

so 'n breuk nog nie daar was nie. Hulle het die *studium generale* in die lewe geroep om gevolg te gee aan die onweersaanbare eise van 'n nuwe sosio-ekonomiese wêreld wat op differensiasie afgestuur het. Daarmee strewende egter die middel-eeuse *studium generale* die teenoorgestelde doel na wat ons in die XXste eeu met 'n gelyknamige beweging in die oog het. Juis om daardie rede is die gelyknamigheid verleidelik en gevaarlik, want dit lei tot die identifisering van mekaar weersprekende dinge. En om dieselfde rede was dit miskien nie heeltemal nutteloos om die tweewaardigheid van die begrip *studium generale* in die regte perspektief te stel nie. 'n Ander bedoeling het ek hierby nie gehad nie.

— H. J. de Vleeschauwer, Pretoria.

4

Sociology of law and its philosophical foundations

EVERY attempt to delimit the area of sociology of law in a general sense from other "modal" branches of sociology,¹ such as sociology of morals, of "religion", of language, economics, aesthetics, etc., is confronted with a fundamental problem of legal philosophy. This problem, put in a really critical way, concerns the transcendental-juridical mode of experience, both as to its distinctness from, and its inner coherence with all other transcendental modes of experience (modal aspects).

On the other hand, a critical reflection on our social experience confronts us with the fundamental state of affairs that the concrete societal relations in the mutual coherence of their modal aspects can only be experienced in typical individuality-structures. And at least the inner *structural principles* of the latter must be of an invariant-transcendental character, because these principles condition the possibility of experiencing the changeable social forms in which they are realized in the course of history. The investigation of these transcendental principles of the societal individuality-structures belongs to the task of social philosophy. What is first needed here is: insight into the *typical inner nature* of the societal relations within the various spheres of social life; and it is this very inner nature which finds expression in their typical structural principles, which maintain their constancy in and through all variable forms man gives to them.

Influenced by positivistic and historicistic views of social reality, modern sociology began to confuse the typical inner character of the specific societal spheres with the changing social forms in which their internal structural principles are positivized and realized. The result was that also the inner nature of the different social life-spheres came to be thought of as a changing phenomenon of history, so that any attempt at typology came to lack a firm basis and the inner boundaries

of these spheres blurred. The reason is that the originating forms of these societal spheres, as well as the existential ones, vary with the historical development of a society, and that they are the very knots of numerous inter-twinements between social relationships of a quite different inner nature. Consequently, the variable empirical forms in which the societal relationships are realized cannot furnish reliable criteria for a typological distinction of the latter according to their qualitative inner character. In the concrete societal existence-form, for instance, of a farmer's family functioning in our differentiated Western society, the inner typical structure of the natural family-community is closely interrelated with that of the agricultural enterprise. Nevertheless, the inner character of the natural family-community is radically different from that of the enterprise proper. Similarly, its inner nature is radically different from that of the state or the church. Nevertheless, in our modern Western society the family is interwoven with the state, and often also with the church, in many ways; and these inter-twinements, too, are realized in specific social forms.

Now, the internal structural principles that determine the typical inner nature of the distinct societal spheres also determine the typical character of their internal legal ranges. The typical inner nature of the latter cannot be deduced from the general modal structure of the juridical aspect of our experiential world.

The reason is that this modal structure cannot contain any typical trait of a specific legal sphere, since it determines the general juridical character of all of them. The investigation of the typical nature of the internal legal spheres of the different social orbits belongs to the common task of legal and social philosophy. This inquiry relates to the second transcendental dimension of juridical experience, namely that of the fundamental social types of legal spheres² which, however, presupposes the transcendental modal dimension.

By neglecting this inquiry the development of the sociology of law was rendered poor service. For its result was that in "theoretical sociology of law" the fundamentally important typology of the special legal spheres according to the inner character of the distinct societal areas to which they belong, either remained pretty well completely out of consideration, or was confused with a formal-logical classification. In the second case widely different arbitrary criteria were used, established

without concern for the inner typical-structural nature of the societal life-spheres, and consequently not fit to provide a real basis for such a typology.

It is especially noteworthy that this confusion can be seen in a sociologist of law like Georges Gurvitch, who — unlike many others — correctly insists on the intrinsic connection between sociology of law and philosophy of law. He repeatedly points to the need both of a general philosophic concept of the "jural" and of a detailed typology of the distinct legal spheres, and he rightly considers the absence of a jural-philosophic foundation in many students of theoretical sociology of law a serious fault. "There is no sociology of law without a philosophy of law and vice versa", Gurvitch wrote in his *Sociology of Law*.³

But in the three-fold task that Gurvitch assigns to legal philosophy⁴ one fails to find anything like "research into internal structural principles of the various types of legal spheres". The "jural typology of social groups" in Gurvitch lacks a transcendental-philosophical basis. He considers this typology only a schematic aid in the service of juridical sociology of the plurality and variability of the typical legal spheres ("frameworks of law") of the specific social groups in an all-embracing society *at a certain historical point of time* (p. 189). In his sociology of law there is no trace at all of a distinction between the invariable inner nature of the typical legal spheres of the social life-areas, and the variable forms given to them in the course of history from which originate the so-called variability types of these legal spheres. There is no place for such a distinction within historicist views of human society prevalent in modern sociology. And in Gurvitch one meets with a particular version of this historicism, strongly influenced by Bergson's "philosophy of life", Hauriou's theory of the social institutions, W. James' pluralistic view of integral and immediate experience, and other philosophical trends.

Still it must be clear that a consistent application of this view, which with relation to the typology of "social groups" implies an extreme nominalism, is not possible without undermining the foundations of sociology of law and of the study of legal history. For if the essential typical inner nature of, for example, the natural communities of marriage and family, or of the state, the instituted church, the industrial community,

etc., were subject to change in the historical development of Western and non-Western society, then every conceptual distinction of these types of social units (and their internally typical legal spheres) would lose its basis. In this case the very idea of their historical development would also lose any possible sense. Hence, in his typology of the specific social "groups" Gurvitch is obliged to introduce criteria⁵ that are evidently meant to be constant and universal, and in mutual combination are intended to characterize these groups according to their typical general nature. He makes use of them for instance to give a conceptual description of the state regardless of its functioning in a Western or a non-Western society and independent of periods in its cultural-historical development. This definition (p. 188) rests upon a combination of two of these typological criteria, i.e. a) "function" — specified as function of "the bloc of locality groupings" — and b) the (monopoly of) "unconditional constraint", which he also calls "politic sovereignty". But this definition lacks the structural-typological character that a conceptual description of the typical inner nature of the state or any other societal life-sphere should have. The two criteria used by Gurvitch, function and unconditional constraint, are completely independent of each other and are no more than two among a series of unargued, unjustified criteria introduced for the purpose of a universal typological classification of all social groups. There is no evidence for an inner, typically-structural coherence between these two. To define the state they are externally connected; externally, because Gurvitch has to admit that "unconditional constraint" also occurs in vastly different types of communities, as for instance the natural domestic family, the clan, the medieval church, the hereditary castes in India, the labour unions with unconditional membership in a totalitarian state,⁶ and so on. But, if this is so, then „unconditional constraint" cannot have an intrinsic, necessary structural coherence with the criterion of "locality group". For this necessary coherence does not follow from Gurvitch's statement that "it is *primarily* locality groups based on proximity which have a tendency towards the organization of unconditional constraint" (p. 187).

According to Gurvitch, "locality groups" are connected by (spatio-social) "proximity". They are supposed to be one of six types⁷ in which all "durable" particular (non inclusive) groups can be divided, in which a uni-functional or multi-func-

tional sociality predominates in their social balance. The criterion for this typological classification is the "general character of their function(s)", where "function" is understood, not as predetermined purpose, but as communal task, inspired by one or more "values" that become operative in a social *milieu* — a conception that is obviously influenced by Maurice Hauriou's doctrine of the "institution". However, one only needs to reflect a little longer to realize that these six "generically-functional" types of groups and their species have little or nothing to do with a real structural-typological investigation of the societal relationships. Within the six "functional" basic types, for example, both differentiated and primitive undifferentiated "groups" are listed as sub-types, so that this "function"-typology of social groups takes on an utterly arbitrary character. One wonders in vain why the primitive, undifferentiated clan, based on "mystic parentage", together with the natural family, based on blood-relation, is classified under "kinshipgroups" (p. 185) and not, say, under "political groups" or under "mystic ecstatic groups", where churches, congregations, religious orders and sects, together with "magical brotherhoods"(!) are supposed to belong as sub-types. Indeed, one wonders in vain, especially since Gurvitch just explained that "in archaic society, the family is identical with the clan, which is itself identical with the church⁸(!) and the political group", while he identified the "magical brotherhood" in this society with the *occupational group*, which he had characterized as a sub-type of "economic activity groups". In addition, the primitive clans or sibs, too, often display the character of this latter type. We shall later show the fundamental mistake in Gurvitch's attempt to classify undifferentiated communities with the help of a functional criterion, which he also applies to differentiated "social groups".

The "groups of non-lucrative activity" mentioned in his classification sub d), are simply catch-alls without any real structural-typological meaning, just as the groups under f), of which the common basic type seems to have an especially undetermined sense.

It is obvious that on such a shaky foundation there can be no question of a real structural analysis of the internal legal spheres of distinct types of differentiated or undifferentiated social areas either.

It is not my intention — in an article of this size an impossibility — to analyse every detail of the extremely complex sociology of law offered by Gurvitch. I referred only to that section of it that he called the “differential sociology of law” or the “jural typology of particular groupings”, to show that a structural typology of the specific legal spheres of the distinct societal areas places us before transcendental-philosophical problems that cannot be disregarded with impunity. Which problems are they?

They are closely connected with the relation between the modal-aspectual structures and the typical individuality-structures of our temporal world of experience.

When Gurvitch calls upon philosophy of law to discover the criterion by which the field of investigation of *juridical* sociology can be delimited from *ethical* sociology, sociology of “*religion*” (faith), *economic* sociology, *aesthetic* sociology, etc., it is immediately clear that he has not accounted for the transcendental-modal character of the relevant problematics.

For, as soon as he, in the Introduction of his *Sociology of Law*, introduces the juridical-philosophical problem of a “definition of law”, he makes quite clear that what is at stake is to gain “non-dogmatical” insight into the “*specificity of the complex reality of law*” (p. 41). And because, according to him, especially jural sociology must investigate this complex jural reality, philosophy of law should remain in close contact with sociology of law, also when the former seeks specific criteria of juridical experience and “jural reality”. These sciences are “mutually dependent”. The contradiction seemingly implied in this “mutual dependence” is supposedly resolved in his theory of the immediate, collective juridical experience.⁹ He considers this theory the common basis for philosophy of law and sociology of law, “infinitely variable in both spiritual and sense data and alone making it possible to grasp the full reality of law” (p. 241).

But what is to be understood here by “the full reality of law”? And in what sense can we seek a “definition of law” in the specific criteria of the “full reality of law”, which can supposedly be grasped only in the “immediate integral juridical experience”?

A specific social reality of a *merely juridical* character does not exist. The “juridical” or “jural” is never more than

a *modal aspect* of social reality, and this reality is given to us only in a great diversity of typical individuality-structures in mutual interwovenness. In principle these individuality-structures embrace *all* modal aspects of our temporal world of experience in an unbreakable meaning-coherence. It is within these integral structures, which show a gradual arrangement according to structural main types or radical types and subtypes, that the modal aspectual functions of social reality are gradually individualized and placed within a *typical* structural coherence as “typicalized” (i.e. individualized in a typical way) modal functions of an individual whole. This typical structural coherence will be explained later.

Because of its purely modal character the juridical point of view, distinguishing sociology of law from economic, aesthetic, moral and religious or — better — pistical (Gr. *pistis* = faith) sociology, can never grasp a “specific social reality”. Or in other words, the fundamental concept of law, which Gurvitch correctly considers a necessary jural-philosophical presupposition of the sociology of law, can only be gained by way of an analysis of the modal structure of the juridical aspect of experience; for, this aspect is strictly a transcendental *modus quo*, a general *how*, not a concrete *what* of our integral social experience.

Gurvitch, whose concept of this experiential mode is supposed to relate to a specifically juridical “social reality”, is in consequence of this wrong supposition caught in inescapable contradictions. On the one hand he posits that “the most immediate data of jural experience are ‘normative facts’ and the ‘justice’ which governs them” (p. 42). On the other hand he writes just a little earlier: “the social reality of law is neither an immediate datum of intuition nor a content of sense perception, but is rather a construct of reason, moreover, detached from social reality as a total phenomenon” (p. 41).¹⁰ It happens that for Gurvitch the “social reality of law” consists primarily in exactly these “normative social facts” of a specifically juridical character. If such “facts” are constructions of reason and mere abstractions from the “social reality as total phenomenon”, how then can they be the most immediate *data* of juridical experience?

Sociology of law ought to begin, as he says, with the aid of philosophy of law, “by delimiting the jural facts from those social facts which, being equally related to spiritual values, are

most closely akin to the facts of law, i.e. moral, religious, aesthetic and similar facts" (p. 41).

According to his further explanation he understands by "jural facts" or "facts of law" the "normative facts" which are the immediate sources of positive law and which he distinguishes sharply from secondary sources, for instance, the technical procedures for establishing such facts, such as statutes, sentences, contracts, etc., taken in a formal sense, which are usually called juridical originating forms or formal sources of law. In contradistinction to Eugen Ehrlich's naturalistic conception of "*Tatsachen des Rechts*" Gurvitch wishes to take these "facts of law" in a really *juridical* sense, i.e. as *legal* facts, in which values are embodied, balanced by "justice". Every social group where an active form of social life dominates and in which in this way values are embodied, and also every all-embracing society in which such groups function, constitute such "jural facts", and they produce their own law. The same is true, according to him, of the "micro-sociological elements" out of which these groups and societies are built up, and by which he means the ways of being bound to and by the societal whole, or the "forms of sociability".¹¹

But for sociology of law "jural facts", too, can never be more than the *juridical aspect* of concrete social facts. Certainly, there are social facts that, according to their individuality-structure, are typically *qualified* by their juridical aspect, such as a summons, a sentence, an act of legislation, just as there are others of typically economic, aesthetic, moral, or pistical qualification. But even in the case of typically-juridically qualified social facts, the "jural fact" is merely a modal aspect of an *actual* social fact. For the latter is not exhausted in the former. And, a fortiori, "social groups" and the "society" in which they function cannot be "normative facts" in a merely-juridical sense.

It is not possible to gain insight into the transcendental structural principles of the *typical internal* legal spheres of the particular societal areas without some understanding of the *modal* structure of the juridical aspect in its indissoluble coherence with the other modal aspects of our experience. For, the plurality of these typical legal spheres, to which Gurvitch has correctly called attention in his sociology of law, is possible only on the basis of the unity of the general modal structure of our juridical mode of experience, on the strength of which

we indiscriminately attribute a *juridical* character to all these legal spheres, independently of their *juridical typicalness*.

A penetrating transcendental analysis of this modal structure on the part of philosophy of law can provide sociology of law with a dynamic, never apriorily fixed and closed, concept of the juridical mode of experience, in which the latter is distinguishable, both in its fundamental *irreducibility* to and its unbreakable *coherence* with all other modal aspects of our experiential horizon. Gurvitch — too quickly — rejects every transcendental "definition of law", and places it on equal footing with various "metaphysical, normative, psychological, utilitarian and sociological" definitions as "arbitrary and dogmatic constructions".¹² Too quickly, because on the one hand he is only acquainted with a transcendental method of defining the concept of law in neo-Kantian, so-called "critical-idealistic" conceptions, and since on the other hand he assigned the concept of the general jural mode of experience the impossible task of providing criteria for the demarcation of a specifically juridical reality. We saw that such a reality in a purely jural sense does not exist, and even as "construction of reason" remains meaningless.

As far as the first point is concerned, I would like to point out that in my so-called "Philosophy of the Cosmomic Idea" I developed a new method for a modal analysis of the structure of the transcendental *modes* or *modal aspects* of our experience. This method has nothing to do with what Gurvitch calls "rationalistic dogmatism", working with "fixed and mummified categories", as can perhaps more or less justly be said of, say, Rudolph Stammler's critical-idealistic concept of law. Our juridical mode of experience is not, as Stammler thinks, constituted by some complex of so-called transcendental logical forms of thought or categories in which we are supposed to order an "experiential matter" of psychical desires, nor is the juridical mode of experience *identical* with the epistemological concept of the latter.

Exactly because of its transcendental character this juridical mode cannot be determined *per genus proximum et differentias specificas*, as Stammler still held, since a genuine transcendental experiential mode is by its very nature of an ultimate generic character. Its modal structure is a dynamic meaning-structure, in which the center is the structural nuclear moment which I call the "modal meaning-nucleus" of the juridical aspect of

experience, and which guarantees the irreducibility of this modality with respect to others. But this nuclear moment can reveal its own dynamic character of meaning only in indissoluble coherence with a series of "analogical" meaning-moments that refer either back, or forward, to all those modal aspects that occupy an earlier, respectively later, position in the transcendental-temporal order of our experience. These analogical moments of meaning, to be distinguished into *retrospective* or *retroicipatory* and *anticipatory* ones, assure the unbreakable meaning-bond between the juridical and the other modes of experience, *viz.* those of numerical quantity, space, (extensive) movement, energy, the biotic, the sensitive, the analytical, the cultural-historical, the symbolic, the mode of social intercourse, the economic, the aesthetic, the moral and the pistical (i.e. the experiential mode of faith). But their modal meaning is here *qualified* by the modal meaning-nucleus of the juridical mode of experience, and may therefore never be confused with the modal meaning of the correlate structural moments of non-juridical modalities. In this way the modal structure of the juridical aspect reflects the entire order and inter-modal meaning-coherence of the transcendental modes of experience, as is also the case in the modal structure of the other aspects of experience.

Quite distinct from these, the transcendental-structural principles that determine the typical inner character of the various social areas are, as mentioned earlier, principles of individuality-structures. Potentially they embrace *all* modal aspects of our experiential horizon. Although they do not affect the general intermodal *order* of the experiential aspects, they do bind the various modal functions of the societal spheres within these aspects into the typical structural coherence of an individual whole. As far as the structural principles of *differentiated* social life-areas functioning in a highly developed, opened up society are concerned, this occurs in the first place because one of their modal aspects takes on a central, qualifying role in the typical structural whole; for there the social area concerned finds, according to its inner character, its "internal qualifying function". The Philosophy of the Cosmonomic Idea distinguishes this "internal qualifying function" carefully from objective or subjective purposes to which a social life-sphere is, or can be made, serviceable. The reason is that such goals

presuppose the internal structural principle of the social sphere, and can therefore never be part of it.

Marriage as institution, for example, is according to the creational order undoubtedly serviceable to procreation of the human race, and one can accordingly consider forming a family by rearing children an "objective" purpose of marriage. But such a "telos" cannot possibly determine the intrinsic structure of marriage. The reason is that a family in its narrowest sense, as natural community of a couple of parents with their half-grown children born in wedlock or legitimized, is in its inner nature something different from the matrimonial bond between husband and wife, no matter how closely tied in with the family-relation once children are born. A childless marriage retains its internal matrimonial character. In addition, procreation can also occur by sexual intercourse outside the matrimonial community. Clearly then, the so-called objective goal of procreation lies outside the essential inner nature of this communal bond. On the contrary that which in the Philosophy of the Cosmonomic Idea is called its "internal qualifying function" is rather the typical leading or directional function of its inner structural principle, which enables us to distinguish the connubial bond also from the natural family founded in it genetically.

In this connection should be considered that the internal structural principles of the various societal spheres, which determine their typical inner nature, necessarily have the character of typical structural *norm*-principles. They must receive positive content through human form-giving in accordance with the cultural-historical situation of a society. A human society is not regulated and maintained by invariable instinctive social drives, as in the case of the animal social relationships. The societal life-spheres functioning in human society have intrinsic structural principles of a normative character, and their actualization therefore implies a task for those who are charged with concretizing them. In our sinful world this actualization is only possible in an imperfect way, and both these defectively positivized structural norms and their invariable principles can be violated by the factual behaviour of those who are subject to them in a given societal sphere.

The example I used, marriage, is — as I have extensively tried to show in other writings — intrinsically qualified as

a moral community of love for the duration of the common life-span of two persons of different sex. Within the boundaries of the general modal structure of the moral aspect this love-relationship shows an individuality-type that does not have an original character within this aspect, but finally refers back to an original individuality-type within the organic life-aspect of the conjugal relation, namely the lasting sexual biotic bond between husband and wife. In view of its original character the Philosophy of the Cosmomic Idea calls this the nuclear type of the individuality of the internal connubial community. The moral individuality-type of the conjugal love-community is typically founded in the sexual-biotic function of marriage, and by means of this coheres in a typical structural way with this biotic individuality-type. Thus the inner structural principle of the institution of marriage, which determines the irreducible typical inner nature of this community, is characterized by two structural functions, the so-called "radical functions". The first (the moral conjugal love-relation) is the *leading*, or *internal qualifying function*; the second (the sexual-biotic) is the *foundational function*. The leading function ought to open up all the modal functions preceding her in the inter-modal aspectual order of the internal structural whole of the marriage-community, and should direct them to the intrinsic qualifying and leading function of that community as moral conjugal love-community. The modal structure of its pre-moral aspects makes this possible, because their anticipatory meaning-moments — those that point to a later aspect — typicalized by the internal structural principle of this community, can open themselves up under the guidance of the intrinsic qualifying function. This holds in the first place for the typical *foundational function* of the conjugal community, the durable sexual-biotic bond between husband and wife, which under direction of the moral conjugal bond of love is radically different from the periodic instinctive mating-drive found in the sexual biotic functioning of animals.

Thus the internal structural principle of marriage can express itself in every one of its modal aspects.¹³ In this way it also determines its intrinsically typical *jural* sphere, which should be distinguished carefully from the spheres of civil law and ecclesiastic law, or (in a still undifferentiated society) from the primitive tribal law, in which the matrimonial relations have only an external function because of their intertwinements

with state and church, or with the undifferentiated tribal community, respectively. All *internal* juridical relations between husband and wife are, according to the normative structural principle of marriage, qualified in a typically moral way by the conjugal love-relation, which in turn is typically founded biotically. Hence the internal juridical rights and duties of the marriage partners in relation to each other can never, as civil rights do, be sanctioned by the compulsive legal power of the state. This does not detract from their modal juridical character, since this does not depend on the typical structural principle of the private civil and public law of the state. They can, however, have some juridical consequences in the sphere of civil law, insofar as here typically morally qualified jural duties are acknowledged as natural obligations.¹⁴

The internal juridical spheres of the other social areas of life as they function in a differentiated society ought to be theoretically delimited in accordance with the same structural-typological method briefly sketched above.¹⁵ This presupposes an analysis of their internal structural principles, and the important thing is always to bring to light the unbreakable structural coherence of their intrinsic qualifying function and their typical foundational function. Presently we will consider the structural principles of social life-areas in a society that is still undifferentiated.

The actual structural-typological investigation of the societal relationships, however, is necessarily founded upon a number of preliminary distinctions which form the basis for the horizontal systematic classification of these relations, and overarch their vertical structurally-typical divergence. These basic distinctions may not be arbitrary either: they ought to rest upon the "transcendental categories of our social experience" as they are called in the Philosophy of the Cosmomic Idea, because they constitute the basis for all structurally-typical distinctions of the societal relationships, and thus make them possible.

1. The most fundamental of these categorial distinctions between societal relations is that of communal, and inter-individual or inter-communal relations. By the first I mean all those social relationships wherein people function as members of a whole. The second are those in which individuals, respectively the communities mutually, do not function as members of a

whole, but in co-ordination; either in co-operation or in a mutually neutral position; either in sympathetic or in antagonistic relations (competition, war, etc.). All structurally-typical distinctions in the communal and inter-individual or inter-communal relations presuppose this categorial distinction. It is a distinction that at the same time implies correlativity. For, every communal relation has, viewed externally, its necessary correlate in inter-individual or inter-communal ones, and vice versa. In the juridical mode of experience this categorial relation expresses itself in the mutual relation between communal and inter-individual or inter-communal jural relations that cannot be reduced to each other.

2. The communal relations are categorially divided into natural ones, and those that characteristically depend on organization. The first (marriage, domestic family, the cognate family in a broader sense) are inherently unorganized and can, because of their natural character, actualize themselves at all times, be it in extremely variable social forms. The arising of communities of the second type, however, is dependent upon certain historical conditions. Organization lends them continuity, regardless of the life-span of the members or the duration of their membership. In line with current German sociological terminology we can call these organized communities "*soziale Verbände*" and their internal juridical order "*Verbandsrecht*".

In every one of the "*soziale Verbände*" we necessarily meet with authority and subordination. Among the natural communities the wider cognate family lacks an inherently characteristic authority—subordination relation. Inter-individual and inter-communal relations lack it *per se*. In their case there is great diversity of gifts, of possession, of power, so that in social intercourse with others, certain individuals or communities gain a position of leadership, but intrinsic authority and duty of obedience do not exist here, nor does durable organization.

3. A further categorial distinction is that between institutional and non-institutional communities. Institutional communities are those that, according to their nature, embrace their members either for their entire life (as in the case of natural kinship), or during part of it, irrespective of their own will.

Besides the natural communities, the state and the church (if it has baptismal members) are also of this character. In an undifferentiated society the undifferentiated sibs, tribes and brotherhoods are of this character as well. But non-institutional organizations characteristically rest upon the principle of voluntary membership implying freedom to join and to leave. The typical originating forms of such societal relationships are free association or one-sided establishment, both taken in the sense of founding-acts, in which, unlike the originating forms of institutional communities, the determination of *ends* and *means* is a necessary or constitutive element.

4. Finally, the social relationships are categorially to be divided in connection with their historical level of development into differentiated and undifferentiated.

Particularly the undifferentiated organized communities place general sociology, sociology of law, and the science of legal history before a special structural-typological problem. The reason is that here the most diverse typical structural principles may be interwoven in one organizational form. Structural principles as different, for instance, as those of a unilateral and partially fictional family-bond, a political defense- and peace-organization, a cult-community, an economic enterprise — all together make for a bound unity of a typical structural whole. How is this possible?

This socio-philosophical problem is completely eliminated when, as in the case of Gurvitch, the distinct types of social relations that are interwoven in undifferentiated organizations are simply identified with each other and when such organizations, together with differentiated ones, are classified after a functional criterion which proves to be useless here. Take for example the patrilineally or matrilineally organized clans or sibs, which function in various primitive peoples (certainly not in all) as truly institutional communities. Is the clan here identical with the natural family, with the "politic" group, with the cult-community, etc., as Gurvitch claims it is? That cannot possibly be maintained. The clan is an organized community that cuts across the natural family and the cognate kinship relation and therefore never quite absorbs them. And the clan is not identical with its function as "politic", or religious, or agricultural community. It can unite the characteristics of all these types, but this undifferentiated social unit can only

become a typical structural whole because the family-principle fulfils a central, leading function in it, so that even the organization of the entire community depends upon an artificial, unilateral and partly fictional system of blood-relation. This also explains the rule of sib-exogamy, in virtue of which sib or clan members are not allowed to marry with each other, even where the "blood-relation" rests on a fictional, mystic foundation. It can be said, therefore, that the undifferentiated structure of the clan or sib-community is typically *qualified* by the family- or kinship principle, and that this qualification expresses itself in every type of its internal organized communal relationships, which therefore remain enclosed within an undifferentiated whole. Still, this social totality-structure is not typically biotically founded as is the natural cognate family (limited by fixed degrees of genetic blood-relation). It has a typically cultural-historical foundation in an undifferentiated power-organization which receives, by way of artificial systems of ancestry, an exceptional cohesiveness and intensity, reinforced by factors of magical and religious power. Hence, the sib, along with other undifferentiated communities, is doomed to disappear as soon as the process of differentiation in the cultural-historical development of human society begins. And it is also clear why it is not yet present in weakly organized primitive communities, as for instance the well-known American ethnologist Lowie, in his *Primitive Society*, has pointed out as objection against evolutionistic reconstruction of this process of development.

In conclusion a few brief remarks concerning the fundamental significance of the transcendental structural typology of differentiated social spheres and their typical internal juridical areas for determination of their mutual relation in the usually extremely complex *structural interlacements* in which they in their variable social forms are necessarily involved. The problem of this mutual relation cannot be evaded, and the question as to how it is conceived determines the total view a student of differential sociology of law will have concerning jural life in an all-inclusive society.

An inter-structural intertwinement between societal relations of radically different inner nature is called social "*enkapsis*"¹⁶ in the Philosophy of the Cosmomic Idea.

This enkapsis should not be confused with the relation of

a social whole and its parts, as is present for instance in the case of the State of the Netherlands with its subdivisions into provinces and municipalities. The part-whole relation can only occur within the internal sphere of one and the same typical structural whole, and is determined by the latter's intrinsic structural principle. Accordingly, in a differentiated society, the natural communities of marriage and family, a church-denomination, an economic enterprise, a university or a labour union, can never be part of the state, although they are established within its territory. Their typical inner structural principle is simply radically different from that of the state. Their interrelation with the latter is rather that of a territorial enkapsis — an enkapsis that only concerns the external relations between them and the body politic, but which cannot encompass their inner communal sphere determined by their internal structural principle. This holds even when the enkapsis takes on a very closely bound character, so that we could speak of a "union" between political and non-political relationships. In this way enkaptic structures originate such as a state-church or a church-state, a state-university, a state-industry, a party-state, clerical political parties, church marriage, civil marriage etc. The particular "variability-types" that state, church, university, political party, marriage, etc., display in such cases are not due to the intrinsic structural principles of these communities but to the variable social forms in which they are actualized.

All types of societal relationship, according to their categorial correlation of communal and inter-individual or inter-communal relations, become involved in enkaptic structural intertwinements by way of the social forms in which they are realized. Within these social forms they take on variability-types, distinct from their inner structural radical types.

This distinction between internal structural types and variability-types of communal and inter-individual or inter-communal relations is of fundamental significance for the structural typology of the various legal spheres in a differentiated human society. Delimitation of the internal juridical spheres of the distinct social life-areas is possible only on the basis of the typical internal structural principles of the latter, which are the condition for their different variability-types. These intrinsic structural principles also determine, in principle, the original (i.e. not juridically deduced) spheres of compe-

tence in the area of formation of positive law.

On the other hand, the juridical originating forms of the positive legal rules, and of positive subjective legal relations in the various legal spheres (civil private law and internal public law of the state; international law, supra-national law; internal church-law, internal industrial law, etc.) are veritable knots of enkapitic intertwinements between the distinct juridical spheres. Without philosophical insight into the internal structural types of these different jural spheres a proper analysis of their enkapitic interlacements is simply not possible.

— Herman Dooyeweerd, Amsterdam.

- 1 I.e. a subdivision of sociology according to the different modal aspects of the social relationships.
- 2 By fundamental social types of legal spheres I understand those which result from the invariable typical nature of the social orbits to which they belong.
- 3 Gurvitch, G.: *Sociology of Law*, London. Routledge and Kegan Paul Ltd., 1947, 1953 (no change in pagination).
- 4 a) penetration behind juridical "constructs and symbols" to the "immediate jural experience",
b) determination of criteria to distinguish juridical and other (moral, religious, aesthetic and "intellectual") experience,
c) distinction among juridical values, incarnated in "normative social facts", between objectively valid ones and those that rest upon mere subjective illusions of the "collective mentality" (p. 243).
- 5 These criteria are the following (cf. p. 182 ff.):
 - 1) scope (particular and inclusive groups)
 - 2) duration (temporary and durable groups)
 - 3) function (explained in the text)
 - 4) attitude (divisive and unifying groups)
 - 5) ruling organizational principle (unorganized and organized groups)
 - 6) form of constraint (conditional and unconditional)
 - 7) degree of unity (unitary, federal and confederated groups).The last criterion applied to organized groups only.
- 6 The example here given by Gurvitch indicates, however, that he has no insight into the fundamental difference between the typical internal legal sphere of a trade-union and its external function of compulsory organization within the public legal sphere of a totalitarian state. The union cannot derive this function from itself, i.e. on the strength of its inner character, but it has, in such a case, been imposed externally upon it by the state for the sake of its totalitarian ends. Only as "arm of the state" — a function intrinsically foreign to the trade-union — can it display an "unconditional" coercive character.
- 7 a) kinship groups; b) locality groups; c) economic activity groups; d) groups of non-lucrative activity; e) mystic-ecstatic groups; f) friendship groups or groups of table-companions, admirers or fol-

lowers of one leader etc. (p. 185).

- 8 Pp. 183, 204. Here is meant the "religious community" which in the clans, as Gurvitch wrongly supposes, is always of a totemistic character. But it is not even so that totemistic clans always consider the totem as a god (cf. p. 205). Lowie, in his well-known book *Primitive Society*, has already rightly warned against such a generalizing religious view of totemism.
- 9 According to Gurvitch this immediate or spontaneous juridical experience consists of collective acts of recognition of "spiritual values", embodied in social facts in which they are realized and brought together in a (variable) balance by means of "justice" (cf. pp. 39, 241).
- 10 This statement, which is far from clear, depends on the presupposition that the philosophical criteria for distinguishing the "jural", "moral", "aesthetic", and "religious", ought to make it possible "to isolate in the reality of collective conduct and external patterns the working of law, or morality, of religion or aesthetics" (p. 39). The "social reality of law" then, is in his opinion an abstraction from social reality as it is given in its totality, just like a social reality of morality, or religion, or aesthetics would be. The lack of clarity and the inner contradiction in this train of thought is rooted in Gurvitch' continually confusing the juridical, moral, pistical and aesthetic *modes* of experience, with abstracted "kinds of reality".
- 11 It must be clear that by these "forms of sociability" Gurvitch means something quite different from what I have called the "social forms" in which the typical structural principles of the societal spheres are realized.
- 12 Cf. *Sociology of Law*, p. 40, and more extensively in his *Expérience Juridique et la Philosophie Pluraliste du Droit* (1935) pp. 19 ff.
- 13 In its faith-aspect, insofar as it has been opened up by the gospel of Jesus Christ and the Holy Spirit, it refers beyond the temporal conjugal love-bond to the religious fullness of the love bond between Christ and his "spiritual body", the Church (Ephes. 5 : 25—33).
- 14 The Dutch Supreme Court (Hoge Raad) has accepted this kind of natural obligations since its famous judgement of March 12, 1926 (N.J. 1927, 777). In a judgement of Nov. 30, 1946, the Supreme Court decided that, if a husband performs his morally qualified duty to make provision for his wife after his death, this is not to be considered a gift but meeting a natural obligation.
- 15 The third volume of my *A New Critique of Theoretical Thought* (Amsterdam and Philadelphia, 1957), contains an extensive structural-typological analysis of the societal relationships.
- 16 This term, introduced by the Swiss biologist Heidenhain, was given a general philosophical sense by the German thinker Theodor L. Haering in his small but important book *Ueber Individualität in Natur- und Geisteswelt* (Teubner, Leipzig und Berlin, 1926). He used it, in a sense quite different from that explained in the text, to indicate the relation between an individual whole and its individual and relatively autonomous parts.