Chapter 11

The Deontological or Naturalist Foundation of Validity

1. Relations Existing in the Matter of Validity

1.1. The Relation between Law and Religion

From the historic angle, we see how two orders were at play: the religious and the secular. A fusion took place between them in a dual sphere. First, there was the axiological plane, that of legitimacy. Secondly, there existed the factual plane, that of efficacy.

On the plane of legitimacy, in effect, the power or authority of the governor was anciently upheld by appeal to the theory of the divine origin of power, what might be called “a theocratic basis of power.” This is already present in Eastern Empires, the Persian, for instance. It is patent amongst the Roman Caesars, the Germanic Kaisers or the Medieval Kings. These last being a kind of Vicar of Christ—the King was King by the grace of God.

On the efficacy plane, we see too how law and religion appeared as historically fused. Obedience to the authority thus legitimated is nothing but

efficacy, and this was assured as it inspired fear of the divine legislator’s power. In this sense, Freud, in *Totem and Taboo*,140 or Durkheim, in *The Elementary forms of Religious Life*,141 deal with this matter and connect it to obedience to the King being a form of obedience to God.

Nevertheless, from a static perspective, in modern societies, we find a clear separation between law and religion. Now it is held that a norm is valid when it has been created by a competent authority, following a correct procedure. A secular, rational and scientific, setting-out of the question has been opted for. The law is distanced from the obscurantism—as modern thought sees them—which led to religious beliefs and confused man-as-believer with man-as-citizen. This turn, this methodological purity, can be observed, for example, in Hans Kelsen’s *Pure Theory of Law*.142 It is a rewriting of the theory of the two swords: “Render unto Caesar that which is Caesar’s and to God that which is God’s.”

In sum, from the historical point of view, religion and law were fused together in the most basic forms of society, via “legitimacy” and “efficacy,” and they were separated in modern societies, as concerns their formal “validity.”

As we are in a modern society, at first sight it would appear we should give priority to the legal norm over the religious—in case of an antinomy arising in the judge’s conscience when sentencing. That is, we should offer a secular answer to secular matters and disburden ourselves of the weight of old religious survivals. If the future has overtaken the religious outlook on secular affairs, it seems we too should move with the times.

Still, there are those who do not consider progress can graphically be represented always by a straight line and, forgive the redundancy, by progress. It is not a question of any straight line from which from left to right, from past to future, we see traced out ascendant movement, from the less to the more, from the worst to the better. Quite the contrary, some graphically represent progress as a series of circles and buckles where movements of going and returning to what went before may be discerned. There might be a motion where situations of religious values loss are made up for by other returns to a strong religiosity.

Further, there are not those lacking who see progress as a zigzag line. In the long run, things do get better, but they are prevented from doing so in the short term, or even the medium term. Movements of involution occur.