

The demands of science are violated if a nontheoretical presupposition is put in the place of immanent scientific investigation, with the pretence of solving, or with the effect of eliminating, questions which themselves have an internally theoretical character. This criterion holds for science that proceeds from a Christian basis just as much as for science bound to the immanence standpoint.

However, the misunderstanding of the supra-theoretical character of the ultimate presuppositions of philosophy and the claims of scientific monopoly for a dogma, such as that of the self-sufficiency of science, is especially unscientific.

The standard of scientific investigation must be kept unsullied and may never be misused for the spiritual suppression of those with whom one refuses to combat with truly scientific weapons because they do not want to accept the dogma in question.

#### *1.8 The Cosmomic Idea and the Method of Concept-Formation in the Science of Law*

From our preceding discussions we can draw the following conclusions: the science of law cannot proceed as a special science without philosophical presuppositions, more specifically, legal-philosophical presuppositions; philosophy, in particular, the philosophy of law, cannot operate as a theoretical totality-science without supra-theoretical presuppositions.

Whenever one purports to have disengaged the special jural science from philosophy, it is bound to have fateful consequences for both. It is fateful for the special science because, in a completely uncritical manner it proceeds to advance presuppositions of a philosophical character as if they were judgments belonging to it as a special science. It thereby embraces a positivistic theory of reality, which it then proceeds to impose upon all of its practitioners as the nonphilosophical conception of reality concerning everyday life. It is fateful for philosophy because the latter can only give direction to a special science in direct contact with the questions arising out of it as a special science. Without this contact, it loses touch with reality.

For the special jural science, the entire method of theoretical concept-formation is dependent upon the philosophic ground-idea from which it takes its point of departure. It is customary to say that the basic concept of law is a matter for the philosophy of law. This is undoubtedly correct insofar as the constant nature and structure of the jural aspect must be grasped by this conception in a synthetic manner, after there has been an analysis of the various characteristic moments which are bound within this structure into an unbreakable unity.

A concept of law that truly wishes to grasp this structure of the jural aspect can never be found apart from a philosophic idea of the mutual relationship and coherence of the jural aspect with the remaining aspects of reality. In this concept of law the special jural science has its philosophical presupposition. As an academic discipline the science of law continually finds itself confronted by the given coherence of the jural aspect with the nonjural aspects of reality. Indeed, it finds itself presented with a relationship which, in a remarkable way that must be further investigated, manifests itself within the structure of the jural aspect itself. In this respect, it is first and foremost a matter of not losing sight of the internal limits of law.

A jurisprudential example may explain this. Since the famous 1926 decision *The Builder of Gouda* (Hoge Raad [Supreme Court], March 12, 1926, NJ. 1926, 777; W.11488), the Hoge Raad has accepted as established jurisprudence that the obligations of morality and propriety create a natural binding commitment. The facts were as follows:

In contravention of what he had been instructed to do, an architect employed by the municipality of Gouda accepted 35,000 guilders from a contractor. When this came to light he asked for honorable dismissal and made a deposit into the account of the municipality equivalent to the amount illegally acquired by him. He hoped that by doing this he would ensure that his dismissal would indeed be honorable. When it turned out that this was not the case, he claimed back the 35,000 guilders as an unowed payment. His claim was dismissed with the observation that by his payment he had met a natural obligation and therefore, by virtue of paragraph 2, in article 1395 of the Civil Code (the only place where a natural obligation is mentioned), he was not entitled to recovery. On appeal, the Hoge Raad held in respect of this provision “that it not only considered it to apply to cases where, according to a positive legal rule, there is an existing debt owed, yet the right to claim was either unfounded from the start or through later intervening circumstances having occurred, but similarly applies where the person concerned fulfills an obligation owed to another which merely rests upon the precepts of morality and decency.”

This first case on the point decided by the Hoge Raad is very instructive. Note that the architect had enriched himself unlawfully (contrary to instructions). If, having acquired the payment in this manner, and after depositing that amount in the municipal account, it had been possible for him to recover on account of the unowed payment, then the unlawful enrichment would have been sanctioned by the judge in the civil court. Thus, in this case, we had here at issue not merely a question of morality or propriety but without doubt a legal principle!

Incidentally, not all cases of natural obligation are concerned with redress for a wrong. Thus, in the case of a natural duty of alimony in respect

of a mistress, for example, one certainly may assume a positive, morally qualified legal duty flowing from the very nature of the relationship that exists between a person and his mistress.<sup>1</sup>

Therefore duties of morality and propriety can generate natural obligations. That is to say, it creates a jural bond between the one who, on the basis of such a duty, has to act for the benefit of another, on the one hand, and the beneficiary, on the other. This performance, however, cannot be demanded by right and claiming back the benefit of what has already been given is also out of the question. Furthermore, a natural obligation can, in some circumstances, provide a valid legal basis for converting it into an actionable obligation (which does not require a *causa* for its creation).

The adoption of this stance by the Hoge Raad has extremely important consequences. Gift agreements, for example, according to our civil law, are bound by the formal requirement that they must be embodied in a notarial document. If this requirement is not satisfied, it is a nullity and therefore cannot, as a general rule, have legal consequences. But at this point the jurisprudence of the Hoge Raad now applies with its concept of a natural obligation. If the gift is given out of a natural duty of morality and decency, then, according to our highest legal tribunal, it is conveyed in virtue of a natural obligation, and an amount paid under the agreement cannot therefore be recovered. It is of even greater importance that this natural obligation can be converted by agreement into an obligation in respect of which a claim may be made. Without this basis it would have to be viewed as lacking a cause and would therefore be a nullity (see *inter alia* Hoge Raad, May 4, 1932, NJ 1933; W 12442). This is particularly relevant for gifts made by a man to a woman with whom he is living in an extra-marital relationship; for financial obligations set out in divorce agreements or a separation from bed and board, in which case these agreements are not to be regarded as legally valid; and for retirement agreements between employers and employees, in the sense of converting a natural obligation into one that is enforceable.

Juristic practice shows us here that at its very heart is the requirement of an acceptable criterion to distinguish, for legal purposes, the demands of law, morality, and propriety. What, in this context, is to be understood by the requirements of morality and propriety? If they were to be conceived

<sup>1</sup> *Editor's note:* In the Dutch text this sentence immediately followed: "This concept of a morally qualified legal duty will be explained below in part 4 of this Introduction." This appears to be an error and has been omitted to avoid confusion because part 4 of this Introduction does not explain the concept mentioned, whereas the discussion immediately following the omitted sentence contains an extended discussion of the said concept. The omitted sentence had the following footnote reference: See also *Harms-De Visser* (Hoge Raad, November 30, 1945, NJ. 1946, 62) in which the Hoge Raad held that a life insurance payment to a surviving spouse is not a gift, but the fulfillment of a natural obligation.

according to their original characteristic sense of the moral and the social aspects of reality, then the boundaries marking off law, morality, and propriety would indeed be eliminated and a practically untenable situation would be created that would render illusory many mandatory provisions of the Civil Code.

It is not a question, for example, of designating all gifts given out of affection (an intrinsically moral figure) as the fulfilling of the demands of a “natural relationship.” This has been established repeatedly by the jurisprudence. Even less is it a question of legally requiring from someone a moral sacrifice because of a natural relationship, which the person has to make in order to carry out an obligation that arises from love but which, according to a jural standard, exceeds even the limits of a natural relationship.

On the other hand, propriety, in the sense of a social obligation, is also not a pattern that allows itself simply to be transplanted into legal life, precisely because, in its original sense, it does not have a jural character and does not possess a jural configuration.

In the jurisprudence an appeal has been made to criteria which only consist of an inadequate formulation of a practical intuition with respect to the scope of law. But these practical intuitions, even though they may offer nothing more than a general formula, saying little if anything, cannot always be said to be satisfactory even from a practical point of view.

Thus it appears that the Hoge Raad, in its decision of April 22, 1937, (*The Sister-in-Law Case*, NJ. 1937, 1108), wished to confine the natural obligation to “a moral duty aimed at redressing a moral or material wrong or to recompense services rendered.” This criterion was sharply attacked by Professor P. Scholten who maintained that in this case various maintenance-related moral duties would fall outside the concept of natural obligation.

In the decision of February 18, 1938 (*The 17 Year-Old Marriage Case*, NJ. 1938, 323), concerning a wife separated from bed and board, the Hoge Raad was already prepared to depart from the criterion stated in *The Sister-in-Law Case*.

The general formula that has been introduced by Dutch jurisprudence in order to delimit, for legal purposes, a natural relationship, conveys no meaning if taken at face value. According to the formula, the relationship is only present for legal purposes if a moral obligation, which is obligatory according to an objective standard, is assumed. Nothing can be understood by an “objective standard” other than a universally valid rule (norm) of propriety. But the issue on which everything depends concerns precisely what kind of norm this is. It cannot be moral, in the original sense of the word, because it is then lacking any jural delimitation. If, however, the objective standard is not moral in character, then neither can the obliga-

tion that creates a natural relationship be a truly moral obligation. Apparently, the administration of justice then employs a concept of moral obligation which must be understood, not in the original sense of “moral,” but in a juristic sense that has not been subjected to a more precise definition.

A judge should not be blamed for such lack of clarity in the use of these concepts. The judge’s task is not scientific, but of a practical-juridical nature. And insofar as a judge requires the help of legal science in his deliberations, he is never obliged to give scientific pronouncements but practical-juridical decisions that satisfy, to the greatest possible degree, the requirements of legal life.

In contrast, the science of law ought not to allow itself to be satisfied with such purely practical criteria if it is to continue making the claim of being scientific. The basic concept of law ought to be conceived in such a fashion that it indeed gives a theoretical account of the relationship and mutual coherence of the legal with the nonjural aspects of reality, and for this purpose, as we have seen, a philosophical ground-idea is a prerequisite.

We should not be surprised that the dominant schools of legal philosophy have not been able, from the standpoint of immanence philosophy, to present a concept of law that can offer to the special science of law a reliable approach. Kant’s statement, “The jurists are still searching for their concept of law,” (though it has a different meaning for him) involves an acknowledgment that there is still lacking an encyclopedic account of the place of the jural aspect within the coherence of the aspects of reality. And so long as this has not been accomplished, the concept of law actually remains suspended in mid-air, and theoretical arbitrariness takes the place of exact investigation into the structure of reality in which the jural aspect is embedded.

The principal reason why it has not been possible, on the immanence standpoint, to establish the encyclopedic position of law within the coherence of the aspects of reality must be sought in the fact that on this standpoint it was repeatedly necessary to reduce the jural to another aspect in order to arrive at a concept of law.

This point is directly connected with what we observed earlier concerning the relationship of the concept of law to the transcendental basic idea of philosophy. The theoretical concept of law, so it appeared, allows us, first to theoretically distinguish the jural aspect from the nonjural aspects of reality. But for this theoretical distinguishing there is required a basis of comparison, a kind of denominator on the basis of which the aspects interconnect and by means of which they can be compared with each other. If they had no mutual point of contact with each other at all, they would be completely incommensurable and it would be impossible, in principle, to discern in what respect they differ from each other.

This state of affairs can be made clear to a certain extent by using the analogy of fractions. Each has a prime number (a number that cannot be further divided) as a denominator, for example, 1/2, 1/3, 1/5, and 1/7. Such fractions first must be brought under a common denominator in order to be able to calculate their mutual relation in whole numbers.

In theoretically distinguishing the aspects, we also require, as it were, a denominator in terms of which they may be compared. During our discussion of the second basic problem of philosophy, that of theoretical synthesis, we identified this as the problem of the Archimedean point. Without an Archimedean point on the basis of which we can conceive the aspects in their deeper root-unity, theoretical analysis and synthesis is impossible. If the choice of the Archimedean point is now immanent to theoretical thought, then the basic denominator<sup>1</sup> of the aspects must be sought within a theoretical synthesis. And because this synthesis itself is always of a specific character – depending on the aspect towards which it directs theoretical thought with its logical concept-forming – a particular synthetically conceived aspect will be elevated to be the basic denominator for all the rest. We have seen how this was the source of all the “isms” in philosophy.

These “isms” are echoed in the different conceptions of law which have been constructed by the various schools of immanence-philosophy, and which have been transposed from the philosophy of law into the jural special science.

Thus the conception of Krabbe, the former professor in civil law and the philosophy of law at Leiden, is that law has an intrinsically psychical character and that all positive law – law posited in a binding form – has its only source in the legal sensibilities of the members of the nation. This conception is the result of a psychologistic view of law, at the basis of which there is a psychologistic cosmomic idea.

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<sup>1</sup> *Editor's note:* There is potential confusion for the reader in Dooyeweerd's treatment of the second basic problem of theoretical thought. This might arise especially for those familiar with his definitive treatment of these problems in *A New Critique*, vol. 1. There he refers to time as the “common” or “basic denominator” that guarantees the inter-modal coherence of the aspects (p. 47). It is therefore confusing when he uses the same analogy of the denominator in explaining the second basic problem of the Archimedean point. Here, not time, but the Archimedean point itself is referred to as the “basic denominator.” Arguably, this is a less apt analogy for describing the Archimedean point than for time, because the Archimedean point is not so much a common basis for the synthetic act of thought as the point from which every theoretical synthesis is performed. It must be admitted, however, even after this and earlier clarification (see note on p. 28), and taking account of a clearer treatment in his mature analysis contained in *A New Critique*, there still remains unresolved difficulties in Dooyeweerd's account of the basic transcendental problems of theoretical thought. (See D.F.M. Strauss, “An Analysis of the Structure of Analysis [The Gegenstand-relation in discussion],” *Philosophia Reformata* 49, no. 1 [1984]: 35-56).

Hence the conception of Kelsen, the German neo-Kantian legal theorist and philosopher of law, is that the jural aspect has its origin in a transcendental-logical form of thought. This view is the result of a formalist-logicistic view of law which has, at its foundation, a logicistic cosmomic idea, which in turn is actually dependent upon mathematical thought.

And the previously discussed conception of the Historical School, founded in 1814 by the German legal theorist von Savigny, views law as a phenomenon of historical development, which has its only source in the national historical spirit of a people. This was itself the result of a historicist view of law, and this has its source in an idealistic-historicist cosmomic idea.

It is impossible, on the immanence standpoint, to conceive of the various aspects of temporal reality in their sphere sovereignty and their mutual irreducibility. Of course, there is also here an attempt to make some kind of theoretical distinction between law, morality, and the rules of social intercourse; but only based on an aspect that has been absolutized beforehand in a transcendental ground-idea.

Thus we observed that the Historical School only regarded law as an aspect of a people's cultural development which is able to be isolated by theoretical thought. Forms of social intercourse, language, economics, art, etc., were also accepted as aspects of culture. Hence the Historical School's concept of law is that of a modality (a special revelation) of the historical folk culture. On the basis of this denominator, law is supposed to be distinguished from forms of commerce, language, economics, morality, etc.

It is also impossible to escape the religiously determined theoretical corroding of the sphere sovereignty of the aspects of reality by forsaking a material denominator in favour of delimiting the aspects from each other in an exclusively formal-logical way. In the latter case, for example, the attempt is made to distinguish law, morality, and social forms from each other by subsuming all of these aspects under a purely formal general concept, a *genus proximum*. The concept "norm of action" has been introduced as such a *genus proximum*. The attempt is then made to distinguish the three normative-aspects we have mentioned from each other by establishing their specific attributes (*differentia specifica*). In addition, the legal and social norms are grouped together as communal norms of "external" behavior. The moral norm, by contrast, is conceived as the norm that regulates only the internal attitude of the individual. Finally, the legal norm is distinguished from the social norm (the so-called *Konventionalnorm*) through designating the former in contrast to the latter as a compulsory social norm, a specific characteristic of law that is often better described as organized legal compulsion.

This method of determining the concept of law might well be regarded as the prevailing one in legal science. One comes across it in all kinds of juridical texts and introductions to the science of law, which especially do not want to weary the first year student with philosophical explanations.

Now it must be remarked at the outset that every attempt to encompass legal, moral, and social norms under a more general concept, a logical *genus proximum*, leads to a logicistic levelling of their inner nature. Here a logical denominator is proposed, and it is assumed in turn that the distinguished aspects have a common logical denominator.

The entire method of concept-formation according to *genus proximum* and *differentia specifica* is taken from Aristotelian logic. Aristotle distinguished sharply between the analogical concepts (see the conclusion of part 1.7) in the metaphysical doctrine of being (ontology) and the generic concepts of the empirical sciences. According to him, the generic concepts are formed by way of a complete abstraction from the experience of individual things that have specific essential characteristics in common. The essential characteristics that are common to a group of things and thus are attributable to them univocally (“simpliciter,” says scholasticism) are brought together in a general conception (generic concept) in abstraction from those attributes in respect of which the things differ from each other. The genera are divided into species by the addition of specific attributes that inhere in the essential form, which has a narrower group of genera. Thus it is possible to say that all human beings are rational, because they have the essence of rationality in common. The predicate “rational” is attributed to them univocally (simpliciter).

Thus, according to Aristotle, the concept “living being” is the *genus proximum* of rational living being (*animal rationale*) and animal living being (*animal brutum*). In this fashion, according to Aristotle and Aristotelian scholasticism, it is indeed possible to obtain complete conceptual unity because there is an opportunity here for complete or genuine abstraction.

By contrast, the analogical or transcendental concepts of ontology have contents which are attributable to entities that in principle differ with regard to the nature of their being. Thus they can never say something univocally about these entities. These transcendental concepts are therefore elevated above all generic concepts; they lie at the foundation of all concepts in general. Hence they are called “transcendental” in a metaphysical sense. In this case, being does not allow the possibility of authentic or complete abstraction of the specific characteristics. Here only an incomplete conceptual unity can be obtained by way of incomplete or inauthentic abstraction. This results from the fact that the entities falling under the analogical concept differ in the very respect in which they agree, so that in understanding the element of agreement it is specifically impossi-

ble to abstract from the intrinsic difference. Such a concept has the potential for theoretical diversity within itself for the very reason that it is not a complete unity.

These analogical concepts have already been criticized at the end of part 1.7. Regarding the generic concepts, it must be observed that they only have a right to existence within the framework of the mutually irreducible aspects. Thus it is possible to form generic and specific concepts within the science of law itself, provided that all these juridical concepts are considered on the foundation of the basic concept of law, which has to embrace synthetically the irreducible uniqueness of the jural aspect. However, as soon as the method of concept-formation according to *genus proximum* and *differentia specifica* is applied to this basic concept of law, it becomes indeterminate regarding its meaning, bereft of scientific value, and misleading.

Even a brief critical analysis of the concept of law as construed by this method will teach us this. In contradistinction to the moral norm, the legal norm is supposed to be a norm of communal action. But does morality not have any communal norms? Does there not hold, for example, within marriage and the family, a moral norm of love possessing an explicitly communal nature? Or do the moral responsibilities of the parents with respect to their children, and of the husband with respect to his wife, exist on the same footing as moral responsibilities towards an anonymous beggar who happens to cross our path? Furthermore, is it truly the case that all legal norms have a communal character? Is there then no difference in principle between the norms of so-called civil law, and, for example, those of the internal legal relations of the state or the church which, to be sure, do have a communal nature? The internal character of civil law, as we shall see later, resides in the very fact that it ascribes rights and obligations to individual persons as such, regardless of their belonging to a specific community, such as a state, a people, a particular family, or a race. And is it the dimension of community that qualifies law in the sense of actual law of the community, or is it not rather the very opposite, it is law that determines the jural sphere of a community? Does not community possess its social side, its economic side, and its moral side, as well?

Furthermore, the attempt has been made to distinguish law from morality and from social rules as well by means of the criterion of "coercion." But in what sense is coercion understood here? There is coercion of a physical, a psychological, an economic, a conventional, a social nature, etc. The social obligations of propriety, courtesy, etc., are often much more effective in compelling performance than legal prescriptions, which sometimes are sanctioned, for example, by payment of only nominal monetary compensation or a fine (a traffic ticket, for instance). The economic coercion of lock-out, boycott, etc., often affects interests to a much greater

extent than does legal coercion; it is also highly organized. Even when there is an attempt therefore to define law by means of the criterion of “coercion,” it is legal coercion, apparently, that is meant. In this case, however, the element that is chosen as the sole qualifying element (viz., law: legal compulsion) is the very thing that is supposed to be defined by it.

From this short critical discussion it can be seen that the definition of a legal norm as a “coercive communal norm” is thoroughly indeterminate, misleading, not to say, wrong in principle. That such a definition is easily digested by the beginner student, and is apparently understood without difficulty, is no recommendation at all for this method of concept-formation as a whole. It leaves jurists completely at sea as soon as they begin to involve themselves in the actual study of law. With respect to the underlying concept of law, this is just the very state of affairs that ought not to exist. It must either give direction and support to the entire special scientific investigation of legal life or it is intrinsically worthless. An entirely different method, already implicitly prescribed by our cosmological idea, needs to be adopted for the formation of legal concepts.

*1.9 The Law-Spheres and their Modal Structures.  
The Concepts of Law and Subject in the Science of  
Law*

The aspects of reality are modes, particular ways of revealing a religious root-unity that transcends the diversity within the order of time.

Just as the white light of the sun is refracted by a prism into the seven color ranges of the sensorily perceptible spectrum of light, and just as no one of these colors can alone establish the unity of all the others, so the religious root-unity of the temporal cosmos is broken up by the prism of cosmic time into the aspects as its modalities, no one of which comprises the root-unity of the others.

Now, as we have already remarked repeatedly, these aspects are set within constant structures which themselves do not vary in time. By “structure” we understand an architectural plan that is a relative unity in a diversity of moments. The structures of the aspects are thus able to be called the modal structures of reality because the aspects themselves are modalities of a deeper unity.

That they do not have a variable but a constant character must be ascribed to the fact that they are fundamental in nature, so that the possibility of all the variable and transitory phenomena which present themselves within the aspects presupposes these aspects. Therefore, in the Philosophy of the Cosmological Idea, they are called “ontic a priori.” They are called “ontic” because, unlike Kant’s a priori forms of consciousness, they are not founded in subjective consciousness but essentially in temporal real-

ity. They are called “a prioris” because they lie at the foundation of all of the changing phenomena of reality.

If we apply this to the jural aspect, then we can establish the following: A concrete legal configuration, for example, a purchase agreement made between A and B, comes into being at a particular point in time and is discharged after the parties have carried it out. But as a legal configuration this agreement is enclosed in the modal structure of law, which itself cannot originate and expire within time because it is a structural law [in the cosmic sense] for the changing life of law [in the jural sense] that initially gives to it its jural character.<sup>1</sup> Only on this basis, for instance, is it still possible to recognize classical Roman law as law, even though it has long since lost its positive legal force. Of course, in saying this it does not follow that the modal structure of legal life bears a supra-temporal, transcendent character. Instead, as already observed, it is enclosed within the cosmic order of time as an order, as a cosmic law-ordering, and not in respect of its subjective side as individual duration of time.

The modal structure of an aspect delimits a sphere of modal laws to which temporal reality is subjected within this particular aspect. From now on this will be called its “law-sphere.” Thus each aspect of reality is set within its own law-sphere, which is delimited from all other law-spheres by a modal structure. Each law-sphere in relation to every other is sovereign within its own sphere because, as already stated, the modal structure of these spheres find their deeper root-unity not within time but above it.

The laws of number are not reducible to spatial laws, nor are the spatial reducible to the laws of motion. The latter cannot be reduced to those of organic life. These in turn are not reducible to laws of feeling and thought. The jural laws are not reducible to the logical, the historical, lingual, social, aesthetic, economic, moral or to the laws of faith.

In every law-sphere temporal reality has a modal function and in this function is subjected (*sujet* or *subjekt*) to the laws of the modal spheres. Therefore every law-sphere has a law-side and a subject-side that are given only in an unbreakable correlation with each other.<sup>2</sup> There is no law without a subject (*sujet*) that is subjected to it, and there is no subject without a law that limits the subject and binds it to an order. Thus the entirety

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1 *Editor's note:* Dooyeweerd here uses *wet* and *recht* to distinguish, respectively, law in its cosmic sense and law in its jural sense, applicable to positive human law. Because English has only the one word to translate the two Dutch terms, it has been necessary, in order to avoid confusion of the two senses of law, to insert in parentheses, where required, a qualification of “law” in order to distinguish the different senses in the above sentence.

2 *General Editor's note:* Dooyeweerd's mature conception distinguishes between

of temporal reality is only presented to us in an unbreakable correlation of its law- and subject-side.

In the law-sphere of number the numerical functions are subjected to the laws for number. In the logical law-sphere thought is subject to the logical norms of thought. And thus, in the jural law-sphere, the legal subject is subjected to legal norms.

Both the law-side and the subject-side of an aspect of reality have a constant modal structure. Within this structure, however, both the subjective (and within the previously discussed subject-object relation, also the objective) modal functions which concrete facts, events, social relationships, and even the individual person have, within the aspect of reality involved, are of an entirely individual character.

On the law-side of a law-sphere, the modal laws will indeed become typified, as we shall see later. That is to say, they will assume a typical character in the various individuality-structures of reality. But, in spite of all its further concretizing, in its orientation to the individuality of the subject, the law-type never attains the actual individuality that is inherent in the subject-side of reality. Law still remains a rule, an ordering, to which the subject in its unique individuality remains subjected. If the law itself were to become wholly individual, it would no longer stand above the subject but would merge into the latter.

If we relate the cosmomic idea to the theoretically distinguished laws of the various spheres, then, from a Christian point of view, we must see the root-unity of these modal laws in the religious fullness of the divine law. This is the law which has been revealed and fulfilled by Jesus Christ and demands service to God from the heart with all its temporal functions. In this fundamental law the diversity of the temporal ordinances has its religious focus.

If we relate the philosophical ground-idea, in its subjective dimension (thus as the idea of the subject), to the theoretically distinguished modal subject-functions of temporal reality in its various aspects, then, from a Christian standpoint, we arrive at the idea of the religious root-community of humankind – fallen into sin in its first head Adam, and born again in Jesus Christ as the second head – and to the idea of the “heart” (the soul or the spirit) as the individual religious center of human existence that participates in the community. In this religious root-unity of the entire temporal cosmos, law and subject also appear to be correlated.

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*law-side and factual side.* At the *factual side* a further differentiation is made possible by the subject-object relation in all post-arithmetical aspects, making possible the distinction between the *factual subject-side* and the *factual object-side*. Thus the ambiguous use of the term subject – meaning both “being subjected to” and “is correlated with an object” is avoided.

Only if you proceed from the scriptural Christian standpoint is it really possible to penetrate to the radical unity and fullness of meaning of the divine law-giving for the temporal cosmos. According to the divine plan of creation, the modal laws of all the law-spheres without exception are concentrated upon this root-unity.

Under the influence of the Greek motive of form and matter and the humanistic ground-motive of nature and freedom there arose a polar opposition between natural laws for the nonrational creation and norms, or practical laws, for humankind which is qualified by its rational nature. A search was thus made, on the one hand, for a deeper unity of all natural laws (the unity of the natural-scientific world-view, according to the modern humanistic science-ideal) and, on the other hand, for a deeper unity of all laws for human activity. So the moral law came to be identified with the absolute unity of all norms.

Scholastic theology simply took over this conception from Greek philosophy. In the framework of the Romanistic ground-motive of nature and grace, the natural moral law (*lex naturalis*), which was supposed to be imbedded in the autonomous rational nature (essential form) of humankind, was conceived as the only norm of action, and the legal norm was supposed to be only a modality of that moral law. The norms of faith were completely dismissed, along with the religious central commandment of the Christian faith, to the supernatural sphere of grace. There was no place here for irreducible, unique normative laws of a historical, social, linguistic, and economic kind.

It is for this reason that, in modern Roman Catholic scholasticism, a tendency has predominated of incorporating economics (at least in respect of the person as a subject) into ethics. Economics here refers to what the classical school proclaimed to be a natural science which is given the task of tracking down the unchangeable natural laws of economic activity. It was thought that this was the only way to conceive of economic activity under norms, instead of under rigid laws of nature, and once again to place humankind, rather than material things, at the center. But it was not recognized that in this way the unique modal character of the economic law-sphere was completely misconstrued.

In the economic law-sphere, one is subject to uniquely economic norms governing human actions, not the norms of morality.

The scholastic approach in Protestant theology took over from Roman Catholic scholasticism the conception of the moral law as the unity of norms of practical action. It rejected the autonomy of the natural moral law only with respect to the supernatural norms of faith and maintained a conception of the moral law identified with the Decalogue as unbreakably connected with the basic commandment of the Christian religion. However, it must be emphatically denied that the radical sense of the religious

basic commandment could be thus preserved by relating the religious root-unity of the divine law exclusively to the moral law. Merely by pointing to the great cultural mandate that at the creation was given by God to humankind – “Subdue the earth and have dominion over it” (Genesis 1:28) – is enough to show that conceiving the moral law as a unity of norms cannot be scriptural. For this cultural mandate cannot in any way be reduced to the moral law. Instead it undoubtedly refers to the central religious commandment: the demand to serve God out of love, and one’s neighbor with the whole heart and with all one’s temporal powers. And should not the logical norms of thought, the norms of social intercourse, the norms of language, the economic, and the aesthetic norms also be related to this central commandment?

But we cannot stop with the normative aspects of the divine law-giving if we want to grasp the full radical meaning of the religious central commandment. Natural laws, for that reason, are also already dependent upon the religious central commandment. For they do not exist in themselves but, within the cosmic order of time, are unbreakably intertwined with the normative aspects of the divine law. However, the main point is that these laws of nature do not have a rigid, closed character; humankind is called to disclose them. This will become apparent from our following explorations.

The curse of humanity’s fall into sin has permeated the entire cosmos because the religious meaning of the entire cosmos was concentrated in humankind. Yet it is also the case that the central religious commandment cannot by itself be the root-unity of the normative aspects of the divine law-giving.

The modal law- and subject-concept, developed above, can only be understood in the light of this radical law- and subject-idea. It cannot be found within immanence philosophy. In particular, those who adopt that standpoint have lost sight of the concept of the subject, as *sujet*, as subjected to the law, because the idea of the Divine Sovereign Creator, in the integral sense of the scriptural ground-motive, does not have any place.

The law as an idea of origin is, at one point (*viz.*, in Aristotelian scholasticism), conceived as an objective principle of reason that presents the essence (substantial form) of things and, at another, as a purely theoretical epistemological judgment concerning the coherence of sensory phenomena (for example, Newton’s law of gravitation), or yet again in relation to norms of human action as ordinances that have come into being by human willing (as in the modern humanistic doctrine of science). An illustration of the latter are the positive laws of the state. Here the subject is either identified with metaphysical substance (thing in itself), or is elevated to the position of law-giver, whether in an epistemological sense (as the tran-

scendental subject of thought in Kant), or in a moral sense (the Kantian idea of autonomous personality).

In particular, there is lacking, on the immanence standpoint, the insight that reality is given only in an unbreakable correlation of law- and subject-side, in which neither the subject-side nor the law-side can be reduced to the other.

So there came into being the rationalistic and the irrationalistic conceptions of reality discussed above which, in modern humanistic philosophy in particular, stand diametrically opposed to each other. Both conceptions are also to be found playing themselves off against each other in the science of law.

Rationalism pregnantly manifests itself in the conception that law is nothing more than a set of legal norms, and that the subjective legal fact (a fact with legal consequences), subjective right (as, for example, property right, right of ownership, the right of the buyer to expect delivery of purchased goods, etc.), and all legal patterns that in principle, according to our conception, belong to the subject-side of the jural law-sphere are able to be reduced completely to legal norms. Thus the neo-Kantian professor Hans Kelsen, whom we have already mentioned on several occasions, tells us that a subjective legal personality such as, for example, a corporation which possesses, and which appears in practice to possess, a subjective unity in the multiplicity of its members, occurs within a framework of positive legal rules that define the competence of such a corporation so as to give expression to the general rules of state law in a more concrete form. Incorporating the same approach is his remarkable conception of the state. In reality the state is a subjective community of rulers and subjects and as such functions in all of the aspects of reality. But in Kelsen the state is identical to the logical system of all positive legal rules which are left to the state for legal formation according to international law, and which are amenable to degrees of ordering from the more general to more particular forms whereby a higher law-former authorizes (delegates) a lower for more particularized concretizing of law. This line of approach is also followed in his conception of a subjective right as an authorization (delegation) by the law-giver to the one authorized for further concretizing of the abstract and general positive legal norms that are deposited in the law.

In contrast, a typical irrationalistic conception says that, in itself, the legal norm as general rule is nothing else than a worthless logical gener-

alizing of a concrete, subjective decision in an individual legal contest.<sup>1</sup>

Also irrationalistic is, for example, the earlier mentioned conception of the Historical School, that a legal order is the completely individual product of a subjective, national historical spirit of a people which, originally, unconsciously, without any purposeful human forming, arises from the folk-spirit according to the analogy of a living organism.

Of course, rationalistic and irrationalistic theories of law manifest themselves in any number of varieties, depending on the philosophic denominator to which the jural aspect has been reduced. So in legal theory it is just as possible to have a biologicistic, a psychologistic, or a historicist irrationalism as it is to have a psychologistic, mathematistic, or historicist-economistic rationalism.

Later on, as we deal with the basic problems of the theory of law, we shall repeatedly encounter the opposition of rationalistic and irrationalistic concepts. It is apparent even now, however, just how important the law- and subject-concept is for legal theory, as this is rooted in a philosophic ground-idea, whether or not it has become recognized by the scientific jurist.

#### *1.10 The Cosmic Order of the Law-Spheres and the Method of Analysis of the Modal Structures*

We have already seen that the law-spheres, in spite of their modal sphere sovereignty, unbreakably cohere with one another in cosmic time. By means of the cosmic order of time they are arranged in an established and irreversible order which irrevocably establishes their place in an order of succession. The question now is, How can theoretical thought trace this temporal order? It has assuredly been established that in this mode of thought we must abstract from the continuity of cosmic time in order to be able to form an articulated scientific concept of reality.

In the meantime, it has become clear that cosmic time expresses itself in every aspect of reality, in a unique modal sense, and that the modal structures of meaning, by which the law-spheres are distinguished from each other, are themselves founded in the cosmic order of time. Thus the cosmic order of time must express itself distinctly in every modal structure. And so the theoretical analysis of the modal structure of a law-sphere itself necessarily brings to light the place of that sphere in the temporal order of the law-spheres.

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<sup>1</sup> The adage of the Roman jurist: *Non ex regula jus sumatur, sed ex iure quod est, regula fiat*, should certainly not be interpreted in this irrationalistic sense. Here *regula* does not mean a legal norm that holds in practice but only one that has been established a priori by theory. This adage correctly warns against attempting to deduce binding law in practice from such a theoretical rule.

In part 1 of this Introduction we presented a provisional but somewhat rudimentary analysis of the complex interconnections of the jural moments of a commercial contract with all the other aspects of reality. This necessitates further clarification as to how the modal structure of the jural aspect expresses its temporal coherence with the structures of all the other aspects. It is indeed true that theoretical analysis of the modal meaning-structures can never give us a concept of the cosmic continuity in which time bridges the boundaries of the modal aspects; but it can acquaint us, albeit in a theoretical discontinuity, with the place that the law-spheres occupy in the temporal order.

We have also seen in part 1 that the science of law works with many basic concepts which also play a fundamental role in other special sciences but which, in their juristic employment, obtain a unique jural sense. So the jurist works with a unique jural concept of unity in multiplicity that apparently refers back to the concept of number in arithmetic (*arithmetica*) without itself taking on an original arithmetical sense. Think of the unity of the sale agreement in the duality of the declaration of will by the two parties. Or think of the unity of the corporate legal person in the multiplicity of its members. The science of law also works with a unique jural concept of space (the area over which legal norms hold, or the place of the legal fact which is subjected to it). It also works with a unique jural concept of cause, (on the law-side of the jural law-sphere, legal ground and legal consequence, and on the subject-side, the idea of the subjective causation of an action). These apparently point to physical causality in the aspect of movement, because cause and effect indeed presuppose movement.<sup>1</sup> It also operates with a unique organ- and life-concept (legal life and legal organ). This apparently points back to the organic concept of life as the basic concept of biological science. It also works with a unique jural concept of will and will-capacity (accountability) that would appear to point back to the basic concepts of psychology as the special science having to do with the emotional sensory-aspect of reality. And so we could go on.

On the other hand, we discovered, for instance, how the internal connection with the moral aspect expresses itself within the jural aspect. The Hoge Raad, for example, employed the concept “moral obligation” as the source of a natural bond. We have already seen that “moral obligation,” in that context cannot be meant in the original sense of the moral aspect, but instead must evidently be understood in a unique jural sense that was not further defined by the Court.

It will be clear, at the same time, that within the modal structure of the jural aspect the internal connection with the aspects of quantity, space, movement, organic life, feeling, the logical-analytical, the historical, etc., must be different from, for instance, the internal connection with the moral aspect.

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<sup>1</sup> *Editor's note:* See note on p.14.

It is indeed easy to conceive of a legal system in which this connection has not yet come to expression. Primitive legal systems account for morality in general as an order distinct from that of law. They are completely formalistic, that is to say, they allow a binding undertaking to arise exclusively from the juristic form of a legal fact. Consider, for example, the words that are used at the time of an agreement or other symbolic forms, which here often have a specifically religious meaning; they bind the parties strictly to these forms. In such a formalistic conception there is, of course, no place for investigation of legal phenomena such as guilt, good faith, good morals, admissible cause, moral obligation etc., that is to say, all those legal configurations in which the internal relationship between law and morality is expressed.

By contrast, one discovers in such primitive legal systems that of necessity the internal connection with the aspects of number, space, movement, organic life, etc., are given jural expression. Primitive criminal law, for instance, is based on the principle of *Erfolgshaftung*, that is to say, it discovers its measure of criminal punishment exclusively in the seriousness of the illegal act's effect. It thus acknowledges of necessity jural causality, but the jural concept of guilt does not have any place here.

If the fundamental concept of law, in which we attempt to understand the modal structure of the jural aspect in a synthetic way, is truly to establish a trustworthy guide for the science of law, then this structural framework must be incorporated theoretically into that concept of law. And it has already been shown that the current methods of juridical concept-formation fall miserably short in this respect.

From the standpoint of my own cosmomic idea how is it possible to grasp the modal structure of law?

The modal structure of a law-sphere is, as we saw, an architectonic unity in the diversity of its structural moments. How can the unity be maintained here in the theoretically analyzed diversity? It is only because none of the moments stand on the same level, but are incorporated into a truly architectonic structure in which the cosmic temporal order of the aspects, and thus the place of each aspect in the mutual coherence of the aspects, expresses itself in the unique modal meaning of the aspect in question.

In addition, according to our cosmomic idea, it must be the case that the original and irreducible character of the aspect is preserved, whilst, at the same time, the internal structural interconnections with all the rest of the aspects come to expression. This is only possible because in the modal structure there is a nuclear<sup>1</sup> moment that has an original meaning for this aspect alone. This nuclear moment impresses on all the rest of the structural moments its irreducible meaning, whilst, at the same time, some of

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<sup>1</sup> *Editor's note:* The term *kern* can also be translated in its literal sense as "kernel" or "core."

the remaining moments point back in sequential order to the original nuclear moments that have an earlier place in the cosmic order and others sequentially point forward to the original nuclear moments or aspects that have a later place in the cosmic order of time.

Here there are two directions in the cosmic order of time, namely, a retrocipatory and an anticipatory direction. Both of them find their expression within the modal structure of the law-spheres.

Henceforth we shall call the nuclear moment that qualifies the modal structure of a law-sphere the “modal meaning-nucleus.” The modal meaning-nuclei that point backwards we shall call “modal analogies” or “retrocipations.” Those that point forward to later modal meaning-nuclei we shall call “modal anticipations.”<sup>1</sup> And so we can describe the previously indicated directions in the cosmic order of time, respectively, as the retrocipatory (or founding) and the anticipatory directions.

It will then be clear that in the temporal order of the law-spheres there must be two limiting spheres, one of which can have no modal retrocipations in its modal structure, and the other can have no modal anticipations. One of the limiting spheres is that of quantity (number) because no aspects precede the aspect of number in the order of time. The other limiting sphere is that of faith (*pistis*) because no aspects succeed this law-sphere.

The analogies, as well as the anticipations, within the modal structures of the law-spheres remain qualified by the modal meaning-nucleus of the sphere in question. Therefore they do not assume the original meaning of the law-sphere to which they point back or of the law-spheres to which they point forward.

Furthermore, the fewer the number of analogies within the modal structure of a law-sphere the greater the number of anticipations there are. In this fashion the cosmic temporal structure of the aspects is pregnantly revealed and the place of each law-sphere in the order of the aspects can thus be analyzed.<sup>2</sup>

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1 *Editor's note:* In his later works Dooyeweerd gave more precision to this categorization by acknowledging that both retrocipations and anticipations are sub-categories of the general category, analogies.

2 *Editor's note:* In the version of Dooyeweerd's *dictaat* used for this volume there followed a paragraph that appears to be misplaced. This is because it inexplicably interrupts the discussion of analogies with a general unrelated observation on the effect of the ground-motive of immanence philosophy on its account of the structure of reality! It could perhaps have been located at the beginning of the analysis of the analogical structure of the jural aspect of reality. The omitted paragraph reads: “Lacking a distinction between theoretical and pretheoretical presuppositions, the religious ground-motive within immanence philosophy constantly set itself in the place of true

As long as the modal anticipations in the structure of a law-sphere have not been realized we say that the law-sphere is still in a closed state. The anticipations disclose and deepen the meaning of the aspect because they approach the meaning of a later aspect. So it is clear that if the law begins to disclose its moral anticipations this must mean a very significant deepening of the meaning of law. One need only compare the above mentioned principle of *Erfolgshaftung* or primitive criminal law with the modern principle of punishment according to guilt.

Subsequently, we shall see that by this means the connection with the structures of the earlier aspects will also be deepened. The law-spheres that precede a particular law-sphere in the order of time will be called the substratum spheres of that particular law-sphere. The law-sphere in question is founded in these substratum spheres.

It will be clear then that a law-sphere has as many substratum spheres as it has analogies (retroicipations) present in its modal structure. To be precise, the analogical moments of meaning point back to the modal meaning-nuclei of earlier law-spheres. Every modal analogy is itself founded in the original meaning-nucleus of that law-sphere to which it ultimately points back.

Thus the first major undertaking of a true encyclopedia of the science of law, namely, to indicate the place that the jural aspect of reality assumes within the temporal coherence of the aspects, can now be actually commenced in a scientific fashion. And at the same time we have an indication of the only possible method whereby jural concept-formation can be put on a basis that is truly fruitful and free from arbitrariness. The basic concept of law must theoretically embrace the modal meaning of the jural law-sphere. And this modal meaning can only be found within the context of the entire temporal coherence of the modalities. At the same time, however, we encounter the internal limits of any theoretical definition.

In theoretical analysis of the modal structure of law, we can never go further than to theoretically differentiate the various structural moments that are qualified by the modal meaning-nucleus of the jural aspect. As we unify these moments synthetically into the fundamental concept of law, we shall inevitably encounter this irreducible modal meaning-nucleus that governs the meaning of the analogical and anticipatory moments. It is impossible to provide a more precise logical-analytical account of this meaning-nucleus because, within it, the modal sphere sovereignty of the jural aspect asserts itself over against the logical aspect. Every attempt to reduce this unique nuclear moment to something else produces completely indeterminate and therefore theoretically useless concept-formation. The

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scientific investigation of the structure of reality. (Compare what was said above regarding the Historical School's concept of law.)"

modal meaning-nucleus of the aspect to be defined is thus the limit of all theoretical determination.

But this meaning-nucleus is only able to reveal its meaning in its unbreakable interconnection with the analogical and anticipatory moments, which bring to expression the connection of the jural aspect with all other aspects in the structure of law itself. The task of scientific concept-formation therefore is to analyze these moments theoretically in order to grasp them synthetically in connection with the modal meaning-nucleus.

We want now to demonstrate our method of analysis of the modal structure in relation to certain nonjuridical law-spheres, not only to show the reader that it is indeed of universal, encyclopedic significance, but also because it is necessary to obtain a proper insight into the structure of the remaining aspects if one wants to attain genuine insight into the structure of the jural aspect.

The first example to be chosen is the modal structure of the aspect of number. As already observed, this law-sphere (in the retrocipatory direction of time) is the first limiting sphere of our temporal cosmos, because there are no law-spheres that precede it. Therefore it has no analogical (retrocipatory) moments of meaning in its modal structure. The core meaning of number is only to be found in quantity. The temporal coherence of this meaning-nucleus with those of the other law-spheres can reveal itself therefore only in the anticipatory direction of time. The first anticipatory function of number is the anticipation to the meaning-nucleus of space.

In its structure, yet to be opened in an anticipating direction, number manifests itself in the natural or rational numerical values (the finite numbers). In its own modal meaning, however, number can approximate the modal sense of space, and therein reveals its first anticipatory function. The modal meaning-nucleus of space is continuous extension. In order to make clear how number, in its own modal sense of discrete quantity, can approximate continuous extension, consider a straight line on which there are two nonidentical points A and B. If we designate point A with the whole number 1 and point B with the whole number 2, then we can ascribe to each point in between a numerical value greater than 1 and less than 2. In this fashion there comes into being an infinite series of fractions which only find in 2 their limit, but which form, in the fullest sense of these words, an infinite, approximating series. These numerical functions have been called irrational because the total numerical value of the series is not able to be expressed in a finite (rational) numerical value (so, for example,  $\frac{2}{3}$ ,  $\frac{3}{5}$ , etc.). Here it is clear how discrete number approaches, within its own modal meaning, that of continuous space, without the anticipatory, irrational number functions ever taking on spatial meaning.

By contrast, we find in the modal meaning-structure of spatiality, analogies of (retro-cipations to) the meaning-nucleus of number, both as to its law-side and its subject-side.

The modal meaning-nucleus of space is, as we saw, continuous extension. But there can be no continuous extension apart from dimensions or magnitudes in which it reveals itself.<sup>1</sup> Space may be of two, three, or more dimensions, but in its meaning-moment of dimensionality it still presupposes number. It appears therefore that at the law-side dimension is an analogy of number within the meaning of space. For dimensions are not themselves subjective spatial patterns, but only ways of ordering them. They are regular<sup>2</sup> determinations of those patterns. On the subject-side of space, the analogy of number reveals itself in the spatial point which always presupposes two intersecting straight or curved lines. Furthermore the following holds true: every spatial figure, even a one-dimensional straight line, can only function as a limited spatial figure in its delimitation by two points.

Now the modal meaning of space also displays anticipations, in the first place, towards the meaning of movement. In the original sense of space no movement is possible.<sup>3</sup> Space has a static character. A spatial figure can only exist in the simultaneous extension of its parts. In space, in its original meaning, there can therefore never be succession in movement's original meaning. But it is indeed possible for the various spatial positions of the figures to come so close to each other that the difference becomes infinitely small. Think only of the continual increase of the number of sides of a polygon through which the circumference of the polygon increasingly

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1 *General Editor's note:* Dimension is a numerical analogy at the law-side and magnitude is a numerical analogy at the factual side of the spatial aspect. Although modern topology handles spaces without points, it still has to assume many local pieces (compare the "locale model of spaces" as explained by Mac Lane) and thus analogously reflects the primitive numerical meaning in the acceptance of a multiplicity of "objects."

2 *General Editor's note:* Although the Dutch text employs the word "*wetmatige*" in the phrase, "*wetmatige bepalingen*" (lit. law-conformative determinations/determinations conforming to a law), it does not make sense to translate it as such in this context. The problem is not merely one of language choice. In general, Dooyeweerd identifies the *universal side* of factual reality—evinced in the *law-conformative* (*wetmatige*) functioning of entities, processes and societal relationships—with the *law-side* of reality (the *law for* entities which determines and delimits the orderliness/regularity [*wetmatigheid*] of whatever is subjected to law). The untenability of this identification is evident in this case, because whereas it is clear that he has the *law for* spatial figures (that is, spatial *subjects*) in mind, his said identification causes him to use the term "*wetmatige*" which actually refers to the subject-side of reality. Any direct translation of this passage will highlight the incorrect identification of *law for* with *law-conformity of*.

3 The contrary conception rests on a scientifically unjustifiable confusion of space

approximates that of a circle. In a broader sense, in projective geometry and especially in so-called set theory, one speaks of transformations. In such cases, however, one should not be thinking of movement in the original sense of the word, any more than in the “movement” of points, straight-lines, corners, planes, etc. Here it is only a case of approximating concepts which comprise the anticipations of the modal meaning of space.

In the modal structure of number, we also find an anticipation to the modal meaning of movement, namely, in the differential functions of number, which serve to approach the relationship between two variables to infinitely small differences (the differential quotient), in connection with which the one quantity (the function) is considered to be dependent on the other.

In the modal structure of the aspect of movement, in which again the meaning-nucleus is irreducible, there is involved, again of necessity, a numerical as well as a spatial analogy, both as to the law-side and also as to the subject-side of the law-sphere. According to the law-side, the spatial analogy expresses itself here in the direction of movement (the analogy of the spatial dimension). As to the subject-side, the spatial analogy is given in the field of movement of energy-mass, which, in the subject-object relation, is related to the objective space of movement (physical world-space). In modern physics since Einstein, it has been established that the properties of physical space are determined by matter as moving mass. From this it is immediately clear that this physical space cannot be identical with space in its original meaning, as the field of investigation of abstract geometry. The numerical analogy in the modal sense of movement, on the law-side, already resides in the moment of the direction of movement (one or more directions of movement), while it reveals itself, on the subject-side of this law-sphere, in the degree of the velocity of movement (impetus).

In the modal meaning-structure of the biotic law-sphere which comprises the organic aspect of reality (life), we discover an analogy of movement in the development of life. This analogy of necessity presupposes the movement of growth and, in its turn, metabolic movement. It also presupposes a spatial analogy in the organic bio-milieu as the biotic response-field of the living organism, and a numerical analogy in the nuclear meaning of the organic aspect which always presupposes a multiplicity of life-functions. All these analogies reveal themselves on the law-side as well as on the subject-side.

In the modal structure of the psychical law-sphere, in which the sensory aspect of reality is contained, we discover a biotic analogy in feeling-life

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and movement in their original sense with the sensory-psychical space-and-movement image, i.e., with the analogies of space and movement in the modal meaning of the psychical aspect, of which we shall speak later on.

that always rests on a bio-organic foundation; a kinematic analogy in the moment of emotion (feeling-movement); a spatial analogy in the feeling of space and in objective perceptual space (visual, tactile, and auditory space); a numerical analogy in sensory multiplicity. These analogies also reveal themselves both on the law-side and the subject-side.

In the modal structure of the logical law-sphere, in which the analytical aspect of reality is determined and which is qualified by the meaning-nucleus of the analytical aspect (logical distinguishing), we discover a sensory analogy in logical representation that fixes the analytical qualities of a thing simply in an image, that is, the pre-theoretical concept which is still rigidly bound to sensory impression. This is a biotic analogy in the logical life of thought that rests on a bio-organic basis (namely, the functions of the brain) but which is nonetheless bound to the logical laws of thought, a kinematic analogy expressed as the movement of thought (logical process) which on the law-side is subject to the normative principle of sufficient ground.<sup>1</sup> This is a spatial analogy expressed as logical thought-space in which we analytically place side by side the logical multiplicity of conceptual attributes (numerical analogy) and bind them to a logical unity (analytical synthesis). In contrast we discover in the modal structure of the psychical law-sphere, which delimits the sensory aspect of reality, a logical anticipation in logical feeling.

How can we now, in the analysis of the modal meaning-structure, determine whether a meaning-moment, which is thereby disclosed, has a retrocipatory or an anticipatory character? For this purpose we must proceed from the modal structure in its still closed form, from the primary configuration of this structure in which the anticipatory moments do not yet reveal themselves, or, as we shall say from this point on, in which the anticipatory spheres are still closed. In contrast, we speak of disclosed or deepened configurations of a modal structure, when anticipatory moments of meaning display themselves within that structure. Thus in its closed configuration the modal structure only reveals itself in the unbreakable coherence of its meaning-nucleus and its retrocipations (analogies), although in the case of the numerical law-sphere, of course, in its meaning-nucleus alone. If a law-sphere indeed has substratum-spheres, then its modal meaning can never express itself apart from them. Therefore the simplest form of its meaning-structure is given in the interconnection of nucleus and retrocipations.

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<sup>1</sup> The principle of sufficient ground demands that there be sufficient logical grounds for every logical inference. Logical movement of thought reveals itself in every inference in which there is a progression from grounds to a conclusion. Thus in the deductive syllogism: (i) All men are mortal; (ii) Socrates is a man; (iii) Socrates is mortal.

Number reveals itself in its still-closed structure through its rational functions.<sup>1</sup> By contrast, in its opened structure, it reveals itself through its irrational functions, its differential functions, its imaginary functions, etc.

Thus movement, in its yet-to-be-opened structure, reveals itself in the natural gravitation of inorganic matter. In its opened structure, contrastingly, it reveals itself in motions of the metabolism directed by the organic function of life. Thus feeling reveals itself in its closed structure as the purely sensory feeling-life of the animal, but in its disclosed structure, in human feeling-life in which the normative feelings, such as logical feeling, cultural feeling, lingual feeling, social feeling, economic feeling, aesthetic feeling, jural feeling, feelings of love and hate, the feeling of assurance (feeling of faith) have developed themselves.

By proceeding then from the closed configuration of the modal meaning-structures, we discover the criterion for discerning whether a modal moment of meaning manifests the character of an analogy (retroicipation) or an anticipation.

So in the analysis of the modal meaning-structure of the logical law-sphere, it immediately appears that in the temporal order this law-sphere must precede the historical law-sphere, the lingual law-sphere, the economic, the jural law-sphere, etc. In the closed structure of the logical function of thought there is as yet no trace of the meaning-moment of logical control over form. The latter initially displays itself in disclosed theoretical thought wherein the systematic concept, which conceives matter in a scientific fashion, makes its entrance. In the pretheoretical concept which is still rigidly bound to sensory impressions, this anticipatory meaning-moment is lacking. The nontheoretical concept is bound to sensory perception and does not acquaint us with the systematic coherence of phenomena. With such a concept we do not achieve logical control over the material. We shall now become acquainted with a historical anticipation in the moment of logical formative control, for the modal meaning-nucleus of the historical aspect is the cultural in the sense of free, controlling form-giving.

It is for this reason that the pretheoretical, logical aspect of thought as such does not have a history, while scientific thought definitely does have a history. Science certainly has its historical development. So also in the closed structure of the logical aspect of thought there is no trace of logical symbolism, in which logical analysis points forward in an anticipating way to the meaning of language (symbolic signification). In logical symbolization, thought frees itself from its rigid dependence on sensory repre-

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<sup>1</sup> *General Editor's note:* A closer analysis of the meaning of number indeed reveals that fractions (the so-called rational numbers) actually already anticipate the spatial whole-parts relation with its entailed infinite divisibility (echoed in the infinite divisibility of every positive rational interval).

sentation, and it can thereby conceive its *Gegenstand* abstractly. So, for instance, the abstraction of numbers or spatial figures from concrete things, of which they appear as aspects, is already an elevation above sensorily bound representations, as is symbolical thinking oriented to the symbolical signifying meaning of number and space.

Without difficulty we also discover, in economy of thought and logical harmony of the system, specific anticipations to the modal meaning of the economic and aesthetic law-spheres respectively; but these have a modal meaning of logical analysis. The principle of economy of thought does not play a role within logical analysis in its closed structure. It is a disclosure and deepening of the logical principle of sufficient reason insofar as it demands the exclusion of all superfluous logical grounds for a particular conclusion, and thus, in a logical sense, points ahead to the principle of economic saving. Only in systematic scientific thought, in which we seek to control the field of investigation theoretically, can this principle of the economy of thought disclose itself.

The jural anticipation in logical thought, searching for the logically *justified* ground, is also lacking in the closed structure of logical analysis. By means of this anticipation we confront the phenomena to be investigated as a scientific judge and not merely with the purely receptive attitude of naive thought.

Similarly lacking in the closed structure of the logical aspect is the anticipation to the modal meaning of morality. The meaning-nucleus of the latter is love in the normative sense of *agapē*. The modal structure of the logical aspect anticipates this as theoretical eros, the “Platonic” theoretical love of knowledge as a totality-idea.

Finally, also lacking in the closed structure of the logical aspect is the anticipation of the modal meaning of faith, the nucleus of which allows itself to be tentatively described as an ultimate temporal assurance concerning the absolute ground or origin of all things. In the disclosed structure of the logical aspect, we encounter the anticipation of this meaning-nucleus in the figure of logical certainty which expresses itself in the logical axiom.

The distinction between analogy and anticipation has been illustrated by means of various examples. By applying the criterion of this distinction to the jural law-sphere we are now able to establish the position of the jural aspect within the coherence of the normative law-spheres. It is intended to limit the investigation here to the relationship of the economic to the jural aspect.

Since Marxism (at least according to its current interpretation) characterizes law as a purely ideological superstructure upon the historical-economic structure of society and only allows law to be its ideological expression, there has been much debate about the question as to whether the

economic order in fact determines the juridical order or whether, on the contrary, the legal order is foundational for all economic relationships.

The earlier-mentioned neo-Kantian legal scholar, Rudolf Stammler, was of the opinion in his *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung* [Economics and Law according to the materialistic conception of History] (4th ed., 1921) that Marxism could be refuted by means of his doctrine that the historical-economic relationships only present an in-itself-unordered experiential material which is initially ordered and determined by law (or at least by means of a rule of social behavior) as a thought-form in experience. Law is thus an a priori category that makes possible the experience of economic relationships such as human cooperative social relationships. A historical-economic structure of society therefore, cannot exist apart from a legal order. By this it is supposed to be shown that the Marxist attempt to make economic relationships the basis of law is untenable in principle.

Now, leaving aside altogether our previous rejection of the critical method of neo-Kantianism, the assertion that economic relationships cannot exist in our experience apart from a legal order is by no means decisive in answering the question whether the economic aspect of reality lies at the foundation of the jural or whether the jural is foundational for the economic. This is because, in the temporal order of the world, all of the aspects are constantly and unbreakably intertwined with each other; it is indeed the case that no aspect can exist apart from the other aspects. The question now to be addressed is whether, in this order of the aspects, the economic precedes the jural or whether the jural precedes the economic.

From a serious analysis of the modal structure of law we learn how it is possible to point to necessary economic analogies within it. As to the law-side (norm-side) of the jural law-sphere the modal meaning-nucleus of law (that we shall later discover in the meaning-nucleus of retribution) only reveals itself, even within an as-yet-undisclosed legal order, through an economic analogy that demands fairness in the satisfaction of certain legal rights and therefore rejects allowing excessive significance to certain legal interests. Where this meaning-moment is lacking we are outside the domain of law proper. The analogy in question is an analogy of the principle of frugality as the modal nucleus of the economic aspect.

In the primitive principle of *lex talionis*, “an eye for an eye, a tooth for a tooth,” there is already an attempt to avoid excess, superfluity, in criminal legal retribution – as a particular manifestation of the principle of retribution – and to keep this sanction within the limits of proportionality. The economic analogy in the meaning of law<sup>1</sup> is already strongly expressed

<sup>1</sup> *Editor's note:* See note on p. 20.

where murder, for instance, is punished with the death penalty. According to the strict principle of *talio*, the punishment is carried out as far as possible in the same manner as the crime, for example, where causing disfigurement is requited with the inflicting of a similar disfigurement. Also, the submitting of successive generations' blood-vengeance to the primitive principle of retribution leads immediately to prohibition of excesses and substitution of blood-vengeance by the demand for proportionate retribution.

Later, in the systematic analysis of the modal meaning of law, we shall come to recognize necessary economic analogies on the subject-side of this law-sphere in the jural subject-object relation as it appears in the configuration of subjective right and objective legal facts.

Thus it appears that the economic analogy, which has already come to expression in primitive designations for retribution, and which in turn are derived from economic activity, is essential in the closed modal structure of law. We shall, in due course, return to this point.

Therefore it is possible to assert with confidence that the economic aspect lies at the foundation of the jural and not the other way round. From his neo-Kantian standpoint it was not possible for Stammler to pose the problem regarding the relationship of law and economics in this sense because he did not recognize the modal structure as such. Because he regarded economic relationships in human society as unordered, experiential material, he also had to deny the unique modal law-conformity of the economic aspect and was forced to deny a place for economics as a distinct special science. However, historical materialism certainly cannot be refuted in this way.

### *1.11 Antinomies and Illegitimate Fictions in Scientific Thinking: The Fictions of Legal Method<sup>1</sup>*

The idea of the sphere sovereignty of the various aspects of reality is not an arbitrary hypothesis. That it must truly be founded in the divinely given temporal world-order is clear from the fact that every attempt to erase the modal boundaries of meaning between the law-spheres entangles itself in antinomies. These antinomies are not simply logical in character. Logical contradictions, which are forbidden by the principle of contradiction (*principium contradictionis*), concern the logical conflict of two contradictory judgments ( $A=A$ ,  $A \neq A$ ), both of which cannot be true at the same time. From a logical point of view, it remains undecided as to which of the two judgments has a claim to truth. If a logical argument is in conflict with the principle of contradiction, it is illogi-

<sup>1</sup> *Editor's note:* Legal method (*rechtstechniek*) here refers to the method or "technique" of the practice of law, especially the judicial process of deciding cases, not the "scientific" method of legal analysis.

cal but not a-logical. That is to say, in spite of its illogicality, it remains within the logical aspect. A logical contradiction remains logically qualified. By contrast, the theoretical contradiction in which thought becomes entangled, because it has abolished the modal boundary of meaning between two law-spheres, manifests itself in the fact that in our thought the unique laws pertaining to these law-spheres come into substantive conflict with each other.

Conflicts arising in this way we shall call true antinomies, in contradistinction to mere logical contradictions. The latter concern the logical aspect of these antinomies. In the true antinomy there is indeed a logical contradiction; but a logical contradiction is not of itself an antinomy. Where subjective behavior comes into conflict with the laws within particular normative law-spheres there is no question of an antinomy. Thus within the jural law-sphere there is no true antinomy between justice and injustice; within the economic law-sphere, between economical and uneconomical; in the analytical (logical) law-sphere, between logical and illogical; in the moral law-sphere, between love and hate; in the aesthetic law-sphere, between beautiful and ugly, etc.

In such cases it is only a question of contrarities,<sup>1</sup> which come to expression within the normative law-spheres, and which are related to the normative character of these law-spheres. All such contrarities are founded in the post-logical law-spheres.<sup>2</sup> That is to say, they presuppose the logical principle of contradiction, to which we referred above, and they are to be viewed therefore as logical retrocipations in these law-spheres.<sup>3</sup> They remain enclosed by the modal meaning-structure of the law-sphere in question. For example, an illegal act is still jurally qualified and can only express itself within the modal structure of the jural law-

1 *Editor's note:* Lit. "contrary opposites" (*contraire tegenstellingen*).

2 *General Editor's note:* From the next sentence it is clear that Dooyeweerd actually intends to say: All such contrarities in the post-logical law-spheres are founded in the logical aspect.

3 With respect to the contrarities founded in logical contradiction, one must further differentiate polar oppositions, such as sick-healthy, sensitive-insensitive, desire-aversion, joy-sorrow, etc., which we come across in the non-normative law-spheres. In his *Kritik der praktischen Vernunft* (pp. 347 ff.), Leonard Nelson accounts for the difference between the two kinds of opposition as follows: "The polar oppositions, on the one hand, are only supposed to appear in connection with physical interests (*Interesse*) and have to do with inner, factual (positive) differences of psychological activity. Contrarities, on the other hand, refer only to *Gegen-stände* of logical judgments or decisions of will but just lack the polarity that is typical of the interested activity of feeling." The restriction of polar opposition to interestedness with the desire founded in it is, in my opinion, too narrow. In reality we already discover polarity in the biotic law-sphere (life-death, sickness-health) as well. But in such oppositions as movement-rest, round-square, we do not find any such polarity. These oppositions, to be precise, are only contrarities in a logical sense, that is, insofar as they function in logical judgments.

sphere. By contrast, the true antinomy always reveals itself to theoretical thought in a mutual theoretical conflict between the law-spheres.

The term “antinomy” gives poignant expression to the type of theoretical contradiction we have in mind. The true theoretical antinomy arises by reason of the fact that thought sets itself in opposition to the cosmic order that regulates the mutual interrelation and coherence of the law-spheres.

This kind of antinomy is contradicted by the temporal cosmic world-order. Therefore the acceptance of the cosmic order of time as a temporal order of law, from a Christian standpoint, necessarily leads to recognition of the principle of the excluded antinomy as a cosmological principle of thought.

In the light of our preceding investigations, we must make it clear that the immanence standpoint inexorably leads theoretical thought into antinomies. Kant attempted to explain the theoretical antinomies as the result of transgressing the limits of possible human experience by theoretical thought. This attempted explanation, however, is inadequate because Kant makes the unwarranted identification of empirical reality with what is perceptible by the sense, as it is supposed to be ordered in a priori forms of consciousness, that is, forms of consciousness which found the very possibility of experience. It is impossible, however, for any of the law-spheres to fall outside the range of possible human experience. This is the case because temporal reality presents itself to human experiencing only in an unbreakable meaning-coherence of all the modal aspects. Every limitation of the totality of empirical reality to its particular aspects rests on a theoretical abstraction that can never be squared with naive experience. If theoretical thought denies the modal aspects' sphere sovereignty, it always runs the danger of dissociating the modal analogies and anticipations that reside in the structure of a law-sphere from their appropriate meaning-nucleus. Instead, they are conceived in terms of the central meaning of the modal aspects to which they either point back or forward.

So, for instance, the Logician School of mathematics attempts to reduce the mathematical to the logical aspect of reality with the aim of proclaiming logical multiplicity, which is included in each concept as a summation of logical characteristics, to be the origin of number. But, as we saw earlier, logical multiplicity is only a numerical analogy and presupposes the original meaning of number. The latter therefore can never be deduced from it.<sup>1</sup>

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<sup>1</sup> *General Editor's note:* It is remarkable to note that the foremost mathematician of the twentieth century, David Hilbert, clearly pointed to this “catch 22” entailed in the logicist attempt to deduce the meaning of number from that of the logical-analytical mode. In his *Gesammelte Abhandlungen* Hilbert writes: “Only when we analyze attentively do we realize that in presenting the laws of logic we already had to employ certain arithmetical basic concepts, for example the concept of a set and partially also the concept of number, particularly as cardinal number [Anzahl]. Here we

Thus the Logician School also attempted to construe space, in a purely logical manner, out of the continuous logical progression of one point of thought to another. As a consequence, logical thought-space, that is, the logical analogy of space, was elevated to the origin of geometrical space.<sup>1</sup> As a final consequence, the modal boundaries of number, space, movement, and logical analysis were completely obliterated with respect to one another. There arose, however, at the same time, theoretical antinomies which higher mathematics has tried without success to resolve. If an attempt is made to construct a continuum logically out of points, the points are thereby eliminated.

Such points were already known to the Greek philosophers. Zeno, the student of Parmenides, thought he could demonstrate that in reality movement and multiplicity cannot exist because the spatial distance that must be traversed in passing between two points is infinitely divisible, and it is impossible in reality to pass through an infinite number of points. In point of fact, he merely offered a strict proof of the mutual irreducibility of number, space, and movement.

So also in the science of law many antinomies have arisen because the boundaries between the jural and the other law-spheres have not been taken into account in the theoretical formation of concepts.

By way of a preliminary introduction we mention several examples:

*Example 1*

In the modal meaning of law there is an analogy of space, which manifests itself, as to its law-side, in the area of validity of legal norms and, as to its subject-side, in the location of a legal fact.

Within the framework of a naturalistic conception of reality, the attempt is made to interpret these spatial analogies as sensorily perceptible spatial relationships and thus to dissociate them from the meaning-nucleus of law. Now the spatial image of a thing or of an event is objectively given in sense perception in relation to possible subjective sense experience. Remember what we have said about the subject-object relation. I observe, for example, how a bullet fired from the barrel of a gun takes a certain trajectory and finally strikes its target. By accurate subjective perception we experience the objective spatial image of this event.

end up in a vicious circle and in order to avoid paradoxes it is necessary to come to a partially simultaneous development of the laws of logic and arithmetic" (*Analysis, Foundations of Mathematics, Physics, and Diverse Life History*, 2nd ed., vol. 3 [Berlin/New York, 1970], 199).

<sup>1</sup> A beginning was made from the point as a supposed *Denksetzung* in logical space. Logical thought was supposed to construct a continuum by way of the continuous process of the movement of thought. It is evident here how spatial continuity is explained as a logical continuity of thought, movement as a logical movement of thought, etc.

Undoubtedly, the location of a thing or of an event can also be a datum in a jural sense, for instance, the place which a piece of land, as a legal object, occupies. This objectively given location, quite properly, has a jural meaning because it falls within a legal system's sphere of validity. The legal order, which subsumes legal relationships, depends on this fact. The relevant legal order will be that under which the piece of land functions as a legal object. But it is by no means always the case that the location of an act is objectively evident in a jural sense.

Consider, for example, the legal fact to which we referred earlier, where an Amsterdam merchant places an order by telephone for a shipment of grain from a company located in Berlin. Now where did this agreement come into being? That aspect of the mutual action of the contracting parties which is susceptible to sense perception cannot give an objective clue to the solution because, as a subjective legal fact, the agreement is not able to be perceived by the senses. Yet, according to traditional doctrine, the answer to this question concerning the location of the agreement's formation depends on the issue: under whose civil law, the German or the Dutch, must the agreement be determined? The most diverse theories have been advanced to solve this question. According to some, the agreement is formed at the place where the shipment is arranged. According to others, it is where the shipment is received. According to yet a third point of view, both places are supposed to qualify as the place of formation.

The last theory, at least, approaches most closely to fixing the place of the transaction with respect to that side of it which is perceptible to the senses. But jurally viewed, it immediately leads to an antinomy. To be precise, it eliminates the jural unity of the agreement as a legal transaction and dissolves it – in conflict with its jural character – into two independent declarations of will. It may indeed be the case that the circumstances require that different parts of the agreement be judged according to different systems of law; but then the place of the agreement, of which there can only be one, cannot itself be made the exclusive criterion.

*Example 2*

Within the modal meaning of law, on its law-side, an analogy of movement<sup>1</sup> lies concealed that manifests itself in the legal consequences of a legal fact determined by the legal norm, and, on its subject-side, in the subjective (that is, the subjective-objective) causation of this fact.

According to the naturalistic conception of reality, subjective jural causality was conceived in a natural-scientific sense. In a consistent application of this natural-scientific concept of causality as factors in a causal chain, human acts were placed on the same level as natural phenomena,

<sup>1</sup> *Editor's note:* See note on p. 14.

such as a flash of lightning or a falling stone. Human acts were simply incorporated into this causal chain as preconditions of the necessary occurrence of the effect in question, an effect that would not have occurred if these conditions had not been present. Thus the acts were interpreted according to the theory of *conditio sine qua non*.

However, this naturalistic concept of causality in the science of law necessarily leads to antinomies because it destroys any basis for jural accountability. If, for instance, the premeditated firing of a revolver by a murderer is only a link in a causal chain leading to the death of the victim, it functions at the same level as the mechanical motion of the projectile. Given the fact that the victim happened by chance to be within shooting range, then it is no longer possible to say that it was just the murderer's act which caused the death of the victim. That act is then only one of many preconditions for the occurrence of the effect.

One might just as well point to the acts of conception by grandparents and parents which led to the birth of the murderer as a cause of the effect that took place, presupposing that these acts of conception in their entirety could be treated as natural causal factors. For apart from these acts of conception the culprit would not have been present at all! Why therefore is the event solely attributed to him?

In a natural-scientific chain of cause and effect, it is possible to enumerate an entire series of "conditions" that are equivalent to each other. Jural accountability, by contrast, is only possible if a human act can be regarded as the free cause of the event that has taken place. This can never be so if this behavior is only a link in a natural causal chain. If causality in a jural sense were identical with causality in a physical sense, then the basis for jural accountability would have been destroyed. It is clear, however, from the legal pattern of *causa omissiois*, that jural causality can only exist in an unbreakable connection with jural accountability.

By the mere dereliction of duty, by sitting still and doing nothing when it was appropriate to act, it is possible to cause damage in a jural sense. Think, for example, of a railroad worker who falls asleep at the switch-point and whose dereliction of duty causes a train accident. This is not simply a question of fault divorced from any causal connection.

We shall see at a later point how fault in a jural sense presupposes the jural causation of the blameworthy acts. But the concept of causality in physics is only able to take account of positive functions of movement.<sup>1</sup> Negative conditions can never be causal in a physical sense. It is indeed the case that jural causality cannot exist, that it has no meaning, apart from the substratum of causality in the original sense of physical movement. But the sense that is original to the physical aspect is only an analogy in

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<sup>1</sup> See note on p. 14.

the subjective legal sense and must as such be qualified by the meaning-nucleus of law. If there is an obliteration of the modal boundaries of meaning between jural causality and causality in the original sense of physical movement, antinomy is unavoidable.

*Example 3*

A psychical analogy within the jural aspect is inseparable from the modal meaning of law. It is manifested, for instance, on the law-side, in the will of the law-former and, on the subject-side, in the jural will of the accountable legal subject who is subject to the legal norm. There is no possibility, however, of reducing this jural meaning of will to the psychical function of will in the sense of an emotional desire accompanied by the feeling that you are freely able to reach the desired goal.

This is clear from the following example. In the Netherlands, a statute comes into existence through the cooperation of the States General<sup>1</sup> and the Crown. Then a Bill is presented in the Second Chamber by Royal Proclamation. This Bill, assuming it has not been introduced by a member of the Chamber, having been drafted within one of the ministerial departments, is dealt with in the Cabinet, and in the meantime the advice of the Council of State is sought. During the deliberations of the Lower (First) Chamber, different members invoke their right to amend the Bill. Possibly contrary to the intention of the minister concerned and of other dissenting members of the Chamber, the Bill is then altered and amended. Finally, the Bill obtains approval, not because every individual member of the Chamber desires it in this form, but on the basis of a majority vote. If the Bill is of a highly technical nature, one can be certain that a large number of members of the Chamber who are not at home in this area, or who do not show any interest in it, are not likely to be familiar with its contents, although they vote for it, nonetheless. The Bill then goes to the Upper (Second) Chamber where it is passed. The last step occurs when the Crown gives its sanction to the Bill, whereby it is elevated to the status of law. Subsequently, the enactment is promulgated by publication in the Statute Book. This statute, in the form according to which law is created, is truly a declaration of the will of the legislature directed towards the formation of law (compare the High Court decision, November 12, 1900, W.7525 in which the statute is expressly mentioned: “the intention of the legislators expressed in the text”). Thus the preamble of each Dutch law states: “Whereas We have taken into consideration that ... be it known that We, having heard the Council of State, and in consultation with the States General, have thought fit and decreed, as we think fit and decree hereby ...”<sup>2</sup>

<sup>1</sup> *Editor's note:* i.e., Parliament.

<sup>2</sup> *Editor's note:* Compare the English text of the old article 81 of the Dutch Constitution (1972).

However, anyone should be able to see that this proclamation expressing the will of the law-giver is not identical with the factual psychical wishes and desires of the Queen and the members of the States General. It is a will in a normative, juristic sense, the content of which in due course obtains a more precise determination in the application of the statutory enactment. Nevertheless, the statute as a declaration of will that is constitutive of law is always attributed to the will of the legislator. Yet any attempt to explain the will of the law-giver as a will in a psychical sense necessarily entangles itself in antinomies. It then becomes necessary to speak of a psychical willing that is independent of the psychical, perceptual image and of the factual psychical desires and wishes of the persons involved, thus of willing that is in conflict with a truly psychical willing. On the other hand, one senses that the will of the law-giver, as a constant jural ordering, would be impossible if indeed it were fundamentally dependent upon subjective individual sensations, subjective desire, and representations of the persons involved in the task of preparing the law.

Consider also the following example: An ordinary person wants to purchase a life insurance policy. An insurance agent visits the person and explains the practical advantages of this or that policy. Finally, the person chooses one and receives an extensive printed policy full of clauses of which the insured understands little or nothing, if the time is taken to read them. In a juridical sense an agreement of will extends to the contents of the entire contract. But it cannot be maintained that the content of the juridical will is identical with the actual psychical content of the intentions of the contracting parties.

When the psychologistic theory of will in legal science all too obviously comes into conflict with the normative demands of law, it makes use of fictions in order to disguise the antinomies in which it has become entangled by reason of its elimination of the modal boundaries between a jural and a psychological concept of will.

Ernst Zitelmann, for instance, who is one of the best known adherents of this theory, introduced in his *Irrtum und Rechtsgeschäft* the concept of an unconscious psychological will in order to make the psychological concept of will useful for juristic purposes. In point of fact, it is clear that an unconscious psychological will is a pure fiction to which nothing corresponds on the psychical side of reality. For though the unconscious plays an important role in modern psychology, the psychological concept of the unconscious does not in any way correspond to the jural states of affairs which Zitelmann intended to accommodate within his concept of unconscious will.

Furthermore, the fiction has been an escape mechanism of long-standing in the science of law for glossing over the antinomies that have arisen because of the theoretical elimination of the boundaries between jural and

nonjural data. But a fiction used in this way is a scientific untruth and is therefore inadmissible in scientific thought.

There also exists a quite different use of fiction, namely, as an aid to the practical formation of law by means of which legal norms that originally had a more restricted area of application are applied to a different situation that is considered appropriate for similar regulation.

So Roman law has an entire category of *actiones ficticiae*, that is, legal actions allowed by the praetor, by means of which the legal protection of a particular legal provision, on the basis of the old *jus civile*, applying only to Roman citizens, was extended by way of analogy to other similar legal relationships which fell outside the *actio civilis*. Of course, there can be no objection to this practical employment of the fiction.

By contrast, it is impossible to maintain the theoretical fiction because it conflicts with the demands of scientific truth. In modern legal science an attempt has been made to defend it as a constructive aid to legal method. In contradistinction to legal science, legal method is not supposed to be bound to the states of affairs given in reality but may freely operate with artificial constructions which can be utilized as if they related to real states of affairs. Such constructions of legal method are supposed to introduce a greater simplification into juristic thought because they present a shorthand account of what is an extremely complicated state of affairs; that is to say, the theoretical fiction is defended by an appeal to the principle of the economy of thought which we have come across in an earlier context.

The concept of legal personality, for example, is viewed as being such a purely technical legal construction. It is understood as constituting an organized corporation or foundation as an independent legal subject. The reasoning behind it is this: legal personality is a pure fiction of legal method. In reality, the only persons who exist are natural ones, individual people with psychological wills. At the basis of this conception, as shall be demonstrated when we systematically consider the subject of legal personality, there lies a peculiarly positivistic and individualistic view of reality that leads to jural antinomies because it does not conceive the jural aspect of reality in its proper cosmic relationship to, and coherence with, the other aspects.

An example of this reasoning is as follows: Only individual human persons have a will that is truly psychical, and are accountable and responsible for their acts. A corporation or a foundation cannot will as such and cannot be made accountable and responsible. However, a nonjural concept of will, accountability, and responsibility is being employed here. Since this unjurally defined concept comes into conflict, of course, with the juridical states of affairs, an attempt is made to make it serviceable for jural use by means of a technical legal fiction. Here also fiction serves to camouflage antinomies that have their origin in a theoretical distortion of

the boundaries of meaning between the law-spheres. Such a use of fiction can never be justified by an appeal to the principle of economy of thought.

Rather, the true significance of the principle of economy of thought can only be appreciated when theoretical thought coincides with the requirements of scientific truth. We have done this by recognizing it as a deepening of the principle of sufficient reason. If this is not done, truth is deprived of its character as a supra-arbitrary law of thought. It is thereby made into a purely subjective indicator that consciously leads theoretical thought from the path of truth, and it becomes impossible for the theoretically inclined jurist to gain insight into the true states of affairs within the juridical field of investigation. As long as attempts are made, using technical fictions, to paper over the antinomies that emerge from the employment of concepts in the science of law that are unjustly defined, the critical, scientific conscience is stifled and it is impossible to arrive at a self-critical insight into this indefensible way of proceeding.