

**Justice, legal validity and the force of law
with special reference to
Derrida, Dooyeweerd and Habermas**

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Abstract

Philosophy, political philosophy and legal philosophy are all concerned with issues of justice and the validity of law (also known as the *force of law*). These two problem areas are discussed against the background of the intersection of traditional theories of natural law and legal positivism, mediated by the contribution of the historical school. In addition the influence of the two neo-Kantian schools of thought (Baden and Marburg) required attention, particularly because certain elements in the thought of Derrida, Dooyeweerd and Habermas are (implicitly) influenced by these schools. Derrida positions the problem of justice within the context of distinguishing universality and singularity (what is unique) and he alludes to the difficulty of bridging the gap between the two. It turned out that modern nominalism had an important effect on all three of the mentioned thinkers, in spite of their willingness to recognize “extra-mental” forms of universality. The problem of *legal validity* (the “force of law”) appears to be an instance of the interconnectedness between different aspects of reality, namely the *jural* and the *physical*. In order to account for this coherence Dooyeweerd developed a theory in which both the uniqueness and coherence between different aspects are explained in terms of inter-modal analogies. On this basis the difference between law and justice is specified by distinguishing between constitutive legal principles and the regulatively deepened (disclosed) principles of legal morality (such as *fault*, *equity*, *bona fides* and so on). It will be shown that the idea of *positivization*, shared by thinkers coming from different backgrounds, is an important ingredient of an understanding of the nature of *legal validity*. Explaining it will require a focus on the nature of state law, of the power of the state, and of the *legal competence* entailed in the office of government.

Introductory remark

Insofar as philosophical reflection has been concerned with human society it always generated views on justice and the ordering of society with positive laws, i.e. laws that have legal validity and are therefore *in force*. Particularly political and legal philosophy entered into an account of the role of law in such a legal ordering. For that reason an understanding of the nature and place of law within human society continues to

constitute a general philosophical concern. In order to delimit the scope of this article it will focus on the ideas of “justice” and the “validity (force) of law,”¹ although it will turn out that this theme cannot be divorced from several general *legal philosophical* issues. The most basic concern in this regard is related to the fact that legal scholars tend to identify law with state-law – thus losing sight of what we will designate as the modal universality of the jural aspect of reality. For example, when H.L.A. Hart discusses the question *what is law?* he does that within the parameters of the *legal system* found within *state-law* (see Hart, 1961:3 ff.). In particular it is also clear from his view that “the most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in *some* sense *obligatory*” (Hart, 1961:4).² This position is derived from Kant for from him we inherited a distinction between law and morality in terms of the following opposition: law is said to be *universal, external* and *compulsory (obligatory)* whereas morality is supposed to be *individual, internal* and *voluntary*. The distinction between collective and communal societal relationships on the one hand and coordinated societal relationships on the other³ explains what happened here. By describing law as being universal, external and obligatory the jural is identified with *typical* collective jural relationships – such as those found within the state where the “external” authority of the government applies “universally” and in a coercive way to all subjects. And when morality is defined in terms of ethical coordinational relationships it is characterized as being individual, internal and voluntary. However, if we choose the nuclear family – as a moral societal collectivity – then the authority of the parents is valid for all children (“universal”), external and compulsory, whereas any jural coordinational relationship displays the opposite features. It is therefore clear that the general modal meaning of law (its modal universality) and the general meaning of morality ought to be understood in *abstraction* from all collective, communal and coordinational relationships.⁴ Habermas has this confusion in mind when he warns us that one must not succumb to what he calls an ingrained prejudice, namely that “morality pertains only to social relationships for which one is personally responsible, whereas law and political justice extend to institutionally mediated spheres of interaction” (Habermas, 1996:109).

Comparing the views of the three thinkers mentioned in the title of this article will require that other related problems ought to be dealt with as well, such as the long-standing controversy between conceptions of natural law, the historical school of law and legal positivism. Some of the main ideas of the (Baden and Marburg) neo-Kantian schools of thought in legal philosophy will also surface in connection with the idea of “validity” or “force” (in German: *Geltung*).

- 1 According to Kelsen the statement that a specific jural norm is “in force” (“in Kraft”) means the same as the statement that a specific jural norm has validity (“steht in Geltung”) (see Kelsen, 1960:82).
- 2 Hacker points out that in his understanding of law Hart is concerned with the binding nature of law rendering law obligatory, the relation between law and morality and the nature of rule and their role in social and legal activities (Hacker, 1979:4).
- 3 Collective relationships (such as those embodied in the state, business enterprise, university and social club) display both a solidary unitary character (they persist in spite of the coming and going (exchange) of individual members) and a durable relation of super- and sub-ordination; communal relationships (such as marriage, the extended family and a people in the cultural-ethnic sense of the term) evince only one of these features while in the case of coordinational relationships (friendship and all social relationships with a next-to-each-other structure) both features are absent.
- 4 Although Hacker does mention the distinction between legal obligations and social obligations (Hacker, 1979:11) he does not question Hart’s restriction of law to the legal system of state-law.

An ordered (differentiated) society

Traditional or undifferentiated societies do not lack an order, even though it may not be possible to discern within such societies what we today (within a differentiated society) recognize as the state. Early Greek philosophers, such as Heraclitus, contemplated the idea that there is a world *logos* governing the entire cosmos. In the period before the Greek *polis* (city-state) emerged *justice* (*dikè*) and *themis* (the internal legal order of the clans) were viewed as the guardians of the *natural order of things*. Yet the 5th century witnessed significantly new developments. *Dikè*, for example, lost its original meaning and acquires a new content, designating the *positive law* formed by the *polis* and the punishment exercised on the basis of these positive laws.

The term *Politeia* was used by Plato in his famous work *The Republic* (see Plato, 1966) while Aristotle, in his *Politica*, made the *Polis*, the Greek city-state, the focus of his attention (see Aristotle, 1894). Both these thinkers viewed justice as the encompassing *moral virtue* of society, guiding the individual human being towards the ideal of moral perfection accomplished by participating in the *Politeia* or *Polis*. Aristotle disqualifies arbitrary rule and advocates a state governed by laws – but within the ideal monarchy (similar to Plato) the wise ruler does not need positive laws to govern. Aristotle for the first time distinguishes between *natural law* and *positive law*. Justice in a broad (moral) sense (*dikaion politikon*) embraces all virtues (such as courage, moderateness, friendliness, and so on) and manifests itself within the state. Justice in a strict sense concerns legal norms and their obedience. One of the hall-marks of this strict form of justice is equality. Equality may be determined according to an arithmetical or according to a geometrical yardstick. The latter is applied in the case of distributive justice – regarding the distribution of “honour or money or such other possessions of the community as can be divided among its members,” while the “other kind is shown in private transactions or business deals, where it serves the purpose of correcting any unfairness that may arise.”⁵ The latter kind of justice, designated as corrective justice, operates according to an “arithmetical proportion” requiring from the judge to find (or restore) the mean between what is too much and what is too little (cf. NE, Book V, Chapter 4). Well anticipating what the classical Roman jurists took justice to mean, Aristotle's understanding of distributive justice could be summarized in the guideline: treat equals equally and un-equals unequally. We shall return below to his view of equity.

After the collapse of the ecclesiastical unified culture of the medieval era the Renaissance paved the way for *atomistic* views of society, particularly prominent in the early modern social contract theories, aimed at giving a rational account of an ordered society by means a fictitious (hypothetical) *social contract* and substantiated by the idea of human autonomy.⁶ From the 16th to the 19th centuries both the term and the societal entity designated as the “state” emerged, thus giving a new impetus to reflections on law and justice within a differentiated society.

⁵ The Nicomachean Ethics (NE), Book V, Chapter 2.

⁶ Rousseau, for example, defines freedom as “obedience to a law which we prescribe to ourselves” (Rousseau, 1975:247).

Law and its validity

The notion of *law* is related to the Latin root *ius*. For that reason asking about *law* is equivalent to investigating the nature of the *jural*. It seems natural to associate the *jural* with statutory law and therefore with the state and its legal organs, such as the legislative and the judiciary. The central theme of Habermas's (1998) work on "positivity and validity"⁷ is aimed at coming to terms with the tension between the *validity* of law and its *legitimacy*.⁸ Derrida has an equally serious concern for the question of what it means to "enforce the law" combined with an attempt to understand the incalculability of justice which is not the justice of the law (Derrida, 2002:244, 257). Dooyeweerd speaks of the sphere of validity of legal norms (Dooyeweerd, 1967:13).

Speaking of the *force of law* – compare the form this expression obtained in the USA: *law-enforcement* – and of the *validity of law* (*legal validity*) implicitly alludes to the *power* of the state needed to "enforce" law. The possibility of unlawful actions taken by the state – by enacting injustice in the form of law (just recall the legal system of *Apartheid*) – naturally raises Habermas's question concerning the *legitimacy* of valid law, an issue that intrigued Derrida to such an extent, as we shall see below, that he developed a view of justice transcending the calculability of valid law.

Observing a connection between law, validity, enforcement, violence and the power of the state has a long history. Enough to say that already Immanuel Kant (who is closely connected to the natural law tradition and the idea of a social contract), developed his understanding of law in relation to both the state and the contrast between validity (*Geltung*) and violence (*Gewalt*). Kant holds that the rights of people are uprooted when the concept of law is deprived of its validity and delivered to wild violence (*wilden Gewalt*).⁹

After Kant the contest between traditional conceptions of *natural law* and the reaction to natural law inaugurated by the *historical school* of Von Savigny (1779-1861) at the beginning of the 19th century, eventually found an ally in legal positivism. Within the tradition of the Historical School the legal positivism of Puchta (1798-1846)¹⁰ divorced the formation of law from *jural* principles that are not bound to the will of the former of law. Friedrich Justus Thibaut (1772-1840) was the acknowledged leader of scientific positivism. Eventually also R von Jhering (1818-1892) followed the path of legal positivism.¹¹ The critical trend of legal positivism, the "pure theory of law" ("reine Rechtslehre") of the early 20th century, Kelsen (1881-1973) and Stammler (1856-1938), does not provide a criterion for the positivity of law (see Dooyeweerd, 1967-I:258).

7 In German: Faktizität und Geltung (1998).

8 Habermas equates the tension between positivity and validity with that between positivity and legitimacy (see Habermas, 1998:163).

9 Kant therefore considers validity to be inherently legitimate: "Aber sie tun überhaupt im höchsten Grade unrecht, weil sie dem Begriff des Rechts selber alle Gültigkeit nehmen, und alles der wilden Gewalt, gleichsam gesetzmäßig, überliefern, und so das Recht der Menschen überhaupt umstürzen" (Kant, 1797-1798-AB:158).

10 Puchta succeeded Von Savigny in Berlin in 1842.

11 Dooyeweerd remarks: "Although his naturalistic sociological foundation of law transcended the course of a formalistic positivism, von Jhering finally returns to this positivism by making the validity of law as will of the state not dependent upon the objective correlation of the contents of positive law with the existential conditions of society, but solely upon the motive which subjectively guides the person forming law" (1967-I:50).

Between natural law and legal positivism

Historically two options were available in this regard:

- (i) Either one claims universal validity for normative principles *per se*, or
- (ii) One subscribes to the view that there are no universal or constant starting points for human action because all human decisions are viewed as inherently changeful.

Traditional theories of *natural law* chose the first option, and the *historical school* and *legal positivism* opted for the second.

Of course this entire history is rooted in the dominant influence of modern nominalism since the Renaissance. Nominalism denies any form of (ontic) universality, i.e. universality outside the human mind. Universals (concepts or words) are fully intrinsic to the human mind. Compare the stance of Descartes who also claims that “number and all universals are only modes of thought” (Descartes, 1965:187; *Principles of Philosophy*, Part I, LVII). Jellinek straight-forwardly portrays the alternatives of realism and nominalism. He explicitly rejects the idea of the jural as independent (in an ontic sense) from the human being. According to him law is an ingredient of human representations existing in the human mind. Coming to a closer determination of what law is amounts to establishing which part of the contents of human consciousness should be designated as law.¹²

The modern tradition of natural law consistently holds the view that there are universally-valid legal rules embedded in (or derived from) human reason (the “human mind”). Hommes summarizes the traditional concept of *natural law* as follows:

Natural law in its traditional sense is the totality of pre-positive legal norms (not brought into existence through a human declaration of will in the formation of law) that are immutable, universal and *per se* valid as well as the eventual subjective natural rights and correlating duties, based upon a natural order (whether or not traced back to a divine origin), such that the human being can derive it from the natural order aided by natural reason (Hommes, 1961:55).¹³

By contrast *legal positivism* received its most powerful ally in modern (Post-Enlightenment) *historicism*. This movement surfaced during the era of Romanticism (late 18th and early 19th centuries) by exploring, as Meinecke phrases it with reference to Goethe, the opposition between Heraclitean and Eleatic thought, *eternal becoming* versus *eternal being*.¹⁴ The decisive focus of historicism on *change* is accompanied by an equally important switch from *universality* to what is *individual*. It is remarkable that an element of Goethe’s romantic understanding of law anticipates Derrida’s view of justice (to which we shall return below).

The significance of historicism for the discipline of law is foremost found in the conceptions of the *Historical School*. In 1815 Von Savigny wrote, in the first Volume

12 “Entweder man sucht die Natur des Rechtes als einer vom Menschen unabhängigen, in dem objektiven Wesen des Seienden gegründeten Macht zu erforschen, oder man faßt es als subjektive, d.h. innermenschliche Erscheinung auf. ... Das Recht ist demnach ein Teil der menschlichen Vorstellungen, es existiert in unseren Köpfen, und die nähere Bestimmung des Rechtes hat dahin zu gehen, welcher Teil unseres Bewußtseinsinhaltes als Recht zu bezeichnen ist” (Jellinek, 1966:332).

13 Neo-Thomistic adherents to the idea of natural law continued this traditional conception, while other views explored the distinction between the concept of law and the idea of law (see Hommes, 1961:84 ff.; 125 ff.; 158 and 203).

14 “So besteht Goethes höchste Weltanschauliche Leistung darin, daß er heraklitisches und eleatisches Denken, ewiges Werden und ewiges Sein verschmolz – ‘Dauer im Wechsel’ ” (Meinecke, 1965:503).

of the newly established *Journal for Historical Legal Science* (*Zeitschrift für geschichtliche Rechtswissenschaft*), that law is a *purely historical phenomenon* and that next to or above positive law, there is no immutable and eternal legal system of natural law (see Von Savigny, 1948:14 ff.). Dooyeweerd phrases this stance of historicism as follows. “The *Historical School* finally disposed of natural law in the rationalistic cast which legal philosophy from Grotius to Kant had given it. Two propositions have seemed beyond reproach:

- 1) all positive law is a historical phenomenon that cannot deny its link with the past, and
- 2) next to or above this historically developed law there can exist no second legal system with everlasting and immutable content, such as one might deduce from ‘human nature’ or ‘human reason’ in an a priori manner” (Dooyeweerd, 1938: 3-4).

Dooyeweerd and Habermas agree that the impasse of natural law, historicism and legal positivism should be avoided, although their alternative approaches differ in other respects.¹⁵ The historicist and relativist consequences of historicism also prompts Derida not to deny universality, although, as we shall see below, his view of the relationship between law and justice nonetheless embodies a dialectical tension between what we shall define as *rationalism* and *irrationalism*. A similar problem will then be discerned in the thought of Dooyeweerd.

In passing we may note that the realist tradition dominating medieval thought reified things (entities), whereas the rise of modern nominalism was accompanied by a reification of functional modes of reality. The former tradition advanced a *substantialist* understanding and the latter a *functionalist* view. Both Rickert and Cassirer, two prominent representatives respectively of the Baden and the Marburg schools of thought in neo-Kantianism, equated functions with *relations*.¹⁶ Habermas continues this element in respect of human society (the social world), for he characterizes the latter merely in terms of *relations*. He distinguishes between three worlds: “1. The objective world (as the totality of all entities about which true statements are possible); 2. The social world (as the totality of all legitimately regulated interpersonal relations); 3. The subjective world (as the totality of the experiences of the speaker to which he has privileged access)” (Habermas, 1984:100). Such a functionalist approach cannot account for the more-than-functional concrete many-sidedness of the state and state-law.

15 In legal practice historicism results in a merely formal account that actually sanctions putting any arbitrary content in the form of law. Kelsen, for example, holds: “Daher kann jeder beliebige Inhalt Recht sein. Es gibt kein menschliches Verhalten, das als solches, kraft seines Gehalts, ausgeschlossen wäre, Inhalt einer Rechtsnorm zu sein” (Kelsen, 1960:201). (“Therefore every arbitrary content can be law. There does not exist any human action for which, according to its quality, it is excluded to be the content of a legal norm.”)

16 Rickert initially develops this perspective by binding the natural sciences to the ideal of transforming all thing concepts into concepts of function (explicitly designated by him as concepts of relations). Rickert holds: “Whatever the role the category of a thing may fulfill in a theory of the thing world, envisaged as closed, at bottom there is no doubt that the natural sciences have to strive to resolve the rigid and fixed things increasingly, ... and this means nothing else but transforming as far as possible all thing concepts into relation concepts. ... Our theory is valid for the logical ideal of natural scientific concepts, because this ideal solely concerns relation concepts” (Rickert, 1913:68-70).

Positivization: making principles valid, enforcing them

Leaving aside the differences between Dooyeweerd and Habermas regarding the nature of (legal) principles, it is clear that both opt for a position in which the formative role of human beings is accepted in the positivity of law. Once underlying principles, guiding human action, are accepted, their “enforcement” is not automatic, for they can only acquire a positive form through formative acts of shaping performed by competent *legal organs*, such as the legislature and judiciary.

This idea of the positivization of underlying principles is found in the thought of various philosophers throughout the 20th century. During the first part Hartmann employs the idea of positivizing (‘Positivierung’) in connection with the tendency towards the realization of values: “What is important here, on the other hand, is that the tendency towards realization is inherent in values”.¹⁷ A few pages further he continues: “If, however, a value is realized and a goal could be attained, then the aim first had to be acknowledged as such and posited as such. That is to say that the value first must be positivized.”¹⁸ The word *Positivierung* was also used by Smend (see Smend, 1930:98) and Horneffer (Horneffer, 1933:105). Also Habermas uses the notion that legal principles ought to obtain a positive form, i.e. that they require *positivization* (*Positivierung*) (see Habermas, 1996:71; 1998:101, 173, 180). The term *positivization* is also used by other contemporary socio-philosophical orientations, see for example the systems approach of Luhmann (Luhmann, 1985:147 ff., and Luhmann, 1986:26).

Since 1929 Dooyeweerd started to use this term in the specific sense of giving shape or form to principles as starting-points for human action. The reason is that at this time he introduced the idea of a cultural-historical aspect of reality, associated with the core meaning of *formative control, mastery, shaping*. Not only is it true – accepting an element of the criticism of historicism against traditional conceptions of natural law – that the formation of law is always embedded in changing historical circumstances, for in addition to that legal principles can only be *made valid*, i.e. *positivized*, through the intervention of formative human activities. Although the underlying principles themselves are not valid *per se* (since they need the mediation of human acts of positivization), their universality and constancy ought to be acknowledged – thus appreciating an element present in natural law views.

The emergence of the idea of *positivization* is related to a *general issue* for many 20th century thinkers, namely the challenge to acknowledge *historicity* without succumbing to an anchorless relativism.¹⁹ Historicism appears to over-emphasize change at the cost of constancy (persistence). It is therefore understandable that Heidegger aimed at introducing something like an event that opens up the space within which hermeneutics could become a new universal (“zum neuen Universale wird”) – without any final foundation. This space is the *dimension of language*.²⁰ In a similar way Jonas holds that “history itself no less than historiography is possible only in conjunction

17 “Dagegen ist hier wichtig, daß den Werten die Tendenz zur Realisierung immanent ist” (Hartmann, 1926:154 ff.).

18 “Soll aber ein Wert realisiert, ein Ziel erreicht werden können, so muß das Ziel zunächst erkannt und als solches gesetzt werden. D.h., daß der Wert zunächst positiviert werden muß” (Hartmann, 1926:160 ff.).

19 We here leave aside the dilemma of modern subjectivism (the modern ideal of autonomy), as it is given in the question: how can the (collective) human person at once be both the constructive author (law-giver) as well as the subject of normativity?

20 “Dieser Raum ist die Dimension der Sprache” (Gadamer, 1989:172). This view is an effect of the so-called linguistic turn – the switch from the logical-analytical focus of Enlightenment to language. In

with a transhistoric element. To deny the transhistorical is to deny the historical as well (Jonas, 1974:242).²¹

Of course the notion of *historicity* does not refer to some or other individual (unique) historical event, but to what is shared by *all* historical events evincing the property of “being-historical events.” The pitfall of traditional natural law theories exists in the *double validity* to which they adhere. In addition to those positivizations constituting *valid positive law*, the theory of natural law also accepts natural law as an equally valid (universal, pre-positive) *order of law* – constituted by principles of human reason already applied, already made valid. Although Habermas does not explicitly mention this problem of a duplicated *validity* present in theories of natural law, he does point to a *conceptual* duplication present in modern theories of natural law: they preserve “the distinction between natural and positive law,” and thus “assumed a burden of the debt from traditional natural law. It holds on to a duplication of the concept of law that is sociologically implausible and has normatively awkward consequences” (Habermas, 1996:105; Habermas, 1998:136).

Postmodern interpretations of the thought of Derrida tend to suggest that he denies *unity, totality, identity* and *universality*. Yet, as soon as he is questioned in this regard it becomes clear that he solely rejects “totalitarianism, nationalism, egocentrism” (Derrida, 1997:13). Deconstructing unity and totality does not deny the mutuality of *unity* and *plurality*, for Derrida states that we “do not have to choose between unity and multiplicity” (Derrida, 1997:13).²² It is therefore, according to Derrida, only owing to the primacy given by Heidegger to gathering as being more powerful than dissociation that he prefers to “say exactly the opposite” (Derrida, 1997:14). Moreover, in a similar way Derrida does not suggest a choice between *universality* and *individuality*. He posits *singularity* as something transcending the difference between unity and multiplicity (Derrida, 1997:13) and then adds that his “attention to singularity is not opposed to universality” (Derrida, 1997:22). For that matter, on the same page he speaks of the universality of faith – formulating a sentence such as: “That is why this faith is absolutely universal.” He distinguishes between the *messianic* (or: *messianicity*) and “messianisms” (“that is Jewish, Christian, or Islamic messianism”) (Derrida, 1997:23).

When he explains that one has to “go back from these religions [Judaism or Christianity] to the fundamental ontological conditions of possibilities of religions” (Derrida, 1997:23) Derrida actually articulates what one may call a *transcendental-empirical* view. The term *transcendental* refers to that which makes possible whatever

passing we note that when Derrida applies the mutuality of identity and difference to language, he implicitly underscores this foundational position of analysis vis-à-vis language: “The identity of a language can only affirm itself as identity to itself by opening itself to the hospitality of a difference from itself or of a difference with itself” (Derrida, 1993:10) – and in doing that succeeds in appreciating a worth-while element in the rationalistic legacy of the 18th century.

21 Gadamer’s student, Jean Grondin, underscores the inconsistency of historicistic claims: “Some have tried to construe the universal claim of hermeneutics as climaxing in the thesis that everything is historically conditioned, a thesis supposed to be universally valid. If this thesis is meant to apply universally, then it must apply to its own claim, which must itself be historically limited and therefore not universal. The universal claim of hermeneutics is thus considered self-contradictory” (Grondin, 1994:10).

22 “You see, pure unity or pure multiplicity – when there is only totality or unity and when there is only multiplicity or dissociation – is a synonym of death” (Derrida, 1997:13).

we can experience within a particular domain of reality (the *ontic*).²³ The *ontic conditions* here intended are transcendental in the sense of “making possible” what we (empirically) can experience and for that reason one may call them *transcendental-empirical*.

This idea forms the starting-point of Dooyeweerd's approach, for he distinguishes between those conditions making possible our experience of concrete things, events and societal relationships (see Dooyeweerd, 1997-III:3-784) and the various aspects (modes of being) making possible our experience of diverse functional relationships (see Dooyeweerd, 1997-II:3-598).

Both these dimensions of reality are captured in an example in which he gives “a brief account of the multifacetedness of an ordinary activity in daily life,” purchasing a box of cigars (Dooyeweerd, 2002:13-17).

A jurist, who considers this act in the role of a scientific observer, begins at once to abstract from the act its legal configuration. The transaction is taken into consideration by the jurist only as a jural transaction, as a legal agreement, out of which flow mutual rights and juridical obligations for the buyer and the seller. Furthermore, it is clear that this legal configuration forms only one of many aspects of the transaction in question. If an aesthetician were present among the scientific observers, that specialist would view the same transaction from the particular standpoint of its aesthetic aspect and would provide an answer to the question as to whether or not the attitude, speech, and the expressions of those who were involved in the transaction were harmonious. An economist, however, would direct attention not to the jural, nor to the aesthetic, but to the economic side of the transaction. Another aspect is now brought into view out of the concreteness of the act of real life, namely, that of economic valuation and the economic measure which was applied in working out the price of the purchased goods. A fourth scientific observer, who makes the social side of human society a subject of special study, focuses on what is taking place in the store between the buyer and the seller, and considers it specifically from the point of view of social forms. In the form and the tone of their greetings, and in their questions and answers, such an observer quickly discerns the degree of education, status, or importance of the buyer and the seller. The aspect of language, which is unbreakably connected with the aspect of social intercourse, is interesting to the linguist, who pays particular attention to the lingual significance of the words, to the construction of the sentences, to the possible differences of dialect, and to flaws in pronunciation, etc. A historian, who views the transaction from its historical aspect, fastens our attention on the fact that the cigars in their packaging, as well as the money with which payment is made, are typical historico-cultural objects which have come into use only in the course of the historical development of Western society. That specialist also directs our attention to the fact that in the transaction the typical forms of language and social convention, the fixing of a price, and the content of the positive law involved in the agreement rest entirely upon a historical foundation. A logician directs attention to the logical side of the transaction. Does the answer con-

²³ Note that the term *ontic* refers to what is given in reality, whereas the term *ontology* designates an intellectual discipline reflecting on what is given. Likewise the term *biotic* points at living entities, while a theoretical investigation of these phenomena may be designated as biological in nature.

form to the question in a logical fashion, and are question and answer an expression of a logical train of thought? A psychologist is interested more in the unique sensory aspect of the transaction. Which psychical strivings, emotional representations, and desires drive the buyer and the seller to an agreement of will? What mood manifests itself in their tone, their expressions, their entire attitude as they make the deal and carry it out? Is it possible to point out emotional aberrations and disorders? A biologist is interested in the transaction only in respect of its organic aspect of life. Finally, it would also be possible to invite a physicist and a mathematician to join the group of scientists. Even though, at first, they might well excuse themselves, observing that the event lies outside the field of their own scientific interests, they would admit, nevertheless, that this transaction manifests a physico-chemical, [a kinematic,] a spatial, and a numerical aspect, etc., that is to say, precisely those aspects of reality to which their scientific interest is directed.

The fact that purchasing cigars functions within the various aspects of reality embodies what is meant by a transcendental-empirical approach. Although diverse philosophical traditions operated with *categories* of all kinds – from Aristotle, Thomas Aquinas and Kant up to Hartmann – the unique contribution of Dooyeweerd is given in his transcendental-empirical analysis of the diversity (uniqueness) and mutual coherence (interdependence) between these aspects. He applied a phrase initially coming from the domain of political philosophy to the idea of the uniqueness of every aspect – *sphere-sovereignty*. It entails that every aspect is irreducible and that this uniqueness is guaranteed by its indefinable core meaning, also designated as its meaning-nucleus.²⁴ Dooyeweerd considers retribution to be the meaning-nucleus of the jural aspect.²⁵ However, the other side of the coin is given in the unbreakable *coherence* between the various aspects, expressed in analogical structural moments pointing at other aspects (this idea is said to represent the *sphere-universality* of each aspect).

Interconnections between the jural and non-jural aspects of reality: assessing the nature of jural validity (the force of law)

Distinguishing the various aspects of a concrete action therefore does not imply that these aspects are mutually separated. What is primarily required is to understand that the same action or problem allows for access through the gateway of different aspects or functions. Habermas emphasizes that different kinds of “normative principles and rules” may refer to “these same problems in different ways” (here he has *law* and *mo-*

24 When Derrida considers the possibility to speak about the “proper or primitive meaning” of communication (see Derrida, 1982:307), he approximates the uniqueness, irreducibility and indefinability of the distinct modal aspects of reality analyzed by Dooyeweerd.

25 Polak attempts to define the core meaning of the jural by viewing it as an objective, transegoistic, harmonization of interests. The term objective suggests universality, but it does not highlight something distinct about the jural because non-jural states of affairs may also display the feature of being universal (in fact every aspect of reality has a universal scope in the sense that whatever there is functions in all of these aspects, similar to the way in which purchasing cigars does it). The second element, transegoistic, is derived from the meaning of neighbourly love while harmonization reflects the meaning of the aesthetic aspect. Finally the term interests lacks a distinctive meaning, for it is found in different contexts (such as social interests, economic, interests, and so on). Only when it is qualified as legal interests does it acquire a jural meaning, but in this case the meaning of the jural is presupposed. Dooyeweerd is therefore justified to conclude: “It could just as well be seen as a moral rule relating to the distribution of charity” (Dooyeweerd, 1967-II:9).

reality in mind – Habermas, 1996:106). The interconnection between different modes of being (modalities) concerns phrases in which the relationship between two different aspects is expressed.

Although Derrida does not employ an articulated theory of modal aspects, he places credit against the background of acknowledging the universality of ‘faith’. We noted that he stresses that “faith is absolutely universal” (Derrida, 1997:22). This paved the way for his acknowledgement of the coherence between the economic aspect and the certitudinal aspect, given in the reality of *credit* (as *economic trust*). He states:

There is no society without faith, without trust in the other. Even if I abuse this, if I lie or if I commit perjury, if I am violent because of this faith, even on the economic level, there is no society without this faith, this minimal act of faith. What one calls credit in capitalism, in economics, has to do with faith, and the economists know that. But this faith is not and should not be reduced or defined by religion as such (Derrida, 1997:23).

When Habermas speaks of a *legal order* (Habermas, 1996:106) or when Derrida mentions a *juridical order* (*Rechtsordnung*) in his discussion of Benjamin's views, one has to ask which aspects of reality are involved in these composite phrases. The qualifying part of the phrase *juridical (legal) order* is derived from the root *ius*, i.e. from the *jural aspect*. But what about the term *order*? Is it possible to relate it to an aspect different from the jural?

If the multiplicity of (positivized)²⁶ legal norms²⁷ within a specific legal sphere is not integrated into a unity it will be impossible to speak of a *legal order*. It is therefore possible to discern an interconnection between the jural aspect and the numerical aspect in the configuration of a *juridical unity and multiplicity*. This interconnection represents a numerical analogy within the structure of the jural aspect.²⁸ In order to be able to appreciate what the “force of law” (*legal validity*) actually entails, we first look at a more specific account of the numerical analogy within the jural aspect (according to its norm-side) as it is found in the following explanation given by Dooyeweerd:

Every differentiated legal order is constituted as a unity of public law, civil private law, the totality of internal law of all non-state societal collectivities (for example ecclesiastical law), as well as coordinational law (the internal contractual rules regulating agreements between parties). All these legal rules, which belong to intrinsically different societal spheres, are interwoven into a jural unity, that is to say, they ought to be brought into harmony with each other in accordance with retributive criteria, so that one cluster of legal norms does not threaten another (hence the internal law of the contracting parties should never

26 What Habermas calls “lawmaking” (Habermas, 1996:258) concerns the formation of law, i.e. an analogy of the cultural-historical aspect within the jural aspect (see note 23).

27 The possibility to speak of juridical norms (or a legal order) entails a correlation of what Dooyeweerd calls the norm-side and the factual side of the jural aspect. The norm-side (law-side) delimits and determines what is factually subjected to it.

28 An analogy represents a partial similarity and a partial difference in the sense that the difference manifests itself in the moment of similarity. For example, a president and its bodyguard are in spatial proximity although they are socially far apart. Clearly spatial distance (proximity) and social distance (far apart) show a similarity, namely distance, but in this similarity the difference manifests itself for spatial distance differs from social distance.

violate the basic and mandatory legal principles and norms) (Dooyeweerd, 1997-II:11).²⁹

Correlated with and subjected to the juridical norms of a specific legal order every legal subject is also a subjective *jural unity in the multiplicity* of legal relationships. According to Dooyeweerd the legal relationships are “juridically harmonized in a retributive sense” because a “legal object is also an objective jural unity in a multiplicity of legal relationships.”³⁰ We can now focus on the nature of the composite expression *legal validity*.

The force of law: legal validity³¹

The question here is to determine if the terms “force” and “validity” are derived from some or other non-jural aspect of reality. Number merely provides us with an awareness of *unity and multiplicity* (meaning-nucleus: discrete quantity). Space reveals the core meaning of *continuous extension* and the kinematic mode opens up the possibility to discern *uniform motion*. Yet it is only within the physical aspect of energy-operation that the notion of *force* appears. When energy operates the forces it generates causes changes (effects), i.e. it embodies what is known as *physical causality*.³²

Derrida explores examples of analogies of *force* in his discussion of the “differential character of force” aimed at avoiding “the risks of substantialism or irrationalism” (Derrida, 2002:234). He does that in connection with his notion of *différance* because he does not offer a systematic theory regarding the inter-modal connections (analogies) between various aspects of reality. But he does mention the relation between *force* and *signification* (in various forms, such as “‘performative’ force, illocutionary or perlocutionary force, of persuasive force and of rhetoric”; Derrida, 2002:235). He concedes (on the same page) “that [he has] ... always been uncomfortable with the word *force* even” though he “often judged it indispensable.” Perhaps his hesitance flows from the fact that he did not contemplate that modal analogies form a constitutive element in the meaning of the jural aspect – as it is indeed given in the physical analogies of jural *force*, jural *being-in-force*, jural *enforcement*, having jural *validity*, as well as *jural causation* (causality).

29 Compare with this the way in which Habermas speaks of “legal domains/spheres of law” (“Rechtsgebieten”) – clearly pointing at a spatial analogy within the modal structure of the jural aspect (see Habermas, 1998:59). [Incidentally, the English translation, “different subject areas of law,” is not a proper rendering of “Rechtsgebieten” (see Habermas, 1996:40).]

30 “The same piece of land may be the property of A, the object of B’s usufruct and of C’s mortgage” (Dooyeweerd, 1967-II:12-13).

31 Within the circles of legal philosophy and philosophy in general during the first part of the 20th century the idea of validity played a significant role. Whereas the initial position of the Baden School of neo-Kantianism (Windelband, Rickert, Weber, and others) still held on to the validity of supposedly ideal and timeless values, the latter soon became fully historicized and relativized through the emerging idea of changing lingual and social constructions. In respect of Kant and Rawls, O’Neill remarks: “Constructivism for Kant, as for Rawls, begins with the thought that a plurality of diverse beings lacking antecedent coordination or knowledge of an independent order of moral values must construct ethical principles by which they are to live” (see O’Neill, 2003:362).

32 Of course one does not have to sell the term causality out to either its deterministic or indeterministic interpretations (compare the difference between Einstein, Planck, von Laue and Lenard on the one hand and Schrödinger, Heisenberg and Jordan on the other). A formulation avoiding both extreme states that although nothing happens without a cause (partially conceding what determinism has seen), whatever the outcome may be does not need to be fixed in advance (partially conceding what indeterminism stressed).

Habermas attempts to define “Geltung” (validity) but he does that in a circular way and in a manner that misses its connection with the physical aspect (see Habermas, 1998:138). His main reference on this page is to *action norms* as behavioral expectations, embedded in a context where the “predicate ‘gültig’ ” (*valid*) is (tautologically) said to express a non-specific meaning of normative *Gültigkeit* (validity).³³

Derrida has a solid understanding of the constitutive meaning of the physical analogy within the jural aspect: “Applicability, ‘enforceability,’ is not an exterior or secondary possibility that may or may not be added as a supplement to law. It is the force essentially implied in the very concept of *justice as law*, of justice as it becomes law, of the law as law [*de la loi en tant que droit*]” (Derrida, 2002:233).

Configurations such as *legal order*, *legal sphere*, *legal constancy* and *legal validity* are all expressions of constitutive structural moments present within the modal structure of the jural aspect. For that reason they are treated by Dooyeweerd as *elementary basic concepts* and they are also designated as *analogical basic concepts* of the discipline of law.³⁴ It should be noted, however, that the neo-Kantian interpretation of validity did exert an influence on the views of Dooyeweerd. It is first of all found in his taking over of the expression *universally valid* in connection with the nature of (structural) principles (see Dooyeweerd, 1997-I:160). Pre-positive legal principles are not yet positivized for, as we noted, they are dependent upon human intervention in order to be *made valid*, to *have effect*. It is only when principles are given a positive shape that they display *validity*. Consequently, insofar as principles are given as universal and constant starting-points for human action they are not yet valid and insofar as they are positivized (made valid) they are no longer universal in an unspecified sense. It is secondly found in the fact that Dooyeweerd did not realize that the term *legal validity* is actually synonymous with the phrase *legal force* (*rechtskracht*) employed by him (see Dooyeweerd, 1967-II:14).

Before we continue our discussion of the relationship between justice and the force of law it should also be noted that the modal (functional) nature of the jural aspect exceeds the confines of anything (including societal relationships and social collectivities) merely functioning within this mode of reality. One may call this feature of the aspects or reality their *modal universality*. Although he upholds the neo-Kantian view of validity Kelsen's view of the nature of a norm reflects an element of modal universality when he affirms that the essential contents of a norm holds everywhere (universally) and always.³⁵

33 Of course one can relate the term “action” to the core meaning of the physical aspect (activity).

34 The other elementary basic concepts analyzed by him in his five volume Encyclopedia of the Science of Law are the following: Legal life and legal organ [biotic analogy within the jural]; the juridical will-function [sensitive analogy within the jural]; legal accountability, legal conformity and legal contradiction [logical-analytical analogy within the jural]; legal power and the formation (positivization) of law [cultural-historical analogy within the jural]; juridical meaning and juridical interpretation [lingual analogy within the jural]; legal intercourse in the correlation of jural coordinational and communal relationships [social analogy within the jural]; juridical economy and avoiding jural excesses – such as an abuse of power [economic analogy within the jural]; the juridical harmonization of interests [aesthetic analogy within the jural]. See also the extensive analysis of these basic concepts by Hommes (Hommes, 1972:106-480).

35 “But because those essential moments of the contents of a norm are a priori unlimited in respect of space and time, the norm holds (gilt), insofar as it does not posit limits for its contents in respect of space and time, everywhere and always (überall und immer)” (Kelsen, 1966:137).

The universal modal structure of an aspect transcends the *typical* way in which anything functions within it.³⁶ Our above mentioned argument regarding the distinction between law and morality demonstrates that it is incorrect to identify a specific kind of social interaction (such as collective, communal or coordinational relationships) with the general modal structure of either the jural or moral aspects of reality, simply because the modal universality of these aspects cannot be restricted to the typical appearance of anything functioning within these aspects (recall our remarks concerning the distinction between law and morality on the basis of what is *external*, *universal* and *compulsory* – see page 66 above).

Viewed solely in terms of the modal universality of the jural aspect, abstracted from any social collectivity (such as the state), it is clear that the notion of “law-enforcement” has a *typical* meaning and not a merely modal jural meaning. Entering into a purchase agreement (compare the example of purchasing cigars) does entail that a positive shape is given to legal (and other)³⁷ modal principles. Yet in this case no “sword power” of the state is assigned to either contracting party, simply because we are concerned with a coordinational relationship on equal footing (lacking a relation of super- and sub-ordination).

In conclusion we may now move towards a brief discussion of the relationship between law and justice.

Law and justice

According to Dooyeweerd a genuine state requires that the government ought to unite the “power of the sword” in such a way that it acquires the *monopoly* over it (internally the police force and as safe-guard against possible hostilities from without the defense force, traditionally differentiating in the air force, navy and military force). This monopoly ought to manifest itself over a spatially delimited cultural area, known as the *territory* of the state. This process of differentiation and integration automatically breaks through undifferentiated structures such as those of the medieval guilds – for no form of private sword power can be reconciled with the state as a *public institution* (*res publica*). Since *power* in its original moral meaning stems from the cultural-historical aspect of reality, the foundational function of the state is indeed found in this aspect. Nonetheless the term *power* ought not to be taken in the negative, a-normative sense of untamed, *brutal force*.³⁸ Much rather, according to the cultural mandate to humankind, it must be seen as a cultural calling, as an assignment given to humankind which places a peculiar task on the shoulders of the power formations of the

36 Consider the general focus of thermodynamics – a strictly modally delimited discipline with a universal scope in which the typical features of different kinds of physical entities are disregarded. In thermodynamics it does not matter whether we are talking about the solid state, the fluid state or the gaseous state – the specific weight and heat remain the same. As soon as we take into account the relationship between micro-structures and macro-structures (such as within the confines of statistical physics) then the formerly neglected nuances do matter, because the specific heat or weight is now specified in a different way in each of the mentioned states (solid, fluid, gaseous).

37 Such as showing respect (social norm), expressing clearly what one wants (lingual principle), distinguishing properly (logical-analytical norm), and so on.

38 When Derrida refers to Benjamin who speaks of the monopolization of Gewalt (violence) it is clear that the normative task incorporated in state-power is identified with an abuse of power, i.e. with violence that is anti-normative in character. (See Gerrida, 2002:267 – “Interesse des Rechts an der Monopolisierung der Gewalt”). Legal power is therefore not authorized violence (see Derrida, 2002:262 where he discusses the difficulties in translating Gewalt). Although it could be employed in norm-conformative and norm-violating ways, it cannot by definition be identified with either of the two.

state. Naturally this task could be accomplished in a better or worse way, in norm-conformative or in norm-violating (anti-normative) ways. The internal public law of the state (constitutional law, criminal law, criminal procedural law and administrative law) is guided by the typical principle of the *public interest*. It concerns the *res publica* in a broad sense also embracing international public law (see Dooyeweerd, 2004:75-103). The power of the state, as it is manifested in its function within the cultural-historical aspect, must be distinguished both from *legal power* (the cultural-historical analogy within the jural aspect mostly captured by calling it *legal competence*) and from *force*, because, as we saw, the latter term is derived from the core physical meaning of energy-operation.³⁹

When Derrida speaks about law he acknowledges the historical foundation of law – the fact that it constantly changes: “There is a history of legal systems, of rights, of laws, of positive laws, and this history is the history of the transformation of laws.” These changes (deconstruction) form the “condition of historicity ... and progress” (Derrida, 1997:16). Yet “justice is not the law. ... Without a call for justice we would not have any interest in deconstructing the law” (Derrida, 1997:16; see also Derrida, 2002:254). Derrida is pleased with Levinas who says that “justice is the relation to the other” (Derrida, 1997:17).⁴⁰ Often Derrida explains the difference between law and justice in terms of the difference between what is *calculable* and what is *incalculable* (see Derrida, 1997:17 and 2002:235, 244, 249-250, 257).

On the one hand Derrida emphasizes that there must be laws: “Law is the element of calculation, and it is just that there be law” (Derrida, 2002:244). This affirmation that it is “just” that there are laws becomes all the more significant when Derrida at the same time stresses that “[L]aws are not just in as much as they are laws.” This view causes Derrida to depreciate the nature of law even further, for he argues that the reason why we obey laws is not because they are just, but because they have “authority”: “The justice of law, justice as law is not justice. Laws are not just in as much as they are laws. One does not obey them because they are just but because they have authority” (Derrida, 2002:240).

If it is “just that there be law” this “justness” of the law links what is just with the universality (and calculability) of law. Yet, in general Derrida opposes the universality of law on the one hand and the direction of justice towards what is unique and singular on the other. He introduces the idea of an address (in the sense of *direction*), which “says something about law [*droit*] and about what one must not miss when one wants justice, when one wants to be just,” but “the address always turns out to be singular” (Derrida, 2002:245). Having initially stated that *laws are not just in as much as they are laws* Derrida here proceeds to speak of “justice, as law”: “and justice, as law,⁴¹ seems always to suppose the generality of a rule, a norm or a universal imperative” (Derrida, 2002:245).

39 In his discussion of the views of Pascal Derrida uses the terms force and power interchangeably (Derrida, 2002:241).

40 Of course this is a fairly undifferentiated designation, for the relation to the other may come to expression in different ways or modes of being, not merely the jural within a context of justice. The relation to the other at once also comes to expression in economic actions, social contexts, lingual interaction, and so on – and all of these modal functions differ from the jural aspect that is also discernable in those (many-sided) interrelationships.

41 In the same context Derrida mentions the possibility “to apply a just rule.” If a rule is taken to be universal (and calculable) and if justice does not follow from applying rules, how then is it possible for Derrida to refer to “a just rule”?

The opposition between *law* and *justice* which Derrida has in mind is clearly captured in the following significant question:

How to reconcile the act of justice that must always concern singularity, individuals, groups, irreplaceable existences, the other or myself *as* other, in a unique situation, with rule, norm, value, or the imperative of justice that necessarily have a general form, even if this generality prescribes a singular application in each case? (Derrida, 2002:245).

Note the subtle distinction between the “act of justice” – that “must” concern singularity and a unique situation – and the “imperative of justice” – that “necessarily have a general form.” This distinction may give the (mistaken) impression that Derrida considers justice to obtain when a universal imperative (namely the imperative of justice) is *applied*. There seems to be an inherent dialectic between universality and singularity (uniqueness / individuality) present in the exposition of Derrida. A few pages further on he says: “One must know that this justice always addresses itself to singularity, to the singularity of the other, despite or even because it pretends to universality” (Derrida, 2002:248).

What rips apart the homogeneous fabric of law-making, of a previously founding law, a preexisting foundation, is a *decision* (Derrida, 2002:241), where “the *decision* between just and unjust is never insured by a rule” (Derrida, 2002:244). When a law is followed, even in the sense of autonomy, i.e. the “freedom to follow or to give” to oneself “the law,” such an application of a rule (the effect of a calculation) may “perhaps” be seen as “legal” – in the sense “that it conforms to law” – “but one would be wrong to say that the *decision* was just. Simply because there was, in this case, no decision” (Derrida, 2002:251). A decision opens the way to justice, but as soon as one attempts to interpret a decision as conforming to a law there was *no decision!*

It is only in respect of a being that is free and responsible in a given act that one can say “that its decision is just or unjust” (Derrida, 2002:251). As long as a “programmable application or the continuous unfolding of a calculable process” is at stake it “might perhaps be legal” but “it would not be just” (Derrida, 2002:252) – “only a decision is just” (Derrida, 2002:253). Discourses may be (obliquely) seen as discourses of justice in reflecting “the undecidable, the incommensurable or the incalculable, on singularity, difference and heterogeneity” (Derrida, 2002:235).⁴²

However, according to Derrida “the undecidable is not merely the oscillation between two significations or two contradictory and very determinate rules, each equally imperative ... between two decisions.” What is undecidable delivers itself to “the impossible decision while taking account of law and rules” (Derrida, 2002:252).⁴³ And “at no time can one say *presently* that a decision is just, purely just (that is to say, free

42 It goes without saying that discourses on double affirmation, the gift beyond exchange and distribution, the undecidable, the incommensurable or the incalculable, on singularity, difference and heterogeneity are also, through and through, at least oblique discourses on justice.

43 The full text reads as follows: “Yet, the undecidable is not merely the oscillation between two significations or two contradictory and very determinate rules, each equally imperative (for example, respect for equity and universal right, but also for the always heterogeneous and unique singularity of the unsumable example). The undecidable is not merely the oscillation or the tension between two decisions. Undecidable – this is the experience of that which, though foreign and heterogeneous to the order of the calculable and the rule, must [dolt] nonetheless – it is of duty [devoir] that one must speak – deliver itself over to the impossible decision while taking account of law and rules” (Derrida, 2002:252).

and responsible)" (Derrida, 2002:252). Justice emerges from a decision going through the ordeal of the undecidable, for otherwise it would not be a *free* decision.⁴⁴

The position taken by Derrida on law and justice therefore boils down to a particular view of an *act*, a *decision* and *freedom* present in his thought. In his view that justice is incalculable one finds an anti-mathematical trait, similar to what forms a part of Goethe's understanding of the nature of a law. Meinecke writes: "Goethe's concept of law was totally different from that of the Enlightenment, completely free from mathematical ingredients"⁴⁵ – and then he quotes Gundlof: "Goethe's laws themselves are individuals, delicately, elastic precisely though constantly mobile, mystical inner forces."⁴⁶ Of course the difference between Goethe and Derrida is that the latter does not combine his understanding of 'incalculable' justice with any notion of law, owing to the distinction he makes between the universality of law and the singularity of justice.

The guiding and refining role of an act, a decision and freedom in Derrida's thought about justice (what is just and unjust) presupposes his acknowledgement of the rightful place of law ("it is just that there be law" – Derrida, 2002:244). The universality of law appears to play a *constitutive role* whereas the guiding and refining role of justice serves a *regulative purpose* by being focused on unique and singular historical circumstances. This orientation shows remarkable similarities with Dooyeweerd's view of the relationship between law and justice. According to Dooyeweerd those aspects that are foundational to the jural aspect (compare the above-mentioned example of purchasing cigars and note 29) are indeed constitutive for the meaning of the jural and for every imaginable legal system or juridical order. The government of every constitutional state under the rule of law has to bind together (i.e. to *integrate*) the multiplicity of legal interests within its territory, thus erecting and maintaining one public legal order. Such a state is called, through appropriate jural organs, to establish a balance and harmony amongst these legal interests. Wherever an infringement of rights takes place such a state in a retributive manner ought to restore the imbalance thus created.

Constitutive legal principles could be compared to bricks in a wall – without them the house will collapse. Yet standing on the roof supported by the walls may open up a purview exceeding the limitations of the house. Similarly, those modal analogies within the legal aspect referring back to the aspects *preceding* the jural mode are *constitutive* structural building blocks within the jural aspect. They are found in every possible legal order. Let us expand briefly on this constitutive side of a public legal order in the thought of Dooyeweerd.

This said task of the juridical integration of legal interests entails a differentiation between the domain of *public law* (correlated with public freedoms – like the freedom to express political views, to organize political convictions in political parties, and to participate in the capstone of political freedom: the right to vote), the domain of *personal-individual freedom* (common law or civil law) and the domain of *societal freedoms* (non-civil private law). The nature and existence of these legal spheres are *con-*

44 "A decision that would not go through the test and ordeal of the undecidable would not be a free decision; it would only be the programmable application or the continuous unfolding of a calculable process. It might perhaps be legal; it would not be just" (Derrida, 2002:252).

45 "Der Goethesche Begriff von Gesetz war also völlig anders als der der Aufklärung, völlig frei von mathematischen Bestandteilen" (Meinecke, 1965:504).

46 "Goethes Gesetze sind selbst Individuen, dehnbar feine, dem immer beweglichen eben geheimnisvoll innewohnende Formkräfte" (Meinecke, 1965:504).

stitutive for the existence of a constitutional state (*Rechtsstaat*). The specification *constitutive* implies that the legal order of a state cannot function properly except on the basis of the presence of all three of these legal domains. A more refined analysis may proceed by specifying the constitutive legal principles present in the subdivisions of the above-mentioned legal spheres. Consider for example the fundamental *procedural principle* of civil law, namely that the other side must also be heard (the *audi et alteram partem* rule). Or contemplate the basic (constitutive) nature of criminal law, evinced in the principle that a person can only be found guilty if the sentence is based upon evidence enabling a conclusion *beyond any reasonable doubt*. In addition it must be based upon a *due process*. Within the domain of administrative law the requirement of *proper care* obtains, and so on.

However, the meaning of the jural aspect may also be disclosed under the guidance of the two aspects succeeding the jural aspect, namely the ethical (core meaning: love) and the certitudinal aspect (core meaning: trust, certainty). According to Dooyeweerd traditional (undifferentiated) societies lack an opening up or disclosure of the forward-pointing (anticipatory) coherence between the jural aspect and the moral and certitudinal aspects. In other words, since the jural aspect is foundational to the moral (ethical) aspect, it does occur that the structure of this aspect may still only appear in its *restrictive*, i.e. “not yet disclosed,” meaning (see Hommes, 1972:481-546). A system of penal law in which the meaning of the jural aspect is undisclosed will still display all the constitutive structural moments within the jural aspect, such as that it is constituted as a *legal order* with its own *domain of jurisdiction*, its own form of *jural causality* (*Erfolgshaftung*), and so on. *Erfolgshaftung* concerns an undisclosed jural awareness of accountability, one in which only the *effects* of an action are taken into account. A person is held liable for the consequences (effects) of an action without considering the intentions of the actor. The well-known *lex talionis* applied the proportionality of an eye for an eye and a tooth for a tooth. On the one hand, this measure embodied a constructive (constitutive) legal concern by establishing a certain *jural balance* (an analogy of a physical equilibrium), for one is not entitled to take a *head* for an *eye*. In traditional societies, this configuration is intertwined with collective accountability.⁴⁷

It is only when the jural awareness of a society and the legal order of the state is *regulatively* deepened under the guidance of the aspect of moral love, that it is possible to account for the moral disposition of the perpetrator, for the subjective intentions of the person who committed the deed. Only now do the (disclosed) principles of juridical morality come into play, such as the *fault principle* – in its two forms: *dolus* (intent) and *culpa* (culpability). In Dutch and German, the term ‘Schuld’ is normally translated as either *fault* or *guilt*. Alan Cameron points out that in English-speaking Common Law jurisdictions, “fault” is usually reserved for civil wrongs (torts) and “guilt” for criminal wrongs, but that Dooyeweerd “uses ‘schuld’ ... to refer to both types of wrong (i.e. to both civil and criminal delicts).” Therefore it can be “translated as ‘fault’ in a broader sense, not specific to any particular category of legal wrong.”⁴⁸

47 The legal stipulations of the Old Testament are instances of the application of the *lex talionis*. This is an undisclosed principle of penal law that had already been found in the law books of Hammurabi (almost verbally repeated in the Old Testament).

48 Editorial note added by Alan Cameron to Dooyeweerd’s analysis of jural causality contained in the Collected Works of Dooyeweerd, B Series, Volume 2 (see Dooyeweerd, 1997a:42).

Whereas Dooyeweerd holds that the constitutive (backward-pointing or retrociprocal) structural elements of the jural aspect are included in the *concept* of law,⁴⁹ he argues that the forward-pointing analogies exceed the confines of concept-formation since they can only be approximated in an idea (in the sense of that which, as we prefer to call it, exceeds the confines of a concept, i.e. in terms of what we designate as concept-transcending knowledge): “the moment of fault cannot be grasped in a basic concept of legal science. Within the jural aspect jural fault anticipates the moral mode of experience. It only reveals itself when we encounter a structure of legal life that has been opened-up. It is therefore theoretically encapsulated in the theoretical idea of the jural aspect” (Dooyeweerd, 1967-II:75-76).

At this point one can compare the following explanation of Derrida with what has been said about the deepened idea of the jural aspect in Dooyeweerd's legal philosophy: “This excess of justice over law and calculation, this overflowing of the unrepresentable over the determinable, ...” (Derrida, 2002:257). What one can designate as idea-knowledge (concept-transcending knowledge) in Dooyeweerd's thought is portrayed by Derrida as an “excess of justice over law and calculation,” as an overflow “of the unrepresentable over the determinable.” We shall presently return to the similarities and differences between Derrida and Dooyeweerd in this regard.

Another long-standing legacy regarding a deepened, legal-ethical jural principle is found in the deepened jural principle of equity. Aristotle explained his view of equity (*epieikeia*) in his *Nicomachean Ethics* (NE, Book V, Chapter 2). Consider Chapter 10 where he gives an explanation that almost sounds like Derrida. Aristotle emphasizes that although equity is *just* it is not the *justice of the law*. Enacting a law necessarily entails a *general statement* that cannot possibly foresee all particular unique circumstances that may obtain and therefore it cannot exclude the possibility of error. Applying *equity* as an effect of the occurrence of an exception to the rule essentially just amounts to a rectification of the law. This modified statement should be what the law-giver would have done if the special circumstances were known in advance. Everything cannot be regulated by law – and when the applicable law in fact would accomplish an unjust effect, the original law-statement ought to be rectified *ex equitate*, i.e. on behalf of *equity*.

The field of application of equity concerns unique historical situations, transcending the generality of statutory law. This direction of equity towards what is “singular” (to employ the term used by Derrida) is another instance of a deepened legal-ethical principle. All the deepened principles of jural morality – such as the mentioned fault principle, the principle of equity, that of *good faith* (*bona fides*), *legal certainty*, the *worth of the human personality* and so on – could be designated as *principles of justice*.⁵⁰

The similarity between Derrida and Dooyeweerd is that they both distinguish between the concept of law and what exceeds this concept. The difference between them is that whereas Derrida considers this “exceeding” to leave behind every form of calculability and universality, Dooyeweerd holds on to the idea of deepened legal

49 Each one of them represent a distinct elementary basic concept of the discipline of law.

50 Owing to the clear distinction between the jural and the moral (ethical) aspects of reality Dooyeweerd no longer considers justice to be an ethical virtue. The latter view is still found in the thought of Rawls. From Greek political thinking he inherited his view of justice as a moral virtue. He states that “[J]ustice is the first virtue of social institutions” (Rawls, 2003:3). Note that Habermas considers “just” to be a predicate for “the validity of universal normative sentences that express general moral norms ... Justice is not one value among others ... justice poses an absolute validity claim” (Habermas, 1996:153).

principles – where justice serves as the embracing term capturing all the disclosed principles of juridical morality (the mentioned legal-ethical principles). Although this may appear to be a substantial difference, closer investigation reveals a further remarkable similarity. In order to understand this similarity we briefly have to recall that modern nominalism denies the universal features of factual reality – concretely existing entities (individuals) and events are strictly individual because outside the human mind there is no universality.

Dooyeweerd accepts ontic universality (for example the universal scope of the different aspects of reality). And Derrida, as we have seen, did not hesitate to affirm universality. He claims that faith is universal, deals with *messianicity* and speaks of the “historicity of law” (Derrida, 2002:266). The historicist intends to strip historical reality of its universality by claiming that every historical event is unique and irrepeatable. However, the opposite of what is aimed for is achieved – *uniqueness* and *irrepeatability* are two universal traits of *historicity* applying to *all* historical events. In other words, factual reality in its assumed uniqueness, singularity or individuality cannot escape from displaying universal features. Messianicity and historicity share in this quality. In *being historical* every unique historical event in a universal way evinces the fact that it is subjected to universal conditions for being historical. Historicity exhibits the measure of the law for being historical and in its orderliness (or even disorderliness) it reflects the correlation between conditions (law) and what is conditioned (what is subjected to law).⁵¹

In a typical nominalistic fashion Dooyeweerd denies the universal side of factual reality (its law-conformity). This does not mean that he denies law-conformity as such. He simply identifies law and law-conformity, thus handing factual reality over to what is purely *individual*. Derrida accepts universal principles and the universality of law-conformity (by talking about messianicity and historicity), but when it comes to the meaning of justice he wants to be *free*, to be liberated from universality and focused on what is unique and “singular” – as if factual reality in this case is also suddenly stripped of any universality. The nominalistic element in Dooyeweerd's thought, given in his denial of the universal side of factual reality, is mirrored in the thought of Derrida in respect of his peculiar view of justice “as the experience of absolute alterity” of what “is unrepresentable” (Derrida, 2002:257) and as concerned with “singularity, individuals, ... irreplaceable existences, ... in a unique situation” (Derrida, 2002:245). If one defines rationalism as an overestimation of (universal) conceptual knowledge and irrationalism as an over-estimation of concept-transcending (idea-) knowledge, then it is clear that both Derrida and Dooyeweerd are partially in the grip of the irrationalistic side of nominalism.⁵²

The starting-point for overcoming this nominalistic element may be present in a twofold way. In reaction to Dooyeweerd one may say that he has to acknowledge universality at the factual side of reality. How should this be done in respect of what Dooyeweerd calls the legal-ethical principles of justice? By holding on to the idea of positivization it should be kept in mind that not even a deepened legal principle can ever be “individualized” for then the basic distinction between universality and what is

51 The normative meaning of the historical is reflected in the contrary between historical and un-historical (historical norm-conformity and anti-normative historical events – reformation versus revolution and reaction).

52 Since nominalism does acknowledge universal concepts or words within the human mind it should be appreciated as being rationalistic at the same time.

individual will collapse. Through disclosed legal-ethical principles the deepened meaning of law acquires an ever increasing *specified* form of justice, without ever converting justice into something purely and solely unique and individual. This last remark can liberate Derrida from his attempt to bridge the gap between what is universal and what is unique. By conceding that whatever is given in its factuality always displays both an individual side and a universal side – just compare the statement that this state (individual side) is a state (universal side) – one can side-step the squaring of the circle, because universality and individuality are *irreducible*. Von Ranke once said: “Consider aristocracy according to all its features, and never one could suspect the existence of Sparta” (cf. Landmann, 1973:81).⁵³ Sparta is similar to the instances of justice in Derrida's thought (connected to *acts*, *decisions* and *freedom*), but although it cannot be suspected (*ahnen*) Sparta does not fall outside the (universal) conditions for being-an-aristocracy, it is merely one of many possible specified instantiations of these conditions. Likewise, what Derrida calls justice does not need to fall outside universal conditions or evincing in *being-just* that there is also *universality* attached to just situations (acts or free decisions) – without denying the truly factual uniqueness (individual side) of such situations.

Concluding remark

Our analysis of justice and the force of law turned out to be dependent on taking into account apparently unrelated issues – such as the role of traditional natural law theories, the historical school and legal positivism, with, at the background of all of these, the powerful under-current of modern nominalism. The surprising effect of the latter is that within the thought of Derrida, Dooyeweerd and Habermas we find traces of this nominalistic legacy. Yet the idea of *positivization*, shared by thinkers coming from different backgrounds, proved to be an important ingredient of an understanding of the nature of *legal validity*. In order to explain this attention had to be given to the nature of state law, of the power of the state, and of the legal competence entailed in the office of government. A central element of this approach is given in what we designated as the transcendental-empirical method of analysis, implicitly present in the thought of Derrida and explicitly employed by Dooyeweerd, who explored it in his account of constitutive and regulative legal principles, the latter viewed as principles of *justice*.

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⁵³ “Denke dir die Aristokratie nach allen ihren Prädikaten, niemals könntest du Sparta ahnen.”

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