist view of body and soul than our experiential world in general. Therefore, the view that they are nothing but "physico-psychical" events and that law completely occurs within the "world of psychical facts" testifies to a lack of really transcendental anthropological and legal philosophical reflection.

But why do I insist on this point? It could seem that it is only of a secondary importance in DEL VECCHIO's magistral system so that my stressing it testifies to a lack of appreciation for the latter. But this is certainly not true. The very fact that I consider his system of philosophy of law a very important work is the reason why I pay special attention to this point. For it is not of secondary but rather of primary importance for his whole analysis of the transcendental concept of law, since it

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[6]) DESCARTES himself has only hold to this view from a *philosophical* standpoint.

concerns his philosophical view of temporal reality and of the human experiential horizon. Wherever DEL VECCHIO explicitly reverts to the concept of will and the human acts, he nowhere conceives them in the modal legal sense in which alone they can be related to the transcendental juridical aspect of human experience [7]). As standards of ethical evaluation, the juridical norms are considered by him to belong to the metaphysical world of *noumena.* But is is impossible to assume that he classes the "physical facts" among these *noumena.* So we must conclude that in speaking of human acts as "psycho-physical" events, he can only mean *phenomena* of the "inner" and "outer sense", as they were conceived in the Kantian epistemology. In the third part of his work (pp. 600 and 601) DEL VECCHIO expressly states that the human acts both in their physical and psychical aspects may be viewed as phenomena subject to the causal nexus of nature. He contrasts this view sharply with the transcendental and metaphysical view related to the *homo noumenon.* But this latter cannot belong to the psychical facts. As "phenomena" in the Kantian sense, the human acts can only occur within the modal psychical aspect of our experience, as it is understood by us. For the "physical" phenomena are not conceived by Kant in their original and irreducible *modal* meaning belonging to a prepsychical aspect of our experiential horizon. Rather they are only understood by him as *objective sensory* phenomena, *i. e.* in their psychical object-function, whereas the subjective psychical phenomena are considered to relate to the "inner sense" only.

The undeniable fact that in the human feelings the psychical aspect of experience displays an opened modal meaning, *anticipating* the normative aspects, does not detract from the fundamental difference between "physico-psychical" and normative legal phenomena. When we speak of logical, linguistic, social, aesthetic feelings or of a feeling of justice or morality, these feelings are certainly not phenomena functioning within the logical, linguistic, social, aesthetic, juridical or moral aspects of our experiential horizon. Neither can really legal phenomena function in the psychical modal aspect. Therefore, DEL VECCHIO's assertion that law completely functions among the psychical facts of consciousness must rest upon a misunderstanding of the modal structure of our experiential horizon.

If this assertion refers to positive law it is already refuted by the fact that nobody is able to have a complete actual awareness of the whole of legal rules and legal relations presenting themselves in our modern society. Man is subject to these norms and relations irrespectively of his having a psychical awareness of them. If this were not so, a legal order would be impossible.

It is of no avail to appeal to a "collective consciousness" of a people or a society. There are certainly socio-psychical relations between the members of a community. But there cannot exist a "collective consciousness" apart from the psychical life of individual men.

Since the thesis that law ranks among the psychical facts necessarily includes the fundamental modal meaning of the juridical aspect, it is still

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[7]) Only in context with the problem of juridical interpretation we could establish a really legal view of the facts in DEL VECCHIO's explanations. But he has not drawn the consequences from this view with respect to the points at issue.

more evident that it cannot be right. For if the juridical *mode* of experience, which lies at the foundation of all experience of variable legal phenomena, should rank among the psychical *facts* it would be itself nothing but a variable phenomenon. Indeed, our factual consciousness of what is lawful and unlawful is of a variable character. But the transcendental juridical aspect of human experience cannot be considered a psychical fact without disregarding its transcendental meaning-structure. It is true that the psychical aspect has also a transcendental modal structure which implies anticipatory meaning-moments referring to the juridical experiential modus. But the psychical *mode* of experience can no more be a psychical fact than the juridical modality, let alone that these two modal aspects have a quite different meaning.

Naturally DEL VECCHIO is not of the opinion that the transcendental validity of what he calls the "logical form of (all possible) law" could be derived from variable factual experiences. He has amply combated this empiricistic view. Nevertheless, he expressly asserts that law is the result of convictions and valuations as "psychical facts" and that it is therefore necessary to acquire knowledge of the nature of psychical processes to understand the origin of law (p. 49). Now it is hardly to see how he can combine this psychological view of the origin of law, which he has apparently borrowed from VICO, with his conception of the transcendental logical form of law as the *a priori* condition of all possible experience of legal phenomena.

DEL VECCHIO does not know a transcendental psychology in the sense meant by HUSSERL in his posthumous work *Die Krisis der Europäischen Wissenschaften und die transzendentale Phänomenologie*. This Husserlian view of a genuine psychology fundamentally contradicts DEL VECCHIO's conception of the relation between the "physical" and the "psychical world". Nor does he know a transcendental psychology in the sense of the philosophy of the cosmonomic Idea, *i. e.* a critical inquiry into the modal meaning-structure of the psychical mode of experience. So we can only conclude that he has tried to give his transcendental gnoseology and deontology of law (inspired by the Kantian criticism of pure reason and practical reason) an empiricistic-psychological foundation. Similar attempts at a psychologizing of the Kantian transcendental critiques have been undertaken by FRIES, NELSON, HEYMANS and other thinkers. But they are intrinsically contradictory. It is of no avail to appeal to supposed constant psychical laws which reveal themselves in the factual convictions and evaluations of man. For, since these laws are themselves viewed as "empirical laws" which can only be detected by "empirical research" of the factual psychical processes, they cannot possess the "transcendental validity" meant in KANT's critiques.

To evade the inner antinomy inherent in the psychologistic view of the origin of law one may introduce a sharp distinction between the genetic-causal view and that of the transcendental ground of validity of the fundamental concept of law and the Idea of justice. But a real solution of the antinomy is not to be found in this way. For, if law would indeed have its *origin* in the human mind and this mind is nothing but a complex of factual psychical functions, law itself cannot have an inner nature different from that of psychical facts. Then it must be reducible to the latter. A

psychologistic Idea of origin is incompatible with a really transcendental conception of the modal structure and meaning of the juridical aspect of experience.

It does not help to restrict the thesis of the psychological origin of law to the *empirical contents* of the legal phenomena, whereas the so called transcendental logical form of law, as the *a priori* condition of all legal experience, is considered exempt from this genetic psychological relation. For in this case it would be meaningless to say that *law* has its origin in the psychical facts of the human mind. Then one could only assert that it is the "unordered matter" of our legal experience which functions among the psychical facts. But DEL VECCHIO does not make this restriction, and he could not do so because his intention is to combine the Kantian critical idealism with the socio-psychological view of law found with VICO. The transcendental Idea of the origin of the legal mode of experience is at issue here, and by psychologizing the latter DEL VECCHIO evokes an indissoluble contradiction in his transcendental idealist philosophy of law.

We shall see later on that this is also the weak spot in his philosophical phenomenology of law, whose psychological foundations do not agree with the transcendental idealist basis of his philosophy. For the present we will follow DEL VECCHIO further in his transcendental-logical explanation of the law-concept.

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After having established that law is a normative principle of evaluating human acts, DEL VECCHIO seeks for the specific characteristics of the legal norm. For, as he expressly states, the conceptual definition of law must occur by indicating its *genus proximum* and its *differentia specifica.* Therefore he asks the question: Does there exist only one form of practical evaluation, or are there different forms of the latter? His answer is that there are only two forms of such normative judgment of human acts, *viz.* the form of law and that of morality. These two forms have their common basis in what DEL VECCHIO calls the fundamental ethical principle (*ethischen Grundsatz*) which must be pre-supposed in every practical evaluation of human acts. This principle (which is termed "ethical" in a broader sense) is expressly introduced as an Idea, in the sense of a *"sein-sollendes Urbild"*, and in the context of the analysis of the concept of law there is nothing said about its *contents.* It is not before the third part of his work, which is devoted to the explanation of the Idea of justice, that DEL VECCHIO engages in a circumscription of the contents of this fundamental "ethical imperative", which is here sharply related to the Kantian *"homo noumenon"*, in contrast with the *"homo phenomenon"*.

Consequently this imperative cannot belong to the world of „psychical facts", *i. e.* to the factual psychical opinions and evaluations, no more than to the logical categories or forms of thought. On the contrary, it is expressly related to the transcendental view of the *"Vernunftich"*, the *homo noumenon.* Since this "ethical imperative", as a *transcendental Idea,* turns out to be considered the *genus proximum* of moral and legal norms, we are once again confronted with the crucial question, how in this way DEL VECCHIO can arrive at a distinction between the gnoseological *concept* of law and the *Idea,* as the transcendental criterion for judging the positive legal

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norms as to their "justness". For, if the *genus proximum* of the law-concept is itself an *Idea,* the *species* of this *genus* seem also necessarily to be practical *Ideas,* and not *concepts.* But the transcendental concept of law is supposed to be indifferent to the contents of the legal norms, since it must be able to embrace both just and unjust law. It should be nothing but a *transcendental logical* form of a specific nature. Here DEL VECCHIO's gnoseological analysis is involved in an inner antinomy which is unsoluble on the neo-Kantian standpoint.

I suppose that this is the reason why in the gnoseological part of his work he purposely refrains from indicating the contents of the fundamental ethical principle. But the latter can in no way be conceived of as a mere *gnoseological form* of judging human acts. As an "imperative" it is no logical form at all. Consequently it cannot be a real *genus proximum* from which the concepts of law and morality are to be derived by adding specific characteristics to it.

Nevertheless DEL VECCHIO supposes he can do so: "From a single fundamental principle", so he says, "we derive two fundamentally different kinds of evaluating human acts, corresponding to the different modes of its application, *i. e.* the two fundamental ethical evaluations of morality and law" (p. 364).

The moral kind is that which evaluates the human acts only with reference to the acting subject himself. The juridical kind is that which evaluates them in an "objective" way, *i. e.* with respect to the acts of other human subjects. In its moral mode of application the ethical imperative assumes an unilateral and subjective form: It demands from the acting subject an act which is the single morally possible: all other *physically* possible acts are morally forbidden. You, the acting subject, have to choose between doing your moral duty which imposes itself upon you with an inescapable inner necessity, or forsaking your duty. In its juridical mode of application, on the other hand, the ethical imperative assumes an inter-subjective and bilateral form, *viz.* that of an imperative-attributive norm. According to this juridical form it attributes to the subject claims in respect to other subjects and imposes upon the latter the duty to respect these claims. In this way the legal norm evaluates the acts of the different subjects in an inter-subjective or "objective" way by ordering them into an inter-subjective connection.

All further characteristics of law (its starting from the external physical side of the acts, its enforceability, the more precise form of its regulations) are supposed to be implied in this "logical form". And so DEL VECCHIO gives the following definition: 'Law is the objective ordering (into an inter-subjective connection) of the acts possible among a plurality of subjects according to a fundamental ethical principle that determines the unfolding of these acts and excludes any impeding of them'. DEL VECCHIO is of the opinion that it is *logically impossible* to find other forms of evaluating human acts than the moral and legal. This thesis is really surprising and incomprehensible from a logical point of view. Which rules of logic might prescribe an exclusive division of all normative modes of evaluating human acts into a subjective and an inter-subjective form? And which rules of logic could guarantee that this division is identical with that into moral and legal norms? And finally, which rules of logic might justify an

identification of the inter-subjective form of normative evaluation with that according to a bilateral connection of duties and subjective claims?

We are confronted here with all the unwarrantable consequences of a kind of transcendental idealism which attributes to logic a task which it cannot fulfil, *viz.* the constitution of *a priori* normative modes of human experience.

In addition the whole method of defining law according to a *genus proximum* and *differentia specifica* contradicts the very nature of a transcendental critical inquiry. If the legal and moral aspects are really *transcendental* normative modes of human experience, they cannot have a *genus proximum.*

The general concept "norm" is not a *generic* but rather an *analogical* notion, which is multivocal and consequently scientifically undefined in its sense so long as it is not related to one of the fundamental modal aspects of our experiential horizon which are called "normative" in this analogical sense. Only in the transcendental structure of these aspects can all analogical meaning-moments be qualified by the irreducible meaning-nucleus of the modal sphere concerned, so that their multivocality is replaced by univocality.

In other words, the transcendental modes of experience are themselves the ultimate and foundational generic modi. They have nothing in common but their unbreakable inter-modal meaning-coherence. The latter expresses itself within the inner transcendental structure of every aspect in analogical meaning-moments referring backward or forward respectively to all the aspects which are earlier or later arranged in the temporal order of our experiential horizon. According to this criterion we may divide these analogical moments into retrocipations and anticipations.

This is why any attempt to define law as to its transcendental modal meaning according to the method of indicating its supposed *genus proximum* and *differentia specifica* must result in undefined analogical concepts. If there exists a transcendental juridical mode of experience, it cannot be a specific logical form, though the modal structure of the juridical aspect cannot fail to contain analogies of genuine logical relations. The transcendental logical *concept* of law cannot be identical with the modal meaning of the juridical aspect of experience. The former can only be the result of a theoretical (inter-modal) synthesis between the logical (analytical) and the juridical mode of temporal experiencing.

STAMMLER sought the *genus proximum* of the "logical form" of our legal experience in the logical relation of means and end, which in his view is *a priori* related to the psychical material of our temporal subjective desires and not to that of our spatial sensory perceptions, as in the case of the natural-scientific category of causality. By adding the specific characteristic of the inter-subjective (social) connection of means and ends, he supposed he had found the difference between the juridical and the moral form of volition. By adding the specific characteristic of sovereignty, he tried to distinguish the legal form of social connection from that of social intercourse, whose rules were supposed to have only an inviting character *(Konventianalregel).* And by adding the specific characteristic of inviolability he supposed to have found the difference between law and arbitrariness.

But the combination of this supposed *genus proximum* and these *differentia specifica* cannot bring to light the transcendental modal meaning of all possible legal phenomena. For all these supposed "logical characteristics" of law are nothing but analogical concepts, which are also handled by non-juridical sciences.

Is it true, as both STAMMLER and DEL VECCHIO assert, that law is distinct from morality by its inter-subjective character? This view originates in the Aristotelian distinction between justice and the other "ethical virtues". According to ARISTOTLE justice (both in its general and special sense) implies the social relation προς ἕτερον (*i. e.* with respect to another person) and presupposes in its special sense a social connection between at least two persons, while the other "special virtues" (wisdom, bravery, moderation, *etc.*) may be only related to the acting subject himself. DEL VECCHIO agrees that the moral imperative imposes a duty whose fulfilment may have effects also with respect to other persons. But in his opinion this never implies a rule of behaviour for the latter. From the moral point of view it is only the acting subject himself whose behaviour is at issue.

But it must be decidedly denied that moral duties are exclusively related to the acting subject. All social human relations have a moral aspect, if the term "social" is not taken in a specific *modal* sense but in its reference to the typical structures of individuality of temporal human society embracing all of the modal aspects together. The typical communal duties of love between husband and wife, or between parents and their children are of a mutual character. The same holds good with respect to the moral bonds between the members of a nation, of a church, *etc.* And in the inter-individual social relations which lack a communal character in its proper sense, the moral duties are also of an inter-subjective character.

If it is my moral duty to help my neighbour who applies to me in a situation of distress, the latter has the same duty if the rôles are reversed. In addition my moral duty with respect to him is connected with his moral duty of gratitude.

Now DEL VECCHIO argues that in this case the duty of the one subject lacks any connection with a claim of the other. But this is only true if the term "claim" is taken in a *juridical* sense. And then the supposed specific difference between law and morality (*viz.* the bilateral character of the former in contrast to the unilateral trait of the latter) turns out to land us in a vicious circle. It is hardly to be denied that the moral duty of the parents to love their children has its counterpart in a moral claim of the latter to this love, and a similar state of affairs presents itself in all other socio-moral relationships. But naturally, a *moral* claim is not a right in its legal sense.

The view that law is distinct from morality by its attributive-imperative character has especially been developed by the Russian jurist PETRAZCICKY, who arrived at it from a psychological viewpoint. But in my opinion this criterion owes its appearance of rightness only to the fact that the vicious circle implied in the use of analogical concepts in the supposed sense of transcendental criteria, has not been observed. A *moral* claim is a clear juridical analogy in the *moral* mode of experience, *viz.* an analogy of the *legal* claim which finds its most solid foundation in a subjective right.

Since moral claims are even found in moral love-relations, as they present themselves in an as yet closed and primitive society [8]), it follows that the moral mode of experience must be founded in the juridical mode. This is to say that the juridical experiential mode must precede the moral modality in the temporal order of the modal aspects.

This appears also in a convincing way from the fact that an as yet primitive legal order lacks any anticipatory juridical principles (*e. g.*, that of punishment according to guilt, that of *bona fides*, that of equity *etc.*) in which the modal meaning of law discloses and deepens itself by anticipating the sense of morality, without exceeding its own modal boundaries.

So we can only conclude that DEL VECCHIO has not succeeded in indicating a transcendental criterion by which we may distinguish the legal mode of evaluating human acts from the moral modality. But how does he argue his thesis that it is logically impossible to find out other forms of normative evaluation but these two?

It can hardly be denied that our experiential horizon displays a rather great variety of modal aspects which in an analogical sense are to be considered *normative*. There are norms of a logical and of a cultural-historical modality; there are norms in the modal sense of social intercourse, and norms of a linguistic character, economic norms and aesthetical norms, juridical norms and moral norms. And finally there are norms of faith. All the modal aspects of our experiential horizon to which these norms refer in their modal sense are arranged in an unbreakable intermodal coherence of meaning. How then may it be argued that there are to be found only two modes of normative experience? One should not object that DEL VECCHIO does not speak here of normative modes of experience, but of forms of ethical evaluation. This objection would be right if I had raised my critical question in respect to KANT's ethical system which equally knows no other kinds of norms than legal and moral ones. But we have seen that DEL VECCHIO speaks of a legal and a moral form of ethical evaluation in a *gnoseological* sense. Consequently these forms are really to be considered transcendental conditions of normative legal and moral *experience*.

Well then, the author tries indeed to demonstrate that all other genuine modes of normative evaluation of human acts are reducible to that of law or that of morality. And he is of the opinion that the exclusive character of this division of the ethical system "has been proved *a priori* in an irrefutable way" (p. 366). He starts with observing that, on the one hand, empirical reality displays the two forms of morality and law, but on the other presents us a plurality of phenomena in which the ethical evaluation reveals itself in its general sense without our being able to establish whether this evaluation assumes the form of law or that of morality. As an example DEL VECCHIO refers to the morals or ethical customs, especially those prevailing in a primitive society. Quite rightly he remarks that customs are not to be considered a particular kind of norms. In fact they may

[8]) Different ethnologists (W. SCHMIDT, LOWIE, MALINOWSKI) have remarked that in matriarchal societies the father tries to fulfil his natural moral duty with respect to his sons by means of gifts. Though such gifts are contrary to the rigid matrarchal rule of succession, they are in general respected by custom, since it is acknowledged that a son has a natural claim to such manifestations of paternal love.

display different modal qualifications, though it is certainly not true that they must necessarily be either of a legal or of a moral character.

DEL VECCHIO, however, holds to this either-or, at least with respect to the clearly differentiated norms. As a consequence he denies the irreducible modal meaning of the aspect of social intercourse with its norms of fashion, courtesy, good breeding, tact, sociability, etiquette, *etc.*, and even the irreducible modal sense of the norms of faith. But this is certainly untenable. According to DEL VECCHIO most of the norms of social intercourse are nothing but sub-species of moral rules, and insofar as they find expression in customs they are to be considered norms of positive morality. The latter opinion is also defended by the so-called analytical school of law, founded by JOHN AUSTIN. But here these norms of "positive morality" were conceived of in an inter-subjective or social sense and certainly not in the sense which DEL VECCHIO ascribes to the moral form of ethical evaluation.

The truth is that the normative experiential aspect of social intercourse has an irreducible modal meaning-nucleus, and that any attempt to reduce it either to the juridical or to the moral mode of experience must result in inner antinomies. The reason is that these latter modal aspects presuppose that of social intercourse since their modal meaning-structure contains essential analogical moments which refer back to the nuclear moment of this modality.

The aspect of societal life which is ruled by norms of fashion, good breeding, courtesy, etiquette, *etc.* is in principle withdrawn from any legal or moral regulation. Different students of the general theory of law have denied this by referring to the undeniable fact that there are legal rules concerning dressing, a certain manner of saluting, *etc.* But this argument rests on a fundamental confusion of the concrete social acts of dressing and saluting with the different modal aspects of their normative regulation.

Both, legal and moral rules may refer to dressing or saluting insofar as the latter function in the juridical or moral aspect of social experience. But these norms can never assume the modal meaning of those of courtesy, good breeding, fashion, tact, sociability, *etc.* If these modal norms of social intercourse were lacking, the legal and moral imperatives would lose one of their necessary social substrata.

DEL VECCHIO is of the opinion that the norms of social intercouse are of inferior importance when compared with others belonging to the same moral area. But it is evident that this thesis makes no sense if its presupposition (*viz.* that most of the norms of social intercourse have a moral meaning) proves to be wrong. And if this assumption should be right, it would destroy DEL VECCHIO's view of the moral mode of experience. For it is impossible to deny that the norms concerned are of an inter-subjective character, which was also acknowledged by STAMMLER. And their high and essential importance is proved by the fact that not any societal order can lack them. From the Biblical Christian viewpoint they are a temporal modal expression of the central religious commandment of love, just as the temporal modal norms of law and morality. This is why Jesus Christ reproached his host, Simon the Farisee, with having violated the social forms of courtesy with respect to Him and his disciples. Indeed these forms are not of secondary importance when viewed

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according to their own modal sense and their transcendental relation to the central religious meaning-totality of all temporal norms and to the whole temporal order, in which they function.

DEL VECCHIO's "ethical system" has no more room for the irreducible modal meaning of the norms of faith than for that of the norms of social intercourse. He agrees that faith norms are of a *"jenseitigem Gepräge"* and have a particular signification both in the consciousness of the individual and in the life of nations. Nevertheless he is of opinion that, as a particular foundation for the ethical norms, they can only consist of prescriptions of a moral or a legal form. This view convincingly proves that a reduction of the transcendental normative modes of experience to "logical forms" of evaluating human acts must result in a complete destruction of the modal meaning-structures of the different normative aspects. The transcendental experiential mode of faith can never be reduced to the legal or moral modi; nor may it be identified with the central religious sphere of human consciousness in which all temporal modalities of meaning are concentrated on the I-ness in its relation to the divine Origin of all that has been created. The dilemma posited by DEL VECCHIO, according to which all normative evaluations of human acts must either occur in a subjective or in an inter-subjective form proved to lack any logical foundation. Therefore the logical *principium exclusi tertii* is not relative to it.

There is not any modal kind of norms which exclusively applies to the acting subject viewed apart from all inter-individual and communal relations. Consequently it is logically unallowed to apply DEL VECCHIO's *either-or* to the modal faith norms, let alone that the distinction between a subjective and inter-subjective form of normative evaluation can by no means be identical with that between the moral and legal modalities of experience.

It is quite true that an institutional church community, which is *qualified* as a christian community of faith, implies both legal and moral norms of a typical character expressing the typical total structure of the communal whole. But the typical inter-modal meaning-coherence between the norms of christian faith and the ecclesiastical legal and moral norms does not detract from the intrinsic modal difference between these three kinds of norms.

DEL VECCHIO's subsumption of the faith-norms either under the moral or under the legal mode of ethical evaluation might make sense on the basis of the Kantian *"Vernunftglaube"*. According to KANT true religion is identical with morality founded in the autonomous practical reason. From this it follows that the faith-norms related to true religion can only be of a moral subjective character, whereas the inter-subjective faith norms relating to ecclesiastic dogmas can only have a *legal* validity in the church-community and—in the case of an established church—in the state. But KANT has never pretended that this division of the norms of faith into moral and legal imperatives is of an epistemological validity and derives from the rules of logic alone. This latter assumption is to my mind untenable from any religious viewpoint, irrespectively of its being founded in the Biblical-Christian or in the Humanist basic motive.

The other modal kinds of norms, not belonging to those of social intercourse and faith, are subsumed by DEL VECCHIO under the general term "technical" rules. This is to say, insofar as he has paid attention to them. For in the present context he does neither mention the logical, nor the cultural-historical, nor the economic norms. As to the first kind of modal norms this could be seemingly justified by the argument that logical principles do not belong to the "ethical norms" in the sense meant by DEL VECCHIO, since they are of a theoretical and not of a practical nature.

But if the term "practical" means nothing but "relating to human acts" it must be evident that the logical norms are "practical" as well, since they are doubtless related to acts of thought. That there is a difference between practical and theoretical thought does not mean that the former is not subject to logical principles. It cannot be sustained that the logical rules do not concern the human will and consequently cannot have a genuine normative meaning. Every real thought act is at the same time a volitional act, which has a logical aspect and only as such can be subject to logical norms. And we may say that logical norms are the substratum of all other kinds of modal norms since all of the latter presuppose the *principium contradictionis.*

The fact that in DEL VECCHIO's "ethical system" there is no room for cultural-historical norms relating to an irreducible normative mode of experience, hangs together with his naturalist misinterpretation of power. For we shall see presently that formative power or formative control is the nuclear moment of the cultural aspect.

So far as the economic norms are concerned I suppose that DEL VECCHIO will rank them among the technical rules. The latter are sharply distinguished by him from the ethical norms. They have only the intention to indicate how we must act if we want to realize a certain end. But they are not concerned with the question whether it is ethically required or allowed to act in this way or to strive after this end. In DEL VECCHIO's opinion the whole content of the technical norms is exhausted in a natural-scientific causal nexus established in the logical form of a hypothetical teleological judgment. Every natural scientific sentence may be transformed into such a technical norm.

In themselves these technical rules can never imply an ethical duty. Nevertheless, in societal life their observation is often made into an ethical duty either by moral or by legal norms. When, for instance, the insight has generally gained ground that it is an ethical duty to take care of health, the rules of hygiene will also assume an ethical signification.

DEL VECCHIO is of the opinion that a similar state of affairs is to be observed with respect to the technical rules of the different arts and professions. It is always a moral duty to devote ourselves seriously to any task that we have set ourselves, and in general it is also a moral duty to take into consideration the feelings and taste of our fellow men. From this it follows that a violation of the technical rules of language, poetry, fine arts, *etc.*, due to ignorance or inaccuracy, is always reprehensible, also from a moral point of view. But here, too, it is never the technical rule as such, but only an ethical imperative, that can found a duty to observe it.

In taking cognizance of this view of the relation between technical and ethical norms we must first ask why DEL VECCHIO speaks of technical

norms? If they are indeed nothing but natural scientific causal sentences in an hypothetical teleological form, there can be not any reason to call them "norms", or "hypothetical imperatives", as KANT has it. Then we should conclude that this terminology can only favour the confusion of these rules with ethical standards, a confusion against which DEL VECCHIO rightly warns.

But the truth is that the human τεχνή has an irreducible cultural sense and that the cultural mode of experience is as such of a transcendental normative character. The nuclear moment of this experiential modus is a controlling mode of formative activity proceeding after a free project. This is the original sense of the terms power or mastery, whose retrocipating analogy is found in the modal structure of the juridical aspect, *viz.* the juridical meaning-moment of *legal* power. There is a cultural power over men and a power over natural objects. The analogy of this distinction in the juridical aspect is that between legal power over men (legal authority) and legal power over objects (subjective right).

Well then, formative power in its original cultural meaning implies as such a *normative cultural vocation* whose modal meaning is irreducible to that of the legal or moral aspects, though it displays an unbreakable inter-modal coherence with the latter. The great cultural commandment, imposed upon mankind at the creation, reads: Subject the earth and control it. This imperative implies a duty of a genuine cultural character. It does not have the hypothetical teleological form meant by DEL VECCHIO. In fact, a genuine technical *norm* refers to the cultural vocation of mankind. It is never to be reduced to a teleologically transformed rule concerning a mechanical causal nexus. Any genuine technical norm appeals to the free formative project of man, though it doubtless implies a certain application of our knowledge of natural laws. Every engineer knows that no single bridge can be built by means of a mere application of his natural scientific knowledge of particular causal relations. Technical norms imply a due observation of the requirements of technical economy, technical harmony, *etc.* And in these requirements we are confronted with anticipatory normative meaning-moments in which the inter-modal coherence between the technical, the economical and the aesthetical norms is clearly revealed.

Technical norms, however, have a fundamentally different meaning from that of linguistic or aesthetical rules. Rules of syntax concerning the right grammatical arrangement of words in speech or writing have the irreducible modal meaning of the linguistic aspect, *i. e.* that of symbolical signifying. These normative rules have as such nothing to do with technical norms in their genuine modal sense, and still less with teleologically transformed natural scientific judgments of causality. There are doubtless technical rules concerning the formative control of speech sounds in the pronunciation of words, or concerning the reaching of rhetoric effects in speaking or writing. But it is a serious error to confound them with the grammatical norms. The act of writing or speaking has different modal aspects. But the linguistic aspect is in no way reducible to the technical-cultural. A similar state of affairs presents itself in the relation between the technical and the aesthetical norms of the fine arts. A work of fine art has a typical total structure of individuality which is typically founded in a technical-cultural form and is typically qualified by its aesthetical

object-function. The technical-cultural aspect of this work of art should be completely disclosed and deepened under the guidance of the aesthetical function, so that the technique does not obtrude at the cost of the latter. Consequently the technical and the aesthetical norms of the fine arts display an unbreakable inner coherence. But it is impossible to reduce the aesthetical principles to technical rules without destroying the meaning-structure of a work of art.

Do the technical and aesthetical norms imply ethical duties of the acting subject to observe them? It makes no sense to ask this question since the term "ethical", if it is taken in the sense of a *genus proximum* of the moral and legal aspects, lacks any transcendental-modal meaning, or, to speak more exactly, lacks any possible meaning. For, we have seen that really transcendental modes of experience cannot have a *genus proximum*. But that both, technical and aesthetical norms are of a really binding and imperative character, different from legal and moral modes of binding, is implied in their inner modal normative nature.

DEL VECCHIO has bound himself to the Kantian ethical system. This is why he must try to eliminate all normative modes of experience which are not reducible to the legal or moral aspects of our temporal horizon. KANT related the beautiful only to the subjective aesthetical feeling of taste and uninterested pleasure. The faculty of aesthetical judgment is, according to him, a particular faculty of teleological judgment which is neither theoretical nor practical. Aesthetical feeling has only a subjective generality, it cannot lay claim to objective validity. Beautifulness is in KANT's opinion the form of appropriateness (*Zweckmässigkeit*) of an object in sofar as the latter is perceived without any logical representation of an inner aim of the object. Nevertheless, KANT would certainly not agree with a reduction of the aesthetical principles of teleological judgment to technical rules in the sense of DEL VECCHIO.

I have insisted on DEL VECCHIO's view of the norms, because it testifies to the fact that his *a priori* deduction of the concept of law lacks any foundation in the transcendental modal structure of our experiential horizon. The real modal meaning of the juridical aspect cannot reveal itself to a transcendental analysis without our having a due insight into the unbreakable meaning-coherence between the different transcendental modes of experience. By reducing all other modal norms either to ethical (legal or moral), or to technical rules, DEL VECCHIO has blocked the way to this insight. And the radical transcendental critique of philosophical thought which we have laid at the foundation of our analysis of this author's legal philosophy has laid bare the deeper ground of this misconception. It has shown that in the last instance it is the dialectical basic motive of nature and freedom which leads to a methodical destruction of the integral meaning-coherence of our transcendental horizon of experience.

DEL VECCHIO certainly acknowledges a necessary coherence between morality and law. He is not satisfied with the sharp separation between these two normative areas, as it was found with THOMASIUS, KANT and FICHTE (in his Kantian period). And it testifies to his profound philosophical intuition that he seeks for a deeper unity and coherence to conquer this rigid dualism. He is of the opinion that this coherence has

a *logical* necessity and may be demonstrated *a priori*. But the very fact that he tries to found it in logic proves that he does not mean a real transcendental meaning-coherence, revealing itself in the modal structure of the aspects concerned. Rather we are confronted here with a remarkable revival of the rationalist view of CHRISTIAN WOLFF concerning the relation between law and morality, which has neither anything to do with a transcendental analysis of the modal meaning-structures, nor with the Kantian critique of practical reason. In keeping with WOLFF's natural law system, DEL VECCHIO starts from the principle: Any duty is always at the same time a right and nothing can be a duty if it is not at the same time also a right. The truth of this thesis is demonstrated by an appeal to the *principium contradictionis*. If in a given ethical system of norms a subject should have the duty to act in a certain sense, and at the same time the impediment of this act by other subjects should be lawful, this ethical system would dissolve itself in a logical contradiction. Consequently it is logically necessary that what is morally commanded must also be ethically possible within the objective legal order. In other words: Anybody has always the right to fulfil his own (moral) duty. DEL VECCHIO is of the opinion that all objections raised against this logical argument originate in handling ambigious notions by confounding different and separate ethical systems with each other.

According to him, each ethical system implies the correspondence of a fully determined moral order to a given legal order. When, contrary to the prevailing ethical system, we acknowledge a new ethical duty (*e. g.* in particular cases a duty to revolution), this implies our acknowledgement of a new right to fulfil such a duty.

But we must establish that this argument starts from two premisses which lack any logical necessity:

1° There exists an "ethical system" consisting of two and only two kinds of norms, *viz* legal and moral imperatives.

2° To any positive legal order corresponds one and only one positive moral order within the same "ethical system". The unwarrantableness of the first premisse has already been shown. As to the second we must ask: What can be meant by a positive ethical system with two corresponding orders? Contrary to DEL VECCHIO's logical thesis, KELSEN has argued that a positive legal system and a moral system of norms cannot be united into a same system embracing both of them, since they derive from a different logical "*Ursprungsnorm*". Apart from the positivist and logicistic way in which this argument is set forth, it seems in any case to be better founded *from a logical point of view* than DEL VECCHIO's second thesis.

From DEL VECCHIO's concept of morality it is even hardly to see how he can speak of a positive moral order. For such an order, which according to him consists of a system of customs, can only be of an inter-subjective, *i. e.* societal character. As such it contradicts DEL VECCHIO's notion of the moral imperative as a norm which is only addressed to the acting subject himself apart from all inter-subjective relationships.

But if we accept the possibility of a fully determined positive moral order, we are necessarily confronted with the question: In which "social group" does it have positive validity and to which positive legal order does it correspond?

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This question is all the more crucial from DEL VECCHIO's viewpoint, according to which even the norms of faith are to be considered moral norms insofar as they refer to the subjective conscience. The Christian belief forbad categorically to sacrifice on the altar of the pagan Roman emperor. According to DEL VECCHIO this should be considered a moral imperative, and it cannot be denied that this imperative had a positive validity in the Christian congregations. Consequently it belonged to the positive "moral order" of these latter. But to which positive "legal order" did this "moral order" correspond? This could only be the ecclesiastical legal order of these congregations and certainly not the positive legal order of the Roman empire. A natural law order can hardly be said to belong to the same ethical system as the positive Christian faith-norms, if the term "ethical system" is to make any sense. But if this is granted, it is impossible to assert in a general sense that to every moral duty corresponds a subjective right in *the* legal order. For the ecclesiastic order of the Christian congregations could not bind the Roman judges who condemned the Christians to death. Consequently the Christians could not lay claim to a positive subjective right to fulfill their "moral" duty over against the magistrate of the pagan Roman state. In fact they have never done so, but appealed to the Biblical principle that one should obey God more than men.

CHRISTIAN WOLFF has derived a whole system of innate rights from his eudemonistic theory of innate moral duties. This was a fairly arbitrary natural law system corresponding to a natural moral system. But he frankly acknowledged that these "absolute innate rights" may not be appealed to in the case of their conflicting with the principle of *salus publica* which is the supreme rule of the state. This encroachment upon the natural law system of innate rights was justified by him on the ground of the rule: *Necessitas non subditur legi.* WOLFF's eudemonistic ethical system was rejected in principle by KANT, and I think the Wolffian basic tenet of DEL VECCHIO is incompatible with KANT's transcendental idealist ethics insofar as it implies the coexistence of different "ethical systems".

In any case this basic tenet cannot be founded in logic. An anarchist, who in principle rejects any legal order, cannot logically appeal to a right (neither to a positive nor to a natural one) when he refuses to pay tax or denies his liability to military service on moral grounds. At the utmost he may say that he is *morally obliged* to refuse obedience to the legal order and that he considers it everyman's duty to do so. This standpoint cannot be combated from a logical point of view.

It is remarkable that DEL VECCHIO tries to strengthen his argument by conceiving the relation between law and morality in terms of a logical relation between possibility and necessity. Law refers to what is ethically possible, the moral imperative refers to what is ethically necessary. Since necessity logically implies possibility, the moral duty must imply a right to act according to this duty. A legal duty is, according to DEL VECCHIO, not related to what is ethically necessary. It only indicates the limits of the legal possibilities of every person. Consequently we cannot reverse the logical relation between law and moral duty. From the legal possibility we cannot derive a moral necessity.

This argument can only corroborate our opinion that DEL VECCHIO's

concept of law lacks a really transcendental modal foundation. It is certainly not true that every legal duty must find its counterpart in a subjective right and that law only refers to the ethically possible. The subjects of a state have the legal duty to obey the magistrate within the limits of the latter's legal competence. But we cannot speak of a subjective public right of the magistrate to this obedience (as was already done, *e. g.*, by GEORG JELLINEK). For the question whether or not a subjective right is to be exercised is in principle left to the free decision of the entitled subject, whereas the magistrate has only the public legal duty to enforce obedience. In other words, the claim of the magistrate to obedience means a *legal necessity*, and not a *legal possibility*, as in the case of a subjective right. This does not mean that there do not exist real public rights. But the latter should not be confounded with a public legal power over subjects and with the claim to obedience, inherent in it. Not every legal claim can be viewed as a subjective right, as is done by DEL VECCHIO (p. 385). The juridical praxis has never fallen into this erroneous identification. It makes a sharp distinction between misuse of legal authority (*e. g. détournement de pouvoir*) and misuse of a right.

There are many other instances to be alleged of legal duties which neither are connected with a subjective right as their counterpart, nor may be viewed as a mere limitation of legal possibilities. A legal rule which prohibits bigamy does not mean the prohibition of an act which implies an encroachement upon a subjective right of an individual subject. Much rather it gives expression to a legal principle of public order which in the legal conviction of the Western peoples possess an "ethical necessity" as DEL VECCHIO would have it.

This legal principle is closely connected with the typical moral qualification of the marriage-institution as an exclusive love-community between husband and wife implying a bi-unity of their temporal personalities. It makes no sense to say that this legal principle implies only a limitation of ethical possibilities, while, as a moral duty, refraining from bigamy is an ethical necessity. True, engaging in a marriage-bond *may* be a moral necessity in a certain situation. But in many cases it will only be a moral possibility. In any case, if we contract a marriage, refraining from bigamy is necessary both in a legal and in a moral sense.

DEL VECCHIO agrees in a later context (p. 380) that not all legal duties are of a negative character (*i. e.* only concern a refraining from acts which encroach on the rights of other persons), but that there are different legal duties of a positive content. But if this is granted, what may be the meaning of the thesis that law only concerns ethical possibilities, and that the moral imperative always refers to what is ethically necessary? It makes certainly sense to say that a subjective right implies only a legal possibility for the entitled subject and, as such, implies no moral rule as to the mode of its realization. But it is hardly comprehensible why a positive legal duty should lack the character of a normative necessity and should only mean a limitation of ethical possibilities.

The reason why we are in doubt about the meaning of DEL VECCHIO's distinction is that the terms ethical possibility and ethical necessity are ambiguous because the adjective "ethical" lacks a transcendental modal determination. As soon as this pseudo-generic adjective is replaced by

the two modal adjectives *legal* and *moral*, it appears that the terms possibility and necessity may be used both in a juridical and in a moral sense. For it is not true that in the moral aspect we are only confronted with imperatives which prescribe one single act as necessary without leaving any room for different moral possibilities. If this were so, the question concerning our moral duties would be of an extreme simplicity. But this idealist simplification of the moral questions occurs at the cost of any contact with the complexity of the real situations in which we are placed. There are doubtless cases in which one and only one act is prescribed by our moral duty since the situation leaves no other moral possibility. But in most of the moral situations we are confronted with a complex of moral possibilities and concurrent duties in respect to which we are charged with the full responsibility of a decision. And this moral decision is never to be derived from a moral rule, nor can we in general pretend that it was the single possible decision from a moral point of view.

* * *

We may thus establish that also the characterization of the difference between law and morality in terms of the distinction between the ethically possible and the ethically necessary remains entangled in the vicious circle of analogical concepts which lack a modal determination of their sense.

The consequence is that all the further explanations of DEL VECCHIO in which he tries to give the subject-matter of the so-called general theory of law a philosophical foundation in his general concept of the legal aspect, lack a genuine transcendental critical basis. All acuteness and erudition which in these explanations manifest themselves cannot fill up this void. In addition DEL VECCHIO tries to derive from his fundamental concept of law the inner nature of the public legal norms of the internal state-order. This is to say that he falls back into the traditional confusion between the transcendental modal meaning of the juridical aspect and the typical total structure of individuality of the state. The state's structure expresses itself within this modal aspect in a *typical* legal sphere not belonging to the modal meaning-structure of law in general.

Before having engaged in an inquiry into the different typical structures of human society both in its primitive undifferentiated and its differentiated condition, DEL VECCHIO asserts that, as to its origin, *all positive law*, without exception, has a public legal nature, because, according to its genetic form, it originates in the state (p. 404). Only in a secondary sense he accepts a distinction within this all embracing notion of public law between public law in a narrower sense, and private law. By the former he understands the fundamental legal norms concerning the attribution of the sovereign power to the state as the bearer of the total legal order, the limits of this power, the form of government, the organization of the state's sub-divisions (*e. g.* provinces, municipalities, *etc.*), and the public legal "rights" of the individuals (*e. g.* the vote). Private law, though as to its origin it is also of a public legal nature, may be called the system of legal norms which regulate the private relations between the individuals.

Here we are confronted with the old dogma concerning the state's sovereignty in the sense of an exclusive original competence to law form-

ation. Since BODIN this dogma has prejudiced the state-absolutist theory of the sources of law. It lacked any critical foundation in the typical structural principles of human society which are the transcendental conditions of our social experience. Modern sociology of law has generally broken with this political dogma which impeded a scientific observation of the real states of affairs. And it is really surprising that DEL VECCHIO tries to maintain it though in his later discussion of the societal relations he is obliged to mention different facts which contradict the dogma concerned. Should we assume that this latter is only viewed by him as a normative ideal? But, in this case it should at least be justified from a transcendental idealist point of view, whereas DEL VECCHIO much rather *proclaims* it as an axiom needing no further argument.

In the post-Kantian transcendental-idealist trends in legal philosophy, inspired by SCHELLING and HEGEL, the idea of the state as the sovereign bearer of the total legal order, was founded in an (inconsistent) universalist view of human society. This view was doubtless codetermined by the classical Greek conception of the state as the all-embracing "perfect society". But in the third volume of my work *A New Critique of Theoretical Thought* I have amply shown that both this universalism and its opposite, the individualistic view of human society, are incompatible with a really transcendental analysis of the typical structures of individuality of the different societal relationships and of the typical legal spheres implied in them.

(to be continued)

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