Public Justice: Delimiting the Task of Government in the Thought of Dooyeweerd and Chaplin

Prof. D.F.M. Strauss

Samevatting

Politieke teorieë deur die eeue het bly worstel met die vraag hoe die bevoegdheid van die staatlike owerheid sinvol begrens kan word – veral beliggaam in teorieë van vorssoewereiniteit, volksoewereiniteit, regsoewereiniteit en staatsoewereiniteit. H.J. Strauss beskryf 'n magstaat as synde beide absolutisties (sonder politieke medeseggenskap) en totalitêr (sonder siviele en samelewingsvryhede). Dooyeweerd se antwoord op die krisis van die humanistiese staatsleer is gegee in sy nuwe samelewingsteorie wat deur middel van die idee van 'n funderings- en kwalifiseringsfunksie 'n nuwe weg open om die staat te definieer as 'n publieke regsverband, gekwalifseer deur die regsaspek van die werklikheid. Die vraag wat egter onbeantwoord gebly het in Dooyeweerd se staatsleer is hoe nie-tipiese owerheidstake waardeer moet word. Aangesien Chaplin hierop fokus in sy resente artikel in Philosophia reformata*, word in hierdie artikel, in aansluiting by sleutel-idees van H.J. Strauss, 'n weg uit hierdie* impasse *bespreek.*

1. Introductory remark

The question how one should demarcate the task of the government of a state effectively accompanies the long history of reflections of the state. That it continued to concern academic reflection is seen from the fact that contemporary scholars still pay attention to the limits of law and government.[1] Since the government controls "state-power" it may appear as if the

1 See for example Allott (1980), Craig (2003), Gatti (1981), Johnston (1984), Pennock *et al.* (1974), Schmidtz (1991), Snellen (1985).

government can do *anything*. Yet, one simply question immediately reconnect us to the measure of justice, reflected in the crucial question whether the state actually can act *unlawfully*. This question, moreover, only makes sense if there are indeed underlying *principles* to which the actions of governments are bound (in the sense of being *subjected* to them). Once the existence of such guiding principles is acknowledged it is no longer far-fetched to think of the limitations of governmental actions, i.e. to consider how one should understand the delimitation of the task of government. Without such delimitation political theory will inevitably run into a state-absolutistic and totalitarian stance, also known as the theory of the *power-state*, reminding us of the period between 1648-1789 which is described as the era of the absolute monarchy, the age of *absolutism*. The rise of the modern state during the 18th and 19th centuries indirectly did benefit from the consolidation achieved through the enhancement of the authority of the monarch. The most important feature of the rise of the modern state is given in the break-through of the idea that state by its very nature is a *res publica*. Whereas a monarchy belongs to its king, the state is a *public* legal institution.

The reformational political philosopher, H.J. Strauss (1912-1995), distinguishes between the concepts *absolutistic* and *totalitarianism*. The former characterizes a state in which there is no political co-determination and co-responsibility, while the latter concerns the absence of civil and societal freedoms. A true *power state* (German: *Machtstaat*) is therefore both absolutistic and totalitarian. The principle of sphere sovereignty opens up a perspective that side-steps the shortcomings present in power state theories – such as those of Machiavelli (1469-1527) and Hobbes (1588-1679), for it acknowledges the inherent limitations of the distinct spheres of competence within a differentiated society.

During the first few decades of the 20th century Dooyeweerd discerned a crisis in Humanistic political theory, analogous to what Nelson discerned within legal theory that turned into a legal theory without law ("rechtswetenschap zonder recht"). Similarly so, Dooyeweerd in 1931, argued that political theory also arrived in the *cul de sac* of a state theory without a state ("een staatsleer zonder staat" – mentioned by Dooyeweerd, 1931:5).

Although the initial Humanistic theories of the state considered the state (or the people) to be competent to form law, they at least realized that this competence entailed *legal power*.[2] This was the case whether or not these

2 See Mekkes's penetrating analysis of the process of decay in the Humanistic idea of the "rechtsstaat" (just state) in its public legal sense within the modern idea of democracy (Mekkes, 1940: 586-620).

theories emphasized the monarch or the people (the monarch as sovereign or popular sovereignty). At the turn of the 19th to the 20th century a new doctrine emerged – that of state sovereignty. This theory differs from yet another one, that of the *sovereignty of law* – advocated by thinkers such as Krabbe, Duguit and Kelsen. The theory of state sovereignty is advanced by Gerber, Laband, Jellinek and in particular by Otto von Gierke (in his *Grundbegriffe des Staatsrechts*, 1915). Gierke strips state-power from its juridical character by viewing it as a pure institute of power. He views political life and legal life as "two independent and specifically distinct sides of communal life" (Gierke, 1915:105). Interestingly, as Dooyeweerd published his *Crisis*, a contemporary German legal scholar had to leave Germany because he criticized the power-state theory of Hitler (see Coetzee, 1955:12, note 12).

2. Traditional notions of the *salus publica*

Political philosophy has its roots in a more encompassing philosophical view of society and for that reason it by and large reflects the dominant philosophical views on human society. The prominent and opposing views operative practically throughout the development of political theory are found in atomistic (individualistic) and holistic (universalistic) conceptions. Either society (and the state) is seen as a mere collection of individuals (considered to be autonomous or taken up in constant interaction), or it is viewed from the perspective of some or other all-encompassing social collectivity, embracing all the other social entities as its intrinsic parts. The political theories of the early modern period (the main thrust of the social contract theories) are individualistic whereas the views of Plato, Aristotle, Thomas Aquinas, Schelling, Fichte, Hegel and more recent Roman Catholic approaches are universalistic.

Since the individualistic idea of individuals (in interaction) merely and solely falls back to the *one* and the *many* as the ultimate principle of explantion, and since the whole-parts scheme merely and solely employs the original meaning of spatial coherence as principle of explanation, it is understandable that these two orientations, being restricted to a quantitative and spatial perspective, will run into difficulties when it come to the challenge of defining the limits of the task of the government. The shortcomings of these two restricted principles of explanation are particularly clear when they are advocated in support of the idea of the *public good* (*salus publica*) or *public interest*.

Plato, for example, accepts the (transcendent) existence of an *eidos* (ideal, static ontic form) determining the structuring of his ideal state. Following the pattern

of the threefold soul, the ideal state is constituted by three parts respectively correlated with the rational soul-part (the *logistikon*), the morally sensitive part (*epithumetikon*) and the sensory-desiring part (*thumo-eides*). The first part is given in the class of philosopher-rulers, where the philosophers must become kings and the kings ought to become philosophers, pursuing the virtue of *wisdom*. The second part of the state is constituted by the guardians and they have to observe the virtue of *braveness*. The highest two classes fulfill a *public* legal role within this totalitarian state-idea – they do not have any private rights.

Although the third class, by contrast, was assigned an exclusively *private* function – dedicated to make possible economic life, its particular organization received its guidance from the idea of the public interest. This third estate, therefore, on the basis of private property, had the task to provide in the needs of private marriage and family life (see Plato, *Politeia* 367 ff., 457 ff., 471 ff.). Yet they are not allowed to own private property and they share, within a common dwelling place, wives and children, while parents were not supposed to know their children. Women had to take a common responsibility in raising the children – children are brought to life in a state-controlled eugenic way (selecting the best and eliminating weak and deformed children).

In an equally totalitarian way Aristotle elevated the Greek city-state (*polis*) to become the encompassing whole of society, providing for the highest fulfillment of human life – in reaching moral perfection (an ideal continued by Thomas Aquinas during the late middle ages). From a purely individualistic starting-point Locke later on reduced law to *innate rights* and he saw the state merely as a continuation of the state of nature (similar to a limited liability company). His general claim "*Salus populi suprema lex* is certainly so just and fundamental a rule, that he who sincerely follows it cannot dangerously err" (Locke, 1690:197, § 158). How does Locke delimit the "public good" (or: the *salus populi*)? Is it identical to what is willed by the majority? And how does one calculate the majority? Is it done on the basis of their properties? Because Locke avoids these questions in his theory of the state (which actually is nothing but a continued state of nature endowed with a coercive power) it inherently carries with it the germ of state absolutism and totalitarianism. The unlimited power assigned by the social contract in Rousseau's political theory to the body politic (the general will) also terminated in the antinomous claim that those who do not accept the general will ought to be forced to be free (Rousseau, 1975:246) for just "as nature gives to every human being an absolute power over all its members, so the social contract endows the body politic with an absolute power over all its members; and it is this power which, directed by the general will, as I have said, bears the name of sovereignty" (Rousseau, 1975:253).

An appeal to the "public interest" can fluctuate between the extremes of state totalitarianism and state nihilism. It is therefore clear that the challenge to delimit the task of the government needs an account of the *intrinsic nature* of the state. What is first of all required is an appropriate *legal* criterion. Pursuing this avenue immediately calls for an account of what the *jural* or *legal* aspect of reality entails. Because the notion of *retribution* may lead to a misunderstanding, namely that the jural primarily should be interpreted in terms of *penal law*, it may be preferable to designate the core meaning of the jural aspect of reality as *tribution*. Such a positive designation of the core meaning of the jural aspect is correctly advocated by Chaplin – he employs the term *tribution* instead of *retribution* (Chaplin, 2007:130, note). However, it is indeed also possible to use the term *retribution* in a positive sense as well. Dooyeweerd does that when he warns against the equation of retribution with criminal law or, even worse, with a response to a legal wrong. The legal measure of proportionality entailed in retribution is applicable to every jural fact with its accompanying legal consequences (effects): "Retribution is not only exercised *in malam* but also *in bonam partem*" (Dooyeweerd, 1997-II:130).

3. State and society: differentiated spheres of law

The jural aspect is of central importance for Dooyeweerd's political philosophy because the sphere-sovereignty of the different modal aspects provides the decisive perspective needed to avoid a totalitarian view of the state within a differentiated society. Yet he does not distinguish between *state* and *society* as such, as Chaplin alleges (Chaplin, 2007:131). He solely employs the idea of a *differentiated* society and then delineates within it the different spheres of law – public law and civil and non-civil private law.[3] In order to understand how Dooyeweerd succeeded in introducing a comprehensive alternative understanding of the state and its place within a differentiated society we briefly highlight his view of the multi-aspectual nature of the state.

3 Chaplin is mistaken in attributing to Dooyeweerd the view that the "civil-law sphere" of the state is a "part of public law" (Chaplin, 2007:134). To Dooyeweerd civil law is civil *private law*, never *public law*. There is only one place in *A new critique* where Dooyeweerd employs the combined phrase *civil and non-civil private law* (Dooyeweerd, 1997-III:692), although the implied distinction does occur in other contexts as well. Slightly differently formulated the same distinction surfaces on one of the pages from which Chaplin quotes Dooyeweerd, namely page 446 of NC-III (on page 132 of his article Chaplin quotes Dooyeweerd with reference to NC-III:416 while in fact the quotation is derived from page 446). Under the heading "The civil law-sphere of the State" Dooyeweerd here explains: "The internal public law-sphere of the State has its typical correlate in the sphere of civil law as a private *common law*" (Dooyeweerd, 1997-III:446)

Natural and social entities as well as all events (or: processes) within reality in principle function in all the various distinguishable aspects of our experiential world. The state, for example, is a social entity comprising a multiplicity of individuals (designated as citizens). As such the state therefore definitely has a function within the quantitative aspect (or: modus) of reality. We are familiar with the term 'modus' due to expressions such as "modus operandi" and "modus vevendi" – in both cases indicating a *way* of going about. In the case of our example: when we say that the state functions within the numerical aspect of reality, we are highlighting one of its *modes of being* (modes of existence). But there are more of them – the existence of the state is not exhausted by its arithmetical functioning. Referring to the function within the spatial aspect unveils the idea of the *territory* of a state. On the basis of this locality a state in a specific (as shall be seen: public legal way) not only embraces the relatively situated nature of its citizens, but is also dependent upon their connection to the state in spite of their relative movement (a term stemming from the kinematic aspect of uniform motion). Through its juridical organization the "sword power" of the state is capable of using the required force whenever it is necessary – in service of restoring law and order when certain legal interests are encroached upon (think about actions of the police or the defense forces). The term force stems from the physical aspect of energy-operation and in this context it elucidates the function of the state within this aspect.

The state as a public legal institution binds together the lives of its citizens in a specific way – in the sense that a certain portion of one's life-time actually belongs to the state (insofar as one has to work for that part of one's income destined for tax-paying) and also in the necessity that the state can only maintain its territorial integrity against possible threats from outside if citizens are integrated within the defense forces – even running the risk of losing their lives in military action. Clearly, life and death assumes their own peculiar role within the state as an institution – and it undeniably testifies to the fact that the state does function within the biotic aspect of reality as well. The nation of a state (transcending diverse ethnic communities without eliminating their right to exist) operates on the basis of a national *consciousness* and an emotional *sense of belonging*. Although it does not apply to all citizens, a worthwhile state should succeed in making the majority of its citizens feeling at home. These phenomena clearly cannot be divorced from the sensitive-psychic function of the state. Furthermore, once we realize that citizens ought to feel at home within the state, they can also positively identify with it (compare the role of ID documents) – the political contents of what sociologists would call the 'we' and the 'they'. We are South Africans and 'they' could be from any other nationality (Australian, American, German, Namibian, and so

on). The core meaning of the logical-analytical aspect is captured in the reciprocity of identification and distinguishing – whoever identifies something is at once involved in distinguishing it from something else. Therefore, the national identity of the citizens of the state testifies to the fact that this identity cannot be understood apart from the function of the state within the logical-analytical aspect. When we take into account the argumentative possibilities entailed by functioning within the logical-analytical aspect of reality, we realize that the nature of the public opinion operative within any particular state in a broader sense manifests the function of the state in the said aspect.

The historical aspect of reality concerns formations of power since it brings to expression the basic trait of culture: the uniquely human calling to subdue the earth and to disclose the potential of creation in a process of cultural development. Such a process takes place hand-in-hand with an on-going development of human society in which – through increasing differentiation and integration of distinct societal zones (spheres) – distinct societal collectivities, such as the state, eventually emerge. It is only on the basis of its "sword power" that the state can function as a public legal institution, because maintaining a public legal order requires the monopoly over the "sword power" on the territory of the state. This function of the state within the historical aspect of reality actually constitutes one of its two outstanding (or: characterizing) functions, namely its *foundational* function, which requires the leading role of a qualifying aspect (which, in the case of the state, is the jural aspect). Of course, the function of the state in the historical aspect is also clearly evidenced in the actual history of every distinct state. That the state has a function within the sign-mode of reality is obvious from its national symbols (anthem, flag, etc.) and from its official language(s). Similarly, the state function within the social aspect of reality since by binding together its citizens within a public legal institution it thus determines a specific kind of social interaction taking place within it. Participating in a general election, acquiring an ID, observing traffic rules on the way, respecting the rights of fellow citizens – all these and many more forms of social interaction exemplify the function of the state within the social aspect of inter-human interaction.

Raising taxes not only affect the financial position of the citizen but also enables the state to fulfill its legal obligations in governing and administering a country – bringing to light a facet of the economic function of the state. Although a state is not an artwork, it typically belongs to the task of a government to harmonize clashing legal interests.

But establishing balance and harmony amongst the multiplicity of legal interests within a differentiated society is always guided by the (mentioned) jural function of the state. The idea of *public justice* is impossible without the function of the state within the jural aspect of reality. The state also requires ethical integrity amongst its citizens, for without this loyalty the body politic will fall apart. It is therefore appropriate that the extreme of disobedience to this loyalty is punishable if a citizen is found guilty of high treason. The nation of a state must also share in its vision, in its convictions regarding establishing a just public legal order, giving each citizen its due. It is only on this basis that the highly responsible task of governing a country could be en-trust-ed to those in office.[4] Terms like 'trust', 'certainty' and 'faith' are simply synonymous. The certitudinal or fiduciary aspect of reality – the faith aspect – is therefore not foreign to the existence of the state. Just like all the other mentioned aspects it intrinsically co-conditions the existence of every state and at once explains why no single state can exist without also functioning within the faith aspect of reality.

4. Internal function and external relations

Chaplin highlights a certain ambiguity and inconsistency in Dooyeweerd's thought regarding the distinction between "internal functions" and "external relations" of the state (Chaplin, 2007:130-133). According to him one finds on NC-III page 483 an instance where the "regulation of private economic structures" by the state is "cited as an example of the internal economic functioning of the state" (Chaplin, 2007:131). By contrast Chaplin says that in "raising its own revenue, the state is requiring its citizens to fulfill the proper duties of membership in the political community" (Chaplin, 2007:131). The heading of the section to which Chaplin refers concerns the integrating function of the state in respect of its *internal political economy* (Dooyeweerd, 1935:420 ff.;[5] see Dooyeweerd, 1997-III:482 ff). Yet it should be kept in mind that initially *political economy* emerged as a study of the *economies of states* and its agenda included the tax obligation of citizens (see Myrdal, 1932:7, 86-87).[6]

4 The modern idea of the *office* of government left behind a personal feudal bond of troth as well as the relation to any , dynasty of group – it embodies in the full sense of the word the depersonalization of governmental authority (see Donner, 1951:185).

5 The Dutch text reads: "De integreeringsfunctie van den staat in de interne politische economie …"

6 The 19th century witnessed the rise and development of political economy, although a professorship in it was already established at the University of Vienna in 1763. See in particular the works of J.S. Mill (1844 and 1878).

In the context of his analysis, focused on the way in which the state expresses itself within the diverse modal functions of reality, Dooyeweerd was here supposed to analyze the internal function of the state within the economic aspect. But, instead of doing that, he embarked upon a treatment of the integrating function of the state regarding *political economy*. Surely, performing "a political integrating function" (NC-III:482) forms a part of the *political task* of the government and therefore ought not to be confused with the original function of the state within the economic aspect. Dooyeweerd is fully aware of this, because he immediately adds that this task of the government is totally different from the integrating function of "economically qualified societal relationships" (NC-III:482). The term 'internal' in Dooyeweerd's exposition therefore refers to the government's *political* integrating task and not to its "internal economic function." The fact that the political task of integrating economic legal interests presupposes independent economically qualified organized communities (*verbanden*) *external* to the state (that are sphere-sovereign), does not mean that this task itself is *external* to the state.

The criticism therefore should have been that, instead of discussing the intrinsic function of the state within the economic law-sphere (such as observed in tax revenue), Dooyeweerd actually discussed an element of the government's task of integrating (economic) legal interests. The content of what Dooyeweerd explains is correct; the place where he does this should have been elsewhere.[7]

In this context Chaplin gives a positive assessment of Dooyeweerd's notion of "political enkapsis" as an alternative to "both individualism and universalism" by emphasizing that the state does not have "any original competence in non-political structures." This "simultaneously" affirms that the "state has the competence to regulate *externally* any non-political structures insofar as their activities have public-legal consequences" (Chaplin, 2007:132). However, the full context of the partial quotation which Chaplin here gives shows that his own qualification is incorrect: "insofar as their activities have public-legal consequences." Dooyeweerd says that this "harmonization process should consist in weighing all the interests against each other in a retributive sense, based on a recognition of the sphere-sovereignty of the various societal relationships" (Dooyeweerd, 1997-III:446). The mere fact that civil private law never

7 Of course this remark does not invalidate the correct distinction highlighted by Chaplin between "a balance of payment deficit and a budget deficit" (Chaplin, 2007:131).

originated independent of the body politic shows that the harmonization of legal interests cannot be restricted to "public-legal consequences" as Chaplin alleges. Encroaching upon the sphere-sovereignty of one non-political social entity by another one also does not transform the private legal interests involved into something having a public legal nature. The integrative task of a government embraces both its upholding of those state-institutions concerned with *public legal interests* (criminal courts) and those involved with *personal and societal freedoms* (civil courts).

The two most basic public legal interests of importance for the individual citizen concerns the personal bodily integrity of every citizen and the public-legal side of property right. For that reason the state takes the initiative when an assault or killing occurs, or when someone's property right is violated (compare the classical phrase *life*, *liberty* and *property* – Locke, 1966:119). Entering into a contract and terminating it belong to the domain of civil law. Note that the relevance of the three distinguished spheres of law within a differentiated society is not restricted to any specific or privileged place within the territory of the state. When someone is killed during a church service criminal law is immediately activated, and when the minister incriminates a member of the congregation from the pulpit the sphere of civil private law can be activated.

5. A different idea of internal and external coherence

Of course there is a different way in which one can distinguish between what may be designated as the *internal* and the *external* coherence between different aspects, in particular between the qualifying aspect of an entity or societal structure and the original function of that (natural, cultural or societal) entity within all the other aspects of reality. However, Dooyeweerd did not make this distinction 'H'.

Similarly, one can discern an inner and an outer coherence between the qualifying jural aspect of the state and the other original modal functions of the state. The fact that also a state functions within the economic aspect implies that every state has to observe economic normativity, for in the execution of its task it should handle all its resources in a *frugal way*. Therefore the economic actions of the state are subject to economic principles. By contrast, the economic retrocipation within the structure of the jural aspect on the law-side constitutes the jural principle of *avoiding what is excessive*.[8] Public opinion manifests the original function of the

8 In particular Dooyeweerd refers to the concept of *jural economy* and its implied elementary basic concepts of *legal interest* and *legal proportionality* – see Dooyeweerd, 1967:27.

state within the logical-analytical aspect, but it differs from the jural accountability of natural persons or legal entities because the jural accountability analogically reflects the logical principle of sufficient reason within the jural aspect.[9] The legal power vested in the office of government is nothing but the *competence* to form positive law (to positivize jural principles). This office with its competence (legal power) is different from the original function of the state within the cultural-historical aspect, for the latter concerns the original *power of the sword*.

Finally, in order to highlight one further instance of the difference between the inner and outer coherence we mention the deepened principles of jural morality (designated as legal-ethical principles). These disclosed principles come in sight through the anticipatory coherence between the qualifying jural aspect of the state and the moral (ethical) aspect of love. The love of a country by its citizens shows the original function of the state within the moral aspect and it therefore differs from legal-ethical principles such as the fault principle, equity and *bona fides*.

6. Justice and the distinction between constitutive and regulative structural elements

Before the term *justice* can acquire a well-delineated meaning it is necessary to come to terms with the constitutive structural elements within the jural aspect as well as the regulative (deepened or disclosed) jural principles. Dooyeweerd phrases this distinction in terms of the difference between retrocipatory and anticipatory analogies within the structure of the jural aspect. From the perspective of analyzing the basic concepts of the discipline of law Dooyeweerd raises the following question: "Is it possible to grasp in concepts all the analogies that we discern in the jural mode of experience?" His answer reads:

> No, this is only possible in relation to the retrocipatory analogies. The anticipatory ones only reveal themselves when law is opened up and starts to anticipate later aspects on the basis of a historical disclosure of culture. The jural elements of fault (or guilt) bonos mores, bona fides, equity, etc. are not found in a closed legal order. And so they fall outside the ambit of the concept of law, for that concept can only encompass those modal moments that are found in all legal orders, including therefore a primitive legal order (Dooyeweerd, 1967:2).

Whereas concepts such as a legal order (elementary basic concept expressing the numerical analogy within the jural aspect) and jural causality

9 This logical principle, in turn, reflects the causal physical analogy within the structure of the logical-analytical aspect as to its norm-side.

(elementary basic concept reflecting the physical analogy within the jural mode) apply to distinct (constitutive) structural elements within the jural aspect, the concept of law embraces all these retrocipatory analogies at once.

In order to appreciate Dooyeweerd's view of the *idea* of public justice, a proper understanding of his *concept of law* is required. Chaplin approaches the idea of public justice by relating it to sphere-sovereignty, for "public justice involves *harmonizing the various interests which arise from the legal sphere-sovereignty of various social structures*" (Chaplin, 2007:134). He then focuses on the term 'harmonizing' which, according to him, was employed by Dooyeweerd for the sake of "systematic consistency" because the jural aspect has its direct foundation in the aesthetic aspect. He then interjects: "But I suggest that the *economic* foundation of the legal aspect illuminates more clearly what Dooyeweerd actually has in mind here" (Chaplin, 2007:134). He continues: "We might more felicitously speak of a 'frugal' or non-excessive balancing of legal interests. The state's responsibility to render justice to each legal interest could then be described, more evocatively, as preventing the excessive satisfaction of each of these interests at the expense of others. When justice is done, there will be such an element of 'frugal (re-)tribution'; or, more elegantly perhaps, 'balanced rendition'" (Chaplin, 2007:134). On the previous page Chaplin provides a quote by Dooyeweerd in which it appears as if Dooyeweerd sees a close link between "public social justice" and the "harmonizing of interests." Dooyeweerd writes: "The internal political activity of the State should always be guided by the idea of public social justice. It requires the harmonizing of all the interests obtaining within a national territory, insofar as they are enkaptically interwoven with the requirements of the body politic as a whole. This harmonizing process should consist in weighing all the interests against each other in a retributive sense, based upon a recognition of the sphere-sovereignty of the various societal relationships" (Dooyeweerd, 1997-III:446).

Chaplin is correct in pointing out that the phrase "public social justice" does not properly render the meaning of the original Dutch text into English. The Dutch text reads: "Steeds behoort de interne politische activiteit van den staat onder *typische leiding* te blijven van de idee *der publieke verbandsgerechtigheid*, welke een evenwichtige harmoniseering in den zin der vergeldende afweging eischt van alle belangen, welke zich binnen het landsgebied geldend maken, inzooverre zij enkaptisch verlochten zijn met de eischen van het staatsgeheel, en welke ook de *juridische* souvereiniteit in eigen kring eerbiedigt" (Dooyeweerd, 1936-

III:401-402).[10] Chaplin suggests that the correct translation should be: "public *communal* justice" (Chaplin, 2007:133). However, translating the original Dutch text is more complicated, because Dooyeweerd distinguishes between *gemeenschap* and *verband*. According to him only historically founded *gemeenschappen* are to be designated as *verbanden*. Whereas the Dutch term *gemeenschap* could be translated with the term *community*, the term *verband* (= historically founded *gemeenschap*) is normally translated (in NC) as *organized community*.[11] The phrase "publieke verbandsgerechtigheid" therefore rather requires a circumscription in English, such as: "The internal political activity of the State should always be typically[12] guided by the idea of the public justice of the state as an organized community".[13]

When Dooyeweerd says that public justice *requires* the harmonization of interests, he highlights a constitutive (retrocipatory) element within the structure of the jural aspect. But his understanding of the constitutive structure of this aspect embraces *all* retrocipatory analogies, not merely *one* of them, such as the aesthetic or the economic. Chaplin apparently did not realize that the concept of law is a compound or complex concept embracing at once every one of its foundational analogical moments. Dooyeweerd specifies what this entails both with respect to the law-side and the factual side of the jural aspect.

(1) The modal meaning of the juridical aspect on its law-side is: the unity (the order) in the multiplicity of retributive norms positivized from super-arbitrary principles and having a particular, signified meaning, area and term of validity. In the correlation of the interpersonal and the communal functions of the competency-spheres

10 Chaplin mentions the Dutch phrase as "publiek verbandsgerechtigheid" accidentally leaving out the "e": it should be "publieke verbandsgerechtigheid."

11 Because this terminology of Dooyeweerd confuses the modal totality concept regarding different ways of social interaction with the issue of a foundational function of societal entities, we opted for a different translational equivalent for *verband*: *soci(et)al collectivity*.

12 Note that the English translation left out the crucial term *typische*! Implicit in this terminology is the distinction between *modal laws* and *type-laws*. Modal law hold for all possible entities whereas type-laws only apply to a limited class of entities, namely those belonging to a specific *type*. The first two main laws of physics – energy-conservation and non-decreasing entropy – are instances of modal laws because they apply to all possible physical entities. The law for an atom, by contrast, only holds for this specific *kind* of physical entity – justifying the use of the phrase *type-law*.

13 Literally *publieke verbandsgerechtigheid* should be rendered as: public, organized-communal justice."

these norms are to be imputed to the will of formative organs, and they regulate the balance in a multiplicity of inter-personal and group-interests according to grounds and effects, in the coherence of permissive and prohibitive (or injunctive) functions by means of a harmonizing process preventing from any excess, *in the meaning-nucleus of retribution*.

(2) The modal meaning of the juridical aspect on its subject-side is: the multiplicity of the factual retributive subject-object relations imputable to the subjective will of subjects qualified to act, or per repraesentationem to those not so qualified. These subject-object relations are bound to a place and a time, in the correlation of the communal and the interpersonal rights and duties of their subjects. In their positive meaning – in accordance with (or in conflict with) the juridical norms –, these subject-object relations are causal with respect to the harmonious balance of human interests *in the meaning of retribution* (Dooyeweerd, 1997-II:406).

From this comprehensive account it is clear that the concept of law does not allow for any *trade-off* by means of which one retrocipatory analogy (such as the aesthetic) could be replaced by another one (such as the economic), because they are all equally constitutively and mutually involved.

The normative meaning of the qualifying jural aspect of the state is sometimes depicted as the jurical norm of integration and following some of Dooyeweerd's analyses it is specified as the task of a government to establish a balance and harmony amongst the multiplicity of legal interests on its territory and to restore this balance in a retributive sense whenever it is disturbed. Yet a proper articulation of this *typical* guiding function of the task of government ought to include every distinct analogical moment within the jural aspect. Let the author therefore attempt to give an account of this (typical) guiding normative jural meaning that incorporates all retrocipatory analogies.

> A government, as legally competent state-organ, is called to maintain a balance and harmony in the multiplicity of collective, communal and coordinational legal interests within its legal domain by effectuating a durable positivization of underlying typical legal principles that can only be made valid (enforced) if the government has an accountable free legal will enabling it to correctly interpret juridically relevant events in order to, without any abuse of power, act by harmonizing the legal interests involved.[14]

14 Let us briefly identify the distinct modal norms on the law-side of the jural aspect embodied in this formulation: *multiplicity* (number), legal *domain* (space), *made valid* (physical), *legal organ* (biotic), *legal will* (sensitive-psyhical), *legal accountability* (logical-analytical), *positivization* (cultural-historical), *legal interpretation* (sign),

This analysis runs parallel with the cross-cutting significance of the (elementary and compound) basic concepts of the science of law. Dooyeweerd remarks that none of them belongs to any specific division of the science of law (such as "civil law, commercial law, law of civil procedure, law of criminal procedure, and administrative law").

Dooyeweerd lists the following concepts analyzed by him in his *Encyclopedia of the science of law*: "The concepts: legal norm, legal subject and legal object, legal fact, subjective right and legal duty, area of validity and the locus of a legal fact, lawfulness and unlawfulness, jural attribution and accountability, jural will, jural causality (legal ground, legal consequence as to the law-side; the subjective or objective causality of, respectively, a legal transaction or objective legal fact, as to the subject-side), jural positivizing and the originating jural form (formal source of law), legal organ and jural competence (legal power), jural interpretation and legal significance, jural fault or guilt, good morals, good faith" (Dooyeweerd, 2002:199-200). It therefore has to be emphasized once more: it is not meaningful to consider any constitutive structural element within the jual aspect in isolation from all the others.

Only when the *full scope* of the foundational structure of the jural aspect is taken into account is it possible to consider its deepening and disclosure under the guidance of the post-jural aspects. The most obvious legal-ethical principles mentioned above are those of fault, bona fides and equity).

Insofar as the term *justice* is employed in Dooyeweerd's thought two things ought to be kept in mind. First of all it presupposes the entire constitutive structure of the jural aspect, capable of being grasped in the concept of law. Secondly it is meant to take into account the deepened or disclosed structure of the jural aspect.

As an effect of the process of societal differentiation, the deepened modal personality principle (*persoonlijkheidsbeginsel*), as well as the sharp distinction between public legal power and private property right, materialized (see Hommes, 1972:481). This distinction intimately coheres with the rise of the modern state supported by a process through which governmental power changed from a private property right (*patrimonium*) into a *public office* in service of the idea of the public interest, having as

collective, *communal* and *coordinational* (social), avoiding abuse of power (economic), *jural harmonization* (aesthetic).

its counter-pole the differentiation of private property rights. The juridical personality principle is guided by the regulative jural principle of the *worth of the human being* (*dignitas humana*) (Hommes, 1972:487) and it acquired a significant role in respect of the articulation of the public spheres of jural freedom of the human personality within the state[15] as well as within the non-political spheres of life.[16]

With reference to NC-III:445 Chaplin correctly remarks that "the principle of the public interest binds the state to the norm of public justice" (Chaplin, 2007:136).

The regulative principle of the *salus publica* brings to expression the deepened meaning of the jural aspect and the typical nature of administrative law. The crucial question is how the idea of the *salus publica* is to be limited, because, as we have noted, it has been used for diverse extremes – from the separation of parents and children (Plato and Fichte) in the name of public interest up to Locke's state nihilism (*laissez-faire*, *laissez-passer* – see Locke, 1690:197, § 158). There is simply no yardstick entailed in the mere idea of the public good or pubic interest that can curb the extremes of state nihilism and state absolutism and totalitarianism.

The only way to break through this deadlock is to revert to an explication of the meaning and role of the jural aspect as the *qualifying function* of the state. The crucial insight concerns the fact that the body politic finds its stature within the context of the public-*legal* nature of the state as a public-*legal* instutition (a *res publica*). Apart from acknowledging the guiding role of the jural aspect the idea of the *salus publica,* as well as that of the state as a *res publica,* do not obtain a structural delimitation. As a societal collectivity ("organized community" in Dooyeweerd's sense) the *typical* public-legal nature of the state differs from every other legal sphere within society in that the non-political social forms of life are not *qualified* by the jural aspect.

Therefore, since their jural function is not the leading or guiding function their internal law remains bound only to their specific spheres of competence. It remains a *ius specificum*, a specific law, merely limited to

15 (Think of the freedom of expressing an opinion in the form of the press, confidentiality of letters (briefgeheim)), prohibition of arbitrary arrest (habeas corpus), religious freedom, an so on.

16 Freedom of association and meeting, of religious organizing, the freedom to educate children in accordance with their own convictions, and so on. See Hommes, 1972:504 and, in respect of educational freedom – see Chaplin, 2007:135).

a *section* of the population of the state. It is only state-citizenship that cuts across all other societal ties, because it is united into a truly universal collective communal law (*ius commune*). This *universality* is not *unlimited* for it does not authorize the state to engage in the usurpation of any specific private legal sphere – as if the state would be called to pursue a private religious integrative task (by establishing a universal church denomination), or to involve itself in elevating a particular cultural legacy to become normative for the body politic as a whole. Particular private concerns, flowing from the non-jural qualifying function of non-political social collectivities and communities, contradict the *universal public-legal* nature of the state, for the jural qualification of the task of the state cannot transform itself at once into a *universalistic* totality embracing every non-political sphere as an integral part.

The term *justice* captures all the *deepened* and *disclosed* moments present in the opened-up (anticipatory) structure of the qualifying jural aspect *requiring* the constitutive building blocks as their irreplaceable foundation. For that reason the idea of *public justice* does not receive its content from any retrocipatory moment as it is suggested by Chaplin – who nowhere in his article attempts to explain the nature of justice in terms of the disclosure of the jural aspect. The ethically deepened respect for the *dignity* of the human person indeed guides the different spheres of law – public law (including constitutional law, administrative law, criminal law and procedure) and civil private law. The regulatively deepened jural principles of *equity* and *bona fides* cut across the different legal spheres that are intertwined with the complex and multi-aspectual functioning of the state. It is only on behalf of these disclosed jural principles that the word *justice* acquires it full meaning – the deepened principles of jural morality collectively are all principles of *justice*.

6.1 Sphere-sovereignty: typical and a-typical tasks

It was noted that through societal differentiation and integration distinct sphere-sovereign social collectivities emerged in the course of a long process of historical development. The type-law for each distinct social collectivity delimits its inner sphere of operation, guided by its typical qualifying modal function. Once the inner structural principle of social entities is recognized it is possible to distinguish between *typical* and *a-typical* tasks of specific social forms of life.

Chaplin points out that this distinction caused severe difficulties for reflection on the task of government. How does one have to conceive of the task of a government regarding that which is supposed to fall *outside*

its sovereign sphere of operation? With reference to De Ruiter he notes that it seems as if Dooyeweerd cannot specify any structural norms for the a-typical tasks of the state (Chaplin, 2007:141). In respect of a "nationalized industry" he explores a good intuition saying: "Here too the state must respect economic sphere sovereignty if the industry is to function properly. But it is not essential to the nature of the state that it operate any nationalized industries" (Chaplin, 2007:141).

Of course the picture gets more complicated if the government has to weigh the interests of diverse non-political entities.

> It is certainly true that, if the government does any of these things, it must do so in (a) manner which treats the juridical interests of the relevant persons or structures equitably. It should not, arguably, dole out huge subsidies to opera companies while starving community theatres of funds, or bail out loss-making car companies while driving efficient farmers out of business (Chaplin, 2007:142).

In a more general sense Chaplin reiterates the yardstick of respecting the sphere-sovereignty of non-political social entities. "And it is also clear that the government must act in a manner which respects the sphere sovereignty of the parties involved" (Chaplin, 2007:142).[17] Chaplin's discussion could benefit by taking into account an article written by H.J. Strauss in *Philosophia reformata* in 1965. In this article Strauss engages in a consideration of these issues and suggested an alternative that transcends the criteria that may be deduced merely from the sphere-sovereignty of the state. He affirms the positive stance advanced by Chaplin regarding the sphere-sovereignty of non-political societal entities, including a brief account of their typically different tasks guided by their diverse qualifying modal aspects (see Strauss, 1965:198-199).

In order to assess a-typical governmental tasks a broader perspective is required, one in which the genesis of a differentiated society is kept in mind. Such a process of differentiation basically followed the path of historical norms for civilizational development, amongst which the principles of historical continuity, historical differentiation and historical integration are prominent (see Strauss, 1965:200-203). Tasks of an a-

17 In South Africa the landscape made it very difficult for a private company to construct a railway-network. Therefore the state took on that responsibility. In a similar way *Yskor* was erected as a steel industry. The Dutch Reformed Church also established an industry, namely a farming community at Kakamas (Northern Cape) in order to help out in difficult times.

typical nature within any community or societal collectivity therefore ought to be assessed in terms of the normativity of the principles guiding meaningful cultural unfolding and development in a general civilizational sense.

It should not be difficult to determine whether or not a specific task is *typical* or *a-typical*. The question is simply: if one imagines a situation in which the task under discussion is not performed, will that mean that the societal life-form involved no longer can perform those tasks that typically belong to its calling and sphere of competence? For example, is it possible to say that a state that is not running a railway-network or a steel industry is still a proper state? The answer is obviously *yes,* for states do not need to be involved in tasks such as these in order to continue to be full-blown states. Likewise a church denomination that is not running a farming industry will continue to function as a church.

Therefore it seems that two considerations ought to guide and direct an institution in taking on *a-typical tasks*.

(1) Treat the a-typical domain (sphere) in accordance with its own inner structural principle (inner *sphere-sovereignty* or *type-law*). A business firm ought to be managed *as* a business firm – not as an integral part of the state; a farming industry cared for by a church denomination does not turn into something ecclesiastical – it is not transformed into a religious service or a part of the congregation.

(2) Always work towards a situation where the relation of dependence could be terminated – support the a-typical sphere to regain its independence and thus to realize its own internal sphere-sovereignty in the on-going process of differentiation and integration of society. This second consideration retreats to a more general perspective, focused on the *dynamic development of society*, subject (amongst others) to the historical principles of historical continuity, historical differentiation and historical integration. This implies that the process of taking on a-typical tasks and allowing the spheres involved to eventually once again reach a situation where they can take responsibility for and give shape to their own distinct callings. In other words, neither the emergence of a-typical tasks nor their termination proceeds in an a-normative way. But if the norms for meaningful historical development are not applied, the reactionary effect may be a return to an earlier undifferentiated condition mediated by an on-going process of de-differentiation.

7. State and school: A national pledge and bill of responsibilities

The recent discussions in South Africa about the tentative *national school pledge* and *a bill of responsibilities* assume as their basis the *Constitution of South Africa.* Phrases such as "the rights enshrined in the Constitution of the Republic of South Africa" and the intention to "uphold the rights and values of our constitution" are used without for one moment contemplating questions such as: is the *Constitution of South Africa* written for the *state* or for the *whole of society*? and: does the school system solely aims at educating pupils to become *good citizens of the state*? One can add another relevant question formulated in a general sense by Chaplin: "require schools to conform to governmentally-authorized curricular philosophies (as in too many liberal democratic states to mention)"? (Chaplin, 2007:135).

8. Concluding remark

The non-political institutions and social entities within a differentiated society do not owe their existence to the state. The state presupposes them, for they co-constitute the multiplicity of legal interests integrated within the public legal order of a state. Yet a-typical governmental tasks ought to follow the guidance of historical principles such as that of continuity, differentiation and integration in order to ensure that society does not embark upon the road of a reactionary process of de-differentiation.

Bibliography

ALLOTT, A. 1980. A. *The limits of law*. London: Butterworths.

CRAIG, P. 2003. The limits of law: can laws regulate public administration? In: Pierre, J. & Peters, B.G. (Eds.), *Handbook of public administration*. pp.269-278.

COETZEE, P.H. 1955. *Die plek van die Staatsadministrasie in Friedrich Darmstädter se regs- en staatsbeskouing*. Amsterdam: Teerhuis & Klinkenberg.

DONNER, A.M. 1851. Bijdrage tot de Discussie over de Staatstaak In: Verdam *et al.,* Rechtsgeleerde Opstellen, door zijn Leerlingen Aangeboden aan Prof. Dr. H. Dooyeweerd, ter gelegenheid van ziin 25-jarig Hoogleraarschap aan de Vrije Universiteit. Kampen: Kok. pp.177-187.

DOOYEWEERD, H. 1931. *Crisis in de humanistsche staatsleer*. Amsterdam: N.V. Boekhandel W. Ten Have.

DOOYEWEERD, H. 1967 (to be published): The Encyclopedia of the Science of Law, Collected Works of Herman Dooyeweerd, A-Series Vol. 9, General Editor Strauss, D.F.M.; Special Editor Cameron, Alan. ((The Dutch texts comprise (a) The Introduction, (b) The Historical Volume, (c) The Systematic Volume, (d) The Distinction between Public Law and Private Law and (e) The Theory of the Sources of Positive Law. References to the Dutch text will be to 1967-I (historical part) and 1967-II (systematic part).)) Lewiston: The Edwin Mellen Press.

GATTI, J.F. (Ed.), with a foreword by Severence, M.F. 1981. *The limits of government regulation.* New York: Academic Press.

GIERKE, Otto von 1915. *Die Grundbegriffe des Staatsrechts und die neuesten Staatsrechtstheorien*. Tübingen: Mohr.

JOHNSTON, J.F. 1984. The limits of government. Chicago : Regnery Gateway.

LOCKE, J. 1966. *Two treatises of civil government*. London: Everyman's Library (1690).

MEKKES, J.P.A. 1940. *Proeve eener critische beschouwin van de ontwikkeling der humanistische rechtsstaatstheorieën*. Rotterdam: Libertas.

MILL, J.S. 1844. *Essays on some unsettled questions of political economy*. London: Aldwych (Reprinted by the London School of Economics and Political Science, 1948).

MILL, J.S. 1878. *Principles of political economy*, *with some of their applications to social philosophy*. London: Longmans, Green.

PENNOCK, J.R. & CHAPMAN, J.W. (Eds.). 1974. *The limits of law*. New York: Lieber-Atherton.

PIERRE, J. & PETERS, B.G. (Eds.) 2003. *Handbook of public administration*. London: Sage Publications.

SCHMIDTZ, D. 1991. The limits of government: an essay on the public goods argument. Boulder: Westview Press.

SNELLEN, I.Th.M. (Ed.) 1985. *Limits of government*: *Dutch experiences*. Amsterdam: Kobra.