

The genesis of a new conception of the state in the political philosophy of Dooyeweerd

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Opsomming

Hoewel Dooyeweerd regte studeer het sou sy aandag spoedig verbreed word tot 'n studie van die regsfilosofie, die filosofie in die algemeen en veral ook die geskiedenis van die filosofie. Daardeur is hy gekonfronteer met die eensydighede van sowel atomistiese (individualistiese) as holistiese (universalistiese) benaderings wat die ganse geskiedenis van besinning oor staat en samelewing deurkruis. Deur aandag te gee aan die struktuur van tradisionele (ongedifferensieerde) samelewings is Dooyeweerd in staat gestel om rekenskap te gee van die differensiering van die samelewing en die ontstaan van die moderne staat. Die owerheid se gesag is in 'n publiekregtelike amp gesetel wat nie langer as 'n heerlike reg (behorende tot die privaatbesit van 'n koning) gesien kan word nie. Op die basis van sy nuut-ontwikkelde teorie van modale aspekte het Dooyeweerd vir die eerste keer daarin geslaag om sistematies-samehangend rekenskap te gee van die ryk-geskakeerde wyse waarop die staat as samelewingsvorm in alle aspekte van die werklikheid funksioneer. Hierdie analise is verder verdiep deur die idee van 'n funderings- en 'n kwalifiseringsfunksie. Met behulp daarvan kon Dooyeweerd 'n belynde begrip van die aard van die staat formuleer: die staat is 'n publieke regsverband wat op basis van die monopolie van die swaardmag op 'n begrensde territorium onder leiding van 'n publieke geregtigheids-idee regsbelange saamsnoer in een openbare regsorde. Hierdie omskrywing hang saam met die nuwe tipering wat Dooyeweerd van die aard van die

publieke reg en die burgerlike en nie-burgerlike privaatreg gegee het – in diens van 'n geartikuleerde strewe om staatsvorming te laat rig deur die idee van 'n egte regstaat.

Abstract

Dooyeweerd commenced as a law-student but soon expanded his intellectual pursuits beyond the boundaries of the science of law. The prevailing schools of thought within the discipline of law helped him to be sceptical about the allegedly purely logical or purely jural nature of the basic concepts of the discipline of law. His novel approach accepted both the uniqueness of the various aspects of reality and their mutual coherence. In articulating his new general theory of modal law-spheres he advanced systematic distinctions which facilitated an understanding of universal modal aspects which are not only modes of being but also modes of explanation. The dominant theories of state and society mainly fluctuated between atomistic (individualistic) and holistic (universalistic) approaches – one-sided views accentuating either a quantitative multiplicity (number) or one or another societal whole of which all the other societal entities are mere parts. Traditional societies need to differentiate before the necessary space is opened up for the rise of the modern state. Nonetheless it did happen that monarchies are sometimes romanticized as the most frequent states while holding on to a view of kingship which does not allow for the office of government as being public in nature. What is unique in Dooyeweerd's understanding of the state is that it functions within all aspects of reality. Although these aspects are fitted in an irreversible order of succession, something else is needed to account for the typical nature of the state. On the basis of the distinction between modal laws and type laws Dooyeweerd introduces yet another novel systematic distinction, namely the one between the typical foundational function and the typical qualifying function of an entity. As an organized community the public nature of the state is qualified by the jural aspect while having its foundational function in the formation of power (the sword power), i.e. in die cultural-historical aspect of reality. What is unique in his legal and political philosophy is given in the way Dooyeweerd distinguishes between public law on the one hand and civil and non-civil private law on the other. In the final analysis Dooyeweerd's

new appreciation of the structural principle of the state primarily serves to inspire state-formation to observe the inherent sphere-sovereign limits attached to governmental power – the idea of a just state (rechtsstaat).

Particularly in confrontation with the dominant philosophical orientations of the early 20th century Dooyeweerd soon realized that his training within the field of law should be expanded in the direction of the philosophical foundations of the academic disciplines. At the same time he first of all wanted to test his novel philosophical ideas within an academic domain in which he specialized before he ventured to explore the general philosophical implications of his innovative new philosophical stance. In this article the focus will be on the difficulties facing his attempt to develop a new understanding of the state. For the sake of a proper understanding of the focus and scope of this article we commence with a brief overview of what will follow.

Because the main aim of this article is to account for the *genesis* of a new conception of the state in the political philosophy of Dooyeweerd, it first of all highlights the main contours of the intellectual legacy of the West, which toggled between the one-sided extremes of an atomistic (individualistic) and a holistic (universalistic) approach. It is only on the basis of this background-perspective that it is possible to appreciate the originality of Dooyeweerd's contribution to the domain of scholarship and of his confrontation with various philosophical trends within die science of law and the discipline of political theory. The way in which the familiar distinction between entities and functions is treated within this article, including a concise overview of the various ways in which the state functions within each modal aspect of reality, is not found in any article formerly published in the *Journal for Christian Scholarship*. This perspective is broadened when a brief account is given of the distinction between civil and non-civil private law (absent in the training of students in standard law-schools). This section contains novel arguments regarding succession and foundation, regarding the republican nature of the state as well as the spheres of law within a differentiated society, articulated against the background of the Roman *ius civile* and *ius gentium*. The way in which Dooyeweerd distinguishes between civil and non-civil private law barely features in *A New Critique*. In Volume III it is implicit on pages 446 ff. and explicit only on page 690 – in a single sentence: "In this view private law is only of one kind: it is identical with civil law." Dooyeweerd elaborates this significant view in more detail in his not-yet-published class-notes on the Encyclopaedia of the Science of Law.

1. Contours of the intellectual legacy of the West

Western (political) philosophy originated in Greek antiquity. During the medieval period it was transformed through an attempted synthesis between elements of Greek philosophy and biblical Christianity. What Plato and Aristotle contemplated about the state in supra-individual terms assumed a subordinate place in the medieval split between *nature* and *grace*. Although it represented the highest *temporal* form of perfection, the state ultimately was merely a stepping-stone utilized by the church which was supposed to obtain supra-natural eternal bliss (see Von Hippel, 1955:313). Via the Renaissance and the Enlightenment the emphasis shifted to individuals, the supposed atoms or elements incorporated in social contract theories. However, romanticism reverted once more to an appreciation of the supra-individual nature of a *folk community* with its own *national spirit* (*Volkgeist*). This development, through its influence upon Nazism, caused unforeseen and horrific consequences for the political situation in Europe more than a century later, particularly evident in *World War Two*. It also influenced the Afrikaner *folk ideology*.

2. Dooyeweerd entering the domain of scholarship

During the second decade of the 20th century Dooyeweerd started to acquaint himself with the broader world of scholarship.¹ After the completion of his dissertation he was confronted with the most diverse schools of thought both within legal philosophy and political theory. The preceding 500 years were largely dominated by various *humanistic* traditions which developed after the Greek-Medieval legacy dominated the scene for millennia.

Christian reflection on state and society resorted to the foundational ideas of Augustine (354-430) and Thomas Aquinas (1225-1277), although it also had to distance itself from un-biblical motives present in their philosophical views. What emerged was a new approach dating back to the Reformation of the sixteenth century and eventually followed up by Groen van Prinsterer (1801-1876) and Abraham Kuyper (1837-1920). These thinkers in particular paved the way for the contribution of Herman Dooyeweerd (1894-1977) who, alongside his brother-in-law, D.H.Th Vollenhoven (1892-1978), developed a philosophical understanding of reality directed at and informed by the biblical distinction between Creator and creation.

1 He completed his doctoral dissertation in 1917 on *The Council of Ministers in Dutch constitutional law*.

It explains why the cultural sphere within which Dooyeweerd grew up acquainted him with significant fruits of the Reformation. Groen van Prinsterer conveys his explanation for the intrinsic link between unbelief and revolution in a work with a similar title, *Unbelief and Revolution (Ongeloof en Revolutie* – 1847, 1868, and 1922) and Abraham Kuyper states his views in works such as his *Ons Program (Our Program* – 1880) and his *Anti revolutionaire Staatkunde (Anti revolutionary Politics, 2 Volumes* – 1916).

3. Appreciating Dooyeweerd's originality

However, as soon as one investigates Dooyeweerd's political philosophy and theory of the state, one is struck by its comparative *originality*. Although there are many points of connection with the past, the encompassing context within which Dooyeweerd articulated his idea of the state exceeds what normal practitioners of the disciplines of law and political science would have expected.

The same assessment applies to his entire philosophy, because it is striking that academics coming from diverse intellectual back-grounds nonetheless highly appreciate the unique contribution of Dooyeweerd to scholarship as such. When Dooyeweerd turned 70 (in October 1964) the daily newspaper *Trouw* published an article written by G.E. Langemeijer, a former *Attorney General* of the *Dutch Appeal Court* and a former *Chairman* of the *Royal Dutch Academy of Sciences*. In this article Langemeijer explicitly mentions the fact that he has a totally different worldview and political orientation than Dooyeweerd.² He ponders the question what the significance of Dooyeweerd's philosophy is for *The Netherlands* and for the *rest of the world*? The reason for this lenience and wider scope is found in Langemeijer's preceding assessment, where he states "that one can comfortably say that Dooyeweerd is the most original philosopher Holland has produced, even Spinoza not excepted".³

That a president of the "Humanist League" in the Netherlands and professor of philosophy at the Technical University of Delft, dr. P.B. Cliteur, holds a similar appreciation, underscores what Langemeijer has said. According to Cliteur "Herman Dooyeweerd undoubtedly is the most formidable Dutch philosopher of the 20th century."

2 Langemeijer stated that he came "van geheel andere wereldbeschouwing en politieke orientatie".

3 "van wie men rustig kan zeggen dat hij de meest oorspronkelijke [wijsgeer] is, die Nederland ooit heeft voortgebracht, Spinoza zelfs niet uitgezonderd" (see Kalsbeek, 1970:10).

Another scholar, Giorgio Del Vecchio (the well-known Italian neo-Kantian legal philosopher), straight-forwardly said that Dooyeweerd is “the most profound, innovative, and penetrating philosopher since Kant” (Dooyeweerd, 1996a).

4. The importance of a world- and life-view

Initially Dooyeweerd’s philosophy of the Law-Idea (*Wetsidee*) was also seen as a *Calvinistic philosophy*. He soon realized that in many respects this may cause misunderstandings and therefore eventually switched to the phrase: *philosophy of the cosmonomic idea* – literally, *Philosophy of the Law-Idea*.

The term ‘Calvinism’ can only be explained historically by the fact that this movement originated in the Calvinistic revival which, according to Dooyeweerd, “toward the end of the previous century [19th century], led to renewed reflection on the relation of the Christian religion to science, culture, and society” (see Dooyeweerd, 1996:1). Dooyeweerd remarks that Abraham Kuyper pointed out that the “great movement of the Reformation could not continue to be restricted to the reformation of the church and theology. Its biblical point of departure touched the religious root of the whole of temporal life and had to assert its validity in all of its sectors. Kuyper argued that insight into these implications had been best expressed by Calvin, and so for lack of a better term began to speak of ‘Calvinism’ as an all-embracing world view which was clearly distinguishable from both Roman Catholicism and Humanism” (Dooyeweerd, 1996:1).

However, being aware of the radical and integral meaning of the biblical basic motive of creation, fall and redemption by itself does not generate a new articulated philosophy. The challenge to accomplish such a goal faced two significant obstacles: The first one concerns a romanticized appreciation of relatively undifferentiated societies and the second one flows from the one-sidedness of traditional theories of state and society.

5. Undifferentiated societal structures

When the term *undifferentiated* is used we are reminded of the social organization of societies such as the guilds of the middle ages. They reveal features similar to the extended family and the sib as well as pre-feudal and feudal communities. Given the fact that theories of society and the *polis* (the Greek city-state) emerged within Greek culture, it should be kept in mind that

ancient Greece as well as ancient Rome reflect *undifferentiated societies*. The process of cultural and societal differentiation took shape during the reign of the patrician clans in Greece. Within the Greek city states the undifferentiated patrician clans were the bearers of power. Typically agriculture and stock-breeding were superseded by the money aristocracy, while the older Ionian tribes were replaced by territorial tribes.

Within societal conditions such as these it is understandable that the *politeia* was appreciated by Plato and Aristotle as encompassing all of society and as capable to perfect human life, guided by justice as moral virtue.

Remark:

In passing it should be noted that the word *state* is not very old. Plato used the term *politeia* (republic) while the medieval era referred to a *regnum*, also known as *empires* and *kingdoms*. Owing to their universalistic orientation Greek and medieval philosophy did not properly distinguish between “state” and “society”. An empire embraced all of life and is succeeded by another empire. Charlemagne, for example, saw in the Frankish empire the successor of the Roman *empire* (see Ehler & Morrall, 1954:12).

At a later stage of his scholarly development Dooyeweerd had a good understanding of the relative undifferentiated nature of early Roman folk law. Initially the *ius civile* was the sole bearer of law. The family life of the patrician clans had a sphere of competence which belonged to the *civitas* (the Roman tribe). These patrician clans were dissolved into the Roman *familia* when the power of the Roman republic emerged. Yet the Roman *familia*, subjected to the authority of the oldest male member, the *pater familias*, was still undifferentiated. This explains why the *pater familias* had power over the life and death of its members and why the *ius civile* (Roman folk law) excluded non-Romans – anyone outside the Roman folk community had no rights. At the same time, as Dooyeweerd points out, the “sphere of authority of the pater familias was juridically distinct from the power of the state. It was religiously inviolate and absolute, and the state could not interfere with it” (Dooyeweerd, 2012:24). Also the above-mentioned Germanic *guild* system continued a totalitarian and undifferentiated structure (see Dooyeweerd, 2012:78).

Within an undifferentiated context it is not yet possible to discern a genuine state geared towards the maintenance of a public legal framework, one in which the office of government is no longer seen as belonging to the private capacity of a king. This is precisely what Ludwig von Haller did in his extensive work, *Resauration der Staatswissenschaft (Restoration of Political*

Science – 1820-1825). Here he dedicates a substantial part to the independence of landlords and patrimonial monarchs (Second Part, Volume 3: “Von den unabhängigen Grundherren oder den Patrimonial-Fürsten”). Before Groen van Prinsterer was acquainted with the views of Friedrich Julius Stahl, he adhered to the position defended by von Haller. The latter considered the monarchy, with its large-scale ownership, as the norm for any political organization. He holds that monarchies are not only the first, oldest and most frequent states, but that originally most municipalities were based upon domestic communities or on (patriarchal) seignorial relationships of an estate (von Haller, 1820-1825:157).⁴ In his work, *Ongeloof en Revolutie*, van Prinsterer quotes the view of Guizot which advocates a similar stance. “the decisive and fundamental character of a kingship is that it was a personal and not public authority” (Van Prinsterer, 1922:68).

This romanticized appreciation of relatively undifferentiated societies is nothing but *reactionary* in a historical sense. In Kuyper's thought similar views are continued even dating back to ancient Greek culture – just compare his view of the state as an *ethical organism* which combines Aristotle and Romanticism (see Kuyper, 1907:60 ff.).

6. The one-sidedness of traditional theories of state and society

The entire history of reflection on the nature of state and society fluctuated between the extremes of *atomistic* and *holistic* theories. In the terminology of more recent sociological theories these orientations are also designated as individualistic and universalistic. The former type (atomistic/individualistic) postulates “atoms” – i.e. “individuals” – as the ultimate building blocks of society, while the latter (holistic/universalistic) assumes one or another societal whole to be the all-encompassing totality of society, embracing all other societal entities as mere parts.

4 A remark of Dooyeweerd in his extensive work, *The struggle for a Christian Politics*, sheds light on the background of this counter-revolutionary view: “Within the prevailing natural economy (the exchange of goods without the fundamental role of money as the measure of value), the services of state officials were rewarded by the territorial rulers with sizeable land grants. This resulted in the formation of a class of hereditary landowners and a subjective linking of authority to land ownership, leading to the false suggestion, maintained by some even in modern counter-revolutionary writings (Von Haller and others), that authority itself was a private right” (Dooyeweerd, 2012:25).

Before Dooyeweerd articulated his idea of the state he engaged himself in the just-mentioned study on *The Struggle for a Christian Politics*. Over a period of three years (1924-1927) he published a series of articles on this theme. The *Foreword* of this volume notes that it contains historical topics covering early Christianity and the rise of the idea of the *Corpus Christianum*. It also investigates the unitary ecclesiastical culture of the Middle Ages and its dissolution with the rise of modern Humanism, introduced by the Renaissance. As legal scholar Dooyeweerd highlights the rise and self-destruction of the Humanist theories of natural law while at the same time analyzing the development of the modern concept of *science* and the new concept of *matter*. He succeeds in relating themes that are apparently widely apart, such as the prevalent mathematical method and the views of Grotius and Hobbes. Of specific importance for an understanding of Dooyeweerd's new idea of the state is his confrontation in this volume with the nature of modern Humanism. It is remarkable how well he versed himself in the spirit of this newly emerging worldview with its dialectically opposing motives of *nature* (the natural science ideal) and *freedom* (the personality ideal).

Dooyeweerd understood the levelling effects of the continuity postulate of the science ideal and realized that it has an inherent levelling tendency that does not accept any boundaries for logical thinking. At the time he already had a first, rudimentary perspective on multiple aspects or functions of reality to which he applied the idea of spheres of laws (law-spheres) subject to the principle of sphere-sovereignty. Dooyeweerd holds:

Also, just as frequently, we find the tendency of logical continuity to be characteristic of this ideal of science. The goal of this tendency is to have the creative intellect reconstruct the universe with all its spheres of existence and validity in a logically unbroken, continuous coherence. The sovereignty of reason, the bulwark of the humanist ideal of science, cannot accept any absolute boundaries for thought. All law-like boundaries become relative. It is logical thought that guarantees the logical coherence, the logical continuity, between all law-spheres (Dooyeweerd, 2012:273-274).

This explains why the thought of Bodin and Grotius, and in particular that of Hobbes, "as soon as it gets hold of the law-sphere of the juridical and the state, cannot but result in the destruction of all sphere-sovereignty. Whereupon the dangerous political tendencies of the ideal of science, grounded in the fundamental structure of the humanist law-idea, are realized, with state absolutism as the dreary outcome" (Dooyeweerd, 2012:274). Interestingly, Fichte and Hegel are just briefly mentioned in this work. Later on Dooyeweerd

extensively (and in different contexts) analyzes the switch within post-Kantian freedom-idealism from the rationalistic individualism of the 18th century Enlightenment to an irrationalistic universalism. This switch was mediated by early Romanticism with its individualistic irrationalism (see Dooyeweerd, 2012:251 and Dooyeweerd, 2012a:175-187).

7. Philosophical trends in die science of law

After his appointment at the Free University of Amsterdam, Dooyeweerd presented his *Inaugural Address* in 1926, entitled: *The Significance of the Cosmonomic Idea for the Science of Law and Legal Philosophy*. He commences with a brief sketch of the development of the humanistic basic motive of nature and freedom (Dooyeweerd, 1926:5-13) in preparation of a more penetrating assessment of the state of the discipline of law at the time. In the light of the dialectical nature of the ground-motive of Humanism his *Inaugural Address* displays a sharpened awareness of the antinomies⁵ entailed in scholarly thinking. First of all he highlights antinomies from different academic fields, including the currently well-known set theoretic contemplation of the “set of all sets” (Dooyeweerd, 1926:83) – and then he proceeds with a penetrating analysis of antinomies within the humanistic theory of law in the light of diverse types of the humanistic law-idea.

These include naturalistic types (Dooyeweerd, 1926:16-22); idealistic functionalistic types (the Marburgh School within the neo-Kantian theory of law – Dooyeweerd, 1926:22-40); relativistic personalistic types (the Baden School of the neo-Kantian legal theory –Dooyeweerd, 1926:40-51); and the transpersonalistic type (revival of objective idealism within legal philosophy – Dooyeweerd, 1926:51-60).

In confrontation with these schools of thought Dooyeweerd soon realized that neither the logical-analytical aspect nor the jural aspect could be isolated from all the other aspects of our empirical world. For this reason the basic concepts of the science of law cannot be seen as *purely logical thought categories*, just as little as it is possible (*a la* Kelsen) to generate a “reine Rechtslehre”, a “pure theory of law”, in which all the ties or interconnections with the other aspects of reality are (theoretically) severed.

⁵ Note that whereas a contradiction concerns a confusion within a specific aspect (such as confusing a square with a circle: *a square circle*), an antinomy results when two (or more) unique aspects are reduced to one only (in the case of Zeno arguments static spatial positions are confused with the uniform flow of rectilinear movement). According to Stafleu one may interpret Zeno's arguments as a demonstration of the fact that numerical and spatial relations are inadequate to explain *motion* (Stafleu, 1987:61).

In response to the shortcomings and antinomies present in these modes of thought, Dooyeweerd further explored the implications of acknowledging sphere-sovereign functional aspects (modal aspects) of reality.⁶ His confrontation with the diverse trends of thought within the science of law mediated the development of the theory of modal law-spheres and their analogical interconnections.

8. Inter-modal connections

Dooyeweerd soon realized that the so-called “categories of thought” (the apriori categories of human understanding in the thought of Immanuel Kant) are not purely logical-analytical in nature and that the meaning of the jural aspect (law-sphere) cannot be grasped in isolation from all the other aspects of reality. Equally less should these categories be “seated” within the subjective human consciousness, as a prominent representative of the Berlin school of political theory, Georg Jellinek, advocated. He explicitly rejects the idea of the jural as transcending, in an ontic sense, human subjectivity. According to him, law is an ingredient of representations in the human mind, and coming to a closer determination of what law is, amounts to establishing which part of the contents of human consciousness should be designated as law.⁷

The first challenge facing a sound theory of law is to trace the modal aspect where aspectual (functional) terms are located. Consider the concept of a *legal order*. It entails the idea of a multiplicity of jural norms that are united. A legal order therefore entails a jural unity in the multiplicity of positively shaped or formed legal principles. The phrase “legal order” thus displays an unbreakable connection between the numerical meaning of the one and the many and the jural mode of our experience. Dooyeweerd articulates this

6 Interestingly Dooyeweerd’s work on the *Crisis in Humanistic Political Theory* (1931) totally avoided using the terms “modal”, “modality” or the expression “modal aspect”. Here he consistently restricts himself to using the term “function” (see the *Editor’s Foreword* in Dooyeweerd, 2010:i).

7 “Entweder man sucht die Natur des Rechtes als einer vom Menschen unabhängigen, in dem objektiven Wesen des Seienden gegründeten Macht zu erforschen, oder man faßt es als subjektive, d.h. innermenschliche Erscheinung auf. ... Das Recht ist dem nach ein Teil der menschlichen Vorstellungen, es existiert in unseren Köpfen, und die nähere Bestimmung des Rechtes hat dahin zugehen, welcher Teil unseres Bewußtseins inhaltlich als Recht zu bezeichnen ist” (Jellinek, 1966:332). Since the Renaissance modern nominalism did not acknowledge universality outside the human mind. Compare the nominalistic stance which has already been defended by Descartes: “number and all universals are mere modes of thought” (*Principles of Philosophy*, Part I, LVII).

situation by saying that within the structure of the jural aspect we may discern an *analogy* of the original meaning of the numerical aspect (the one and the many). The validity of legal rules concerns their *effect*, their *being in force*, clearly showing that the meaning of the physical aspect of energy-operation is also analogically reflected within the jural mode. Without the (foundational) meaning of the biotic aspect of reality, within which we meet life phenomena such as growth, differentiation and integration, it would be meaningless for the science of law to speak about differentiated legal spheres within society, such as constitutional law, penal law, civil private law, internal ecclesiastical law, commercial law and so on. Furthermore, the contrary between what is logical and what is illogical is analogically reflected within the jural aspect in the configuration of legal lawfulness and unlawfulness. Although the core meaning of the jural aspect is indefinable, its unique core meaning (meaning-nucleus) comes to expression only in coherence with all the non-jural aspects of reality. Perhaps the best way to designate the meaning-nucleus of the jural aspect is to see it as giving each person his or her due. Although Dooyeweerd uses in Dutch the term “vergelding”, the best translational equivalent may be the idea of *tribution* (as giving each person his or her due).

Within the theory of modal aspects (law-spheres) Dooyeweerd at the same time also acknowledges that the many-sided existence of natural and societal entities presupposes the (ontic) *universality* of all modal aspects, including the jural. This fundamental insight opens the way for recognizing an equally important trait of our empirical world, namely the fact that all natural and societal entities and processes in principle invariably function within all modal aspects of reality. This insight therefore requires an understanding of the connection between entities and functions.

9. Entities and functions

At first sight it may seem that distinguishing different modal (functional) aspects of reality does not remotely impact upon theorizing about the state. Dooyeweerd identified the following aspects, given in the order of succession which he discerns between them: number, space, movement, energy-operation, life, feeling, logical-analytical thinking, cultural-historical control, the lingual, social, economic, aesthetic, jural, moral and the faith aspect. If the structural principle of the state, designated by Dooyeweerd as its *individuality-structure*, has nothing to with most of these aspects, how can one then explain that *Annual Yearbooks* of states commence with statistics (such as the *number* of its citizens) and by providing information about the

size of the state's territory (*space*)? As noted above in connection with the phrase *legal order*, the core meaning of number, which is given in discrete quantity, underlies our awareness of the *one* and the *many*. This feature is often employed in an expanded context, transcending the mere numerical meaning of a discrete multiplicity, for instance when the idea of *unity and diversity* is articulated.

In respect of political theory and the structure of the state we have already noted that particularly since the Renaissance *atomistic* or *individualistic* theories of the state emerged – manifesting themselves in social contract theories. According to these theories the “atoms” of society and the state are the “individuals”. Clearly, the various natural and societal entities which we experience always function within the numerical aspect of reality. Conversely the numerical aspect may indeed serve as a *mode of explanation* of theoretical thought. From a historical perspective exploring this mode of explanation resulted in a *reductionist* understanding of the state. It is the outcome of the theoretical attempt to explain the state merely in terms of the interaction of a multiplicity of individuals.

At the cradle of philosophy in ancient Greece the Pythagoreans even claimed that *everything is number*. This conviction was soon challenged by a shift in emphasis after the discovery of *incommensurability* gave rise to the problematic nature of irrational numbers, which led to an exploration of the spatial whole-parts relation (see Parmenides B Fr. 8:3-6 and Zeno B. Fr. 3 – see Diels-Kranz, 1960:235; 257-258). This development led to a *geometrization* of Greek mathematics. Aristotle combined a reference to the one and the many with the whole-parts relation: “What ‘is’ may be either in definition (for example ‘to be white’ is one thing, ‘to be musical’ another, yet the same thing may be both, so the one is many) or by division, as the whole and its parts” (Physics 185b32-186a1 – see Aristotle, 2001:221). A bit further on he provides a precise characterization of the numerical meaning of infinity (one plus another one and so on) and its spatial meaning (infinite divisibility): “everything that is infinite may be so in respect of addition or division” (Physics 204a3-4 – see Aristotle, 2001:260).

Apart from the space metaphysics of Parmenides, the road was now paved for exploring a different *mode of explanation*, which resulted in universalistic or holistic theories of society and the state. Universalistic political theories, consistently thought through, invariably terminate in totalitarian views eliminating the structural differences between the various societal entities, because they elevate one or another societal whole to incorporate all the others as integral parts (see Strauss, 2012).

Dooyeweerd's philosophy enables us to recognize the fact that a one-sided and misdirected use of the numerical or spatial aspects as points of entry and as modes of explanation does not eliminate the functioning of every state within them.

Of course natural and societal entities, as well as all events (or processes) in principle also function in *all* the other modal aspects. Let us therefore briefly reflect on the functioning of the state within the various (ontic) modal functions of reality:

First of all, as already mentioned above, the state comprises a *multiplicity of individuals* normally designated as its *citizens*. Every *census* underscores this active function of the state within the quantitative aspect of reality. Keep in mind that this numerical function affirms one of the many modes of being of the state. Moreover, the existence of the state is certainly not exhausted by its numerical functioning. The most striking feature of the spatial function of a state is given in its *territory*. In spite of the fact that the citizens of a state are constantly *on the move*, i.e., interacting with other citizens, they remain bound to the state. In fact one of the hallmarks of a democratic state is that it should provide for the freedom of movement of its subjects. In addition to the kinematic function, the state also functions within the physical aspect. By organizing the "power of the sword" the state is capable of exercising the required *force* whenever necessary – in service of restoring law and order when certain legal interests have been encroached upon (think about the actions of the police or the defence force). In popular parlance we are used to hear of *law-enforcement*. Undoubtedly the term *force* stems from the physical aspect of energy-operation and in this context, it clearly elucidates the function of the state within the physical aspect.

The state as a public legal institution binds together the *lives* of its citizens in specific ways. Taxpaying shows that every productive citizen indirectly dedicates some part of his or her time to the state. A certain portion of the life time of these citizens actually belongs to the state. Furthermore, owing to the need to maintain its territorial integrity against possible threats from outside, a defence force is required, running the risk of citizens being *killed* in military action. Clearly, the life and death of citizens assume their own roles 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. Jim Skillen correctly points out: "Likewise, a political community exhibits biotic functions by the fact that its citizens function biotically, and many of its laws deal with public health and natural environmental regulations" (Skillen, 2008:12). The nation of a state (transcending diverse ethnic communities

without eliminating their right of continued existence), always operates on the basis of a national consciousness and an emotional sense of *belonging*. Although not all citizens may share this sentiment, a proper state should succeed in making its citizens *feel at home* (the notion of a *Heimat*). These phenomena clearly cannot be divorced from the *sensitive-psychic function* of the state. Furthermore, once we realise that citizens ought to feel at home within the state, they can also positively *identify* with it (compare the ID-documents of citizens). This function illustrates the political content of what sociologists call the ‘we’ and the ‘they’ – those belonging to this state and those not belonging to it. Since the core meaning of the logical-analytical aspect is captured in the reciprocity of *identification* and *distinguishing*, it is clear that whoever identifies something is also involved in distinguishing it from something else. The national identity of the citizens of the state testifies to the fact that this identity can’t be understood only by recognizing the function of the state within the logical-analytical aspect (of identifying and distinguishing). Citizens are capable of rational interaction such that their functioning within the logical-analytical aspect of reality provides a basis for the *public opinion* within any particular state.

The cultural-historical aspect of reality concerns formations of *power*, since it brings to expression the basic trait of culture, namely the uniquely human calling to disclose the potential of creation in a process of cultural development. Such a process goes hand-in-hand with an on-going development of human society in which – through increasing differentiation and integration of specific societal zones or spheres – distinct societal collectivities, including the state, in the course of time emerge. It is only on the basis of its “sword power” that the state can function as a *public legal institution*, since maintaining a public legal order depends on a monopoly of the “sword power” within the territory of the state. Of course the function of the state in the historical aspect is also seen in the actual history of every independent state. Then, 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 function of the state within the social aspect of reality is evident in the way in which it binds together its citizens within a public legal institution. It thus determines a specific kind of social interaction. Participating in a general election, acquiring an ID, observing traffic rules, respecting the rights of fellow citizens – and many more forms of social interaction, exemplify the function of the state within the social aspect of inter-human social intercourse.

Through taxes the state is enabled to fulfil its legal obligations in governing and administering a country, which brings to light an element of the economic function of the state. Given the significance of trade and commerce “political

economy” focuses on the financial duties of a government. Although a state is not a work of art it does have the task of *harmonizing* clashing legal interests. Establishing balance and harmony amongst the multiplicity of legal interests within a differentiated society is always guided by the jural function of the state. In addition to this internal coherence between the jural and aesthetic aspects of the state the latter also has an external (i.e. original) function within the aesthetic aspect, displayed in the characteristic format of published (promulgated) state laws, in the aesthetic qualities of governmental buildings (houses of parliament, jails), and so on. The idea of public justice is not possible if the state does not actively function within the jural aspect of reality. The state also requires mutual respect between government of subjects as well as an ethical integrity amongst its citizens, for without this loyalty, the body politic will fall apart (of course the government must also conform to standards of public decency and integrity in order to avoid vices like nepotism and corruption). The nation of a state must share in its vision, its convictions regarding establishing a just public legal order through which each citizen receives its due. It is on this basis only that the highly responsible task of governing a country could be entrusted to its office-bearers. Terms like ‘trust’, ‘certainty’ and ‘faith’ are synonymous. The certitudinal or fiduciary aspect of reality – the faith aspect – is therefore not foreign to the existence of the state. Apart from party political differences mutual trust between government and subjects is an important ingredient of a stable state organization. And every political party operates on the basis of a specific political *confession of faith* (its *credo*).

In the light of this brief analysis it follows that all aspects of reality *co-condition* the existence the state.

10. What is unique in Dooyeweerd’s understanding of the state?

10.1 *The aspectual many-sidedness of the state*

The modal universality of all aspects of reality implies that every natural and societal entity and process has functions within all modal aspects. We have seen that the state also shares in this many-sidedness of reality. Although this insight in itself certainly is unique, it still applies to all entities, not just to the state.

10.2 *The state as an organized legal community*

Of course what Dooyeweerd presents in respect of the state does not bypass historical contours found throughout the history of reflections on the domain of politics. One of the prominent features is seen in the fact that political theories have always focused on the nature and mutuality of “might” and “right”. Sometimes the state is endowed with *absolute power* and at others it is portrayed as protecting what is *right*. Theodor Litt notes that all reflection on the nature of the state oscillates between these two poles of state activity; *might* (Macht) and *right* (Recht) (Litt, 1948:23). But in spite of lines of connection such as these, linking Dooyeweerd’s philosophy in general and his political and legal philosophy in particular, to the intellectual legacy of the West, shows that his novel views are not found anywhere else.

In order to differentiate between the various kinds of societal entities Dooyeweerd first of all distinguishes between organized communities (Dutch: *verbande*), communities (Dutch: *gemeenschappen*), and coordinated relationships (Dutch: *maatschapsverhoudingen*). These distinctions are intimately connected with the way in which he characterizes natural and societal entities. For this purpose he introduces the distinction between a foundational function and a qualifying function.

10.3 *Succession and foundation*

Understanding this distinction between a foundational function and a qualifying function requires the insight that the various modal aspects of reality are fitted into a specific order of succession.

The numerical aspect, as the first aspect, precedes all the other – and we have already noted above that numerical analogies are found in other aspects, such as the jural, where we have met the phrase *legal order* (a *unity* in the *multiplicity* of legal norms). That the aspect of space, as the second aspect of our experiential horizon, has its direct foundation in number is evident when the nature of *dimensions* in space is considered, coupled with *spatial magnitude*. There may be one, two, three or more dimensions, analogically reflecting the meaning of number (1, 2, 3, ...). Spatial magnitudes are designated by numbers: length constitutes a one-dimensional magnitude, a surface a two-dimensional magnitude, and so on. Motion presupposes extension (the *movement-path*) and tempo (speed: specified with a *number*). Uniform motion is presupposed in the dynamics of physical energy-operation and without energy-operation living entities cannot display their vital (biotic) functioning. Apart from biotic organs no sensitivity is possible, since all sentient (conscious) creatures have *sense organs*.

Dooyeweerd advanced arguments supporting the view that the aspects just mentioned are foundational to the logical-analytical aspect, which in turn is foundational to the cultural-historical aspect, and that the same applies to the subsequent aspects which are given in the order of the lingual mode, the social aspect, the economic facet, the aesthetic side of reality, the jural, the moral and the certitudinal. In general, one can therefore say that particular aspects presuppose earlier aspects that are foundational to them.

An awareness of the order of succession between the various modal aspects, however, does not help us to arrive at a more precise understanding of different *types of entities*.

10.4 Modal laws and the type law of the state

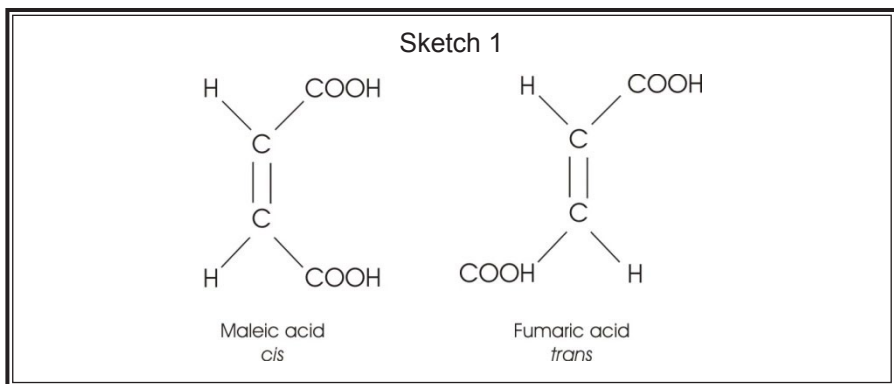
Dooyeweerd had to introduce another systematic distinction, namely that between “modal laws” (universal laws for any possible entity, i.e., all kinds of entities) and “type laws” (holding for a limited class of entities only, i.e., for specific kinds of entities only). Modal laws hold universally *without any specification*. For example universities, businesses, states, families and sport clubs all observe the normative economic sense of *frugality*, of not *wasting* money. But accounting for the difference between *tax* and *profit* requires an insight into the *typical* differences between a business enterprise and a state. Lacking such an awareness of the *typical* differences between states and business enterprises may easily lead to a confusion of these societal entities. Max Weber, for example, claims that there is no difference between a *large scale business enterprise* and the *state* (Weber, 1918:15).

10.5 The typical foundational function and typical qualifying function of the state

In order to identify the type law for being a state, Dooyeweerd made an appeal to what he called the *typical* foundational and *typical* qualifying function of the state. This specification aims at analyzing the *type law* of the state, similar to the way in which physics would investigate the type law for being an atom. Such a type law surely is universal in the sense that it holds for all states (or all atoms). But it is immediately *specified*, because not everything in our universe is a state (or an atom) – type laws always hold for a limited class of entities only.

Our earlier general observation, namely that every natural and societal entity functions within all the aspects of reality, is now in need of a more precise characterization, because the word “functioning” should actually refer to the *typical* functions of entities. This *typicality*, however, derives from the typical foundational and typical qualifying functions of entities.

Initially Dooyeweerd conjectured that natural things (material things, plants and animals) do not have a *typical* foundational function. However, in 1950 he altered his view stating that natural things do have a foundational function (see Dooyeweerd, 1950:75 note 8). Let us consider an example from the field of biochemistry. Merely identifying 12 atoms (namely $C_4H_4O_4$) does not tell us anything about the *typical* patterns in which they can be arranged and the possible chemical structures and physical properties that may ensue as a result of different spatial configurations. Yet, when diverse spatial arrangements are contemplated, it appears that these atoms may be constitutive for two chemically distinct compounds (maleic acid and fumaric acid), as illustrated in Sketch 1 below.



Although we are dealing with the same number of atoms, merely considering the foundational arithmetical aspect clearly does not generate any *typical* differences. The latter surfaces only once different spatial configurations are considered. Therefore, the typical foundational function of these molecular structures is given in the spatial aspect, while their typical qualifying function is found in the physical-chemical aspect of reality.

Regarding Dooyeweerd's conception of the state, the basic question in this context is which aspects are, according to him, the typical foundational and typical qualifying functions of the state. Surely, what Litt remarked (mentioned above), namely that views of the state oscillated between *power en right*, may be helpful. But it is helpful only when the argument is based upon an insight into the various modal aspects of reality, for the key problem is to identify the modal aspects within which "power" and "right" are respectively located. According to Dooyeweerd *power (control)* is the meaning-nucleus of the cultural-historical aspect, while what is "right" or *just* features within the jural

aspect with its core meaning of “*tribution*”.⁸ We may understand “*tribution*” as the jural imperative to give every person his or her due (*retribution* is the equivalent of the Dutch term “*vergelding*”). He therefore finds the foundational function of the state within the *cultural-historical aspect* and its qualifying function within the *jural aspect*.

Yet this brief characterization receives further specifications in Dooyeweerd’s political philosophy. First of all, the state is an *organized community* (*verband*). Secondly, the state is a *public* institution, which means that the office of government is embedded in this public legal character of the state, strictly correlated with the subjects of a state.

10.6 Why a republic is not a state-form

Dooyeweerd argues that this public legal character of the state ensures that the office of government is withdrawn from the private power-sphere of any individual, such as a King in a traditional monarchy. The public interest (*salus publica*) therefore stamps the state as a *republic* by definition. It entails that the term *republic* actually does not describe a state-form, but merely designates the public-legal character of the state as such. The following explanation of Dooyeweerd elucidates these distinctions:

An authentic state is not really present as long as the authority to govern in effect belongs, as a feudal right, to the private prerogatives of a ruler who in turn can convey, pawn, or lend them to officials belonging to the ruler’s realm or even to private persons. According to its nature and inner structure, the state is a *res publica*, a “public entity”. It is an institution qualified by public law, a community of government and subjects founded typically on a monopoly of sword power within a given territory. . . . Thus the division of the forms of the state into monarchies and republics commonly made since Machiavelli is basically incorrect. The word *republic* indicates nothing whatsoever about the form of government. It merely signifies that the state is a public rather than a private institution. . . Throughout the course of history many monarchies have lacked the character of a state, since governmental authority functioned not as an office serving the *res publica* but as the private property of a particular ruler. Governmental jurisdiction was an undifferentiated feudal prerogative. In such cases one should speak not of a state but of a realm (*regnum*), which was the property of a king. Not every realm is a state (Dooyeweerd, 2012a:162-163).

8 Note that every aspect displays a law side and factual side, analogical moments pointing (backwards and forward) to all the other aspects, subject-subject and subject-object relations. These structural elements are all qualified by the unique meaning-nucleus or core meaning of an aspect. The latter guarantees the irreducibility and indefinability of an aspect.

10.7 The integrative public legal task of the government

A genuine state arises in the process of societal differentiation and is therefore always accompanied by a multiplicity of differentiated societal entities *distinct* from the state. Although within such a differentiated society humans may assume multiple societal roles, no person is ever consumed by any one of them. Being a citizen of the state entails that we disregard all those other ties (roles) a person may have within societal entities apart from the state. Citizenship does not concern to which culture, race, sex or language group a person belongs. Nor does it ask whether a person is rich or poor, aesthetically gifted or not, highly intelligent, belongs to a particular confessional denomination, disposes over an academic qualification or not, is a member of a particular (nuclear) family, and so on. The only concern regarding citizenship is whether or not a person was born on the territory of a state or whether its parents are citizens of that state.

Yet, by disregarding these non-state ties in life they are not *eliminated*, because the public legal task of the state is precisely to bind together, in one public legal order, the legal interests flowing from participating in these non-political societal entities. On the basis of the monopoly of the power of the sword on its territory, the state is obligated to harmonize and balance the multiplicity of legal interests on its territory and whenever an infringement of rights occur, this balance should be restored in a truly retributive way.

10.8 Spheres of law within a differentiated society

Dooyeweerd rejects the extremes of atomism (individualism) and holism (universalism), respectively because these isms one-sidedly over-emphasizes number and space as modes of explanation. Alternatively Dooyeweerd applies the principle of sphere-sovereignty in his analysis of a differentiated society. The scope of this principle leaves room for the own inner laws both of the state and of all the other societal entities present in a differentiated society – social collectivities (*verbande*), communities and coordinated relationships.

Within the domain of public law, including constitutional law, administrative law, penal law, criminal process law and international public law (the “law of nations”), the authority structure of the state occupies a central position. The relationship between government and subjects is a relation of super- and sub-ordination, qualified by the public-legal character of the state.

Usually legal doctrine merely distinguishes between public law and private law. However, Dooyeweerd points out that there is a difference between civil private law and non-civil private law. Earlier we noted that initially the

Roman *ius civile* was an exclusive tribal law or folk-law. The expansion of the Roman Empire witnessed how people moving to the empire lacked the rights attached to Roman citizenship. By the middle of the third century a need developed to provide for the legal needs of these people. It was designated as the *ius gentium*. The *ius gentium* should not be considered as the intimations of the law of nations, as it is sometimes misunderstood. For that matter, these foreigners did not live *outside* the Roman Empire. Lord Mackenzie writes: "The *jus gentium* was a definite system of equitable law, free from technicalities, applying to the legal relations of all free persons" (Mackenzie, 1898:77, note 3).

Dooyeweerd realized that the *ius gentium* influenced the rise of civil private law. The latter developed as an inter-individual legal sphere in which every free person was equally appreciated as "a legal subject independent of all specific communal bonds, even independent of Roman citizenship. This was the difference between the undifferentiated Quiritian tribal law and the private common law" (Dooyeweerd, 1997-III:447). As a private common law civil law developed on the basis of a "large differentiation and integration of legal life and it is destined for one structure of human society only, namely that of co-ordinational civil relationships which fall outside the internal communal and collective sphere of marriage, family, the firm, organizations, and so on. Within the civil sphere individuals do not exercise any authority over each other" (Dooyeweerd, 1962a:160):

Civil law, according to its entire structure as differentiated legal system, is the asylum of the individual personality and constitutes the safe-guard for maintaining the individual personality within legal life. . . . It can fulfil this role only in unbreakable coherence with the communal and collective juridical spheres in which the solidarity of the members in relationships of super- and subordination are maintained. Within these communal and collective spheres a person is only a member of the collectivity and is not considered according to its private sphere as an individual (Dooyeweerd, 1962a:162).

Public law and civil private law are both qualified by the jural aspect, but whereas public law displays a structure of super- and sub-ordination, civil private law operates on the basis of equality – where persons or societal entities meet each other on equal footing or by opposing each other. Civil law is "unbreakably bound to the structure of the body politic" (Dooyeweerd, 1997:446).

Non-civil private law pertains to the internal legal spheres of those societal entities that have a non-jural qualifying function, such as internal ecclesiastical law (certitudinally qualified), marital law (ethically qualified), business law (economically qualified), and so on. The legal interests entailed within the spheres of public law and civil and non-civil private law need to be protected within the legal order of the state. An integral part of this perspective is that the internal legal spheres of non-civil private law are not derived from the competence of the state – the state does *grant* them the right to exist. For this reason a just state has to acknowledge other societal spheres of competence within society in their own right.

Without the principle of sphere-sovereignty, applied both to unique and irreducible (but mutually cohering) modal aspects and to a differentiated society, theoretical thinking invariably collapses into a totalitarian and absolutistic view. The unique and novel theory of the state developed by Dooyeweerd should therefore be seen as an attempt to secure the idea of a just state (*rechtsstaat*), observing the limits of its competence and serving society merely by integrating the multiplicity of *legal* interests on its territory.

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