

BETWEEN NORM AND FACT: THE JURISPRUDENCE OF HERMAN DOOYEWEERD

ALAN CAMERON*

I INTRODUCTION

From his appointment in 1926, Herman Dooyeweerd (1894-1977) held the position of professor in “the encyclopaedia of jurisprudence, in philosophy of law, and in the history of Dutch law” for nearly forty years at the Free University of Amsterdam.¹ During this tenure he developed an original system of jurisprudence which he taught and produced in written form as bound notes for his students under the title *Encyclopaedie der Rechtswetenschap*.² These “notes” attained an extensive and relatively complete form of several volumes. Although his successor in the chair of jurisprudence and dedicated disciple of his method, H.J. van Eikema Hommes (1930-1984),³ published substantial jurisprudential texts, which both elaborated and applied the conceptual framework of the *Encyclopaedie*,⁴ the “notes” themselves were never published.⁵

After more than 30 years since Dooyeweerd finished working on the *Encyclopaedia*, the Dooyeweerd Centre for Christian Philosophy in conjunction with Edwin Mellen Press, is about to publish an English translation of the introduction (“Inleiding”) to the *Encyclopaedie* as the first volume of a planned multi-volume publication entitled *The Encyclopedia of Legal Science*.⁶

¹ M Verburg *Herman Dooyeweerd: Leven en Werk van een Nederlands Christen-wijsgeer* (Ten Have, Baarn 1989) 430.

² According to a bibliography compiled by L D Derksen, A M Petersen & A J van Dijk *Bibliographie H. Dooyeweerd* (Filosofisch Instituut, Vrije Universiteit, Amsterdam, 1977) the first set of the “notes” appeared in 1946 and the last in 1966. Subsequently Dooyeweerd undertook a revision of the “Introduction” which was never completed. The “dictaat” of the Introduction (*Inleiding*) which has been used for the translation (see n 6 below) has the year 1967 printed on it. This is the version I will be citing in the paper.

³ A biographical note is provided in Verburg, above n 1, 386.

⁴ For example, *De Elementaire Grondbegrippen der Rechtswetenschap* (Kluwer, Deventer, 1972) and *De wijsgerige grondslagen van de rechtssociologie* (Zwolle, 1986). Hommes also provided an introduction to the “encyclopaedic” legal philosophy in *Major Trends in the History of Legal Philosophy* (North Holland, Amsterdam, 1979) an English translation of the Dutch text, *Hoofddlijnen van de Geschiedenis der Rechtsfilosofie* (1972).

⁵ However, it had been Dooyeweerd’s intention that they should be published. Marcel Verburg, Dooyeweerd’s biographer, informed me in a discussion in 1996 that it was Dooyeweerd’s intention and understanding that Hommes was to undertake the task of having the *Encyclopaedie* published.

⁶ It will comprise 5 volumes under the editorship of the author of this paper and the general editorship of Prof. D F M Strauss, the Director of the Dooyeweerd Centre for Christian Philosophy. This is one part of the project to publish the complete works of Dooyeweerd in English. The full *Encyclopedia* will comprise: vol 1 *Introduction*; vol 2 *Historical Part*; vol 3 *Systematic Part A* (Basic Concepts); vol 4

*Senior Lecturer in Commercial Law, School of Accounting and Commercial Law, Faculty of Commerce and Administration, Victoria University of Wellington. This article is an edited version of a paper delivered at the Annual Conference of the Australian Society of Legal Philosophy, Australian National University, Canberra, 2000 under the conference theme of “dissenting jurisprudence.”

The discussion of Dooyeweerd's jurisprudence in this paper is largely based on familiarity with his legal philosophy attained in editing the introductory volume and from incomplete editorial work already done on the volume which sets out the system of "basic" legal concepts. However, other published jurisprudential and related works by Dooyeweerd will also be cited.

In Part II of the paper, following, I will briefly provide background to the development of the *Encyclopedia* before setting out the key elements of Dooyeweerd's jurisprudential system and its encyclopaedic method. This will allow an evaluation of Dooyeweerd's legal philosophy as a "dissenting jurisprudence" in Part III. The latter takes the form of a response to an assessment of Dooyeweerd by Professor Arend Soeteman who compares the Dutch legal philosopher's ideas with those of leading Anglo-American legal philosophers. The Conclusion (Part IV) provides a summary assessment of the potential applications of this "new" jurisprudence.

II THE ENCYCLOPAEDIA OF LEGAL SCIENCE⁷

Background

In a recent paper⁸ I have described Dooyeweerd's legal philosophy as "reformational." This is an epithet used of a Christian intellectual and cultural movement originating in the neo-Calvinism of nineteenth century Dutch Reformed thought, whose leading light was theologian, preacher, journalist and politician⁹ Abraham Kuyper.¹⁰ Trained in the discipline of law, Dooyeweerd's preoccupation after completing his doctorate¹¹ was to explore the central theoretical problems of continental legal theory.¹² But having become familiar with Kuyperian neo-Calvinism after completing his university studies, he became convinced that the resolution of the conceptual and methodological problems of jurisprudence needed to be rooted in the neo-Calvinist world-view.

Systematic Part B (Private and Public Law, Sources of Law, Interconnections ("enkaptic interlacements") of internal jural spheres of different societal domains and vol 5 *Revised (Unfinished) Introduction*. For details of other publications already produced and planned see The Dooyeweerd Centre webpage: <http://redeemer.on.ca/Dooyeweerd-Centre/>.

⁷ I have provided other introductory accounts of *The Encyclopedia* (some of which I have drawn on in this paper) in writings cited below, nn 8, 33.

⁸ "The Dutch Reformational Legal Philosophy and Legal Pluralism: Implications for Citizenship" presented at *Re Visioning Citizenship for the 21st Century*, Centre for New Zealand Jurisprudence, University of Waikato, Hamilton, 23-24 Feb. 2000

⁹ He was Prime Minister of the Netherlands from 1901-1905.

¹⁰ For further details on Kuyper's intellectual contribution see R D Henderson *Illuminating Law: The Construction of Herman Dooyeweerd's Philosophy 1918-1928* (Free University, Amsterdam 1994) 16-17.

¹¹ He completed his doctoral dissertation in 1917 on "The Cabinet in Dutch Constitutional Law" ("De Ministerraad in het Nederlandsche Staatsrecht").

¹² Quoting from Dooyeweerd's correspondence, Henderson notes that after finishing his doctorate he spent all his free time on "methodological and philosophical legal studies." Above n 10, 25.

An idea fundamental to this Calvinist world-view is that of “sphere-sovereignty.”¹³ For Kuyper this idea referred to distinctive spheres of society, such as church, state, family, business, etc. whose inviolable boundaries and inner normative character (“law”) are governed by God’s “sovereign” normative ordinances.¹⁴ Dooyeweerd extended this idea and incorporated it into the general philosophy which provided the framework for his jurisprudential system. As we shall see the idea of a “law-sphere” as a “modal aspect” of reality which defines the boundaries of a special scientific area of investigation provided the key to the development of an original jurisprudential system and method.

The genesis of *The Encyclopedia* and the encyclopaedic method dates from Dooyeweerd’s early wrestling with German neo-Kantian legal theory.¹⁵ Prominent in the array of legal philosophers whose writings he critically considered, were Stammler, Radbruch and Kelsen. But others to feature in his early jurisprudential study included von Savigny, von Jhering, and Erhlich.¹⁶ Though gaining valuable insights from all the leading jurisprudential writers, he was especially influenced by the neo-Kantians and none more so than Kelsen. Ultimately, Dooyeweerd rejected all of these neo-Kantian legal philosophers’ efforts to define the scope and method of the discipline of law. Although this included Kelsen, he had the highest regard for the Austrian jurist’s writings. He found in Kelsen’s “norm-logical” method an appreciation of “the indispensability of distinguishing a specifically legal type of normativity.”¹⁷

This need to recognise law as involving a distinctive type of normativity led Dooyeweerd to the view that the study of law required its own scientific method and its own conceptual framework which reflected its *sui generis* normativity, distinct from morality and the study of ethics.¹⁸ But he was also convinced that the neo-Kantians had not yet provided such a method or framework. One thing he had learnt from his study of their writings was that a

¹³ Developed by Kuyper from the writings of G van Prinsterer, founder of the “Anti-Revolutionary” political party of which Kuyper became the leader. See Henderson, above n 10, 44. For an account of the idea compared with the Roman Catholic doctrine of subsidiarity see J Chaplin, “Subsidiarity and Sphere Sovereignty: Catholic and Reformed Conceptions of the Role of the State” in F. P. McHugh and S. M. Natale (eds.), *Things Old and New: Catholic Social Teaching Revisited* (University Press of America, Lanham, 1993) 175-202. Some adherents of this world-view, myself amongst them, instead of referring to “sphere-sovereignty” now prefer to speak of the “distinctive integrity” of different societal spheres.

¹⁴ Henderson, above n 10, 44.

¹⁵ See Henderson’s valuable discussion of the unpublished manuscripts by Dooyeweerd on the neo-Kantian legal philosophy. Above n 10, Ch 3, 51-87.

¹⁶ Henderson, above n 10, 56.

¹⁷ Henderson, above n 10, 84-85.

¹⁸ See, for example, Dooyeweerd’s expression of dissatisfaction with Kelsen’s alleged identification of the legal concept with the ethical concept using the analogy of international law. Henderson above n10, 85.

natural scientific method, and its accompanying account of causality, would not do for the study of law; Kelsen's normative jurisprudence made that clear.¹⁹

Dooyeweerd became convinced that the Kantian epistemological (and ontological) basis for legal theory, was not sufficiently self-consistent in carrying through the project of a theoretically critical approach. The inability of the neo-Kantians to resolve the theoretical differences which led to polarisation into different "schools" within their own ranks,²⁰ was rooted in their basic presuppositions. According to Dooyeweerd, had they been consistently self-critical in working out their assumptions they would have come to appreciation of a fundamental irreconcilable dualism in their approach. Dooyeweerd articulated the nature of this dualistic irreconcilability through a critique of Kant and neo-Kantianism which was part of a major philosophical work on the history of the Western theoretical tradition.²¹

Dooyeweerd found in Kant, the neo-Kantian legal philosophers, and within the entire corpus of Western "Humanistic" philosophy, an irreconcilable dualistic polarisation between the ideals of natural science ("Nature") and the free human personality ("Freedom").²²

This irreconcilability of the "Nature-Freedom" dualism resided in the deep belief of Kant and Western thought in the autonomy of theoretical reason, according to Dooyeweerd, the false belief that such thought finds its own starting point within itself; hence he gives to this entire tradition the label "immanence" philosophy.²³ Here we come to one of the most original parts of Dooyeweerd's general philosophy and the intimate connection which he saw between epistemology and ontology a feature also of his legal philosophy. He rejected Kantian epistemology because Kant had not taken his examination of the conditions of theoretical thought far enough. Its rational construction of

¹⁹ See Henderson's summary, above n 10, 86-87.

²⁰ The major division was between the Marburg School led by Stammler and the Freiburg School of Baden of which Radbruch was a leading figure. For the theoretical basis of the division see Henderson, above n 10, 52, 57 ff.

²¹ H Dooyeweerd, *A New Critique of Theoretical Thought* (Edwin Mellen, Lewiston, 1997), vol 1, Part II, 169 ff; for Kant 325-402; and neo-Kantianism references see vol 4, *Index*, 169-170.

²² This is manifested in the polarisation within the neo-Kantians, which expressed itself through the commitment of Stammler and the Marburg school to a purely formalistic conception of jurisprudence, with its reliance on a natural-scientific concept of causality, in opposition to the later Radbruch and the Freiburg school with its emphasis on accounting for the normativity of law in terms of "values." Henderson, above n 10, 57-78.

²³ "Immanence philosophy" is not to be confused with his own "immanent" *method* of critiquing that tradition! "Dooyeweerd characterised the immanent method of critique as 'placing oneself at the starting point of the theory which is to be judged.'" Henderson, above n 10, 53 quoting from one of the Dooyeweerd legal philosophy manuscripts. See *A New Critique*, above n 21, vol 1, 37-38 for the distinction between a transcendental and a transcendent critique which is not immanent in the critical sense. Dooyeweerd devoted a separate work to this topic of the "pretended autonomy" of Western thought: H Dooyeweerd, *In the Twilight of Western Thought: Studies in the Pretended Autonomy of Philosophical Thought* (Presbyterian and Reformed, Philadelphia, 1960).

reality according to logical categories of thought evidenced a failure to properly account for the structure of theoretical/logical thought itself.²⁴

Reality is given as a coherent totality.²⁵ Therefore our everyday (“naïve”) or primary experience and its way of knowing is an experience and knowing of that unified reality.²⁶ Only in our “scholarly”²⁷ thinking do we view cosmic reality from the viewpoint of a particular dimension, or “aspect,” or “mode,” according to which reality functions. The logical aspect is one such mode of reality in which human creatures subjectively function. In our theoretical analysis our logical-analytical functioning finds its “object” in a “non-logical” aspect (such as the “jural” aspect) which is isolated within our thought in the *Gegenstand* relation.²⁸ But it is a mistaken tendency of immanence philosophy to view reality according to the logical-analytical character of the *Gegenstand* relation because it wrongly takes its starting point for its account of reality within theoretical thought itself. So for example, Kelsen’s jurisprudence is driven mistakenly to view law as a *logical* hierarchy of norms owing to his adopting a Kantian starting-point within theoretical thinking.

From his grappling with the problems of neo-Kantian legal philosophy, Dooyeweerd came to the insight that the *conditions* which structure reality and “scientific” knowledge of that reality (that is, the knowing activity itself *as part of that reality*), transcend theoretical thinking. This implied a new epistemology and ontology which accounted for the structure of theoretical thinking and of cosmic reality in its entirety. Only by taking this path would the true character of law as a normative phenomenon be laid bare. And it was only possible to come to this insight by abandoning the dogma of the autonomy of theoretical thought which always seeks its starting point within thought.

*The Reformational Philosophy*²⁹

²⁴ For Dooyeweerd’s account of that structure see, *A New Critique*, above n 21, vol 1, 3ff, esp. 3-20, 68-38, and in depth, vol 2, 429-541 as part of his treatment in Part II of “The Epistemological Problem in the Light of the Cosmological Idea.” For references to the Kantian categories of thought see, vol 4, 24.

²⁵ Hence coherence is not primarily the product of logical thought but founded in the coherence of “cosmic” reality.

²⁶ For Dooyeweerd’s theoretical account of the idea of experience and *a priori* conditions as “ontic” not “logical” see *A New Critique*, above n 21, vol 2, 542 ff.

²⁷ Henderson, above n 10, 90. The term he used in this mature philosophy is the “theoretical attitude of thought.”

²⁸ The Kantian epistemology found the structure of (theoretically) knowable reality in the categories of thought. According to Dooyeweerd, whilst the *structure of theoretical analysis* itself partakes of a dualistic character whereby the logical function of the act of thinking is opposed to a theoretical non-logical “object,” the so-called *Gegenstand*, the reality which is the focus of that analysis exists independently of that analysis and is not determined by the cognitive relation of thinking subject and its cognitive object, which the subject generates in the act of theoretical analysis.

²⁹ In this section where I outline the main elements of the philosophy, wherever possible, references are to *A New Critique* rather than to the Dutch *Encyclopaedie*, pending publication of the English translation of the latter work.

Dooyeweerd's ruminations in legal philosophy led to the construction of a completely original philosophical systematics found in its expanded and maturest form as the English, four-volume³⁰ *A New Critique of Theoretical Thought*.³¹

Dooyeweerd developed a "new critique" which he styled a "transcendental critique."³² Whilst some of his philosophical terms were borrowed from Kant and the neo-Kantians (such as the term "transcendental") in this critique they acquired a radically different meaning under the influence of his neo-Calvinist assumptions.

... By this critique he claimed to have shown that the activity of theorising is rooted in non-theoretical (religious) presuppositions of the thinker. Both the activity and the subjective presuppositions of the theory themselves presuppose non-theoretical structural conditions ("presupposita") which make theorising possible.

His transcendental critique provided the standpoint from which he could go on to critique the history of Western theoretical thought. It showed that the theoretical dogma of Western philosophy hid from view its religious roots or "ground-motives." He exposed these roots by identifying within each major stream of thought a basic "ground-idea" which was the most fundamental theoretical expression of the religious ground-motives. From his critique of the necessary presuppositions of theoretical thought Dooyeweerd purports to show that every basic idea provides answers to central philosophical questions concerning the, coherence, totality and origin of temporal existence. The answers given to these fundamental questions are radically informed by the religious motive which gives hidden direction to the theoretical idea. As answers to questions concerning the *structure* of reality the theoretical ground-ideas are *law*-ideas. They presuppose the attribution of a cosmic type of lawfulness that structures temporal reality. Hence the basic theoretical (ground-) idea is a *law-idea* in that cosmic (non-juridical) sense.³³

The notion that there is a cosmic law ordering a reality (including legal reality), which includes the *conditions* for the activity of acquiring scientific knowledge of that reality, was an application of Kuyper's neo-Calvinist belief regarding the divine rule of God's sovereign law over all of creation. Through his transcendental critique Dooyeweerd extended Kuyper's notion of sphere-

³⁰ It comprised three volumes of the content of the philosophy plus a separate volume containing an extensive index.

³¹ First published by Presbyterian and Reformed, Philadelphia between 1953-58. Other editions have appeared in 1969, 1984 and most recently in 1997 (see above n 21). All of these later editions are re-prints. In references to the work I will be using the 1997 edition published in four volumes under the imprint of Edwin Mellen Press as part of the Dooyeweerd Centre for Christian Philosophy *Collected Works* series. The earliest complete form of the general philosophy is the two-volume *De Wijsbegeerte de Wetsidee* ("The Philosophy of the Law-Idea") (H J Paris, Amsterdam, 1935-36). The first volume of the *Encyclopedia* encapsulates the general philosophy in a manner that orients it to serve as the philosophical foundation for his jurisprudence and its basic legal concepts.

³² Above n 21, vol. 1 for the transcendental critique.

³³ A M Cameron, "Dooyeweerd's jurisprudential method: legal causality as a case study" (*ALTA 1998 Conference Proceedings* vol 2) 595-634. See *A New Critique* above n 21, vol 1, for an account of the ground-motives operative in Western thought, a summary account of which is also provided in the *Encyclopaedie*, vol 1, "Inleiding," 10-41.

sovereignty, the idea of different distinct spheres of human life governed by their own inviolable divine ordinances. Dooyeweerd's theory of the "aspects" as distinct irreducible "modal" spheres governed by their own "sovereign" law-structure lies at the heart of his original ontology of temporal cosmic reality. It is also the basis for his epistemology.

In Dooyeweerd's critique, the "theoretical attitude of thought," owing to its "ontic" (that is, not purely subjective-epistemic or formal-logical) *Gegenstand*-relation, explicitly isolates an aspect or aspects of reality in the act of theoretical analysis.³⁴ These aspects themselves, though only explicitly brought to view in the theoretical attitude of thought, are not creations of the thinking subject or mere logical categories, but are real "law-spheres" of experiential reality in its totality. The aspects not only encompass the natural modes, such as the physical, towards which natural science directs its gaze,³⁵ but also *normative* modes of reality,³⁶ which provide the various orientations of the normative sciences. The jural aspect is the normative mode that provides the "field-of-view" for the science of law.

By *theoretically* identifying the aspects of reality as real and irreducible (cosmically) law-governed aspects of our experience, which provide defining limits for the special sciences, and not as mere arbitrary deliverances of reason or "categories of thought," the errors of the academic disciplines under the influence of immanence philosophy can be avoided.³⁷

Kelsen did much to advance the idea of the science of law as the study of a normative phenomenon. Yet, by adopting the Kantian approach, which takes its starting point within the logical-analytical activity of the theoretical attitude of thought with its implicit irreconcilable opposition between natural scientific fact and noumenal world of values, Kelsen could not see beyond the purely

³⁴ Professor D F M Strauss, the leading authority on Dooyeweerd's systematic philosophy, though continuing to follow the main lines of Dooyeweerd's transcendental critique, has abandoned the concept of the *Gegenstand*-relation for explaining the structure of theoretical analysis. See Strauss, (1984) *Philosophia Reformata* 35.

³⁵ According to this philosophy of science the special sciences, strictly speaking, do not investigate the aspects themselves but investigate concrete reality as it functions in that aspect or aspects. To accomplish this presupposes a theoretical idea of that aspect in its connection with the other aspects of reality.

³⁶ In Dooyeweerd's mature modal schema there are 15 aspects which function according to a definite order. The natural (non-normative) in ascending order are the numerical, spatial, kinematic (movement), physical, biotic, and sensory followed by the normative aspects comprising the logical/analytical, historical, lingual, social, economic aesthetic, jural, ethical and finally the faith (pistical) aspect. See L Kalsbeek, *Contours of a Christian Philosophy* (Wedge, Toronto, 1975), 100.

³⁷ For example, the error of Stammler, under the influence of a natural-scientific methodology, was to view law as a purely formal category without material contents. Dooyeweerd criticised Anders Lundstedt, one the Scandanavian Realists, also under the influence of the "nature" pole of the Nature-Freedom ground-motive, for reductionistically viewing law as natural fact and denying the real normative character of law. The juridical normative concepts (rights, duties, obligations, etc.) refer to nothing real in actual juridical experience in Lundstedt's view. This view, according to Dooyeweerd, must be mistaken. See *Encyclopaedie*, vol 1, "Inleiding," 9-10.

logical character of legal normativity to the “ontic” source of legal normativity in a real jural aspect.

In our concept-forming we can attain limited theoretical knowledge of reality as it functions in the diverse aspects, but that reality, and the aspects themselves, are more than the logical concepts of them. Furthermore, by mistakenly taking the starting-point for viewing them within theoretical thought, the various special sciences have fallen prey to the consequential error of having to view the subject-matter of the particular discipline in question from the stand-point of a theoretically isolated aspect or aspects that have been “hypostasised” or “absolutised.”³⁸ This absolutisation is the source of all “isms” in the special sciences.³⁹ In the science of law it prevents insight into the true character of law, with its defining normative jural dimension, and into the method of legal science.⁴⁰

The Encyclopedia of Legal Science

The idea of an “encyclopaedia” which Dooyeweerd employs to describe his jurisprudential systematics is by no means original.⁴¹ He reverts to an older sense of the term as denoting an integrating philosophical foundation for a special science.⁴² Only an introduction of this kind, in his view, can provide a truly insightful orientation to the special science of law for the student being initiated into the discipline.⁴³ However, in his philosophical perspective, the specific meaning that “encyclopaedia” acquires is governed by his theory of the modal aspects. To explain this application of the term will require expanding on the theory of the aspects.

I earlier referred to Dooyeweerd’s account of the ground-ideas of every philosophy that of necessity provide answers to questions concerning “the coherence, totality and origin of temporal existence.”⁴⁴ Implicit in the idea of coherence is the idea of diversity and, in particular, the diversity of the modal

³⁸ *A New Critique*, above n 21, vol 1, 45-46.

³⁹ *A New Critique*, above n 21, vol 1, 46.

⁴⁰ From this reformational perspective, at least some “schools” within the modern law and economics movement are guilty of “economism” in their tendency to reduce law to an economic phenomenon by viewing it exclusively from the field-of-view of economics and the economic dimension under a certain (neo-classical) view of economics. Coase is correct to criticise his fellow law and economics theorists such as Becker and Posner for seeking to imperialistically use a reductionistic economic method to invade other disciplines. And he is also correct to say that it is the distinctive subject-matter which is to be examined that dictates the method. For an assessment of Coase’s criticisms of his fellow law and economics adherents, see my unpublished paper, “Coase versus Posner in Law and Economics” (1995).

⁴¹ Dooyeweerd devotes a substantial part of one of the Encyclopaedia’s volumes (vol 2 in *The Collected Works Series*, above n 6) to the history of the idea with respect to the sciences in general and to the discipline of law in particular.

⁴² For the relationship between philosophy and the special sciences in *A New Critique* see above n 21, vol 1, 528 ff.

⁴³ *Encyclopaedie*, vol 1, “Inleiding,” 10.

⁴⁴ See text accompanying n 33 above.

aspects, which are the most basic “transcendental” conditions of cosmic reality. The passages quoted below from the same paper help to explain the idea of encyclopaedia incorporating the central philosophical ideas of aspectual diversity, coherence and unity (or totality) which had been extensively articulated in *A New Critique* and encapsulated in the first volume of *The Encyclopedia*.

Dooyeweerd utilises an older sense of “encyclopaedia” that refers to a view of learning and scholarship as a theoretically interconnected enterprise in which no special discipline philosophically speaking is able to exist completely autonomously. This view of the interrelationship of the various disciplines within the academy gives to philosophy both a foundational and integrating role.

According to the transcendental critique, not only philosophy itself but no special discipline either, can avoid basic questions concerning the diversity, coherence and unity of reality. Though a specialist field of study such as law examines the functioning of social phenomena from the perspective of one of its dimensions or “aspects”, in this case the “jural”, it can only do so by assuming a view of the nature of that aspect, what distinguishes it from other dimensions of reality, how it interrelates with those other dimensions and what is the nature of the unity in which the aspect defining the discipline’s field is embedded. The discipline’s philosophic ground-idea must assume answers to these questions because the very structure of scholarly investigation requires adopting the theoretical “attitude” of thinking which abstracts from what is given in reality as a concrete unity or totality. ...⁴⁵

The concrete “datum” which provides the subject-matter of the science of law comprises discrete entities such as laws and legal institutions. Although it is the functioning of the jural aspect that imparts to such concrete legal phenomena their juridical character, legal “things” also function in every other aspect of reality, as does every other kind of thing within temporal reality.⁴⁶ Here expressed is the principle of “sphere universality.” A legal institution or a law, no less than an economic enterprise, can be the subject of investigation by the science of economics (or many other disciplines). This multi-dimensionality of concrete reality is illustrated in the introductory volume of the *Encyclopedia*, using the mundane but typically Dutch example of the purchase of a box of cigars.⁴⁷

But the necessity of an an encyclopaedic view of the disciplines requires, in addition to an understanding of the diversity of the universal aspects, an insight into their interconnections or coherence. This interconnecting of the aspects is

⁴⁵ Cameron, above n 33 , 612-613.

⁴⁶ But not always as a *subject*. An “inanimate” thing can only function as an object to some ethical subject, for example, when a personal item becomes a “treasured” possession. It is of course, inter alia, also a jural object (ownership) and an economic object (a potential item for economic exchange with a monetarily expressible “value”). Whether as subject or object, however, the significant point is that the thing has functions that are governed by all of the aspects as law-spheres and in that sense belongs to it.

⁴⁷ *Encyclopaedie*, vol 1, “Inleiding,” 2-6. In an example of “political correctness” the original translation (Knudsen), on which the introductory volume is based, replaced the purchase of a box of cigars with the purchase of a suit! Dooyeweerd’s own example has been restored in the soon-to- be-published volume one.

the basis for understanding the interrelationships of the basic academic disciplines.

According to the modal theory, however, not only are there distinct aspects of concrete phenomena but each aspect, also, *within itself*, displays connections with all the other aspects. For example, there is an *aesthetic* dimension within the jural aspect which expresses itself in the concept of jural *harmony*, the harmonising of different legal interests, in this case, the interests of buyer and seller. In other words, there are as many dimensions within the jural aspect itself as there are aspects of the event in its full concreteness, excluding the jural aspect itself.

These “analogies,” connections to distinct aspects of reality within an aspect, in this case the jural, provides [sic] the basis of Dooyeweerd's idea of encyclopaedia as an integrating view of a particular discipline in relation to every other discipline. Because, by the very nature of experiential reality, each aspect contains reflections of all the others, it is never possible to give a critical account of the fundamental concepts of a discipline, the focus of which is oriented to one or more of the aspects, without an account of how the aspect or aspects concerned are related to, as well as distinguished from, other aspects. In other words, no discipline can isolate itself from any other because its basic concepts, which are unique to it and which correspond to the “analogies” within the aspect(s) concerned, appeal to the irreducible dimensions or aspects in which the specialised orientation of the other disciplines is founded.⁴⁸

And so Dooyeweerd arrives at his idea of an encyclopaedia of law as a philosophy of law that furnishes an introduction to legal study as the special science of law.

... All of this implies a distinction between the task of legal philosophy and the discipline of law itself, that is, between, on the one hand, an encyclopaedia of law which provides an introduction to the study of law by way of a theoretical account of law and, on the other hand, the science of law which examines concrete phenomena viewed from the standpoint of its jural aspect. The difference between the two branches of scholarship are that the former actually examines the nature of the jural or legal dimension that gives to legal phenomena its legal or jural character. It does so by distinguishing that aspect from all other dimensions or aspects of reality and by giving an account of its internal structure which again shows its interconnections with all other aspects.

The discipline of law, as with that of economics, ethics, etc does not examine the relevant aspect itself but accounts for phenomena – laws, legal decisions, processes and institutions from the (assumed) standpoint of its jural dimension. The connection between an encyclopaedia of law and legal science is that the latter, as an analytical activity which *presupposes* an abstracting from, and isolating of, the jural dimension of reality to provide its particular angle of approach for the object of its investigations, by that necessary abstracting also *presupposes a conception of the nature of law or the jural dimension* which is the basis of its empirical analyses.⁴⁹

The comprehensiveness of Dooyeweerd’s jurisprudence, which the above description of the idea of an encyclopaedia of legal science implies, is

⁴⁸ Above n 33, 614.

⁴⁹ Above n 33, 614-615.

demonstrated in the application of the theory of the modal aspects in the *Encyclopaedia* itself in order to produce his basic legal concepts. These concepts, collectively, provide Dooyeweerd's unique concept of law.

*The Basic Concepts of Law*⁵⁰

The building blocks of Dooyeweerd's concept of law are the earlier-mentioned internal structural elements or "analogies" within the jural aspect. In particular, it is the analogies within the jural aspect pointing back to earlier aspects founded in the cosmic order of time⁵¹ ("retrocipations") that provide the datum for the "elementary basic legal concepts" which, along with the "complex" basic concepts, are constitutive of the full concept of law.⁵²

Number, or the numerical, is the first aspect in the order of the modal aspects. Legal-unity-in-a-legal-multiplicity is for Dooyeweerd an elementary basic legal concept founded in the jural "retrocipation" pointing back to the original meaning of the aspect of number. But, as an analogy within the jural aspect, it possesses a peculiarly jural meaning and not an original numeric sense. Hence a corporation as a legal subject is a jural unity for the purposes of law (a legal "person"), though as a human organisation it comprises a multiplicity of ("natural") human persons. The legal order or system itself is a unity of legal norms constituted by a multiplicity of spheres of legal norms, public and private. Furthermore, both the legislative and adjudicative functions require a harmonising of a multiplicity of diverse legal interests to produce a single result, a jural unity.⁵³

To the spatial analogy in the jural aspect corresponds elementary basic concepts of legal location of jural facts and jurisdiction.⁵⁴ These spatial analogies in the jural aspect do not refer to space in its original meaning of *extension*, in the sense that a physical thing⁵⁵ such as a stone possesses extension ("occupies space"), but to a jural space.

⁵⁰ This section is taken, with some minor modifications, from a section of the paper, "Dooyeweerd's jurisprudential method" above n 33, 595, 615-618, headed "*The concept of law and the jural aspect.*"

⁵¹ Above n 21, vol 1, 22-34 for Dooyeweerd's account of cosmic time and its various dimensions.

⁵² Dooyeweerd's analysis of basic legal concepts and the "concept of law" is found in the second volume of the *Encyclopaedie*, "Deel II" (but the third volume in the *Collected Works* series). For an introduction to the two fundamental categories of basic concepts, "elementary" and "complex", or compound basic concepts see Hommes (1979), above n 4, 374-392.

⁵³ *Encyclopaedie*, vol 2, 11-13.

⁵⁴ Jurisdiction is "the sphere of validity ("geldingsgebied") of legal norms" *Encyclopaedie*, vol 2, 13-14.

⁵⁵ It is a feature of the first three aspects, numerical, spatial and kinematic, that they are not factually realised (functioning subjectively) except in concrete "things" or beings. Only things (e.g. a stone, a person, an animal) are one, two or more, occupy space, or can move. A stone is a *physical* thing because it is the physical aspect that qualifies it as such, and is the last aspect in which it functions as a subject. Apart from such things the spatial, numeric and kinematic aspects have no factual (actualised) existence.

Although, in his jurisprudential writings, Dooyeweerd does not appear to distinguish between jural analogies of legal movement and physical analogies in the jural aspect, it is nevertheless easily deducible from the maturest phase of his ontology in which he separated the aspect of movement (kinematic) from that of energy-effect (physical).⁵⁶ Hence legal movement, for example, the passing of property in a sale transaction, is a kinematic analogy in the jural aspect. Jural movement clearly is not movement in its original sense as exemplified in the mere “physical” transportation of the goods from the seller's warehouse to the buyer's place, for the legal title to the goods is able to “move” without physical movement.⁵⁷ This is a common occurrence in contracts for the sale of goods⁵⁸ as it is for other kinds of legal movement such as share transfers.

Legal force and legal “operation” are elementary basic concepts founded in the physical analogy within the jural aspect which do not refer to the original core meaning of the physical aspect, that of energy-effect.⁵⁹ A law does not have force or “bind” in a physical, but in a legal, sense only, though its application will have physical effects (physical confinement, physical transference of goods, etc). As I have explained in more detail elsewhere, legal causality is an elementary basic concept founded in the physical analogy.⁶⁰

I have now sufficiently indicated the manner in which Dooyeweerd's elementary basic concepts of law are founded in analogies within the jural aspect, and it is not necessary here to account for all of the other elementary basic concepts corresponding to the remaining analogies.⁶¹ However, in addition to the elementary basic concepts there are also “complex” or “compound” basic concepts.

The elementary basic concepts as explained earlier are founded in the analogical elements of the jural aspect. The compound basic concepts are a synthesis of all the elementary concepts viewed from different angles. Dooyeweerd therefore describes them as “modal totality” concepts (“modale

⁵⁶ *A New Critique*, above n 21, vol 2, 93-107.

⁵⁷ However, without at least the possibility of actual physical transference of goods, transference of legal title might not be possible either. Another way of putting it would be to say that legal movement in the form of transference of title is dependent on a background practice of physical movement of goods. The seller's obligation of delivery of goods also involves the concept of jural movement but without necessarily being accompanied by “movement” of title, or again, actual physical movement, though it presupposes such physical deliveries do occur, e.g., the concept of “constructive” delivery presupposes that of actual delivery.

⁵⁸ Section 20 rule 1, Sale of Goods Act 1908 (New Zealand).

⁵⁹ *Encyclopaedie*, vol 2, 14.

⁶⁰ Above n 33, 618 ff.

⁶¹ Other analogies (retrocipations) within the jural aspect for which there are corresponding elementary basic concepts are those of legal life and legal organ (biotic), legal will (psychical/sensory), legal contradiction (logical), legal power (historical), legal meaning and interpretation (lingual), legal interaction and coordination (social), legal economy (economic), legal harmonisation (aesthetic). See *Encyclopaedie*, vol 2, 11-30.

totaal-begrippen”).⁶² The latter are founded in “categorical relations” which span all elementary basic concepts corresponding to the “analogies” within the jural aspect.⁶³ They comprise the relation of law-side or *norm*-side and factual or subject-side, subject and object, and becoming, duration and termination.⁶⁴

Though all three categorical relations are of importance for an account of the complex basic concepts,⁶⁵ it is the relation of norm-side and fact-side on which I wish to focus and its relevance for the juridical distinction between (legal) fact and (legal) norm. In Dooyeweerd’s system of legal concepts both legal norm and legal fact are complex basic concepts which arise out of the categorical relation of norm- (or law-) side and fact- (or subject-) side.⁶⁶ I will now consider in some detail what is involved in this relation and how it relates to the theory of the modal aspects.

The cosmic law-ordering of reality, as already explained, displays its rich diversity in the different modal aspects as irreducibly unique (cosmic) law spheres. In human experience we only encounter this diverse law-ordering in concrete things, events, processes, etc. In other words, the aspectual ordering is only empirically present as modes of concrete reality or factuality. There are no concrete facts that are not subject to the cosmic law-ordering manifest as the modal aspects of those facts, and we cannot discern the presence of the law-ordering apart from subjective realisation in concrete phenomena. Hence concrete reality has a “law-side” and a factual or “subject-side.”⁶⁷

This dual character of reality is present in legal phenomena and in its “analogies” which are the basis of the elementary basic concepts. Dooyeweerd refers to this dual feature of legal phenomena when, for example, he refers to the numerical analogy in the jural aspect “*at the law-side*” as a jural unity in the multiplicity of legal norms,⁶⁸ whereas the numerical analogy reveals itself “*at the factual side*” in, for example, the legal subject as a jural factual unity.⁶⁹

⁶² *Encyclopaedie*, Vol 2, 98.

⁶³ “These relations are connected with the entire modal structure of the juridical aspect and encompass all structural elements comprised within it.” Hommes (1979), above n 4, 387. See also 388 where the reason for Dooyeweerd’s use of “categorical” is explained.

⁶⁴ See *Encyclopaedie*, vol 2, 100-102 ff. Hommes (1979), above n 4, 387-388.

⁶⁵ For example, from the subject-object relation arises the concepts of legal subject and legal object and legal right. These provide the basis for his theories of legal subject in which he critiques the fiction of legal personality, and legal right.

⁶⁶ Other concepts arising out of this relation include legal obligation and legal permission. Hommes (1979), above n 4, 388.

⁶⁷ *Encyclopaedie*, vol 2, 99-100 and *A New Critique*, above n 21, vol 2, 7.

⁶⁸ *Encyclopaedie*, vol 2, 11. “Aan de wetszijde is dit een juridische eenheid in de veelheid van *rechtsnormen*”.

⁶⁹ Another example of this duality is given by Dooyeweerd when he points out that there is a physical analogy in both the factual causal relation of legal cause and legal effect and in the normative legal relation of legal ground and legal effect. *Encyclopaedie*, vol 2, 14-15. Where the “institution” of contract, for example, has been provided for by legislation but has not been realised in a concrete actual contract, we are only dealing with the normative jural conditions for a formed agreement becoming a legally recognised and enforceable contract. Hence, as Neil MacCormick has pointed out, the

As a synonym for law-side of jural phenomena he often employs the phrase “norm-side.” This is owing to (juridical) law being a normative phenomenon that obtains its normative jural character from the qualifying role of the jural aspect of reality. Though all the aspects, from the numerical to the aspect of faith, are (cosmic) law aspects – expressions of diversity in the cosmic law governing reality – not all aspects are normative in character. The (cosmic) law structures of number, space, movement, energy-effect, biotic life, and the sensory dimension are “natural,” applying irrespective of human will. We cannot choose whether or not to obey these laws. We can, however, subjectively choose to act contrary to the normative, law-like, cosmically ordered conditions of logic, historical forming, lingual expression, social interacting, economy, aesthetic harmonising and ethical behaviour, although, as normative conditions of our experience, we cannot dispense with them or disregard them with impunity.

The Core of the Jural Aspect

Dooyeweerd's unique contribution to legal philosophy is the theory of the jural aspect as an irreducible *normative* aspect distinct from other normative aspects. We have already seen that the analogies within this aspect form the basis of the elementary basic concepts which are part of the total concept of law. All of these concepts have a uniquely jural meaning derived from the core meaning⁷⁰ (“meaning-nucleus” or “meaning kernel”) of the jural aspect itself. The question then arises: if the basic elementary concepts derive their meaning from the core of the normative jural aspect, what is the core meaning of the jural aspect which characterises its analogies and the correlated concepts as uniquely and irreducibly jural?

For every aspect Dooyeweerd has provided a description of its core or “nuclear” meaning, its “meaning-kernel” or “nucleus”.⁷¹ For example, we have already noted in passing the core meaning of the physical as that of energy-effect and

institution in question does not display, a spatial dimension or aspect. In other words, a legal norm (e.g., contractual obligation) has no independent factual (jural) existence apart from subjective legal facts (formation of a contract). See D N McCormick “Law as Institutional Fact” in McCormick and Weinberger *An Institutional theory of Law* (Reidel, Boston, 1986), 49, 52.

⁷⁰ Strictly speaking we should say “meaning-core” (“zinkern”) which signifies a difference between mere semantic meaning founded in the lingual/symbolic aspect and Dooyeweerd’s “ontic” sense expressed at the beginning of *A New Critique* in a memorable phrase, “Meaning is the being of all that has been created” Its divine transcendental nature is explained by his statement that “[Meaning] has a religious root and a divine origin.” *A New Critique*, above n 21, 4. Prof D F M Strauss has suggested to me that this account of reality in terms of meaning represents a “linguistic turn” in Dooyeweerd comparable to the linguistic turn in leading modern philosophers (such as Wittgenstein, etc.) and one might add to those comprising postmodernism in general. In legal philosophy the name of H L A Hart immediately springs to mind as one who drew upon ordinary language philosophy. In that connection we could say, to draw a comparison with Hart’s analysis, that in addition to the jural aspect having a meaning-core, it also has its meaning “penumbra,” the so-called jural “analogies” which surround the core of the aspect.

⁷¹ *A New Critique*, above n 21, vo 2, Chapter. II, “The Modal Structures of Meaning,” 55-328 and Kalsbeek, above n 36, 95-103 for a convenient summary.

the spatial as extension. As a normative aspect the meaning kernel of the jural aspect he identifies as being the norm of *retribution*.⁷²

The first point to note about Dooyeweerd's notion of retribution⁷³ is that is not confined to a criminal legal meaning, but is understood as a *re-tributing* which has the sense of that which is justly *due* or *owing* (*suum cuique tribuere*) and, therefore, can encompass non-criminal (civil) legal concepts of restoration, restitution and recompense, as well as their criminal counterparts.⁷⁴ Secondly, the limits of thought which attempts to give a theoretical account of the core meaning of this and any other aspect are such that we can only arrive at a theoretical “intuition”⁷⁵ of its core meaning.

Whilst an account of the jural aspect necessarily appeals to its constituent analogical elements, its core meaning is not reducible to any one of them or even to all of them together. For they presuppose and are qualified by the core retributive meaning of the jural aspect which is unable to be further analysed.⁷⁶ His description of retribution as the meaning of the jural modal aspect therefore is expressed in analogical terms as follows:

... an irreducible mode of balancing and harmonizing individual and social interests. This mode implies a standard of proportionality regulating the legal interpretation of social facts and their factual social consequences in order to maintain the juridical balance by a just reaction, viz. the so-called legal consequences of the fact related to a juridical ground.⁷⁷

This “circumscription” of the jural mode as retribution contains explicit and implicit references to all the analogical elements that constitute the jural aspect.⁷⁸ The use of the term retribution to characterise the normative meaning kernel of this dimension of our experience should not distract us from this key feature of Dooyeweerd’s account of the concept of law. For example, the mention of proportionality in this description is an indirect reference to the

⁷² *A New Critique*, vol 2, 129-140 and *Encyclopaedie*, vol 2, 3-9 for Dooyeweerd’s defence of his account of the core meaning of the jural aspect and his rejection of others’ attempts to reduce it to the core meaning of non-jural aspects as leading to internal inconsistencies or “antinomies.”

⁷³ For a recent discussion of Dooyeweerd's conception of retribution as the core meaning of law and the jural aspect, see A Soeteman “Dooyeweerd als rechtsfilosoof” in Geertsema et. al. (eds) *Herman Dooyeweerd 1894-1977: Breedte en actualiteit van zijn filosofie* (Kok, Kampen, 1994) 28, 33-34.

⁷⁴ Whilst it is important to point out the sense which Dooyeweerd gives to “retribution,” the question may be legitimately raised as to whether that term, having so firmly acquired a more specific and narrower meaning, ought to be abandoned as the term to describe what Dooyeweerd understands to be the core meaning of law and the jural aspect. What the alternative term might be, assuming there is such a satisfactory alternative, I cannot pursue here.

⁷⁵ For a discussion of the role of intuition in the context of Dooyeweerd’s early analyses of neo-Kantian legal theory see Henderson, above n 10, 93, 107 ff.

⁷⁶ *A New Critique*, above n 21, vol 2, 129 and *Encyclopaedie*, vol 2, 3 ff.

⁷⁷ *A New Critique*, above n 21, vol 2, 129.

⁷⁸ See these elements discussed in the context of his analysis of legal causality in the essay “The modal structure of legal causality,” in *Essays in Legal, Social and Political Philosophy* (Edwin Mellen, Lewiston, 1997, Series B, vol 2, *The Collected Works of Herman Dooyeweerd*), 39-72.

economic analogy within the jural aspect. The latter founds the elementary basic concept of legal economy which in the jural mode of retributive balancing forbids *excessive* weight being given to particular interests. But reference to the concept of legal economy in terms of *proportionality, weight and balance* necessarily appeals to aspects of experience that are constitutive of the economic mode, namely the numerical and the physical, the spatial necessarily being implied also.

Retribution or the retributive *mode* evokes the (analogical) elements that are always present in (constitutive of) the jural aspect as an irreducible universal mode of human experience. In particular it points directly to the requirement of balancing and weighing of differing interests. It also implies the sense of “reaction” or “response” and the associated juristic concepts of legal accountability and responsibility. These concepts in turn presuppose the legal concepts of unlawfulness, jural acts that disrupt the harmony of interests⁷⁹ requiring a re-balancing, a *re-tributing*, implied in the legal concepts of restitution, recompense, reparation, restoration, etc.

*Law and Morality*⁸⁰

Dooyeweerd’s unique theory of the modal aspects implies an equally original solution to the problem of understanding the relationship between law and morality. Only a brief indication of the “encyclopaedic” perspective on this topic will be provided, sufficient for the purposes of the following Part of the paper.

It may not have gone unobserved that, in Dooyeweerd’s legal philosophy the distinct character of the normative jural aspect and its constitutive elements (“analogical moments”) is circumscribed without reference to morality or “values” such as justice. Were it not for its account of the source of all normativity in a divine (law) origin one might be inclined to label this perspective as positivist. To be sure the sharp distinction between the jural and ethical, or moral, aspects points to some significant similarities shared with contemporary legal positivism. The similarities and differences between the legal philosophy arising from the cosmomic idea philosophy and legal positivism will be more fully addressed in the next part of this article. For the present, it will be sufficient simply to summarise Dooyeweerd’s understanding of the relationship between law and morality and to indicate how it stands with respect to legal positivism. The following passages from an article devoted to this topic adequately serves our purpose. Having explained there the normative

⁷⁹ Compare Hart and Honoré’s description of the “overriding purpose of the legal system” as being to protect against the “unlawful invasion of rights and legally protected interests.” H L A Hart and T Honoré *Causation in the Law* (Oxford University Press, Oxford, 1985), 455.

⁸⁰ A fuller treatment of this topic is to be found in Alan Cameron, “Dooyeweerd on Law and Morality: Legal Ethics – a Test Case” (1998) 28 *VUWLR* 263, esp. 266ff.

constituents of the jural aspect and its “nuclear meaning,” as has already been done in the preceding section above, I go on to say:⁸¹

The key to understanding the *relationship* between law and morality lies in the moral analogy within the jural aspect. Because the normative moral aspect immediately succeeds the jural in the temporal order of the aspects, the moral (“anticipatory”) analogy is not a constitutive element in the structure of the jural aspect. The concept of law as a theoretical account of the aspect which gives to concrete law its jural character expressed as a retributive mode of harmonising different legal interests does not include the *actualisation* of the moral dimension (analogy) as an essential component. It is only in the idea of justice as a legal ideal (idea of law) that the concept of law is “opened up” by the moral “anticipatory” analogy within the jural aspect under the leading of the aspect of faith. This is concretely illustrated by the role of the Christian faith within Western legal traditions in bringing this moral dimension into the law through the concepts of “equity”, “conscience”, “good faith”, “guilt”, etc. Whilst these “legal-moral” concepts have come to be regarded as essential elements of our idea of legal justice they are not essential for the existence of valid law in every legal system.⁸²

This account of the relationship of the jural and the moral aspects enables a summary comparison of this perspective with that of legal positivism provided in the paragraph immediately following the above quoted:

Thus, it can be seen that by means of his “structural” modal theory Dooyeweerd is led to a view of the interrelationship of law and morality that is similar in important respects to that of modern legal positivism. First, his concept of law implies a notion of valid law that is independent of moral criteria; hence like the positivists he believes that the existence of law is one thing, its morality or justice is another. Secondly, like modern positivists such as MacCormick he is able to maintain the distinctiveness of law and morality without asserting their separation into hermetically sealed spheres, even though “morality” or the moral aspect, for Dooyeweerd, has a more restricted meaning than in current jurisprudential and ethical literature.⁸³

III DOOYEWEERD’S JURISPRUDENCE: LEGAL POSITIVISM, NATURAL LAW, OR TERTIUM QUID?

Professor Arend Soeteman holds the chair in jurisprudence at the Free University of Amsterdam once occupied by Dooyeweerd for many years. As a former student of the reformational philosopher he is well placed to assess Dooyeweerd’s legal philosophy. He does this by comparing Dooyeweerd’s ideas with those of leading contemporary legal philosophers with particular

⁸¹ Above n 80, 267-68.

⁸² For Dooyeweerd on the idea of law as justice see *Encyclopaedie*, vol 2, 30 and Hommes (1979), above n 4, 374-387; on faith and legal morality, *Encyclopaedie*, vol 2, 141; and on the “opening process,” *Encyclopaedie*, vol 2, 63.

⁸³ Cameron, above n 80, 268.

reference to three topics: (1) the concept of law; (2) legal positivism and natural law theory and (3) legal causality.

1 Dooyeweerd's Concept of Law

Norms, Things and Normative Things

Legal philosophy is hindered in attaining systematic insight, according to Dooyeweerd, because it focuses on law as a concrete “thing,” rather than viewing legal phenomena from the perspective of the jural aspect, as a mode in which such “things” function. Soeteman sees in this approach an implicit criticism of contemporary legal theories such as that of H. L. A. Hart, and Dworkin, for persisting with this focus on law-as-thing.⁸⁴ But whilst he acknowledges that the modal functional analysis of legal phenomena is indeed able to provide fruitful jurisprudential insights,⁸⁵ Soeteman questions whether Dooyeweerd's giving of primacy to this method of accounting for legal phenomena is always appropriate.⁸⁶

The second question⁸⁷ is whether Dooyeweerd does not stand closer to the prevailing reifying approach than had earlier been suggested [by Soeteman]. The jural is for him an aspect of reality, but law norms are things, which as such function in all aspects and which in time come into being, endure and perish. When one is in search of an analysis of the concept of law then as a rule one is also in search of an analysis of those “things” of reality. No wonder that the idea of law takes on a “thing” character.

Another question therefore is whether this “thing” (legal norms) really is best understood from the outset through viewing its typical qualification by means of the jural aspect.⁸⁸

In raising these questions Soeteman makes the point that, whilst there is some value in Dooyeweerd's modal method insofar as Dooyeweerd, in conformity with contemporary approaches, understands law as constituted at least in part of normative “things,” one has to doubt whether Dooyeweerd is correct to insist on giving primacy to the modal approach. Would it not be better at the outset to view legal norms in their total thing-ness, that is to say, comprising both substantive-normative dimensions and positive-formal dimensions as is the approach of contemporary theory?⁸⁹

⁸⁴ Soeteman, Above n 73, 31-33.

⁸⁵ For example, his analysis of legal causality. See discussion under topic 3 below.

⁸⁶ Soeteman, Above n 73, 35.

⁸⁷ The first question concerned the adequacy of proposing the substantive norm of retribution as a criterion of law apart from any formal criteria for distinguishing the positivising of jural or legal norms from moral norms. Above n 73, 34-35. See nn 72-74 and text above for discussion of retribution as the modal “kernel” of the jural aspect.

⁸⁸ Above n 73, 35. This and all other translations of passages from the original Dutch are my own.

⁸⁹ Above, n 75, 35-36.

This point concerning Dooyeweerd's giving primacy to the modal method in his treatment of legal norms appears to be based on a confusing of Dooyeweerd's idea of a modal aspect and the notion of norms or normativity. To clear up this confusion will require expanding on our earlier account of the elements of Dooyeweerd's encyclopaedic method.

A distinction between the modal structure and the structure of individual things or entities (individuality-structures) is of critical importance in Dooyeweerd's general systematic philosophy.⁹⁰ The structures of individuality comprise the structures of concrete phenomena or things, what are commonly referred to as "physical" things or objects, but also include other entities such as human communities and relationships. Only by first having a concept of aspects as modes of functioning can we understand the nature of these individual entities. The individuality (identity) of entities such as stones and states is governed by their structures of individuality. These structures are typified as different kinds of individuality-structures by the manner in which they function in the modal aspects. In particular, the normative modal aspects play a critical role in normative entities insofar as one of these normative aspects has a qualifying or leading function. For example, in the individuality-structures of the family and marriage the normative moral/ethical aspect plays a qualifying or leading role, whereas for a business organisation the economic mode has this role.⁹¹

This leads us to another critical distinction in Dooyeweerd's philosophy already considered, in Part II above, between "law-side" or "norm-side" and factual or "subject-side" of concrete phenomena (things, human communities, events, processes).⁹² Whilst it is correct to say that an individual law is a kind of thing in the broader sense of a normative entity or normative "institution" comprised of institutional or normative facts,⁹³ it would not be correct to describe legal *norms* as "things" in the same sense. For Dooyeweerd, norms in the sense of posited standards of conduct have no factual existence as normative "things" except in relation to concrete, "social" facts. A legal norm, for example, a contractual obligation, has no independent existence apart from the factual subjective activity of contract formation, that is, apart from the contract as a legal fact. The legal norm (for example, an obligation of contractual performance) is only the norm-side of a legal fact.⁹⁴ But there is a further important qualification that has to be made here and which relates to the Soeteman's point regarding the primacy of modal analysis.

⁹⁰ The second volume of *A New Critique* provides an account of the modal structure of reality, the third provides the account of structures of individuality. Both of these parts of Dooyeweerd's ontology are re-presented in a compressed form in the introductory volume of the *Encyclopaedie*, vol 1, "Inleiding."

⁹¹ For Dooyeweerd's theory of individuality-structures see, above n 21, vol 2, for example, 53-156 (natural things), 266-304 (family), 304-339 (marriage) and 379-508 (state).

⁹² See text accompanying nn 63-69 above.

⁹³ See MacCormick (1986), above n 69, 49-75.

⁹⁴ See above n 69 and accompanying text.

For the purpose of jurisprudential analysis even legal facts are not concrete (normative) things in the sense of concrete totality structures or entities encountered in our everyday experience. We have already seen that for Dooyeweerd the discipline of law only examines concrete “social” (normative) facts, such as a consumer purchase, from the standpoint of its jural aspect. Dooyeweerd would say that a legal fact is only the jural or legal aspect of a concrete “real” or “social” fact which can be examined from many other modal points of view.⁹⁵ It is only the theory of individuality-structures that can account for the entity or social fact in question as a totality (individual “thing”). But that theory, as we have seen, presupposes the theory of the modal aspects. To identify a norm as a kind of “thing” therefore implies a high degree of analytical abstraction from the primary datum of concrete things.

Dooyeweerd never sought to deny that the science of law examines legal “things” such as contracts and laws. But its limited modal perspective only allows it to view such concrete things from that perspective and to view their functioning within that aspect. Other disciplines are required to give an account of those concrete things as they function in other normative (linguistic, social, economic, ethical, etc) or non-normative (biotic, physical etc) aspects. Furthermore, the *typical* way in which the legal “thing” in question functions in any one of those aspects depends upon the individuality-structure of the entity or relationship which comprises it or provides the context in which it occurs. In other words, just as the theory of individuality-structures (of physical things and normative things such as human communities and normative “institutions” such as law) presupposes the theory of modal aspects, so the modal perspective of the science of law and other sciences in their modal orientations presuppose the theory of individuality-structures. Hence, to give a proper account of the differences between private law and public law assumes an account of the individuality-structures of private phenomena (for example, contract) and public (state) legal institutions.⁹⁶

Positivisation

There is another feature of Dooyeweerd’s theory to which Soeteman alludes and which is required to understand the former’s theory of legal norms and the relationship between law and morality, between legal and moral norms. This is the concept of “positivising” or “positivisation.”⁹⁷ As has already been explained legal norms, for Dooyeweerd, are only concretely experienced in legal life as embedded in normative facts. These normative facts are the result of a subjective human response to the functioning of the jural aspect of human

⁹⁵ See the reference in Part II to the consumer purchase example (box of cigars) in text accompanying n 47 above.

⁹⁶ For an excellent introduction to Dooyeweerd’s sociology of law as the basis of his explanation of types of law or legal pluralism see H Dooyeweerd, “The Relationship between Legal Philosophy and Sociology of Law” in *Essays in Legal, Social and Political Philosophy*, above n 78, 73-89.

⁹⁷ For examples of Dooyeweerd’s use of this concept in his general philosophy see the item “positivization” in *A New Critique*, above n 21, vol 4, *Index*, 186.

experience understood as a normative law-sphere within the cosmic ordering of the law-spheres. This normative law-sphere is the normative source of “supra-arbitrary” (“bovenwillekeurig”) legal principles, that is, principles or norms which are independent of subjective human will.⁹⁸ There are non-positated substantive or “material” norms or principles which correspond to the “analogies” within the jural aspect in which the basic elementary concepts of law are founded. Hence, viewed from its jural aspect, a concrete law as part of its constitutive elements requires the principles or norms of legal economy and legal harmony to be positivised. These material, non-positated, supra-arbitrary norms only receive concrete factual form when positivised through subjective human responses to them.

When Soeteman refers to “positive legal norms” in giving an account of Dooyeweerd’s concept of positivisation, these legal norms must be understood, according to Dooyeweerd, as the norm-side of positive legal facts. It is the subjective activity of human positivising (responding to) supra-arbitrary legal principles or norms that allows these principles or norms to be factually realised in legal life.

An assessment of Soeteman’s thing criticism

Based on the above account of Dooyeweerd’s theory of norms and positivisation, I am not inclined to agree with Soeteman’s assessment that in Dooyeweerd’s legal philosophy legal norms might be better viewed at the outset as things rather than from the perspective of the jural aspect or modal theory. In these observations of Soeteman there is an apparent confusion of two different dimensions of Dooyeweerd’s theory and the distinctions which accompany them.

First, there is the notion of the jural aspect, implying a distinction between the modal-aspectual structures and the structures of individuality, and, secondly, the concept of positivising legal norms or principles with its accompanying distinction between the law-side, or norm-side, and factual, or subject-side, of legal facts. Soeteman’s misreading appears in the statement that “the jural is for [Dooyeweerd] an aspect of reality, but law norms are things, which as such function in all aspects and which in time come into being, endure and perish.”⁹⁹

It is true that the jural mode is an aspect of reality, but legal norms are not “things that function in all aspects” (including the jural). It is the concrete positive legal phenomena as individual totalities or “social facts” as Dooyeweerd, confusingly,¹⁰⁰ sometimes describes them,¹⁰¹ that function in all

⁹⁸ see *Hommes* (1979) above, n 4, 376, 379 and 382.

⁹⁹ See text accompanying n 88 above.

¹⁰⁰ Confusing, because he also uses the term “social” to describe one of the universal modal aspects of temporal experience. There it has a restricted meaning of social intercourse which is one of the aspects of a “social fact” understood as a fact in its full concreteness. It is particularly relevant for a critique of modern legal positivism (Hart, Raz, etc.), from the reformatory perspective, to compare

aspects. As a *legal* or *jural* fact, to be sure it is the qualifying role of the normative jural aspect that characterises the total “social fact,” for example an individual positive law. But as a *legal* fact the jurist is only addressing the total social fact from its jural dimension. Furthermore, the legal norm, of which the jurist wishes to give account, is only the *norm-side* of the total social fact viewed from the perspective of the jural normative aspect. Thus, for Dooyeweerd, legal norms do not have independent existence as concrete things.

For every normative aspect in which the concrete social fact or “thing” (law) functions there will be a norm-side and a subject-side. For example, a concrete law as the outcome of a subjective act of form-giving not only involves the positivisation of a jural norm or jural principles – the constitutive elements of law corresponding to the retrocipatory analogies – of legal logic (consistency, non-contradiction sufficient ground, etc), legal power, legal interpretation, (for example explicitly expressed in interpretation sections of statutes), or legal economy in the proportionate balancing of legal interests when positivising the normative subject matter of the legal act of positivisation, and so on. The total act of positivisation, however, also involves the positivising of non-jural norms and principles corresponding to the non-jural aspects in which the concrete fact (law) functions.

Therefore, viewed from the economic aspect of the concrete positive fact (law), to enact a law requires not only the positivisation of the jural norm which characterises the fact as a legal fact but also positivising the economic norm which involves the frugal or efficient employing of the material resources required for creating law, such as the computer equipment, paper on which the text of the law is printed, the human resources employed (amount of time, number of people and skills), in order to minimise the economic cost and maximise the economic benefit.¹⁰² Law-making also requires the positivisation of lingual norms of linguistic economy (as many words and sections as are necessary to express the intended legal meaning) and textual clarity and coherence (all words spelled correctly, grammatical sentences and the appropriate terms used, arranged in a textual structure and style that is easy to read and accessible).

Our discussion of the concept of positivisation leads us into the second area of Dooyeweerd’s theory on which Soeteman has made some observations.

2 Legal Positivism and Natural Law

Dooyeweerd’s understanding of “social facts” in the broad sense with positivisms use of “social” in the “social sources” thesis which is supposed to be a defining trait of that school of legal thought.

¹⁰¹ For example, “A burglary is undoubtedly a social fact with many aspects.” Dooyeweerd (1997), above, n 78, 45.

¹⁰² For his account of the modal kernel of the economic aspect and internal analogies see *A New Critique*, above n 21, vol 2, 66.

Legal positivism and legal validity

Soeteman notes that legal positivism, for Dooyeweerd, was characterised by its “absolutising” of the human form-giving element of law creation, that is, the element of positivising in the positivisation of supra-arbitrary legal principles or norms. This absolutising requires that such principles “have to be jettisoned in a positivist conception [of law].”¹⁰³ He remarks that Dooyeweerd is correct insofar as positivist conceptions of what constitutes valid law exclude substantive elements;¹⁰⁴ their conception of validity is formal, what Dooyeweerd described as “formal-juridical validity.” But he sees a problem in the position which Dooyeweerd adopts on this topic.¹⁰⁵

Soeteman asserts that Dooyeweerd understood legal validity in the sense prevailing at the time he was writing: a valid law is one that ought to be obeyed by those subject to it. Mere “formal-juridical” validity is insufficient for validity in this sense. Hart, Soeteman argues, would agree with this because “he makes a very clear distinction between the question of what is valid law (in his sense of the word) and the question of whether that law is also required to be obeyed.” Thus, “[f]or Hart it is clear that it is possible that there may exist in a society positive law, at least something which appears to us in every respect to be a kind of law, but which, at the same time, is very unjust.” Hence it is not at all self-evident that one ought to obey law such as was to be found in Nazi Germany or apartheid South Africa. Whether one ought to obey such laws is for Hart a moral question.¹⁰⁶

Soeteman concludes that Dooyeweerd is correct to say that legal positivism absolutises the element of form-giving insofar as he means that for the positivists form-giving is decisive for legal validity. But he doubts Dooyeweerd’s own conception of legal validity is correct.¹⁰⁷ In evaluating that conception and its accompanying critique of legal positivism’s conception of legal validity, Soeteman distinguishes two different positivist conceptions of legal validity: “ideological positivism” and “legal positivism.” Both versions maintain that one only properly speaks of valid law when used in its sense of formal validity. Ideological positivism requires that (formally) valid law ought to be obeyed. Legal positivism (of the non-ideological kind) does not make that claim but regards the question of obedience to be a moral issue.¹⁰⁸

Now, applying this distinction between two types of legal positivism, Soeteman concludes that Dooyeweerd “incorrectly equates legal positivism with

¹⁰³ Above n 73, 36.

¹⁰⁴ This is the positivist conception of legal validity as “content-independent.” Not all positivists, however, hold that maintaining the positivist distinction between law and morality requires a content-independent conception of legal validity, e.g. a view of legal validity as independent of moral criteria.

¹⁰⁵ Above n 73, 36-38.

¹⁰⁶ Soeteman, Above n 73, 36-37.

¹⁰⁷ Above n 73, 36.

¹⁰⁸ Above n 73, 37.

ideological positivism.” In Soeteman’s view, Dooyeweerd’s criticisms of the positivist conception of legal validity only applies to ideological positivism. In fact, “[i]n his critique of this ideological positivism Dooyeweerd has arrived at an absolutely identical position to the contemporary view.”¹⁰⁹ But he acknowledges that Dooyeweerd reaches that position by a different route, which Soeteman explains as follows:

For Dooyeweerd the mistake is that (ideological) positivism gives no account of the material factors (constitutive legal principles) which are necessary for the positivising of valid law. As stated this is very much the approach at the present, that the question of whether legally valid law ought to be obeyed is a moral question and that this moral question is one which in every case ought to be answered in the negative where it involves law that is utterly morally objectionable. These two forms of criticism do not amount to the same thing. The moralisation of legal validity would not receive Dooyeweerd’s assent. For him it is not about moral principles, but to do with structures in reality. Morally bad law as such is at most in conflict with the idea of law, but on that ground it still cannot be denied its character as law. ... For the modern legal philosopher the question at present would be whether Dooyeweerd’s modal analysis according to the sequence which the different aspects have does not now compel him to a significant change of heart with respect to the following views: law which in respect of relatively insignificant details is ineffective is not valid law, an individual law that comes into conflict with one of the fundamental principles of law of the modern legal order ought rightly to be obeyed.¹¹⁰

Is this a correct reading of Dooyeweerd’s position? Is Soeteman correct to say that Dooyeweerd’s criticisms no longer hold with respect to the modern non-ideological, positivist conception of legal validity? And does a Dooyeweerdian position on the two views mentioned above have to be abandoned in the light of contemporary views on legal validity and the relationship of the latter to legal obedience? In attempting to answer these questions doubts are raised concerning Soeteman’s interpretation of Dooyeweerd’s conception of legal validity which bear upon the latter’s views on law and morality.

The source of these doubts arises from Soeteman’s conflating Dooyeweerd’s conception of legal validity with his views on the question of the obligation of obedience to law. And, insofar as the distinction between the two types of positivism which Soeteman uses to assess Dooyeweerd’s views on legal validity depends on the issue of legal obedience, it is, in my view, somewhat misleading to state that Dooyeweerd held an identical position to legal positivists with respect to their rejection of what Soeteman call ideological positivism. In this regard the two-fold classification of positivists into ideological and legal positivist is not helpful.

How we truly characterise Dooyeweerd’s conception of legal validity (or any conception for that matter) should not depend on the question of legal

¹⁰⁹ Above n 73, 37.

¹¹⁰ Above n 73, 37-38.

obedience. These are two different, albeit, related matters. Whether or not Soeteman is correct in asserting that Dooyeweerd held that valid law ought always to be obeyed the question as to what constitutes valid law is a different question from whether valid law ought to be obeyed. And it may be possible to disagree with Dooyeweerd on the question of obedience whilst agreeing with his conception of legal validity which, as Soeteman correctly points out in the above cited passage, is at odds with the formal-juridical conception shared by both the ideological and legal positivist versions. By stating that Dooyeweerd held the prevailing view on legal validity, by which Soeteman means valid law ought to be obeyed, he underplays the uniqueness of his conception of legal validity and how it differs from other conceptions including the positivist formal-juridical conception.

Connected with this conflation of legal obedience and legal validity is a tendency in Soeteman to equate the notion of different *senses* or *meanings* which the term “validity” or law’s “existence” can have with different *conceptions* of validity in whatever sense it may be used. Soeteman suggests that modern legal philosophy, especially since Hart, now uses the term in a different *sense* from that which prevailed when Dooyeweerd was writing, the sense in which Dooyeweerd himself used the term, that is, which entails legal obedience.¹¹¹ Hence both ideological positivism and (non-ideological) legal positivism use the concept of legal validity *in the current sense* of formally valid but have differing views on whether (formally) valid law ought to be obeyed. Soeteman seems to think that, owing to the change in the meaning of legal validity, Dooyeweerd’s criticisms of legal positivism’s conception of validity only apply to the ideological version of positivism but not its “formal-juridical” conception of validity because modern legal positivism of the non-ideological sort agrees with Dooyeweerd that that the question of its obedience is a matter of substantive morality (Hart) or constitutive legal principles (Dooyeweerd).

Soeteman, I believe, is mistaken in thinking that Dooyeweerd’s critique of legal validity applies only to ideological positivism. This is because of his conflating the question of validity and obedience in Dooyeweerd and his consequent equating of sense (or meaning) and conception with regard to validity. A Dooyeweerdian might be prepared to agree that the Hartian sense of validity is the currently accepted *meaning* but he would say that this is only because a “formal-juridical” *conception* with which he fundamentally disagrees has become the prevalent *conception*.

¹¹¹ “Dooyeweerd always conceived of validity in the prevailing sense. Putting it succinctly, it holds that a legal norm possesses validity, meaning that it ought to be obeyed by those subject to it. But that is not the meaning which modern positivists such as Hart give to validity” (“Dooyeweerd heeft gelding altijd opgevat in degangbare betekenis. Kort gezegd: dat een rechtsnorm geldt, betekent dat zij door de subjecten gevolgd hoort te worden. Maar dat is niet de betekenis die positivisten als Hart aan gelding gegeven.”) Above n 73, 36.

The conception of legal validity which he holds is distinct from the question of its obedience. Thus whether or not a valid law ought to be obeyed for Dooyeweerd there is no such thing as a merely formally valid law. A valid law comprises all the constitutive analogies corresponding to the elementary basic concepts, which together constitute the concept of law discussed earlier. Every constitutive element or the “modal structural principles,” as Soeteman describes them, has a substantive normative jural meaning that is qualified by the non-positived norm of retribution (legal justice). This is as much true of the “moment” of positivisation or jural form-giving as of the principle of legal harmony (harmonising of legal interests and competences). From this perspective the positivist image of law as a container (form) with variable contents (substance) presented by the familiar form-substance dichotomy is an inaccurate description.¹¹² For, on Dooyeweerd’s approach, we can never conceive of legal form except in its substantive normative meaning as retributive forming, the exercise of jural *power* (historical analogy in the jural aspect), and in conjunction with all the other constitutive “structural principles” founded in the normative “retroicipatory” (constitutive) “analogies” within the jural aspect.¹¹³

This allows us finally to address the question which Soeteman posed with respect to Dooyeweerd’s views on legal validity at the end of his treatment of this topic. It will be recalled he asked, first, whether Dooyeweerd would have to change his view that law, which failed in respect of “relatively insignificant details,” was not valid law, and, secondly, that a law which conflicts with a fundamental principles of a modern legal order (such as human rights principles protecting human dignity) ought to be obeyed.

From our discussion above it may be seen that this way of posing the question concerning Dooyeweerd’s views misrepresents Dooyeweerd’s position on legal validity. It implies that a putative act of legal positivisation may involve the apparent satisfaction of important normative requirements (consistency with human rights principles) but not be valid because it fails to satisfy the relatively less important constitutive requirements.¹¹⁴ Soeteman’s question opens up Dooyeweerd’s position on legal validity to possible misinterpretation.

To begin with, there is nothing trivial or insignificant about the failure to satisfy the constitutive requirements of valid law. For, as Fuller pointed out,¹¹⁵ those who attempt to achieve evil purposes via the law frequently fail to make law because the nature of law’s inner normative requirements are ill-suited to such purposes. In Dooyeweerd’s terms the failure to retributively balance and harmonise legal interests in any genuine (substantive) manner cannot result in genuine law. Hence Hommes, following Dooyeweerd, agrees with Fuller that

¹¹² For example, in the jurisprudence of Robert Summers.

¹¹³ See the discussion of the retroicipatory analogies in Part II above, “*The Basic Concepts.*”

¹¹⁴ Soeteman does not specify what he had in mind by “insignificant details.” Clearly he is referring to Dooyeweerd’s constitutive principles, but all of them or only some (insignificant) principles?

¹¹⁵ In *The Morality of Law*, (Rev Ed, Yale, New Haven, 1969).

grossly unjust Nazi law was not merely unjust but was not valid law at all because it did not amount to an authentic positivisation of substantive (“material”) jural principles.¹¹⁶ The mere invoking of the recognised legislative or judicial processes of legal forming will not always result in valid law.

For Dooyeweerd, as for Fuller, valid law requires the observance of internal normative requirements. Fuller called these normative requirements of law its inner morality,¹¹⁷ Dooyeweerd its constitutive principles. Both agree that the matter of these inner “moral” requirements was distinct from the issue of whether the law was unjust in the sense that it violated substantive morality (Fuller) or legal-moral principles comprising the idea of law or justice (Dooyeweerd). And Dooyeweerd agrees with both Hart and Fuller that the existence of law is one question, its (substantive) justice is another. But he differs from Fuller¹¹⁸ (and Hart) in holding that the inner normative requirements of positivisation of valid law depends upon non-positive, “supra-arbitrary” (divinely sourced) legal principles. Furthermore, all of Dooyeweerd’s “retroicipatory analogies” within the jural aspect, unlike Fuller’s “desiderata”¹¹⁹ are unequivocally required to be positivised as normative constituents of valid law formation.

In Dooyeweerd’s view of the jural aspect and legal positivisation, it simply is not possible to have some relatively unimportant inner normative elements present and other less important elements absent. In the complexity of the analogical structure of the jural aspect expressed in an actual law, the normative requirement of jural harmonising and balancing of legal interests *presupposes* that all the other preceding analogies (jural economy, jural signification, jural intercourse, and so on) have been positivised as jural norms to a greater or lesser extent. It would appear, for Dooyeweerd, that it is all or nothing; either the jural norm has been positivised with all its constituent normative requirements (analogical jural principles) or it has not, in which case none of the constituent normative requirements have been positivised either.

We can conclude therefore, in answer to Soeteman’s query concerning Dooyeweerd’s view on the positivisation of valid law, that there is little reason to believe, in the light of contemporary views of legal validity, that Dooyeweerd would be compelled to change his position. The issue is not so much a question

¹¹⁶ Hommes, above n 4, 364-365. However, there is a degree of vagueness in Hommes’s position through the qualification “gross” when referring to the “negation” of the constitutive principles by a legislator. Andrew Butler in his swingeing criticism of the New Zealand Court of Appeal’s decision in *R v Grayson & Taylor* [1997] 1 NZLR 399 comes very close to accusing the Court of a failure to make valid law in this sense. He identifies the lack of any genuine balancing of the interests of the citizen (accused) and state authorities (police) and a failure to have regard for binding precedent. See A Butler, [1997] NZ Law Review 274, 291.

¹¹⁷ See Fuller, above n 115, e.g., 42.

¹¹⁸ See J D van der Vyver “Law and Morality” in E Kahn (ed) *Fiat Iustitia* (Juta, Cape Town, 1983) 350, 358-362 for a critique of Fuller’s inner morality of law from a Dooyeweerdian perspective.

¹¹⁹ See van der Vyver’s discussion of the “relativism” of the eight internal moral requirements, above n 118, 362.

of whether the act of the state officials is a genuine positivisation of the *substantive* jural retributive norm with all its concomitant *substantive* constitutive “structural” or material principles. It is true that an official act, which does meet that criterion, will not always produce “just” law because it does not conform to a morally enhanced idea of law or justice through failing to embody a principle of legal morality, such as good faith or modern human rights principles.¹²⁰ However, it is more likely that a regime set on implementing fundamentally unjust, not to say evil, purposes, such as the Nazi regime, has not merely violated principles of legal morality but has failed even to genuinely positivise a norm of law at all.

The answer to the question posed in respect of Dooyeweerd’s view that valid law ought to be obeyed is less easy to provide. One reason is that Soeteman does not provide any direct or detailed evidence of Dooyeweerd’s views on this matter. However, once we distinguish the matter of the existence of valid law from the issue of whether valid law ought always to be obeyed then it becomes possible to accept Dooyeweerd’s conception of legal validity without necessarily holding the view that unjust valid law ought always to be obeyed. Such a position is similar to that adopted by both a version of natural law (Finnis) and legal positivism (MacCormick) that valid law (whatever our conception of validity) *prima facie* ought to be obeyed. For Dooyeweerd the reason for obedience lies in the divine purpose of the creational structure of human government instituted on account of human sin to achieve public justice,¹²¹ for Finnis it is owing to the natural law requirements of practical reasonableness relating to the “common good” which include principles of justice.¹²² MacCormick thinks the intrinsic formal (non-substantive) moral dimensions of law as rules are a non-conclusive factor weighing in favour of an obligation of obedience.¹²³

Dooyeweerd and Natural Law

This brings us to Soeteman’s assessment of Dooyeweerd’s legal theory in relation to the tradition of natural law theories.¹²⁴ Having seen that Dooyeweerd’s notion of the jural aspect on which he bases his concept of law is founded in an idea of a divine cosmic law-ordering, it is hardly surprising that Soeteman views Dooyeweerd’s legal philosophy as a type of natural law theory. Dooyeweerd, however, in his mature thought sought to distance himself from the natural law tradition. Soeteman observes that Dooyeweerd considered that his “structural” method of modal analysis, on which his concept of law is based,

¹²⁰ See the the discussion of the moral “anticipations” in the text accompanying nn 81-83 above.

¹²¹ See Dooyeweerd, “The Christian Idea of the State” in H Dooyeweerd (1997), above n 78, 148. Roy Clouser in *The Myth of Religious Neutrality* (Notre Dame Press, Notre Dame, 1991) 268 thought that Dooyeweerd in *A New Critique* (above n 21, vol 3, 423) had changed his view to agree with Aquinas. I am grateful to Dr Jonathan Chaplin for pointing out that this is a misreading of the passage.

¹²² J Finnis, *Natural Law and Natural Rights* (Oxford University Press, Oxford, 1980) Chapter 11, 297-350, for example, 318-319.

¹²³ D N MacCormick “A Moralistic Case for A-Moralistic Law?” (1985) 20 *Val U L Rev* 1, 39-40.

¹²⁴ Soeteman, Above n 73 38-40.

had allowed him to overcome the traditional natural law/positivist dichotomy.¹²⁵ Nevertheless, Soeteman also notes, that in his early writing Dooyeweerd presented a theory which he himself described as a Calvinist natural law doctrine;¹²⁶ it was only later that he disavowed his idea of “cosmonomic” law as being a version of natural law theory.

Dooyeweerd’s disavowal accompanying the development of his mature systematics in both general and legal philosophy does not impress Soeteman as a shift in substance from an essentially natural law position. This is because, in both his early and later thought, he adheres to the idea of supra-arbitrary principles founded in a religious creation order to which the law-former “ought to be accountable in positivising law.”¹²⁷ What he rejected was the rationalist metaphysics of Thomistic natural law, and the rationalist humanistic versions in which the notion of a divine creation-order as a necessary basis is lacking. Evidently, what is supposed to differentiate Dooyeweerd’s theory from its closest natural law theory, the Thomistic natural law, is the latter’s notion of natural law as “an already posited and in-itself-valid” set of universal norms which thereby results in “a dualistic law concept of two simultaneously valid systems of law: natural law and positive law,” natural law being a higher universal kind of positive law “derivable in an a priori manner by human beings from that natural order with the assistance of natural reason.” Natural law then has the difficulty that it does not possess a notion of positivising non-positive, non-arbitrary principles.¹²⁸

To back up his view that the basis of Dooyeweerd’s legal philosophy in the idea of cosmic law and its “supra-arbitrary” legal principles really is a natural law theory, Soeteman compares his theory with that of the modern natural law theory of John Finnis in *Natural Law and Natural Rights*.¹²⁹ Whilst the Oxford theorist holds the traditional view of the eternal and immutable character of natural law he does not view that natural law (“a set of basic principles which indicate the basic forms of human flourishing, a set of basic methodological requirements of practical reasonableness, or a set of general moral standards”) to be law in the “focal sense” of human law.¹³⁰ For, to be law in that focal sense requires the natural legal principles (requirements of practical reasonableness)

¹²⁵ Above n 73, 39.

¹²⁶ See the essay “Calvinism and Natural Law” in Dooyeweerd (1997), above n 78, 3-38. This essay appeared in 1925 as “Calvinisme en Naturrecht.”

¹²⁷ Above n 73, 38-39.

¹²⁸ Above n 73, 39. This view of Thomistic natural law was actually propounded by Hommes in his published doctoral dissertation, *Een Nieuw Herleving van het Natuurecht* (Zwolle, 1961). Soeteman assumes this was Dooyeweerd’s view also because he was Hommes’s doctoral supervisor and Hommes’s account is consistent with Dooyeweerd’s conception of law as the positivising of supra-arbitrary, non-positive jural principles. Van der Vyver refers to the same passage from Hommes cited by Soeteman in adopting this Dooyeweerdian view of natural law. See J D van der Vyver “The jural credo: justice as the essence of legal ethics and a component of positive law” (1989) 52 *THRHR* 157, 159 n 2.

¹²⁹ Above n 122.

¹³⁰ Soeteman, Above n 73, 40.

to be expressed as positive legal principles. Furthermore, by employing the distinction between focal, or core, sense of law and peripheral senses of law he is able to assert that an unjust law, whilst not law in its focal sense of law embodying natural law principles, is still law in a real, albeit, peripheral sense.¹³¹ This is similar to Dooyeweerd's conception of the relationship between a universal cosmic law with its "supra-arbitrary principles" and (valid) human law which results from positivisation of the those (jural) normative principles.

Soeteman is fully justified in pointing out similarities between Dooyeweerd's "cosmonomic" theory of law and natural law theories including the modern Finnisian version, as he is in identifying similarities between Dooyeweerd and modern legal philosophy in relation to the latter's concept of law and his conception of legal validity. However, in this case also, Soeteman appears to underplay the significance of the differences. In eschewing the label natural law Dooyeweerd could hardly have been wishing to deny that his philosophical system including the legal philosophy was based on some idea of fundamental law as indeed are the traditions of natural law. What he objected to was the sense given to "natural", to the idea of a relatively autonomous sphere of Nature accessible to common human reason alongside the realm of Grace accessible through faith, (Church). This is the dualistic ground-motive of nature and grace which involved, for Dooyeweerd, an illegitimate attempt to synthesise two antithetical religious motives, the rationalistic Greek motive of form and matter and the Christian ground motive of Creation, Fall and Redemption.¹³²

To understand the fundamental nature of his objection to natural law theories we have to be reminded that Dooyeweerd's philosophical system emerged from a thorough-going critique of the entire tradition of Western philosophy, in which his analysis of the religious ground-motives play a critical role. In the history of natural law theorising, the different types of natural law theory, for Dooyeweerd, are rooted in fundamentally different ground-motives.¹³³ Classical Greek conceptions under the ground-motive of form and matter were fundamentally different from the scholastic versions under the directing of the motive of nature and grace. And the latter in its religious root was radically different again from the modern humanistic version of Locke, Hobbes, Pufendorf, etc which were based upon the ground-motive of "nature and

¹³¹ Soeteman, Above n 73, 40. Although Soeteman does not make this point explicitly, no doubt he had in mind the adoption by Finnis of the analytical tools and concepts of the legal positivists (e.g Hart's distinction between focal sense, or central case, and penumbra, the "internal point of view", etc). This use of analytical tools allowed him to arrive at a version of Aristotelian-based, Thomistic natural law that avoids the positivist accusation of deriving an "ought" from an "is," and to hold a conception of legal validity compatible with the formal-juridical conception of legal positivism. See Finnis, above n 122, Ch. 1, 12ff, Ch 2, 23 ff, Ch 12 351 ff.

¹³² See above nn 33, 34 and text on ground-motives.

¹³³ See *A New Critique*, above n 21 vol 1, 501-508 for a schematic summary of the "Humanistic" and Christian ground-motives and ground-ideas. For a more accessible account of the ground-motives see Dooyeweerd, *Roots of Western Culture* (Wedge, Toronto, 1979).

freedom.” What all of these theories did have in common, however, was a view of human theoretical reason as autonomous, a belief in the “pretended autonomy” of theoretical thought.¹³⁴

In Thomistic natural law, the classical Greek metaphysics of Aristotle, with its absolutising of theoretical thought (rationally apprehended essences), was synthesised with Christian doctrine to produce the dualistic motive of nature and grace. Dooyeweerd objected to an idea of nature as an autonomous natural realm accessible to common natural reason. Grace in the form of the (the supra-natural) Roman Catholic Church and its doctrine was needed to perfect nature. Dooyeweerd rejected in principle any such attempt to accommodate Christian doctrine to Greek metaphysics in this fashion, because it denied the radical religious character of all human life including human thought. For Dooyeweerd there was no autonomous natural realm in which, by the application of common human reason, all could obtain a common knowledge of principles of natural law.

Western thought took a new religious direction when it severed grace from nature. The implicit rationalism of the scholastic schema now took on a humanistic character. Human reason under the directing of a new religious ground-motive of nature and freedom (from supra-arbitrary divine law) became the source of human ordering released from the super-added necessity of Church doctrine and theology to provide its perfection.¹³⁵

Insofar as Finnis’s natural law theory is attempt to revive a Thomistic version of that tradition, his theory displays the rationalism to which Dooyeweerd was fundamentally opposed. It is true that in his idea of the basic goods or aspects of human flourishing Finnis’s theory bears a resemblance to Dooyeweerd’s theory of the modal aspects. However, Finnis’s emphasis on the role of (common) principles of practical reason as the means of “instantiating” or giving expression to the basic goods in pursuing one’s life-plans betrays the rationalism characteristic of the Thomist tradition. The claimed objectivity or “self-evidence” of these basic goods, though denied by Finnis to arise out of a rational derivation from some concept of human nature, nevertheless is apparently only self-evident to common human reason.¹³⁶

In his attempts to incorporate the insights and methods of the analytical school of legal positivism into a Thomist theory of natural law, Finnis follows the synthetic tradition of scholasticism that characterises not only the Catholic traditions of Christian thought but the Protestant as well in Dooyeweerd’s

¹³⁴ See above n 23 and accompanying text.

¹³⁵ See the chapter, “Classical Humanism” in Dooyeweerd (1979), above n 133, 148-174.

¹³⁶ Finnis, above n 122, 33, quoting Aquinas with approval: “...the first principles of natural law ... can be adequately grasped by anyone of the age of reason, are *per se nota* (self-evident) and indemonstrable.” They are principles of “practical reasonableness” (33). See also 64-69.

view.¹³⁷ In so doing, however, he only reinforces the rationalism of the Thomist tradition with that of modern Humanist thought. This may make his thought more acceptable to that tradition but would not satisfy Dooyeweerd in his attempt to free his own approach to theorising from the influence of ground-motives antithetical to a radical, thorough-going Christian ground-Idea.

Finally, the rationalist and synthetic approach of Finnis is well-illustrated from the composition of his major work. It is only in a final chapter that he addresses the “religious” question. Though religion is one of the basic goods, and, in his view, such an account is required to give full meaning to his natural law theory, his locating of the religious question at the end of his account, as well as the content of the chapter itself, is a clear indication that his natural law theory is intended to stand autonomously as a plausible theory of law acceptable to all on the basis of common reason (principles of practical reasonableness). This is an assumption regarding the nature of theorising to which Dooyeweerd was fundamentally opposed, and which is reflected in his own attempts to expose the “religious” basis of all theories he critiqued while explicitly grounding his own positive views on a different religious basis.

Therefore, in his summing up of Dooyeweerd’s position in relation to the legal positivist-natural law dichotomy, Soeteman is correct to point out that Dooyeweerd in his “structural” account of the concept of law had *claimed* to have transcended the traditional legal-positivist/natural law polarity within legal theory. But I do not share Soeteman’s scepticism of that claim insofar as it was a claim to have arrived at a unique and original position. By his characterisation of legal positivism as an absolutising of the element of form-giving (positivisation) and natural law as an over-emphasising of supra-arbitrary principles as quasi-judicial, already-valid natural principles Dooyeweerd, according to Soeteman, was able to gain a “victory” that was “easy to accomplish” over both traditional approaches. This was achieved through being able to account satisfactorily for both non-arbitrary principles as non-positing norms or principles and for the legal form-giving as positing of these non-arbitrary principles.¹³⁸ In his concluding remarks on this part of his examination of Dooyeweerd’s legal philosophy he states that Dooyeweerd’s position in substance is the contemporary approach of both modern positivism (Hart et al) and natural law (Finnis) regarding the nature of law and its normative character, though differently expressed. He summarises this allegedly shared approach as follows:

... [P]ositive law is made and sustained by human beings (Dooyeweerd: human form-giving). That law created by human beings has a changeable quality (Dooyeweerd: there cannot be any other concretising of supra-arbitrary principles of law). This changeable quality is of relevance for he claim of legal obedience

¹³⁷ Dooyeweerd’s critique of the synthetic traditions of “accommodation” in Western Christian (Catholic and Protestant) is contained in volumes 1 and II of a three volume set, *Reformation and Scholasticism in Philosophy* (Edwin Mellen, Lewiston,).

¹³⁸ Soeteman, Above n 73, 40.

(Dooyeweerd: law that comes into conflict with constitutive legal principles is not valid law.)¹³⁹

As the reasons for disputing Soeteman's assessment of Dooyeweerd with regard to legal positivism has already been given in our earlier discussion of Dooyeweerd's conception of legal validity and positivisation there is no need to repeat them here. And our just concluded discussion of the philosophical basis of Dooyeweerd's eschewing natural law approaches leads to my rejection also of Soeteman's attempt to assimilate his legal philosophy to a modern natural law position such as that of Finnis who adopts a positivist-compatible position on the question of legal validity and the ("moral") obligation to obey law.

What the above discussion of Dooyeweerd's concept of law and his position in relation to modern legal positivism and natural law shows is that Soeteman underestimates the uniqueness of Dooyeweerd's legal philosophy and the extent of its difference from contemporary legal thought. The main reason for this, in my view, is because he does not give sufficient weight to the importance of his transcendental critique of theoretical thought with its sophisticated analysis of the history of the Western theoretical traditions in terms of religious ground-motives. This applies not only to his assessment of Dooyeweerd in relation to natural law theory, but also in relation to the mainstream of legal positivism.

That there are important similarities between Dooyeweerd's legal philosophy and modern streams in legal philosophy, or that on specific issues Dooyeweerd is agreement with modern thinking (for example, unjust law is valid law), are justified observations on Soeteman's part. But the above discussion of Soeteman's assessment of Dooyeweerd's legal philosophy in the context of contemporary legal philosophy has led to the conclusion that he has understated the originality and continuing importance of Dooyeweerd's legal philosophy and its modal encyclopaedic method.

Although it is only in respect of the above areas evaluation of Dooyeweerd that I have significant disagreements with Soeteman, it is worthwhile briefly considering the third area of Dooyeweerd's legal philosophy which he addressed, the analysis of legal causality. This is because, in my view, it tends to support the tenor of my conclusions above relating to the originality of Dooyeweerd's legal philosophy and its jurisprudential method, but also because it provides an illustration of the implications and value of his method for the practice of jurisprudence.

3 Legal Causality¹⁴⁰

¹³⁹ Above n 73, 40-41.

¹⁴⁰ In Dooyeweerd's jurisprudence, strictly, we ought to speak of "jural" causality, jural power, jural life and generally, of jural concepts. "Legal" usually denotes state law (public and private) whereas for Dooyeweerd the aspect in question is a universal aspect of all concrete phenomena, hence a family has its own jural dimension or "law" to which the concept of "jural" causality also applies. When Dooyeweerd refers to the "juridisch aspect" I also prefer to have "juridisch" translated as "jural" rather

Soeteman's discussion of Dooyeweerd's analysis¹⁴¹ of this troublesome concept in legal theory is used to demonstrate that the latter's contribution to the study of legal concepts is important, original, and still has something to offer modern jurisprudence.¹⁴²

According to Soeteman, Dooyeweerd demonstrated that legal causality is a legal phenomenon with a normative structure that manifests itself across the entire range of legal activity. He purported to show that the inability of juristic study to reveal this state of affairs was owing to its being wedded to a natural-scientific conception of legal causality, which not only failed to account for genuine instances of legal causation, but in those cases it acknowledged often entangled itself in "antinomies." Theories of legal causality ("necessary conditions" or condition *sine qua non* and adequate cause) were unable to provide a concept which satisfactorily explained these instances. Furthermore, Soeteman suggests that the persistence of the influence of natural-scientific conceptions of causation on explanations of legal causality continue to the present time. In his view they are still unable to provide satisfactory accounts of legal causation. To the extent that they are able to free their accounts from natural-scientific conceptions and show legal causation to be a *sui generis* concept, they are in agreement in with Dooyeweerd; but Dooyeweerd explains it more accurately.¹⁴³

What was it that Dooyeweerd's analysis was able to reveal that others could not, or could not do so satisfactorily? And how was he able to do this?

In answer to the first question, Dooyeweerd was able to show, amongst other things, that the relation of cause and effect in law is to be found not only in relation to unlawful acts such as in the case of civil or criminal wrongs but also in the case of *lawful* acts. Hence the legal effect of a sale and purchase

than "juridical" (or "juristic") partly for the same reason that it usually connotes state law. Another reason is that "juridical" (from the Latin *ius*, and dico, dicere = to speak), which is an obvious translation of "juridisch" carries a sense of positive human law or human positivising, whereas for Dooyeweerd "juridisch," when used in conjunction with "aspect" always carries the meaning of a non-human, non-positive normative ("ontic") given in reality. "Causaliteit" or "oorzakelijkheid" is correctly translated as "causality" in referring to the normative jural *state of affairs*, causation denoting the process or *action* involved in the relation of cause and effect. The latter (action) is only explicable on the basis of an explanation of the normative state of affairs (causality). For an extended discussion of Dooyeweerd's concept of of jural causality see my ALTA paper above, n 33.

¹⁴¹ See *Encyclopaedie*, vol 2, 31 ff. and Dooyeweerd's address to the Royal Dutch Academy of Sciences now translated and published in English as "The modal structure of legal causality," in *Essays*, above n 78. Soeteman's references in respect of the latter work are to the original Dutch publication, "De modale structuur van het juridisch oorzakelijkheidsverband" (1950) 13 *Medelingen Koninklijke Nederlandse Akademie van Wetenschappen, Nieuwe Reeks*, No. 5.

¹⁴² Soeteman, Above n 73, 42.

¹⁴³ See his discussion of the work of Loth (above, n 73, 43-44) which shows that "[t]he problems between, on the one hand, a natural-scientific conception of causality and a legal account on the other, for which the so-called natural scientific-approach leaves no room, still exists, but has now become more apparent" (43).

transaction is that the property in the subject-matter passes to another.¹⁴⁴ Neither the natural-scientific conceptions nor the more recent common-sense approach to the analysis of legal causality based on “ordinary language” and the notion of interrupting or abnormal events (Hart and Honoré) can explain such instances of lawful actions as causal. Moreover, The common-sense approach cannot even adequately explain, for example, interrupting lawful events such as natural events which give rise to insurance claims because we are not here dealing with human actions.¹⁴⁵

How then is it possible for Dooyeweerd to provide a satisfactory account where other theories have failed? Soeteman clearly identifies the reasons for this in his idea of the jural aspect and the “categorical” relation of norm-side and subject-side both of which we have considered above. Although legal causality is founded in the physical aspect of reality the concept of legal causality cannot be reduced to a natural-scientific concept of physical causation because it is the normative jural aspect that gives to legal causality its distinctive quality. As an elementary basic concept, the concept of legal causality is based upon a physical “retrociatory analogy” in the jural aspect.¹⁴⁶

In Dooyeweerd’s view, because we are dealing with a normative dimension of reality when it expresses itself in legal life it always does so on both of its “sides,” in the relation of law-side (norm-side) and subject-side. Legal theories, however, have no concept of the jural aspect as a normative mode of reality and therefore no concept either of law-side and subject-side. This is traced to the influence of natural-scientific conceptions where Kant’s distinction between “is” (Sein) and “ought” (Sollen) has been influential in interpreting legal causation in a purely physical-factual sense. Hence, while the normative relation of legal ground and legal effect has been recognised as a normative legal relation, it is not understood to be a causal relation, that is, as the norm-side of a (factual) causal relation. Instead genuine legal causality has been confined to its subject-, or factual-side.¹⁴⁷ In other words, theories of causality are based on the prejudice that “causal explanation and normative considerations should mutually exclude each other”, a prejudice which, says Dooyeweerd, cannot withstand critical scrutiny.¹⁴⁸

The importance of this summary of Soeteman’s positive assessment of Dooyeweerd’s theory of legal concepts, in particular the concept of legal causality, is that it reinforces the points made earlier concerning the originality of Dooyeweerd’s legal philosophy through his idea of the jural aspect, which

¹⁴⁴ In New Zealand sale of goods law whether and when property passes depends on the intention of the parties and the rules for passing of property in the absence of evidence of intention. See ss 18-21, Sale of Goods Act 1908.

¹⁴⁵ Soeteman, above, n 75, 42, 45.

¹⁴⁶ See above nn 59-61 and accompanying text.

¹⁴⁷ Soeteman, Above n 73, 42-43.

¹⁴⁸ Soeteman, Above n 73, 43, quoting from the Academy lecture (above, n 141).

involved abandoning a thing-based approach. It also demonstrates the significance of his conceptual distinctions, especially that of norm-side and subject-side, which are part of his jurisprudential method. More importantly, it shows how that method is capable of providing novel insights. It also provides an illustration of how Dooyeweerd arrived at his method by abandoning prevailing approaches and their philosophical foundations, but especially the philosophy of Kant and its basic distinction between “is” and “ought” (fact and values). The significance of these observations arising out of an examination of Dooyeweerd’s concept of legal causality for my own assessment of Soeteman’s evaluation of Dooyeweerd relates particularly to Soeteman’s observations on the concept of law and his locating of Dooyeweerd in the natural law-legal positivist continuum.

What should be now becoming clear is that Dooyeweerd could only have come to his structural account of law, based on the central idea of the jural aspect, by first undertaking a thorough-going critique of the philosophical foundations of legal theory and, as a result, breaking free from the dominant paradigms. The inability of legal theory, even at present, to completely liberate itself from natural-scientific conceptions of causality in accounting for legal causality suggest that modern legal theory is still dominated by the old paradigms¹⁴⁹

In the Academy Lecture, to which Soeteman refers, Dooyeweerd explicitly links his criticism of the natural-scientific conception of legal causality to his transcendental critique of Western “immanence” philosophy by referring to the basic religious ground-motive of nature and freedom which dominates Kant and modern humanistic thought.¹⁵⁰ This again reinforces my earlier evaluation of Soeteman’s assessment of Dooyeweerd’s legal philosophy with specific reference to his doubt about Dooyeweerd’s abandoning a thing-based approach to understanding legal norms, and in his treating with some scepticism Dooyeweerd’s claim to have transcended the natural law/legal positivist categorisation with respect to modern conceptions of legal validity and issues concerning the relationship of law and morality.

What I am suggesting here is that the observations of Soeteman on Dooyeweerd’s legal philosophy under the first two headings (“concept of law” and “positivism and natural law”) are not consistent with his assessment of the originality and positive contribution of Dooyeweerd’s legal philosophy and its method in relation to his elementary basic concepts which constitute his concept of law. This appears somewhat puzzling given the intimate knowledge of Dooyeweerd’s jurisprudential theory which Soeteman clearly displays and the overall positive view which he has of his work.

¹⁴⁹ Ian Ward’s assessment of the overarching and continuing influence of Kant in contemporary legal theory supports this assertion. See I Ward “The sorcerer and his apprentices: Kant and the critical legal project” (1994) 80 ARSP 508-533.

¹⁵⁰ Above n 78, 48-51.

However, I would suggest that the reason for this apparent inconsistency lies in the failure of Soeteman to give sufficient weight to the transcendental critique and the extensive analysis of the religious ground-motive operating in Western philosophy through their basic ground-, or law-idea. In particular the religious motive of “humanistic immanence-philosophy” (nature and freedom) in which Kant is a key figure. I identified this failure in the above consideration of Soeteman’s observations in the sections on the concept of law and positivism and natural law. This omission is not rectified in his positive account of Dooyeweerd’s concept of legal or jural causality, notwithstanding the explicit connection which Dooyeweerd himself makes between his account of this concept and his critique.¹⁵¹

It appears that Soeteman has difficulty accepting the religious-transcendental critique of philosophy with its positive ontological counterpart, in particular, the notion of a supra-arbitrary, non-positive, material legal principles sourced in a divine cosmic law. This might explain why he appears to adopt a positivist standpoint similar to that of MacCormick, for example, who is reluctant to base his reconstructivist account of law on a commitment to “fundamental values,” remaining agnostic as to their “objectivity” and knowability.¹⁵² It might also explain why he does not devote more time to a discussion of the “fundamental values” which Dooyeweerd sees operative in other legal philosophies and which are the basis of Dooyeweerd’s own approach. The point, nevertheless, requires repeating that without a fuller appreciation of that underlying basis in Dooyeweerd’s systematics a proper assessment of his legal philosophy cannot be attained.

If it is indeed the case that Soeteman is committed to a legal positivist standpoint then it to his credit, as well as Dooyeweerd’s, that he is able to give such a strong affirmation of the value of Dooyeweerd’s legal philosophy notwithstanding his reservations examined above.

IV CONCLUSION

Both the descriptive part and the evaluative part of this paper are necessarily provisional. This is because the full contents of the multi-volume *Encyclopedia*, including the central “basic concepts” volume, have yet to be examined in detail. However, the imminent publication of the introductory volume, and, hopefully not too long thereafter, the “basic concepts” volume, to be published next, ¹⁵³will at least provide a relatively complete view of the jurisprudential structure pending the appearance of the remaining volumes. Yet

¹⁵¹ See above n 150 and text.

¹⁵² D N MacCormick, “Natural law and the separation of law and morals” in George (ed), *Natural Law Theory: Contemporary Essays* (Clarendon, Oxford, 1992), 127-129 and his “Four Quadrants of Jurisprudence” in Krawietz, MacCormick, von Wright (eds) *Prescriptive Formality and Normative Rationality in Modern Legal Systems* (Duncker & Humboldt, Berlin, 1994), 53-70, esp. 69.

¹⁵³ This is actually the proposed volume 3 in the 5-volume series. See above n 6.

it has not even been possible, in this overlong article, to adequately convey the breadth and depth of Dooyeweerd's general systematic philosophy, which is accessible in its entirety, and of those parts of his legal philosophy available for examination here.

For example, the extensive theory of individuality structures has only been touched on.¹⁵⁴ This component of the philosophy of the cosmomic idea plays a critical role in his account of *types* of law¹⁵⁵ which is the foundation of the *Encyclopedia's* legal pluralism. The latter undoubtedly has considerable potential for application to issues relating to non-state legal or "jural" orders. However, these issues of legal pluralism require addressing the problems of the *interrelationships* of types of law *within* public and private state law, as well as interrelationships of the latter with non-state types of law. Here an important element of the reformational philosophy not even mentioned in passing,¹⁵⁶ the theory of "enkaptic interlacements"¹⁵⁷ of individuality structures and their internal functions or spheres, including the jural, would come into play to demonstrate the remarkable sophistication of the "transcendental-empirical" method¹⁵⁸ of the *Encyclopedia*.

The subject-object relation¹⁵⁹ in the reformational philosophy has been only briefly considered. Yet, it too plays a critical role in the jurisprudence, for example, in the theory of rights.¹⁶⁰ Dooyeweerd's account of this "categorical relation" brings a whole new perspective to bear upon the concepts of object, objectivity, subject and subjectivity, in both legal philosophy and legal doctrine, the sophistication of which account it is again impossible to adequately convey here.

There remains, therefore, much work to be done, first, in simply giving an adequately complete account of the *Encyclopedia* and its philosophical basis that would serve as an introduction to its contents. This is undoubtedly necessary in the context of Anglo-American jurisprudence, which is not accustomed to approaching jurisprudence and the discipline of law itself in such an over-arching and systematic fashion. But it is not merely the typically Continental cast of the jurisprudence that presents difficulties students and scholars in Common Law countries. The sheer originality of many of the

¹⁵⁴ See above nn 91-96 and accompanying text.

¹⁵⁵ See the reference to volume 4 of the *Encyclopedia* in n 6 above.

¹⁵⁶ Except parenthetically in referring to the contents of the *Encyclopedia*. Above n 6, vol 4.

¹⁵⁷ See *A New Critique*, above n 21, vol 3, Part III, 627-784.

¹⁵⁸ A description adopted by Hommes, above n 4, 372-373.

¹⁵⁹ See above nn 62-64 and text.

¹⁶⁰ For the development of Dooyeweerd's theory of rights see J Witte Jr., "The Development of Herman Dooyeweerd's Concept of Rights" in Chaplin and Marshall (eds), *Political Theory and Christian Vision?* (University Press of America, Lanham, 1994), 27-55. J D van der Vyver has applied this concept in "The Doctrine of Private-Law Rights" in S Strauss (ed), *Huldingsbundel vir W A Joubert* (Butterworths, Durban, 1988), 201. Professor van der Vyver has also applied this perspective in the fields of constitutional and international human rights law.

concepts and the terms employed also present a substantial challenge even for those brought up in the Civil law system, in which Dooyeweerd developed and taught his jurisprudential ideas. Nonetheless, it is my conviction that the effort taken to obtain a grasp of the “encyclopaedic” concepts and method will be amply repaid in depth of juridical insight. I would hope that this article has at least gone a little way towards providing a glimpse into the riches of this extraordinary work and its potential for application to a range of contemporary juridical problems.
