

philosophique ne peut qu'être d'un caractère réformant et libérant, pour autant qu'il peut l'affranchir de préjugés issus de motifs fondamentaux

apostats, qui obscurcissent la vue théorique de la structure de l'expérience humaine en l'embarrassant dans les différents ismes et dilemmes nés d'absolutisations.

Les motifs fondamentaux exercent leur influence centrale et nécessaire sur la pensée philosophique par l'intermédiaire d'une idée transcendante tripartite (« l'idée de Loi ») se rapportant aux trois problèmes transcendants concernant l'attitude théorique de la pensée et de l'expérience, à savoir: 1° le problème du lien de cohésion et de la relation mutuelle entre l'aspect logique et les aspects non-logiques de l'expérience; 2° le problème du moi humain comme le point de référence central de la pensée et de l'expérience théoriques; 3° le problème de la tendance vers l'Absolu (y compris la tendance vers l'absolutisation) du moi pensant.

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The Philosophy of the Cosmonomic Idea and its Importance for the Philosophy of Law and the Social Philosophy

I. Introduction

Summary

The philosophy, developed since the twenties at the Free University in Amsterdam and going by the name of "philosophy of the Cosmonomic Idea" is a Christian transcendental philosophy of a radically critical character.

Here, for the first time, the traditional dogma concerning the autonomy of theoretical thought was put to the test of a transcendental critique by asking the question: Which are the necessary presuppositions that alone, in virtue of the inner structure of the theoretical attitude of philosophical thought itself, make this thought possible? This criticism was obliged to be really radical, because it could not accept any dogmatical assertion concerning the pretended autonomy of philosophy as a self-evident condition of its freedom of research. It could not permit itself to eliminate any fundamental question

belonging to the legitimate sphere of its inquiry, even if it would turn out to be necessary to penetrate to foundations of philosophical thought which surpass the immanent sphere of this latter. This is why this transcendental critique should not be confounded with the KANTIAN critique of pure reason or with EDMUND HUSSERL's transcendental phenomenological critique of knowledge.

The theoretical attitude of thought and experience is characterized by an antithetical relation between the logical function of thought and the non-logical aspects of human experience. The different aspects of experience, including the logical or analytical aspect, within which the logical function of thought displays its activity, are of a modal character. That is to say, they are the fundamental experiential modes which do not refer to a concrete *what*, but only to the *how*, the particular *manner* of experience.

These modal aspects underlie our whole consciousness of the diversity manifesting itself within the empirical reality of our temporal world. They belong to the transcendental structure of our experience within the order of time. Consequently they are also the modal aspects of empirical reality.

The non-logical experiential aspects which in the theoretical attitude are opposed to the logical function of thought, offer resistance to our attempt to grasp them in a logical concept and this resistance gives rise to theoretical problems of an epistemological character.

The antithetical relation which characterizes the theoretical attitude of thought does not correspond to the structure of our integral experience and should not be misunderstood in an ontological sense as if the logical function were really separated from the other functions of experience.

The theoretical antithesis is only the result of an analytical abstraction by means of which we dissociate the logical aspect and the non-logical aspects which in fact are joined through an undissoluble bond of coherence in the intermodal continuity of time.

Time in its integral sense embraces all modal aspects of human experience and is their intermodal bond of coherence expressing itself in each of them in a particular modality. This is why time is not to be identified with one of its modal aspects, *e. g.*, the aspect of extensive movement, or the physical, the biotic, the sensitive or the cultural historical aspect. Beyond the horizon of time the diversity of modal aspects loses any meaning and it would be a mere illusion to suppose

that at least some of these aspects, *e. g.* the numerical, the spatial, the logical and the moral, are of a time-less, or supra-temporal character.

The integral time presents itself in a strict correlation of order and duration. Duration is time in its factual and individual sense, undissolubly bound up with concrete and transitory things, events, relationships etc.

An order of time is a law of duration, to which the factual duration is subjected. It is the transcendental order of time in its integral intermodal sense, underlying every particular time-order, which has disposed the modal aspects in an irreversible sequence of anterior and posterior, relating to the successive phases of the genetic processes of our experiential world. This transcendental order of time expresses itself in the modal structure of the experiential aspects. This structure is of an open and dynamical character, it is a meaning-structure, in which a nuclear moment guarantees the irreducible sense of the aspect. But this nuclear moment can only reveal its central meaning in an undissoluble coherence with a series of analogical moments giving expression to the meaning-cohesion of the aspect concerned with all other experiential modes which precede it or succeed to it in the transcendental order of time. According to this order the analogical moments may be distinguished into retrospective (or retrociprocity) and anticipatory moments. The latter open up and deepen the meaning of the aspect.

The pre-theoretical attitude of thought and experience lacks entirely the antithetical relation characteristic of the theoretical attitude. Here our attention is neither directed to abstracted modal aspects of concrete phenomena, as in special scientific research, nor to the inner structure of the abstracted modal aspects as such, as in the philosophical theory of the transcendental modes of experience. In this attitude empirical reality presents itself to us in an inexhaustible diversity of typical structures of individual totalities, interlaced with each other in a very complicated network of mutual relations. In principle these individuality-structures function in all modal aspects of our experience either in a subject-, or in an object-function. The subject-object relations are essential to pre-theoretical experience and guarantee its integral character. They have nothing to do with the antithetical relations of theoretical thought and experience, though in epistemology they have been frequently confounded with them.

By virtue of its antithetical structure the theoretical attitude of

thought obliges us to seek for an intermodal theoretical synthesis between the logical or analytical mode and the non-logical modes of experience to gain an epistemological insight into the latter.

Here we are confronted with the transcendental question: Where do we find the central unity of our consciousness and existence to which every theoretical antithesis and synthesis must refer and without which theoretical thought and experience would be impossible?

This is the problem concerning the human selfhood in its central sense implying the problem concerning the central starting-point of philosophical thought.

As the central and individual reference-point of all transcendental modes of experience, including the logical or analytical mode of distinction, this central human selfhood must necessarily be of a supra-modal and supra-theoretical character.

This means that the question: What is this central I? (the centuries old question of human selfknowledge), though inevitable to discover the real starting-point of philosophical thought, transcends the bounds of a theoretical problem.

As the concentration-point of our experience and existence, our selfhood is empty and meaningless in itself, *i. e.* viewed apart from the three central relations in which it finds itself disposed, namely: that to our temporal world, that to the selfhood of our fellow men, and that to God as the absolute Origin of all that has been created, *upon* Whom man should concentrate himself. This latter relation embraces the two others and determines their central meaning which is of a religious character. It is because man has been created in the image of God, that the religious impulse, the tendency towards the absolute, is the innate impulsion of the human "heart", *i. e.* the center or radix of human existence, and that our self-knowledge is dependent on our knowledge of God. This religious impulse takes its contents from a religious basic motive which as a spiritual motive power is active in the central human selfhood and unites all who find themselves in its central grip into a fundamental spiritual communion.

Such a communal basic motive underlies also philosophical thought and is its necessary supra-theoretical starting-point. This applies both to a Christian philosophy and to a supposedly autonomous philosophy whose defenders do not realize that the attribution of autonomy to philosophical thought implies an absolutization of this latter contrary to its relative structure. The central biblical motive of the divine

Word-revelation, namely that of creation, fall into sin and redemption by Jesus Christ in the communion of the Holy Spirit, shows its truly divine Origin through its radical and integral character. It lays bare the central source of all kinds of absolutizations of the relative, namely the spirit of apostasy which turns away the "heart" or religious center of human existence from its true Origin directing its innate religious impulsion towards the temporal horizon of human experience. Because of its great diversity of modal aspects and individuality-structures this temporal horizon offers many possibilities for absolutizations to a supposedly autonomous philosophical thought, which finds itself in the central grip of an apostatical or semi-apostatical basic motive.

This is why the central influence of the biblical basic motive upon philosophical thought can only be of a purifying and liberating character. It can deliver this thought from prejudices, originating from unbiblical or anti-biblical basic motives, which entangle it in the different *isms* and in meaningless dilemmas resulting from absolutizations.

The basic motives exercise their necessary central influence upon philosophical thought through the medium of a threefold transcendental groundidea (the "cosmonomic idea") that, consciously or unconsciously, underlies any philosophical reflection. This groundidea relates to the three transcendental basic problems concerning the theoretical attitude of thought and experience, viz: 1° that concerning the bond of cohesion and the mutual relation between the theoretically dissociated modal aspects, 2° that concerning the human selfhood as the central reference-point of theoretical thought and experience, and 3° that concerning the tendency towards the absolute (including the tendency towards absolutization) in the thinking ego.

Grundsätzen qualifizierte, Ermessensprüfung. Dasselbe gilt falls der obersten Verwaltungsbehörde die Rechtsmacht zusteht, Verfügungen oder Verordnungen niederer Behörden zu annullieren, nicht nur auf Grund von deren Gesetzwidrigkeit, sondern auch auf Grund, daß sie dem öffentlichen Interesse widerstreiten.

Auf die dynamischen und reich variierten öffentlichrechtlichen Grundsätze der modernen Verwaltungsgerichtsbarkeit, wie sie sich in verschiedenen Staaten entwickelt hat, kann hier leider nicht näher eingegangen werden.

Ich hoffe aber, daß es mir wenigstens einigermaßen gelungen ist, zu zeigen, daß die Philosophie der Gesetzesidee auch der alten Streitfrage bezüglich der Unterscheidung zwischen öffentlichem und privatem Recht und deren gegenseitigem Verhältnis eine neue rechts- und sozialphilosophische Grundlage gegeben hat.

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Continuation and End

Summary

1. In the first section of the second part of this treatise the modal structure of the juridical aspect of experience is subjected to an epistemological analysis. Not only the legal norms but also the legal facts have their modal structure which determines their general juridical character. The analysis of the modal structure of the juridical mode of experience with regard to its normative as well as to its factual side is necessary to obtain a correct concept of the juridical in its transcendental sense. This epistemological concept has no constitutive significance for the juridical mode of experience since it presupposes the latter. But it is of fundamental importance for theoretical jurisprudence as far as it serves as the basis of and the guide to its general methodology.

The still current attempts to define the fundamental concept of law *per genus proximum et differentias specificas* cannot be successful, because this method is completely unfit for the analysis of the modal structure of a transcendental mode of experience. Of course, in order to come to a conceptual distinction between the juridical and the other transcendental modal aspects of our experiential world we need a denominator of comparison, to know what they have in common as far as their modal structures are concerned. But this common trait cannot be of a generic nature since the transcendental aspects have no modes of experience still more general which are superior to them. As the modal structure of one aspect is inserted in an indissoluble coherence of meaning with that of all the others, the denominator of comparison looked for must have an integral character, *i. e.* it must embrace the aspects all and sundry and at the same time guarantee their mutual irreducibility and their intermodal coherence of meaning.

In my opinion it is only the transcendental temporal order of the aspects which meets these requirements and which has its expression in the modal structure of each of them.

The choice of this intermodal transcendental temporal order as denominator of comparison implies, as it can easily be seen, a completely new method to determine the "concept of law". The fundamental "concept of law" ought to be a transcendental structural concept of the juridical mode of experience. The modal structure of this latter cannot be conceived by an arbitrary selection of some of its analogical moments which, being detached from their modal meaning-kernel, are all multivocal. It is an indissoluble dynamical and open meaning-whole, by which all analogical moments are arranged according to the transcendental temporal order of the aspects to which they refer and where, in their indissoluble intermodal coherence, they are determined and qualified by the meaning-kernel of the respective aspect. The distinction between the retrocipatory and the anticipatory moments within modal structure enables us to determine the place of the juridical aspect within the total order of the modal aspects. By this way the philosophical idea of an encyclopedia of legal science within the framework of a universal "*Wissenschaftslehre*", which in post-kantian idealism had got into speculative roads, has acquired a new sense and basis.

Since the anticipatory moments of the modal structure can only open up and deepen the modal meaning of the juridical aspect, they have

no constitutive, but only a regulative function within this experiential mode. Within the modal limits of the juridical they express the coherence of meaning between the legal and the deepened moral and pistical aspects according to the dynamical principles of justice. The systematic analysis of the modal structure leads to the discovery of the elementary modal basic concepts of legal science. They are to be distinguished from the categorial concepts which do not relate to particular moments of the modal structure, but are founded on general categorial relations of the temporal order of experience, and which adopt the modal meaning of the latter within the juridical aspect. These categorial relations may be reduced to three, viz.: 1. the correlation of the juridical and the factual side of temporal experience; 2. the subject-object relations; 3. the correlation of arising and perishing which delimits the temporal duration of all transitional. Categorial juridical basic concepts of this kind are the concepts of legal norm and juridical fact, legal validity and legal relations, legal subject and legal object, right and legal duty, legal arising and legal perishing. These modal juridical basic concepts, too, display an unbreakable mutual connexion. Their modal meaning can only be analysed by means of the elementary modal basic concepts.

The method of conceptional determination of the juridical mode of experience developed above can, of course, not lead to a concept of law which might be put into a short and simple definition. But this does not involve any loss, for, the current "simple" definitions leave the modal structure of the juridical aspect out of consideration. Consequently they are either entangled in the ambiguity of unqualified analogical conceptual elements of a non-juridical nature, or they adopt, by the definition of the juridical, conceptual elements which typically relate to the state, which amounts to an evident confusion of the modal structure with a definite social individuality-structure.

2. By its theory of individuality-structures and their encaptic interlacements ("Verflechtungen") the philosophy of the Cosmonomic Idea has provided both the philosophy of law and social philosophy with a new method to develop a typology of the different spheres of human social life and their particular internal juridical orders together with their complicated mutual interlacements.

Just like the modal structures the structures of individuality own the character of an open dynamical meaning-whole. But the latter show a gradually descending arrangement after higher and lower

structural types in which they are more and more individualized. The most comprehensive of these types is the so-called radical type of the individuality structure. It determines the modal aspect within which the individual whole, according to its inner structural law, has its central and guiding internal function. This latter indicates the typical direction which its other modal functions take when they unfold their meaning by their gradual individualization. It gives the structural whole its typical qualification and is therefore called its "qualifying function". This qualifying and leading function is sharply to be distinguished from the objective or subjective ends to which the individual whole is, or may be made, subservient.

The so-called kingdom of inorganic nature, the vegetable and the animal kingdom are radical-types of pre-logical qualification. There does, however, not exist a radical type of man, because the human existence is not qualified by some of its temporal modal functions or others, but transcends the modal diversity of the temporal world in its religious centre. For that very reason the human social relations, quite opposite to the animal, may adopt the most different individuality structures. The radical types of the temporal social relations among men are of a normative character. Consequently, the individuality-structures comprised by them are, as far as they are founded in the essential nature of these relations and as far as their law-side is concerned, normative structural principles needing human shaping and positivation an accordance with the level of the cultural-historical development of the society concerned. The products of this shaping are the "social forms" which may be distinguished into genetic and existential ones.

They show a variable character which does not exclude a relative stability, and they are the nodal points of numerous interlacements between the social relations of different inner nature and structure. In the theory of the individuality-structures these interlacements wherein these relations come to display so-called variability types, are called "encaptic interlacements". The term "enkapsis" is taken from the swiss biologist HEIDENHAIN, but in the philosophy of the Cosmonomic Idea it has acquired a quite different sense. The relation of "enkapsis" is, in contrast to Heidenhain's view, sharply opposed to the relation between a whole and its parts.

If a system of social relations with a definite structure of individuality (e. g. matrimony, the church) is bound encaptically

within another system of different inner nature (e. g. the state), it will get an encaptic function within the latter which does not belong to its inner sphere. Within its internal sphere which is determined and delimited by its inner structural principle, it has a "sovereignty within its own sphere", i. e. in this respect it has to follow exclusively its own inner structural principle.

As far as it has an internal typical legal sphere it may claim, within the latter, an original juridical power or competence which consequently is not derived from another legal sphere.

The variability types which are adopted by the different social spheres and their encaptic functions, do principally not determine their inner-nature. They presuppose the so-called primitive types or genotypes of these spheres which are determined by their internal structural principles.

In the philosophy of the Cosmonomic Idea the analysis of these genotypes it founded on some primary distinctions of the social relations, which make possible a division of the latter into fundamental categories. The most fundamental of these social categories is that of communal and inter-individual or inter-communal relations, a distinction which implies both a correlation and a contrast. The former comprise all social relations belonging to a more or less durable whole that joins its members within a social unity, irrespective of the degree of intensity of the common bond.

Intercommunal or inter-individual relations are those in which individual persons or their communities are functionally united without being tied to a social whole.

Categorially the communal relations are first divided into the "natural", which do not need any organization because they are founded on organic life-relations, and those which, in a typical cultural-historical way, are based on an organized powerformation. According to the current german sociological terminology the latter are called "*soziale Verbände*".

The second categorial distinction of the communal relations is that of institutional and non-institutional communities. Institutional communities are those in which their members live either during the whole of their life or during a part of it, irrespective of their free choice and will. Subjective aims do not have a necessary or constitutive function in their genetic forms. The non-institutional, on the other hand, are based on the principle of free joining and leaving.

Subjective aims participate constitutively in their genetic forms. According to the historico-cultural level of development both the communal and the inter-individual or inter-communal relations are divided into differentiated and undifferentiated.

On the basis of the above mentioned social categories the further structural typological analysis of the differentiated spheres of social relations is tied to an examination of the individuality-types, which gradually adopts the internal "qualifying function" of its structure. The primary individuality-type of this function is determined by the internal structural principle of the social sphere, in which the inner nature of the latter finds its expression. As this individuality-type within the qualifying modal aspect of the structural principle seems to lack an original character and to be founded on an original individuality-type in which the respective social sphere functions within another modal aspect, this latter function is called the typical "basic function" ("Fundierungsfunktion") of the internal structural principle. The internal leading or qualifying function and the basic or foundational function are consequently the two characteristic functions which, by their typical structural coherence, determine the internal nature of the social sphere concerned.

On the basis of the fundamental typology of the differentiated social spheres, set up according to their inner structural principles, the philosophy of the Cosmonomic Idea has developed a typology of their internal legal spheres. The juridical genetic forms of the legal norms do not offer any criterion for the delimitation of these legal spheres, because they are the nodal points of their encaptic interlacements.

In the second section there are particularly examined the internal sphere of civil law and the encaptic functions of the different spheres of non-civil private law within the former.

3. In the third section finally, the relation between the civil private law and the internal public law of the State is subjected to a structural typological analysis. The typical foundation of the former on the latter becomes already clear from the juridical genetic forms of the civil legal norms (statute und judiciary sentence) which presuppose the public legal organization of the State. As to its typical inner nature, however, it does not belong to the internal sphere of public communal law of the body politic, though it is encaptically interlaced with it by various ways.

It rather shows the typical structure of a private common law of an

integrant character which, in contrast to the other spheres of private law, is not qualified by a specific meta-juridical function. In other words: it has an integrating function with respect to the different spheres of non-civil private law which all are typically qualified by the particular meta-juridical leading function of the social sphere to which they belong.

This integrating function, however, has no effect beyond the inner nature of civil law. It cannot replace, *f. i.*, the typical economically qualified integration of private industrial and commercial law by means of standard contracts, usual conditions, *etc.* The latter do not contain civil law but a *ius specificum*, which can only have an encaptic function within the civil law sphere of the State.

The internal public law of the State is a typical communal law whose inner nature can only be understood from the structural principle of this organized and differentiated community.

In accordance with this principle the State may be defined as the organized public legal and territorial community of authorities ("Obrigkeit") and subjects, on the cultural historical basis of a monopolist organization of the sword power. The first part of this definition refers to the typical leading and qualifying function, the second to the typical basic function of the body politic.

As the typically structural coherence between these two characteristic functions is indissoluble, it does not make sense to conceive the State either as a non-juridical politico-historical organization or as a system of legal norms only. The conception of Otto Gierke and Rudolph Smend, according to which "State" and "law" are two independent, specifically different aspects of communal life shows a lack of insight into the inner structural principle of the body politic.

By virtue of the typical juridical qualification of its structural principle the State should be a "State of Law" ("Rechtsstaat"). This means that the public welfare as guide of the governmental policy also needs the inner limitation and leading by public legal principles, if it shall not degenerate into the political maxim of an unbridled political absolutism. The administrative law, too, should be founded on material, not metajuridically qualified public legal principles of justice and should not be conceived as a purely formal limitation of the administrative activity of the governmental organs.

These principles play a more and more important part in modern administrative jurisdictions.