

BEYOND FREEDOM VS. DEMOCRACY

**A Dooyeweerdian Contribution to the
Individual - Collective Debate**

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INTRODUCTION

Legal and political theory face a dilemma - they have been unable to convincingly reconcile individuality and community. Various theories have tended to "resolve" this polarity by stressing one pole and systematically suppressing the other. To stress individualism, as liberalism has done, ultimately leaves little room for collective goals, and thus conflicts with the democratic ideal. To stress community will ultimately lead to a totalitarian government which denies individual rights - there is nothing inherent in democracy which constrains the majority to treat individuals and minority groups fairly. That individuals and communities cannot survive without each other, however, is what Kennedy has called the "fundamental contradiction" -

... the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it.ⁱ

Canadian society in particular faces this dilemma when faced with demands for self-government from First Nations and from Québécois nationalists. The dominance of liberalism has prevented most Canadians from being able to see the legitimacy of a significant political role for collective interests.

It is the thesis of this paper that the theory of Herman Dooyeweerd would provide assistance in reconceptualizing and resolving this dilemma. Dooyeweerd was a twentieth century Dutch neo-Calvinist legal philosopher. He asserted the dependence of theory on basic commitments long before this was a commonplace idea, and so in this sense anticipated some of the ideas of Critical Theory. It is his particular theory of the state, and how it might assist in the current dilemma, however, which is the focus of this paper.

Chapter 1 is a general introduction to Dooyeweerd's thought. Chapter 2 deals specifically with his epistemology, and compares it with that of Critical Theory, in order to be better able to situate Dooyeweerd's ideas. Chapter 3 describes his theory of the state, and is the key element of the paper. Chapter 4 outlines the dilemma in legal theory in more detail and suggests how a Dooyeweerdian analysis might provide assistance.

ⁱ Duncan Kennedy, "The Structure of Blackstone's Commentaries" (1979), 28 Buff. L. Rev. 205 at 211.

GENERAL OUTLINE OF DOOYEWEERD'S PHILOSOPHY

Backgroundⁱⁱ

Herman Dooyeweerd (1894-1977) was for most of his life professor of legal philosophy at the Free University of Amsterdam. He was deeply rooted in the neo-Calvinist tradition, from which comes the driving forces behind his theory. To properly understand his thought, however, it should be kept in mind that he drew many of his conceptual tools from neo-Kantianism and from phenomenology, although he rejected both of these as direction giving worldviews.

"Neo-Calvinism" probably requires some explanation. Among the general public, Calvinism is usually associated with predestination theologically and with capitalism politically, the latter along the lines of Weber's analysis in The Protestant Ethic and the Spirit of Capitalism. Neither of these associations do more than scratch the surface, and in some ways they are quite misleading. Theologically, the core of Calvinism is not "predestination", but the sovereignty of God. The soteriological expression of sovereignty is indeed predestination, although this is often misconstrued as being synonymous with determinism.ⁱⁱⁱ However, in the social realm, Calvinism is most emphatically not predestinarian. In fact, Calvinism has been the driving force behind movements of major social change, such as the English Puritan movement. It is important to realize that these Calvinists saw social transformation as their religious duty. This application of God's sovereignty to human social and cultural affairs has probably remained more central in the Dutch Calvinist tradition than in other varieties of Calvinism.^{iv} The other distinctive thing about Dutch Calvinism is that it has approached systematically the question of how to live together in a society with those of different beliefs. Early Calvinism had serious deficiencies in dealing with this matter - church attendance was compelled by the state, and heresy could be punished civilly.^v Some of this tendency continues to animate the right wing of Calvinism in, for example, some Reformed

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- ii. The material in this background section is drawn largely from Bernard Zylstra "Introduction" in L. Kalsbeek, Contours of a Christian Philosophy: An Introduction to Herman Dooyeweerd's Thought ("Contours"), B. & J. Zylstra, eds., (Toronto: Wedge, 1975); Albert M. Wolters "The Intellectual Milieu of Herman Dooyeweerd", in C.T. McIntire, ed., The Legacy of Herman Dooyeweerd: Reflections on Critical Philosophy in the Christian Tradition ("Legacy") (Lanham, MD: University Press of America, 1985); John Kraay, "Translator's Preface", in Herman Dooyeweerd, Roots of Western Culture: Pagan, Secular, and Christian Options, ("Roots"), M. Vander Vennen & B. Zylstra, eds., trans. J. Kraay, (Toronto: Wedge, 1979); L. Praamsma, Let Christ be King: Reflections on the Life and Times of Abraham Kuyper, (Jordon Station, ON: Paideia, 1985); and Nicholas Wolterstorff, Until Justice and Peace Embrace, (Grand Rapids: Eerdmans, 1983) at 3-22.
- iii. Distinguishing predestination and determinism would require a lengthy theological digression. At the core of this is the idea that the telos of articulating the doctrine of predestination is not to foster acceptance of the status quo or to relieve the believer from moral obligation, but to free up the psyche of the believer so that one might do good works (including social transformation) out of gratitude to God.
- iv. For example, the North American Presbyterian churches.
- v. The most notorious example of this in Calvin's Geneva was the execution of Servetus for heresy, which was approved of by Calvin. See R.W. Collins, Calvin and the Libertines of Geneva, (Toronto: Clarke, Irwin & Co., 1968) at 168-181, and François Wendell, Calvin, P. Mairet, trans., (London & New York: William Collins Sons & Co, and Harper & Row, 1963).

Churches in South Africa and in the "Moral Majority" in the United States.^{vi} In contrast, the Dutch version of neo-Calvinism has espoused politically the form of structurally pluralist democracy.

"Structural pluralism" requires some explanation. Few people oppose "pluralism", but may mean very different things by it.^{vii} Sometimes pluralism is taken to mean merely religious toleration or freedom of association. Even when manifested structurally, pluralism can take many forms - it could mean federalism; it could mean separation of powers of different elements of the government (eg executive, legislative, judicial); it could mean a functional differentiation of societal entities (eg schools and churches as independent of the state); or it could mean a cultural differentiation (eg different schools systems for different cultural communities).^{viii} Dutch neo-Calvinism has embraced pluralism in the functional differentiation meaning, and, within certain limits, in the cultural differentiation meaning.

The result of this is that the "public" institutions in the Netherlands such as schools, universities, political parties, labour unions, and mass media are independent of the state and can be organized along religious confessional lines. The role of the state is seen by neo-Calvinists to be to integrate the various institutions and communities within it, not to directly operate such institutions, which should be free to be governed by the norms appropriate to the type of institution and the (eg confessional) community which it serves. After a religious revival in the 1880's, neo-Calvinism expressed this worldview by establishing neo-Calvinist schools, a university, a political party, a labour union, and several newspapers. Neo-Calvinism also achieved political dominance for a time, with Abraham Kuyper as Prime Minister around the turn of this century. As a result structural pluralism became deeply embedded in Dutch law and political practice. This is reflected, among other things, by Dutch elections being by proportional representation (proportion of total popular vote = proportion of seats held), and by a practice of forming coalition governments (even if not strictly necessary to achieve a majority) which thus integrates diverse views into the government. It was this milieu in which Dooyeweerd was steeped, and his work has the effect of articulating an ontological foundation for this political theory.

Contours of Dooyeweerd's Philosophy

With this background, we can now turn to the driving forces in Dooyeweerd's theory. One of these is an insistence that theory is not absolute, but depends on religious commitments. This, of course, is a sine qua non of structural pluralism of the cultural differentiation variety. In making this

vi. But note, however, the progressive positions taken by the Black Reformed Churches in South Africa, who self-consciously root themselves squarely in the Calvinist tradition. See Allan Boesak, Black and Reformed: Apartheid, Liberation, and the Calvinist Tradition, (Maryknoll, N.Y.: Orbis, 1984).

vii. A recent example, however, of an attack on pluralism is R. W. Bibby, Mosaic Madness: The Poverty and Potential Life of Canada, (Toronto: Stoddart, 1990). Some legal scholars also attack "pluralism" because of the particular way they define the term. Some of these nuances are noted in R. C. Post, "Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment" (1988), 76 Calif. L. Rev. 297 at 301.

viii. It could also refer to any of these things being done for different reasons. In Macklem's typology of constitutional ideologies, he refers to "pluralist liberalism", where certain kinds of group activity are promoted, but only instrumentally in service of individualism. P. Macklem "Constitutional Ideologies" (1988), 20 Ottawa L. Rev. 117 at 133-138. This "pluralist liberalism" has some of the same contours as the Dutch neo-Calvinist concept, but in the latter the instrumentalism is not present - groups are seen to have value in themselves.

point, Dooyeweerd's target was often Kant or his followers, but in the period of reconstruction after World War II, there was also a direct political threat to structural pluralism. The Dutch National Movement was calling for a homogenous national spirit to meet the challenges of reconstruction, spurred on by the close cooperation across confessional lines which had taken place in the Dutch Resistance Movement. The existence of neo-Calvinism as a legitimate public presence was under attack.

What is in some sense the flip side of the above point is also a driving force in Dooyeweerd's theory: that theory must be rooted in reality - theories which have to explain away experience are inferior. As is discussed in the chapter on epistemology, this leads Dooyeweerd to a theory of theory which provides for both the input of empirical data and religious commitments into theoretical thought. Related to this point is that Dooyeweerd's vision of reality is, while highly ordered, also highly complex. Dooyeweerd therefore has a strong anti-reductionist stand, viewing many other theories as absolutizing one or a few aspects of reality. Indeed he would view this absolutization from a confessional perspective as idolatrous.^{ix} A particular example of this which concerned Dooyeweerd was Nazism - significant portions of his work seem devoted to developing as convincing, quasi-objective a critique of Nazism as possible.

Keeping these general themes in mind, we can now turn to the specific content of Dooyeweerd's theory.

Nature of Philosophy

Perhaps the best place to start describing Dooyeweerd's philosophy is by noting his concept of what the aim of philosophy is: to investigate the structure of creation.^x Already, three striking things are revealed by this. First, this is a large scope for philosophy - for Dooyeweerd it is the all-embracing discipline, although (as will be seen), not one which subsumes the other disciplines. Second, embedded right at this starting point is a manifestation of a commitment that reality was created. This points to one of the driving forces in Dooyeweerd's philosophy - the doctrine of creation (in Calvinist form). This leads into the third thing revealed by Dooyeweerd's concept of philosophy - that God has absolute sovereignty. Furthermore, God's authority is a "legal" authority - one marked by consistency, order, and constancy.^{xi} Thus Dooyeweerd looks for, and finds a strong sense of order in reality, and one which, being rooted in God's creation, is good.

ix. Bob Goudzwaard, a follower of Dooyeweerd, used precisely this characterization of idolatry to describe revolution, nationalism, materialism, and militarism, in Idols of our Time, trans. M. Vander Vennen, (Downers Grove, IL: Inter-Varsity Press, 1984).

x. see Contours, p.1.

xi. see Contours, p.201, which asserts that societal sphere sovereignty is based on the biblical [Calvinist] motive of creation. This is a much stronger sense of order than held even by many of those who accept that there is an order to reality. The doctrine of creation is part of what Dooyeweerd considers the "scriptural ground motive of the Christian religion" - creation/fall/redemption (Roots, p.15). It is important to understand that in Calvinist thought creation/fall/redemption applies to all of the cosmos, not just to humans. Although creation, fall, and redemption are not exactly independent doctrines, for the point we are discussing here, the order of reality, Dooyeweerd draws most heavily on the creation aspect. The fall aspect would seem to predominate in his idea of antithesis (below), and the redemption aspect would seem to be driving the idea that Christians should work purposefully to establish a just society.

The investigation into the structure of creation which Dooyeweerd contemplates is an empirical investigation,^{xii} although one undeniably influenced by the three aspects of Dooyeweerd's concept of philosophy noted above - a totality discipline, with an external reference point (i.e. God, in sharp distinction from thinkers who purport to reflect philosophically with their only reference point being within thought itself),^{xiii} and with a view to discovering highly orderly patterns. Thus Dooyeweerd's investigations are empirical in the sense that he begins with and takes seriously everyday experience, but not empirical in the absolute sense that the data can only lead to one conclusion - for Dooyeweerd the data are always subject to a variety of interpretations.^{xiv} This is developed further in the chapter on epistemology.

Dooyeweerd's idea of empirically discovered deep structures which are good might suggest a comparison with Structuralism (eg. Levi-Strauss, Saussure). This would be misleading. Dooyeweerd has none of the objectivist flavour that Structuralism has, nor does he have a "synchronic" methodology - he often engages in detailed historical analyses. Furthermore the content and scope of the structures Dooyeweerd finds are totally different from those of Structuralism. Dooyeweerd would probably view Structuralism as reductionist (eg because of its synchronic methodology) and in this sense would share the post-structuralist and post-modernist critiques of structuralism.

The Modal Scale

The centrepiece of Dooyeweerd's ontology, which appears to be both a tool for and a result of empirical observations is what Dooyeweerd calls the "modal scale" or "scale of cosmic modalities". These are irreducible aspects of reality. All things function in some way in all aspects. Each modality is centred on a "meaning-nucleus" or kernel of meaning.^{xv} Further, each aspect of reality has a corresponding "special science" the goal of which is to investigate the nature of that aspect.^{xvi} The fifteen modalities are shown in Table 1.

xii. eg Contours, p.36, 177.

xiii. eg Descartes, Kant

xiv. See Herman Dooyeweerd, In the Twilight of Western Thought, (Nutley,NJ: Craig Press,1972) ("Twilight"), pp. 55-60, where Dooyeweerd sees room for contribution of all serious philosophies to the common human task of philosophy. Yet Dooyeweerd sees his transcendental critique as of universal value.

xv. Dooyeweerd means something special by "meaning". For him, reality does not have meaning, it is meaning. Herman Dooyeweerd, A New Critique of Theoretical Thought, trans. D.H. Freeman, W.S. Young, & H. de Jongste, (Amsterdam & Philadelphia: Uitgeverij H.J. Paris & Presbyterian & Reformed, 1953-58) ("New Critique"), Vol I, p.4.

xvi. "Special science" is defined as one relating to a modality - Dooyeweerd does not deny that sciences other than "special" ones do or should exist - indeed he thinks they should. "Particular discipline" probably would capture the meaning of the concept better than "special science", but this would leave it more difficult to distinguish between disciplines associated with a modality, and those not so associated (eg those directed to study of an entity structure (explained below)).

TABLE 1 MODAL SCALE^{xvii}

	MODE	Meaning- Nucleus	Special Science
15.	Pistic	Faith ^{xviii}	Theology
14.	Ethical	Love (Humanitarian/Family)	Ethics
13.	Juridical	"Retribution" (Justice) ^{xix}	Legal Theory
12.	Aesthetic	Harmony	Aesthetics
11.	Economic	Frugality	Economics
10.	Social	Social Intercourse	Sociology
9.	Lingual	Symbolic Meaning	Linguistics
8.	Historical(Historicocultural)	Formative Power	History
7.	Analytic(Logical)	Distinction	Logic
6.	Sensitive(Emotional) (Psychic)	Feeling (applies to humans and animals)	Psychology
5.	Biotic	Life	Biology
4.	Physical	Energy	Physics/Chemistry
3.	Kinematic	Motion	Physics/Mechanics
2.	Spatial	Continuous Extension	Geometry
1.	Arithmetic	Discrete Quantity	Mathematics

xvii. Sources: Contours 40-41, 100-1, Roots 40-41; Some entries surmised.

xviii. Dooyeweerd uses "faith" in a particular sense here. As a modal meaning-kernel it reflects a particular aspect of being, present in the structure of human nature. Religion, on the other hand, regards the content of faith commitments made, which then influence the rest of life - thus the religious antithesis between good and evil. However, as will be noted later, Dooyeweerd also develops his theory in a way which tends to collapse the distinction he makes here. See infra, note xxiv.

xix. Dooyeweerd explained "It is very difficult to render the meaning-kernel of the juridical modality by a satisfactory term. In the first (Dutch) edition of this work I chose the word retribution (Dutch: vergelding, German: Vergeltung). This term was used in the pregnant sense of an irreducible mode of balancing and harmonizing individual and social interests..." New Critique, Vol. 2, p. 129.

Although Dooyeweerd is sometimes ambiguous about this, his predominant thought seems to be that these modalities, although "ordered", are not ordered by importance or hierarchy - rather the order is earlier to later. This order is to be established empirically. Indeed there are different views on how many modalities there are and what their order is - Dooyeweerd changed his mind on some of these specifics during his career. The earlier modes are necessary foundations for the later modes, and the later modes can "open" the earlier modes. Nonetheless, each modality has its own distinctive laws or norms, and a given modality has what might be called "jurisdictional independence" of the norms of other modalities. Dooyeweerd calls this "sphere sovereignty".^{xx} This is not to say that the modalities are wholly unrelated - this would be incongruous with everyday ("naive") experience, which is holistic and unified. Modalities relate to each other by what Dooyeweerd calls "analogy" - some feature of one aspect may parallel another aspect. For example, the clarity and conciseness of thought which is one of the norms of the logical modality is an analogy to the frugality which is the meaning-nucleus of the economic modality. When the analogy is to a later modality, Dooyeweerd calls it an anticipation; when to an earlier modality, a "retroicipation". The historical development of society in such a way that analogies are fleshed out Dooyeweerd sees as a positive process of "opening". Indeed when the contents of a given modality are examined they are found to consist entirely of analogies to other modalities.

Dooyeweerd's modal scale can be seen as a manifestation of his opposition to reductionism - he is here positing quite a complex structure of irreducible dimensions of reality. His idea of historical "opening" puts forward societal differentiation as a norm for the progressive direction of history^{xxi} - he saw de-differentiation (which is how he analyzed Nazism) as regressive.^{xxii} The fact that the structures and trends he put forward as normative resemble Dutch society so closely lead one to suspect an ethnocentric bias - and even on the matter of differentiation per se (as opposed to the particular manifestations of it) he may well have dismissed too easily the value of societies (eg some tribal societies) which are "undifferentiated" yet display considerable sophistication and contain integrative mechanisms well advanced over those in modern European societies.^{xxiii}

Cutting through the modal scale is the law-subject division. Thus, each modality has a "law-side" and a "subject-side", meaning that there are norms or laws about how each modality functions, and modal phenomena which are subject to these laws. For example, numbers are "phenomena", which are subject to the laws of the arithmetic modality. Within the subject-side of reality there is a division called the antithesis between those things in conformity with their appropriate laws and

^{xx.} In this paper I have minimized the use of the term "sphere sovereignty", because Dooyeweerd used it (confusingly) to refer to two different things. One is the irreducibility of modalities. The other is the jurisdictional independence of various social institutions - this is really a matter of enkapsis (explained below).

^{xxi.} See Roots, p. 81, and Contours, p. 126ff.

^{xxii.} In fact finding a quasi-objective, empirically based refutation of Nazism seems to have been an animating drive for Dooyeweerd. Note that he published his major work, De wijsbegeerte der wetsidee (of which New Critique is a later version in English) in 1935-36. See also Roots, pp. 79-82, and Paul Marshall, "Dooyeweerd's Empirical Theory of Rights", in Legacy, p. 121.

^{xxiii.} cf McIntire's critique of Dooyeweerd in "Dooyeweerd's Philosophy of History" in Legacy, p. 103ff.

those things not in conformity with them. This is a fundamental religious division between good and evil. (Of course, some kinds of things on the law-side leave little room for disobedience (eg laws of physics), while the "later" modalities have normative laws with increasing scope for obedience or disobedience (eg the meaning-nucleus of the ethical modality is love).)^{xxiv} It is important to understand that the religious antithesis does not neatly divide reality into two parts but runs through all parts of reality. For example, the antithesis does not divide Christians from pagans, the antithesis runs through the hearts of all humans. For this reason, Dooyeweerd views the antithesis as something to be "confessed", not used as a battle cry.^{xxv} Of course, the antithesis runs through the non-human aspects of reality as well. The antithesis, of course, is a manifestation of Dooyeweerd's belief that commitments shape theory.

The Nature of Theoretic Thought

According to Dooyeweerd, theoretic thought is thought qualified analytically and it is characterized by abstracting one particular aspect of reality and opposing to it the logical aspect. (Which particular aspect is chosen determines what kind of theoretic thought it is). This gives rise to an antithetic tension since this process by definition cannot capture the whole of reality, since it has abstracted out all reality but one aspect. To overcome this tension, we need to create conceptual syntheses. However, since in Dooyeweerd's view theoretic thought is essentially antithetic in nature, the synthesis must come from outside theory. In Dooyeweerd's view it is at this point, through the human self of the person theorizing, that religious commitments enter the picture and provide roots for theorizing.^{xxvi} This is the general outline of what Dooyeweerd calls his transcendental critique. He goes to great lengths to apply it to particular philosophies to show what religious presuppositions they depend on. For example (to simplify it to crudest terms) Dooyeweerd's critique of Kant is that Kant's choice of pure reason as a starting point was a religious choice, which led to unresolvable theoretical problems. For example how could one pole (the logical) of a relation of opposition (logical aspect vs. particular non-logical aspect) provide the basis for a synthesis? A second example of a theoretical problem is Kant's sharp separation of theoretical and practical reason.^{xxvii}

xxiv. There is an ambiguity in Dooyeweerd concerning his distinction between faith (a modality) and religion (a matter of direction and commitment, related to the antithesis). Dooyeweerd sometimes seems to have faith functioning in two places - as a modality and as between the heart and the modalities. He has faith pointing beyond the modal scale to the Word-revelation. Because of this, he has difficulty in seeing false (i.e. non-Christian) faith as faith at all. This would seem to suggest that there is not an antithesis boundary in the faith modality. See James H. Olthuis, "Dooyeweerd on Religion and Faith", in Legacy, and notes of conversation with James H. Olthuis, 26 November 1990.

xxv. Roots, p.3.

xxvi. See Hendrik Hart, "Dooyeweerd's Gegenstand Theory of Theory", in Legacy, pp.147-9. See also Contours, pp.163-9, and Twilight, pp. 8-22, and Herman Dooyeweerd, Introduction to the Encyclopedia of Legal Science, ("Encyclopedia"), unpublished draft translation by Johan D. van der Vyver of Encyclopaedie der Rechtswetenschap, (Amsterdam: Free University of Amsterdam, 1946-68), Chapter 1, at 118-121.

xxvii. Critiques of Kant permeate Dooyeweerd's writings, but see, for example, Contours, at 50, New Critique, Vol I, at 49-55, and Encyclopedia, Chapter 1, at 124-144.

The modal scale is also involved in this transcendental critique as often the presuppositions of a theory being critiqued amount to absolutizing one aspect of reality, rather than having the "total-view" of Dooyeweerd's philosophy. That is, the laws relating to one aspect of reality are applied to all of reality, thus reducing reality to one of its aspects. This absolutizing leads to an "...ism", a tendency Dooyeweerd, being strongly anti-reductionistic, opposes.^{xxviii} Examples would be materialism (i.e. the belief that everything is determined by the physical properties of atomic particles) and historicism (i.e. the belief that "anything goes" in history - related to legal positivism). Dooyeweerd's concept of "analogy", however, does suggest why it is tempting to apply laws across modal boundaries - analogies in a given modality do indeed point to other modalities.^{xxix}

With this basic transcendental methodology, Dooyeweerd analyzed the intellectual history of western civilization as revealing four basic ground motives - matter-form (Greek), creation-fall-redemption ("Scriptural" [Calvinist]), nature-grace ("Roman Catholic" [medieval scholastic]), and nature-freedom (humanistic).^{xxx} These ground motives represent the deepest driving forces in the development of Western civilization. He was of the view that

Three [of these ground motives] are internally dualistic and fragmentary. Their discord pushes one's posture of life to opposite extremes that cannot be resolved in a true synthesis. We call these extremes 'polar opposites' because they are two spiritually 'charged' poles that collide within a single ground motive. Each pole bears the seed of a religious dialectic.^{xxxi}

In Dooyeweerd's analysis, Greek philosophy contained a "matter motive" - rooted in the ancient nature religion and characterized by a cyclical stream of life driven by mysterious, irrational fate. This was in unresolvable tension with the "form motive" - rooted in the Olympian culture religion (i.e. as mythologized by Homer) and characterized by measure and harmony. The tension was between the mystical and the rational, and manifested itself in the view of human nature as being an immortal rational soul trapped in a mortal material body.^{xxxii}

xxviii. See Twilight, p. 20 and Contours, pp. 109-113. Some scholars in Dooyeweerd's tradition go so far as to speak of concepts as being "Calvinian" rather than "Calvinist" in order to avoid (?) a charge of falling into an "...ism". Actually, this is hardly necessary - not all things ending in "ism" in English are absolutizations of one aspect of reality. It should be noted that Dooyeweerd himself rejected the description "Calvinist", preferring "Christian", in order to be more inclusive and not to pin his philosophy to one particular man. (See New Critique, Vol. 1, pp. 524-5.) My view is that Dooyeweerd's interpretation of Christianity is so thoroughly (neo-) Calvinist that it would obscure reality to avoid using the term.

xxix. He also calls "analogy" "sphere universality", making clear that it is the counterpart to "sphere sovereignty", as the irreducibility of modalities is sometimes called.

xxx. Roots, see especially p. 15. This typology must seem simplistic when so summarized. Its validity can only be judged with reference to the detailed and exhaustive analysis of intellectual history which Dooyeweerd undertakes.

xxxi. Roots, at 11-12.

xxxii. Roots, at 16-22.

The "Scriptural conception" as Dooyeweerd expresses it, is that God alone created the cosmos, the entire cosmos (not just humanity) has fallen into sin, and is being and will be redeemed. There is no dialectic here because there is a unified conception of normativity. There is of course a conflict between good and evil, but even here the good is predestined to prevail.^{xxxiii}

What Dooyeweerd calls the "Roman Catholic" ground motive is an attempted synthesis of the first two ground motives - Christian belief and Greek philosophy. Dooyeweerd viewed this as an impossible synthesis which resulted in a reworked dialectical ground motive: nature-grace, for which Thomas Aquinas provides the paradigmatic example. In this motive the realm of nature has a kind of independence from God and can be investigated apart from revelation.^{xxxiv}

The nature-freedom ground motive stems from the Renaissance. Although influenced by Greek philosophy, at the centre of it was rather

... the humanistic religion of human personality in its freedom (from every faith that claims allegiance) and in its autonomy (that is, the pretension that human personality is a law unto itself).^{xxxv}

Associated with this freedom motive was a new view of nature - that humans could have mastery over nature. This motive of nature (or control) led to a scientific revolution which in turn left no room for freedom. That is, since the freedom motive provided no other basis for theoretic thought than mathematical natural-scientific thinking, once it became apparent that on this basis science determined all of reality, there was no reason not to apply these scientific methods to humans as well. This ends up denying human freedom, which had been the starting point of the enterprise in the first place. However, rather than leading to abandoning the assumptions which led to this contradiction, the nature motive and freedom motive continued in humanistic thought, necessitating finding different ways of holding one or both of the sides of the dialectic in check. In Hobbes, the nature motive dominated, yielding a picture of a deterministic universe. Kant divided reality into realms of nature and freedom, giving religious priority to freedom. Later there was an irrational "Romantic" reaction to this, which had elements of communitarianism, leading in its most extreme form to an ideology of nationalism or even fascism.^{xxxvi}

Dooyeweerd's four motive analysis can be reconciled, if in a way that seems a bit strained, with his "antithesis" analysis, which would seem to suggest only two basic categories - Christian [Calvinist] and "other". For Dooyeweerd, the most fundamental division in reality is between Revelation and idolatry. Within that framework he is able to see different forms of idolatry. He also insists that there is only one form of [Christian] Revelation, and that the appearance of different

xxxiii. Roots, at 28-39.

xxxiv. Roots, at 115-137.

xxxv. Roots, at 149.

xxxvi. Roots, at 148-182.

forms (i.e. theological traditions) results from (illegitimate) attempts to synthesize Revelation with a form of idolatry.^{xxxvii}

Entity Structures

The modal scale deals with aspects of reality, and more specifically with aspects of particular things, but not with the "things" themselves. These Dooyeweerd calls "individuality structures". James Olthuis, somewhat more descriptively, calls them "entity structures".^{xxxviii} Entity structures include everything from physical objects to social institutions. A particular entity structure will function in all modalities, but will be characterized by two of them - one called the foundational (or grounding) function, the other the guiding (or leading or qualifying) function. In modalities "later" than the qualifying modality, an entity structure functions only as object and not as subject. Loosely speaking, the foundational function is that modality which is absolutely necessary for the particular entity structure to function at all, while the guiding function is the modality which characterizes how the entity structure should function.^{xxxix} For example, in Dooyeweerd's thought, the family is biotically founded and ethically qualified (i.e. it is biology which determines whether a family exists, and a family functions properly when love is the guiding principle); and the state is historically founded and juridically qualified (i.e. states are states because they exercise (historical) power, and function properly when justice is the guiding principle).

Enkapsis

In Dooyeweerd's view a frequent relationship between entity structures is called "enkapsis" (a neologism which he coined, using the same root as "encapsulation"). Entity structures with different internal qualifying functions can be "interlaced" enkaptically - meaning that each entity structure retains its own structural laws. This kind of relationship is distinguished from a part/whole relationship where one thing subsumes another, which requires that both things have the same internal structure.^{xl} Dooyeweerd's classic example of enkapsis is that of a sculpture - the entity structure of the physical piece of marble remains present and its structural laws (i.e. physico-chemical laws) are not affected by the marble having been made into a work of art, which, as an entity structure is historically founded and aesthetically qualified. Yet the marble is totally bound up into the sculpture.^{xli} Dooyeweerd then applies this analysis to societal structures. All social institutions are in a relation of territorial enkapsis to the state, but this does not mean that they form a part/whole relationship with the state - the state must observe and respect the independent structural laws of different social institutions - and only regulate those aspects of them which fall within the characteristic function of the state (which, for Dooyeweerd, is juridical).^{xlii} Indeed,

^{xxxvii.} See Encyclopedia, Chap. 1, pp.155-6.

^{xxxviii.} Conversation with James H. Olthuis, 26 November, 1990.

^{xxxix.} This does not quite capture Dooyeweerd's use of the foundational and qualifying functions, but to do this would require a lengthy digression. See infra, note **Error! Bookmark not defined.**

^{xl.} see Contours pp. 190-202, 269-286.

^{xli.} Contours, pp.190-195.

^{xlii.} See Marshall in Legacy, especially pp. 127ff.

Dooyeweerd is of the view that not only should the state respect the independent structure of other institutions or spheres, but that it cannot get away with doing otherwise for very long.^{xliii} For example, the family is a social institution which is biotically founded and ethically qualified. The meaning-nucleus of the ethical modality is love in temporal relationships - hence a norm for the family as an institution is that its internal relationships should be ones of love. This does not mean that the state can pass a law requiring family members to love one another. It can and should, however, pass laws putting some limits on how family members can treat each other, and regulating how resources be divided if a family breaks up.^{xliiv} A legal example Dooyeweerd himself gives is that the internal commercial law created by a contract is enkaptically bound in civil law.^{xliv} For Dooyeweerd the state must also respect other distinct social institutions, including some often subsumed in the state, such as schools and businesses.^{xlvi} Dooyeweerd points out that when an enkaptic relation with the state is misconstrued as a part/whole relationship, one of two false conclusions arises: one is that the state can then regulate anything in any way, the extreme of which is totalitarianism (which need be no less totalitarian if manifested as unconstrained majority rule). The other false conclusion, partly in reaction to this, is to use individual rights as the only constraint on state power. Thus freedom and democracy can come into conflict.^{xlvii} Yet an individualistic view of society does not capture the reality of what is, and carried to an extreme, denies collective rights. It would seem that Dooyeweerd's notion of enkapsis can break through some futile debates between individualists and communitarians: by recognizing the authority, independent of the state, of some social institutions, the state's power is constrained, but in a way which takes full account of collectivities.^{xlviii} This is a decentralist view - but a functional, not a geographical decentralism.

xliii. Marshall in Legacy, p.127.

xliv. See Contours p. 208, Marshall in Legacy, p. 136, and infra, at 22.

xlv. Herman Dooyeweerd, A Christian Theory of Social Institutions, ("Social Institutions"), trans. M. Verbrugge, (La Jolla, CA: Herman Dooyeweerd Foundation,1986) at 106. The meaning of this example has shifted somewhat since Dooyeweerd used it, with the rise in Anglo-American law, of doctrines like unconscionability, which might suggest something closer to a part-whole relationship. As will become clearer later, I am of the view that this makes the example more nuanced, but that it does not cease to be an example of enkapsis. See infra, at 22.

xlvi. This assertion about businesses is not as reactionary as it might sound - the state's role is to make sure social institutions do not overstep their role and impinge on other institutions (Marshall in Legacy, p. 129). In unrestrained capitalism business organizations do overstep their role. Dooyeweerd would certainly not be of the view that the economic modality should be the dominant one in politics or law [cf Law & Economics]. Nor is the role of business to make profit at any cost in Dooyeweerd's analysis. There is room for incorporating the interests of workers and consumers in the very nature of a business enterprise. (See Contours p. 252, and Marshall in Legacy, p. 129) See also the quite radical direction in which economist Bob Goudzwaard takes Dooyeweerd's thought eg in Capitalism and Progress and Aid for the Overdeveloped West. It is also apparent that Dooyeweerd's analysis is much more sophisticated than and quite unlike the classical 19th century public/private distinction - the boundaries of authority are drawn functionally, not institutionally. It is also, despite a superficial similarity, different from the Neo-Marxist concept of relative autonomy. (Dooyeweerd views the Marxist position as a unilateral enkapsis, while he holds that there must be a correlative enkapsis - Social Institutionspp 69,74.) This entire matter is dealt with in more depth in Chapter 3, infra.

xlvii. See Roots pp. 165ff, Social Institutions, pp. 180ff.

xlviii. This does not mean there is no place for individual rights in Dooyeweerd's theory. See Marshall in Legacy, p. 129.

THE EPISTEMOLOGICAL QUESTION

Outline of Dooyeweerd's Epistemology

As may have become apparent in sketching a general outline of Dooyeweerd's philosophy, at first glance there appears to be some dialectic tension in Dooyeweerd's epistemology. This stems from the fact that empirical data is a touchstone for him coupled with his insistence that theory is dependent on basic commitments. What is the relationship between empirical data and commitments? Which predominates in shaping theory? Dooyeweerd's answer appears to be that they both do and should shape theory, and not in a particularly dialectic way. To appreciate this answer, however, we must back up first.

Dooyeweerd's epistemology can be sketched as follows.

religious commitments

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cosmic order----→ data ----→ synthesis ----→ theory

To begin with, Dooyeweerd does believe in an eternal and immutable cosmic order, so his thought should be understood in this context. However, the validity of his theory does not seem to depend on this belief, which is now extremely contentious philosophically. From the cosmic order comes data, which, however, are subject to a variety of interpretations.^{xlix} Commitments may indeed influence our perception of the data. The data are not infinitely malleable, however, and do place constraints on theory, and indeed provide some basis for comparison of the validity of theories (i.e. as to how well they fit the data)ⁱ. Were it otherwise, theory would collapse into solipsism. The data then become the input for theoretic thought, the goal of which is a synthesis into a theory. Since Dooyeweerd's theory of theories views theoretical thought as essentially antithetical in nature, he is of the view that in order to proceed with synthesis, there must be some input from outside of theory. Here again religious commitments enter the picture.

In presenting his epistemology this way, Dooyeweerd separates the structure of his theory of theories (i.e. that everyone has commitments that influence their theory - this is the basis for his transcendental critique) from the content of his commitments (i.e. Christian [Calvinist] - this is the basis for his transcendent critique).ⁱⁱ He does not expect the content of his commitments, or conclusions based solely on them, to be convincing to one who does not share them. He does, however, think that his radical transcendental critique (that everyone's commitments affect their theory) has "universal value".ⁱⁱⁱ This language might seem a bit confusing, given his insistence on the effect of commitments on theory, which must surely apply to his theory of theories as well. He

xlix. Twilight, p.58.

i. See Twilight, pp. 59-60.

ii. See Hart in Legacy, p.153.

iii. Twilight, p.55.

recognizes this, and admits that even his transcendental critique is not independent of his religious starting point.^{liii} That is, the assertion that commitments affect theory is itself a commitment (or depends on a commitment). He goes on to point out that his theory is not infallible,^{liv} and goes out of his way to say that any serious philosophy has some contribution to make to the common philosophical task of humankind.^{lv} What then can we make of his claim to "universal value" of his transcendental critique? Perhaps the following. If we apply his theory of theories to his theory of theories itself, we have to admit that his transcendental critique depends on his commitments. However, it is still possible to assert that his theory of theories fits the data better than other available theories. For example, it accounts for the observation that there are different theories, and no one of them has prevailed over the others. A foundationalist view that theory can be based on unmediated perception of data and universal rationality (eg Descartes, Kant) cannot account for this observation. If the rationality is really so universal and self-evident why doesn't everyone agree with it?^{lvi} In this context one can also understand Dooyeweerd's insistence that his theory is not one of "relativism".^{lvii} He is asserting that there are means of comparing the value of theories (by how well they fit the data), and that he after all does believe in an eternal immutable cosmic order. This need not be taken as an assertion that commitments do not affect theory. Thus, while at one level both the structure and content of Dooyeweerd's theory of theories both depend on his commitments, the structure (the transcendental critique) can find substantial support from empirical data, while the content (Christian) is more purely dependent on commitment.

Parallels in Critical Theory

When Dooyeweerd first advanced his theory it was relatively novel. At present the idea of commitments affecting theory is widely shared, although much of the rest of Dooyeweerd's theory remains arcane. Dooyeweerd's epistemology, however, has broad parallels with critical theory. His views on how commitments affect perception of data show some similarity to the post-structural critique of structuralism. His theory also shares the complexity of post-structural and post-modern theory. Regarding his protest that he is not "relativist", one can compare this to critical theory's response to charges of nihilism. Characteristic of this is J.M. Balkin's introduction to Derrida, where he argues that deconstruction is analytic, not synthetic, and its goal is to permit choice, not close it down. This is done by making thinkable again marginalized forms of perception. But most emphatically, freedom is not nihilism.^{lviii} This is essentially the same approach as taken by Gary Peller on this point, in arguing that we must accept the inevitability of politics and choose sides in the social struggle, without any guarantee that any particular course is the right one.^{lix} To say that

liii. Twilight, p.52.

liv. Twilight, p.53.

lv. Twilight, p. 55.

lvi. This understanding of Dooyeweerd on this point is drawn from a conversation with Hendrik Hart, February 11, 1991.

lvii. Twilight, pp. 59-60.

lviii. J.M. Balkin, "Deconstructive Practice and Legal Theory", (1987) 96 Yale L.J. 743 especially at 777 and 786.

lix. Gary Peller, "The Metaphysics of American Law", (1985), 73 Calif. L. Rev. 1151 at 1290.

there is no guarantee of making the right choice is not to say that there is no non-arbitrary basis for choosing. David Caudill, in a thesis focused on comparing Dooyeweerd's approach with that of one strand of CLS, particularly concerning the matter of assumptions affecting theory, points out that charges of nihilism (directed to either Dooyeweerd or CLS) are based on several false assumptions.

" The first is that people will no longer have confidence in any laws, values, and goals once the foundations of social order and progress are shown to be religious or ideological. The second is that various competing viewpoints will not be able to agree on any common grounds for discussion, analysis and research. Finally, those fearing nihilism assume that no one will be able to convince another to change viewpoints."^{ix}

It becomes evident the charge of Dooyeweerd being relativistic, and the charge that CLS is nihilistic amount to the same charge. Indeed, both are heavily loaded words used without much care to specific content. Few, if any, CLS scholars are nihilistic in a technical sense,^{lxi} and Dooyeweerd, with a view of an eternal immutable cosmic law is clearly distinct from "relativism", unless "relativism" is taken to mean no more than that commitments affect theory.

The relativism/nihilism debate comes into sharper focus in a political context. The major modern theories, Liberalism and Marxism both see themselves as necessary end-states of history, and much of their power and appeal seems based on this. This makes it understandable that to deny that social progress is historically necessary is taken to mean that there is no hope for progress at all, while all it need mean is that progress is possible but not necessary.^{lxii} Chantal Mouffe addresses this point:

"That a question remains unanswerable by science or that it does not attain the status of a truth that can be demonstrated does not mean that a reasonable opinion cannot be formed about it or that it cannot be an opportunity for rational choice.

"...an accusation [of relativism] makes sense only if one remains in the thrall of a traditional problematic, which offers no alternative between objectivism and relativism.

"...As Rorty notes, 'the real issue is not between people who think one view is as good as any other and people who do not. It is between people who think our culture, our purpose or institutions cannot be supported except conversationally and people who still hope for other sorts of support.' It is always possible to distinguish between the just and the unjust, the legitimate and the illegitimate, but this can only

ix. David Caudill, Disclosing Tilt: Law, Belief and Criticism ("Disclosing Tilt"), (Amsterdam: Free University Press, 1989) at 121.

lxi. It is true that a philosophic tradition which has had some influence on CLS, that of French post-modernism, has in the case of some theorists (egBaudrillard) begun to resemble nihilism. See Michael Ryan, "Postmodern Politics" (1988) 5 *Theory, Culture & Society* 559 at 565-6.

lxii. In fact, it is the idea that progress is historically necessary which erodes the meaningfulness of the concept "progress".

be done from within a given tradition... to give up the distinction between logic and rhetoric to which the postmodern critique leads - and where it parts with Aristotle - does not mean that 'might makes right' or that one sinks into nihilism.

"...As Searle has pointed out to Derrida: 'the real mistake of the classical metaphysician was not the belief that there were metaphysical foundations, but rather the belief that somehow or other such foundations were necessary...'^{lxiii}

Thus an assertion that a foundational approach is not necessary is taken as complete relativism because the framework of the person interpreting admits of nothing between absolute truth and nihilism. Such a belief also is a barrier to understanding Dooyeweerd. Hendrik Hart notes, here in a philosophical context

"From within the camp of those who regard truth as essentially related to belief in correct propositions, the undermining of the idea of truth as rational inevitability seems like relativism."^{lxiv}

"...if the choice in our theory of theory is to make the theoretical attitude itself the foundation - as is the case in scientism - [Dooyeweerd's] argument makes no sense. More than that, the point he made would be invisible. One needs to share Dooyeweerd's point of view to see what he saw."^{lxv}

"An ultimate commitment to the autonomy of reason makes it impossible for a theory based on that commitment to separate the structure of the commitment-theory relation from its believed content. As a result, the difference between commitment and theory is not noticed, and the unity of commitment and theory in commitment to theory is interpreted as uncommitted, unprejudiced, objective rational judgement... But it is only the same integrality of theory and commitment in both structure and content that allows Dooyeweerd to distinguish the two in his theory."^{lxvi}

Assessment

Given the similarities of debates about relativism/nihilism surrounding the work of Dooyeweerd and CLS, which debates have proceeded independently, are there things from one which can be helpful to the other? It would seem that they have largely covered the same ground, so that any mutual help is probably minimal. Dooyeweerd does have a much more elaborate theoretical investigation into how commitments enter into theoretic thought, although for this kind of theorizing, most CLS scholars would probably want to draw on Foucault. One thing that can be said is that the Dooyeweerd debate about relativism occurred earlier, and is noteworthy in that

lxiii. Chantal Mouffe, "Radical Democracy: Modern or Postmodern?" in Andrew Ross, ed., Universal Abandon? The Politics of Postmodernism (Minneapolis: University of Minnesota Press, 1988) at 37-8.

lxiv. Hart in Legacy, p. 163, note 44.

lxv. Hart in Legacy, p. 153.

lxvi. Hart in Legacy, p. 164-5, note 51.

regard. It might be given as an example of a fully developed theory which has been around for some time, as a defence against dire predictions of where this kind of thinking might lead. Pointing to instances of how ideas in Dooyeweerd's tradition have become embedded into Dutch constitutionalism might also be helpful in this regard. Dooyeweerd's thought also might be used as an illustration of what is asserted by deconstructionists - that there is nothing inherently "leftist" about deconstruction, although generally speaking the right has more to lose than the left from the unmasking of ideological tilt.^{lxvii} Dooyeweerd does not easily fit on the political spectrum. As will be noted below, his thought has been used in both conservative and radical directions.^{lxviii} But more significantly, the left/right typology is just not very helpful in explaining political groups working in a Dooyeweerdian framework. The left/right typology implicitly assumes that economic policy is the determining factor in the stance of a political group. The very nature of a Dooyeweerdian analysis rejects this assumption, as the economic is seen as one modality, not as the key to politics. Further, the political groups working in the Dooyeweerdian tradition regularly raise issues that result in their position being opposed by both left and right established parties. Nor does their agreement with another particular party on one type of issue indicate that there will be agreement on other matters.^{lxix}

It should be noted that critical theory is not a homogenous theory which can be categorically compared to Dooyeweerd. Caudill, in a thesis comparing Dooyeweerd and CLS, distinguishes the normative critique in CLS, which stresses ideology as false consciousness, from the methodological critique, which discloses ideological tilt to improve discussion and criticism. It is the latter strand of CLS which Caudill sees as parallel to Dooyeweerd in significant ways.^{lxx} Actually both strands have cognates in Dooyeweerd's theory - the normative critique corresponds to Dooyeweerd's transcendent critique and the methodological critique corresponds to his transcendental critique. Dooyeweerd's transcendent critique, being explicitly Christian, does not compare easily to the normative CLS critique, being implicitly neo-Marxist.^{lxxi}

^{lxvii.} See, for example, J.M. Balkin, "Deconstructive practice and Legal Theory" (1987), 96 Yale L.J. 743 at 786.

^{lxviii.} See infra, at 24.

^{lxix.} The prime political organization in the Netherlands rooted in his tradition was the Anti-Revolutionary Party (A.R.P). This party was considered "right" in the Dutch Political spectrum at the turn of the century. The party has since merged with other parties in the Christian Democratic Appeal (C.D.A.), which is today considered "centre" in Dutch politics. This would make it "left" in Canadian politics. The Canadian counterpart of this is the organization Citizens for Public Justice (C.P.J.), which by most outsiders would probably be considered "left". Those inside these organizations would agree, though, that the left/right categorization is not helpful in explaining what they are about. An issue like public funding for confessionnal schools sees C.P.J. opposed to a common position of established left and right parties, and C.P.J. finds common cause with the left on issues like welfare reform and native rights, but has a position on abortion (moderately pro-life) which does not fit in a "left" typology. (This is an oversimplification of C.P.J.'s position, particularly on abortion, but it will suffice for the purposes of the point being made.)

^{lxx.} Disclosing Tilt, at 67-68.

^{lxxi.} This is especially so given Dooyeweerd's hostility to Marx's writings. Note, however, that Nicholas Wolterstorff has attempted to promote interaction between Dooyeweerdians and Liberation theologians (who are, of course, influenced partly by neo-Marxism), and believes that Dooyeweerdian theory and Liberation theology have important things to learn from each other. See Until Justice & Peace Embrace, (Grand Rapids: Eerdmans, 1983).

It should be further pointed out that although Dooyeweerd and critical theory have some common ground, they are far from being identical, even on the epistemological question. Dooyeweerd's belief in an eternal immutable cosmic order, despite our inability to perceive it in an unmediated way, springs to mind at once. So in some sense Dooyeweerd goes less far than some critical theorists in deconstruction. He would probably not say that judgements could only be made within a given tradition (cf Mouffe, above). While acknowledging that the presuppositions of any tradition will inevitably influence judgements, he does believe that the data provide some constraint on theory. In short, while he acknowledges (and indeed insists) that society influences our perception of reality, he does not believe it constructs our reality. The makers of history do not start with a clean slate. One thing that seems a driving impulse in his thought, for example, is an attempt to show that Nazism is regressive on the basis of an empirically derived norm of history (although the derivation of the norm also necessarily involved commitments). He viewed the theory behind Nazism as having to explain away too much data to be a credible theory, even from its own perspective.^{lxxii}

One thing that Dooyeweerd does not address directly, which some critical theorists do is the following. If theoretical frameworks can affect perception of data, it is at least conceptually possible that two theories may explain (their perception of) the data equally well within their own frameworks. This I gather to be the driving force behind Mouffe's statement of only being able to make judgements within traditions. Dooyeweerd's frequent methodology, on the other hand, was to point to antinomies of other theories on their own terms (this part is a judgement within that tradition), and to show that his theory gives a better account of the phenomenon in question (this is a judgement between theories). This only works if one believes antinomies are bad. This belief is a core and driving presupposition of Dooyeweerd's thought, so in a sense the latter judgement between theories is made from within Dooyeweerd's own theory. Of course, if both theories in question view antinomies as bad, this step is not problematic, since being common ground, as between the two theories it is "neutral". To be fair, there were probably few if any theorists in the time of Dooyeweerd's greatest activity willing to challenge the idea of antinomies being bad, and much greater challenges from the opposite direction, so it is understandable that Dooyeweerd does not meet this head on. This step also only works if one theory explains the data better on its own terms than does the other theory on its terms. As noted, it is conceptually possible that they may be evenly balanced.

Another point needs to be made that although the general conclusions of Dooyeweerd's epistemology are now widely shared, the detailed steps by which he comes to these conclusions are not, even by those who consider themselves his followers.^{lxxiii} The way he developed the theory depends on his distinctive concept of the role of philosophy, his modal law theory, and the belief that the essence of theoretic thought is antithetical, that is, that it consists of opposing the analytic aspect of a phenomenon to one of the other modal aspects.

^{lxxii.} See Roots, at 73-81, especially at 78-9.

^{lxxiii.} See Hart in Legacy, p.152.

DOOYEWEERD'S THEORY OF THE STATE

In developing a theory of the state, Dooyeweerd rooted his investigations in the perennial dilemma of might versus right. He addressed this dilemma in the framework of his general philosophic structure of modal law theory, and in so doing generated a unique answer to the dilemma. One of his basic concerns in developing a theory of the state was to limit the state's power.^{lxxiv} Given his general philosophical position, however, it was clear that doing this via the rights of individuals would be unsatisfactory, in contrast to most prevailing legal theories.^{lxxv} Hence his project became to provide some other means of limiting state power, which provided tangible limits, but did not lead to a laissez-faire system.

Dooyeweerd began his investigation empirically, noting that political theory had always been centred on one basic dialectical problem - the relation of might and right.^{lxxvi} He diagnosed this dialectic as flowing from dialectic ground motives, in particular (since the Renaissance) of the Nature-Freedom motive.^{lxxvii} He then incorporated the elements of the might/right debate into his theory of the state as follows. Recall that in Dooyeweerd's terms the state is an "individuality structure" [entity structure], and that entity structures are characterized by two modalities - a foundational function and a qualifying function. For Dooyeweerd, the foundational function of the state is

...an internal monopolistic organization of the power of the sword over a particular cultural area within territorial boundaries.^{lxxviii}

This is a particular subset of the historico-cultural modality. The qualifying function is an integrative function -

... a public legal relationship uniting government, people and territory into a politico-juridical whole.^{lxxix}

This is a function within the juridical modality. The meaning of the interaction of these functions is that power is indispensable to the state, and always retains its intrinsic nature, but that it should be exercised in a way which serves the qualifying function of the state to do justice. Otherwise it would degenerate into "an organized military gang of robbers" and cease to be a real "state".^{lxxx}

lxxiv. Recall his abhorrence of Nazism, but his concern was much broader than this.

lxxv. Let me re-iterate that this does not mean that he sees no role for individual rights - his concern is that this is an insufficient foundation for a political theory. See supra, note xlvi.

lxxvi. New Critique, Vol III, at 397.

lxxvii. See supra, at 11, and New Critique, Vol III, at 398.

lxxviii. New Critique, Vol III, at 414.

lxxix. New Critique, Vol III, at 437.

lxxx. New Critique, Vol III, at 434.

Thus Dooyeweerd claims to have overcome the might/right dialectic by seeing them in "structural coherence".^{lxxxix}

The qualifying integrative function of the state is to be guided by what Dooyeweerd calls "public social justice", which

...requires the harmonizing of all the interests obtaining within a national territory, insofar as they are enkaptically interwoven with the requirements of the body politic as a whole. This harmonizing process should consist in weighing all the interests against each other in a retributive sense, based on a recognition of the sphere-sovereignty of the various societal relationships.^{lxxxii}

There are three points worthy of note in this quote. First, as has been noted above,^{lxxxiii} Dooyeweerd uses "retributive" in a particular sense probably amounting to "just", as the context would suggest.^{lxxxiv} Second is the matter of sphere sovereignty. This is part of his modal law theory, and provides limits to the power of the state. Different aspects of reality (eg certain kinds of relationships) have their own internal structure which the state must respect. Otherwise the state would be stepping outside its own task. The state has a task of integrating these relationships "in the public interest", but the public interest itself has limits - it cannot encroach on non-political societal relationships.^{lxxxv} The state's role is not to actively participate in the various social relationships and activities, but to integrate them by ensuring the conditions necessary for them all to flourish. This concept is probably easier to grasp when expressed in a more concrete way in the notion of enkapsis. Enkapsis is a relation between "entity structures", and so can apply to the relationship between the state and other societal structures. It is of course correlated to the sphere sovereignty relationship between the function of the state and the function of the other structures. All societal structures within the territory of a state are in a relation of territorial enkapsis with it.^{lxxxvi}

What Dooyeweerd is advancing here could be understood as similar to the administrative law concept of jurisdiction, which accords deference to "inferior tribunals", but retains for the courts

^{lxxxix}. New Critique, Vol III, at 434. See also Jonathan Chaplin, Dooyeweerd's Theory of Public Justice: A Critical Exposition (M.Phil. Thesis, Institute for Christian Studies, 1983) at 73-75. At this point we have reached the limits of our earlier explanation of the foundational and qualifying functions in general, which may have suggested an "is/ought" distinction. It should be clear that the foundational function of the state contains normative, as well as descriptive force (since the exercise of power may be achieved more or less perfectly - New Critique, Vol III, at 420), and that the qualifying function is not purely normative (although Dooyeweerd was a trenchant foe of legal positivism, he did recognize that there could be different positivizations of law which could be proper - see his distinction of the positive contents of goals of the state from the structure of the state - New Critique, Vol III, at 425ff.)

^{lxxxii}. New Critique, Vol III, at 446.

^{lxxxiii}. Supra, note xix.

^{lxxxiv}. Chaplin has suggested replacing the term "retributive" with "tributive", (suggesting retributive, distributive, and attributive) as better reflecting the content of Dooyeweerd's concept. Chaplin, supra, note lxxxix, at 100ff.

^{lxxxv}. New Critique, Vol III, at 438.

^{lxxxvi}. New Critique, Vol III, at 661-2.

the over-arching power of jurisdictional review.^{lxxxvii} That is, the relationship between the courts and specialized tribunals is analogous to the role Dooyeweerd sees for the state in general vis a vis other social structures. It is as if Dooyeweerd applied an administrative law paradigm to social structures in general (as well as even more generally in philosophy). This can be seen most clearly in Dooyeweerd's treatment of the question of the sources of law.^{lxxxviii} In sharp distinction from both legal positivism and social contract theory, Dooyeweerd views the authority of various social institutions (eg families, churches, labour unions, schools) to be an original authority, derived from the nature of reality independently of the State. Thus he rejects the whole/part model for the relationship to the state - for example the family is not "part" of the state, although it is part of society. He also rejects the idea that the state has the authority to determine the limits of its own authority.^{lxxxix} The original spheres of competence bind and limit one another.^{xc} Nor does the state have a monopoly on everything belonging to the juridical modality - each societal structure functions in the juridical sphere, and has a responsibility for doing justice in a way particular to its own task.^{xc1} It is only the public aspects of justice where the state has authority. Nonetheless, when an institution exceeds the limits of its competence, it is the duty of the state to intervene. An institution exceeding the limits of its authority is a matter of public justice. Dooyeweerd gives a number of examples of this: review of domestic tribunals of associations on the basis of the principles of natural justice,^{xcii} a church imposing a compulsory tax on its members,^{xciii} and "abuse of power" which might occur in a family situation, or in a commercial situation (such as where a standard form contract is used).^{xciv}

A paradigmatic example of the kind of thinking Dooyeweerd is advocating here would be that on the normative basis for the family, a child would be entitled to love from his or her parents. The state, however, should not (and could not) enforce this duty. But the state would be fully justified in intervening if a parent failed to provide the necessities of life for a child. This would

^{lxxxvii.} Indeed, Dooyeweerd's notion of enkapsis may well have been inspired by administrative law, which was clearly a major interest and formative influence on him. Although he spent most of his life as professor of legal philosophy, encyclopedia of law and medieval Dutch law, his doctoral dissertation was on the subject of the cabinet in Dutch constitutional law, and he spent time working for a municipal government, and for the Department of Labour. (Zylstra, "Introduction", in Contours, at 14.) As we will see, he also gives a number of examples of enkapsis drawn from administrative law. Enkapsis does seem to be a more general concept than jurisdiction, however, since Dooyeweerd applies it to the relationship of a statue and the marble which makes it up, which most administrative lawyers would not think of as a case of jurisdiction.

^{lxxxviii.} New Critique, Vol III, at 664-670.

^{lxxxix.} This is what the theory of "Kompetenz-Kompetenz", which he critiques, states. See Chaplin, supra, note lxxx1 at 126 n. 81.

^{xc.} New Critique, Vol III, at 669.

^{xc1.} See Chaplin, supra, note lxxx1 at 106. See also Encyclopedia, Chapter 2, at 18.

^{xcii.} New Critique, Vol III, at 680-1.

^{xciii.} New Critique, Vol III, at 689-91.

^{xciv.} New Critique, Vol III, at 691-2.

amount to an abuse of the parent's power.^{xcv} Some of the other examples Dooyeweerd gives, however, are more problematic. One is of a Dutch civil suit for damages for expulsion from a typographical society. The plaintiff, while chairing a meeting, had allowed an "insulting expression" to be used, and was expelled for "endangering the reputation" of the society, contrary to its constitution. The court examined the questions of whether the expression was indeed insulting and whether the reputation of the society had been endangered. Dooyeweerd approved of this on the grounds that an insult would be a civil wrong, giving the court jurisdiction.^{xcvi} This seems unconvincing. The civil wrong in question would have been a wrong by a third party against the defendant association. How could this give the court jurisdiction to hear the plaintiff's complaint that he had been expelled for condoning this wrong? If anything, the farthest it would seem to go would be to give the association a cause of action against the plaintiff, not vice versa.^{xcvii} Dooyeweerd does note that this kind of reasoning is "extremely delicate", and it is quite possible for the state to overstep its limits in such matters.^{xcviii} It is easy to find parallel examples of such overstepping in Anglo-Canadian jurisprudence. In fact, the type of reasoning in the typographical union case sounds suspiciously like the notorious judgement of the Supreme Court of Canada in Metropolitan Life.^{xcix} Almost anything can be characterized as a jurisdictional error (although the characterization may be more or less convincing), and in Dooyeweerd's case, many things can be characterized as a social institution stepping outside its competence (again, more or less convincingly). Dooyeweerd does seem aware of this danger, and gives examples of the supervisory role of the state being exceeded. He cited a part of the Dutch Commercial Code as

^{xcv.} See New Critique, Vol III, at 276-81, and Chaplin, supra, note lxxxi at 157-159. This is intended as an example which shows how Dooyeweerd's theory of enkapsis corresponds to a strong intuition most people have that the state should not be so intrusive into the family as to require love, and that no state would be able to enforce this very well. Dooyeweerd roots his conclusion here in a modal analysis of the internal structure of the family. However, as Chaplin notes, even here there is a certain softness to Dooyeweerd's distinction - exactly where and how is the boundary line about what is "abuse" to be drawn? Chaplin concludes that this is dependant on the particular social conditions, but subject to the overall framework of Dooyeweerd's norms, which do provide some real constraints - the state must satisfy the public criterion and the justice criterion. *Ibid*, at 185-188.

^{xcvi.} New Critique, Vol III, at 684-5.

^{xcvii.} Chaplin tries to salvage this example by saying that the judge examined whether or not the expression was insulting or not on the basis of the ordinary civil right not to be insulted. Had he concluded it was not, he could have found for the plaintiff on the basis of unfair dismissal (which was within the court's competence). This does not explain, however, why the court found it could dismiss the plaintiff's case after having found the expression was insulting, unless this was via finding the dismissal was not unfair. This, however, is not how Dooyeweerd explains the reasoning of the case. See Chaplin, supra, note lxxxi at 155-6.

^{xcviii.} New Critique, Vol III, at 685 and 692. See also Chaplin, supra, note lxxxi at 156-7 where he notes there is a certain indeterminacy remaining in Dooyeweerd's conception of the boundaries of the state's competence.

^{xcix.} Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796, [1970] S.C.R. 425. A labour relations board had found that certain employees were members of a union on the basis of de facto membership despite that they were not qualified under the terms of the union's constitution. The Supreme Court found this to be the "wrong question", and that in doing this the labour board had stepped outside its jurisdiction. Shortly after this judgement the legislation was amended to give the labour board the jurisdiction to do what it had done. Metropolitan Life has been much critiqued, and is usually regarded as the high water mark of intervention by the courts.

interfering in the inner sphere of commerce and industry,^c and suggested that legislating profit sharing for workers would violate industrial sphere sovereignty.^{ci}

The above examples demonstrate something of the power of Dooyeweerd's analysis. It is not surprising (nor a shortcoming) that when pushed, some of the examples show some indeterminacies.^{cii} The theory provides plenty of normative guidance, including, as we will argue below, on points where other theories have stalled. What is unfortunate is that Dooyeweerd was relatively sparse on giving examples, compared to his elaborate theoretical arguments. This has led to his ideas being used for quite different purposes. Wolterstorff has commented

It ought to be noted that Dooyeweerd's thought has regularly been used by social conservatives to undergird their position: they use his stress on the importance of resisting the expansion of government outside its sphere to justify their indifference to - and, indeed, their practice of - economic exploitation; they use his stress on the importance of recognizing governmental authority within its own sphere to justify their opposition to all who preach or practice resistance to government dictates; and so forth. Dooyeweerd's thought is one more example in that long line of "creation ordinance" theologies and philosophies that have been used to support conservative positions. We might well suspect that, as Karl Barth insisted, there is an affinity here to which we must be constantly alert. Some will argue that only by misrepresenting Dooyeweerd can the conservative find support among his ideas, but I am not persuaded of that. It seems to me that at the very least they contain certain ambiguities.^{ciii}

Wolterstorff (who is in the Dooyeweerdian tradition) goes on to note (approvingly) that Dooyeweerd's thought has also been taken in "thoroughly progressive, even radical, direction[s]"^{civ} For example, Goudzwaard argues that the norm for the economic sphere should be stewardship, and that by this standard many businesses which make large profits are really economic disasters (such as those which pollute the environment, use up too much non-renewable energy or resources, or exploit their workers), and that some businesses which lose money may actually be very

^{c.} New Critique, Vol III, at 692-3. He is rather sketchy about this example. His main concern seems to be that the Code made a commercially untenable distinction between merchants in movable goods and real estate brokers.

^{ci.} See Chaplin, supra, note lxxxi at 172. Chaplin critiques this as being inconsistent with his view that minimum wage laws were proper for the state to enact, and suggests that both these matters should be within the competence of the state. Ibid, at 179-185.

^{cii.} In fact, I find J.B. White's characterization of law as rhetoric convincing. By rhetoric he means "the central art by which community and culture are established, maintained, and transformed". Viewing any legal theory as a systematic rhetoric does not mean that any one is as good as another, or that legal theory can be manipulated purely instrumentally. The nature of the system of rhetoric will constrain the use it is put to. This is roughly compatible with Dooyeweerd's epistemology, as applied to theoretic thought in general. J.B. White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life" (1985), 52 U. Chicago L. Rev. 684.

^{ciii.} Wolterstorff, supra, note ii at 59n.

^{civ.} Ibid.

"economical".^{cv} Chaplin argues that Dooyeweerd's public justice concept is not merely a matter of the state policing the boundaries of other institutions' competence, but requires creating the conditions necessary for the fulfilment of the tasks of those institutions, such as guaranteeing access to required resources.^{cvi} A vigorous application of this principle would thoroughly transform the nature of most states.

Another point essential to Dooyeweerd's notion of the state is one which is curiously undeveloped in Dooyeweerd's writings. The context of Dooyeweerd's tradition makes it plain that not only is authority in society to be distributed along functional lines, as Dooyeweerd argues for at length, and which his modalities provide an ontological basis for, but authority may also be decentralized along cultural lines. That is, a modal analysis suggests, for example, that educational institutions should be independent of the state. The Dutch Calvinist tradition is also strong in asserting that as well, different cultural groups should be able to operate their own schools. This could probably be rooted in Dooyeweerd's notion of antithesis, but in discussing the role of the state, he does not make this point. These two decentralizing factors could also be linked by pointing out that functionally decentralized authority would provide a context where cultural differentiation is easier. He does make a cryptic reference that cultural communities have their own sphere sovereignty which the state must respect since these communities have their own integrating task.^{cvii} However, this is scarcely enough of a basis on which to build a positive theory of structural cultural pluralism, which, given the circles he moved in, Dooyeweerd must have shared. His theory does leave ample room for cultural differentiation. He distinguishes those kind of communities which one can freely join and leave from those where this is not possible. In his view, only marriage, the family, the church, and the state fall in the latter category.^{cviii} One is free to join or leave any other kind of association, or to start a new one. Once a free association exists, it becomes a matter of public justice to see that it has appropriate resources to fulfil its task. Thus any cultural group is free to start its own school, for instance, and once it has done that, it becomes a matter of public justice, given that other schools receive public funding, to see that it receive funding as well. Cultural differentiation is thus permitted, and encouraged, but not required. To require it would be undue

cv. Bob Goudzwaard, Capitalism and Progress: A Diagnosis of Western Society, (Toronto: Wedge, 1979) at 211-2.

cvi. Chaplin, supra, notelxxxix at 139. Unfortunately, Chaplin is ambiguous about where Dooyeweerd's ideas end and his own begin. He is, however, trying to follow the thrust of Dooyeweerd. See ibid, at 135. Note that Dooyeweerd has a flexible enough concept of the separate competences of political and economic spheres that he advocates caution regarding, not rejection of, centralized economic planning (New Critique, Vol III, at 483). His theory is clearly not one of laissez faire capitalism. Perhaps a crown corporation would meet his concern regarding respecting the sphere sovereignty of economically qualified societal structures.

cvi. New Critique, Vol III, at 488-9.

cvi. See Contours, at 200. Some of these communities being non-voluntary may seem problematic. It is clear enough that one can never leave a family, no matter how little one might have to do with one's family. Marriage and the state (i.e. citizenship) can in fact be left, but not exactly freely. Many people, however, regard the Church as a voluntary association. Dooyeweerd, having a particular Calvinistic view, does not see it as such.

interference with the cultural communities. It is also significant that in this schema only the state can use compulsion.^{cix}

Dooyeweerd's key insight, then, which will be further developed below, is of a limitation on the power of the state other than individual rights. This arises from picturing society as a collection of structures (overlapping in membership), each with its own task and jurisdiction, where the state's role is to balance and harmonize the interests of all of these structures, and to accord suitable deference to their internal activities.

A CURRENT DILEMMA IN LEGAL THEORY

The Dilemma

The Critical Legal Studies Movement has often been criticized for being strong on deconstruction, but weak on positive alternatives to the present social/political arrangements. While most CLS thinkers have positive proposals which are not usually too hard to discern, it is true that there is often a reluctance to explicitly articulate alternative political visions. In fact, sometimes on principle, the position is taken that a discussion of substantive values must be postponed for a democratic discussion once various inhibiting and restricting presuppositions and/or social structures have been discarded.^{cx} Even Unger, who has gone the furthest in proposing a new substantive vision, is not free of this tendency.^{cxii}

However, generally speaking, most CLS writers would sympathize with some form of communitarianism, in opposition to liberal individualism. The difficulty they then have to struggle with is what Kennedy calls the "fundamental contradiction":

... the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it.

... at the same time it forms and protects us, the universe of others... threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good.

The kicker is that the abolition of these illegitimate structures, the fashioning of an unalienated collective existence, appears to imply such a massive increase of collective control over our lives that it would defeat its purpose.^{cxii}

Hutchinson also recognizes the problem this poses and notes that liberal theory is ceaselessly vacillating between the extremes of an "heroic Rodinesque individual" and an

^{cix.} Dooyeweerd recognizes that parents should discipline their children, and that this is a kind of "compulsion" - what he is referring to here is "sword power".

^{cx.} Richard W. Bauman, "The Communitarian Vision of Critical Legal Studies", in A.C. Hutchinson and L. Green, eds, Law and the Community: the End of Individualism?, (Toronto: Carswell, 1989) at 9, 28, 34 and 36.

^{cxii.} *Ibid*, at 28.

^{cxii} Duncan Kennedy, "The Structure of Blackstone's Commentaries" (1979), 28 *Buff. L. Rev.* 205 at 211-2.

"overbearing Stalinesque state".^{cxiii} He realizes that radicals face a similar challenge ("to wrest theory and practice from the grip of a paralysing liberalism without falling into the embrace of a suffocating communitarianism"^{cxiv}), and seems to be sceptical that communitarianism alone is up to this task.^{cxv}

There seems to be no easy way out of this dilemma. The preferred CLS answer is to leave such matters up to a democratic decision, once the political context has been suitably transformed.^{cxvi} This would seem to beg the question. It leaves in the hands of the collectivity the very definition of the limits of power of the collectivity. This provides little comfort for those concerned with the collectivity exercising power inappropriately. The difficulty, however, is that the only other thing in sight with a claim to limit the power of the collectivity is the individual; and individualism is precisely what is perceived as a problem in the first place. Hutchinson critiques liberal democracies for giving priority to liberalism, but to defer a resolution to the problem for future democratic decision simply flips the priority.^{cxvii} Even supposing that the "democratic dialogue" of Hutchinson^{cxviii} would be the appropriate way (procedurally) to resolve such a problem, when it comes to a substantive issue, the only arguments available would tend pull to the extremes of either individualism or communitarianism, with no theoretical help in how to balance them or choose between them. The ideologies of liberalism and democracy both prove too much to meet in the middle. How could such a "dialogue" composed of diverging, contradictory ideas give a result that does not amount to either a victory by one side over the other or an arbitrary compromise? (I am supposing here that there is a real conundrum and that both sides have some important concerns, and that therefore a victory by one side, even by persuasion, would not be desirable.)

Unger, especially in his theory of organic groups, shows promise of escaping this dilemma, by proposing political structural elements intermediate between the individual and the larger society. This shows promise because he conceives of these structures as "organic", and the common purpose of members of such groups could help break down the view of others as antagonistic intrinsic to individualism.^{cxix} He also, (similarly to Dooyeweerd) sees an aim of the state as

cxiii. Allan C. Hutchinson, "Talking the Good Life: From Liberal Chatter to Democratic Conversation" in A.C. Hutchinson and L. Green, eds, Law and the Community: the End of Individualism?, (Toronto: Carswell, 1989) at 165-6.

cxiv. Ibid, at 153.

cxv. A.C. Hutchinson and L. Green, "Introduction" in A.C. Hutchinson and L. Green, eds, Law and the Community: the End of Individualism?, (Toronto: Carswell, 1989).

cxvi. See Bauman, supra, note cx. See also Hutchinson, supra, note cxiii at 172, where he argues that the abandonment of the public-private distinction means those occasions when society should establish a space where individuals are immune from collective interference must be decided democratically.

cxvii. See Hutchinson, supra, note cxiii at 158.

cxviii. Hutchinson notes that his proposal has some similarity with the ideas of Habermas and Rorty, but that his ideas are "more self-consciously political and historical in design and ambition." See Hutchinson, supra, note cxiii at 169 n.52.

cxix. Roberto M. Unger, Knowledge and Politics, (New York: Free Press, 1975), at 261.

establishing peace between groups.^{cxx} However, ultimately Unger concludes that there are dilemmas of communitarian politics consisting of conflicts of polar views, the triumph of either of which would destroy the communitarian ideal, and that there are no theoretical criteria for balancing these views.^{cxxi} Underlying these conflicts are diverging interests of what is best for a group internally and what is best for the integration of groups into the larger society, and diverging interests about what is best for the creation as opposed to the perpetuation of groups.^{cxxii} Even at the point of determining how groups should be constituted, Unger had to deal with, without resolving, a tension between different aims of communitarianism which pulled toward either a small group (the aim of individual participation) and a world wide republic (the aim of universality, needed for moral weight).^{cxxiii} Unger characterizes this as a manifestation of the universal/particular dilemma. In this context, it seems also to be a manifestation of the divergence between liberalism and democracy (in the internal context of the group), indicating that Unger's proposal lacks a sufficiently specific rationale to escape being a compromise between the unreconcilable. Indeed his image of history as animated by communitarianism is of a spiral between the conflicting elements of dominance and community, which seeks an impossible end.^{cxxiv}

There is a further point which raises some difficulty. Unger is routinely cited as a CLS scholar, yet his work is usually regarded as "different". Bauman describes this phenomenon as CLS and Unger following "somewhat parallel course[s]", with relatively little interaction.^{cxxv} We will see later how a Dooyeweerdian analysis explains how and why Unger is different from most other CLS scholars. At this point I want to observe that it might be that Unger is as close to Dooyeweerd as he is to CLS in general, so that explaining how Dooyeweerd is related to CLS using Unger as a paradigm would be problematic. Most notably, both Unger and Dooyeweerd are engaged in projects of Christian philosophy: Unger by attempting a dialogue between Christianity [Roman Catholic variety] and modernism by drawing heavily on the Aristotelian tradition,^{cxxvi} Dooyeweerd by attempting a Christian [Calvinist variety] construction, using the conceptual tools (but not the substance) of neo-Kantianism and phenomenology. The fact that they both have Christian reference points places Unger and Dooyeweerd in a different category than most CLS scholars, who when

cxx. Ibid, at 282.

cxxi. Ibid, at 285-7.

cxxii. Ibid, at 288.

cxxiii. Ibid, at 269.

cxxiv. Ibid, at 260. However, in Social Theory: Its Situation and Its Task, (Cambridge: Cambridge University Press, 1987) at 156, Unger hints that the tension between autonomy and community is not inevitable, and that there could be structures which could increase both at the same time. Unfortunately, he remains rather cryptic on this point, despite an interesting example of a rotating capital fund which could increase both the social control of accumulation of wealth and the decentralization of economic decision making. It is not clear if he means this suggestion to apply more generally to the dilemmas of communitarian politics described in Knowledge and Politics.

cxxv. Bauman, supra, note cx at 19-20.

cxxvi. This is Unger's own self-definition. See Unger to Kronman, 22 September 1976, published as appendix to A. Kronman, "Book Review" (of Knowledge and Politics) (1976), 61 Minn.L.R. 167 at 200-1.

speaking of basic commitments, usually speak of "politics" rather than "religion". There are other points of contact between Unger and Dooyeweerd. Both find epistemological reference points in empirical data.^{cxxvii} Both are engaged in "total critiques" of Liberalism, using the methodology of exposing the antinomies of Liberalism.^{cxxviii} Both propose a politics where groups intermediate between individuals and the state as a whole have authority, and see the role of the state as establishing peace between groups.^{cxxix} Both have a view of work as a transformative calling, as opposed to a sense of calling in a fixed scheme or as a mere source of material well-being.^{cxxx} This is not to minimize their differences, however - they do come from significantly different traditions, and Dooyeweerd is sharply critical of the "Roman Catholic" approach of synthesizing Christianity and Aristotelian philosophy, in which tradition Unger places himself. Perhaps the most significant difference is that Unger is engaged on pushing to the limit the notion of "society as artifact", and so sees nothing as beyond politics permanently.^{cxxxi} Dooyeweerd is of the view, of course, that there are limits to the role of the state embedded in creation.

Another element in the dilemma in legal theory we are examining comes from the "spheres of justice" analysis and prescription of Michael Walzer.^{cxxxii} Walzer argues for authority to be decentralized along functional lines, so that different social goods can be distributed for different reasons, with different procedures, by different agents^{cxxxiii}. He views the conversion of one social good into another where there is no intrinsic connection as tyranny (for example, using political power to gain wealth)^{cxxxiv}. Walzer's prescription is seldom seen as bearing on the individual/communal debate. This is surprising since it has the potential of limiting the power of the state by appeal to considerations other than individual rights. Walzer's notion of spheres of justice bears some resemblance to Dooyeweerd's cosmic modalities, although Walzer has a more modest project, eschewing any ontological claims. Some of Walzer's proposed "spheres" (eg money, office, education, political power, free time, kinship/love, divine grace) even sound fairly close to some of Dooyeweerd's modalities, although Walzer is apparently unaware of Dooyeweerd.

cxxvii. See Unger, Knowledge and Politics, (New York: Free Press, 1975) at 24.

cxxviii. Ibid, at 2 and 8.

cxxix. Ibid, at 281-2.

cxxx. Roberto M. Unger, Social Theory: Its Situation and Its Task (Cambridge: Cambridge University Press, 1987) at 11. It is interesting to note that at this point Unger seems to depart from the traditional Roman Catholic separation of sacred and secular, and this is also a point where Dooyeweerd (and Calvinism in general) parts from the Lutheran strand of Protestantism (which views work as a calling in a fixed order). This view is also sharply different from at least orthodox Marxism which sees work as no more than a source of material well-being.

cxxxi. Ibid, at 3, and Knowledge and Politics, (New York: Free Press, 1975), at 274.

cxxxii. Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality, (New York: Basic Books, 1983).

cxxxiii. Ibid, at 6.

cxxxiv. Ibid, at 19.

A Dooyeweerdian Diagnosis

Dooyeweerd can help both with understanding the nature of the dilemma of legal theory described above, and with providing a way out of it. It has been noted above that he categorized western thought into four basic motives - matter-form (Greek), creation-fall-redemption ("Scriptural" [Calvinist]), nature-grace ("Roman Catholic" [medieval scholastic]), and nature-freedom (humanistic).^{cxxxv} He was of the view that

Three [of these motives] are internally dualistic and fragmentary. Their discord pushes one's posture of life to opposite extremes that cannot be resolved in a true synthesis. We call these extremes 'polar opposites' because they are two spiritually 'charged' poles that collide within a single ground motive. Each pole bears the seed of a religious dialectic.^{cxxxvi}

This description sounds remarkably similar to the dilemma posed above. In fact, the dilemma posed above is but a particular example of a dialectic Dooyeweerd describes. Dooyeweerd would analyze the individual/communitarian dilemma described above as part of the nature-freedom dialectic. In critiquing Rousseau, he dealt with an almost identical problem. Rousseau, being driven by the freedom motive, rejected a representative system for government (because it would surrender free self-determination to an elite), as well as separation of political powers (because the sovereignty of the people is indivisible). But then

... a state which is an authentic expression of the humanistic idea of freedom cannot possibly recognize the private freedom of an individual over against itself. Such a state must completely absorb the natural freedom of man into the higher form of political freedom, of active citizenship rights which inherently belong to all citizens equally and not merely to an elite among them. In a truly free state the individual cannot possess rights and liberties over against the res publica because in such a state the total freedom of the individual must come to expression.^{cxxxvii}

Thus "radical democracy" ends in totalitarianism, with the paradox that the highest freedom leads to state absolutism. This seems to be the same paradox that Kennedy calls the "fundamental contradiction". Dooyeweerd then notes that the real battle between freedom and equality (or liberalism and democracy) begins when the idea of the state itself was drawn into humanistic decay. He here seems to have in mind fascism and communism.

Thus Dooyeweerd can provide a larger context for the individualism/collectivism dilemma, which provides additional clues to its meaning, and which confirms that it is unresolvable within its own framework. This indicates that resolution must await a paradigm shift (i.e. to the creation/fall/redemption ground motive). As an aside, Dooyeweerd's analysis also explains how and why Unger is "different" from the rest of CLS - Unger by his own definition is in the Catholic and Aristotelian tradition - which means that in Dooyeweerd's schema he is in the nature-grace

cxxxv. Supra, at 10.

cxxxvi. Roots, at 11-12.

cxxxvii. Roots, at 169-170.

tradition, while most of the rest of CLS Dooyeweerd would consider animated by the nature-freedom motive.^{cxxxviii} This also makes sense of Dooyeweerd having more in common with Unger than with some of the rest of CLS (since the nature-grace motive includes elements of Dooyeweerd's motive: creation-fall-redemption).^{cxxxix}

A Dooyeweerdian Prescription

Understandably enough, Dooyeweerd's diagnosis points to what his solution would be. In broadest terms, it would be to view the matter from the non-dialectic creation-fall-redemption perspective. There would be three elements to a Dooyeweerdian approach to the individual/communitarian dilemma - a normative basis, a modal analysis, and an enkapsis analysis. The last of these is the most distinctive and so will receive the most attention.

Dooyeweerd asserts the necessity of a normative approach. To leave the matter to a democratic decision once certain philosophical and social impediments have been removed, as some CLS scholars propose, is to beg the question. To begin with, if we are unable to advance positive political proposals because of philosophical and social barriers, are we not equally unable to advance a critique for the same reasons? It is quite a different thing, of course to advance proposals in a tentative sense. Given Dooyeweerd's epistemology, he would always be open to revising proposals on the basis of new information, but he would see no need for the degree of reticence exhibited by some CLS scholars. On this point, Dooyeweerd would be more or less in agreement with Unger, who has been the boldest in making specific proposals. Indeed Unger recognizes (as does Dooyeweerd) that the descriptive/prescriptive dichotomy breaks down, as there is always a normative perspective embedded in description.^{cxl} However, there is a certain ambiguity in Unger here, for while he sketched out a theory of organic groups in Knowledge and Politics, in Social Theory, rather than expanding on this substantive vision, he focuses on the contours and processes of social transformation. His key seems to be maximizing the possibilities of change. This has led one commentator to observe

The details of the programme appear to touch on the central problems of politics. Unger's task, however, is not to solve those problems, but to envision a context in which they might be solved.

... genuinely democratic debate must be postponed until the institutional structures he commends have been adopted through collective mobilization.^{cxli}

This comment may underestimate the scope of Unger's project, but nonetheless seems to have some truth to it.

cxxxviii. See the (Dooyeweerdian) analysis of Unger by Caudill, relying on Smolin. David Caudill, Disclosing Tilt: Law, Belief and Criticism, (Amsterdam: Free University Press, 1989) at 109-110.

cxxxix. Using a Dooyeweerdian analysis amounts to overkill for this point - merely that Dooyeweerd and Unger are animated by Christianity in their theories would explain this.

cxl. Unger, Social Theory, supra, note cxxx, at 15.

cxli. Bauman, supra, note cx at 53.

The second element of a Dooyeweerdian prescription concerns what a modal analysis would say about this problem. This generates a theory that different aspects of reality (modalities) have different norms. This leads to a conclusion very much like that of Walzer - that different activities should be regulated in different ways by different agents. This helps the individual/communal debate since such a decentralization on functional lines minimizes the dangers of totalitarianism if one proceeds along a communitarian line. There then arise multiple communities, overlapping in membership but not in function, in place of a single community. This also prevents what Walzer is worried about - the illegitimate conversion of power in one sphere into power in another. Dooyeweerd goes further than Walzer in having a more elaborate sphere sovereignty theory, and one that he tries to root ontologically as well.

The third element of a Dooyeweerdian prescription focuses on the notion of enkapsis. This overlaps in a way with the modal analysis (since enkapsis refers back to the modal scale), but is more specific to the problem at hand, since the modal scale deals with aspects of reality, while enkapsis deals with social structures (among other things). This leads to a theory of harmonizing the jurisdictions of the state and other social institutions. The state does have an overall role in ensuring that the relations between various different groups are just, and that any group or institution does not exceed its jurisdiction, but the various institutions are not "part" of the state, and the state is to respect the jurisdiction that they have. Their jurisdictional powers are to be derived from a modal analysis, and, ultimately, from reference to empirical data. Although Dooyeweerd does not stress the point, his theory also allows for jurisdictional separation of (most) institutions along cultural/confessional lines as well as along functional lines, so that the state must respect cultural differences as well as functional limits. These concepts are related in that in a functionally decentralized society there is more likelihood of making the necessary social room to accommodate cultural diversity.

The usefulness of all this to the individual/communitarian debate is that it provides a rationale for limits on the power of the state other than individual rights. Nor is it just a matter of finding a compromise between irreconcilable pulls. In Dooyeweerd's theory some things should neither be in the hands of the individual or the state. This provides a specific reason for these intermediate social institutions - they are not just compromises. In this framework there is room to accommodate both the need for limits on the power of the state and the concept of group rights. Nor is there a tradeoff at this point - in Dooyeweerd's theory, in sharp distinction to liberalism or national-style communitarianism, advancing group rights strengthens rather than weakens the constraints on state power.

At this point it might be interjected whether this is just a more elaborate form of the public/private distinction. This would be to misunderstand Dooyeweerd. All institutions have their own norms which must be respected - to allow absolute power to any of them would just move the problem of totalitarianism. The state, moreover, has an over-arching power to keep the various institutions within their own jurisdiction. It is true that some of the dilemmas in the public sphere are reproduced at the level of other social institutions. Unger also grapples with this problem, and comes up with three limits to the power of groups which are "all but unconditional" - the freedom to join/leave, freedom of expression, and freedom to choose the character of one's own work.^{cxlii} Dooyeweerd's theory provides some similar safeguards. Firstly, only the state can use

cxlii. Unger, supra, note cxxi, at 279.

compulsion. Secondly, all social institutions except marriage, family, state, and church are free associations, and so can be joined or left freely. Thirdly, the state has a supervisory role to see that groups do not exceed their proper jurisdiction. Finally, the consequences of a any group acting in an undesirable manner are minimized because of the function differentiation of groups - a group could only affect the area of life its role lies in.

Applications

There are at least four pressure points in current Canadian legal and political discourse where the debate between individualism and communitarianism is being articulated. We will now see how a Dooyeweerdian analysis might provide some assistance at these points. Up to this point, we have had reference to critical theory. The points of discourse now to be examined are not specific to critical theory, but I believe demonstrate shortcomings of a broader range of theories. Specifically, we will examine the challenge in constitutional interpretation presented by the Charter, and challenges to liberalism posed by First Nations, Québécois nationalism, and feminism.

To begin with the Charter, it is clear that the enactment of the Charter posed a new context for the individual/communal debate. Section 1 seems an open invitation for the courts to balance individual rights against collective interests. As Macklem has noted, the post-Charter case law has manifested a tension between competing ideologies, which he characterizes as classical liberalism and pluralist liberalism, with the occasional hint of collectivism.^{cxliii} He goes on to diagnose Canadian constitutional discourse more generally as revealing two paradigms, the individual and the collective, each of which contain

... a series of attempts to mediate or resolve the tension which exists between the two poles of individuality and community by emphasizing one aspect of that polarity and systematically suppressing the other. Our constitutional imagination is 'a prison house of paradox', built by well-intentioned but ultimately unsuccessful discursive attempts to reconcile the demands of the individual with the demands of the community.

The failure lies in the refusal to acknowledge, despite the fact that each attempt is evidence of it, that individuality and community constitute each other.^{cxliv}

This sounds remarkably like Dooyeweerd's more general ground motive analysis revealing unresolvable dialectics at the root of Western civilization. Macklem's suggested resolution is rather cryptic, but appears to be along the lines of Unger's prescription. Dooyeweerd provides another way of understanding and resolving the problem - to conceive of the matter as one of enkapsis. Perhaps more specific examples will clarify this.

First Nations' demands for self-government pose a fundamental challenge to Canada, one which liberalism is unable to accommodate, and which collectivism is unable to constrain. A Dooyeweerdian analysis could provide for self-government with some constraints. First Nations would clearly qualify as cultural communities with their own integrating tasks which the state must

cxliii. P. Macklem, "Constitutional Ideologies" (1988) 20 Ottawa L. Rev. 117 at 144-153.

cxliv. Ibid, at 154.

then respect. Also to be respected (as enkapically included in the state) would be various organizations which First Nations might choose to create to express different economic, environmental, and cultural beliefs. On a public justice criterion, such organizations would then have to be provided with appropriate resources. Furthermore, the jurisdiction of these institutions would be seen as independent, and not as delegated from the state, meeting one of the concerns most important to First Nations. The state, however, would retain an overall supervisory role to see that the various institutions stay within their jurisdiction. Such a system would meet most if not all of the demands of First Nations, while not amounting to an abdication of power by the state, which appears to be the concern of some Canadians.^{cxlv}

Québécois nationalism is also a challenge which "English" Canada, largely in the thrall of liberalism, has been unable to meet. The same kind of analysis as regarding First Nations would apply here as well in general terms. Indeed, seen from a Dooyeweerdian perspective, the issues are closely related, prompting one organization in that tradition to assert (regarding post - MeechLake constitutional debates)

A unified Canada hinges on whether we will deal justly with aboriginal nations. Doing justice to the aboriginal peoples must be our first step toward building political community in Canada.^{cxlvi}

Feminism also provides a challenge to liberalism. For example, Post argues convincingly that the feminist critique of pornography is controversial precisely because it is pluralist - because it asserts that (individual) women are harmed by pornography as members of the group "women", and not as individuals. In his view, this is what the debate is really about, rather than freedom of expression.^{cxlvii} Although Dooyeweerd did not speak very explicitly to this issue, it could be argued that pornography creates a cultural climate which denies equal opportunity for women (as women) to develop as human beings, and that this is part of the balancing and harmonizing of interests which is the state's public justice function. Such a factor, if strong enough, could outweigh "freedom of expression".^{cxlviii}

Conclusion

I share Macklem's diagnosis that Canadian social and constitutional discourse (and for that matter legal theory in general) is impoverished by being dominated by two opposing paradigms of

cxlv. This analysis follows loosely the proposals in Denendeh: the Dene Struggle for a Pluralist Province, (Toronto: CJL Foundation, 1982). The CJL Foundation (Committee for Justice and Liberty) is now called Citizens for Public Justice (C.P.J.), and is an independent citizens association which grew out of the Dutch neo-Calvinist community, and operates in a general Dooyeweerdian framework. This kind of analysis has led it to support First Nations in the quest for self-government since the mid 1970's.

cxlvi. "Towards a New Canada: founded on mutual respect and responsibility", submission to the Ontario Legislature's Select Committee on Ontario in Confederation by Citizens for Public Justice, 8 March 1991.

cxlvii. R.C. Post, "Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment" (1988) 76 Calif. L. Rev. 297.

cxlviii. This is the argument made by Citizens for Public Justice in "A Public Justice Response to Pornography: Proposals for the Revision of Bill C-114", Submitted to the Minister of Justice, 3 November 1986.

individualism and collectivism, neither of which is able to be sufficiently convincing because each has suppressed one pole of a dialectic. This suppression then calls forth the opposite pole, leading to an irresolvable dialectic. My assessment is that Dooyeweerd's theory, in particular his theory of enkapsis, provides a framework for understanding problems regarding the relationship of individuals and groups, and the role the state should play in these, and provides helpful insights into how to resolve such problems.

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