THE FUNCTIONS OF LAW

«Functions of law» is often understood to refer to a legal order's capacity to achieve the realization of certain nonjuridical purposes such as: the provision of a cadre within which men migth more easily and freely develop their human personality; the ordering of society; the establishment of conditions facilitating the satisfaction of men's individual and collective needs; the provision of social justice, of welfare, etc., etc.

It may be doubted, however, whether law is to be properly apprehended from the point of view of its functions in the sense suggested. After all, these same functions can be equally well ascribed to economics, morals, industrial development and what have you... Accordingly we may, I think, justifiably conclude that these functions and purposes can, as such, shed no light whatsoever on the nature of law as distinct from that of economics, morals, industrial development, etc.

And if it be true that law, morals, economics, etc., all of them alike and equally serve to introduce order to human society, enhance possibilities for the free development of human beings, and such like, then that which essentially distinguishes law from morals, economics, etc., is to be found only in the *mode in which* law serves these purposes.

And the mode in which law serves these purposes is no other than the juridical mode. The mode in which law serves these purposes then, is not determined by the purposes themselves. In other words, the juridical mode must be recognized in its own proper normative character, if it is to contribute in its way to the realization of the purposes mentioned, and if it is to fulfill its functions in societal life.

Enquiry into the functions of law, then, takes one directly into the search for the irreducibly peculiar character of law.

«Law», however, is a multi-vocal term. It may refer to any or all of a number of legal orders such as are constituted by e. g. Dutch, or German, constitutional law, administrative law, criminal law, etc. It may as well refer, moreover, to the internal legal order of some organization

such as a church, or an organized industrial firm like Shell, or Unilever, etc. One may also use the term «law», however, to indicate that fundamental mode of experience which alone makes all these positive systems of law, when- or wherever they appear, as well as our experience of them, possible. Taken in this sense, law refers to the transcendental normative cadre of experience through which men learn to recognize law as law, and by which they are also enabled to experience certain societal ordernigs as being *juridical* orderings.

The transcendental, juridical mode of experience constitutes the proper field of enquiry for legal philosophy. Philosophy of law in this sense is often called general legal theory. «Law» in its reference to the various positive legal systems as bound to time and place, on the other hand, constitutes the field of enquiry for the various special branches of jurisprudence. Whereas the fundamental juridical mode of experience is basic to all positive systems of law, making them possible, legal-philosophical enquiry into the foundations of a general theory of law ought to serve as basis for research into the particular branches of jurisprudence. All of the socalled foundational concepts of jurisprudence, whether they be elementary or complex, such as: the concept of legal system (juridical unity in a multiplicity of legal norms), the concept of juridical area of validity, of the dynamic process of law-formation within the areas of validity, of legal force (the juridical validity of legal norms), of juridical causality, of juridical imputation to a juridical will, as also the concepts of juridical organ, juridical competence, legal norm, legal cbligation, subjective rights, legal source, etc., all of these concern moments of the juridical mode of experience that play a part in all positive systems of law; indeed, they play a constitutive part in them. Such basic concepts are presupposed in the several branches of jurisprudential research. It is here that the more specific areas of research are to be directed by legal philosophy albeit that philosophy of law may only carry out its enquiry into the basic structure of the juridical mode of experience in a transcendental-empirical way. This means that such philosophy only attempts to trace the transcendental structure of the juridical mode of experience (which makes empirical law possible) in terms of empirical, that is, variable positive law.

In other words, legal philosophy may never function in abstraction, or isolation, from the various areas of positive law or it will degenerate into some sterile form of «Begriffsjurisprudenz» while the several areas ot specialization within jurisprudence may not divorce themselves from legal philosophy if they are not to devolve into merely technical and uncritical

disciplines. Already Kant observes that a purely empirical theory of law resembles the theatrical mask of the Phaedrusfable: it may be very nice; just too bad that it is brainless.

Enquiring into the transcendental structure of the juridical mode of experience and its place in the whole range of our experiential modes, legal philosophy brings the *juridical mode,* in which societal purposes can be realized by valid law, into focus.

A point of significant consequence here is that the juridical *mode* of experience *(modus quo)* is *normative* in character, fundamental juridical principles being implicit in it. These principles must be acknowledged by those who form law if there is to be question of a veritably legal order rather than a merely technical tool for the benefit of extra-juridical aims and purposes.

It is my conviction that these principles of law are the normative, supra-arbitrary starting-points for positive law-formation. They are not to be understood, however, as static rules of natural law, supposedly valid per se, since, instead, they are dynamic, always requiring positivization, driving the process of law-formation onwards, ever unfolding the depth and the richness of their normative juridical meaning in dynamic positive realization.

As such, per se, they can have as yet no legal validity or force of law, which they can only acquire within the dynamic process of law-formation. That is to say that juridical positivization by competent legal organs, though not *conditio per quam,* is nonetheless *condicio sine qua non* for the validity of positive law. Validity of law then, requires on the part of those who give it positive form that they accept the material, supra-arbitrary principles as point of departure. Only with their acceptance can positive law-formation ensure that law fulfills its functions in human society.

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