

# Hypothetical social contract theories

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## **Abstract**

*Ancient Greece and the medieval period contributed to an understanding of a "Republic" (Plato's Politeia) and an "Empire" (kingdom), but it took some time before the modern idea of the state (as well as the term "state") emerged. The modern spirit of the Renaissance was inspired by the new ideal of a free and autonomous personality which found in the science ideal a rational instrument through which reality could be demolished and reconstructed from its simplest atoms, in the case of human society: the individuals. Thus the nature motive (science ideal) and freedom motive (personality ideal) became the dominant spiritual force directing theoretical reflection on state and society since the Renaissance. It also inspired a hypothetical rational account of the origination of the state against the background of an equally hypothetically construed "state of nature." In conclusion a brief indication is given of an alternative perspective transcending the shortcomings of hypothetical social contract theories.*

## Opsomming

### **Hipotetiese sosiale kontraktheorieë**

*Die antieke Griekse en die Middeleeuse eras het 'n bydrae gelewer tot die verstaan van 'n "republiek" (Plato se Politeia) en 'n "ryk" (koninkryk), maar dit het lank geneem alvorens die moderne idee van die staat (sowel as die term "staat") na vore sou tree. Die moderne gees van die Renaissance was geïnspireer deur die nuwe ideaal van 'n vrye en outonome persoonlikheid wat in die wetenskapsideaal 'n rasionele instrument gevind het met behulp waarvan die werklikheid afgebreek en vanuit die eenvoudigste atome daarvan weer opgebou sou kon word. In die geval van die menslike samelewing is hierdie atome die enkelinge. Langs hierdie weg het die natuurmotief (wetenskapsideaal) en vryheidsmotief (persoonlikheidsideaal) die beheersende geesteskrag geword wat rigting aan besinning oor staat en samelewing sedert die Renaissance gegee het. Dit was ook die motivering agter hipotetiese sosiale verdragsteorieë wat teen die agtergrond van 'n ewe hipotetiese "natuurtoestand" gekonsipieer is. Aan die einde word 'n saaklike alternatiewe perspektief ontwikkel wat die tekortkominge van die hipotetiese sosiale verdragsteorieë te bowe gaan.*

This article investigates the three crucial phases of development of the modern idea of the just state (*Rechtsstaat*) in the light of the dilemma between atomism and holism (individualism and universalism), which explains why the views of Rawls are included in the analysis, because his political philosophy wrestles with the same problems. Ultimately the discussed views are largely operating within the legacy of modern Humanism.

The Kantian view of the autonomy of human (theoretical or practical) reason (freedom is obedience to a law which we have prescribed to ourselves, as Rousseau proclaimed) characteristically unites a main motive of modern, post-Renaissance Humanism, in opposition to a view in which norming structural principles are acknowledged. Transcending the extremes of an atomistic or holistic view of state and society is made possible by acknowledging sphere-sovereignty and distinguishing between modal laws and type laws. This approach intrinsically connects the idea of the public good (*salus publica*) to the normative structural principle of the state as a *public legal institution*.

## 1. The Greek and Medieval background

World history and the history of the West in particular are indissolubly connected to reflections on the place of the state within human society. Ancient Greece is no exception, because the philosophy of Plato and Aristotle to a large extent culminates in their philosophy of the Greek city-state, the *polis*. When Plato discusses these issues he employs the term *Politeia* (Republic), while in the work of Aristotle the designation *Politica* is used. What is shared by Plato and Aristotle is the fact that they both advanced a totalitarian understanding of political life – the *polis* fully embraces human life and it has the task to bring its citizens to their highest accomplishment, moral perfection (the starting-point for what during the medieval era became known as the *societas perfecta*).

Largely under the influence of neo-Platonic thought Augustine's famous book on the *City of God (Civitas Dei)* provides an important link to the late medieval views of Thomas Aquinas and the subsequent developments since the Renaissance. It is noteworthy that during the middle ages the Latin term *regnum* was still in use. The idea of a *Ruler*, the *Body Politic* and a *Territory* gave rise to the modern idea of the state. The term "Ruler" relates to the status of such a person, while the *body politic* concerns the *political* form of a republic (*forma politicae, reipublicae*). The decisive development enabling a proper understanding of the modern idea of the state, however, is found in the distinction between the office of *government* and the *person occupying this office* (see Mager, 1968:488). It also presupposes what used to be private legal issues, handled by means of *revenge*, which then were transferred to the state for protecting life and property as public legal interests (see the remark of Von Humboldt quoted below).

## 2. Renaissance and Post-Renaissance Humanism

When the Dutch legal scholar and philosopher, Herman Dooyeweerd, entered the academic world during the second decade of the 20<sup>th</sup> century, the rise of the national states (during the 19<sup>th</sup> century) was already history. During the previous centuries theoretical reflection on the nature of the state and its place within human society also went through its own distinct intellectual development. Initially this intellectual development was inspired by the new spirit of *Renaissance Humanism* manifested in the scientific ideal to construe human society and the state out of their assumed basic elements, their "atoms" (the individuals). This motive, which resulted in the idea of *logical creation*, received its original impulse from the ideal of a free

and autonomous personality (the *personality ideal*). In the philosophy of Hobbes it surfaced in the form of a thought-experiment – first break down the universe into a heap of chaos and then, step-by-step, reconstruct reality by means of the basic concept of a *moving body*.

In order to proclaim its freedom the personality ideal used the instrument of the mathematical natural sciences. In the case of human society this was done by postulating a hypothetical *state of nature* and an equally hypothetical *social contract* (Thomasius, Pufendorf, Hobbes, Locke, Rousseau and Kant). With the exception of Kant all these social contract theories were informed by the dominance of the modern humanistic science ideal (see Dooyeweerd, 2012 Chapter 6 on “Classical Humanism”). The hypothetical construction of the state by means of a thought-experiment wanted to provide a *rational* account or explanation for the existence of the state within an ordered society. The assumed “state of nature” is therefore also mere *fiction*.

### **3. The three phases of the Humanist idea of the just state**

In his encompassing work on the development of humanistic theories of the just state (*rechtsstaat*) Mekkes provides a penetrating analysis of the three phases of this process (Mekkes, 1940:200-422; 423-572; 575-728).

#### **3.1 The classical idea of the just state**

The classical period is characterized by an ambiguity because its method – constructing society from its simplest elements – is motivated by the motive of *logical creation* flowing from the natural science ideal. Yet at the same time it witnesses the awakening of the humanistic personality ideal which actually gave birth to the science ideal. This shift is already seen in the political philosophy of Locke. According to him *reason* is the law of nature (Locke, 1690 Book II, Chapter II par.6; 1966:119) to which the *lex talionis* belongs: “Who so sheddeth man’s blood, by man shall his blood be shed” (Locke Book II, Chapter II par.11; 1966:122). Yet although the state of nature is continued after the conclusion of the social contract, two natural rights have to be suspended: “The first is to do whatever he thinks fit for the preservation of himself and others within the permission of the law of nature ... The other power that a man has in the state of nature is the power to punish the crimes committed against that law” (Locke Book II, Chapter IX par.128; 1966:179; 185).

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John Locke argued that the state has only one aim, namely to protect the *innate human rights* of all citizens to life, liberty and property in an organized manner. It should not infringe upon the non-political society, captured in the famous non-interference slogan, "*laissez faire, laissez passer*". Proceeding from an atomistic orientation "law" was equated with *innate subjective rights*. According to Dooyeweerd the "law-state" of Locke is nothing but "a limited liability company continuing the 'state of nature' under the protection of governmental authority" (Dooyeweerd, 1997-III:427). In the second volume of his *New Critique* it is stated as follows: "The civil state is no more than a company with limited liability, designed for the continuation of the natural state under the protection of an authority. It is the constitutional state of the old liberalism, the state which has as its only goal the maintenance of the innate human rights of the individual" (Dooyeweerd, 1997-II:318).

In the thought of Rousseau the primacy of the freedom motive (personality ideal) once again started to surface. Consider his remark: "Nature commands every animal, and the brute obeys. The human being experiences the same impulse, but recognizes the freedom to acquiesce or to resist; and particularly in the awareness of this freedom the spirituality of humankind manifests itself. ... but in the capacity to will, or much rather to choose, and the experience of this power, one encounters nothing but purely spiritual acts which are totally inexplicable through mechanical laws" (Rousseau, 1975:47).

However, the mathematically constructed social contract continued the dominance of the science ideal, because according to Rousseau the contract gave to the *general will* an *absolute power* over all its members. Therefore the general will is supposed to be the *own will* of each *indivisible part* of it. Not conforming to the general will violates one's own will, thus eliminating freedom, because only when we obey the law which we prescribe to ourselves are we *free* (Rousseau, 1975:247). Finally, on the basis of the "absolute power [of the *general will*] over all its members" Rousseau arrives at the totalitarian conclusion, claiming that it means nothing else but that dissenters will be *forced to be free* ("... ce qui ne signifie autre chose sinon qu'on le forcera à être libre" – Rousseau 1975:246). Mekkes succinctly summarized the impasse present in Rousseau's thought: "With the culmination-point of the humanistic democratic freedom ideal at once its deepest fall is given" (Mekkes, 1940:315).

This hypothetical theory of a social contract as it was continued by Rousseau, is subsequently also incorporated in the thought of Kant, who assigned primacy to the personality ideal in his idea of the just state.

Immanuel Kant identifies freedom with being “independent from the coercive arbitrariness of another person” (Kant, 1797-1798, AB:45). This view rests on the basis of a *coordinational* view, in the sense that the general principle of law depends on the co-existence of the free actions of each person according to a general law (Kant, 1797-1798, B:33). The absence of super-ordinating relationships ensure that the personality ideal holds its ground.

Kant’s conception of autonomous (jural) freedom, which is supposed to be identical to the independence from the arbitrariness of another person, is in conflict with every form of jural coercion – what is *just* merely emerges from the hindrance of a hindrance. However, the atomistic orientation of the classical science ideal is continued in Kant’s characterization of the state: “A state (*civitas*) is the union of a collection of people under legal laws” (Kant, 1797-B:195). In following Rousseau he teaches that the legislative power only applies to the *united will of the people*.

As long as someone decides over himself or herself (*volenti non fit iniuria*), an injustice cannot arise. Consequently, only the consenting and united will of all, insofar as everyone decides over all and all over everyone, that is to say, only the *general united will* of the people could be *legislative* (Kant, 1797-B:195-196). Yet by assigning the *legislation of freedom* to the *general will*, he does not escape from the totalitarian and absolutistic consequences entailed in the thought of Rousseau (and Hobbes).

The classical phase of the humanist idea of the *just state* continued to blossom in the *freedom idealism* of Fichte. After him, Von Humboldt explored a slightly different accent because he conceived of the state as accomplishing the supra-sensory aim of *aesthetic education* (*Bildung*) to which humans in their totality ought to surrender. The state then has the task to secure the largest possible amount of freedom for the citizen. The highest and final goal (*Zweck*) of being human is not found in “variable inclinations”, but in what the “eternal immutable reason” prescribes, which is the first and necessary condition for education to freedom (Von Humboldt, 1792:24). The maintenance of security, both against external enemies and internal strife constitutes the *goal* of the state and with what it should concern itself (Von Humboldt, 1792:60). He emphasizes that the state ought to protect the personal integrity and property of its citizens (Von Humboldt, 1792:45) and adds that the security of citizens foremost depends upon transferring all actions of taking matters in one’s own hands to the state (Von Humboldt, 1792:48). Knoll remarks that for Von Humboldt the state was therefore “a necessary evil whose sole responsibility was to protect its members from external threats” (Knoll, 1967:13). On the

same page it is mentioned that according to Lassalle Von Humboldt's state was a "night-watchman state".

Yet the concept of law within the classical idea of the just state boils down to the view that law ought to be an expression of the "volonté générale" as conceived by Rousseau (see Coetzee, 1955:14).

### **3.2 The second phase of the idea of the just state**

During its second phase of development the modern idea of the just state (Stahl, Bähr and Gneist) shifted the emphasis to a merely *formal* limitation of the *purposes* of the state. The idealistic conception of the "Volksgeist" (folk spirit) served to account for those who are united within the state, thus preventing a total formalization of the conception of state and law, as it was subsequently found within a positivist understanding of law and justice (see Mekkes, 1940:578).

In this second phase the idea of the just state, the public administrative legal order was subjected to a *formal limit* binding the magistrature in its administrative duties. When the administrative organs are subordinated to legislation as a legal restriction to their executive authority, statute law is supposed to safeguard citizens from *administrative arbitrariness*.

Dooyeweerd discerns in this view the absence of a structural conception of the internal legal sphere of the body politic and he notes that "the theory of the law-State is the expression of a political tendency that has radically broken with the old-liberal programme of political non-interference with the free (non-political) society". He explains:

*It is evident that in this conception of the law-State the legal order is connected with the power of the body politic only in an external, formal way. STAHL, and all the adherents of this idea of the law-State [just state], look upon administrative law only as a formal limitation ("Schranke") within which the government can operate free of material legal principles when pursuing the "cultural and welfare purposes". The non-juridical "purposes of the State" are not given any internal structural delimitation, if their administrative realization is only bound to the formal limits of legislation. This formalistic conception of public law is closely connected with the equally formalistic, and essentially civil juridical view of administrative judicature, represented as a requirement of the modern constitutional State by the Hessian jurist OTTO BAHR and RUDOLPH GNEIST (Dooyeweerd, 1997-III:430).*

In other words, within the second phase of the humanistic theory of the "just state" (Stahl, Bahr and Gneist – all 19th century thinkers) various non-political ends are tolerated – as long as it occurs within the formal delimitation of the law.

### 3.3 *The third phase of the idea of the just state*

However, within the *third phase* of the humanist idea of the state a radical denaturing of the idea of the just state emerges. Particularly Hans Kelsen and his “norm-logical” school of thought embodies this phase in which state and law are identified. It is remarkable that Kelsen once more reverted to the classical science ideal in his conviction that it cannot be denied that the human will, like all events, in reality is causally determined.<sup>1</sup>

Separating the *validity* of a norm from *physical actions* shows that Kelsen does not realize that the term *validity* (i.e., being *in force*) reflects the meaning of the *physical* aspect of reality. Kelsen argues that the validity of the norm is a “Sollen” (*ought*), which must be distinguished from a “Sein” (*is*). That is to say, its *validity* must be distinguished from its *operation* (*Wirksamkeit*). At the same time he elevates the operation of the legal order to become the *condition* (*Bedingung*) for *Geltung* (Kelsen, 1960:82).

Interestingly, although Kelsen, as a serious *legal positivist*, distances himself from traditional theories of natural law, his understanding of the *Basic Norm* (*Grundnorm*) surrenders to what has been rejected, because he accepts this *Grundnorm* as a pre-positive starting point which serves as the ultimate reason for the validity of all the legal norms forming the legal order:

*It is a 'basic' norm, because nothing further can be asked about the reason for its validity, since it is not a posited norm but a presupposed norm. It is not a positive norm, posited by a real act of will, but a norm presupposed in juridical thinking, i.e. a fictitious norm – as was indicated previously. It represents the ultimate reason for the validity of all the legal norms forming the legal order. Only a norm can be the reason for the validity of another norm (Kelsen, 1991:255).*

The final erosion of the humanistic idea of the “just state” is found in the general theory of law advanced by Hans Kelsen. In his doctrine of the *sovereignty of law* he dissolves the state into a functional complex of legal norms. His conception is structured in such a formal way that it is stripped of every normative appeal. This enables him formally to appreciate an absolutistic dictatorship still as a “Rechtsstaat”! In a different work, *Allgemeine Staatslehre* we read:

*From a strict positivistic standpoint excluding every form of natural law every state must be a “Rechtsstaat” in this formal sense, insofar as every state is an ordering, a coercive ordering of human behaviour ... This is the concept of*

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1 “Mitunter leugnet man zwar nicht, daß der Wille des Menschen, wie alles Geschehen, tatsächlich kausal bestimmt ist, ...” (Kelsen, 1960:98). “Da die objective Bestimmtheit des Willens nach dem Gesetze der Kausalität nicht geleugnet werden kann, ...” (Kelsen, 1960:99).



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a “*Rechtsstaat*” which is identical with the state as well as with law (Kelsen, 1925:35).

The intended distinction here indeed forms a stumbling block both for an individualistic and a universalistic view of society, simply because these theoretical approaches do not proceed from a view of reality enabling the acknowledgement of the unique inner natures of the different non-political entities within society according to their distinct structural principles. The universalistic scheme of a *whole* with its *parts*, which dominated, amongst others, the thought of Plato, Aristotle and Thomas Aquinas, can never account for the said differences. For whatever forms a part of a larger encompassing whole must bear – in its capacity of *being-a-part* – the same structure as the entire whole (state).

The ambiguity in Kelsen’s approach made it possible for him to contemplate how the Bolshevik dictatorship could be appreciated as a legal theory liberated from any form of ideology. His attempt to accomplish this is pursued notwithstanding the fact that Bolshevism, for example, rejects the normative meaning of law and disregarding the fact that Lenin characterizes Bolshevism as “unlimited power, not restricted by any laws or any general rules and resting directly on force” (Lenin, 1921:15). Dooyeweerd concludes:

*At this juncture, idealist humanism is separated from naturalist humanism by mere hollow, meaningless terminology. The entire ideology that the humanist personality ideal, from Grotius to Hegel, had offered to political theory finds itself in a condition of relativistic, skeptical decomposition. And so a large portion of the European states has proved ripe for the new ideology of dictatorial power (Dooyeweerd, 2010:37).*

Being burdened by the shortcomings of social contract theories, it is understandable why the development of humanist theories of the *just state* terminated in the collapse both of the idea of the state and the idea of *law*, causing Dooyeweerd to write his book *The Crisis in Humanist Political Theory*.

#### 4. John Rawls – wrestling with the same problems

Of course during the second half of the 20<sup>th</sup> century another theory of the social contract emerged, as advocated in the *Theory of Justice* (as fairness) developed by John Rawls. He revived modern social contract theories in his reflections on justice understood as fairness. By toggling between justice in a jural and a moral sense, he demonstrates that he continues to wrestle with elements of Greek political thinking, manifested in his view of

*justice* as a *moral virtue* and in his acknowledgement of the human person as a moral person. Within modern philosophy particularly Kant advanced a view of moral autonomy and what he called the *categorical imperative*. He supports the modern theories of a social contract while conceding that his initial agreement is hypothetical and therefore not historical in nature (Rawls, 1996:271). He holds that “it is clear that the original position is to be seen as a device of representation and hence any agreement reached by the parties must be regarded as both hypothetical and nonhistorical” (Rawls, 1996:23). Later on he also states: “At this point I consider why the initial agreement has features that distinguish it from any other agreement. Once again, the explanation lies in the distinctive role of the basic structure: we must distinguish between particular agreements made and associations formed within this structure, and the initial agreement and membership in society as a citizen” (Rawls, 1996:275).<sup>2</sup>

The theme of *justice* is equally fundamental in the work of Rawls than that of its correlate, the *basic structure of society*. Almost consistently Rawls prioritizes justice, although occasionally it happens that this order of priority is reverted, for example when he remarks that a “theory of justice depends upon a theory of society” (Rawls, 1978:84).

This appears to be related to a striking ambiguity in his political philosophy, which is given in the fact that he attempts to uphold an atomistic (individualistic) and a holistic (universalistic) view of human society at the same time. Instead of assuming *individuals* to be the contracting parties, his assumption is that they are *heads of families*. He explains: “For example, we can assume that they are heads of families and therefore have a desire to further the well-being of at least their more immediate descendants” (Rawls, 1999:111). In the original edition of *A Theory of Justice* (1978), he wants to think “of the parties as heads of families” (Rawls, 1978:128, 146). This assumption reminds us of Aristotle’s view of the family as the “germ cell” of society. This choice did not pass unnoticed, because Brennan and Noggle (2000:48-50) sharply criticized it.<sup>3</sup>

The first principle of justice embodies the idea of basic (free and equal) liberties: “First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.” The second is specified as “social and economic inequalities

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2 “Let us consider how the special role of the basic structure affects the conditions of the initial agreement and necessitates that this agreement be understood as hypothetical and nonhistorical” (Rawls, 1996:271; see also page 273).

3 Aristotle’s approach is found in his *Politica* (Book I, 1252a ff.; and Aristotle, 2001:1127 ff.).

[which] are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all" (Rawls, 1999:53).

One may associate his first principle with the nature of *civil law* which, within modern states, holds for individuals as such, abstracted from those societal ties in which humans participate as parts of a larger whole. The second principle, in contrast, implicitly takes into account the *typical differences* between diverse societal entities. His mature formulation is found in the revised edition of *A Theory of Justice* where his summary statement concerns "the principle of the equal liberties and the principle of fair equality of opportunity" (Rawls, 1999:xiv).

These formulations are relatively *unstructured* for to speak of "equal liberties" without specifying the *difference* between civil legal liberties and the liberties present within the "basic structure of society" is not sound. In fact the second principle touches upon typically distinct societal forms of life, belonging to the sphere of non-civil private law (the freedoms intrinsic to the societal entities distinct from the state).

However, it is a pity that Rawls effectively switched to a holistic (universalistic) view of the basic structure of society. Just like Habermas did in his theory of communicative actions, Rawls also found a point of contact in modern sociological system theory with the whole-parts relation as its basic assumption. Rawls writes: "Now by assumption the basic structure is the all-inclusive social system that determines background justice" (Rawls, 1996:271-272). Yet from the fact that one does not have knowledge of one's place in the original position does not mean that the multiplicity of possible positions within the social system are not presupposed all the way, because the whole argument rests on the presupposition of the "basic structure of society".

What Rawls actually has in mind when he employs the phrase "the basic structure of society" is found in his account of persons behaving justly or unjustly and just or unjust institutions. But what are the "major institutions" of society?

*By major institutions I understand the political constitution and the principal economic and social arrangements. Thus the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family are examples of major social institutions (Rawls, 1999:6)*

The scope of the basic structure of society reaches further than the major “political” and “economic” institutions of society because “the monogamous family” also surfaces, reminiscent of the heads of families as contracting parties. And soon we are informed that “churches and universities are [also] associations within the basic structure, ...” (Rawls, 1996:261). Here we meet some additional ambiguities, for on the one hand churches and universities are located within the basic structure of society, while on the other “principles of justice” are “not fully general principles” for they “do not apply to all subjects, not to *churches* and *universities* [emphasis by the author], or to the basic structures of all societies, or to the law of peoples” (Rawls, 2001:532).

Social system theory (from Parsons, Habermas, Alexander, Münch and Rawls) has surrendered to an overextension of the whole-parts relation which entails that what is a *part* of a whole reflects the *structural principle* of the whole. As a result such an approach cannot effectively explain how to understand the uniqueness of the diverse societal collectivities.

## 5. Scope for an alternative perspective

What is remarkable in this regard is that in certain instances we do find a glimpse of an alternative view in the thought of thinkers like Münch, Habermas and Rawls. According to Münch the starting point of the theoretical debate of the 1980s is “Weber’s theory of rationalization of modern society into spheres that are guided to an increasing extent by their own inner laws” (Münch, 1990:442).

In spite of the influence of atomistic and holistic views upon his thought, Rawls did reveal an acknowledgement of different principles applying to distinct kinds of subjects. He mentions the role of “organizing principles” in “social life” and the “corresponding subjects [which they] are presumed to have” (Rawls, 1996:262). What is “essential” is “differences in the structure and social role of institutions” (Rawls, 1996:262).

On the same page we read that “the various elements of society requires that, within some sphere, they act from their own principles designed to fit their peculiar nature”. In a similar context Habermas positions the state alongside “private spheres of life” (Habermas, 2001:81).

These statements open up a whole new perspective, also transcending the traditional Roman Catholic social principle of subsidiarity. Although Monsma holds that the “Catholic principle of solidarity” rejects “both individualism and collectivism” his appeal to “subsidiarity” actually reverts to the whole-parts

relation underlying the principle of subsidiarity. This relation exceeds the boundaries of all the non-political societal entities present in a differentiated society. A quotation from the German Jesuit, Oswald von Nell-Breuning, makes it plain that under solidarity “all individuals are involved as members of the social totality in the common social destiny of this totality; similarly the totality (society or community) is inextricably involved in the destiny of the members” (Monsma, 2006:7).

## **6. Dooyeweerd’s criticism of the legacy of social contract theories and the idea of the public interest**

Dooyeweerd realized that a proper understanding of the structural principles of the various societal entities actually depends on a proper understanding of the human personality. Unlike anything that can be subsumed within a kingdom or realm (such as material things, plants and animals), human beings cannot be exhaustively characterized in terms of one single property. Human beings can assume multiple social roles without ever being exhausted by any one of them – because the human self-hood or I-ness (*heart*) transcends the multiplicity of functions and structural features humans exhibit. The history of reflection on humankind produced many attempts to arrive at a single characterization, such as found in claims that the humans are “rational beings”, “social beings”, “economic beings”, “moral beings” and so on. Humans are said to be “homo economicus”, “homo sapiens”, “homo symbolicus”, “homo ludens”, etc. Sometimes a combination is employed to characterize humans, such as when they are depicted as rational-moral beings.

Since the human self-hood transcends all the aspects in which humans function, it is impossible to use only one of them to characterize humankind.

Since the ultimate ontological starting points of atomism and holism (individualism and universalism) are found in an over-extension of the aspects of number and space, these two isms are equally not capable of an understanding of the many-sidedness of societal entities. Dooyeweerd rejects a personification of social forms of life, such as ascribing “a full real, supra-individual personality to temporal organized communities” or what is present in trans-personalism which basically rests on an irrationalistic reification of temporal communal relationships (Dooyeweerd, 1997-III:246).

By contrast, according to Dooyeweerd, modern *individualism* misunderstands human beings for in its empiricistic trends the human person is reduced

“either to an atomistic self-contained natural thing, or to a functional system of elementary interactions operating according to natural laws”. Metaphysical accounts either end up with “an autarchical metaphysical combination of matter-monads and a central soul-monad (as in LEIBNIZ)”, or they postulate the idea of a self-sufficient moral individual which “in its ‘pure will’ is considered to be identical to the general form of the ethical law (KANT), or to the idea of a self-sufficient moral ego (FICHTE in his first period), etc.” (Dooyeweerd, 1997-III:246).

On the same page Dooyeweerd claims that in “all of its nuances modern sociological individualism results in the denial of the inner communal structures of temporal society”. Sometimes universalist theories, such as found in Schelling’s use of the term “organism” in his *organological* view of the state “as a supra-individual being which historically develops from a natural community after the pattern of the growth of a natural organism (*naturwüchsig*), in contradistinction to all revolutionary artificial work” (Dooyeweerd. 1997-III:406).

We have seen that in the development of the modern (contractual) idea of the just state the notion of the *purposes of the state* played an important role. The humanistic doctrine of natural law and that of “reason-law” (“Vernunftrecht”) surrendered to subjectivistic and teleological constructions of the body politic by making the latter a “mere instrument in the service of the individual or into that of a national cultural community” while the “purpose of the State” was understood in the sense of “the classical liberal idea of the law-State (LOCKE, KANT, von HUMBOLDT)” or in the “eudaemonistic sense of the ‘welfare State’ (the police-State of CHR. WOLFF and his pupil JUSTI). Or again in the idealistic sense of a culture-State (FICHTE in his last phase).” This teleology never had a bearing on the genuine structural principle of the state because the theories of the subjective “purpose of the State”, elaborated in Humanistic conceptions of natural law, merely reflected contemporary political tendencies which turned out to be untenable once an altered historical condition prevailed. Hence every attempt to grasp the intrinsic structural limits of the task of the state in such a teleological way is futile (Dooyeweerd, 1997-III:246).

Besides, only if the state exhibits a *typical structure* will it be possible to speak of the goals or purposes of the state. This follows from the mere fact that a distinction can be drawn between *typical goals* and *a-typical goals*, showing that the typical inner structural principle of the state is a presupposition for pursuing goals.

Although it seems legitimate to see the state as an institution geared towards the *public good* (*common good* or the *salus publica*), a prior criterion is required to specify the limited sphere of competence of the state. This is evident from the a-morphous (*Protean*) content given to the idea of the *public interest*. Without an insight into the intrinsic structural principle of the state no meaningful limits could be found for the idea of the public interest.

Dooyeweerd points out that resolving the state into a norm-complex (Kelsen for example) does not realize that the state is more than merely its legal or jurial *function*. Yet it is only this characteristic *jurial function* which can give the state “its inner limitation as the material principle of public communal law” (Dooyeweerd, 1997-III:442).

Dooyeweerd gives a brief overview of what has been claimed in the name of the public interest. He commences by mentioning Plato and Fichte who advocated the idea that the children should be taken away from their parents by entrusting their education to the body politic. Likewise Plato wanted to abolish marriage as well as private property amongst the ruling classes by appealing to the *public interest*. Aristotle made a plea for uniform education on the same grounds Rousseau used to eliminate all the intermediate particular associations between state and citizen. Wolff expected that the body politic should be involved in everything human, even up to fixing the confessions of the protestant churches. Wolff gave shelter to an admitted tension between his understanding of natural law and his theory of innate natural rights.

Dooyeweerd proceeds with a succinct explanation of the way in which the idea of the *salus publica* took shape in the political thought of Aristotle: “It is oriented to a metaphysical theory of the purpose of the State, and is entirely in accordance with the ancient totalitarian idea of the body politic. In this conception there is in principle no possibility of freedom outside of the State” (Dooyeweerd, 1997-III:443). He notices that Rousseau’s idea of the “public interest” was only limited by equality in a public legal sense expressing the “general will” although it did not imply any restriction in principle of the competence of the legislative power, thus sanctioning the absolutist and totalitarian authority of the state over all spheres of life, including public worship. Wolff contemplated the purpose of the state as it took shape in the social contract and found a foundation for the *salus publica* in his eudaemonist theory of natural law.

Kant aimed at providing the idea of the *salus publica* with a new meaning which was both anti-absolutist and non-eudaemonistic because the latter contradicted Kant’s idea of practical autonomy. Yet for him the idea of the *salus publica* simply points at a constitutional principle with norming juridical

duties based upon a categorical imperative. Ultimately his idea of the *just state* is an individualistic civil law idea, because the internal structure of the state is reduced to an organizational form which is destined to create and maintain the judicial application of civil private law (Dooyeweerd, 1997-III:444).

From the above-mentioned considerations advanced by Dooyeweerd in connection with the endless varying ways in which the idea of the *salus publica* acquired a particular content, his following statement is understandable:

*The slogan of the public interest was the instrument for the destruction of the most firmly established liberties because it lacked any juridical delimitation. The terrible threat of Leviathan is audible in this word as long as it is used in a juridically unlimited sense. The universalistic political theories could conceive of the relation between the State and the non-political societal structures only in the schema of the whole and its parts. This is why they could not delimit the idea of "the public interest" (Dooyeweerd, 1997-III:443).*

To this he adds the warning: "The idea of *salus publica* should be oriented to the structural principle of the State, else it will become the instrument of an unbridled State-absolutism, or the embodiment of an arbitrary conception of the external content of the State's task. In spite of all theoretical misconceptions of this principle it has a universally valid meaning, internally delimiting all real political activity of the State" (Dooyeweerd, 1997-III:443).

## 7. Modal universality and type laws

The dilemma of modern political theory is an effect of the lack of a proper theory of *type laws*. Such a theory, in turn, can only bear fruit when it is founded in a sound theory of *ontic modes* displaying *ontic universality*. The relationship between these two dimensions of reality, namely the dimension of aspects and (natural and social) entities, reveals a unique order of dependence, in the sense that the dimension of entities with their type laws, although irreducible to the dimension of modal aspects, presupposes the latter. *Health* and *illness*, for example, are universal biotic features evinced by *all* living entities functioning in the biotic aspect of reality. When Von Bertalanffy observes that the laws of physics are "not interested in whether dogs are alive or dead" because "the laws of physics do not tell a difference" (Von Bertalanffy, 1973:146), he actually explores the modal universality of the physical aspect of reality because his remarks first of all apply to all non-living entities. At the same time they also apply to the modal universality of the biotic aspect of reality. Yet the moment one commences with *specifying*



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the properties displayed when living entities function within the physical and biotic aspects, it turns out that concretely existing entities *specify* the universal meaning of these aspects in *specific* ways. Consider healthy human beings or healthy cats and then contemplate the numerous typical features which are surfacing, belonging only to humans or only to cats, where even similar traits are specified in different ways, such as average body temperature, blood structure and functioning, specific shape and size, typical movement, ontogenetic developmental type (*Nesthocker* or *Nestflüchter* – Portmann, 1990), and so on. This follows because the type law for being a human or being a cat *specifies* (and limits) their respective physical and biotic features. Whereas modal laws hold universally (for all classes of entities), type laws hold for a limited class of entities only.

Therefore, also the type law for *being a state* is limited because it is only specified for *states*, not for *every possible* (societal) *entity*. At this point it becomes clear that *atomistic* and *holistic* (individualistic and universalistic) theories of society and the state inevitably entangle themselves in distorting views, fluctuating between state nihilism (Locke) or state-absolutism and totalitarianism (Hobbes, Rousseau, Kant, etc.). Atomism (individualism) overextends the (numerical) meaning of the one and the many, while holism (universalism) expands the spatial whole-parts relation beyond its legitimate sphere of application. It should therefore not be surprising that the science of law and political science were accused of proceeding without a proper concept of law and without a concept of the state, by some authors characterized as the crisis in legal and political theory.

In 1928 Carl Schmitt said that the general idea of law became *relative* and threatened to collapse. “What saves the constitutional state from utter dissolution into the absolutism of shifting parliamentary majorities is a mere lingering remnant of respect for this general character of law” (Schmitt, 1928:156). In his own diagnosis of the crisis in Humanist political theory, Dooyeweerd mentions Heller who also explicitly declares (regarding the science of law and political science): “At bottom, [they know] no more how to deal with the material idea of the just state than how to deal with the material concept of law” (Heller, 1928:115; see Dooyeweerd, 2010:36).

Acknowledging the uniqueness, i.e. modal sphere-sovereignty, of the jural aspect, plays a decisive foundational role in appreciating the intrinsic nature of the state as a public legal community governed by its own specific type law. Within this perspective also the non-political societal entities are respected because each has its own, non-jural qualifying function, securing its functional sphere-sovereignty, not *granted*, but acknowledged by the *state*. However,

the societal entities distinct from the state are not independent of the state, because their legal interests are supposed to be incorporated in the public legal order of the state.<sup>4</sup>

## 8. Diverging life view orientations

Ultimately modern legal and political theories part way owing to diverging life and worldview assumptions. Are we as human beings the exclusive source of the order operative within societies, or are we called to give shape to ontic (modal and typical) principles guiding human actions in norm-conformative or antinormative directions? It is significant to mention what O'Neill remarks in respect of the idea of "constructing principles" in the thought of Kant and Rawls: "Constructivism for Kant, as for Rawls", so O'Neill explains, commences when a plurality of diverse beings who are "lacking antecedent coordination or knowledge of an independent order of moral values must construct ethical principles by which they are to live" (see O'Neill, 2003:362). In the philosophy of Kant this view found its counter-position in his idea that human understanding must be seen as formal law-giver of nature: "Understanding creates its laws (a priori) not out of nature, but prescribes them to nature" (Kant, 1783, II:320; § 36).

## 9. Concluding remark

It should be noted that Rawls published his theories by the end of Dooyeweerd's academic career and that Dooyeweerd was no longer in a position to respond to the theories of Rawls in any of his publications. However, since Rawls wrestled with the same dilemma facing modern Humanist theories of the state (atomism and holism) it is considered meaningful to incorporate his views in our discussion. From our analysis it is clear that Rawls could have benefited from considering the fruitfulness of the principle of sphere-sovereignty and the distinction between modal (jural) principles and type laws.

Talisse quotes the philosopher Thomas Nagel saying that Rawls is "the most important political philosopher of the twentieth century" (Talisse, 2001:5). However, if Dooyeweerd and Habermas are added to this list, Rawls arguably may end up in the third position!

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4 An account of what this entails exceeds the boundaries of this article (it is discussed in Strauss, 2014).

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