

DOOYEWERD ON LAW AND MORALITY: LEGAL ETHICS – A TEST CASE†

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I INTRODUCTION

The problem of the nature and source of law's normativity is a major preoccupation of legal philosophy. H L A Hart's *The Concept of Law*¹ centred its criticism on the failure of Austinian legal positivism to adequately account for the *obligatory* character of legal rules. His notion of the "internal point of view" which plays a critical role in Hart's legal positivist concept of law as the union of primary and secondary rules directly addresses this aspect of legal normativity. Furthermore, his conception of legal validity based on the identification of formal conditions for the existence of valid law (rule of recognition) and the sharp distinction drawn between law and morality are regarded as basic features of this theory which set it over against the traditions of natural law theory.

Since the appearance of *The Concept of Law*, beginning with Hart's own "minimum content of natural law", the dividing line between legal positivism and natural law on the question of the relationship between law and morality has become increasingly blurred. Neo-Hartians such as Neil MacCormick see a more-than-contingent connection between law and morality.² And "soft positivists" even believe it possible to have moral elements as part of the criteria for valid law whilst still maintaining a positivist account of legal validity.³

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¹ H L A Hart *The Concept of Law* (Oxford University Press, Oxford, 1994).

² See Neil MacCormick, "Natural Law and the Separation of Law and Morals" in R P George *Natural Law Theory: Contemporary Essays* (Oxford University Press, 1992) 105-133.

³ Hart himself admitted to being a soft positivist. See above n 1, 250-251.

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From the other side of the natural law/legal positivist divide John Finnis has made us re-examine the view that natural law theories are founded on logical or other philosophical error.⁴ His revised Aristotelian-Thomist theory challenges legal positivism by defending a version of natural law theory which adopts the analytical tools of positivist legal philosophy and some of its concepts,⁵ including a view of legal validity compatible with legal positivism.⁶ To a “post-positivist” such as Neil MacCormick,⁷ therefore, Finnis’s natural law holds some attractions. Neo-positivists have moved away from Hart’s attempt at a “descriptive sociology of law” based on ordinary language analysis towards an account of law as a form of practical reasoning. MacCormick, as one of the leading figures in this movement, finds common ground in Finnis’s interpretation of the normative (natural law basis) of positive law as the fulfillment of the requirements of practical reasonableness.⁸

Whilst the natural law/legal positivism divide may have become less certain, the debates over legal normativity itself have not been less vigorous. Whether or not Fuller’s “inner morality of law” is correctly categorised as a natural law theory the issues involved in his sharp disagreement with Hart’s positivism over the status of Nazi law are still of interest.⁹ More recently, Ronald Dworkin has launched a sweeping attack on Hartian legal positivism in which he rejects the positivist (“conventionalist”) view of valid law as independent of morality and replaces it with an “interpretive” conception of law founded in the normative requirement of integrity.¹⁰

⁴ See Chapter 2, J Finnis *Natural Law and Natural Rights* (Oxford University Press, Oxford, 1980), 23-55, where he defends Thomistic natural law against the accusations of deriving natural law from human nature and “ought” from “is.”

⁵ Consider, for example, the way in which he applies the analytical concepts of the “central case” and “focal meaning” to Hart’s concept of the “internal point of view.” Above n 4, 11-18.

⁶ Above n 4, 268-269.

⁷ See his comments in the foreword to second edition of *Legal Reasoning and Legal Theory* (Oxford University Press: Oxford 1994), ix, xiv-xvi, where he describes how he has moved away from some aspects of Hartian theory into a “post-positivist” phase.

⁸ MacCormick, however, maintains his positivist stance by rejecting Finnis’s cognitivist “meta-theoretical” stance that asserts the self-evidence of his basic goods as the foundation of his natural law theory of law. For MacCormick practical reasonableness is not itself one of the basic goods but their constructive source. See above n 2, 128.

⁹ For example, see MacCormick’s defence of Fuller against Hart, above n 2, 122.

¹⁰ R Dworkin *Law’s Empire* (Fontana, London, 1986). This work incorporates earlier criticisms of Hartian positivism in *Taking Rights Seriously* (Duckworth, London 1977).

A very different approach to the central philosophical problem of law's normativity is to be found in the legal philosophy of the former professor of jurisprudence at the Free University of Amsterdam, Herman Dooyeweerd (1894-1977). The current occupant of the chair formerly held by Dooyeweerd Arend Soeteman, in providing an assessment of Dooyeweerd as a legal philosopher¹¹ has identified key elements in Dooyeweerd's concept of law which are also found in three of the leading Anglo-American legal philosophers of recent times mentioned above – Hart, Dworkin and Finnis.

In this essay I attempt to demonstrate the originality of Dooyeweerd's account of the normative character of law with particular reference to his views on the relationship between law and morality by utilising his jurisprudential method and basic concepts. This is a contribution towards providing a new perspective for understanding the relationship between law and legal ethics. The second part of the study following this introduction provides a "short version" of the main elements of Dooyeweerd's theory of law and his account of the relationship between law and morality. The third and central part of the article applies Dooyeweerd's theoretical perspective on the relationship between law and morality and its key concepts explained in the preceding part to the topic of legal ethics. The final part offers some concluding observations on the significance of Dooyeweerd's legal philosophy and its implications for issues of law and morality in general.

II THE JURAL AND THE ETHICAL ASPECTS IN DOOYEWERD'S LEGAL PHILOSOPHY

A Philosophy of the Cosmonomic Idea, Encyclopaedia of Legal Science and the Relationship of Law and Morality

¹¹ A Soeteman "Dooyeweerd als rechtsfilosoof" in H Geerstema et al. *Herman Dooyeweerd 1894 – 1977* (Kok, Kampen, 1994), 28-49.

Dooyeweerd desired to give a more satisfactory explanation of the normative character of law in its factual experiential context than his contemporary legal philosophers were able to do.¹² This effort grew out of his conviction that such an explanation could only be accomplished through constructing a philosophy rooted in a radically Christian life-and-world-view.¹³ Dooyeweerd produced his “Philosophy of the Cosmopolitan Idea.” This in turn resulted in his major jurisprudential work¹⁴ which embodied the central ideas and adopted the method of his main philosophical work.¹⁵

His philosophical ontology is based on the original idea that experiential reality is governed by law-ful ordering conditions which are independent of human subjectivity and which human theoretical knowing can explicitly discern as functional modalities in which reality is embedded. These ways of law-governed functioning or “law-spheres” are modal aspects, not concrete “things,” but universal, irreducible modes in which concrete things, entities, processes, relationships, etc function.¹⁶ These are the “presupposita” of concrete experience. Every theoretical attempt to account for that experience, necessarily presupposes a view of these aspects in their diversity, coherence and unity in a basic idea of law or “ground-Idea” (their “presuppositions”) which are ruled and given their “religious” direction in a basic ground-motive.¹⁷

¹² R D Henderson *Illuminating Law* (Free University, Amsterdam, 1994), Ch. 3, 51-87.

¹³ Henderson, above, n 12, Ch 2, e.g., 32, 50.

¹⁴ H Dooyeweerd *Encyclopaedie der Rechtswetenschap* (Studentenraad, Vrije Universiteit, Amsterdam, 1946-1967). It comprised several volumes of ‘notes’ prepared for his students which were never published despite Dooyeweerd’s taking steps towards this end. An English translation of the set of student notes comprising the introduction to *Encyclopaedie der Rechtswetenschap* is in the process of being edited for publication. It will be volume I of the set, *Encyclopedia of Legal Science in The Collected Works of Herman Dooyeweerd* A-Series (A8) published by Edwin Mellen Press in collaboration with the Dooyeweerd Centre for Christian Philosophy.

¹⁵ H Dooyeweerd *A New Critique of Theoretical Thought* (Presbyterian and Reformed, Philadelphia, 1954-58).

¹⁶ For the theory of the modal aspects see Dooyeweerd (1954-58) above, n 15 vol II, 3-426. For an introduction to the theory see L. Kalsbeek *Contours of a Christian Philosophy*, Wedge, Toronto, 1975), 91-113.

¹⁷ For the theory of the ground-ideas and religious ground-motives see Dooyeweerd (1954-58) above, n 15, vol I, “Prolegomena” 3-164.

The jural aspect is that mode of reality which imparts to law and concrete legal phenomena their distinctively legal or jural character. A theoretical explanation of law and legal phenomena, therefore presupposes a view of the jural aspect and its “meaning-kernel” or “nucleus” as a distinct aspect amongst other distinct irreducible modes in their diversity, interconnections (coherence) and unity. In an original manner Dooyeweerd characterises the meaning-nucleus or core of the jural aspect as a normative mode in the notion of “retribution” or as a retributive mode having a broad juridical meaning of legal justice.¹⁸ This mode, however, is quite distinct from the ethical, or moral aspect, the meaning-core of which he described as love.¹⁹ Notwithstanding the distinct irreducibility of the diverse modal aspects (modal sphere-sovereignty”) the coherence of the aspects is guaranteed by the internal complexity of these aspects which connect with one another through their “analogical” structure. An account of the jural aspect necessarily appeals to its *constitutive* analogical elements.²⁰ However, its core meaning is not reducible to any one of them or even to all of them together for they presuppose and are qualified by the core retributive meaning of the jural aspect which can only be analysed in terms of its structure of modal analogies.²¹ Hence the notion of legal harmonising implies a direct appeal to the aesthetic aspect of experience in an analogical sense – analogical, because the meaning of legal harmonising has a jurally qualified retributive meaning, not the original meaning of aesthetic harmony as would characterise a work of art, for example.²²

¹⁸ Dooyeweerd (1954-58) above, n 15, 129-140 and (1946-67), above n 14, vol II, 3-9 for a defence of his account of the core meaning of the jural aspect and his rejection of others' attempts to reduce it to the core meaning of non-jural aspects as leading to internal inconsistencies or “antinomies.” For a recent assessment of Dooyeweerd's conception of retribution as the core meaning of law and the jural aspect see Soeteman, above n 11, 33-34.

¹⁹ Olthuis, adopting the Dooyeweerdian modal analysis, preferred the term “troth” or “fidelity” to avoid confusion of this distinct mode of human experience with the normatively all-encompassing “religious” meaning of love. J Olthuis *Facts, Values and Ethics* (Van Gorcum, Assen, 1968), 198-199.

²⁰ Dooyeweerd provides the following description of the “nucleus” of the jural aspect which refers explicitly or implicitly to the constitutive analogical elements: “an irreducible mode of balancing and harmonizing individual and social interests. This mode implies a standard of proportionality regulating the legal interpretation of social facts and their factual social consequences in order to maintain the juridical balance by a just reaction, viz. the so-called legal consequences of the fact related to a juridical ground”, Above n 15, vol II, 129.

²¹ See Dooyeweerd (1954-58), above n 15, vol II, 129. and (1946-67), above n 14, vol II, 3 ff.

²² For Dooyeweerd's account of the irreducibility of each aspect and their interconnections (coherence) via their internal “analogical” structure see Dooyeweerd (1954-58), above n 15, vol II, 55-179.

Critical for understanding the *relationship* between law and morality lies is the moral analogy within the jural aspect.²³ Because the normative moral aspect immediately succeeds the jural in the temporal order of the aspects,²⁴ the moral (“anticipatory”) analogy is not a constitutive element in the structure of the jural aspect.²⁵ The concept of law as a theoretical account of the aspect which gives to concrete law its jural character expressed as a retributive mode of harmonising different legal interests does not include the *actualisation* of the moral dimension (analogy) as an essential component.²⁶ It is only in the idea of justice as a legal ideal (idea of law)²⁷ that the concept of law is “opened up” by the moral “anticipatory” analogy within the jural aspect under the leading of the aspect of faith. This is concretely illustrated by the role of the Christian faith within Western legal traditions in bringing this moral dimension into the law through the concepts of “equity”, “conscience”, “good faith”, “guilt”, etc.²⁸ Whilst these “legal-moral” concepts have come to be regarded as essential elements of our idea of legal justice they are not essential for the existence of valid law in every legal system.²⁹

By means of his “structural” modal theory Dooyeweerd develops a view of the interrelationship of law and morality that is similar in important respects to that of

²³ Arguably the jural analogy (retrocipation) in the moral aspect is as important. See below n 68

²⁴ Using the illustration of the purchase of a box of cigars Dooyeweerd refers explicitly to the following aspects of the event: in (temporal) order they are the numerical, spatial, physico-chemical (physical), biotic, psychical or sensory, logical, historical, linguistic, social, economic, aesthetic, jural, ethical and faith (or “pistic”) aspect. This amounts to 14 distinct aspects or modes in which concrete reality functions. In the maturest expression of his philosophy he separated out from the physical a further aspect of movement (“kinematic”). See above n. 14, vol I, 2-6.

²⁵ In his mature philosophy analogies within an aspect are either “retrocipations” or “anticipations”. Retrocipatory analogies refer back to aspects earlier in the temporal order and are constitutive of the aspect concerned. Anticipatory analogies point forward to later aspects and open up the aspect through human subjective functioning in the faith aspect. See Dooyeweerd (1954-58), above n 15, vol II, 164-180.

²⁶ See Soeteman, above n 11, 30-36 for a comparative analysis of Dooyeweerd’s concept of law.

²⁷ See, Dooyeweerd (1946-67), above n 14, vol II, 30; H J van Eikema Hommes *Major Trends in the History of Legal Philosophy* (North Holland, Amsterdam, 1979), above n 41, 374-387.

²⁸ Dooyeweerd (1954-58), above n 15, vol II, 141. For the “opening-process” with reference to law see Dooyeweerd (1946-67), above n 14, vol I, 63.

²⁹ For a discussion of Dooyeweerd’s concept of legal validity in the context of legal positivist and natural law views see Soeteman, above n 11, 36-40.

modern legal positivism.³⁰ First, his concept of law implies a notion of valid law that is independent of moral criteria; hence like the positivists he believes that the existence of law is one thing, its morality or justice is another. Secondly, like modern positivists such as MacCormick he is able to maintain the distinctiveness of law and morality without asserting that their separation should be considered in jurisprudence **as if** they are divided into hermetically sealed spheres, even though “morality” or the moral aspect, for Dooyeweerd, has a more restricted meaning than in current jurisprudential and ethical literature.³¹

It is not merely the making of a firm distinction between law and morality that characterises legal positivism; a jusnaturalist such as Finnis demonstrates that a theory of natural law also recognises the distinction in the sense asserted by positivism.³² For Dooyeweerd it is the overriding importance given to the element of positivisation (historical form-giving) in its account of law as a “social” fact that characterises legal positivism. The difficulties which the latter has in accounting for the source of law’s normative validity including any moral component, can be attributed to this “absolutising” of the aspect of legal form-giving.³³ What positivism lacks from Dooyeweerd’s perspective is any notion of “supra-arbitrary” (i.e., independent of human willing), non-posed, legal principles or norms which are founded in the normative jural aspect and are positivised in some fashion in concrete law.³⁴ Furthermore, to the extent that modern natural law theory (i.e.,

³⁰ Although, as a general observation I agree with Soeteman in relation to this aspect of Dooyeweerd’s legal philosophy, I would argue more strongly than he for the distinctiveness and originality of Dooyeweerd’s views on legal validity and the relationship between law and morality. For example, I do not necessarily agree that Dooyeweerd would have had to seriously consider changing some of views in this regard had he available the insights of modern positivists (and natural law theorists such as Finnis). See above n 23.

³¹ The moral aspect is but one of a plurality of “normative” aspects beginning with the logical which also include the jural. See above nn 19 and 21 and accompanying text.

³² See above nn 4-8 and accompanying text.

³³ For example, the well-known problem of circularity in Hart’s rule of recognition as the secondary rule which contains the criteria of laws’ validity. A positive rule whether a Hartian “social rule”, a state law or the Hartian rule of recognition as a social fact on which all valid laws depend all presuppose (for Dooyeweerdians) the positivising of a non-factual, non-positive (supra-arbitrary) jural norm. MacCormick’s attempt to overcome the problem of circularity in an historical explanation was by his own admission unsuccessful. See D N MacCormick “The Concept of Law and ‘The Concept of Law’” (1994) 14 Ox JLS 1, 14.

³⁴ Soeteman, above n, 11, 36-41.

Finnis) adopts legal positivism's concept of legal validity it suffers from the same just-mentioned defects.

It is only through the idea of the jural aspect and its accompanying relation between the “norm-side” (or “law-side”) and “subject-side” (or “factual side”) of the functioning of concrete legal phenomena in that aspect that it is possible to attain a clear view of legal normativity and the relationship between law and morality.³⁵ As part of the datum of our concrete legal experience, the non-positive material legal norms or principles, including the legal-moral principles (such as good faith in contracts) never exist in themselves in some normative realm of “things”³⁶ but can only be accounted for as positivised principles and norms on the norm-side of concrete legal facts. A full account of legal norms and principles, nevertheless, also presupposes a theoretical account of the individuality of (normative) “things” (laws, legal entities, etc).³⁷

B An Elaboration of the Modal Theory with reference to Law and Morality

To appreciate the implications of Dooyeweerd's legal philosophy for issues of law and morality requires us to grasp the significance of the notion that the jural aspect along with all the other modal aspects is a *universal* mode of functioning.

Every kind of human community and relationship, including the most intimate (marriage, family, friendship) and those based in power and force, seemingly

³⁵An account of this relation and other “categorial” relations (subject-object and coming into being - termination) required for giving an account of complex legal phenomena is found in Dooyeweerd (1946-1967), vol II, 98-102. For his utilisation of this relation (and subject-object relation) to explain the “basic elementary concept” of legal causality see “The Modal Structure of Jural Causality” in H Dooyeweerd, *Essays in Legal Social and Political Philosophy* (Mellen, Lewiston, 1997), 39, 45-47.

³⁶ For a helpful discussion of Dooyeweerd's rejection of “thing”-based theories of law and its connection with theoretical accounts of legal norms see Soeteman, above n 11, 31-36. However, I do not necessarily agree with his interpretation of Dooyeweerd's account of legal norms as closer to contemporary “thing” approaches than Dooyeweerd himself suggests. On the contrary it could be suggested that a contemporary theoretical account of legal normativity such as MacCormick's notion of (normative) institutional facts is closer to Dooyeweerd's idea of norm- and subject-side of concrete legal facts. See D N MacCormick “Law as Institutional Fact” in MacCormick and Weinberger *An Institutional theory of Law* (Reidel, Boston, 1986), 49.

encompassing much of our social life to the most all-encompassing (state, large-scale business) functions in the jural aspect along with every other aspect including the moral aspect. It follows that each kind of community has its own inner jural sphere of law. However, the typical manner in which that aspect expresses itself within the different kinds of human community *that is, the type of law that is found within each basic kind of community* depends upon the typical character of the individuality-structure of the community or relationship. The family, no less than the state has its own type of law guiding its internal life, but the typical features of each are profoundly different. The structure of the family is typified by the leading or qualifying function of the moral aspect of love.. Though the family is founded in the biotic aspect (sexual reproduction), the moral/ethical dimension typifies the internal relationships and is constitutive of this community.³⁸ Its internal jural sphere therefore is morally qualified and the concrete expression (positivisation) of the jural principles within it constitutes a moral type of law that is only applicable within the confines of that community. The rules and understandings which operate within individual families for the resolving of internal conflicts of interests in order to retributively (justly) restore family harmony are governed by the typical moral character of this basic societal institution. Parents who lay down rules of behaviour for their children or for the entire family will typically express the love and concern they have for their offspring and the moral integrity of the family. The internal rules of an economic enterprise are also instances of genuine law but typically qualified by its leading economic mode of frugal administration of scarce resources.³⁹

The internal spheres of (juridical) law of these “private” communities are quite different from the rules to which we commonly attribute the description “law” – the internal jural sphere of the state, categorised by lawyers and legal doctrinalists as public and private law. For Dooyeweerd, however, the internal rules of a family or voluntary association (club, trade union, etc) are no less law than state legislation.

³⁷ For Dooyeweerd’s theory of individuality-structures see, above n 15, vol III, for example, 53-156 (natural things), 266-304 (family), 304-339 (marriage) and 379-508 (state).

³⁸ Dooyeweerd (1954-58), above n 15, vol III, 270.

³⁹ See Dooyeweerd (1954-58), above n 15, vol II, 66-68 for a fuller definition.

The differentiating feature of state law,⁴⁰ however, is that it is itself jurally qualified because the jural aspect is the state's "qualifying" or "leading" function.⁴¹ The state is a public-legal institution founded in a monopoly of coercive sword-power but always qualified by the (retributive) norm of public justice.⁴² State law then is typified by its public legal character. This public legal character of state law possesses a dual character. As for every other human community the state has its own internal communal law (constitutional and administrative law) that constitutes its legal structure and the relationships between different parts of that structure including the relationships between organs of the state and those subject to its authority, its citizens. In addition, the state in its public legal function has the task, which it alone possesses, of integrating all other jural spheres of non-state communities and of "inter-individual" or "coordinational" relationships in a common private law,⁴³ of which the *Common Law* is a particular historical form within common law jurisdictions.

This common, private (civil), state law carries out the function of binding the private jural spheres of coordinational relationships to public legal norms of public justice. Hence, in a legal system which, as a result of historical development, displays a differentiated and morally opened up form, the (common) law of contract binds the private economic institution of contract in the sphere of commerce to public legal norms of equity, and legal certainty (security of agreements), to norms of commercial legal justice. At the same time that common state law is itself normed by the following principle which is no less binding upon state law because of its character as convention : It must *respect the original jural competence of the parties to positivise the internal jural norms of the relationship* in the form of an agreement containing contractual obligations which are jurally binding *inter partes*. The (state) law of contract gives public legal *recognition* to the privately generated jural expression of the economic relationship through permitting such agreements to

⁴⁰ See above n 15, vol III, 379-508 for Dooyeweerd's theory of the state and its internal jural sphere.

⁴¹ Above n 15, vol III, 433-436.

⁴² See Dooyeweerd (1954-58), above n 15, vol III, 433-446, and (1996), above n 32, 148-150

⁴³ Dooyeweerd (1954-58), above n 15, vol III, 438-450 and (1996), above n 32, 64, n 1 and text.

be enforced and by granting state enforceable remedies for its breach, subject to the agreement fulfilling the public legal requirements of formation of a private agreement. Or it may set aside otherwise binding agreements for violation of such moral legal duties of unconscionability, good faith, etc.

The implications of Dooyeweerd's account of the different types of law are profound. First his theory propounds a version of legal pluralism with a robust sociological basis.⁴⁴ One is apt to overlook this feature of his legal philosophy when focussing solely upon his account of the basic concepts of law; most of his examples in the *Encyclopaedie*, not surprisingly, refer to state law as the most important form of law, societally speaking. However, Dooyeweerd's concept (and idea) of law, *in principle*, applies to *every type of law*. Hence the constitutive principles corresponding to the “retrocipatory analogies” within the jural aspect apply to every type of law or jural sphere as well as to state law.

This theory, then, is anti-positivistic, not only in respect of the older law-as-command variety of legal positivism found in Hobbes, Austin and Bentham, but also with regard to the modern interpretations of legal positivism. The latter, although rejecting the command theories, still focus their attention on state law as the “central case” of law. Hart's concept of law as a system of secondary and primary rules is appropriate to describe the public legal rules of the state. But for Dooyeweerd a “social rule” is as much law whether in a pre-state society or in a modern society. The rules of etiquette as much as the provisions of the New Zealand Bill of Rights Act 1990 are law in the *fullest* sense of law. The greater weight or social importance attributable to the latter is on account of the *type* of law that it is, not for being any less a law in its “focal” sense. On this theory of legal classification, not only the modern legal positivists, however, are guilty of state law bias. Even avowed anti-positivists such as Fuller and Dworkin fall into this trap. For

⁴⁴ See Dooyeweerd (1996), above n 32, “Sociology of Law and its Philosophical Foundations”, 73-89. I would suggest Dooyeweerd's theory provides a rigorous theoretical basis for legal pluralism which Tamanaha considers to be missing from the current movement of legal pluralism See B Z Tamanaha “The Folly of the ‘Social Scientific’ Concept of Pluralism” (1993) 20 JL & Soc 192.

example, whilst Fuller appropriately acknowledged the inner normative constituents of valid law some of his eight “desiderata”⁴⁵ are only applicable to the state law with its public legal qualification. In its coordinating or integrating task the requirement of promulgation, for example, is especially appropriate to the public function of state law. The requirement of congruence between the law as announced and official action clearly only has the rules of state in mind. His definition of the purpose of law as “the enterprise of subjecting human conduct to the governance of rules”⁴⁶ contains a state bias in the concept of governance. Dworkin’s state law bias is even more explicit in his “interpretive” abstract “concept” of law as a scheme of rights and responsibilities flowing from past *political* decisions about when collective force is justified.⁴⁷ on the basis of which he provides his “conception” of law as integrity.

Dooyeweerd’s legal pluralism theory has profound implications for the issues of law and morality. It permits us to see more clearly the practical significance of his modal theory and the idea of the jural and moral dimensions as distinct modal aspects. Such a view of the internal jural functions of non-State structures allow us to more accurately define and reckon with the plural structure of human society. The implications of this approach for an understanding of the relationship between law and morality will be illustrated in the following section by providing a sketch of how it can be applied to the topic of legal ethics.

III LAW AND LEGAL ETHICS

⁴⁵ L L Fuller *The Morality of Law* (Rev Ed, Yale, New Haven, 1969), 33-94 and the summary of eight “moral” requirements and discussion in J D van der Vyver “Law and Morality” in E Kahn (ed) *Fiat Iustitia* (Juta, Cape Town, 1983), 350, 358.

⁴⁶ Above n 44, 106.

⁴⁷ Dworkin (1986), above n 10, 93.

Dooyeweerd's legal philosophy implies that a proper theoretical understanding of the relationship of law and morality must make clear a distinction between "legal morality", and legal ethics.⁴⁸

A Legal Morality

By legal morality we understand legal principles or duties which have a moral content, expressed in general terms by Dooyeweerd as the concept of law morally "opened up" by the idea of law or justice. We are speaking here of such legal-moral concepts as good faith, unconscionability, guilt, etc which have a distinctively jural meaning qualified by the retributive mode of harmonising jural interests (legal justice).⁴⁹

In its jural sense good faith requires disclosure of information the withholding of which would be harmful to the interests of the other party whether this be within an *economically qualified* relationship (commercial contract) or a *morally qualified* relationship (friendship). The consequences of failure to observe moral norms such as good faith within the context of economic relationships (commercial transaction or consumer sale) where it is damaging to the economic interests of the other party may be provided for within the private jural sphere of the relationship (the contract) by the parties themselves. For example, an insurer will provide for the consequences of breaches of the duty of utmost good faith (material non-disclosures, misstatements, false statements) by the proponent in the proposal or insured in making a claim. However, the importance of commercial morality for the

⁴⁸ Although Professor van der Vyver is an adherent of the Dooyeweerdian analysis of types of law with its regulative idea of law or justice that opens up these different types of law in an ethical fashion, he does not clearly explain the relationship between positive state law with its legal-moral concepts as a public-legal type of law and the internal "law" of legal professional relations with its own legal-moral component. As explained in the text below the internal regulations of the profession comprise a fiduciary- ethical type of law within the sphere of professional legal conduct or "legal ethics." Van der Vyver's use of "legal ethics" to refer to legal-moral concepts in general within the different types of internal legal spheres (e.g., in the title of J D van der Vyver "The Jural Credo" (1989) 52 THRHR, 157) in this respect is confusing. Van der Vyver himself, citing du Plessis, refers to the inappropriateness of denoting the "juridical facet" of the rules of professional conduct as "professional ethics." The same however could be said of his own use of "legal ethics" to denote the legal-moral component of that "juridical facet" of professional legal ethics. See van der Vyver (1983), above n 44, 176 and (1989), above 354.

⁴⁹ See discussion of the "nucleus" or "meaning-kernel of the jural aspect, above n 20 and text.

security and stability of commercial and consumer transactions requires the state to bind those inner jural spheres (contracts) into a compulsory common regime of moral-legal norms consistent with a general conception of public legal justice. To continue our insurance example, the state supports the concept of a general duty of (utmost) good faith (*uberrima fides*) in all contracts of insurance via a general common law duty.⁵⁰ It also requires that insurers not use their superior bargaining position to depart from a conception of public justice that imposes the good faith duty by onerously extending it in their favour to the disadvantage of the insured. When, for example, insurers require the proponent of insurance to warrant the accuracy of all statements made in the proposal, the state insists that only misstatements which meet the common law standard of “materiality” under the duty of utmost good faith will allow the insurer to avoid the contract.⁵¹

B Legal Ethics

1 Fiduciary relationships and ethics

Not only economic relations possess an inner jural dimension which is bound as a matter of the public interest to state legal norms of justice. It is considered to be excessively intrusive to informal relations of friendship and lacking in any overriding public interest justification to make the parties within such relationships comply with a state law enforcing the inner jural norms of good faith even where failure to observe the latter results in damage to such relationships. There are other kinds of relationships, however, where the law is prepared as a matter of the public interest to regulate by imposing legal-moral duties. These kinds of relationships include those into which lawyers enter when practising their profession. The positive norms established by the profession itself for conduct within these relationships are what is commonly referred to as legal ethics.

⁵⁰ The duty is codified in the case of marine insurance. See Marine Insurance Act 1908, ss 18(1) and 20(1).

The doctor when practising within the “caring” profession through utilising his or her expertise to maintain and promote the bodily well-being of the patient is regarded as having entered into a relationship with the patient which carries with it ethical duties (medical ethics). Similarly, the lawyer in exercising his or her professional skill by providing legal services (legal advice, preparing legal documents, acting for the client in legal proceedings, etc) is regarded as having entered into a relationship accompanied by ethical obligations (legal ethics) vital to the maintenance of the relationship. Whilst not all ethical obligations within professional relationships are legally enforced in what I have referred to as legal-moral duties, those that are so enforced are termed “fiduciary duties” and the relationships within which they arise, fiduciary relationships.⁵² Owing to the ethical nature of the obligations attaching to these relationships, when we employ the Dooyeweerdian analysis it appears natural to ascribe to the moral aspect of these professional relationships the qualifying or leading role within their internal structure. Indeed, this is precisely how I first viewed the matter. After all, the obligations central to the law of fiduciaries such as “trustworthiness”, “fidelity”, “loyalty”, confidentiality, “good faith”, etc. are all primarily moral requirements and evidently constitutive of fiduciary relationships. Hence trustworthiness on the part of the lawyer is not merely an “aspirational” ideal which morally enhances the relationship but is indeed constitutive of it.⁵³ A lawyer who in contravention of legal ethics unjustifiably breaches the confidence of his or her client effectively destroys or, at least, seriously impairs the relationship by destroying that trust or faith which the client reposes in him or her. But this only shows that ethical behaviour is a prerequisite for establishing and maintaining a relationship that is characterised by (mutual) trust. It is especially important that the client is able to have the assurance, to have grounds to believe, to trust that the lawyer will act in her best interests

⁵¹ See ss 4-6 Insurance Law Reform Act 1977.

⁵² A leading text on the law of fiduciaries is P D Finn *Fiduciary Obligations* (The Law Book Co, Sydney, 1977). For an up-to-date view of developments in this area of law see C E F Rickett “Equity: fiduciary law, remedies law and equitable compensation” in D Goddard and C E F Rickett *Developments in the Law of Obligations* (New Zealand Law Society, 1996) 31-63.

⁵³ Andrew Brien considers this an essential ethical component of all “professional” relationships owing to the inherent vulnerability of the user of professional services who must place their trust in the person

(ethically) in providing the services she seeks from him or her. Only ethical (trustworthy) behaviour or an assurance thereof or will allow such a relationship of trust to exist. This suggests then that such fiduciary relationships are qualified by the aspect of faith or, as Clouser styles it, the “fiduciary aspect”⁵⁴

It may well be true that the services which the client seeks from the lawyer though concerning legal matters (legal advice, conduct of litigation, preparation of legal documents, etc.) insofar as those services involve the client entrusting those legal-needs-to-be-served to the *care* of the lawyer, are of an ethically qualified character. The service which the relationship facilitates is that of legal *care* as it is medical *care* which the doctor provides to the patient. Acts of caring are ethically qualified actions and within professional relationships they require ethically qualified acts of good faith, fidelity, loyalty, etc. But the relationship itself is characterised by role of the aspect of faith or trust.

In the lawyer-client relationship the lawyer is en-*trusted*⁵⁵ with the care of the client because of the legal knowledge and skills which she or he possesses and which the client lacks. The client must trust the lawyer to exercise that knowledge and skill in the client’s interest. Only by so trusting the lawyer can the latter properly carry out his or her role within the fiduciary relationship. The lawyer for his or her part can only do this by caring for the client’s interests, that is, by acting in a *trustworthy* manner *with respect to those interests*.

2 Legal ethics and law

providing those services. A Brien “Creating and Maintaining an Ethical Profession” (1994) Chartered Accountants Journal 34, 35.

⁵⁴ R Clouser *The Myth of Religious Neutrality* (University of Notre Dame Press, Notre Dame, 1991), 207-208. For institutions and organisations considered by Clouser to be qualified by the aspect of faith see 235-236 and table at 260.

⁵⁵ Applying the modal structural analysis this *entrusting* is a positivisation of the norm of faith within the functioning of the leading faith (“pistic”, “fiduciary”) aspect of the lawyer-client relationship. However, for that realisation of the faith norm (entrusting) to take place within that relationship requires the ethical norm of love or care in the core sense of “troth” or fidelity, good faith etc., which

A lawyer who breaches the fiduciary *duty* of confidentiality to the client⁵⁶ or violates the *duty* not to allow his or her interests to conflict with those of the client,⁵⁷ however, has not merely acted unethically, in contravention of legal ethics, but in acting unethically has damaged the interests of the client. From the perspective of Dooyeweerd's legal ontology we have a damaging disruption of the harmony of interests within the fiduciary relationship that calls for the positivising of a jural norm within the inner jural sphere (jural aspect) of the relationship in order to re-harmonise those interests in a jural (retributive) manner.⁵⁸ In other words, what is required is the giving of what is owed to the injured party as a matter of justice. Hence it is not with the intent of enforcing norms of moral conduct *qua* moral conduct that the (state) common ("private") law of fiduciaries (Equity) regulates such violations of the fiduciary relationship. Rather it is a matter of public justice (but not "public law") that internal jural norms of such relationships should in the public interest be reinforced with the coercive backing of public-legal sanctions.

Absent an issue of inter-relational justice, an ethical failure to positivise the merely aspirational or supererogatory norms in the relationship is not the proper concern of the state to coercively correct.⁵⁹ Thus, in the (ethically qualified?) relationship of friendship not carrying through into deed the thought of giving your friend a gift as a token of appreciation does not positively harm the relationship, though the failure is a lost opportunity to enhance the relationship and to further strengthen the bonds of friendship. Similarly, in the lawyer-client relationship a lack of generosity towards an impoverished client will not attract legal penalty though the codes of the law profession often contain aspirational ethical ideals.⁶⁰ Such

is, at least in part, *constitutive* of the relationship, to be positivised in ethically good actions which show the actor to be *worthy* of trust.

⁵⁶ R. 1.08, *Rules of Professional Conduct for Barristers and Solicitors* (4th ed, New Zealand Law Society, 1996).

⁵⁷ R. 1.03, above n 55.

⁵⁸ See above nn 18-22 and accompanying text.

⁵⁹ For a similar view on the general issue of state enforcement of morality see D N MacCormick "A Moralistic Case for A-Moralistic Law?" (1985) 20 Val U L Rev 1, who speaks of enforcing "duties of justice," 30-37. For a Dooyeweerdian view, van der Vyver (1989), above n 47, 170-171, disagreeing with Devlin, and also (1983), n 44, 364-369.

⁶⁰ The rules of professional conduct in New Zealand and Australia, however, make no reference to service "pro bono publico" nor is there any established pro bono scheme in either country. See Dal

codes however overlap with state law insofar as they contain statements of fiduciary duties the breach of which may result in the disciplinary processes of the profession being invoked.

As a form of self-regulation the *rules* of professional conduct,⁶¹ which involve the sanctioning of professional duties, represent a concrete expression of the inner jural sphere of professional legal relationships as a private law of a fiduciary-ethical type so far as the lawyer-client relationship is concerned – fiduciary-ethical because this form of regulation serves the purpose of maintaining the integrity of the lawyer's professional relationship as a relationship based on trust (fiduciary or faith aspect) by attending to its inner jural dimension (retributive harmonizing of interests) through the imposition of ethically “opened up” jural norms of behaviour (legal-moral duties). This private form of regulation, however, itself receives public-legal *recognition* in the Law Practitioners Act 1982 as part of the state's internal communal law (public law) which aims to promote the public interest in having an ethically self-regulating profession. Hence, there is a public-legal requirement for the profession to regulate itself through the promulgation of a code of conduct and the maintenance of internal disciplinary institutions and procedures, just as there are similar requirements for the medical profession.⁶² The internal jural competence of the private professional body (New Zealand Law Society) to make rules regulating its members' conduct has not been usurped by direct public legal regulation but has been sanctioned by public law.

This public law form of indirect regulation is to be differentiated from the direct form of (state) private law regulation of the private (non-state) inter-individual relationships of lawyer and client or doctor and patient through the law of fiduciaries (and law of tort and contract) in the interests of maintaining justice

Pont *Lawyers' Professional Responsibility in Australia and New Zealand* (LBC Information Services, Sydney, 1996), 75-76.

⁶¹ On the aspirational versus regulatory model of codes of professional ethics see C Sampford and C Parker “Legal Regulation, Ethical Standard-Setting, and Institutional Design” in Parker and Sampford (eds) *Legal Ethics and Legal Practice* (Clarendon Press, Oxford, 1995), 11-24, 14-17.

⁶² Medical Practitioners Act 1996.

between the parties to these relationships. Both, however, are forms of the type state law and, as such, are qualified by the jural aspect in conformity with the norm of public justice.

There is, however, a distinguishing feature of the legal profession which adds another dimension to the interrelationship between its internal jural sphere and that of the state. This arises from the fact that the service which the profession provides is *legal*; it provides advice and other services pertaining to the positivised norms within the internal jural sphere of the state (state law), governed by and arising from, the jural aspect which gives that institution its characteristic stamp founded in its jurally-qualified individuality-structure. The state, therefore, regulates the profession and the professional legal relationship in the interests of aiding the performance of its own normative public legal function of administering justice. No other profession has this kind of intimate relationship to the state.

This intimacy presents a challenge to the Dooyeweerd's modal-structural theory. We can indicate the problem through posing the following question: how, on this approach are we to characterise the relationship between the lawyer, as counsel for the defence, and the court? We see here that there can be multiple professional legal relationships. There is, first, the fiduciary relationship between the lawyer and client and, secondly, the relationship between the lawyer as officer of the court and the court itself (including the judge and opposing counsel as other officials of the court). What is the nature of this second relationship and the duties to which it gives rise?

The prime duty of counsel, overriding duties to client, is to the court. It is the duty to assist in the administration of justice as the central aim of the court process.⁶³ This is not a duty to do justice *per se* – that is the duty of the court of which counsel are officers – but a duty *to facilitate that aim in the way they conduct themselves within the internal relationships that constitute the court of*

justice. The general duty of counsel to the administration of justice translates into a more specific duties such as the duty “to act with frankness candour and honesty in relations with the court.”⁶⁴ A failure in this respect, such as deliberately misleading the court, undoubtedly involves the transgression of an ethical norm affecting the fiduciary (trust) dimension of a relationship. It is an ethical failure in an institutional (state) *legal* context of the relationship between lawyer and court. Because such misleading conduct “undermines the confidence which the court and fellow practitioners can thereafter place in her or his integrity”⁶⁵ does this mean the relationships themselves are characterised as fiduciary? Or is it only to be understood as a violation of the fiduciary aspect of jurally qualified relationships internal to a public legal (judicial) institution?

This breach of the ethical norm constitutes a breach of a public-legal norm because it damages the public legal interest in the judicial function of administering justice. The court is able in its inherent jurisdiction to discipline such behaviour by making an award of costs against the lawyer.⁶⁶ Nevertheless, such conduct is also regarded as damaging the ethical standing of the lawyer concerned within the profession insofar as he or she is no longer considered trustworthy by other practitioners and also the public’s confidence not only in the particular lawyer but in the profession at large. Hence the transgression also does damage to the fiduciary relationship between lawyer and client. The offending conduct, therefore, will frequently be subject to discipline within the profession because it constitutes more than an aspirational failure but a violation of norms within the internal jural sphere of the profession demanding a retributive response.⁶⁷

From this brief excursion into legal ethics I have sought to demonstrate the manner in which the Dooyeweerd’s jurisprudential method of structural analysis can help to elucidate the complex nature of the relationships between law and

⁶³ See Dal Pont, above n 59, 344-345.

⁶⁴ Above n 59, 343.

⁶⁵ Above, n 59, 344.

⁶⁶ Above n 59, 361. *Y v M* [1994] 3 NZLR 581 at 589 per Temm J.

morality, between the jural and ethical aspects of human experience. Applying the theory of modal aspects and the accompanying theory of individuality-structures we have seen that within relationships typified by their fiduciary-ethical character, such as occur within the legal profession, there exists an inner jural sphere of norms and principles which are positivised as an internal law which is typified or “qualified” by its fiduciary character owing to the fiduciary context of the relationships (of trust) to which these “jural” norms apply. Within these relationships the internal jural sphere of fiduciary-ethical “law” is to be distinguished from purely fiduciary-ethical (aspirational) norms which lack any retributive-jural character and therefore are not enforced in a jural manner by regulatory or disciplinary procedures.⁶⁸

To summarise this discussion of legal ethics, the connections between legal ethics and state law have been seen to evince a complexity of a three-fold character. First, state law regulates professional legal relationships along with other fiduciary relationships with respect to their internal jural sphere through the common law of obligations (equitable, tortious, contractual, restitutionary) and the law of fiduciaries. Secondly, state law affects legal ethics by means of profession-specific public law which in the public interest regulates the administration of professional legal ethics by the profession through public-legal recognition of the central administering body, The New Zealand Law Society, and its internal institutions, including its regulatory code and disciplinary procedures which are required to

⁶⁷ Above n 59, 361, 455-458, 502-504.

⁶⁸ That is not to say, however, that the ethical dimension lacks an inner jural dimension (jural retrocipatory analogy) according to the idea of coherence expressed in the inner aspectual complexity of each modal aspect. Hence Dooyeweerd identifies the jural analogy as a retributive retrocipation, a well-balanced proportion between self-love and love of one's neighbour. (See Finn's definition of morality in terms of this “analogy” in his discussion of commercial morality, P D Finn “Commerce, the Common Law and Morality” (1989) 17 Melb ULR, 87). Moral *duties*, therefore, as obligations of love or care *owed* to self and others, by implication, refer to the jural analogy within the moral aspect. As a retrocipatory analogy within the moral aspect it is constitutive of it. Love cannot be truly expressed without a (better or worse) positivisation of the norm of moral-retributive balance. Contrast this with the non-constitutive anticipatory moral analogy in the jural aspect (legal-moral concepts). A further distinction, however, has to be made between the jural analogy of “moral retribution” and the normative requirements of the jural aspect, that is, retribution in its original jural sense which is a necessary pre-requisite (“substratum”) for realisation of the ethical dimension of love. Love of neighbour is impossible without observing the requirements of justice in its original retributive jural sense. See Dooyeweerd (1954-58), above n 14, vol II, 160-161 and text, above nn 18-22 and accompanying text.

observe public-legal norms of justice. Thirdly, the state in the public interest regulates the internal fiduciary-ethical dimensions of professional relationships within its own jurally qualified institutional structures (courts) in order to protect and promote its prime jural function of administering public justice.

V CONCLUSION

There are several obvious objections which might be raised against the “new” legal philosophy of Herman Dooyeweerd. The first and most obvious of all, perhaps, would be directed against its appeal to a theological basis (divine law). Such objectors, however, have to reckon with the counter-accusation that this objection is itself based on a non-rational faith commitment to the autonomy of theoretical reason. They must take seriously the “transcendental” critique that challenges the “myth” of the religious neutrality of theories.⁶⁹

A second objection might be lodged against the specialised terminology and considerable complexity that is found within Dooyeweerd’s philosophic system. These complaints can be levelled to some degree or other against any original philosophy as they have been, for example, against postmodernist theories. Whether these complaints are fully justified will in the end depend on the extent to which the legal philosophy is able to provide new insights into legal phenomena, irrespective of the standpoint on which its approach is based. Without himself being a committed Dooyeweerdian, Soeteman has indicated the value of Dooyeweerd’s analysis of legal causality.⁷⁰ In this article I have attempted to similarly indicate the relevance of the “modal” analysis for the perennial jurisprudential debate over the relationship of law and morality with a particular application to legal ethics.

Which brings us to a third possible objection. Surely the attempt to confine the ethical/moral dimension of experience to a non-jural (non-economic, non-aesthetic,

⁶⁹ See Clouser, above n 53.

⁷⁰ Soeteman, above n 11, 41-46.

etc) sphere of normativity which excludes principles and norms of justice is a highly artificial exercise and runs counter to the history of legal and ethical philosophy? In the face of this objection I can only point to the necessity which both legal philosophers and legal doctrinalists acknowledge of distinguishing between the normative requirements of legal justice which are internal to the law and non-legal or non-jural normative ethical or moral requirements, such as good faith, which, whilst not necessary constituents of valid law, nevertheless form part of a pervasive and widely-held view of justice that *ought* to be embodied in the law. Dooyeweerd's notion of the normative jural aspect and the method of modal analysis provides a means of explaining the complexities of these interconnections between distinctive juristic and moral norms and how they can mesh in legal-moral principles or norms such as good faith.

Furthermore, without some such distinction between the jural and ethical (and faith or fiduciary) aspects it becomes almost impossible to clearly explain the connections between law and morality or ethics when considering the topic of legal ethics. The vague and normatively all-encompassing definitions of ethics or morality as to do with "right and wrong" or "good and bad" are completely useless as a basis for explaining such areas of human practice. Similarly the consigning of all issues of normativity involving "justice" or "public policy", "public morality" or "reasonableness" to an autonomous sphere of "values" will not do either. One of the greatest contributions of Dooyeweerd's jurisprudential method is to show, not merely that questions of (legal) value or normativity and issues of (legal) fact, what we lawyers and jurists ambiguously refer to as issues of "law and fact", are inextricably connected, but to explain in a highly sophisticated manner *how* fact and value are related in the law through his idea of the "law-", or "norm-", "side" of legal phenomena. He could only have arrived at that insight through a fundamental rejection of the prevailing fact-value dichotomy and by adopting a unique "structural" approach. Notwithstanding modern attempts to bridge the fact-value divide I would doubt whether there exists a more sustained, systematic and comprehensive exposition of legal concepts which has been able to relate the

deepest and most abstract concerns of legal philosophy to the jurisprudential concerns of legal doctrinalists and practising lawyers in such a comprehensive and all-encompassing manner. Much more than this limited study has been able to accomplish, however, will be required to expound the full complexity of Dooyeweerd's jurisprudence and its implications for doctrinal exposition and legal practice.
