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Dooyeweerd's legal and political philosophy: A response to the challenge of historicism

Abstract

A look at the penetrating and encompassing nature of Dooyeweerd's political and legal philosophy makes it understandable why Giorgio Del Vecchio, a reputable Italian philosopher of law, appreciated Dooyeweerd as "the most profound, innovative, and penetrating philosopher since Kant". Dooyeweerd's *Inaugural address* laid the foundation for uncovering the deepest dialectical motivation of modern philosophy, namely the (dialectical) basic motive of nature and freedom (science ideal and personality ideal). Dooyeweerd rejected the idea of a "pure theory of law" because in spite of its uniqueness, the meaning of the jural aspect of reality comes to expression only in its coherence with other irreducible aspects. In opposition to the relativistic claims of historicism, Dooyeweerd emphasises the irreducibility of each aspect of reality. Dooyeweerd exercised immanent criticism on the impasse of a theory of the state without the state and a theory of law without law. Despite his continuing an element of natural law, Dooyeweerd's approach avoids the antinomial stance of historicism by realising that change can only be established on the basis of *constancy*. The article concludes with a brief sketch of his systematic programme, as it unfolds in his multi-volume *Encyclopaedia of the science of law*.

Dooyeweerd se regs en politieke filosofie: 'n Antwoord op die uitdagings van historisiteit

Wie die indringende en omvattende aard van Dooyeweerd se politieke filosofie en regsfilosofie betrag, sal begryp waarom Giorgio Del Vecchio, 'n gerespekteerde Italiaanse regsfilosoof, Dooyeweerd waardeer as "the most profound, innovative, and penetrating philosopher since Kant". Dooyeweerd se Intreerede het die grondslag gelê vir die blootlegging van die diepste dialektiese motivering van die moderne filosofie, naamlik die (dialektiese) grondmotief van natuur en vryheid (wetenskapsideaal en persoonlikheidsideaal). Dooyeweerd het die idee van 'n "suiwere regsleer" verwerp omdat die sin van die regsaspek van die werklikheid slegs tot uitdrukking kom in die samehang daarvan met ander onherleibare aspekte. In teenstelling tot die relativistiese aansprake van die historisme het Dooyeweerd die onherleibaarheid van elke werklikheidsaspek beklemtoon. Hy het immanente kritiek uitgeoefen op die impasse van 'n staatsleer sonder die staat en 'n regsleer sonder die reg. Ten spyte daarvan dat hyself nog 'n element van die natuurregsleer kontinueer, het Dooyeweerd se benadering die antinomie se posisie van die historisme vermy op basis van die insig dat verandering slegs op die basis van konstanse vasgestel kan word. Die artikel sluit af met 'n oorsigtelike skets van Dooyeweerd se program soos wat dit in sy meerdelige *Ensiklopedie van die regswetenskap* ontvou.

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1. From the Kuyper Foundation to the Free University of Amsterdam

On 2 July 1917, Herman Dooyeweerd defended his dissertation in the discipline of law on the theme *De Ministerraad in het Nederlandsche staatsrecht* [The Cabinet in Dutch constitutional law]. After his appointment as Deputy Director at the intellectual Think-Tank of the *Anti-revolutionary Party* in 1922, the *Kuyper Stichting* [Kuyper Foundation]. Dooyeweerd expanded the scope of his intellectual endeavours by entering into the field of philosophy in general. This widening perspective directed him towards the history of philosophy and, in addition to many other disciplines, to a penetrating interest in the foundation of political and legal philosophy. In the monthly academic journal of the Anti-revolutionary Party, known as *Anti-revolutionaire Staatskunde* [Anti-revolutionary politics], Dooyeweerd soon published an extensive series of articles entitled *In den strijd om een Christelijke Staatskunde* [The struggle for a Christian politics],¹ between 1924 and 1927.

In 1926, Dooyeweerd was appointed as Professor in Philosophy of Law, Encyclopaedia of the Science of Law and Ancient Dutch Law at the Free University of Amsterdam. He succeeded Prof. Willem Zevenbergen who published a work entitled *Formeele encyclopaedie der rechtswetenschap als inleiding tot de rechtswetenschap* [Formal Encyclopaedia of the Discipline of Law as Introduction to the Science of Law] (1925). This appointment laid the foundation for Dooyeweerd's multi-volume work, *The Encyclopaedia of the Science of Law*, which is still in the process of being published as part of the *Collected Works* of Dooyeweerd.²

When Dooyeweerd was appointed at the Free University of Amsterdam in 1926, the development of a new philosophical orientation at the *Kuyper Stichting* was reflected in a comprehensive inaugural address on the theme *The significance of the cosmonomic idea for the science of law and legal philosophy* (Free University, Amsterdam, 15 October 1926). In this address, Dooyeweerd characterises the dominant law ideas operative within the science of law, namely the idealistic-functionalistic type of the Marburg school of neo-Kantianism, the relativistic-personalistic type of the Baden school in neo-Kantian legal theory, and the transpersonalistic type, which revives objective idealism in legal philosophy. Only then does he briefly outline his own approach. Within the domain of philosophy, in general, these two neo-Kantian schools of thought, in particular, dominated the scene at the time.

2. The impossibility of a “pure theory of law”

Hans Kelsen's attempt to establish a *Reine Rechtslehre* [Pure theory of law] prompted Dooyeweerd to reflect on the nature of the jural aspect and

1 This is now available as Vol. 17 of the B Series of the *Collected works* of Dooyeweerd, 2008.

2 The *Introduction* is currently available in print as Series A, Vol. 8/1 (2012).

its interconnections with all the other aspects of reality. From a historical perspective, conceptions of law and justice continued to play an important role in the intellectual legacy of the West. Yet, in the second edition of his Critique of pure reason, Immanuel Kant remarks: “*Noch suchen die Juristen eine Definition zu ihrem Begriffe vom Recht*” [Jurists are still seeking a definition of their concept of law].³

3. The rise of historicism and the problem of indefinability

By the end of the 18th century and the beginning of the 19th, historicism explored the apparent relativity of human (scholarly) insights, with its emphasis on the historical individuality and uniqueness of all human endeavours. Its spirit permeated philosophical thinking during the 19th and early 20th centuries. The emphasis on what is unique and individual immediately highlighted a serious problem, because it confronted the humanities (*Geisteswissenschaften*) with the question: How is it possible to understand and represent the meaning (*Sinn*) of an individualised coherence of life in unavoidably universal categories?⁴ This problem regarding the relationship between universality and what is individual raises another issue facing historicism. It concerns the *indefinability* of the core meaning of the various aspects of reality, including the *jural aspect*. The historical development of language constantly requires a review of the terms employed in designating the core meaning (or meaning-nucleus) of the various aspects of reality. Is the core meaning of an aspect in itself subject to historical change, or does it remain constant amidst all lingualchanges?

3.1 Historical background

Any attempt to come to terms with these problems inevitably requires reflection on a number of perennial philosophical problems as such. Contemplating the relationship between what is universal and individual as well as the problem of *defining* primitive terms are not of a recent origin, since they were already scrutinised in Greek philosophy. Plato assumed universal (supra-sensory) ontic forms, which were transposed into the universal substantial forms of entities by Aristotle. The latter also claimed that educated thinkers should know “of what things one should demand demonstration”: “For it is impossible that there should be demonstration of absolutely everything (there would be an infinite regress, so that there would still be no demonstration)”.⁵

3 Kant 1787:759, footnote.

4 “[w]ie der Sinn eines individuierten Lebenszusammenhangs in unvermeidlich allgemeinen Kategorien erfaßt und dargestellt werden kann” (Habermas 1970:203).

5 Aristotle 2001:737; *Metaphysics* 1006a:8-10.

3.2 Limits to the trust in human understanding

The *Enlightenment* orientation, with its trust in the unbridled capacities of human understanding, assumed an objectivity and neutrality of the (natural) sciences (mathematics and physics). However, if one ultimately has to accept *primitives* (indefinable terms), it is clear that one can only *define* something by employing *indefinable terms*. The irony, therefore, is that a rationalistic epistemic ideal does not even hold in an apparently “exact” discipline such as mathematics, because the problem of primitive (indefinable) terms is also present within this discipline.⁶

4. Not even mathematics is an “exact science”⁷

Intuitionistic mathematics accepts a basic intuition of two-oneness, which splits up in the *discrete* and *continuous*. In his dissertation of 1907, Luitzen Egbertus Jan Brouwer, in the words of John Bell, “regards continuity and discreteness as complementary notions, neither of which is reducible to each other”.⁸ Hermann Weyl, who left the axiomatic formalist school of David Hilbert, underscores the primitive meaning of numerical *succession* when he explains that, from an intuitionistic standpoint, “complete induction” protects mathematics from collapsing into an enormous tautology.⁹ In the Zermelo-Fraenkel axiomatic foundation of set theory, the only primitive term is given in the binary predicate \in , which denotes the membership relation.¹⁰

From the angle of the humanities, Moore similarly holds that there must be primitive terms, terms that are undefinable: “I think we shall see that some terms must be undefinable if anything is to be defined at all”.¹¹

6 From footnote 4 on page 83 of his inaugural address, it is clear that Dooyeweerd informed himself about the foundational problems of mathematics; he refers to Ziehen 1917 and Petzold 1925.

7 This subheading may remind us of Edmund Husserl’s transition from *Platonism* to *transcendental idealism*. His penetrating confrontation with the philosophy of Immanuel Kant led to the opening article in the newly established journal *Logos* (1910) entitled *Philosophie als strenge Wissenschaft* [Philosophy as an exact science]. Of course, although Husserl did not support the classical ideal of a *mathesis universalis* (i.e., a *mathematical science ideal*), he did make a significant remark on the occasion of his 70th birthday celebration, namely that his aim was to do for philosophy what Weierstrass accomplished for mathematics.

8 Bell (2006:217) refers to Brouwer’s dissertation of 1907. In this work, Brouwer (1907:62) states that the “continuum as a whole ... is intuitively given to us”.

9 Weyl 1966:86.

10 Fraenkel *et al.* 1973:22-23, 26-27. Dooyeweerd followed Brouwer and Weyl in their rejection of the actual infinite without realising that his own philosophy provides a sound basis for its acceptance. See Strauss 2011.

11 Ewing 1962:87.

5. The coherence between what is primitive

Of course, the next problem is to explain the *coherence* between what is irreducible. Perhaps the greatest logician of the 20th century, Kurt Gödel, raised this issue. In the words of Yourgrau, he “insisted that to know the primitive concepts, one must not only understand their relationships to the other primitives but must grasp them on their own, by a kind of ‘intuition’”.¹² This position, assumed by Gödel, approximates Dooyeweerd's theory of irreducible modal aspects and their interconnections.¹³ This novel theory incorporates an alternative solution to this problem of the “coherence of what is irreducible”.

6. Intuitive insight

Early in his intellectual development, Dooyeweerd realised that, although the meaning of the *jural function* of reality is unique, it can only be grasped through an *intuitive insight*. Edmund Husserl may have influenced him in this regard. Primitive and indefinable terms leave two options only: to express a tautology (for example, *legal is legal*), or to use terms from non-jural aspects, in which case the target is missed. The first option is meaningful, because it employs a term or word intended to designate the immediate intuitive insight in the (indefinable) meaning-nucleus of an aspect. Moreover, every aspect of reality is not only a *mode of existence*, but may equally well serve as a *mode* or *principle of explanation*. We are used to expressions such as “There is a logical explanation for all of this”, or “Is there an economic explanation for all the losses?”, or “Copernicus, Galileo and Newton introduced motion as a new principle of explanation”, and so on.¹⁴

However, the second option will fail, because it will, in fact, reduce an irreducible mode of explanation to those other modes by which it is explained. Perhaps one of the oldest examples of such a reduction is found in Zeno's arguments against *multiplicity* and *movement*: “Something moving neither moves in the space it occupies, nor in the space it does not occupy”.¹⁵ In this instance, the core meaning of the kinematic aspect of *uniform motion* is defined in *static spatial terms*, which leads to Zeno's antinomies – in this instance, something moving can move if and only if it cannot move.

6.1 An attempted definition of law

Acknowledging the unique meaning of the jural aspect of reality, therefore, entails that its core meaning cannot be *defined*. Dooyeweerd analyses the attempt of a Dutch legal scholar, Leo Polak, to define “law” (“*recht*”)

12 Yourgrau 2005:169.

13 See Strauss 2011.

14 See Stafleu 1987:56-57.

15 Diels-Kranz 1960, B Fr.3.

by examining the key elements incorporated in it. Polak's definition reads as follows: "retribution is an objective, trans-egoistic, harmonization of interests". Now consider each one of these terms. First, the term "objective" implies universality, but does it say anything distinctive or specific about the jural? Since all the other aspects of reality are equally universal, in the sense that whatever exists has either subject functions or subject and object functions within all the modal aspects, each and every one of them displays aspectual universality or *modal universality*. The term "trans-egoistic" is derived from moral (non-self-centred) love. Consequently, this element of the attempted definition does not touch the original jural meaning of retribution. "Harmonization" has an aesthetic meaning and, therefore, misses the core meaning of the jural. In conclusion, the term "interests" may assume multiple connotations, such as when we speak of economic interests, aesthetic interests, legal interests, and so on. This shows that the unique or core meaning of the jural cannot be captured by this term. Polak solely used *non-jural terms* in his attempted definition of "*recht*". The outcome of this attempted definition neglects the qualifying meaning-nucleus of the jural aspect, namely (re-)tribution. Dooyeweerd aptly remarks: "The result is a general concept fully lacking any delimitation. It just as well could have been a moral rule regulating the distribution of alms".¹⁶

7. Political science without the state and legal science without law

The difficulties involved in defining the meaning of the jural form part of the reason why the German scholar, Leonard Nelson (1917), wrote a book with the significant title *Die Rechtswissenschaft ohne Recht* [*The science of law without law*]. This work includes Nelson's reflections on the foundations of constitutional law and the law of nations, and contributes to Dooyeweerd's reaction in his work, *The crisis in humanist political theory*. In addition to a science of law without law, the crisis alluded to also concerns "a theory of the state without a state". According to him, the "most disturbing symptom of the crisis in modern political science is that scholars in general no longer see the essential difference between a science of law without law and a political theory without a state".¹⁷ The general shift from *substance* to *relations* in the natural sciences since the Renaissance also influenced the humanities, because even the state has theoretically been reduced to a functional concept of law (Kelsen).¹⁸

16 Dooyeweerd 1967:10-11.

17 Dooyeweerd 2010:1.

18 See also the work of Siegfried Marck: *Substanz- und Funktionsbegriff in der Rechtsphilosophie* [*Substance-concept and function-concept in legal philosophy*], 1925.

8. The new move towards historicism

According to Dooyeweerd, one of the intellectual forces responsible for uprooting the idea of law and the state is found in *historicism*. This trend in modern philosophy surfaced early in the 19th century, particularly in the historical school of Von Savigny and its followers. This school rejects traditional theories of natural law, from Grotius to Kant, because they were considered to be rationalistic and unable to account for the *historical dynamics* operative in legal developments. In terms of a historicistic approach, two perspectives appear to be unassailable:

- (a) All positive law is intrinsically historical in nature and, therefore, tied to the past with an undeniable link, unable in denying its connection with the past.
- (b) Apart from what historically developed as law, there cannot be a second legal order with an everlasting and immutable content, allegedly deduced in an *a priori* manner from “human nature” or from “human reason”.

Before the end of the 18th century, Novalis (pseudonym of Georg Philipp Friedrich Freiherr von Hardenberg who was an early romantic German philosopher) used the term *historicism* for the first time. By the middle of the 19th century, it was used more widely.¹⁹ But what are the spiritual roots of historicism?

9. The dialectic basic motive giving rise to historicism

Dooyeweerd traces the historicistic spirit of the time to its roots in the rise of the basic motive of *nature* and *freedom* since the Renaissance. The new personality ideal of autonomous freedom observed in the rise of the modern natural sciences (mathematics and physics), the instrument needed to assert itself. He designates these two opposing driving forces as the *science ideal* and the *personality ideal*. But this ground motive entails an inherent dialectical tension, for if the universe in its totality is understood in terms of “mechanical causality”, then human freedom is also reduced to this causal determination. The natural science ideal assumed primacy during the initial phase of modern philosophy. Various alternative modes of explanation successively surfaced during this period, commencing with Descartes’ “*res extensa*” (*extended substance*) and followed by Spinoza, Hobbes (using the concept of a “*moving body*” to reconstruct all of reality according to the plan of human reason), Leibniz (*discrete monads* and the law of *continuity*), as well as Locke, Berkeley and Hume.²⁰

19 See Scholtz 1974:1142.

20 All three are exploring the explanatory power of the sensory mode – recall Berkeley’s *esse est percipi* – *to be is to be perceived* and Hume’s statement “To hate, to love, to think, to feel, to see; all this is nothing but to perceive”) (see Berkeley 1710 Part 1, §3; 1969:66; Hume 1739 Part 1, Section VI; 1962:113).

The views of the Enlightenment philosopher, Immanuel Kant, dominate the late 18th century in attempting to restrict causality to the empirical world of phenomena as the domain of theoretical understanding (the world of appearances). Kant introduces this restriction in order to safeguard the supra-sensory domain of practical reason, in which the human being in its autonomous freedom is an aim in itself (*Zelbstzweck*). According to him, one finds the “thing in Itself” [*das Ding an sich*] behind the appearances. He calls the freedom of the human soul a “thing in Itself”.²¹ This explains why Kant holds that, if appearances are things in themselves, freedom cannot be rescued.²²

Kant distinguishes between understanding as the *a priori* lawgiver for nature, and reason as the *a priori* lawgiver for freedom:

The domain of the nature-concept, subject to the one, and that of the freedom-concept subject to another legislation, are in spite of all mutual influence which they can exert upon each other (each according to its own basic laws), totally secluded by the huge divide which separates the supra-sensory from the appearances. The freedom-concept determines nothing in respect of the theoretical knowledge of nature, and likewise the nature-concept also determines nothing regarding the practical laws of freedom: and it is therefore not possible to erect a bridge from the one domain to the other.²³

10. Historicism between universality and what is individual

Friedrich Meinecke, who has researched the rise of historicism in detail, is aware of this tension. In the introduction to the third volume of Meinecke’s *Collected works*, Carl Heinrichs²⁴ mentions his reaction against the spirit of the time (the second half of the 19th century), as it was dominated by the view that the “universe is in the grip of a firm connection [of] mechanical

21 Kant 1787-B:27-28.

22 “Denn, sind Erscheinungen Dinge an sich selbst, so ist Freiheit nicht zu retten” (Kant 1787-B:564). In the same context, his concern to come to terms with the tension between *nature* and *freedom* is formulated as follows: “My purpose has only been to point out that since the thoroughgoing connection of all appearances, in a context of nature, is an inexorable law, the inevitable consequence of obstinately insisting on the reality of appearances is to destroy all freedom. Those who thus follow the common view have never been able to reconcile nature and freedom” (Kant 1787-B:565).

23 “Das Gebiet des Naturbegriffs, unter der einen, und das des Freiheitsbegriffs, unter der anderen Gesetzgebung, sind gegen allen wechselseitigen Einfluß, den sie für sich (ein jedes nach seinen Grundgesetzen) auf einander haben könnten, durch die große Kluft, welche das Übersinnliche von den Erscheinungen trennt, gänzlich abgesondert. Der Freiheitsbegriff bestimmt nichts in Ansehung der theoretischen Erkenntnis der Natur, der Naturbegriff eben sowohl nichts in Ansehung der praktischen Geetze der Freiheit: und es ist in sofern nicht möglich, eine Brücke von einem Gebiete zu dem andern hinüberzuschlagen.” (Kant 1790-B:53-54).

24 Heinrichs 1965:10.

causality". In his work on the "reason/necessity of the state" ["*Staatsrason*"], this orientation is explicit: "Nature and spirit, law-conformative causality and creative spontaneity are these poles, which as such are sharply and apparently irreconcilably opposed. But historical life, situated between them, is always simultaneously determined by both, even though not with an equal force".²⁵

Initially, it seemed as if this transitional process would succeed in maintaining a sound balance between universality and individuality. According to Meinecke, modern historicism even pursued the task of understanding both the individual structures of historical humanity and the general timeless laws-for-life in their universal interconnections.²⁶

When Meinecke characterises the highest world-view achievement of Goethe in terms of a balance between Heraclitean and Eleatic thought (eternal becoming and eternal being),²⁷ it still seemed as if he was trying to defend a balanced view on universality and what is individual. Neo-Platonism inspired his concern for eternal laws and it reveals an element of continuity with the *Enlightenment*. Yet, in the final analysis, his appreciation of the universal is redirected towards what is individual. Meinecke writes: "Goethe's concept of law was totally different from that of the Enlightenment, completely free from mathematical ingredients."²⁸ He then quotes Gundlof: "Goethe's laws themselves are individuals, delicately, elastic precisely though constantly mobile, mystical inner form forces."²⁹

In his *Introduction* to the first volume of the *Collected works* of Meinecke, we find a striking summary of alternative expressions for the basic dualism in modern thought. Hofer³⁰ speaks of the 'discrepancy' between "spirit and nature, values and causalities, ought to be and is, power and culture".

11. The motive of logical creation behind historicism

The motive of logical creation, operative in modern philosophy since its inception, inspired the natural science ideal to use the idea of a *social*

25 Meinecke 1957:10: "Natur und Geist, gesetzliche kausalität und schöpferische Spontaneität sind diese Pole, die sich als solche scharf und anscheinend unvereinbar gegenüberstehen, aber das geschichtliche Leben, das zwischen ihnen liegt, wird immer gleichzeitig von beiden her, wenn auch durchaus nicht von beiden immer in gleiche stärke bestimmt."

26 "Die individuelle Gebilde der geschichtlichen Menschheit, gleichzeitig aber auch ihren zeitlosen Kern, das Generelle in ihren Lebensgesetzen, das Universale in ihren Zusammenhängen zu erfassen, ist Wesen und Aufgabe des modernen Historismus" (Meinecke 1957:22).

27 Meinecke 1965:503: "So besteht Goethes höchste Weltanschauliche Leistung darin, daß er heraklitisches und eleatisches Denken, ewiges Werden und ewiges Sein verschmolz – 'Dauer im Wechsel'".

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

29 Meinecke 1965:504: "Goethes Gesetze sind selbst Individuen, dehnbare feine, dem immer beweglichen eben geheimnisvoll inwohnende Formkräfte.."

30 Hofer 1957:15.

contract to reconstruct human society from its simplest elements, the *individuals*. The result of such an atomistic approach, fruit of the science ideal, was that no limits could be set for the competence of the state. It moved from the extreme position of Locke, *laissez-faire*, *laissez-passer* (as little government interference as possible), to the totalitarian authority of the *general will* in Rousseau's contract theory.

The political philosophy of John Locke and the conceptions of the classical school in economics (Adam Smith and his followers) were both directed by the natural science ideal. This is clear from what Viner stated:

The claim to fame of Smith in the first place therefore appears to have a foundation, because he has applied the conception of a uniform, natural order just as comprehensively to the world of economics; an ordering that functions on the basis of a natural law and, if left to its own functioning, will be beneficial to humankind.³¹

Although Rousseau commenced in an atomistic way, he held that the contract produces a moral-collective whole, transforming each individual into an indivisible part of a new (universalistic) whole – the “body politic”, the “*volonté générale*”. With law turned into an expression of the general will manifesting itself within the state only, Rousseau – in spite of his apparent intention to secure individual and societal freedoms – succumbed to a totalitarian and absolutistic view in which those who are not conforming to the general will (which is supposed to be their own will – since freedom is defined as obedience to a law that we have prescribed to ourselves) will be “forced to be free”.³²

In his work on *The crisis in humanist political theory*, Dooyeweerd points at the humanistic personality ideal beneath the crisis of humanist political theory. As long as this ideal manifests itself in the mathematical science ideal, humanist legal and political theory appear to have a firm foundation in the supposedly eternal practical truths of reason.

The state and its authority were accounted for in terms of mathematical thought and men had an optimistic view of the possibility to shape all of life in conformity with the eternal truths of reason. Although already affected by a bitter scepticism about the value of the science ideal for a genuine development of the personality, Rousseau proclaimed his rationalist theory of popular sovereignty and its *volonté générale* (general will) with the old optimism about the sovereignty of mathematical thought.³³

On the next page, Dooyeweerd lifts out historicism and positivism as important role players challenging the rationalist faith in reason: “This rationalist faith in eternal truths of reason, on which both state and law were supposed to be founded, has been drastically upset since the

31 Viner 1956:92.

32 Rousseau 1975:246: “... ce qui ne signifie autre chose sinon qu'on le forcera à être libre” [“... This means no less than that such a person would be forced to be free.”]

33 Dooyeweerd 2010:30.

nineteenth century by the tidal wave of historicism and positivism.”³⁴ In fact, other prominent legal scholars within the field of political theory, such as Hermann Heller and Carl Schmidt, also sensed this impasse.

12. Discerning the crisis in political theory

Heller speaks of the:

current political degeneration of the idea of the just state [which obstructs] a clear understanding of the meaning of the concept of law in the just state [*Rechtsstaat*]. ... today contemporary science of constitutional and administrative law distinguishes between two concepts of law in the same way as it distinguishes between a formal juridical idea of the just state and a material one, which it calls “political”. At bottom, it knows no more how to deal with the material idea of the just state than how to deal with the material concept of law.³⁵

Schmitt puts it as follows:

All other characteristics of law as a substantial, rational, just and wise command have today become relative and problematic; the natural-law faith in the law of reason and the rationality of law has largely collapsed. What saves the constitutional state from utter dissolution into the absolutism of shifting parliamentary majorities is a mere lingering remnant of respect for this general character of law.³⁶

13. Dooyeweerd's reaction to historicism

How did Dooyeweerd respond to the claims of historicism? His first novel move is given in the way in which he transformed the traditional distinction between *entities* and *properties*. While avoiding a substance theory and a bundle theory of entities, his new view embedded all natural and societal entities within cosmic time, which is understood in an all-encompassing sense, not restricted to any specific modal aspect distinguishable within reality. Physical time is not the only *mode of time*. Kant already identified the three modes of time lying at the foundation of physical time, namely (numerical) *succession*, (spatial) *simultaneity* and (kinematic) *persistence* or *endurance* (uniform, rectilinear motion).³⁷ Within each aspect, cosmic time comes to expression by “adapting” itself to the peculiar nature of the aspect concerned. There is a strict correlation between time-order (appearing on the law side of an aspect) and time duration (appearing on the factual side). For example, whereas all living entities are subject to the biotic time order of birth, growth, maturation, ageing and dying, they may

34 Dooyeweerd 2010:31.

35 Heller 1928:115.

36 Schmitt 1928:156. See Dooyeweerd 2010:36.

37 “Die drei modi der Zeit sind Beharrlichkeit, Folge und Zugleichsein.” [“The three modes of time are endurance, succession and simultaneity”] (Kant 1787-B:219).

differ widely in their respective life expectations, from one year to several thousands of years.

The integral temporal *process of becoming* functions in all aspects of reality and should not be confused with any one of them. The cultural-historical aspect should, therefore, be carefully distinguished from all the other aspects of temporal reality as well as from the encompassing process of becoming. In Germanic languages, two distinct words distinguish between the cultural-historical aspect and the concrete, multi-aspectual historical events, namely “*historie*” and “*geschiedenis*”.

Historicism has the positive merit of drawing our attention to the historical relativity of events, but unfortunately it attempts to reduce everything to the cultural-historical aspect. As noted earlier, Dooyeweerd was confronted by the struggle between natural law and historicism during the 1920s. The former orientation accepts universal principles as (supposedly) valid for all times and places, rooted in human reason, whereas the latter emphasises historical changefulness and contingency at the cost of constancy and universality.

14. Giving positive form to universal, constant principles

Human beings have the competence to give a positive shape and form to universal, constant principles in varying historical circumstances. This orientation indeed assumes an important role in overcoming the one-sidedness present both in natural law conceptions, on the one hand, and in historicism, on the other. Being mere products of human cultural formation, no single particular positive shape (designated as a positivisation) may be elevated to the level of the underlying conditioning principle. In this way, the shortcomings of natural law theories could be avoided for they postulated principles that are supposedly already applied or valid (in the sense of being positivised) for all times and places. Moreover, it also avoids historicistic approaches, i.e. approaches denying the existence of universal and constant principles, for historicism acknowledges only historically varying shapes and formations.

15. Ontic normativity

A key element in understanding Dooyeweerd’s approach is his emphasis on *ontic normativity*. Although scholars may differ about specific principles or norms, the presence of contraries in all the normative aspects of reality testifies to the normative character of these aspects. The first modal aspect within which we encounter such a normative contrary is the logical-analytical aspect: logical – illogical. All the subsequent contraries analogically reflect the meaning of this foundational contrary. Consider contraries such as historical-un-historical; clear-confused; polite-impolite; economic-un-economic; beautiful-ugly; legal-illegal; moral-immoral, and

belief-unbelief. One may differ about the precise meaning of any of these contraries, but one cannot deny their existence.³⁸

16. Historical change at the cost of constancy

Just like every other *ism*, historicism attempts to reduce the rich diversity of ontic aspects within reality to only one of them. The basic position of historicism concerns the claim that everything is embraced within the ongoing process of change. The supposedly universally valid construction of reality by the human subject eventually also became a victim of the relativistic consequences of this historicism which claims that moral standards, legal norms, aesthetic values and religious convictions are all caught up in the ever-flowing stream of historical change. In 1922, Troeltsch declared: "We see here everything in the flow of change, in endless and constantly new individualization, in its being determined by the past and in the direction toward an unknown future. State, law, morality, religion and art are dissolved in historical change and they are everywhere only understandable as ingredients of historical developments."³⁹

However, the ultimate historicistic claim that "everything *is* history" is intrinsically antinomic. Equating history with historical change inevitably terminates in the conviction that law, morality, language, etc. *is* history. It leads to well-known statements such as that *everything is always changing*, that *everything is constantly changing*. Although the emphasis appears to be on *change*, the unnoticed word accompanying the prominence of change reflects the awareness of endurance, persistence, or constancy – compare the presence of terms such as "always" and "constantly". One of the well-known legal philosophers of the previous century, the Italian Giorgio Del Vecchio, acknowledges that law is determined by the flow of changing events. Yet he points out that building upon the changefulness of reality renders it impossible to delineate the concept of law.⁴⁰ The possibility to subsume diverse legal phenomena under a higher concept is

38 Where Carl Schmitt holds the view that "political enmity" is original and not reducible to other *spheres of value*, such as the ethical, the aesthetic or the economical, he accounts for the nature of contraries in his own way. Vinx (2010) explains it as follows: "The ethical, for example, is based on a distinction between the morally good and the morally bad, the aesthetic on a distinction between the beautiful and the ugly, and the economical on a distinction between the profitable and the unprofitable. The political distinction between friend and enemy is not reducible to these other distinctions or, for that matter, to any particular distinction – be it linguistic, ethnic, cultural, religious, etc. – that may become a marker of collective identity and difference".

39 "Wir sehen hier alles im Flusse des Werdens, in der endlosen und immer neuen Individualisierung, in der Bestimmtheit durch Vergangenes und in der Richtung auf unerkanntes Zukünftiges. Staat, Recht, Moral, Religion, Kunst sind in den Fluss des historischen werdens aufgelöst und uns überall nur als Bestandteil geschichtlicher Entwicklungen verständlich." (Troeltsch 1922:573)

40 "Hieraus ergibt sich die Unmöglichkeit, auf dieser veränderlichen Wirklichkeit aufzubauen, um den Rechtsbegriff festzulegen" (Del Vecchio 1951:345).

made possible by the fact that they are all *legal* configurations: “In order to achieve this, we already had to have a concept of the essence of law which is distinct from all changes in content and which embraces them all.”⁴¹

The legitimate insight present in Del Vecchio’s arguments is that changing contents do presuppose an *enduring* (“unchanging”) element. Change can only be detected on the basis of constancy. Yet the claim that the constant element is given in our *concept of law* ignores what is obvious, namely the *constant ontic structure* of the *jural aspect* of reality itself. Our concept of law may also be subject to continuous change, but it is made possible by the ontic status of the legal facet of our experiential world. Dooyeweerd’s argument is that it is not the concept of law that makes possible our legal experience, but the jural aspect itself, which is not the *product* of human contemplation.

Precisely because the jural aspect is distinct from the cultural-historical aspect are we able to speak of *legal history*. Phrased differently: history is only possible of something a-historical in nature, that is to say of what is intrinsically not changeful in a historical sense. Whatever *has* a history cannot itself *be* history.⁴² History is always the history of something (a *state*, a *firm*, an *ethnic community*, and so on) or the history of an aspect (legal history, *social* history, *aesthetic* history, *intellectual* history, and so on). If law is an intrinsic historical phenomenon, then it would have “happened” somewhere in the past, leaving the present and future without the jural aspect of reality!

As in the case of all *ismic* orientations – such as the Pythagorean “everything is number” or the postmodern “everything is interpretation” – the irony of radical historicism is that it achieves the opposite of what was aimed for – if everything *is* history, there is nothing left that can *have* a history. The communist ideal in Russia was that everyone would possess everything, but the tragic irony was that no one of the proletariat owned anything. Hans Jonas refers to *constancy* as something *transhistoric* or *a-historic*.

And so we have the paradox that the advocates of radical historicism must arrive at the position of complete a-historicism, at the notion of an existence devoid of a past and shrunk to a now. In short, radical historicism leads to the negation of history and historicity. Actually, there is no paradox in this. For history itself no less than historiography is possible only in conjunction with a transhistoric element. To deny the transhistorical is to deny the historical as well.⁴³

41 “Um dies tun zu können, müssen wir aber bereits einen Begriff vom dem Wesen des Rechts besitzen, der von allen Wandlungen seines Inhalts verschieden und ihnen allen überlegen ist” (Del Vecchio 1951:345).

42 See Dooyeweerd 1935:164-165; Dooyeweerd 1997-II:223.

43 Jonas 1974:242. The impasse of historicism was ultimately also recognised within hermeneutical circles. In his discussion of the problem of universality, Grondin (1974:10) considers “the universal validity of some proposition”. If this is the case, “it would be easy to show that hermeneutics is stuck in a logical or pragmatic

We have noted that within the discipline of law historicism emerged as a reaction against traditional theories of *natural law*. Henk Hommes, the successor of Dooyeweerd, characterises 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.⁴⁴

17. The universal validity of jural principles: An element of natural law in the thought of Dooyeweerd

The combined legacy of natural law conceptions and historicism prompted Dooyeweerd to introduce an alternative view by distinguishing between *principles* and the way in which they are given a *positive shape* in the course of historical development. But, strangely enough, Dooyeweerd did not fully escape from the terminology of the natural law tradition, because he continues to speak of *universal validity* as a characteristic feature of principles – without realising that, insofar as principles are universal and constant (i.e., pre-positive), they are not yet valid (i.e., not yet positivised), and insofar as principles are given a positive shape and form (i.e., are positivised), they have lost their unspecified (pre-positive) universality.⁴⁵

Flowing from their modal universality, the norming principles within each normative aspect have an unspecified universal scope. For example, all human beings have to obey logical-analytical principles such as the principles of identity, non-contradiction, the excluded middle and the principle of sufficient reason (ground). However, different languages in their functioning within the analytical aspect specify the latter in *typical ways*, sometimes limited or restricted to one language only.⁴⁶

contradiction". He proceeds by remarking: "Some have tried to construe the universal claim of hermeneutics as climaxing in the thesis that everything is historically conditioned." This thesis is then "supposed to be universally valid". But if it is "meant to apply universally, then it must apply to its own claim, which must itself be historically limited and therefore not universal". Finally, the "universal claim of hermeneutics is thus considered self-contradictory".

44 Hommes 1961:55.

45 Habermas implicitly continues the same legacy, for his legal and political philosophy is presented in terms of the distinction between validity (*Geltung*) and positivity (*Faktizität*) (see the title of Habermas' 1998 work). Positivisations always display a specified universality because they were *made valid, enforced*.

46 The double negation in the Afrikaans language, for example, generates a logic peculiar to the language itself. Relatively young children (3-5), who display a clear sense of logical consistency and logical soundness, will answer questions expressed in terms of the double negation in Afrikaans with "yes", where older children and adults, who matured lingually to such an extent that they are "at

18. Modal laws and type laws

Modal laws always concern all possible subjects – their modal universality – whereas *type laws* hold for a limited class of entities only – their *specified universality*. Dooyeweerd designates the modal aspects according to their law sides as *law spheres* and he calls type laws *individuality structures*.

General modal principles encompass whatever functions within the various aspects. Whoever is involved in juridical relationships has to observe the principle of avoiding jural excesses, i.e., such a person ought to obey the principle of *juridical economy*. But, as a result of their distinct type laws, a business enterprise and a state specify their functioning in the economic sphere distinctly – *profit* differs from the raising of *taxes*.

Within the domain of penal law, an alternative specification of the principle of jural economy is found, in traditional societies expressed as the *lex talionis* (a tooth for a tooth and an eye for an eye). In the introductory volume to his multi-volume *Encyclopaedia of the science of law*, Dooyeweerd considers the not-yet-disclosed meaning of this principle. The economic analogy on the norm side of the jural aspect does not allow for assigning an excessive significance to particular legal interests. He points out that the principle of *lex talionis* already entails an attempt to avoid any excesses in criminal legal practices – in service of the principle of retribution. This means that sanctions ought to be kept within the boundaries of proportionality. When the legal awareness of a juridical system is not yet disclosed by the principles of juridical morality, such as the fault principle of penal law which is differentiated in intent (*dolus*) and negligence (*culpa*), the principle of equity, the juridical personality principle, the principle of *bona fides*, and so on, criminal law is still ruled by the consequences of the deed by taking into account the intention of the person responsible for the particular effect. Excessive retaliation violates the jural principle, requiring from those who are participating in legal life to avoid what is disproportionate in a jural sense. In traditional societies, as Dooyeweerd explains,

the economic analogy in the meaning of law is already strongly expressed where murder, for instance, is punished with the death penalty. According to the strict principle of *talio*, the punishment is carried out as far as possible in the same manner as the crime, for example, where causing disfigurement is requited with the inflicting of a similar disfigurement. Also, the submitting of successive generations' blood-vengeance to the primitive principle of retribution leads immediately to prohibition of excesses and substitution of blood-vengeance by the demand for proportionate retribution.⁴⁷

The concept of jural economy is intimately related to the idea of distinct spheres of legal competence present within a differentiated society. This

home” with the (apparently “illogical”) double negation, would say “no”. In Afrikaans, one may ask: “Is jy nie honger nie?” [“Aren’t you hungry?”]. A young child will answer yes whereas more mature language users would say *no*.

47 Dooyeweerd 2012:111-112.

connection is particularly manifest in the sources of law, because a specific source often intertwines materially distinct spheres of law. Just consider the constitution of a parliamentary democracy, which serves as the formal source for positivised principles of civil private law, constitutional law, penal law and criminal procedure law.

As a consequence of the fact that *change* can only be established on the basis of *constancy*, Dooyeweerd emphasises that neither modal principles nor typical principles are the product of human creation. The organs acting within a specific sphere of law are rather subject to these principles and are only entitled to positivise them in unique historical situations by virtue of the competency embedded in the particular office which such a competent organ occupies.

19. Historical continuity and juridical continuity

In order to elucidate this issue, Dooyeweerd pays attention to the difference between historical continuity and juridical continuity. A revolution may not necessarily cause a break in historical continuity, but of necessity entails a disturbance of juridical continuity. Although a revolution is sometimes depicted as a “juridical miracle”, supposedly because it may create a just order from what is unjust, Dooyeweerd warns that this idea is mistaken in principle because the “unjust can never give rise to the just”. Just positive law only exists within a super-arbitrary *material* sphere of competence, and “juridical discontinuity only interrupts the formal validity of laws”. But the presupposition of all formation of law is given in the constant material spheres of competence that are not a product of human arbitrariness. They are “limited by the individuality-structures of the distinct societal forms”. Dooyeweerd concludes that both “juridical positivism and relativistic historicism eliminate the constant structural laws of the transient societal forms and therefore, in the final analysis, have to take refuge in a ‘juridical faith in miracles’”⁴⁸ [namely that what is just could emerge from what is unjust through a revolution]. In its view of revolutionary law-formation, legal positivism must hold that what is “just” is generated from what is “unjust”, whereas relativistic historicism considers what is “just” to originate from “power”. Dooyeweerd remarks that precisely at this point is seen “the significance of the theory of law-spheres and individuality-structures for legal and political theory”.⁴⁹

20. A concise assessment of historicism and Dooyeweerd's alternative approach

We have noted that Dooyeweerd holds that historicism emerged in a process of spiritual uprooting which, according to him, cannot be understood apart

48 Dooyeweerd 1938:39-40.

49 Dooyeweerd 1938:40.

from the entire dialectical path of development which the dominating humanistic basic motive of nature and freedom underwent since the Renaissance. In addition, Dooyeweerd remarks that the deadly ailment of Western culture comes to expression in Spengler's "Der Untergang des Abendlandes" ["The Decline of the West"], in Heidegger's "Sein und Zeit" ["Being and Time"], and in Sartre's "L'être et le néant" ["Being and nothingness"].

Against this background, Dooyeweerd therefore characterises modern uprooted historicism as "a polar reaction against the classical science-ideal of the "Enlightenment" with its natural scientific model of thought". He does this in an extensive article written in 1949, in which he provides a concise analysis of the historicistic presuppositions operative in our thought on state and law. This analysis is a reaction to Scheltema's dissertation "Perspectives on the pre-suppositions of our thought about law and the state".⁵⁰

In reaction to the historicistic levelling of structures, Dooyeweerd introduced basic distinctions without ever denying the *relativity* of fallible, provisional and improvable human insights. But, since relativity and change are always conditioned by underlying elements of constancy, acknowledging relativity does not necessarily entail *relativism*.

The alternative road explored by Dooyeweerd was first to develop a completely novel theory of modal aspects⁵¹ and, on this basis, he proceeded to an analysis of the various individuality structures.⁵² This enabled him to exercise immanent criticism on historicism and to develop an insightful understanding of the ontic status of modal and typical principles. By considering the implications of the principle of sphere-sovereignty, he succeeded in accounting for the uniqueness and coherence between the various aspects of reality, while accepting the limitations of concept and definition in respect of the primitive terms residing within the various modal aspects. Furthermore, once ontic normativity is seriously contemplated, the constitutive features of modal principles surface: every modal principle (such as the above-mentioned principle of jural economy) is a universal and constant point of departure for human actions that can only be made valid (enforced, positivised) by a competent organ with an accountable free will.

21. Dooyeweerd's systematic programme

Dooyeweerd first wanted to test his new philosophical view within his own field of scholarship before presenting it in a general philosophical form.

As a result, he commenced by investigating the idea of an *Encyclopaedia* as well as the history of reflections on the concept of law.⁵³ He then proceeded to analyse the analogical (or elementary) basic concepts of the

50 See Dooyeweerd 1949:195-202.

51 See Vol. II of Dooyeweerd 1997.

52 See Vol. III of Dooyeweerd 1997.

53 See Vol. 1 of his *Encyclopaedia of the science of law*.

science of law. The second Systematic Volume covers these elementary basic concepts, namely the concept of a *legal order* [juridical unity and multiplicity – a numerical analogy within the structure of the jural aspect], *legal sphere* [spatial analogy], *jural constancy* [an analogy of uniform motion] and *legal validity* [physical analogy].

These analogies are expressions of constitutive structural moments within the modal structure of the jural aspect. For this reason, they are treated as elementary basic concepts by Dooyeweerd, and also designated as analogical basic concepts of the discipline of law.

We also mention the remaining elementary basic concepts, while first elaborating on the physical analogy to a certain extent. This analogy not only concerns the basic concept of *legal validity*, but also those of *legal operation*, *legal ground* and *legal effect*, and factual *jural causality*. Subsequently, we have the concept of *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* (positivisation) 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 *harmonisation* of interests [aesthetic analogy within the jural].

Dooyeweerd analyses the deepened jural-ethical principles of justice (belonging to jural morality) such as the *fault* principle in criminal law in both its forms (*dolus = intent* and *culpa = negligence*), *equity*, *bona fides*, and so on. On this basis, he then analyses the complex or compound basic concepts of the discipline of law. This includes his treatment of the concept of a *legal subject*, the doctrine of a *legal personality*, the compound concept of a subjective legal right, the concept of a legal object, and the compound concept of juridical time.

Only after a penetrating discussion of these complex concepts, including extensive historical digressions, does he proceed to the typical concepts: the state and the distinction between *public law*, on the one hand, and *civil* and *non-civil private law*, on the other. The final Volume of the *Encyclopaedia of the science of law* is dedicated to the theory of the *sources of law*.

Being confronted by the historicistic spirit of the first part of the 20th century, Dooyeweerd was inspired to produce a lasting legacy articulated in highly original and innovative distinctions and systematic analyses. It is certainly not surprising that Giorgio Del Vecchio appreciated Dooyeweerd as “the most profound, innovative, and penetrating philosopher since Kant”.⁵⁴

54 Dooyeweerd 1996:1.

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