
Historical perspectives on Christianity and the future of our societies: philosophical considerations

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Opsomming

Historiese perspektiewe op die toekoms van ons samelewings: wysgerige oorwegings

Die organisering van 'n Konferensie oor die Christendom en die Toekoms van ons samelewings gesamentlik ondersteun deur die "Association of Reformational Philosophy" (ARP) en "The Evangelical Theological Faculty" (ETF – Leuven), nooi ons sekerlik uit om aandag aan teologiese en filosofiese oorwegings te skenk. Tog was dit wenslik om allereers ons ontleding te rig op 'n verdieping van ons wysgerige insig in die geskape werklikheid wat dan vrugbaar gemaak kan word vir ons besinning oor die menslike samelewing. Hierdie artikel is grootliks gerig op die verskil tussen ongedifferensieerde en gedifferensieerde samelewings omdat vanuit hierdie perspektief 'n betekenisvolle besinning oor die toekoms van ons samelewings ontwikkel kan word. So 'n benadering vereis dat ons rekenskap van die verlede sal gee deur die strukturele kondisies wat onderliggend aan beide die verlede en die toekoms is uit te lig. Deur hierdie weg te volg sal dit nodig wees om erkenning te verleen sowel aan modale as aan struktuur-tipiese beginsels wat samelewingsontwikkeling

in al die dimensies daarvan begelei.¹ Daar sal geargumenteer word dat hierdie beginsels onties van aard is en gevolglik duidelik onderskei moet word van hul wanvoorstelling in tradisionele natuureg-teorieë sowel as die meer resente ontwortelende na-effekte van die historisme en die juridiese positivisme. Op sy beurt sal hierdie benadering rekenskap moet gee van die komplekse aard van (modale en tipiese) beginsels en tegelyk 'n sensitiwiteit moet openbaar ten opsigte van die verband tussen 'n beginsel en die toepassing daarvan. 'n Oorsigtelike waardering van hierdie insigte sal verder 'n bydrae lewer tot 'n verdiepte wysgerige verstaan van die omvattende aard van die skepping wat aan moderne gedifferensieerde samelewings ten grondslag lê. Deur hierdie oorwegings in verband te bring met die Christendom en die differensiasie van samelewings sal die belang van die skeppingsbeginsel van soewereiniteit-in-eie-kring ook vir die gedifferensieerde samelewings van die toekoms beklemtoon word.

Abstract

Organizing a conference on “Christianity and the Future of our Societies” jointly sponsored by “The Association of Reformational Philosophy” (ARP) and “The Evangelical Theological Faculty” (ETF – Leuven), certainly invites philosophical and theological concerns in relation to the theme of this conference regarding the future of our societies. Yet our analysis aims at contributing “to the deepening of philosophical insight in created reality” made “fruitful for academic studies and for society”. The scope of this paper is largely directed at the difference between undifferentiated societies and differentiated societies because only from this perspective does it become meaningful to contemplate the future of our societies. Such an approach requires that our account of the past contemplates the structural conditions underlying both the past and the future of our societies. Embarking on this path will therefore call for an acknowledgement of the modal and structural (typical) principles guiding societal development in all its dimensions.² It will be argued that these principles are ontic in nature and therefore should be distinguished from

1 Die aanname is dat die leser van hierdie artikel vertrou is met die sistematiese onderskedinge van die reformatoriese filosofie.

2 I assume a basic acquaintance with the systematic distinctions of reformational philosophy.

their misrepresentation in traditional theories of natural law as well as in the more recent uprooting effects of historicism and legal positivism. This argument, in turn, will have to give an account of the complex nature of (modal and typical) principles with a view to the connection between a principle and its application. A brief assessment will be given of the contribution of these insights for a deepened philosophical understanding of the encompassing nature of creation making possible modern differentiated human societies. Relating these considerations to the influence of Christianity on the differentiation of societies will underscore the importance of the creational principle of sphere-sovereignty for differentiated societies and their future.

Keywords:

form motive; Greek *Polis*; civil society; undifferentiated societies; differentiated societies; *societas perfecta*; individualism; universalism; *pacta sunt servanda*; sphere-sovereignty; civil private law; natural law; legal positivism; historicism; ontic normativity

My initial plan was to address the topic: “Philosophy and Theology: Contemplating the future of our societies.” However, it soon became clear to me that we may fall in the trap of a one-sided understanding if we do not commence by reflecting on those historical considerations in which the *past*, *present* and *future* are intertwined. The aim of our investigation therefore was altered in order to highlight the trans-historical conditions underlying these time periods.

1. The dialectical legacy of Greek thought

Greek culture provides the starting-point for both philosophy and theology. Philosophical reflection on being is already present in the philosophy of Parmenides. Since its inception Greek philosophy was in the grip of the ultimate basic motive (ground motive) of matter and form. Initially the matter motive assumed the primacy but since Anaxagoras the form-pole obtained the primacy within the dialectic motive of matter and form. In the thought of Socrates, Plato and Aristotle the primacy of the form motive was continued.

Eventually it was Plato who believed that only philosophers can approach the divine (the race of Gods) while Aristotle saw philosophy as the handmaiden serving the queen of the sciences (theology – the metaphysical knowledge of God). Since the dialectic entailed in this dualism between matter and form is *radical* and *central*, the only option left was to give primacy to one of the two opposing motives.³

Because matter and form are two original (but *opposing*) principles of origin, the dualism between these two poles implies that they presuppose and threaten each other at the same time.

The view that matter is *formless* introduced a dialectical understanding of creation. Both Augustine and Thomas Aquinas confessed that primary matter was created, but not *without form*. They simply do not speak in creational terms about (formless) matter. Ter Horst captures this problem as follows: “But the primary matter is now precisely formless. Therefore in thought there cannot be an idea of it and God cannot have an idea of it according to which he could have created it.”⁴ According to Ter Horst the solution to this problem is found by Thomas Aquinas in the just-mentioned view: “He states that although matter is created, it is not created without form.”⁵

2. The form motive and the Greek Polis

Within Greek culture the form motive guided the way in which Plato and Aristotle understood the rational-moral nature of humankind and it provided a basis for their view of human society. The views of both Plato and Aristotle are intimately related to the *polis* (the city-state) of Greece. When one or more than one communities, such as villages or cities, are united, they constitute a communal city-state designated as “*Synoikismos*” in a public legal sense. *Synoikismen* differ insofar as they are founded on participating communities (villages and cities) or when communities are incorporated in

3 These brief remarks appeal to the encompassing and penetrating work of Dooyeweerd on the dialectical development of Greek philosophy. (See Dooyeweerd, 2012 and Strauss, 2013.)

4 “Maar de eerste stof is nu juist vormloos. Dus kan er denklijk van haar geen idee zijn, en kan God geen idee van haar hebben waarnaar hij haar zou hebben geschapen” (Ter Horst, 2008:73).

5 “Hij stelt dat de stof weliswaar is geschapen, niet echter zonder een vorm” (Ter Horst, 2008:74).

an already existing city.⁶ Aristotle advanced a teleological understanding of the state which precedes the family and individual as mere parts: “Therefore the state, according to its nature, is prior to the family and the individual, since the whole must precede the part.”⁷ According to Aristotle (city-)state (*polis*) and *civil society* (*koinonia politikē*) are synonymous. “The state or political community, which embraces all the rest, aims at good in a greater sense than any other, and at the highest good” (*Politica*, 1252a3-5). From Aristotle to Kant, the idea of a *civil society* was identified with the state.

3. Individualistic and universalistic approaches

It is noteworthy that the history of reflecting on human society toggled between the one-sided extremes of an individualistic (atomistic) and universalistic (holistic) view. It commenced with Calicles, an early 5th century thinker, who advances the view that nature supports the right of the strongest. Therefore he admires the tyrant as someone capable to liberate himself from positive laws and who imposes his power as law upon the weak.⁸

Whereas one can see Calicles as an *individualistic* thinker, Greek thought eventually was dominated by a *universalistic* orientation. Individualism (atomism) may be characterized as a view aiming at an explanation of society and societal institutions purely in terms of the interaction between individuals. Universalism (holism), by contrast, postulates some or other all-encompassing societal whole or totality.

4. Undifferentiated societies

Of course the existence of undifferentiated societies predates the Greek city-state (*polis*). *Undifferentiated societies* are sometimes designated as *traditional societies*, with the *extended family* (*Grossfamilie*) as the smallest

6 See Busolt, 1920:156. This work contains an extensive and detailed exposition of the historical roots and societal shapes in which the *polis* took on its peculiar nature(see Busolt, 1920:153-630).

7 [καὶ πρότων δὲ τῆ φύσει πόλις ἢ οἰκία καὶ ἕκαστο ἡμῶν ἐστιν. τὸ ἄρ πρότερον ἀναγκαῖον εἶναι τὸ μέρος – Aristotle, *Politica*, 1253 a 19-20.]

8 His approach anticipates views on ‘superman’ later on formulated by Nietzsche in the 19th century. Similar to the Leviathan of Hobbes the tyrant alone, according to Calicles, is entitled to rights, while the citizens are all deprived of any rights and delivered to the arbitrariness of the tyrant. This may be seen as a form of “aristocratic nominalism” as Vollenhoven aptly remarks (Vollenhoven, 1933:83).

example of such an *undifferentiated society*. The latter is united on the basis of an *undifferentiated organizational form* (see Kammler, 1966:17-18) and their *social ordering* displays relations of super- and subordination (Kammler, 1966:30). The interwoven family structure assumes the undifferentiated leading role both within the *Grossfamilie* and within the (larger) *sib*. Although this leading role is founded on a specific historical form of power organization, it is only within the stronger political organization of the *tribe* that the interwoven political structures function as the guiding structure (see the extensive analysis of Dooyeweerd, 1997-III:346-376).

5. Medieval views

It should be noted that the theoretical views of the medieval era as well as the diverse societal practices of this period reflect a typical universalistic orientation. The city of God in Augustine's thought was life-encompassing and the same applies to the view of Thomas Aquinas which accommodated the Greek dualism of matter and form to the new medieval basic motive of nature and grace. Thomas Aquinas followed Aristotle by viewing the state (both the *polis* and the *Holy Roman Empire*) as an all-encompassing, self-sufficient community (*societas perfecta*). This encompassing community forms the foundation for the church as encompassing superstructure (the supernatural institute of grace). While the state carries humans to goodness as the highest natural aim in life, the church has to elevate them to *eternal bliss* – their super-temporal perfection.⁹

This view of Thomas strongly influenced the official position of the Roman Catholic church, articulated in the papal encyclical *Quadragesimo anno* (15 May 1931) where we read: "Surely the church does not only have the task to bring the human person merely to a transient and deficient happiness, for it must carry a person to eternal bliss" (cf. Schnatz, 1973:403).

Within the medieval era various kinds of undifferentiated societies are found, such as what is known as feudalism, the guild system and manors. Particularly in the feudal system portions of governmental authority were still distributed over cities, guilds and market communities. Also Troeltsch highlights the fact that a large number of *authorities* did not supersede the power of the spiritual world empire of the Church, which prompts him to note that medieval society does "not know a state as a unified, sovereign will-organization of the whole, where it is irrelevant who exercises this sovereignty" (Troeltsch, 1925:302).

⁹ "ad finem beatitudinis aeterna" (Aquinas, *Summa Theologica*, I, II, 91, 4).

While lasting up to the French Revolution undifferentiated societal entities continued to embrace diverse communities. Both *guilds* and medieval *towns* were dependent upon the privileges and customs granted to them by the *feudal lords*. In reality they therefore embraced much more than what is demarcated by different societal spheres with their own *inner laws*.

6. Moving beyond undifferentiated social practices

The *integration* of legal interests presupposes the *differentiation* of society into a multiplicity of political and non-political societal entities. Before the later eleventh and early twelfth centuries multiple legal rules and procedures persisted within the distinct legal orders of the West. Berman notes that these legal orders were "largely *undifferentiated* from social custom and from political and religious institutions". This was the result of the fact that there was no attempt to integrate the prevailing laws and legal institutions into a unified legal order. At the time not much of the law was captured in writing and there was not yet a professional judiciary (i.e., no professional class of lawyers as well as an absence of professional legal literature). As an effect no goal-directed attempt was made to systematize law because it had not yet been 'disembedded' from the whole social matrix of which it was a part. There was no independent, integrated, developing body of legal principles and procedures clearly differentiated from other processes of social organization and consciously articulated by a corps of persons specially trained for that task (Berman, 1983:50).

With the parting of ways by church and state during the later middle ages a process of societal differentiation commenced, soon followed up by an ongoing branching off of diverse societal entities. During the industrial revolution the nuclear family and the business enterprise differentiated, accompanied by a further proliferation of non-political societal entities. The tradition of identifying civil society with the state changed when Hegel started to distinguish between *state* and *civil society*.

7. Bodin: Sovereignty – assuming an encompassing authority

Those views in which an encompassing authority is assigned to the power of the state discerned in this process of societal differentiation a threat to the state. This prompted Bodin to introduce the term *sovereignty* in order to capture the authority of a state. Unfortunately he still adhered to

the traditional (universalistic) view that the state embraces society in its totality. Bodin explicitly accounts for the relationship between the family, corporations and colleges on the one hand and to the state on the other as that between the *whole* (the state) and its *parts* (cf. Bodin, 1981 – Book III (Chapter 7). Bodin discerned in the emergence of original non-political juridical spheres of competence a threat to the sovereignty of the state. Yet he opposed Machiavelli insofar as he accepted that a state-government is bound both to natural law and divine law. He also accepted the classical principle of natural law, namely *pacta sunt servanda* (contracts ought to be respected and kept).¹⁰ Unfortunately, Bodin still believed that the state has an absolute, unlimited and original competence to the formation of law within its territory. According to him the sovereign authority and absolute power of the government follows from its ability to make laws binding subjects without their consent (Bodin, 1981:222).¹¹

The irony entailed in his view, however, is that his theory of sovereignty, which aimed at establishing an absolute monarchical power by means of a monopolization of the sword power of the government (with its exclusive competence to form positive law), is that such an integration of governmental authority inevitably forms part of the differentiation of society. Bodin did not realize that a differentiation of society contradicts an exclusive competence to the formation of law, because differentiation gives rise to societal collectivities distinct from the state with their own internal spheres of law.

¹⁰ In passing we may note that this maxim lacks a proper understanding of the historical foundation of jural relations within society. Dooyeweerd remarks that “[L]egal principles themselves exhibit a flexible meaning that is connected to their historical foundation and the gradual meaning disclosure of the jural aspect of experience. The maxim of natural law, *pacta sunt servanda*, (agreements must be complied with), does not have any juridical meaning apart from a more precise specification, which necessarily relativizes its validity. In fact, the absolutization of this rule of natural law would exclude the possibility of a legal order. After all, one can also agree committing theft, murder, disturb the public order, and so on. As soon as the stipulation is added that agreements ought to be legal and ought to have a permissible content, a condition is introduced that may assume a different meaning in different times, in accordance with the historical-cultural level of a society” (Dooyeweerd, 2016:259-260).

¹¹ His understanding of sovereign power as “*summa ... legibusque soluta potestas*” reminds us of the view of Occam (1290-1350) regarding the supposed absolute, despotic arbitrariness of God (*postestas Dei absoluta*). Mayer-Tasch characterizes this position of Bodin as a choice for the “classical formula of juridical-political absolutism” (Bodin, 1981:35).

Therefore the rise of the modern (idea of the) state crucially depends upon differentiation, for apart from the legal interests presented by the peculiar nature of non-political societal entities, the state would not be able to establish a public legal order.

8. The mutuality of differentiation and integration

The persistence of each differentiated societal entity requires that it at once also *integrates* its activities while highlighting the interdependence of *social differentiation* and *social integration*. This mutual coherence presupposes creational norming conditions. In its original biotic sense, growth is characterized by differentiation and integration. Within cosmic-later aspects analogies of differentiation and integration are found, such as in the just-mentioned interdependence of *social differentiation* and *social integration*.

Although the sociologist Münch adheres to the universalistic (holistic) implications of sociological *system theory* (with its emphasis on systems and subsystems, i.e., *wholes and parts*), he also explains that “[D]ifferentiation means the growing autonomy of subsystems of interaction which have their own rules” (Münch, 1990:443). On the previous page he mentions that Max Weber holds that the rationalization of modern society resulted in spheres of society “that are guided to an increasing extent by their own inner laws”.

9. The emergence of sphere-sovereignty

Exploring seminal ideas of Johannes Althusius (see Althusius, 1603), the legacy of the *Anti-revolutionary Party* in the Netherlands the views of Groen van Prinsterer inspired Abraham Kuyper in the 19th century to employ the phrase *sphere-sovereignty*.

Kuyper erected the *Free University* of Amsterdam in 1880 with an *Inaugural Address on Sphere Sovereignty*. Already in 1874 he employed the phrase *sphere-sovereignty*.¹² His plea was that an academic institution (such as

¹² In passing we may note that Kuyper, in spite of his adherence to the idea of sphere sovereignty, at the same time was still influenced by an organic view of human society, revealing ideas advanced in the romantic movement and thought-schemes going back to the thought of Aristotle. This explains why he designated the state as an *Ethical Organism* (*Zedelijke Organisme*) and why he advocated an organic idea of the right to vote, which he reserved for the (male) head of households, similar to what Rawls holds in his *Theory of Justice* (see Rawls, 1999:111).

the Free University), owing to its sphere sovereignty, ought to be free from interference both by the Church and the State. He influenced the Dutch legal scholar, Herman Dooyeweerd, who further explored the implications of the principle of sphere sovereignty in a non-reductionist ontology (including his theory of modal aspects) and who in particular made it fruitful in his analysis of the structure of human society.

10. The process of societal differentiation

The expression *undifferentiated societies* anticipates the eventual emergence of *differentiated societies*. The first striking difference between these two kinds of societies is that whereas undifferentiated societies on the whole are organized into one societal totality, differentiated societies witness the rise of distinct societal entities, each having its own unique *form of organization*. For example, the administrative practices of a state, a business enterprise, a university, or an ecclesiastical denomination are different. These differences flow from the distinct guiding functions of each one of these societal entities. Within differentiated societies the multiplicity of societal entities are identifiable in terms of their *characteristic qualifying or guiding function* – albeit it *economic* (the firm), *jural* (the state) or *certitudinal* (a church denomination).

As briefly mentioned earlier, there are no identifiable *qualifying functions* present within undifferentiated societies because one of the intertwined *societal entities* assumes the leading role. Since one of the interlaced societal entities fulfils the leading role, such an undifferentiated society in its totality will act in *different societal capacities*. As a whole it will act as an *economic entity* which is equivalent to what we discern within a differentiated society as a business firm. In a similar way the whole of society may act as a *political unit* – foreshadowing what within differentiated societies will eventually emerge as a *state*. Because undifferentiated societies share in an undifferentiated organizational form, the possibility of any of the above-mentioned differentiated qualifying functions is absent. The variety of social forms of life which eventually surface in the course of a gradual process of cultural-historical differentiation and disclosure, are bound together in an undifferentiated manner within such an undifferentiated society. From this angle we can state that an undifferentiated society does not merely exhibit an economic aspect just because it acts as a whole as something which is recognized on a differentiated cultural level as an economically qualified business enterprise (involved in hunting-, agricultural activities or

cattle farming). Surely this entails that an undifferentiated society does not merely exhibit a juridical aspect, for as a whole it acts like a state within a differentiated society. Likewise an undifferentiated society as a whole acts in a cultic-religious manner, anticipating a collective faith-community.

11. The principle of sphere-sovereignty is unknown to Greek culture

Greek culture does not know the biblically informed principle of sphere-sovereignty. The *polis* (city-state) operates as a totality embracing all of society as its integral parts. Dooyeweerd points out that the *polis*, as the bearer of the cultural religion of form, measure and harmony, obtained a central position in Plato's thought. By applying his theory to the organization of the *polis* this theory receives its most far-reaching application to all areas of life.

For, as the vehicle of the culture religion, the *polis* is simultaneously the earthly vehicle of the form principle, which governs this religion. *Paideia*, in the sense of the forming of the free Greek into a citizen, meant for the popular Greek mind of classical times, and for Plato as well, the cultural formation of a person in all areas of life. Indeed, according to this view, the *polis* is the all-encompassing sphere of human society, which lays claim to all terrains of human life. The notion that each distinct component of society possesses a sovereignty in its own sphere that is rooted in its internal nature and created structure, a view that arose only from the ground-motive of the Christian religion, is completely foreign to the world of classical antiquity (Dooyeweerd, 2012:164-165).

12. The rise of civil private law

The subsequent development of Stoic natural law operates with an idea of the natural freedom and equality of all people. Yet the original Roman *ius civile* was undifferentiated and membership of the Roman community was required for participation in this legal sphere.

Those who were not belonging to this exclusive tribal law had no rights (they were *exlex*, *hostis*). The Roman power motive, permeating all of Roman culture led to a separation of the power of the *gentes* (with their ancestral cults) from the power sphere of the Roman tribe (the *civitas*). With the rise of the Roman republic, the power of the *gentes* was broken and transposed to the smaller Roman family community (*familia*). This *familia*, which still displayed an undifferentiated character, was guided by a head

(*pater familias*) who possessed absolute power, including even the power of life and death over members of the *familia*.

Without cancelling this exclusive and totalitarian legal sphere of the *pater familias* during the gradual expansion of the Roman Empire, there emerged a need to make *legal provision* for all people within the Roman Empire, including those who were not Roman citizens. This development gave birth to the Roman *ius gentium* which, as a kind of private international law, appreciated every person (slaves excluded) as a *legal subject*. The classical Roman jurists connected this view to the Stoic natural law (*ius naturale*), according to which all people are naturally free and equal. In this way, as complement of the public law of the state, an inter-individual legal domain emerged, in which every free person can function as a legal subject, irrespective of what collective or communal links such a person may have. The development of the Roman *ius gentium* actually provides the historical starting point of today's civil private law.

We noted that during the medieval era the state as *societas perfecta* embraced the natural life of its members, in subordination to the church as supra-natural institute of grace. But with the rise of the modern state societal differentiation gave shape to distinct legal spheres – in addition to the domain of civil private law just mentioned.

Since civil private law observes coordinated legal relationships between individuals while abstracting from the non-jural qualification of the societal context in which these legal relationships appear, civil law ought to be seen as the reverse side of both public law and non-civil private law.

The link with the state is crucial because civil private law also has a jural qualification and needs the state to handle civil cases through an impartial civil jurisprudence. Within civil law, the juridical value of the human personality is protected regardless of the socially differentiated ties an individual may have (related to differences in social rank, language, race, religion, or economic position). In these societal forms of life a person functions as member of a larger whole. In the UK tradition, this sphere of individual freedom and the principles of justice protecting it are found within the *common law*.

13. The state as a *res publica*

As a public legal institution the state has the task to protect the interests of the public (the *res publica*). This reveals the public interest as a *typical principle* in a regulative sense of the word. The regulative modal legal principles receive a typical specification in the idea of the public legal interest.

The specific content of the principle of the *salus publica* (public good) derives its meaning from the sphere-sovereignty of the state. Those principles pertaining to the internal structural nature of a societal bond are also designated as *material* principles. Acknowledging material principles gives recognition to the sphere-sovereign, entity-structural nature of the societal life form concerned, while at the same time differentiating itself from *formal* principles that cut across the typical principles of different life forms (or: spheres of law).

Those structural principles guiding the functioning of the state therefore ought to be seen as the universal, relatively constant starting points that can only be made valid by competent organs within the material sphere of competence of the state as public legal institution.

The juridical unity binding together government and citizen within the state abstracts from ethnic differences, racial differences, religious differences, language differences, differences in economic position and social rank, family differences and differences in dispositions or intelligence.¹³

14. The legal interests of non-political societal entities

However, the public legal integration achieved by the government ought not to be appreciated in a universalistic sense, as if it amounts to levelling or negating all the mentioned differences. On the contrary, it belongs to the nature of the state that it creates a juridical unity, leaving the diversity intact. The outcome is that all people in the territory of the state, by means of this juridical unitary organization, receive a function within the state as collectivity.

The state therefore disregards non-political ties in order to care for the legal interests entailed by them!

¹³ In his *Philosophie des Rechts* (1820) Hegel characterizes civil society (bürgerliche Gesellschaft) in similar terms, for in the latter a human being counts "weil er Mensch ist, nicht weil er Jude, Katholik, Protestant, Deutscher, Italiener usf. ist" (§ 209; see § 190). ("because such a person is a human being, not because this person is a Jew, Catholic, Protestant, German, Italian etc.")

We have to note that all collective and communal relationships are strictly correlated with coordinational relationships. The implication of this insight is that the full meaning of being human can never be exhausted by being a citizen within the state.

The internal public law of the state (such as constitutional law, criminal law, criminal procedural law, administrative law and whatever public jural interests there may be) is guided by the typical principle of the *public interest*. It concerns the *res publica* or public law in a broad sense, also embracing international public law.

15. Avoiding natural law, legal positivism and historicism

However, the inherent normativity of human life within a differentiated society should avoid the extremes of natural law and legal positivism (and historicism). From the history of legal theory it appears that there are two options available: either one claims universal validity for normative principles *per se*, or one subscribes to the view that there are no universal or constant starting points for human action since all positive decisions by human beings are variable. Traditional theories of natural law chose the first option, while legal positivism (and historicism) opted for the second.

Legal positivism received its most powerful ally in modern (Post-Enlightenment) historicism. In 1815 Von Savigny wrote, in the first Volume of the newly established *Journal for Historical Legal Science (Zeitschrift für geschichtliche Rechtswissenschaft)*, that law is a purely historical phenomenon and that next to or above positive law, there is no immutable and eternal legal system of natural law (see Von Savigny, 1948:14 ff.).

16. Ontic normativity

In order to transcend the mutual exclusivity of these two positions, an acknowledgement of ontic normativity is required. These ontic principles lie at the basis of all human shaping and construction. Normative contraries suggest that what we know as analytical, social, economic and jural functioning is dependent upon universal, constant starting points (principles). Even though we may disagree about what is entailed in the meaning of *analysis*, of *sociation*, of *economizing* or of pursuing *justice*, the reality of the contraries like logical – illogical, polite – impolite, frugal – wasteful, legal – illegal affirm the inherent normativity of these human capacities.

This understanding of principles transcends the subjectivistic inclination of modern philosophy insofar as it accepts the existence of normative principles in a truly ontic-transcendental sense. This perspective opposes both the rationalistic position of natural law and the irrationalistic stance shared by different trends of legal positivism.

Once the implicit assumption of human autonomy is questioned, it becomes clear that our human experience of legal relationships and our human sense of justice are not the product of individual or collective (rational) construction, since whatever we can observe within the domain of legal relationships is founded in and made possible by the normative structure of the jural aspect of reality. Proceeding in a transcendental-empirical way, entails an investigation into what makes possible every positive form of our legal experience.

17. Giving shape to constant principles

Natural law saw something of the underlying (universal, constant) structure of our legal experience, but it distorted its meaning by assuming that those underlying principles already have been made valid (enforced) for all times and all places. Yet no principle in this fundamental ontic sense is valid *per se*. Every principle requires human intervention in order to be made valid, i.e. no (pre-positive) ontic principle holds by and of itself. Only human beings are able to ‘enforce’ them (as Derrida correctly emphasizes), and only human beings can give a positive form or shape to them. The activity of giving form to underlying principles is sometimes designated as acts of positivizing, and the result of such acts is accordingly known as positivizations. Habermas explicitly uses this term, for example when he speaks of “the positivization of law” (Habermas, 1996:71; 1998:71, 101, 173, 180). Already in 1930 the word “Positivierung” was used by Smend (see Smend, 1930:98). Hartmann also employs the idea of positivizing (“Positivierung”).

The pitfall of traditional natural law theories exists in the double validity to which they adhere. In addition to those positivizations constituting valid positive law, the theory of natural law also accepts natural law as an equally valid (pre-positive) order of law. Although Habermas does not explicitly mention the problem of a duplicated validity entailed in the view of natural law, he does mention a conceptual duplication present in modern theories of “natural law, in preserving the distinction between natural and positive law”. They thus “assumed a burden of the debt from traditional natural law. It holds on to a duplication of the concept of law that is sociologically implausible and has normatively awkward consequences” (Habermas, 1996:105).

18. The impasse of historicism

Historicism, by contrast, is justified in questioning the metaphysical idea of immutable and eternal principles of natural law that are (supposed to be) valid *per se*. But its emphasis on the supposedly intrinsically changefulness of 'historical' reality collapses the normative meaning of law and justice into an anchorless relativism. In legal practice, it results in a merely formal account that actually sanctions putting any arbitrary content in the form of law. Fukuyama has a good understanding of the cultural relativism that blossomed during the first part of the 20th century. He states that cultural relativism believes that "cultural rules are arbitrary", that they are "socially constructed artifacts of different societies", and that "there are no universal standards of morality and no way by which we can judge the norms and rules of other cultures" (Fukuyama, 2000:155-156). However, one should broaden his 'basket' understanding of normativity (identifying the latter with morality) and also point out that behind 20th century relativism one finds 19th century historicism. Grondin mentions that Dilthey envisioned "a new important task for hermeneutics", namely to defend "the certainty of understanding in the face of historical skepticism and subjective arbitrariness" (Grondin, 2003:15).

Without an insight into the foundational relation between constancy and change (dynamics) it sometimes happens that the recognition of what this entails is accounted for in terms of what is considered permanent or unchanging. In his analysis of the logical status of the principle of non-contradiction, Avey intuitively uses the word constancy, but nonetheless falls back on the terms 'permanent' and 'unchanging': He asks: "Rules of practise undergo revision. Why not rules of intellection?" With the intention of distinguishing between a law and what is governed by such a law Avey then questions relativism:

Might it not be that even though the value concept has reference to some criterion beyond, by which the particular is estimated, and that life is a constant pursuit of something not yet attained, yet the criteria themselves, the standards in the light of which all judgments are made, may be permanent, so that the things valued in the light of those standards come and go, the standards themselves may be unchanging (Avey, 1929:520).

And on the next page he continues:

There is, however, another aspect of Heraclitian philosophy which should not be ignored, and which relativist theory does not always find it convenient to emphasize. The law of change does not itself undergo change in the manner of the changing particulars.

The modern ideal of autonomous freedom (exemplified, amongst others, in the thought of Rousseau, Kant and Rawls) actually reifies the freedom of human subjects *to give positive form* or *to positivize* pre-positive jural (and other) norming principles. Without the recognition of such (universal and constant) principles, dependent on human intervention for making them valid, the extremes of natural law and historicism cannot be avoided.

Historicism holds that everything in human life is subject to constant change – moral standards, jural principles, aesthetic norms, epistemic values. All of these are taken up in the ongoing process of historical change and are therefore intrinsically historical. Historicism believes that law, morality, art, science, and even the human being, are all historical in nature.

However, as Plato already realized, *constancy* (the core meaning of the kinematic aspect) lies at basis of all *change* (the core meaning of the physical aspect). If law in its jural sense is *intrinsically* historical, it is supposed to have "happened" somewhere in the past – which is not the case at all, for the discipline of law has a solid sense of the historical changes that took place in the on-going development of legal relationships (law). If the law *is* history, it cannot *have* a history. Therefore the mere fact that we still speak of legal history, art history, economic history, and so on, shows that only that which is not intrinsically historical can have a history (see Dooyeweerd, 1997-II:223).

The irony of the radical historicist is therefore that she achieves the opposite of what is aimed for – if everything is history, there is nothing left that can have a history. Jonas refers to the said element of constancy as something *transhistoric* in his assessment that parallels the irony just mentioned:

And so we have the paradox that the advocates of radical historicism must arrive at the position of complete a-historicism, at the notion of an existence devoid of a past and shrunk to a now. In short, radical historicism leads to the negation of history and historicity. Actually, there is no paradox in this. For history itself no less than historiography is possible only in conjunction with a transhistoric element. To deny the transhistorical is to deny the historical as well (Jonas 1974:242).

In order to avoid the impasse of historicism an alternative account of the nature of a principle is needed. Consider the following definition:

A principle is a universal and constant point of departure that can only be made valid through the actions of a competent organ (person or institution) in possession of an accountable (responsible) free will enabling a normative or antinormative application of the principle concerned relative to the challenge of a proper interpretation of the unique historical circumstances in which it has to take place.

19. A world historical perspective on future societies

The on-going process of societal differentiation in Western Europe and North America during the nineteenth century gave rise to various modern democratic states, such as Germany, The Netherlands, France, Britain, as well as Australia, New Zealand, the USA and Canada. Observed from a world historical perspective it is significant that the cradle of differentiating societies, generating distinct spheres of responsibility and democratic political orders, appears to be found in (former) Protestant countries. Traditional (undifferentiated) societies, ancient Greece, classical Rome, medieval Roman Catholicism and early modern Humanism (reflected in the totalitarian views of Machiavelli and Hobbes) did not, on their own, achieve something similar. Already in 1874 Kuyper highlighted this perspective in a work entitled: “*Het Calvinisme, Oorsprong en waarborg onzer Constitutioneële Vrijheden*” [Calvinism, Origin and Guarantee of our Constitutional Liberties].

The future of our societies will therefore crucially depend upon an acknowledgement of the norming societal structures that made possible the peculiar societal entities that emerged in the process of societal differentiation. Without the emergence of distinct societal entities with their peculiar spheres of competence and accompanying legal interests, the state will not be able to fulfil its public legal task. Yet acknowledging the diversity of legal interests which ought to be integrated into one public legal order, presupposes an understanding of a differentiated society in which the one-sided holistic (universalistic) and atomistic (individualistic) orientations that dominated the entire history of reflection on the relationship between state and society, could be avoided.

The combined perspective offered by the cultural-historical process of differentiation and integration includes an acknowledgement of the creational principle of sphere-sovereignty. Christianity has the important task to preach the kingdom of God while emphasizing its profound importance for societies threatened by totalitarian spiritual forces that may lead to the reverse process of *de-differentiation*. While exemplifying the practical importance of the creational principle of sphere-sovereignty, the legal spheres of *public law*, *civil private law* and *non-civil private law* will continue to be the cornerstone of differentiated future societies.

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