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Theoretical basis and practical consequences of neo-institutionalism

ABSTRACT - Neo-institutionalism is an action theoretical approach based on a specific theory of action. In this paper it will be analyzed according two points: firstly to the anthropological and philosophical suppositions of neo-institutionalism, and secondly to the consequences of this theory for actual jurisprudence, political theory and for practical philosophy in general. It will be also described by which point of view neo-institutionalism differs by the traditional theory of institution according to Maurice Hauriou and Santi Romano.

KEYWORDS - Neo-institutionalism, theory of action, jurisprudence, political theory

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Theoretical basis and practical consequences of neo-institutionalism

I shall confine my exposition to two points: firstly to the anthropological and philosophical suppositions of neo-institutionalism, and secondly to the consequences of this theory for actual jurisprudence and political theory.

Neo-institutionalism is an action theoretical approach based on a specific theory of action. The essential suppositions of our conception read:

1. *Man is a creature able of acting,* individually and collectively.

2. *Man is a zoon politicon* in a double sense: we are living in communities, and our valuation is determined not only by self-interest, but to a large extent also in regard to our fellow people.

3. Our behaviour and acting is determined not only by genetic programs, but essentially also by institutions. *We are creators of institutions which rule types of our activities and of our behaviour as well as different kinds of human interaction.*

4. *The ontology of acting social beings.* The world view, namely ontology as the philosophical theory of what there is, of the categories of entities and their interrelations, depend on the anthropological conception of mankind. Beings which are able to act and which live in communities do not see the world only as a complex of things in time and space, but take

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necessarily also account of institutional facts which depend on normative rules and systems of values.

Anthropology which conceives man as an actor and as a being living in social interrelations leads to two important implications concerning ontology.

Firstly there are two essentially different kinds of facts, *brute facts* which take place in space and time and of which we have knowledge by observation in the last instance, and so-called *institutional facts* that are realities effective in human life, but which are in principle dependent on understanding of rules and values, yet not only on observation of behaviour alone.

The difference between brute facts and institutional facts is a matter of principle to the effect that reality with which we are confronted is much more complex than physical reality which consists of physical objects in space and time. There are, of course, some interrelationships between brute (or physical) descriptions and institutions. E.g. we measure temperature using an institutionalized system of heat measuring. But the statement that the temperature in this room is 20° C is an assertion about a brute fact. On the other hand institutional objects - e.g. money or traffic signs - have a physical shape, but their real essence is the institutionalized role they play in social life.

Secondly the form in which we acquire and express empirical knowledge is such that this information can be used in processes of determining action. We strive to get information about the situation of possible acting and of causal consequences of possible acts. The view that the form of our knowledge is such that it can serve for determining and controlling action can be designed as the thesis of "the epistemic primacy of practice".

The fact that students in ethics and jurisprudence are accustomed to stress the opposition of "Is" and "Ought" - of being and duty - confronts them with the problem how to explain the (real) existence of ought,

because they conceive the world of ought as an ontic sphere opposed to the world of being (the world of brute existence). In the world view of neo-institutionalism there are not two distinct worlds - the world of the existence of brute or physical objects, and the world of ought, values and purposes. The real existence of norms, value standards, purposes and preferences is not at variance with the semantic opposition of "Is" and "Ought", of descriptive and practical information. We are sure on the contrary that human action, social interaction and social organization can be understood and realized only if we acknowledge the existence of practical information as institutionalized facts.

5. The philosophical nucleus of neo-institutionalism is its *theory of action*. Our action theory is a formalistic conception which is applicable to individual as well as to institutional activities. It is a formalistic theory, because it holds that action is in principle determined by teleological and preferential choice processes.

In my opinion the rational structure of the information processes defines the character of the whole practical philosophy, and therefore also the character of jurisprudence and of political theory.

The transformation determining choices embraces two essentially different pieces of information: descriptive information and practical information. Descriptive information deals with the situation in which action takes place and with causal relationships describing the effects of actual or possible acts. The knowledge of means for intended purposes or of programs how to realize intended effects is expressed by help of descriptive sentences. But criteria determining choices — so to speak selective acts - are given by practical sentences. Practical sentences may be of a different kind: they express purposes, valuations, preferences or normative dispositions (orders, permissions, empowerments).

Only on the basis of practical information choices, i.e. a selection means or programs, can be realized.

The language system of practical philosophy is necessarily

dichotomous. The famous Hume-Kantian distinction between "Is" and "Ought" is replaced - and philosophically justified by the categorical distinction of theoretical (or descriptive) and practical sentences.

6. *Semantics of practical philosophy* (namely of all action relative disciplines) *is necessarily dichotomous,* because only on the basis of descriptive *and* practical information choices and information processing determining action is possible.

Dichotomous semantics is linked with *the postulates of non-derivability* as a principle of construction for every logical system which is supposed to function as a normative logic. These postulates read:

(i)   No informative practical sentence can be derived from a class of premises which does not include practical sentences.

(ii)   No informative descriptive sentence can be derived from a class of premises which includes only practical sentences.

[This conception of non-derivability is more appropriate than the well known thesis that "ought" does not follow from "is", and vice versa, "is" does not follow from "ought", because it is possible to justify an imperative by the presupposition of a purpose and the recognition that there is just one means to realize this purpose, if this means is the content of the imperative. E.G.: If there is only one way how to help your neighbour, namely to give <u>him</u> a certain amount of money, and if there is the valid purpose to help the neighbour, the imperative "give the neighbour the amount under discussion" is rationally justified.]

7. Neo-institutionalism is based on *logical theories of practical reasoning,* namely on the logic of norms, formal teleology, formal axiology, and logics of preferences. These theories are fields of logical enquiry dealing with practical sentences - or more precisely, with practical and descriptive sentences.

The development of logical systems embracing practical sentences implies a deep transformation of the methodological apparatus of logic. Logic is not anymore restricted to the realm of truth. Inferences deal also

with sentences which cannot be subjected to the qualification of being true or false[1].

8.   In my opinion the dependence of action on information is essential. To say that *acting is behaviour guided by information* mean that the actor has - at least at certain moments the possibility of choosing between some alternatives of behaviour.

The time sequence of states of the actor can be called his *life tree*. Every system - therefore also the actor — is at any given moment in exactly one state. The life tree of acting subjects branches at some places of the future into different possibilities. The decision which of these possibilities will be realized is determined by an information process. The possibilities how to continue the trajectory of behaviour is the *scope for action*. The existence of a scope for action, namely the fact that actors have the possibility to determine the continuation of the behaviour by choices on the basis of information and preferences is a well established empirical fact. Already *Kant* has clearly seen the practical freedom, in the sense just explained, is proven as an empirical fact[2].

On this presupposition proven as an empirical fact we can define what we understand by the notion of *freedom of action,* namely:

(i)   there exists a scope for (possible) action;

(ii)   an information-dependent process determines which alternative of the scope for action is chosen for realization.

Our practical thought is an element which determines behaviour. This conception of freedom of action does not entail the view that human beings are in possession of a *liberum arbitrium indifferentiae,* namely of a

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[1] Confer the following quotation from G.H. von Wright's *Logical Studies* (Amsterdam 1957, III): "Deontic logic gets part of its philosophical significance from the fact that norms and valuations, though removed from fee realm of truth, yet are subjected to logical law. This shows that logic, so to speak, has a wider reach than truth". Confer also C.E. ALCHOURRÓN, A.A. MARTINO, *Logic without Truth*, in *Ratio Juris*, 1990, 46-67, and O. WEINBERGER, *Alternative Action Theory,* Dordrecht et al. 1998.

[2] Cf. I. KANT, *The Critique of Pure Reason*, 1781.

free will which is undetermined, and so to speak, a *prima causa.* Free will in the sense described is compatible with determinism: every action is determined by circumstances, by the world within which the action is performed, by the constitution of the agent, his goals, preferences, and capabilities. But the subjective determinants of action, the aims and preferences of the actor, are intransparent to the effect that prediction how people will act is possible only in a very restricted way.

9. Action is specified by the intention of the actor. The same behaviour can be a different action if the intention of the actor is different. Many acts have a specific function defined by institutionalized rules. E.g. lifting one's hat means the realization of an act of greeting.

10. The formal apparatus of determination of action is applied in different problem situations, and therefore methodologically distinct:

firstly, it defines the structure of the deliberation, how to act in order to fulfill one's purposes, and how to control the realization of action programs;

secondly, it is the basic scheme of motive interpretation, if we observe the behaviour of an actor and try to interpret his behaviour as an action of a specific kind;

thirdly, we often take a valuating standpoint against an observed or proposed action. Our conception of the action as a behavioural effect of an informational process gives us the possibility to distinguish the valuation of the results of the action and the valuation of the moral tendency of the actor.

11. The main thesis of our conception of institutions reads: *every institution has a core of practical information which defines the kind of action and the intended role of the institution.* This conception is in a way the development of Hauriou's concept of the *idée directrice,* but over and above that the basis of the explication of valid social, and especially legal norms and of the social dynamics of institutions.

Here I would try to clarify two problems: firstly, my conception of the

relation between the institution and its core of practical information, and secondly, the relationship between my conception of institutions and the views of Santi Romano.

(1)   Institutions are human achievements which define and constitute modes of activities, e.g. human speech, production, different games etc. and human cooperation and the organization of interaction. In my view there is no institution, no organization, no valid law without a frame of accepted practical information: purposes, value standards, normative regulations and normative empowerments. This theoretical conception is, of course, dépendait on the acknowledgment of the existence of realities which are not physical, but ideal institutional facts. Under this supposition which is contrary to brute behaviourism, there is no difficulty for accepting the idea of institutional facts.

The reduction of institutional facts to brute facts is, of course, excluded. Practical philosophy cannot be build up on brute physicalism.

(2)   If I understand *Romano* correctly, his conception is based on two theses: The identity thesis: "Every legal system is an institution and vice versa every institution is a legal system: the equation between the two concepts is necessary and absolute"; and the thesis that the legal system is an organization.

The identity thesis is not very clear: I hold it for reasonable to distinguish in modem society a plurality of different systems of social rules; moral rules, professional conventions, legal or state rules, etc. These different rules and value standards are institutionalized in some way, but not all of them are law. The interrelation between different social rule systems are important and contribute to the true picture of social reality.

To take organization as the fundamental reality of social life is appropriate insofar as it stresses the fact that real working connections between the personal substratum and the rules of cooperation and of competence establish the complex of institutional reality. But if we continue to analyze the notion of organization we realize that organization

is not a simple notion, but a complex which has to be explained as a structure and as a reality generated in an evolutionary process. An organization is a developed structure of a certain institutional reality. The nucleus on which the organization is formed is something like an *idée directrice*, the idea of the task of the institution and the *raison d'êtret* of the institution. In order to become effective the *idée directrice* must be accepted by people and must provide the real means for the realization of the task. The leading idea has its consequences in form of value standards, preferences, and rules of competences by which the roles of the persons involved in the organization is determined. The institution becomes often an organized corpus which works by help of normative rules and by power conferring rules by which the role of the persons involved and the organs of the institution are defined.

In short, the central role of the organization and the global view on the law stressed by *Romano* is justified, but the term of organization is more the name of a complex reality which is to be explained, than a simple element's notion by help of which institution theory and the theory of law can be explained.

The notion of organization cannot serve to explain the phenomenon of social reality and of institutional facts, but we must explain the development of the organization using the phenomena of institutionalization by forming social organizations and social cooperation. Properly speaking the notion of organization is an *explicandum*, but not an *explicans*.

For me there is no question of priority between institutions, organizations and valid social rules: they rise and develop in interdependence. The essential finding is just their real coexistence and mutual interplay.

In the next paragraph I shall shortly describe the consequences of the neo-institutional theory for three fields: for jurisprudence, for political theory and for practical philosophy in general.

Some Jurisprudential Implications of Neo-Institutionalism

In this paragraph I shall give some examples of consequences of the neo-institutionalist conception for jurisprudence and legal policy.

Valid Law

It is a primary task of this theory to give an answer to the vexing problems of legal validity. *Kelsen's* theory of the apex norm as an indispensable theoretical presupposition for juristic recognition is rejected. In our opinion the recognition of validity is a thesis about an empirical fact, and it is evident that statements about empirical facts cannot be justified by a mere supposition, but it must be based on experience and observation of facts.

The ontology of neo-institutionalism recognizes the existence of institutional facts, this means of non-physical entities. Valid law is such an institutional reality which is proven by the observed fact that the institutions of the state work on the basis of a system of legal rules. Whether this is the case is a matter subjected to sociological observation.

The question of valid law can be posed on two levels: (a) we may investigate the question whether a legal system under consideration is in fact valid, or (b) we deal with the question whether a certain norm - e.g. a law or a juridical act - is valid. The question (a) is answered by criteria of institutionalization, the question (b) has to be judged by help of rules of norm generation which can be formulated as rules of recognition.

Consistency and the Hierarchical Structure of the Legal System

The fundamental logical demand concerning the construction of a legal system is normative consistency: no behaviour p should be allowed and forbidden at the same time; and competences should be determined in a non-conflicting way. This can be achieved by a hierarchical system of empowerments to norm creation. The delegation is constructed from one central point and competences are determined by the constitution avoiding conflicts.

But we believe that a different construction is also possible, and in fact existing in the realm of European Law. The delegation of the law of member states does not follow from a central authority. But consistency must be achieved also in this case. In our example consistency is achieved by the principle of priority of European Law and by the judiciary of the European Court.

The Notion of Legal Person

The customary definition of this notion that a legal person is a bearer of rights and duties is unsatisfactory. It is essential that the legal person is defined as a possible legal actor. The definition of the legal person must contain a stipulation how acts which are accounted as act of this person can be realized namely by organs of the legal person.

The Analysis of Motives in Legal Considerations

The everyday conception as well as the prevailing view of the judiciary suppose that every action is determined by just one motive. But following the action theory of neo-institutionalism the motivation leading to an action is often the result of a much more complicated choice situation. The decision and the action is often motivated by a class of different motives which may even be in conflict *inter se*. Such an analysis justifies a much more detailed valuation of the action and of the guilt of the actor.

Legal Politics

In contemporary legal philosophy there are two main views concerning legal politics that are fundamentally opposed to one another.

The view of the Pure Theory of Law and different kinds of jusnaturalism.

Kelsen and his followers conceive jurisprudence as an intellectual endeavour to grasp the normative content of the law abstracting from the question whether the law is socially or politically appropriate. The valuation of the law as appropriate or inappropriate is from the standpoint of the *Pure Theory* a metajuristic problem which does not fall into the

competence of jurisprudence.

The other common view on legal politics can be designed as jusnaturalism. The different theories of this type try to justify what is appropriate law by a naturalist argumentation. Anthropological features of mankind or of human society, or the nature of the field which should be rules and the like are arguments offered in order to justify the content of law.

Neo-institutionalism stands in opposition to both of these conceptions. In opposition to the *Pure Theory* we hold that political reasons are important in making juridical decisions and in justifying the content of law which is to be produced. Neo-institutionalism provides a non-naturalistic argumentation about problems of legal politics. The thesis that every institution is ideally constituted by its *idée directrice* gives us a measure for judging the appropriateness and the efficacy of the organization and the normative rules stated for the institution. Such judgments have no jusnaturalistic basis. Neo-institutionalism can use also social experiments in order to develop measures for the realization of the stated goals. Political arguments may be used as additional reasons in the field of decision making. The judge has to consider the social effects of the principles he uses as a standard for his valuation. The social effects are valued by help of the leading idea of the institution.

Functional analyses are considered to be an important field of jurisprudence, namely in the following sense: Jurisprudence does not take over the role of the legislator, but tries to prepare the cognitive arguments for legal measures by logical analyses and by determining the expected social effects of proposed normative rules. This can be realized in a non-jusnaturalistic way, because these considerations take place in the frame of given *idées directrices* and are subjected to value criteria which are connected with them.

Jurisprudence and legal sociology have the task of making preparatory work for political ruling. Statistics of legal relationships show

the actual state of social life, and give information, so to speak, about the reaction of society to the legal rules and the institutionalized organization. It is the task of so-called experts in jurisprudence and legal sociology to elaborate proposals concerning appropriate legislation.

Results in the Field of Political Theory

Functional analysis just described establishes a certain link between jurisprudence and political theory. The investigation into political and social effects of legal rules and of social organization is relevant for both sciences, for jurisprudence and for political theory.

Neo-institutionalism has contributed some important ideas to political theory. I would mention two fields, the theory of democracy and the rejection of the conception that political thought is dominated by the alternative of friend and enemy.

The notion of democracy is controversial and vague in many respects. The basic tendency of democracy can be characterized by the famous Lincoln formula "Democracy is the rule of the people, by the people and for the people". This formula expresses the idea of people's sovereignty, but it is neither a description of the reality of a democratic society nor an advice how to organize democratic life. It expresses the idea of people's sovereignty without specifying the methods how to achieve it. Therefore different theories of democracy provide a theoretical framework explaining the function of democratic systems in political reality. E.g. the well-known explanation of Schumpeter. He conceives democracy as a fight of elites for gaining a majority in elections.

Some actual problems of democracy have determined my conception: (i) the fact that democratic systems can be destroyed by democratic vote (e.g. dictatorship can be established by democratic vote); (ii) majority decision can establish inhuman law (e.g. cancel minority rights); (iii) the modem information society has two opposite effects: it provides broad knowledge of political and social facts, but it makes also manipulation of

information possible and provides an effective basis for political indoctrination; (iv) Methods of advertising known from the business world are applied in the field of political propaganda, a fact that hinders people's free deliberation.

Two elements define our conception of democracy: Firstly, the fact that democracy is an institution and therefore not only a system of formal rules of formation of the collective will, but also a system of material principles (in the role of *idées directrices*). Secondly, democracy is - or should be - a system of public discourses.

The democratic *idées directrices* are preconditions of democratic life, namely such postulates that serve the realization of the democratic rule: transparency of political action, periodicity of voting, the possibility of free organization of groups, freedom of opinion and of speech, protection of minorities, organized and public control, etc. The class of leading ideas is the place where human rights are rooted and where the preconditions of an open society are established. This system of leading ideas of democracy cannot be cancelled by mere majority vote; but the leading principles are not petrified as such, because they are subjected to discussion so that their limits and concrete form can be developed, modified and transformed.

Neo-institutionalism underlines the importance of public discourses on different levels, but it does not accept Habermas's view that (ideal) discourses define truth and the best practical decision. Of course, discourses are a useful tool for the development of ideas and of social institutions, but there is no guarantee, that the result of discourses will in fact be optimal. Instead of *Habermas's* optimism concerning discourses I try to investigate the pragmatical conditions of free discourses and to criticize deceptive arguments.

Following *Carl Schmitt* many political thinkers believe that political considerations are nothing else than to help friends and to use their help and to fight enemies. In the practice of international politics this implies the perpetuation of conflicts and of warlike operations. Dangerous

movements are supported in order to gain help for the fight against an enemy. E.g.: The Taliban movement has been supported in order to weaken the Soviet Union. Yet the long term effects are disastrous for the people concerned and for democracy in the world. In my opinion another strategy is more effective in long term, namely seeking for cooperation, building different kinds of bridges, but not to expel one devil by another.

Consequences of Neo-Institutionalism for the Whole Realm of Practical Philosophy

The basic ideas of neo-institutionalism namely the action-theoretical approach, the conception of action as behaviour determined by a process of transformation of information and the structure theory of institutions, provide not only a philosophical framework for legal and political theory, but also for other fields of practical philosophy. Also the following fields receive new perspectives for their investigation: psychology, mainly psychology of individual and collective action, sociology, economic theory, and the theory of morality. I shall deal with this broad topic in a book which I am preparing under the title "The Action-Theoretical Basis of Social Sciences".

The fact that our theoretical basis for legal and political theory has also general implications for practical philosophy is a kind of re-enforcement for our basic assumptions.