Integrity as a Jural Concept

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This essay utilises one of the many ideas contributed by Professor Danie Strauss towards the development of the Reformational Philosophy based upon the systematic philosophy of Herman Dooyeweerd. It takes up the idea that all analogical moments in the (ontic) aspects of cosmic reality, as articulated in Dooyeweerd's theory of the modal aspects, have a "modal seat" which is frequently to be found in the non-normative ("natural") aspects. This idea is applied to explain the concept of jural integrity within the context of Ronald Dworkin's legal theory of law as integrity. The essay explains the distinction between the moral and jural concepts of integrity whilst leaving open the possibility suggested by Professor Strauss that integrity in the law could also be employed in a moral "idea" way to ethically deepen the law through the ethical "anticipations" that "open up" the concept of law in the idea of justice.

1. Introduction

There are many important developments of the Dooyeweerdian Reformational Philosophy by Professor Danie Strauss from which I have benefited as a legal scholar. This short essay focuses on one of those developments. In recognising that very many concepts used in both the normative and non-normative academic disciplines are analogical in nature, Strauss has observed that the "modal seat" of these analogical concepts often provides a strong clue as to their discipline-specific meaning. He has noted that, within a normative science such as law, the analogical concepts which such a discipline employs frequently involve an analogical pointing back to (retrocipation or "modal seat" in) the core meaning (nucleus, kernel, *zin-kern*) of a non-normative modal aspect of reality as understood within Dooyeweerd's theory of the modal aspects (Strauss, 2005; Dooyeweerd, 1997: vol 2). I propose to explore this insight in relation to the concept of legal integrity with specific reference to the use of that concept in the legal philosophy of Ronald Dworkin.

2. Integrity as a political and legal ideal

Ronald Dworkin in *Law's Empire* articulates an "interpretive" legal theory of law as integrity (Dworkin, 1986). Integrity was adopted as the name of the political and legal ideal (virtue) he wishes to expound "to show its connection to a parallel ideal of personal morality" (Dworkin, 1986: 166). He explains the connection as follows:

> We want our neighbours to behave, in their day-to-day dealings with us, in the way we think right. But we know that people disagree to some extent about the right principles of behavior, so we distinguish that requirement from the different (and weaker) requirement that they act in important matters with integrity, that is according to convictions that inform and shape their lives as a whole, rather than capriciously or whimsically. The practical importance of this latter requirement among people who know they disagree about justice is evident. Integrity becomes a political ideal when we make the same demand of the state or community taken to be a moral agent, when we insist that the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are. We assume, in both the individual and the political cases, that we can recognize other people's acts as expressing a conception of fairness or justice or decency even when we do not endorse that conception ourselves (Dworkin, 1986: 166).

Accompanied by the "virtues" of fairness in the design of the political community, justice in the outcomes of political and legal decisions and procedural due process, integrity is advocated as a political ideal (Dworkin, 1986: 166). The political ideal of integrity translates into a legal ideal through the statutory and adjudicative (judicial) recognition of rights that embody the above "virtues" of fairness, justice and due process according to some coherent principle-based scheme (Dworkin, 1986: 166 -167).

3. The modal seat of the legal and moral concepts of integrity

Strauss-Cameron discussion

The thought that the modal analysis and, in particular, the idea of modal seat could elucidate the concept of integrity in connection with Ronald Dworkin's idea of law as integrity arose out of an email exchange with Danie Strauss in connection with a discussion about the modal normative core meaning of the universal aesthetic aspect of cosmic reality. Strauss pointed out that "fit" and "fittingness" are unable to provide the non-analogical core meaning of this aspect (Email, Strauss-Cameron, October 28, 2005).

In Dworkin's theory of law as integrity the concept of "fit" plays a key role. An important criterion of the soundness of any legal theory that endeavours to set normative ideals for legal and political practice is how closely it fits with those practices and the political-moral background in which they are grounded. Law as integrity and its accompanying principles should therefore provide a better fit with the actual legal practices of courts and legislature than any alternative normative conception of law (Dworkin, 1986: 150, 176).

Danie Strauss and I appear to agree that fit (or fittingness), whether used as a legal, aesthetic concept or when applied to the formation of theory[1] is an analogical concept with its modal seat in the spatial mode. My suggestion however was that integrity, was itself a legal concept that involved a spatial analogy.[2]

At first Professor Strauss was not inclined to accept this proposal and suggested instead that it was the concept *integrality* that embodied a spatial reference but that integrity was itself a fully ethical concept equivalent to honesty without any necessary analogical reference to the original spatial core meaning (Email, Strauss-Cameron, October 27, 2005). Indeed, when one recalls the parallel that Dworkin draws between the "personal" "moral" and politico-legal use of that term, it is not surprising that I was disposed at first to fully accept this distinction of integrity and integrality (E-mail, Cameron-Strauss, October 28, 2005).

However, in reflecting further on Dworkin's utilisation of the concept in his legal theory I became convinced that my first intuition of legal integrity as an analogical legal concept with its modal seat in the spatial aspect was at least *partially* correct. Yes, it might be possible to view the use of integrity in law as having a meaning analogous to ethical honesty (Strauss' suggestion) but Dworkin's own use of the term was closer to the concept of integrality as proposed by my correspondent. I now wish to pursue further this discussion of legal integrity and its "modal seat."

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1 I have now realised that Dworkin's use of 'fit' above is not as a legal concept but as an logical-analytical (analogical) concept pointing to the spatial core meaning that is referable to formation of *theory*, in this case legal theory. 'Fit' however is used elsewhere by him as an analogical legal concept. See Stephen Smith's *theory* use of 'fit' in a theory of contract law (Smith, 2004: 7-11).

2 I see this as clearly evidenced in the mathematical concept *integer* as a *whole* number divisible into *parts* called *fractions*. Here however, it appears that as a concept referring to the aspect of discrete *quantity* it is an *anticipatory* analogy pointing ahead to the core meaning of the spatial mode that succeeds the numerical in the order of the modal aspects This anticipatory moment in the aspect of quantity opens up the meaning of number.

Moral and legal integrity as spatial analogies in Dworkin's theory of law

Ethical honesty is one important meaning of integrity.[3] In its root meanings however integrity refers to *wholeness* or *completeness* in anything, including items such as buildings and walls in respect of their *physical* dimension. Ethical or moral integrity, at least in one of its senses, could refer to an ethical norm or principle that subjectively expresses itself in human conduct as an ethical *wholeness* in one's behaviour towards others so far as it is governed by ethical norms. A person on individual occasions may act honestly in her relations with another but unless she does so *consistently* we would not say she is a person of moral integrity, a person who "on the whole" does what is (morally) right in respect of others and their interests. As with his use of "fit," Ronald Dworkin employed integrity in his theory of law primarily in this spatial analogical sense.[4]

For Dworkin the problem which the modern state and its law confronts is the need for the maintenance of public unity within a community containing a plurality (multiplicity) of belief and conviction about issues of justice. State policy and law must be based upon a relatively unified and *coherent* set of normative principles to maintain the public and *societal* unity and coherence necessary for a harmonious and just society. In other words it requires politico-legal integrity. Two key principles of political integrity comprise a legislative principle, that requires "lawmakers to make the total set of laws morally coherent and an adjudicative principle "which instructs that the law be seen as coherent in that [moral] way, so far as possible" (Dworkin, 1986: 176).

My discussion with Danie Strauss over the meaning of integrity began with a discussion over "fit" or "fittingness" in relation to aesthetic theory.[5] Curiously, Dworkin uses *aesthetic* spatial analogies of fit and coherence

3 The first entry for "integrity" in *The New Oxford English Dictionary* is "the quality of being honest and having strong moral principles; moral uprightness" (1998, OUP).

4 Dworkin's above quoted description of personal moral integrity actually uses integrity in a faith sense of *belief* or *conviction* about principles of right (moral) behaviour. The spatial analogy here is one of faith or conviction. Wholeness in one's beliefs, beliefs about right behaviour towards others.

5 Coherence refers in its modal seat to parts that come ("stick") together to form a whole. Applying Strauss's idea-concept distinction it is evident that within the Dooyeweerdian reformational philosophy *cosmic coherence* (e.g. of the modal aspects) is an idea (concept transcending) use of the spatial modal concept of coherence (Strauss, 2006: 49; 54-55; 128-132)

in order to expound the concept of integrity as an interpretive theory of law. He analogises the interpretive legal function by use of an imaginative literary construction, the chain novel, that comprises a plurality of authors each responsible for writing a chapter of the novel (Dworkin, 1986: 226 - 275). The aesthetic integrity of the chain novel is employed as a metaphor to explain the law in its interpretive adjudicative dimension. The interpretive responsibility that each chain novel author succeeding the author of the first chapter has towards ensuring the coherence and integrity of the novel is used as an analogy for the responsibility a judge has for maintaining the integrity of law within his or her interpretive adjudicative tasks.

In order to gain further insight into the analogical legal concept of integrity and its employment by Dworkin it is necessary to delve more deeply into the theory of the modal aspects from which Strauss' idea of modal seat arose.

4. Jural aspect, jural analogies, and the relationship of law and morality in the Reformational theory of law

Dworkin's response to the legal positivist view of law and morality

To set the context for further investigation of the concept of legal integrity with reference to Dworkin it is helpful to explain the historical jurisprudential context in which he constructed his theory of law.

Law's Empire was in part the maturation of Dworkin's view of the relationship between law and morality that aimed to counter the positivist view found in HLA Hart's *The Concept of Law* (Hart, 1961). He sought to break down the sharp division between law and morality in the Hartian account of the necessary conditions for valid law within a modern legal system. He argued that the adjudicative task of establishing what the law *is* (not simply what it *ought* to be) is an interpretive task that requires recourse to moral principles found in the background political culture. This demanded of the judge that she place herself in the ideal position of a Hercules who has the knowledge of *all* legal principles and the background moral principles necessary to give an interpretation of what the law is which best *fit*s those principles as a *coherent* whole – the ideal of the integrity of law (Dworkin, 1986: 239-240). Unlike Hartian positivism, for Dworkin, establishing what the law is *necessarily* depends upon politico-legal oriented moral principles of fairness, justice due process, and integrity. The positivist rule of recognition (Hart, 1961) that constitutes the criterion – a non-moral formal ("pedigree") criterion – of valid legislative and judicial rules and rulings is insufficient in Dworkin's

view as an account of the necessary normative conditions for creating valid law (Dworkin, 1977: 17).

In the following explanation of how reformational legal theory understands the relationship between the moral and the legal aspects, a view that differs from both the legal positivist and Dworkinian, a clearer view will be gained of the crucial role of analogical concepts and its implications for legal integrity.

The modal aspects

A key reason for the failure of Western legal philosophy to present a conceptually adequate view of the relationship between law and morality lies in its lack of insight into the modal or aspectual character of experiential reality. This can be partly attributed to the abandonment of any notion that cosmic reality *in its totality* is governed by an ordering that has its source in a divine Creator. As a product of his philosophical inquiries into the source of the apparently irresolvable theoretical debates about the factual and normative character of law within neo-Kantian legal theory, and under the influence of the Kuyperian biblical world-view, Herman Dooyeweerd came up with the philosophical basic ideas of the diversity, coherence, unity, and origin of cosmic reality within the embracing idea of cosmic law (Henderson, 1994).

The most original and fruitful idea that enabled satisfactory answers to be given to these basic philosophical questions however is that of a cosmic ordering of universal modal aspects constituting the modal "horizon" of cosmic reality. So fundamental are these aspects of reality that when we come to deepen our understanding of cosmic reality in any respect, whether within a specialised academic discipline, or in philosophical inquiry that provides the coherent conceptual basis for those disciplines, we already require and indeed presuppose one or more modal-aspectual concepts.[6]

The jural aspect

So this brings us to the question vital for the subject of this essay: what is the jural aspect? The jural aspect, along with all other modal aspects, is a

6 Danie Strauss has shown how the basic philosophical ideas of diversity, coherence, unity, origin etc. are themselves grounded in modal concepts (non-normative or "natural"aspects) used in an "idea" way, not confined to the strict conceptual limits of the modal concept. The idea of (divine) cosmic law itself is the result of employing the strictly conceptual *jural modal* meaning of human law in an idea way (Strauss, 2006: 130-131).

universal, normative "law-sphere"[7] manifestations of which are encountered in every area of human endeavour, within relationships, organizations and associations, as a diversity of different *types* of human law. Human law then is to be found not only in the rules generated by the state but in practically every area of human life. Moreover, the "private" (non-state) jural spheres are not be regarded as owing their original source to state law but directly to the jural aspect and are *typified* according to the distinctive nature (*integrity?*) of each societal realm.[8]

This notion of the jural aspect therefore is the basis of a radically pluralist theory of law that counters a positivist prejudice which, even where it acknowledges the existence of law or law-like orders distinct from state law, nonetheless views those orders as receiving their legality from state recognition.[9] It is to be kept in mind that in his *Encyclopedia of the Science of Law,* Dooyeweerd's account of the elementary and compound basic concept of law are not confined to an account of state law, notwithstanding that most of his concrete illustrations of the application of his concepts use examples from Dutch civil and criminal law. The legal concepts of reformational legal philosophy are universally applicable towards an elucidation of diverse *types* of human law, interactions and institutions as they function in the jural aspect (Dooyeweerd, 1967). This observation is especially important for a deeper insight into the concept of legal integrity which Dworkin must be credited with having highlighted, though limited to the state legal sphere.

We have identified the jural aspect as a universal mode of reality, but we have yet to circumscribe its normative meaning. The internal structure of every aspect comprises analogical "moments" all of which are qualified by a "core," "kernel", or "nucleus" (Dooyeweerd, 1997, vol 2: 55-163). Within the jural aspect as a normative mode its (ontic) analogies are infused with (qualified by) the normative jural core meaning.

7 "Law" in "law- sphere" is meant in its idea sense of cosmic law, not jural conceptual sense. "Jural law sphere" would otherwise be a tautology. It can be compared with natural law theories of human law. See also 6 above.

8 The notion of distinctive societal realms or "spheres" is a reference to the Kuyperian idea of sphere sovereignty and is the basis for Dooyweerd's theory of individuality-structures which has also received development at the hands of Danie Strauss amongst others.

9 Even amongst avowedly anti-positivist theorists such as Dworkin the influence of this positivist prejudice is strong. In Dworkin this is reflected in his preoccupation with the state judicial and legislative function.

Although there has been some discussion amongst reformational scholars concerning the appropriate term to designate the jural core meaning there is little disagreement regarding the substantive normative meaning of the jural aspect. It is concerned with what is normatively due or owed to another and is captured in the Latin maxim *suum cuique tribuere*. Dooyeweerd vigorously defended the term "retribution" as the closest (intuitive) approximation to this normative core (Dooyeweerd, 1967: 3-9). Others prefer "tribution" to signify the original cosmic jural state of creation prior to the Fall because only the entrance of sin requires that the human response to the universal jural norm consists in *re*-tribution. Another reason for finding an alternative to "retribution" is the commonplace practice of confining it to criminal state law and generally to punitive or penal contexts.

As important as identifying the modal core meaning is the identification of the analogical moments in the jural aspect. It is through exploring the analogical concepts of law that one is led inexorably to search for their normative meaning in the core sense which they presuppose. So any circumscription of the jural aspect will include references to both analogies and core meaning of the aspect.[10] It is only possible here to consider the spatial analogy and its corresponding concept that is the subject of this short study.

Jural aspect, ethical aspect, law and morality

To obtain critical insight into the jural analogical concept of integrity, having Dworkin's use of it particularly in mind, requires a delimitation of the jural from a distinct ethical aspect with its own ethical core meaning and analogies. Ethical integrity and jural integrity are both analogical concepts but with different core normative meanings. I agree with Danie Strauss and Roy Clouser in following Dooyeweerd's identifying of love as the core normative meaning that qualifies every analogy within the ethical aspect (Clouser, 2005: 245 - 246; Dooyeweerd, 1997, Vol 2: 151 - 152). Because the ethical aspect succeeds the jural in the order of the modal aspects of reality, acting in a jurally normative fashion is not always sufficient for meeting the distinctive normative moral or ethical requirements of love. To give what is due or owing in a jural sense is not always enough to meet the "supererogatory" or "aspirational" demands of

10 For a definition of the jural aspect encompassing core and analogies see Dooyeweerd (1997: 129).

love, though it is a necessary condition of ethical behaviour. If tribution or retribution (Dooyeweerd) is the core normative meaning of the jural, and love the normative meaning of the ethical, what kind of concept or idea is justice? Is it jural or ethical? The answer to this question is critical for an understanding of the relationship between law and morality and for an insight into the ethical and jural analogical concepts.

Justice is a jural concept ethically deepened

I have suggested that Ronald Dworkin's use of the concept integrity in relation to law constitutes a legal rather than moral analogy. In the light of our discussion of the modal structure of the jural aspect, we can say that Dworkin is employing a jural ("retrocipatory") analogy that points back to an original spatial meaning of wholeness. He applies this analogical jural concept to the state (public communal) context where the jural aspect is actualised as a *public type of law*. I will later say more about legal integrity in relation to the public manner in which the state functions in the jural aspect. Before that it is necessary to introduce the idea of the "anticipatory" aspectual analogies.

Backward-pointing analogies (retrocipations) are internally constitutive of the jural aspect in the sense that the jural aspect cannot be actualised in concrete human law (or other social facts, events etc) apart from these analogical elements. Hence jural integrity in the spatial analogical sense is a constitutive normative requirement of law formation. A legal norm must be *wholly* and not *partially* valid. *Every* jurally relevant (material) fact constitutes a jural factual *part* of the (factual) *whole* for the purposes of applying jural norms to legal facts.[11] However anticipations from within the (jural) aspect that point ahead to (the core of) aspects succeeding this (jural) aspect are not constitutive for the purposes of *actualisation* of the aspect but are potentialities for subjective realisation at some point in the history of human cultural development.

In the case of the jural aspect, the idea of justice extends the strict constitutive (re)tributive meaning of law through concrete realisation of anticipations towards the ethical or moral aspect within the jural aspect. Good faith, mercy, duty of care, culpability and guilt, unconscionability,

11 In the context of a contractual dispute over the interpretation of the contract the Court in common law jurisdictions frequently refer to the totality of the relevant facts as the "factual matrix", a spatial analogy (Burrows, Finn & Todd, *Law of Contract in New Zealand*, 2002: 169-175).

equity, and other "moral" principles *within the law* are accounted for by *jural* concepts or ideas that refer to the moral enrichment of law through the realisation of moral anticipatory analogies *within* the jural aspect. Breach of the jural norm of good faith, for example, must be understood in the jural core meaning of (re)-tribution (restoration, restitution, etc) involving a jural interest that has been violated or damaged, not in a purely ethical sense of showing a lack of honesty, love and care beyond any jural sense of failing to give what was in justice owing.

5. A Reformational perspective on Dworkin's concept of legal integrity

I have been arguing that Dworkin's idea of law as integrity refers to an analogical jural concept with its modal seat in the spatial aspect of reality. Now that we have found that the jural aspect is universally present throughout human society expressed in different *types* of law, it is apparent that Dworkin's politico-legal integrity refers to one type of jural integrity, a public-legal type. It will be seen that the features which differentiate this type of law from other types have implications for the distinct manner in which the jural integrity analogy comes to expression in this sphere of state law. Before I consider those state law implications, there are complexities in the relationship between law and morality obscured by Dworkin's integrity idea that need to be unravelled by applying the analysis set forth in the previous section.

Moral and jural integrity revisited

In the quotation from *Law's Empire*, we saw Dworkin analogises his idea of legal integrity with personal moral integrity. This involves the commonplace practice of using "morality" to embrace undifferentiatedly what the Reformational Philosophy distinguishes as jural and moral normed human behaviour. Recall that justice consists in a deepening of the *jural* norm of (re)tribution via a moral *analogy*. The idea of justice is therefore a *jural* concept albeit ethically enhanced by moral (analogical) anticipations. Hence at the level of personal conduct, an act of injustice, such as a parent unfairly favouring one child over another, constitutes a breach of the jural norm. However lying to the same child may constitute the breach of an ethical norm of honesty without necessarily amounting to breach of the jural norm of justice. A consistent pattern of conduct by the parent in the first scenario constitutes lack of *jural* integrity, and a consistent pattern of conduct in the second scenario constitutes lack of *moral* integrity. Although there will be instances when the parent acts

justly towards the child and instances when he or she tells the truth, because the parent does not do so as a general rule, "on the whole," there is a lack of both jural and moral integrity. The significance of making the distinction between moral and jural integrity becomes apparent when we consider Dworkin's application of the concept of integrity to the politico-legal realm.

The concept of jural integrity in state law

Dworkin's politico-legal "virtues" of fairness in political institutional design, justice in legislative and adjudicative aims and outcomes, and procedural due process can now all be seen as distinctly *jural* normative demands on the state and its law. So too is his requirement of legal integrity that enables the principles of justice and fairness of a state law to be viewed as a unified whole. Dworkin is quite right to insist that the best interpretation of the actual functioning of the state in its legal dimension does presuppose an account of state law that views its principles as a coherent unity, a demand of the jural principle of jural integrity expressed within the law of the state. However Dworkin does not sufficiently account for the *universal* presence of the jural aspect, in different *types* of law, within *different* societal spheres. He is therefore unable to clearly discern the distinctiveness of his "legal" integrity as a specific type of jural integrity.

State law as a public type of law not only displays its jural integrity *internally* within its own societal sphere. A distinctive feature of the state and its law involves also a normative society-wide public justice (jural) function in respect of other non-state institutions and relationships and their own *typical* functioning in the universal jural aspect. State law in its public legal character also expresses its jural integrity by *integrating* the internal jural dimension of non-state spheres. This integration occurs through the state *recognising* the different types of law operative in each sphere and binding them to common public legal (tributive) norms of justice.

For example, the internal jural aspect of economic transactional relations expresses itself in the contract as a private jural ordering of the parties. The state law of contract *integrates* all instances of such private jural ordering within a public legal whole by recognising the jural practice of forming contracts and holding the practice as a whole to public legal norms of contractual certainty, security and justice. One expression of the internal private contractual type of jural integrity is the contractual concept of a *complete* (whole) agreement where absence of an essential

term, or an insufficiently determined mutually agreed obligation, might render the agreement *incomplete* or "uncertain" and therefore incapable of public legal enforcement under the state law of contract. The uncertainty or incompleteness in the private contractual agreement evinces a lack of jural integrity of a private (non-state) *economic* type. The state law of contract in its public legal *integrating* function articulates common principles and rules of contract law that are common for all such instances of this private economic (contractual) ordering. Under its doctrines of contract formation, as matter of contract law public policy that favours upholding the practice of lawful bargaining, it can even cure the uncertainties or incompleteness in specific contracts under general principles and criteria it has formulated through the common law adjudicative process. This is an example of a state law (public) type of jural integrity interacting with a private (economic) type of law, with its own internal norm of jural integrity via the integrating function of a common ("private") state law of contract.

6. Concluding caveat

I have concluded that integrity can be used as an analogical concept with its modal seat in the spatial aspect. Yet Professor Strauss might still be right to think that more could be said favouring an interpretation of Dworkin's jural use of integrity as an idea that transcends the conceptual bounds of the spatial analogy. Our discussion will continue.

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