The relation of the individual and community from a legal philosophical perspective[1]

AN AGE OVERESTIMATING the individual is necessarily followed by one overestimating the community. This is also true of legal life and the philosophy of law.

Post-medieval legal philosophy, in its first period, is characterized by the modern humanistic doctrine of natural law as it was founded by Grotius. In reaction to this phase the second period emerged as the Historical School of Law and became the dominant trend in modern sociology.

Individualistic and Universalistic conceptions of Law

Theoretically seen, the individualistic doctrine of natural law is strongly influenced by the modern humanistic natural science-ideal. This ideal sets out to *control* reality by reducing complex phenomena to their simplest elements. Its aim is to analyze these elements with the aid of exact mathematical concepts in order to unveil the laws determining reality fully. The methods of mathematics and occasionally that of mathematical physics (Hobbes) serve as model in this regard. The modern doctrine of natural law similarly attempts to explain the organized communities of human society in terms of their elements, the *individuals*. It performs this jural construction on the basis of the social contract theory.

The Historical School and to some extent also the sociological doctrine of law are positioned against this *individualistic* and constructing approach in its advocacy of a *universalistic* view proceeding from the *totality* in order to understand its *parts*. This, however, is not done in a consistent way. The Historical School, for example, does not get beyond the *people* comprising the "totality of the national culture." From the individual folk nature of the latter, it asserts, the unique legal order, language, mores, art, etc. of that people flow as products of history.

With this the idea of an order of natural law itself, fitting all times and peoples, is rejected.

1 This article appeared in the "Algemeen Nederlands Tijdschrift voor Wijsbegeerte en Psychologie," Year 39, Number 1, October 1946, pp.5-11 – under the title: *De verhouding van individu en gemeenschap rechtswijsgeerig bezien* (The relation of the individual and community from a legal philosophical perspective). *Translator:* D.F.M. Strauss; *Editor:* Alan M. Cameron.

The struggle between these two main trends occupies a prominent place in the divergent evaluation of the Roman *ius gentium* (world law).

The Germanistic wing of the Historical School viewed the reception of the *ius gentium* in Germanic countries of the continent as a forging of the "Germanic conception of law." The latter was supposed to be permeated to a great degree by a "social spirit." It viewed all law as displaying in principle the same character.

Roman law, by contrast, breathes the spirit of Cain, that of an unbridled individualism, and proceeds from a sharp separation between public law and private law. It causes the individual and the state to stand irreconcilably over against each other. The same concern is expressed in the dominant sociological doctrine of law. This approach still uses the (now outdated) depiction of the "spirit of Roman law" as a "spirit of disciplined egoism" in the way that it was put forward dramatically by von Jhering.

On the other hand, from its outset, the doctrine of natural law of the 17th and 18th century viewed the Roman *ius gentium* as the *ratio scripta* and as the *residue* of the true natural law.

One can follow this struggle in the divergent assessments of the modern codifications of civil law which, as an effect of the Enlightenment, were introduced in Prussia, France, Austria and presently also in The Netherlands.

The currently all-powerful historicistic and sociological views of law claim to recognize in these codifications the continual influence of the individualistic spirit of Roman law and a desire for a radical transformation of the "social spirit" which is, according to this view, already in the process of emerging. The call for a *droit social* as substitute for the *droit individuel* has become universal. Various national-socialistic jurists have already spoken about a "farewell to the Civil Code."

Within the idea of the *droit social,* seen as a communal demand permeating legal life in its entirety, an overestimation of the community-idea manifests itself, similar to the fashion in which the idea of a *droit naturel* managed to push the pendulum to the other extreme of an overestimation of individual freedom in the 18th century. For legal philosophy and for legal life the struggle between these two trends is a matter of serious concern.

If one looks at the humanistic doctrine of natural law only as an aprioristic construction, designed in a rigid way, as a legal system to fit all people and times and deduced by applying a mathematical method, then one views it too one-sidedly according to its theoretical and legal philosophic pretensions. For in this sense both its foundation and its method are no longer defensible.

But the doctrine of natural law also had a prominent *practical* tendency – something modern criticisms often have not recognized. This practical tendency is even present in the work of an author such as Gro-

tius who had the intention of developing his doctrine of natural law fully independent of political issues, similar to the mathematician who constructs his figures entirely divorced from "matter."

Civil Law and the idea of the State

Essentially this has initiated the quest of pursuing the basic principles of *civil private law* and the *modern idea of the state*. However, both these ideals were lost again during the medieval period since it came into conflict with indigenous Germanic legal practices that were still primitive in many ways. It also clashed with the feudal system, a whole complex of royal rights, privileges, and a diversity of property relationships reflecting differences in social rank (old farmer serfs, landlord serfs, church serfs and so on), all of which still strongly reflected the stamp of an undifferentiated society.

On the other hand, when the Roman world law was seen as *ratio scripta* and as a positive expression of natural law, then this view was fully consistent with the classical Roman jurists, for these latter maintained a close connection between the *ius naturale* and the *ius gentium* – so intimately that it sometimes was identified incorrectly.

The *ius gentium* was the first realization of a truly *civil law* within the Roman world imperium. It fundamentally differs from the older primitive *ius civile*, i.e. the Roman folk law. The latter can at best be compared with the primitive Germanic folk laws, as they were described in the *leges barbarorum* during the Frankian period.

This kind of folk law still belongs to an *undifferentiated* condition of society – a phase in which all law still displays only one character because as yet society did not know differentiated spheres such as that of the church, the state, commerce and business firms, free associational organizations, and so on.

Undifferentiated spheres of life, such as that of the *familia*, neighborhood, guilds (in the sense of brotherhoods or fraternities), the communal life of the Roman people and the tribe, still encompassed human life totally, with respect to all spheres of life. These spheres take on all tasks that, at a deepened level of cultural development, are performed by independent differentiated societal collectivities. The undifferentiated sphere of power of these collectivities, often strongly rooted in a pagan religion of life, is *absolute* and *exclusive*. The entire legal status of a human being, as a consequence, is completely dependent upon membership in these primitive collectivities. Whoever finds himself outside this bond is *hostis*, *exlex*, i.e. without any rights or peace. The undifferentiated community absorbs the individual according to that person's entire legal status.

This is also valid with regard to the old Roman *familia* where the head, the *pater familias*, had an undifferentiated power over all members, rooted religiously in the exclusive power of the house and hearth gods. This power was an absolute and exclusive *dominium* simultane-

ously incorporating authority and the competence to dispose of property rights. This undifferentiated concept of property was not close to an individualistic spirit at all, as was suggested by von Jhering. Much rather, it is an expression of the totalitarian primitive conception of community.

Civil private law is totally different from primitive folk law. It is the product of a long developmental process, giving birth to a *differentiation* of society. As soon as the undifferentiated spheres of life are transcended, it becomes possible for the differentiated societal collectivities to manifest themselves. Then, according to their inner nature, no single one of them can any longer encompass the human being with respect to *all* spheres of life. Thus it becomes possible to acknowledge the *rights of the individual human being as such*, apart from all particular communal ties such as gender, race, nation, church orientation, social rank and status.

The human being *as such* now witnesses the allocation of an individual sphere of freedom that embodies the *private autonomy* of that person.

By virtue of its particular nature civil law does not accept a difference in principle between human beings on the basis of race, social status or rank – they all enjoy *civil legal freedom* and *equality*.

The classical Roman jurists understood this in terms of their idea of the *ius naturale*. This idea, because it is rooted in the intrinsic nature of civil law, brought to expression, in a pregnant way, the *constant basic principles* of civil law. In doing that, it sharply distinguishes itself from the Aristotelian idea of natural law which also comprises communal ties evincing inequality in position. These classical Roman jurists were justified in positing this essentially *civil legal ius naturale* as the basis of the Roman *ius gentium*. We have seen that they often even presented the two as being identical.

However, this identification is not valid, since the *ius gentium* continued to accept the institute of slavery and, therefore, in this respects deviated from the *ius naturale*. Furthermore, it only gave a completely *historically* determined *positive* form to the former.

The modern humanistic doctrine of natural law advocated this notion of the *ius naturale* to an increasing degree. During the Enlightenment it crystallized in the doctrine of *innate and inalienable human rights*.

Within modern differentiated legal life, civil law constitutes only one of the distinct spheres of private law. As such it is closely connected with the state.

The multiple spheres of private law are fully determined according to the differentiated structural principles of human society. For example, the sphere of internal ecclesiastical law, in its internal jural character and original sphere of competence, is delimited by the peculiar structural principle of the church-institute as institutional community of

Christian believers within the organized service of the Word and the Sacraments. Ecclesiastical law unmistakenly evinces a private communal character and its own irreducible nature. It can never be delineated merely on the basis of its juridical genetic form (ecclesiastical rules of procedure), since within this genetic form ecclesiastical law may be interlaced with legal spheres of a different nature.

Similarly, there also exists the internal legal sphere of a modern factory, which, according to its internal character, is delimited by the structural principle of the firm as one that is qualified by the economic entrepreneurial organization of capital and labor.

This piece of private law, originating from the juridical form of the rules of procedure of the factory, also bears a specific communal character, though it lacks the typical institutional feature of ecclesiastical law since it completely rests on a voluntary basis.[1]

The same applies to the domain of law related to the sphere of interaction in trade and commerce. This domain is also economically qualified though it does not share a communal character. It exhibits a coordinational nature since individuals participating in this legal relationship are coordinated with each other and are not bound together into a durable unity.

We may consider in this regard the so-called "standard clauses" regularly incorporated in separate agreements reached within the different branches of trade and business. In spite of the fact that, as "generally accepted stipulations," they are acknowledged by civil law, these "standard clauses" have an internal nature different from civil law.

Each one of the different societal institutions has its own internal law (consider a social club, a philanthropic association, a trade organization, etc., etc.). All of them stand in service of, and are qualified by, the particular qualifying function of the societal spheres to which they belong. In that way they have a specifically organized communal character since the members of a corporation are organized into a unity.

Civil private law is not a specific law in this sense. In other words, it is not fit to serve, and qualified by, a typical internal guiding function which itself lies outside the jural aspect. It is a ius commune, a common law, as it is called by the British. By itself it has no other destination than to bring to expression the requirements of the ius naturale, of natu-

1 *Translator's note:* Dooyeweerd distinguishes between *institutional* and *voluntary* societal collectivities. Communities "destined to encompass their members to an intensive degree, continuously or at least for a considerable part of their life, and as such in a way independent of their will," are called *institutional* (*A New Critique of Theoretical Thought*, 1957, Vol.III:187).

ral justice in the classical sense of the word,[1] as we have explained above.

According to its internal nature it is built upon the basis of individual human rights of freedom and equality. This character prevents it from having a communal nature. Therefore it has to be distinguished from the domain of what is known as social labor rights – a domain with its own unique constitution and destination.

The attempt to transform it into a communal law, according to the model of the modern idea of the droit social, inevitably cancels its civil legal nature. For the intrinsic nature of the different legal spheres is not something made by human beings, since, to every person forming law, it is a given, based upon the order and structure of reality.

Civil private law, in its nature, constitutes the juridical asylum of the human personality, the stronghold of individual freedom and as such it is destined to provide a beneficial counter balance against the excessive pressure of communal demands within legal life.

In our modern era, due to the reign of historicism and a naturalistic sociologism, this is hardly understood any longer. Both these spiritual trends are united in their historicistic view of human society, according to which everything is caught up in continual development and in a flowing transition. They do not have an eye for the *constant structural principles* that determine the nature of the different spheres of life and that themselves make all historical development possible in the first place.

The Historical School, in a dangerous fashion, starts to link civil law to the individual character and spirit of a people (*Volksgeist*) and in doing so it attempts to eliminate fundamental difference between civil law and primitive folk law. The attempt is accompanied by a serious attack on the classical Roman and the modern humanistic doctrine of the *ius naturale*. All forms of law are seen as the historical product of the peculiar disposition of a people (*volk*) which, therefore, in principle is *communal* law, bearing a typical "folk" character.

> The Romanistic wing did not pursue the consequences entailed in this approach. It continued to adore the Roman world law in its classical phase of development as "ratio scripta," although it rejected the doctrine of the *ius naturale*.

But in the Germanistic wing the basic thesis of the Historical School initiated an assault against the "individualistic" ius gentium of the Romans. And modern sociology, disseminated from France, launched an attack against the "abstract metaphysics" of the ideas of freedom and equality.

1 *Editorial note* (AC): "Natural justice" in this context has to be distinguished from the same expression when it is applied in administrative law.

It is remarkable that the attack against the foundations of civil law is always accompanied by an assault in principle on the *modern idea of the state*, which rests upon a sharp distinction of public and private law and on the principle of the *salus publica* in its clear separation from all group interest.

Leon Duguit, the French scholar in constitutional law, who required a "transformation du droit civil"[1] according to the spirit of a droit social, simultaneously proclaimed the statement l'état est mort.[2] But already in the case of Count St. Simon (with Auguste Comte the founder of positivistic sociology), we can see to what an extent the battle against the "metaphysical" doctrine of human rights is accompanied by an attack on the state, which, as the instrument of class domination, is destined to "die away."

We need not be surprised by this intimate connection in the fight against civil law and the state, since the internal law of the state, as ius publicum, shares with civil private law the absence of a qualification outside the jural guiding function. The state is, just as the church, an institutional community, though, through its structural principle, the state radically differs from the church. According to this structural principle the state is characterized as a public legal community of government and subjects on the basis of a monopolistic territorial organization of the power of the sword. The internal "destinational" function of the state is given in the creation of a public legal community, which stands in an indissoluble structural coherence with a typical historical foundation in a monopolistic organization of the power of the sword. The salus publica as fundamental principle of the public institutional law of the state essentially has to be conceived of as an idea of public law.

This presupposes in the first place that the state cannot assume an absolute sovereignty over the other societal spheres that differ in principle from the state.

Every form of legal power, that of the state also, is structurally delimited by the inner nature of the sphere of life within which it is exercised. For law finds its symbol in the scales of Themis. It requires, according to its nature, delimitation and counter-balance of every competence by another one.

As soon as one ascribes an absolute sovereignty to the state, one has abandoned the boundaries of law and collapses into state absolutism, based upon a deification of the state. Then also the idea of the salus publica degenerates into a lever for an unhampered state absolutism, echoing the frightening sound of the Leviathan, the "Behemoth."

1 A "transformation of civil law."

2 "The state is dead."

The inner delimitation of the legal power of the state is given by the internal structural principle of this societal institution. The *ius publicum*, constitutive of the internal law of the state as public legal institution, does not permit service to group interests external to the jural qualifying function of the state.

Therefore, the nature of the state is irreconcilable with the allocation of *privileges* to specific persons or groups. Similarly, no individual or group may withdraw from the public legal power of the government within the *sphere of life of the state*.

The State as Public Legal Institution

For that reason the state had to commence its entry into the world scene by starting to do away with the undifferentiated spheres of authority of private lords and societal collectivities which withdrew their subjects from the legal power of the state.

In order to achieve this aim the *public legal principle* of *freedom* and *equality* has to be pursued. It also forms the basis upon which *civil legal* private freedom and equality are to be attained. As long as it is possible for private lords and for private societal collectivities, to exercise an exclusive and undifferentiated power over their subjects, there is no room for a truly *ius publicum* and for a truly *civil ius privatum*.

It is only the *state*, on the basis of its public legal power, that can open up to the individual person a *civil legal* sphere of freedom, providing that person with a guarantee against the overexertion of power by specific private communities and also against an overexertion of the public legal power itself, as long as the public office bearers keep alive an awareness of the inner limits of their competence.

The state, in view of the inner nature of the *ius publicum*, does not have the competence to bind the exercise of civil private rights to a specific social-economic destination, simply because the *ius publicum* intrinsically lacks any specific *economic qualification*.

It lacks this competence also because civil law leaves it to private autonomy, in the exercise of civil private rights, to determine its own specific destination. Therefore, the modern sociological doctrine concerning legal abuse in civil private law, employing as a criterion the use of a subjective right contradicting the social-economic destination for which it was given (compare article 1 of the so-called Civil Codes of the Soviet Republics), cannot be reconciled with the foundations of civil law. It is a cautionary example of the undermining influence that the idea of *droit social*, in its overextension, exerts on civil private law.