A PHILOSOPHICAL APPROACH TO LAW AND RELIGION: BACKGROUND CONSIDERATIONS

Danie Strauss

One interpretation of the theme “Law and Religion in Africa” may be to juxtapose the political community and faith communities in such a way that “law” belongs to the former, but not to the latter. In such an approach, the focus is on state-law and its relation to religious communities. Alternatively, one say that “law” is given to the state and “religion” to faith communities. Of course the fundamental issue, on the one hand, is whether state-law can be delimited in such a way that the religious freedom of diverse faith communities is guaranteed and, on the other, what the role of the state ought to be in respect of protecting the legal interests of diverse denominations. The continuing spreading of Christianity in Africa promises fruits similar to the historical significance of Christianity for the rise of a just state (Rechtsstaat).

THING CONCEPTS AND FUNCTION CONCEPTS

It may be beneficial to commence with our everyday experience of the difference between entities and the concrete way in which such entities function within all the aspects of reality. Within all academic disciplines one encounters both entity concepts (thing concepts) and function concepts. The former concern what questions, and the latter how questions. Within the discipline of physics, for

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2 The word “religion” may be used in two different but related senses: (1) it may refer to the radical, central and integral depth dimension of creation, touching the heart of being human and therefore giving direction to all the issues of life proceeding from this core dimension; (2) it may designate one amongst the many articulations of life, familiar to us in faith and confessional activities found alongside all the other differentiated issues of life (see Proverbs 4:23). One may reserve the word religion for (1) and faith for (2), or alternatively employ the expressions religion-1 and religion-2. In English, the word religion is normally used to designate only the faith function of reality and activities qualified by it, so-called “religious endeavours.” The important distinction is therefore between religion-2 (understood in the aspcausal sense of faith), and religion-1 in its life-encompassing radical and integral sense, where radical means touching the root of human existence, and integral means embracing all of life. However, in the text we will simply use the term “religion/religious” when it is clear from the context whether religion-1 or religion-2 is intended.
3 Identifying a chair responds to the “what” question. Then one can proceed by asking “how” questions, such as: how many legs does it have (regarding its numerical aspect), how big it is (spatial), how strong it is (physical), how comfortable it is (sensory), etc. The idea of an aspect as a mode of reality is derived from the Latin expression modus quo which implicitly refers to the how of entities and not to their concrete (many-sided) what.

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example, one may think of *thing concepts* such as elementary particles, atoms, molecules, macromolecules, macro-systems, galaxies and so on. *Function concepts* present within this discipline are concepts such as energy-constancy (the first main law of thermodynamics), mass, volume, entropy (think of the second main law, the law of non-decreasing entropy), gravitation, and so on. In the field of biology, systems of classification concern living entities (such as plants, animals and humans – *thing concepts* with all the subdivisions moving from phyla, classes, orders, families, genera to species), while biological *function concepts* are concerned with properties such as being alive, growth, maturation, adaptation, differentiation, integration, and the like. This pattern encompasses the phenomena considered within the science of law and theology as well and it can help us to understand the various meanings attached to the terms “law” and “religion.”

In the second footnote above, we mentioned that one meaning of the term “religion” concerns “one amongst the many articulations of life, familiar to us in faith and confessional activities found alongside all the other differentiated issues of life.” This meaning of religion relates to an *aspect* or *mode of being* (function) within reality. It is a *certitudinal* aspect should be distinguished from the *non-certitudinal* aspects, among which we find the *jural aspect*, normally also designated with the term “law.” Of course, the latter word is also employed to refer to concrete legal phenomena, such as statutory laws, promulgated in parliament and captured in printing, which are belonging to the entitary dimension of reality, enabling the formation of thing concepts. However, it is crucial to realise that the concept of the jural also concerns a *function concept*. This jural concept of function differentiates into a multiplicity of legal function concepts, such as legal lawfulness and unlawfulness, jural causality, legal life, a legal order, a legal organ, a jural sphere of competence, jural desires (the jural will function), legal formation (giving shape to jural principles in concrete historical situations), juridical interpretation (legal hermeneutics), legal intercourse and legal harmony. A proper concept of the jural function of reality, therefore, should incorporate and embrace all these elements. Interestingly, the same applies to the faith or *certitudinal* aspect of reality, because the meaning of this aspect equally comes to expression in basic fiduciary function concepts, such as certitudinal identifying and distinguishing, certitudinal sensitivity, certitudinal life, certitudinal order, certitudinal grounds and effects (causality), certitudinal interpretation (hermeneutics), certitudinal interaction, certitudinal frugality, certitudinal fairness, certitudinal integrity, certitudinal justice, and so on. (See Figures 1–3).
Figure 1: Spheres of law within a differentiated society

Public law, civil private law and non-civil private law

Faith communities

Civil law coordinates individuals and communities on equal footing next to or in opposition to each other

Nuclear families, marriage, business enterprises, primary & secondary schools, universities

Civil private law protects the personal freedom of the individual apart from participating in diverse societal totalities

Individuals, individuals, individuals

Public law (State)

Civil law coordinates individuals and communities on equal footing next to or in opposition to each other

Individuals, individuals

Marriage

Non-civil private law: The spheres of law intrinsic to non-political communal and collective entities – where individuals are functioning as parts of larger societal wholes

Universities

Constitutional law, administrative law, penal law, criminal process law (characterised by the super- and subordination relation between government and citizen)

Primary & Secondary schools

Individuals
Figure 2: The various aspects and entities within creation

<table>
<thead>
<tr>
<th>Law-spheres (Aspects)</th>
<th>Meaning-nuclei</th>
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<tbody>
<tr>
<td>Certitudinal</td>
<td>certainty (to be sure)</td>
</tr>
<tr>
<td>Ethical</td>
<td>love/truth</td>
</tr>
<tr>
<td>Juridical</td>
<td>(re)tribution</td>
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<tr>
<td>Aesthetical</td>
<td>beautiful harmony</td>
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<tr>
<td>Economical</td>
<td>frugality/avoid excesses</td>
</tr>
<tr>
<td>Social</td>
<td>social intercourse</td>
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<tr>
<td>Sign-mode</td>
<td>symbolical signification</td>
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<tr>
<td>Cultural-histroical</td>
<td>formative power/control</td>
</tr>
<tr>
<td>Logical</td>
<td>analysis</td>
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<tr>
<td>Sensitive-psychical</td>
<td>sensitivity/feeling</td>
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<tr>
<td>Biotic</td>
<td>organic life</td>
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<tr>
<td>Physical</td>
<td>energy-operation</td>
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<tr>
<td>Kinematic</td>
<td>Uniform motion constancy</td>
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<tr>
<td>Spatial</td>
<td>Continuous extension</td>
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<tr>
<td>Numerical</td>
<td>discrete quantity</td>
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</tbody>
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Foundational function of church, state and business

Qualifying function
Figure 3: The coherence between the jural and non-jural aspects of reality

<table>
<thead>
<tr>
<th>ASPECTS</th>
<th>RETROCIPATIONS AND ANTICIPATIONS</th>
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<tbody>
<tr>
<td>Faith aspect</td>
<td>Jural/legal certainty (trust)</td>
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<tr>
<td>Ethical aspect</td>
<td>Jural/legal morality (fault, good faith, etc.)</td>
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<tr>
<td>Jural aspect</td>
<td>[Meaning-nucleus: retribution]</td>
</tr>
<tr>
<td>Aesthetic aspect</td>
<td>Jural/legal harmony</td>
</tr>
<tr>
<td>Economic aspect</td>
<td>Jural/legal economy (avoiding excess)</td>
</tr>
<tr>
<td>Social aspect</td>
<td>Jural/legal interaction</td>
</tr>
<tr>
<td>Linguai aspect</td>
<td>Jural/legal signification and interpretation</td>
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<tr>
<td>Cultural-historical aspect</td>
<td>Jural power/legal competence</td>
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<tr>
<td>Logical-analytical aspect</td>
<td>Jural lawfulness and unlawfulness (consistency)</td>
</tr>
<tr>
<td>Sensory aspect</td>
<td>Jural/legal sensitivity (intention, will)</td>
</tr>
<tr>
<td>Biotical aspect</td>
<td>Jural/legal life</td>
</tr>
<tr>
<td>Physical aspect</td>
<td>Jural/legal dynamics (causality)</td>
</tr>
<tr>
<td>Kinematic aspect</td>
<td>Jural/legal constancy/movement (transfer, conveyance)</td>
</tr>
<tr>
<td>Spatial aspect</td>
<td>Jural/legal sphere, jurisdiction, ambit</td>
</tr>
<tr>
<td>Arithmetical aspect</td>
<td>Jural/legal order (unity &amp; multiplicity)</td>
</tr>
</tbody>
</table>

On the basis of these distinctions, it should be clear that it is incorrect to assign the jural aspect to the state and the fiduciary aspect to faith communities. We have to consider two perspectives. First of all, the scope of any aspect (including the jural and fiduciary aspects) exceeds whatever may function within it. And in the second place, whatever functions within all aspects of reality never exhausts (“fully occupy”) anyone of these aspects, simply because many other kinds of (natural and social) entities also function within these aspects. The implication is that every state, in principle, functions in all aspects of reality, including the jural and the certitudinal aspects. Likewise, every faith community equally functions in all aspects of reality, the jural and certitudinal modes included. This entails that a state embraces its government and subjects (citizens) who may have diverging convictions regarding a just public legal order aiming at securing that each citizen receives its due. It is on this basis only that the highly responsible task of governing a country could be entrusted to its office-bearers. Terms like “trust”, “certainty” and “faith” are synonymous. The certitudinal or fiduciary aspect of reality – the faith aspect – is therefore not foreign to the existence of the state. Apart from party political differences, mutual trust between government and subjects is an important ingredient of a stable state organisation. And every political party operates on the basis of a specific political confession of faith (its credo). That faith communities also function within the jural aspect of reality is amply seen in their certitudinal competence.
to give shape to their own internal legal order, manifest in ecclesiastical law. But before we can articulate the implications of these basic distinctions more fully, other related issues have to be dealt with first, commencing with the distinction between undifferentiated societies and differentiated societies.

**UNDIFFERENTIATED SOCIETIES AND DIFFERENTIATED SOCIETIES**

Traditional undifferentiated societies display an undifferentiated form of organisation, which means that they do not have distinct societal institutions with their own differentiated responsibilities. This is found in the extended family, the sib or clan and the tribe. These undifferentiated units collectively act in different capacities – now as what we today will call a political entity, then as what we today may identify as an independent faith community (a cultic entity) and later on as what we could now designate as a business enterprise (hunting or farming). Undifferentiated societies do not know and therefore cannot legally protect any religious freedom.

The subsequent history of reflection on state and society shows that attempts to delimit state-law were unsuccessful. By and large Greek-medieval conceptions of human society were in the grip of a universalistic (holistic) view. Such a view assumes one or another societal *whole* as encompassing all the others as mere *parts* of it, oftentimes accompanied by an idea of lower and higher (in the thought of Aristotle the lowest part is the household, superseded by the extended family, the village and the *polis*). Plato gave shape to the same idea in terms of the three estates of his ideal state (hand-workers, soldiers and the philosopher-kings). Thus Plato and Aristotle elevated the (city-)state (*politeia*/*polis*) to pursue the encompassing aim of moral perfection attainable only in the *polis*.

Roman law developed from a similar undifferentiated condition, because initially the *ius civile* was a life-encompassing folk-law disposing with an absolute power over all its members, leaving non-members lawless, without any rights (*exlex, hostis*). With the rise and expansion of the Roman Empire, more and more non-Romans prevailed on its territory, prompting a need to make legal provision for them in what became known as the *ius gentium*. This jural domain actually forms the starting-point of modern civil law and should therefore not be confused with the law of nations. The remarkable fact, however, is that by and large until the latter part of the eleventh century, as Berman remarks, “the basic contours of the folk-law remained tribal and local, with some feudal elements”.

Even medieval guilds evinced an undifferentiated structure similar to what is present in the extended family and sib although there is no longer a real or fictitious common descent. The effect of this relatively undifferentiated

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situation was that within the feudal system portions of governmental authority were still divided over cities, guilds and market communities.

PROVISIONAL ASSESSMENT OF THE INTERTWINEMENT OF STATE AND CHURCH

In our historical overview below we shall return to the fact that, in the medieval conception, the state was merely seen as a temporal portal to the church as supra-natural institute of grace, where both these spheres, nature and grace, were totalitarian because the state and/or the church featured as the all-encompassing whole of society.

Within medieval Anglo-Saxon law taking vengeance, waging a feud and practicing the blood-price are prevailing actions which are also found in “Frankish law and the laws of all the peoples of Europe between the fifth or sixth and the tenth or eleventh centuries.” Similar undifferentiated structures are present in thirteenth-century English law, such as the land estate which is also known as the manor. The legal competence of a manor, as pointed out by the Dutch political theorist Herman Dooyeweerd, includes the capacity to issue legal summonses and ordinances which embraced almost all spheres of society. He also mentions the fact that the owners of large feudal land holdings were endowed with privileges giving them the legal right to act as lords over every person domiciled on their estates and adds the remark that the guilds found in the medieval cities were undifferentiated units at once displaying an ecclesiastical, industrial, and sometimes even a political structure. At a higher level, the feudal lords exercised

  governmental authority as if it were private property, which they could indeed acquire and dispose of on the basis of private legal stipulations. All of these undifferentiated legal spheres possessed autonomy; that is, the legal competence and right to act as government within their own sphere without the intervention of a higher authority.7

During the twelfth century, ecclesiastical courts, both in England and Europe, claimed jurisdiction “over all civil and criminal cases involving clerics, including church property”, in “all matrimonial cases”, in “all testamentary cases”, as well as in certain criminal cases, “such as heresy, sacrilege, sorcery, usury, defamation, fornication, adultery, injury to religious places, and assault against a cleric.” Finally, it assumed jurisdiction in cases where there was a breach

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6 Berman, Law and Revolution, 570.
of a pledge of faith (perjury, the violation of an oath) regarding a “contract, property, and other civil cases.”

The persisting, relatively undifferentiated, structure of medieval society during the eleventh and twelfth centuries evinces a lack of a further differentiation of canon law and criminal law. The development of the former by the canonists differs from penitential law, which was earlier valid within the Church as God’s law. It is also differing from “the ‘worldly law’ (or ‘man’s law’) that had prevailed, alongside the penitential law, in the tribal, local, feudal, and royal or imperial legal orders” – as Berman points out.9 The intertwinelement of ecclesiastical law and non-ecclesiastical law resulted in equating crime and sin. On the same page, Berman succinctly highlights this situation: “Generally speaking, not only were all crimes sins but all sins were also crimes.”

However, this process of differentiation did not succeed in delimiting the authority of the church in respect of the convictions of an individual and of a number of other issues which are currently, in modern differentiated societies and their modern legal orders, located outside the sphere of competence of faith communities. The way in which heresies are treated represents the reverse of differentiation. Formerly, a heresy was merely a spiritual offence punishable by anathema, but the lacking differentiation between ecclesiastical and “secular” jurisdictions for the first time made the death penalty applicable to the heretic. Prosecution in the courts of the church was followed by a transferral “to the secular authorities for execution.”10 Thus the church claimed an absolute authority over life and death. In the year 1302 Pope Boniface VIII emphatically states in his famous bull Unam Sanctam that it “is absolutely necessary for salvation that every human creature be subject to the Roman pontiff.”11 A Wikipedia article adds the remark: “pushing papal supremacy to its historical extreme.”12 A significant milestone in the process of differentiation was erected when, during the twelfth century, a “sharp procedural distinction was made, for the first time, between sin and crime.”13

THE SPIRIT OF THE RENAISSANCE

The more important overall process of differentiation, however, concerns state and church parting ways. But this on-going historical process of differentiation was accompanied by theoretical reflections proceeding from the newly

8 Berman, Law and Revolution, 266-7.
9 Berman, Law and Revolution, 185.
13 Berman, Law and Revolution, 185.
emerging Renaissance spirit, namely the urge to proclaim the autonomous freedom of the human personality. This new personality ideal embodied the freedom pole on the humanistic basic motive of nature and freedom. The nature pole enthroned the rising modern natural sciences, in particular mathematics and physics, because the freedom ideal needed the scientific ideal in order to assert its supremacy.

The combined effect of these two motives resulted in the aim of an autonomously free reconstruction of reality in terms of its simplest elements or atoms. Aiming at the reconstruction of human society, the scientific ideal generated the well-known modern social contract theories in an individualistic or atomistic fashion. These theories wanted to reconstruct human society from its simplest element, the individual (Hobbes, Pufendorff, Thomasius, Locke, Rousseau, Kant and Rawls). But this alternative orientation did not succeed in effectively delimiting state-law. In line with the contract theory of Hobbes, who assigned an absolute power over the body politic to the monarch, Rousseau also assumed that the social contract endowed the body politic (the general will) with an absolute power over all its members (to which we shall return below). Rousseau therefore advocated a civil religion with dogmas determined by the Sovereign. In this respect he was just as intolerant as the churches of his time: “Though it [the body politic] cannot compel anyone to believe them, it can dispel from the state everyone not believing them!”

Since Jean Bodin introduced the idea of sovereignty as characteristic hallmark of the authority of a state-government, it was frequently understood in an undifferentiated way as an absolute power not delimited by any other sphere of legal competence. In the light of this background, the position assumed by Hegel should not surprise us, because, in his view, the people (Volk) as state is the spirit in its substantial rationality and immediate reality and is therefore the absolute power on earth.

Combining the views of Bodin and Hegel results in a view similar to that held by the British constitutional scholar, AV Dicey. In his standard work on Constitutional Law, he asserts the “Unlimited legislative authority of Parliament.” This view entailed that Parliament has “the right to make or unmake any law whatever” under the English constitution and, further, “that no person or body [was] recognised by the law of England as having a right to override or set aside the legislation of Parliament.” Of course, the question was whether the government may at will exceed the boundaries of lawful conduct

14 ατομος = individuum.
by enacting what is illegal? Dicey affirmed that this was the case, because according to him the “highest exertion and crowning proof of sovereign power” is given in “the legislation of illegality.”

Surely, these problems are relevant for an understanding of the relation between law and religion. Although the office of government entails the competence to form positive law, this law-giving competence should not usurp all the other jural competencies present within distinct non-political societal entities, such as business enterprises, associations, families, educational institutions and faith communities. It is precisely because the process of societal differentiation generates non-political spheres in their own right that it is possible for the government of a state to bind together within its public legal order the multiplicity of legal interests present in such a differentiated society. In a differentiated society, the competence of the state is therefore delimited both by its own sphere of competence and by the competencies of all the non-political societal entities.

Unfortunately, in Book III, Chapter 7 of his work on the state, the work in which he developed his just-mentioned idea of sovereignty, Jean Bodin elevated the state to the all-inclusive totality of society, embracing the family, corporations, and colleges as its parts. At the same time he felt threatened by the process of societal differentiation, as if newly emerging spheres of authority with their own responsibility and jural competence to form law, would endanger the law-making competence of the state.

The process of differentiation causing the ambiguity in the thought of Bodin, was a result of the collapse of the unified ecclesiastical culture of medieval society. During the sixteenth and seventeenth centuries, trade and commerce started to pursue new practices and by the late eighteenth and early nineteenth centuries, the rise of the industrial revolution led to the differentiation between the nuclear family and the modern firm. It is therefore not surprising that the on-going process of societal differentiation during the nineteenth century gave rise to various modern democratic states, such Germany, The Netherlands, France, Britain, as well as Australia, New Zealand, the USA, and Canada. Observed from a world historical perspective, it is significant that the cradle of social differentiation, generating distinct spheres of responsibility and democratic political orders, appears to be found in (former) Protestant countries. Traditional (undifferentiated) societies, ancient Greece, classical Rome, medieval Roman Catholicism and early modern Humanism (reflected in the totalitarian views of Machiavelli and Hobbes) did not, on their own, achieve something similar. Without the emergence of distinct societal entities with their peculiar spheres of competence and accompanying legal interests, the state would not have been able to fulfil its public legal task. Yet acknowledging the diversity of legal

interests which ought to be integrated into one public legal order presupposes an understanding of a differentiated society in which the one-sided holistic (universalistic) and atomistic (individualistic) orientations, so dominant in the entire history of reflection on the relationship between state and society, could be avoided. The historical picture would be incomplete without a brief overview of the traditional universalistic view of society, to which we now turn.

HISTORICAL OVERVIEW

The initial reign of holism (universalism)

The legacy of Augustine and Thomas Aquinas

Augustine and Thomas Aquinas were influenced by the thought of Plato and Aristotle. Both of them observed in the Politeia or Polis the ultimate goal of being human, for it is only within these structures that the highest good, moral perfection, could be achieved. All human activities are therefore ultimately subsumed under the authority of the Republic or the City-State – which implies that within Greek culture paideia (education) embraced all of society in a totalitarian sense. Augustine compromised the biblical distinction between the kingdom of God and the kingdom of darkness with neo-Platonism, because he saw the earthly world as temporal and changeful, thus displaying an inherent defect. In this dispensation both the civitas terrrena and the civitas Dei are related and mixed. What was decisive, however, is that, for Augustine, the earthly state was nothing but a copy of the city of God. The platonic view of the relationship between ideal ontic form and its copy in matter, which is inherently evil, dominated his view. He even designated the earthly city as Babylon and called its monarch Diabolus. By viewing the sacramental institute of grace (the Corpus Christi) as encompassing the entire life of the Christian, Augustine upheld the totalitarian legacy of Greek thinking and anticipated the subsequent medieval developments in this regard, up to the late-medieval struggle between church and state. Designating the church as societas perfecta (a perfect society superior to the state) Augustine paved the way for the Scholastic ground-motive of nature and grace which was brought to a unique synthesis in the thought of Thomas Aquinas.

Thomas Aquinas accepted the Aristotelian view of the human being as constituted by a material body and a rational soul, and he also held the view that an isolated individual cannot reach its natural perfection alone, reminiscent of Aristotle’s universalistic conception of the human being as a political animal (zoon politikon). Owing to its social nature, an individual aims at moral perfection as the ultimate natural goal. But in addition to this, the human being is directed at eternal bliss (ad finem beatitudinis aeterno), which exceeds the measure of
the natural abilities of human beings. Thomas Aquinas therefore subsumes nature (the state) under the supra-natural sphere of grace. After him, Dante contemplated an account for the intrinsic justification of the world monarchy by holding the view that the Empire within its worldly sphere is ordained by God just as directly as the Papacy was ordained for the spiritual sphere. In the papal encyclical *Quadragesimo Anno* the Thomistic view still prevails when we read: “Surely the church does not only have the task to bring the human person merely to a transient and deficient happiness, for it must carry a person to eternal bliss.”

*The Roman Catholic principle of subsidiarity*

The relationship between sphere sovereignty and one of the dominant elements present in Roman Catholic social philosophy, namely *subsidiarity*, requires brief attention. When Keteler remarks that “towns, guilds, and religious associations … were real entities anterior to the state”,23 he does not acknowledge the difference between differentiated and undifferentiated societies discussed earlier. Within the undifferentiated structure of medieval guilds, similar to the extended family and sib, no state in the modern sense of the term is present. Troeltsch was therefore correct in pointing out that medieval society did “not know a state as a unified, sovereign will-organisation of the whole, where it is irrelevant who exercises this sovereignty.”24 Of course, multiple kinds of undifferentiated societies existed during the Middle Ages (such as the feudal system, guilds and manors). All of them embraced activities which within a differentiated society are performed by societal entities with their own distinct forms of organisation, such as the state, the business enterprise, social clubs, religious denominations, and so on. Naturally various functions of the state were present within the mentioned undifferentiated structures. This explains why in the absence of tribal punishment only relatives exercised revenge. The state simply did not have a monopoly over the power on an integrated territory that would enable the enforcement of a judicial resolution of legal conflicts. Consequently, early Germanic law, as well as early Greek and Roman law,

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had to use private execution as a practical form of enforcement for liability. Moreover, since undifferentiated societies are easily misunderstood in terms of the whole-parts relation, such societies may appear to support the principle of subsidiarity.

The concept of subsidiarity is seminally present in Pope Leo XIII’s encyclical *Rerum novarum* (1891) and even before that in his encyclical *Immortale Dei* (1885).²⁵ But it is explicit in Pope Pius XI’s 1931 encyclical, *Quadragesimo Anno*, which is concerned with the kinds of social institutions contributing most effectively to the full development of the human personality,²⁶ as well as with the basis of authentic individual self-determination.²⁷ These developments continued to struggle with the problem of what properly belongs to the action sphere of the state. The implication is that “subordinate groups” and “various associations” are mentioned, supposedly observing the principle of subsidiarity. A comparison of the principle of sphere sovereignty with the principle of subsidiarity boils down to the question if these “subordinate groups” and “various associations” are genuine parts of the state?

In his work on the *Roots of Western Culture*, Dooyeweerd compares the principle of sphere sovereignty with the principle of subsidiarity.²⁸ He points out that according to Thomas Aquinas the state is founded on the rational nature of human beings, viewed as the all-inclusive total community within the realm of nature where all the other spheres of social life are denatured by viewing them as subservient parts of the state. This conception remains faithful to the classical employment of the whole-parts relation. Within the Roman Catholic view, it means that the state does not have jurisdiction over the supra-natural domain of grace and that society should be constructed in an anti-centralist way, from the individual up-wards, that is, via the lower communities to the state as the highest whole within the sphere of nature. The state is the portal to the supra-natural sphere of grace of the church. The principle of subsidiarity requires that the state should assume responsibility only for those elements of the common good for which individuals cannot provide by themselves or with the aid of the lower communities. Although this may seem to be equivalent to the principle of sphere sovereignty, it is not. In the Roman Catholic tradition, the underlying (undifferentiated) whole-parts relation continued to be applied to human society through the principle of subsidiarity.²⁹

²⁷ Van Til, “Subsidiarity and Sphere Sovereignty”, 615 n 15.
²⁹ See in particular the characterisation of Dooyeweerd, *Roots of Western Culture*, 126-7.
The turn from the whole to an addition of individuals

Marsilius von Padua

During the early fourteenth century, Marsilius von Padua participated in the new nominalist movement which moved away from the traditional holistic (universalistic) Aristotelian-Thomistic conception of society. The aim of a civitas as a collection of people (congregatio) is to establish peace among themselves. Its goal is not merely an inner peace of mind, but an external tranquility through which the parts of the state as a whole can fulfil their obligations without any impediment.\(^{30}\) Since Marsilius von Padua derived all power (authority) from the human will (anticipating the general will of Rousseau) and because the church is supposed to have its foundation in divine law, he considered the church as institution to be an impossibility. According to him, the church was merely the collection of a multiplicity of believers. His conclusion was that practically all the competencies exercised by the church are usurped because the power actually belongs to the state. The authority claimed by the church resides in the “collection of believers.”\(^{31}\) Moreover, the church could no longer be seen as a special community, since the realm of Christ is not from this world. When, as Von Hippel points out, the worldly power inherits also the spiritual power, then this power in the modern sense of the word turns into the total state.\(^{32}\)

The emphasis on a collection of believers (on adding individuals), certainly demonstrates the decisive switch that took shape in the thought of Marsilius von Padua, away from the long-standing priority given to the whole-parts relation in our understanding of society. The personal freedoms of individuals certainly ought to be considered, but we shall briefly show below that emphasizing individuals is not sufficient to secure the inner spheres of operation of the various societal entities within which individuals do not participate as individuals, but as parts of larger societal wholes. As I have argued extensively elsewhere, neither an individualistic (atomistic) nor a universalistic (holistic) approach succeeds in supporting a structurally limited view of the competence of the state.\(^{33}\)

The reign of atomism (individualism)

Social contract theories

Social contract theories, from Hobbes up to Kant, by and large proceeded on the basis of atomistic convictions, without being able to advocate a meaningful


delimitation of the power of the state. The prominent exception was Rousseau who started from an individualistic assumption in which autonomous individuals exist within a hypothetical state of nature – but then, on the basis of his contract theory, switched to a universalistic view. In the latter view, the social contract produces a moral, collective body in which every autonomous individual is transformed into an indivisible part of this new whole. Once the contract is concluded, Rousseau introduces his new universalistic conception which only accepts a whole fully encompassing the former individuals as indivisible parts.\(^{34}\)

Rousseau aims at liberating himself from the enslaving grip of the dominant natural science ideal and its rational reconstruction of society by means of a social contact. He therefore envisions, through the social contract, establishing a new and higher civil state in which public freedom and equality would reign. This final aim highlights that the personality ideal in the final analysis lost the battle. Just consider his line of argumentation in the *Contrat social*:

1. Freedom is obedience to the law which we prescribe to ourselves.  
2. The social contract transforms the abstract individuals into indivisible parts of the general will emerging from the contract as entities with their own communal unity, life and will.  
3. Within the post-contractual civil state, the contract forms the basis of all rights within the civil state. This entails that the general will is supposed to be the true will of each participating individual – it ought to be distinguished from the “will of all.”  
4. Any dissenting minority actually opposes the general will, which is supposed to be the own will of each indivisible part of it.  
5. Not conforming to the general will therefore entails that one is not obeying one’s own will as is therefore not free – remembering that we are only free when we obey the law which we have prescribed to ourselves.  
6. Ultimately, flowing from the “absolute power [of the general will] over all its members”, Rousseau draws the final totalitarian and antinomic conclusion, namely that dissenters will be forced to be free.\(^{35}\)

*From a rationalistic individualism to an irrationalistic universalism*

The age of Enlightenment eventually reverted to what may be designated as an individualistic rationalism. Early Romanticism, by contrast pursued the path of an irrationalistic individualism. But since the anarchistic consequences of such a view are unacceptable, refuge was sought in a supra-individual cultural or ethnic

community. In the freedom-idealism of Schelling, Fichte and Hegel each nation has its own Volksgeist. This development completed the circle, for now we have an irrationalistic universalism. Western civilisation here witnessed the rise of the modern ideology of an all-encompassing community for the first time – which obtained a new life in the Nazism and Fascism of the twentieth century and surfaced also within certain trends of the Afrikanervolk (Afrikaner nation).

An alternative surfacing in the thought of Althusius and Stahl

In his Politica Methodice Digesta, Atque Exemplis Sacris et Profanis Illustrata published in 1603, Althusius for the first time transcended the Greek-medieval scheme of a whole with its parts. In spite of his symbiotic understanding of society he discerns distinct societal entities with their own proper laws. This view anticipates what eventually became known as the principle of sphere sovereignty. But at the time the word “state” was not yet in use because terms such as politia, imperium, regnum, populis and respublica were employed. Whereas contemporary works on political theory frequently identified the state with its government, Althusius clearly distinguished between two capacities of being a citizen, namely occupying the office of government or being a subject. Von Gierke explains that Althusius advanced the “division of citizenship into government and subjects.”

The definition of the state by Althusius contains the stipulation that the “state” is a “universalis publica consociation.” The crucial element in his recognition of the state as a public collectivity is that he came to the realisation that not every societal entity (such as families, churches etc.) is a part of the state. Von Gierke summarises his view by stating that neither the individual nor the collegia privata (private, non-state societal entities) are parts of the state, because being a part of the state only applies to cities [Städte, municipalities] and provinces. Therefore, the genuine parts of the state are solely provinces and municipalities.

39 “die Scheidung der Bürgerschaft in Obrigkeit und Unterthanen” Von Gierke, Johannes Althusius, 23.
40 Von Gierke, Johannes Althusius, 25.
41 Von Gierke, Johannes Althusius, 25.
At the same time, within this context, Althusius in addition also defended the view that “particular associations are ruled” by proper laws (*leges propriae*), as required by their peculiar nature. Von Gierke points out that for Althusius every *Verband* (organised community/societal collectivity) has its proper law. The idea of proper laws combined with a different understanding of the whole-parts relation provides sufficient ground to recognise the first intimations of the idea of sphere sovereignty in Althusius’ thought, even though Althusius did not succeed in maintaining this view consistently or explicitly used the phrase sphere-sovereignty.

In the early part of the nineteenth century Friedrich Julius Stahl also advanced seminal ideas bordering upon the idea of sphere sovereignty. In reaction to state-absolutism, he emphasises that the government is bound by the divine world-order in which he observes a guarantee for the existence of independent spheres of life. What sets a limit to governmental interference is given in inborn and acquired rights as well communal rights. Intervention in these spheres would be unlawful for the state. Similarly, in reaction to socialism (which hands over to the government all means of production), Stahl advocates an independent industrial life accompanied by individual freedom regarding the choice in which organised communities such an individual would prefer to function.

It is unfortunate that Stahl follows Luther’s view that law as a general rule opposes the essence of Christian freedom. This conception derives from the underlying two kingdoms world-view which still burdens the approach of Stahl, for he distinguishes between the natural order of things and the higher

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43 Althusius (1965), *Politico Methodice Digesta*, 16.
44 Von Gierke, *Johannes Althusius*, 21. On the next page Von Gierke mentions the general distinction which Althusius eventually draws between “*consociatio simplex et privata*”, which combine individuals for a particular communal interest (*peculiar commune*) and the “*consociatio mixta et publica*” which binds together the simple “*Verbände*” into a many-sided political community (*politeuma*). In conflict with his initial position (found in the first edition of 1603), where he considered the non-political “*Verbände*” as distinct from the state, he later on once more returned to the (totalitarian) view according to which these non-political *Verbände* are appreciated as parts of the political communal being (“*als Unterart der politischen Gemeinwesen*”) Von Gierke *Johannes Althusius*, 22 n 4.
The state is responsible for the totality of life-goals while the particular aims pursued by the Volk and other communities are subordinate to the state-goal – they are elements and branches of the state. Although they occupy an independent position, they are still located within the state. The well-being of the nation embraces the well-being of all classes within society. “Only in the most recent time humanity, in the full concept of its dynamic virtue, developed into the principle determining the whole society.” This explains why Stahl could observe in “the jural” the “total ordering of human communal life.”

Dengerink therefore correctly points out that although Stahl advanced a view containing elements of the principle of sphere sovereignty, the idea of the relative autonomy of the different parts of the state after all plays a dominant role in his thinking. In his attempt to return to the standenstaat (feudal state) of the medieval era, Stahl actually misunderstood the latter in its undifferentiated structure. Stahl did not realise that the medieval political estates as well as the undifferentiated corporations have lost their significance, because the state and its true parts (provinces, municipalities) integrated these responsibilities within the sphere of the state as a public legal community. The process of societal differentiation at the same time served these corporations to come into their own as private communities and private societal collectivities (Verbanden) with their own limited private task. In the final analysis the dominant role assigned to the whole-parts relation still ensured that the idea of autonomy occupied a central place in Stahl’s thought.


50 ”Erst in den neueren Zeit ist die Humanität vollen Beriff zur energischen Tugend, zu dem die ganze Gesellschaft bestimmenden Princip geworden“ Stahl, Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung, 347.

51 Stahl, Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung, ch VII, s 39, 294. Here, “das Recht” is viewed as “die totale Ordnung des menschlichen Gemeinlebens.”

In his oration on sphere sovereignty delivered at the opening of the Free University in 1880, Abraham Kuyper suggested that Groen van Prinsterer coined the phrase “sphere sovereignty”. However, in his work on sphere sovereignty, Veenhof declares that he was unable to find this expression in the works of Van Prinsterer. A phrase breathing the spirit of the idea of sphere sovereignty is nonetheless found in the Adviezen (advice) of Van Prinsterer: “Church and State are independent within their own spheres, such that neither the Church is subjected to the State nor the State to the Church.”

Van Prinsterer nonetheless did not have a clear view of the sphere sovereignty of state and church. Dengerink mentions how Van Prinsterer’s view of the task of the civil judge in ecclesiastical disputes encroaches upon the sphere sovereignty of the church. Van Prinsterer holds that whereas the Church has the competence to establish the contents of its confession, it should leave the interpretation of this confession to the civil judge. Van Prinsterer therefore did not have a proper understanding of the difference between civil law and non-civil private law – to which we shall return below. The civil judge cannot determine anything within the inner sphere of ecclesiastical law because its competence merely includes the handling of issues belonging to the external civil legal side of the church. (See Figure 1, above).

For example, when a minister assumes a heretical position in a sermon, it is only the church as an institute that can decide whether or not it indeed is the case. But if the accused minister acts as chairperson of the Council Meeting which issues this verdict, an external civil legal principle has been violated; for no one is supposed to take the law into one’s own hands. Only if the Church Council reached its decision without violating any civil legal principle, will it be valid. Naturally such a verdict requires from the Church Council an appropriate interpretation both of the confession of the church and of the sermons preached by the minister – and this interpretation also belongs to the internal legal competence of the church as an organised confessional community – which irrevocably exceeds the sphere of authority of any civil court.

Apart from the shortcoming of leaving it to the civil judge to interpret the confession, Van Prinsterer continues the application of the whole-parts relation to the state and its relationship to non-political societal entities, such as institutions within the domain of education, the press, associations and so on. Kuyper, on the other hand, wants to rise above the traditional Roman Catholic hierarchical view of society, with the church institute at the top and the rest

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53 Kuyper A. 1880. Souvereiniteit in eigen kring. [Sovereignty within its own sphere]. Amsterdam: Kruyt, 16-17.
54 Veenhof C. 1939. Souvereiniteit in eigen kring. [Sovereignty within its own sphere]. Kampen: JH Kok, 103, n 76.
55 Veenhof, Souvereiniteit in eigen kring, 103 n 76.
56 Dengerink, Critisch-Historisch Onderzoek, 93.
of society subordinate.⁵⁷ In view of the fact that the political unity of the state does not coincide with the unity of the church, Kuyper advocates a bilateral “division of church and state” where they do not have any authority to exercise power within each other’s domains.⁵⁸

For Kuyper the scope of the principle of sphere sovereignty primarily applies to societal entities, such as the state, the church, educational institutions, social clubs and business enterprises. His Stone Lectures commence with a discussion of the sphere sovereignty of the “nuclear family, the firm, science, art” and more. All things exist in an interlinked coherence, equally dependent upon the cosmos-encompassing law of God, from which each creature acquires the determination and boundary of its meaning. He frequently refers to the “ordinances” of God.⁵⁹ By “law” as Kuyper notes, not only the “Ten Commandments” are intended and “not even the Mosaic law or the moral or ceremonial law.” Instead, “what must come into view is that whole concatenation of laws, in every creaturely thing, by which everything exists that God created on, or above, or under the earth.”⁶⁰

For Kuyper it is important to find a delimitation of the state vis-à-vis the other social spheres. When he focuses on the state in his Lectures on Calvinism (1898), he deals with the “sphere sovereignty of the political circle.”⁶¹ The above-mentioned positive distinction between government and subjects in the thought of Stahl is continued in Kuyper’s Antirevolutionaire Staatkunde (Antirevolutionary Politics), where he positively quotes Stahl saying in his definition of the state. He posits the maxim that the state, embracing government and subject, has to protect the material and spiritual goods and “maintain ‘law and justice’ (‘recht en gerechtigheid’).”⁶²

Of course his primary distinction is between the sphere-sovereignty of the state and the sovereignty of God. Only in the second place does he aim at the mutual sphere-sovereignty of the other social spheres adjacent to the state. In respect of the state, he contrasts the principle of sphere sovereignty with the doctrines of popular sovereignty and of state-sovereignty.⁶³ It is unfortunate that in the formulation of his own view, he continues to incorporate elements of the Aristotelian-Thomistic legacy. As a result, the jural and the moral are confused. This pattern of thinking is in line with the traditional scholastic

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⁵⁹ Kuyper, Ons Program, 48 ff.
⁶¹ Kuyper, Het Calvinisme, 63.
⁶³ Kuyper, Het Calvinisme, 68 ff.
view that the state, in its organological development, must lead its citizens towards moral perfection. In line with this view Kuyper circumscribes the state as a moral organism. The sub-title of Chapter Four (on government) of his “Our Program” [Ons Program] reads: “The state a moral organism.” The background assumption, derived from Aristotle, is that human society organically developed out of its germ-cell, the household, the nuclear family.

This view was incorporated in the idea of an organic right to vote – only the head of the household has the right to vote. Kuyper went even further in a work titled, Antirevolutionair ook in uw Huisgezin (Anti-revolutionary also in your family). In this work, his aim is to derive all possible relationships displayed within the state from the typical structure of the family. The unfortunate outcome of this conception is that it accepts what has already has been rejected, namely a hierarchical understanding of the relationship between state and family. The state is not founded on the family, since it is actually viewed as a large (macro) family, while the family itself is seen as a small (micro) state. This view informs his conviction that “the principle of our anti-revolutionary constitutional law is rooted in the family.” Yet sphere sovereignty is also assigned to the family (belonging to the “domestic circle”), and distinguished from what he designates as the corporative sphere of universities, guilds, associations, and the personal sphere of the genius, as well as from “municipal autonomy.” On the next page, he sees it as the task of the government to honour these four distinct domain, each with its own “created law-for-life.”

Although Kuyper discerns distinct laws for our thinking (logic), willing (morality), feeling (aesthetics) and eternal life (religion), this mode of speech should not mislead us to assume that Kuyper anticipated Dooyeweerd’s theory of modal aspects, while in fact it actually highlights the influence of the Greek-medieval legacy regarding unity, truth, goodness and beauty as so-called transcendental determinations of being. Within anthropology these determinations surface as head, heart and hand but they are not intended to account for sphere-sovereign modal aspects, even though acknowledging different spheres of laws shows that Kuyper’s view makes an appeal to the same states of affairs which prompted Dooyeweerd and Vollenhoven to develop their idea of modal law-spheres.

64 Kuyper, Ons Program, 60 ff.
65 “het beginsel van ons antirevolutionair staatsrecht wortelt in het huizgezin” Kuyper, A. 1880. Antirevolutionair óók in uw Huisgezin [Antirevolutionary also in your family]. Amsterdam: JH Kruyt, 8 ff.
66 Kuyper, Het Calvinisme, 77.
67 Kuyper, Souvereiniteit in eigen kring, 69.
68 We shall return to the emergence and contents of the phrase sphere-sovereignty below. An excellent exposition of the societal implications of this principle of sphere-sovereignty and the concept of religious freedom is found in Van der Vyver, Reformed Christians and social justice.
The law-spheres innovation entered the scene during the early twenties when Dooyeweerd and Vollenhoven introduced their novel view of created reality crucially depending upon acknowledging the principle of sphere sovereignty. Dooyeweerd did this by distinguishing the central religious dimension of creation, the dimension of cosmic time, the dimension of modal aspects (law-spheres) and the dimension of entity-structures (designated by Dooyeweerd as individuality structures). Sphere-sovereignty applies to all except the first.

Sphere-sovereignty of modal aspects and their modal spheres of laws makes no sense in the fullness and radical unity of meaning. In the religious fullness of meaning love, wisdom, justice, power, beauty, etc. coincide in a radical unity. We begin to understand something of this state of affairs in the concentration of our heart upon the Cross of Christ. But this radical unity of the different modalities is impossible in time considered as successive refraction of meaning.

Kuyper’s employment of the idea of sphere sovereignty is restricted to human society in spite of the fact that he has a more encompassing understanding of the idea of law. Yet Kuyper did not develop a theory of modal aspects as such. Dooyeweerd’s theory of modal aspect in fact proved to be vital in contesting one-sided ismic orientations within philosophy and the various disciplines. They invariably terminate in some form of reductionism which is inherently antinomic. These antinomies are exemplified in trends of thought such as atomism, holism, rationalism, irrationalism, physicalism, vitalism, psychologism, logicism, historicism, and so on. Ultimately every reductionistic stance elevates something within creation to the level of the divine. For this reason orientations such as these are also depicted as reifications, absolutisations or deifications.

The theory of modal aspects provides an account both of the uniqueness and the unbreakable coherence between the diverse sphere-sovereign modal aspects. These two features are accounted for by acknowledging a unique qualifying meaning-nucleus, as well as backward- and forward-pointing analogies (respectively designated as retrocipations and anticipations) revealing the interconnections between all the aspects. No single special science can avoid the task to account for the meaning in which these analogical structural elements are employed, reflected in the elementary or analogical basic concepts of the various disciplines. Any term derived from a specific modal aspect is therefore multi-vocal, which means that it can assume multiple meanings depending upon the qualifying modal context within which it appears. The history of

the disciplines is filled with trends aiming at reducing analogical terms to the original modal aspect in which such analogical terms are located. For example, during the nineteenth century an organic mode of thinking tempted sociological theorizing into neglecting the differences between organic life and social life while accentuating the obvious similarities in order to arrive at an identity conclusion, namely that society itself is a living organism. A proper understanding of the core meaning of an aspect, i.e., its meaning-nucleus as well as its analogical moments, is necessary before attempting to classify the various kinds of entities we experience in the universe, including societal entities such as state, families, faith communities business enterprises, educational and academic institutions, and so on. (See Figure 4).

Figure 4: The Structure of a Modal Aspect

The practice of distinguishing between the realms (kingdoms) of material things, plants and animals acquires a more precise characterisation by assigning a distinct qualifying function to each of them. Material things are qualified by their physical aspect, plants by their biotic aspect and animals by their sensitive-psyical mode as sentient creatures. What distinguishes humankind from the natural realms is the normative flexibility of human actions which can be guided by any normative function. Successively these human actions may be guided by different norming modal functions, such as the logical-analytical, the economic or the social, without absorbing such a person fully in any one of them. (See Figure 5).
The preceding historical overview of the relationship between law and religion highlights the importance of safeguarding both personal and collective religious freedom. But since the history of reflecting on state-law was dominated either by universalistic or individualistic approaches, no satisfactory account was given of the legally limited law-making competence of the state. An alternative approach, aiming at transcending the shortcomings of individualistic and universalistic views, will be developed in the closing chapter of this volume, on the philosophical approach to law and religion within context of human society. It will be argued there that the principle of sphere-sovereignty not only overcomes these defects, but also provides a principled delimitation of state-power.