# 25 A PHILOSOPHICAL APPROACH TO LAW AND RELIGION: THE CONTEXT OF HUMAN SOCIETY

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### SOME SYSTEMATIC PERSPECTIVES

From the historical background considerations explained in the opening article of this volume we have seen that over-extending the whole-parts relation results in a misunderstanding of the relationship between law and religion. Therefore we commence in this follow-up article, directed at some systematic perspectives, with a closer analysis of the nature of the whole-parts relation.

### Towards a systematic account of the whole-parts relation

Since the whole-parts relation played such an important role in the history of reflection on human society, it is necessary to ask how we should understand it. In his principles of mathematics, Bertrand Russell holds that the whole-parts relation is basic and indefinable: "The relation of whole and part is, it would seem, an indefinable and ultimate relation."[2] The question is therefore: in which modal aspect of reality do we meet the whole-parts relation in its original (non-analogical) meaning? We shall argue that a whole or totality resides within the spatial aspect.

Another possible candidate is the biotic aspect, because the vitalistic tradition always emphasised an organic whole with its parts. Commencing in Greek thought, the vitalistic view provided a starting-point for an approach manifesting itself throughout the medieval era and modern philosophy, up to the diverse *organicistic* orientations of the nineteenth century. The latter includes the positivism of Comte and post-Kantian freedom idealism (Schelling, Fichte and Hegel), and it subsequently also surfaced in the thought of Stahl and Kuyper. Although a universalistic emphasis on the whole-parts relation dominates the organicistic legacy, there are nonetheless also examples of atomistic or individualistic orientations within an organicistic modes of thought. Spencer, for example, loads his organicism – the view that society is an organism – with an *individualistic* assumption in maintaining: "A more pronounced individualism, instead of a more pronounced nationalism, is its ideal."[3] Why is it possible for an organicistic approach to be individualistic in one instance and universalistic in another one? This possibility flows from the fact that within the biotic aspect of reality analogies of the numerical and spatial aspects are found. If the quantitative analogy is over-emphasised, an

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2    Russell B. 1956. *Principles of Mathematics.* London: George Allen & Unwin Ltd, 138.
3    Spencer H. 1968. *Reasons for Dissenting from the Philosophy of Comte and other Essays*. Berkeley, CA: Glendessary Press, 22.

individualistic view is advanced and when the spatial analogy of wholeness s elevated a universalistic orientation emerges. In the latter case the whole (German: *Ganzheit*) is qualified as being *organic* in nature and the parts are designated as members (German: *Glieder*).

While number is characterised by discreteness, the whole-parts relation reveals the uniqueness of the spatial aspect. These terms are derived from the Greek word *holon* and the Latin *totum* and *partes* (whole and its parts). Modern set theory had to use both our arithmetical intuition – the discreteness of a multiplicity of distinct elements – and our spatial intuition: the multiplicity of elements is united into a whole (the term for being a whole used by Georg Cantor, the father of modern set theory, is *Ganzheit*). Badiou incorporates only the contribution of the *numerical* when he remarks:

> A set, in Cantor's sense of the word has no essence besides that of being a multiplicity; it is without external determination because there is nothing to restrict its apprehension with respect to something else; and it is without internal determination because what it gathers as multiple is indifferent.[4]

Compare this to the authentic definition of Cantor: "Under the term 'set' we understand every collection *M* of determinate and properly distinct objects *m* of our intuition or our thinking (which are called the "elements" of *M*) into a whole" (*Zusammenfassung … zu einem Ganzen* = "Uniting into a whole"). An understanding of the opposition between individualism and universalism commences with an account of the core meaning of number and space, realizing that individualism overextends the meaning of the one and the many, while universalism overemphasises the meaning of the spatial whole-parts relation. From the fact that organicism took on both an individualistic and a universalistic shape, it is also clear that analogies of number and space within cosmic later aspects can also prompt this opposition within aspects such as the cultural-historical, lingual, social and jural aspects.

However, it is only when these and other analogies are considered within the context of the *social* aspect that we reach an even more nuanced understanding of these two isms under consideration. The crucial issue here concerns the different types of social interaction which can be discerned within a differentiated society. Investigating this issue is not directed at the typicality of any particular societal entity, but merely at the *ways* in which human social interaction takes place. Such an investigation is not interested in a genetic distinction, such as found in the initial position developed by Tönnies in his 1887 work on *Gemeinschaft und Gesellschaft*. In this work Tönnies defends the view that a period of *Gesellschaft* (community) follows a period of *Gemeinschaft* (society).[5] Since the distinctions

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4    Badiou A. 2005. *Theoretical Writings*. New York, NY: Continuum, 46.
5    Tönnies, F. 1972. *Gemeinschaft und Gesellschaft: Grundbegriffe der Reinen Soziologie* [Community and Society: Basic concepts of pure sociology] [1887]. 2nd edition. Darmstadt: Wissenschaftlich Buchgesellschaft, 251. However, in his *Introduction*

here intended have been treated more extensively elsewhere,[6] only the outcome of this analysis will be briefly explained.

When the coherence between the kinematical and the physical analogies within the modal structure of the social aspect is considered, the focus should be on the dynamic equilibrium of thermodynamically open systems. This feature brings to expression the fact that the enduring persistence of an open system is not cancelled by the exchange of material constituents. Likewise certain societal entities also display this feature, for in spite of the coming and going of individual members the solidarity and continued existence of the social form of life under consideration is not threatened. Owing to the foundational relationship between the kinematic and physical aspects, all physical changes presuppose an element of kinematic constancy.[7] Phrased in a different way one should say: *change can only be detected on the basis of constancy*. For example, Ryan accounts for the fact that in spite of the constant flow (exchange) of individual members of a societal collectivity, the durability, persistence and identity of the social form of life concerned are not terminated. He writes:

> There are regularities and constancies in the behavior of groups of people which allow us to talk about groups having a stable structure in spite of fluctuating membership, and about the existence of social roles which can be filled by different people at different points in time.[8]

Here we may speak of the *solidary unitary character of certain social forms*. A more detailed analysis of this phenomenon would show that such an investigation will have to use other analogical structural moments, as well. Identifying a solidary unitary character is only possible when, within the distinct sphere of an integrated social order, an enduring form is given to this internal order, even in spite of the presence of possible or actual social conflict.[9]

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to Sociology it turns out that he wants to relativise these oppositions. He remarks that in addition to social relations and social connections he distinguishes a third category, *Samtschaften* (collectives). Social entities are classified as *Samtschaften*, social relationships (*Verhältnisse*), and social 'bodies' or organisations (*Körperschaften*) See Tönnies F. 1965. *Einführung in die soziologie* [Introduction to Sociology]. Stuttgart: F Enke, XLV ff.

6   Strauss DFM. 2006. *Reintegrating Social Theory – Reflecting upon human society and the discipline of sociology*. Frankfurt am Main: Peter Lang, 245-55.

7   The term *kinematic* is used to designate what is also known as the aspect of uniform (i.e., constant) movement. In his original 1905 publication on the special theory of relativity Einstein also used the term "kinematic". He designates the first parts as: I. KINEMATICAL PART. See Einstein A. 1905. "The Electrodynamics of Moving Bodies". Online at: http://www.fourmilab.ch/ etexts/einstein/specrel/ www [Accessed 10 October 2011]. See also Einstein A. 1982. *Grundzüge der Relativitätstheorie*, [1922] Braunschweig; Wiesbaden: Vieweg, 30-31.

8   Ryan A. 1970. *The Philosophy of the Social Sciences*. New York, NY: Pantheon Books, 174.

9   Note that in this formulation analogies from the following aspects are employed, namely the numerical, spatial, biotical, analytical, and cultural-historical aspects.

While holding on to this feature of a *solidary unitary character*, another feature concerns the spatial analogy. Within the social aspect this analogy could be specified in two ways: accounting for social relations of next-to-each-other and social relations of super- and subordination. Enduring relationships of super- and subordination provides us therefore with a second classificatory feature pertaining to the different forms of social interaction in a differentiated society.[10]

### Classifying Human Social Interaction

Three classificatory options emerge from these distinctions. Firstly one can combine both features; secondly one can choose either one; and lastly one can ignore both of them. When a societal entity partakes in both characteristics, namely (i) a solidary unitary character, and (ii) a permanent authority structure, then we encounter what is designated in German and Dutch as *Verbande* – in English preferably rendered as *societal collectivities*. This type of social interaction embraces societal collectivities such as the state, faith communities, the nuclear family, a firm, social club, language association, tertiary and academic institutions (universities and colleges) and so on. All of these societal entities have a solidary unitary character as well as an enduring authority structure (of super- and subordination). Citizens serving in the office of government are always correlated with those citizens who function as subjects within the state. The state can therefore not be identified with the government, as it is frequently done. Both those citizens who occupy specific governmental offices and those subject to the power vested in these offices are *constantly changing* (without eliminating its permanent authority structure) – thus highlighting the solidary unitary character of the state as a societal collectivity. The same applies to faith communities, clubs, businesses, universities and so on. Selecting only one of the above-mentioned two characteristic classificatory features points at what are known as *communities* – such as ethnic communities (also known as cultural communities) and the extended family. In the absence of both features we meet relationships between individuals, communities or societal collectivities – all of them belonging to the category of *coordinational relationships*.

Although we often refer to the inhabitants of a city of a town as a "community", all three types of social interaction identified above are interwoven within it, each maintaining its intrinsic sphere sovereignty. Dooyeweerd employed the word *enkapsis* for this kind of interlacement. Since whatever is "enkaptically" interwoven remains true to its internal sphere sovereignty, it cannot be seen as an instance of subsidiarity. On the basis of the intimate connection between the diversity of sphere-sovereign aspects and the normative flexibility of human actions, the distinct societal entities present in a differentiated society could be classified by focusing on their characteristic and unique qualifying aspects. Of course the idea of a qualifying aspect pre-supposes the idea of a foundational

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10  In passing we note that the full meaning of this feature is also co-constituted by the other analogical moments.

function – one cannot imagine the roof of a house without considering its foundation as well!

Interestingly, when Dooyeweerd classifies social interaction within a differentiated society, he distinguishes between communities and *Verbande* by characterizing the latter as *organised* communities. That is to say that he links the classification of societal entities to their foundational function.[11] After Groen van Prinsterer, Abraham Kuyper and Herman Dooyeweerd elaborated the idea of *sphere-sovereignty*, more recent social-political thinkers, such as Münch, Habermas and even Rawls, in some instances, acknowledge the "own inner laws" of differentiated spheres of life.

### Münch, Habermas and Rawls – approximating sphere-sovereignty

Alexander acknowledges that here are "inner laws" peculiar to differentiated societal spheres of life. The sociologist Münch states that during the 1980s the key issue is found in "Weber's theory of the rationalization of modern society into spheres that are guided to an increasing extent by their inner laws."[12] He specifically mentions the "political system" with "its inner laws."[13] Also in the political philosophy of John Rawls similar tendencies are present, alongside his struggle with atomistic and holistic perspectives. For example, in his work *Political Liberalism* he discerns different societal principles applicable to distinct kinds of subjects: "But it is the distinct purposes and roles of the parts of the social structure, and how they fit together, that explains there being different principles for distinct kinds of subjects."[14] His acknowledgement that principles within their own sphere fit their peculiar nature clearly approximates the reformational philosophical idea of sphere-sovereignty. He states: "Indeed, it seems natural to suppose that the distinctive character and autonomy of the various elements of society requires that, within some sphere, they act from their own principles designed to fit their peculiar nature"! We may mention also Habermas, who, in his discussion of globalisation, refers to the "classical doctrine of the state", and then refers to *private spheres of life*: "the state maintains law and order within the borders of its own territory and guarantees security for citizens within their own private spheres of life."[15] On the next page he speaks of "differentiated forms of life", and in his encompassing analysis

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11  The problems it caused for his analysis of human society are discussed in Strauss, *Reintegrating Social Theory*, 251.
12  Münch R. 1990. "Differentiation, Rationalization, Interpenetration: The Emergence of Modern Society", in Alexander JC and Seidman S. *Culture and Society, Contemporary Debates*. New York, NY: Cambridge University Press, 442.
13  Münch, "Differentiation, Rationalization, Interpenetration", 444.
14  Rawls J. 1996. *Political Liberalism*, rev edn. Cambridge, MA: Harvard University Press, 262.
15  Habermas J. 2001. *The Postcolonial Constellation: Political Essays.* Cambridge, MA: Polity Press, 81.

of communicative actions, he also, without hesitation, alludes to the "laws" of "specific social spheres."[16]

Every human being partakes in the three ways of social interaction distinguished above. They are actually fitted in an unbreakable coherence, because no one merely acts within coordinational relationships or solely in communal and collective relationships. Sphere sovereignty in principle transcends these one-sided distortions because it prevents any view of human society subsuming one sphere-sovereign societal entity under another sphere-sovereign entity. No single sphere-sovereign societal entity should be reduced to a mere *part* of an encompassing whole, to be subordinate to such a whole. One of the key signs that an implicit whole-parts relation is present in reflections on human society is therefore given when the idea of *subordinate* organisations, groups or associations surfaces.

### The testimony of the Reformed Ecumenical Synod (RES) on Human Rights

In the 1983 Testimony on Human Rights of the Reformed Ecumenical Synod (RES) the perspective on sphere-sovereignty is characterised as "structural pluralism", the "idea that by virtue of the creation order we discover the true meaning of our lives within the structured framework of various spheres of activity, each with its own divinely ordained identity and integrity (such as marriage, family, work, worship, play, governance, art, science, journalism etc.)".[17] *Confessional pluralism* is "the recognition that as a result of our fall into sin and as a fruit of redemption we now live[d] in a religiously divided world with various faith communities (Protestant, Catholic, Jewish, Islamic, Humanist, Buddhist, etc.)."[18]

### A more refined understanding of individualism and universalism

At this point it is possible to deepen our initial definition of individualism and universalism. We argued that over-estimating the discreteness of number or wholeness as the core meaning of space – or analogies of these two aspects analogically reflected within other cosmic aspects – underlies the distortions found in individualism and universalism. The distinction which we have drawn between coordinational, communal and collective ways of social interaction is co-determined by numerical and spatial analogies but mediated by the other analogical structural elements following number and space. Of course these

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16   "… den sogenannten Eigengesetzlichkeiten einzelner sozialer Sphären" Habermas J. 1981. *Theorie des kommunikativen Handelns.* [Theory of Communicative Action] Volume 2. 4th revised edition. Frankfurt am Main: Suhrkamp Verlag, 437.

17   Schrotenboer PG. 1983. "Foreword", in Reformed Ecumenical Synod. *RES Testimony on Human Rights.* Grand Rapids, MI: Reformed Ecumenical Synod. The RES Committee is mentioned on page 159, and the current author is named as a consultant).

18   Schrotenboer, "Foreword" to *RES Testimony on Human Rights*, 25.

distinctions do not imply that any kind of social interaction can exist in isolation. No single person is absorbed by inter-individual coordinational relationships and no one merely lives in communal and collective societal entities. Therefore coordinational relationships are unbreakably correlated with communal and collective societal relationships.

However, as soon as it is attempted to reduce communal and collective relationships to coordinational relationships sociological individualism emerges. By contrast, when communal and collective relationships are reified at the cost of coordinational relationships we meet sociological universalism. Furthermore, classifying different societal entities as social collectivities is done by abstracting from their sphere sovereign uniqueness while focusing on what they share, namely a solidary unitary character and a durable relation of super-and subordination. Avoiding the distorting temptation of subsuming different sovereign spheres under one of them serving as encompassing whole, with the others as its genuine parts, is made possible by identifying a unique sphere sovereign modal aspect as qualifying function of a specific social form of life.

Therefore, without the supporting role played by the theory of sphere sovereign modal aspects, no sufficient demarcation of sphere sovereign societal entities will be possible. The assertion that the state as a public collectivity (*Verband*) is qualified by the *jural aspect* contains a decisive structural delimitation. Its calling is to bind together (integrate) the multiplicity of *legal interests* on its territory – not all possible kinds of non-jural interests. But recognizing the state as a universal integrator of legal interests does not entail that at once it turns into a universalistic societal whole embracing the integration of all non-jural interests as well. This explains why the state is not called to integrate faith interests as if it is an all-encompassing community of faith, or to integrate all love relationships as if it is a macro-family, and so on.

### Sphere sovereignty: the relationship between the state and the other societal spheres

The state does not *grant* existence to any non-state sphere sovereign social entity. It merely has to *acknowledge* that, on equal footing, there are multiple distinct and sphere sovereign societal entities. Each one functions within the jural aspect and therefore has typical legal interests which the state has to integrate in one public legal order. This view is important for the problem of boundary-transgressions. With reference to Kuyper's view Monsma writes:

> But as soon as there is any clash among the different spheres
> of life, where one sphere trespasses on or violates the domain
> which by divine ordinance belongs to the other, then it is
> the God-given duty of government to uphold justice before

arbitrariness, and to withstand, by the justice of God, the physical superiority of the strong.[19]

He mentions that Kuyper once wrote that the "state must ... keep each sphere within its proper limits. The sovereignty of the state, therefore, rises high above all the other spheres by enjoining justice and utilizing force justly" and also mentions David Koyzis who has made this same point in regard to Herman Dooyeweerd's thought:

> By allowing that the state's task includes protecting the integrity of the various societal spheres and enabling them to fulfil their respective normative tasks, it would certainly appear that Dooyeweerd is conceiving the state as something of an overarching hierarchical institution.[20]

Yet there is a subtle difference between *acknowledging* sphere-sovereign social forms of life by integrating their legal interests into one public legal order, on the one hand, and claiming that the state has to *enable* them to fulfil their respective normative tasks, on the other.[21] Integrating legal interests does not at all elevate the state into an overarching hierarchical institution. This public legal task does not turn the state into a whole with the various societal spheres as its subordinate (hierarchical) parts, for then societal entities that are delimited by different structural principles would be integrated and bound together in a new encompassing whole. Dante clearly saw through this shortcoming with his remark that true parts are governed by one and the same structural principle.[22] Proper parts of the state are provinces and municipalities and in this specified sense a legitimate use of the whole-parts relation is found. The competencies, responsibilities and duties belonging to each level are *state* competencies, responsibilities and duties. Therefore they cannot be confused with the principle of subsidiarity, because they exclude those societal spheres that are distinct from the state whereas subsidiarity does not differentiate between the "subordinate groups" and proper parts of the state.

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19  Monsma SV. 2006. "The Relevance of Solidarity and Subsidiarity to Reformed Social and Political Thought". Paper prepared for the *International Society for the Study of Reformed Communities* (July 9-12, 2006), Princeton, NJ, 5. Online at: http:// webcache. googleusercontent.com/search?q=cache:3PaWWIArxF0J:www.calvin. edu/henry/ISSRC/Conferences/Papers/monsma06+&cd=1&hl=en&ct=clnk&gl=us [Accessed 9 February 2015].

20  Monsma, "The Relevance of Solidarity and Subsidiarity to Reformed Social and Political Thought", 6.

21  Chaplin J. 1993. "Subsidiarity and Sphere Sovereignty: Catholic and Reformed Conceptions of the Role of the State", in McHugh FP and Natale SM (eds). *Things Old and New: Catholic Social Teaching Revisited*. Lanham, MD: University Press of America, 183 ff.

22  "Teile stehen aber dann in einem rechten Verhältnis zum Ganzen, wenn ein und dasselbe Prinzip sie regiert" (quoted by Zippelius R. 1980. *Geschichte der Staatsideen*, 4th revised edition. München: Verlag CH Beck, 67).

When Chaplin therefore remarks that the "appropriate conclusion to draw here is surely that each community performs subsidiary functions towards all the others".[23] He does not realise that sphere sovereignty and subsidiarity are mutually exclusive. The remark of Monsma that "the basic insight of subsidiarity [is] that societal functions can best be carried out by the lowest level while protecting a just social order and the common good is a good and appropriate standard",[24] it is clear that he does not address the real problem, namely that it is not an issue of levels, but of a proper or an improper application of the whole-parts relation.

### State-law and faith communities

An understanding of the relationship between (state-)law and faith (communities) depends on an insight into the inner nature of the state, as well as the diverse non-political spheres of life within a differentiated society. Such an account is preceded by the need to distinguish between the *jural aspect of reality* and the multiple societal entities merely functioning within this aspect owing to its *modal universality*, as explained at the beginning of our analysis in the explanation of the nature of modal universality and in the distinction between thing concepts and function concepts.

Whereas the state is characterised as an organised public legal community, faith communities are qualified by the certitudinal aspect of reality. But they also function within the jural aspect of reality, clearly reflected in the existence of ecclesiastical law. But this private legal domain does not embrace every citizen of the state, it is a specific type of (private) law, a *ius specificum*. The state, by contrast, is guided by the concern for legal interests of the public since intrinsically it is a *res publica* (a "public thing"). The office of government is neither a royal prerogative nor a *res in commercio* (something to be traded). While state citizenship is bound to a territory, membership within faith communities is person-bound.

Personal religious freedom and denominational religious freedom reflect the difference between *civil private law* and *non-civil private law*. The former, which is juridically qualified just like the state, does not display the relation of super- and subordination typical of the state. It rather concerns the personal freedom-sphere of individuals participating in the legal intercourse of a differentiated society where individuals, communities or societal collectivities (*verbande*) interact on equal footing alongside or in opposition to each other. The development of civil private law is always attached to the state because it requires civil courts with an impartial jurisprudence, supported by the "sword power" of the state, for the official execution of its decisions.

23  Chaplin, "Subsidiarity as a Political Norm", in Chaplin and Marshall, *Political Theory and Christian Vision*, 93.
24  Monsma, "The Relevance of Solidarity and Subsidiarity to Reformed Social and Political Thought", 12.

*Retribution and justice*

By virtue of the principle of sphere-sovereignty the state does not *grant* the right of existence to any non-political societal entity, it only acknowledges the legal interests entailed in its existence. State citizenship cuts through all the other societal entities without losing sight of the legal interests entailed by these spheres. This flows from the fact that all these legal interests ought to be united in one public legal order and wherever an infringement of rights takes place, the applicable state organs have to restore the balance and harmony of the legal order in a truly retributive sense. Giving each citizen its due represents a long-standing understanding of the meaning of justice (*ius suum quique tribuere)*. The English language is here in need of rendering the positive meaning of *tribuere* into "tribute." "Giving a person his or her due" is synonymous with the "tribute" part of *retribution*.

A constitutional state under the Rule of Law (a *regstaat*) is found when the spheres of public law, civil private law and non-civil private law are secured. A just state therefore gives shelter to public legal freedoms, civil legal freedoms and societal freedoms (the internal sphere of freedom of the non-political spheres of life). Only when the spheres of competence distinct from the state are kept intact will it be possible to secure the confessional freedom of faith communities and the personal certitudinal freedom of individuals. However, the impartiality of the government does not entail that it can coerce individuals within non-political entities to renounce their world view convictions. State subsidies to schools and tertiary academic institutions, for example, do not empower the state to enforce directional choices; in a formal sense it can only secure formal standards.

Since a world-view encompasses all of life every individual and societal collectivity should be allowed to exercise their personal and collective freedom in this regard. No law should encroach on this freedom. When the government of a state provides support and funding for a specific kind of social entity, it should not be transformed into control and ownership.[25] When the publicly accepted standards for one or another public service are met, government funding should not be withdrawn merely because the service is rendered by Christians, secular Humanists, Muslims, Roman Catholics or Atheists with a specific *modus operandi* informed by their world- and life-view, because then the government will infringe upon a directional choice, which is totalitarian. A Christian, Secular Humanist, Muslim, Roman Catholic or Atheist private

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25   In a presentation to an Honours class in Philosophy at the University of the Free State in 1997, James W. Skillen, at the time working at the Center for Public Justice, analysed ten similar principles for a just treatment of public religion Skillen J. 1997. "Is there a place for Christian Politics in America?" Online at: http://www.allofliferedeemed.asia/news/james-w-skillen-is-there-a-place-for-christian-politics-in-america-/ [Accessed 9 February 2015]. See also Skillen, J. 1994. *Recharging the American Experiment: Principled Pluralism for Genuine Civic Community.* Grand Rapids, MI: Baker Books.

school, for example, meeting the formal standards in all the disciplines taught at such a school, should actually receive government funding equivalent to what in normal "state" schools are given for each attending pupil. Just contemplate the absurdity of a state claiming that because it partially funds tertiary institutions of learning (universities, technical universities, and the like) they have to conform to the directional choices of the state. For example, the state can then prescribe that within the discipline of mathematics only intuitionistic and constructive mathematics are allowed (to the exclusion of formalist, axiomatic set theoretical and logicist orientations), that within the discipline of physics only an indeterministic approach is acceptable (ruling out anyone with a deterministic conviction – including Einstein!), that within the discipline of biology only neo-Darwinism is acceptable (excluding Stephen Gould's orientation stating that the "synthetic theory ... is effectively dead, despite its persistence as textbook orthodoxy"[26] and trends such as neo-Vitalism (including "intelligent design" scholars), pan-psychism, organismic biology, holism, emergent evolutionism and idealistic morphology), and so on.

Just as little as the state can infringe upon doctrinal issues within faith communities is it allowed for conviction communities to violate public, private or civil legal interests. Respecting limited spheres of legal competence depends upon acknowledging the unique jural qualification of the state as an organised public legal community on a limited cultural domain (territory) on which it has the monopoly over the power of the sword. It entails that the concern for the public good is guided and limited by the idea of the *res publica*. Integrating a multiplicity of legal interests precludes the excess of also integrating non-jural interests, which will turn the state into a large-scale faith community, family, business enterprise or academic institution. It also follows that the terms "democracy" and "democratic" are overrated, similar to the overextension of the expression "majority rule".

### Democracy and the majority fallacy

The idea of a *just state* has a richer and more encompassing scope than the expression *democratic state*. In modern constitutions the term "democracy" merely captures the way in which a government is put into office. It is to this restricted, subservient, but indeed very important element of constitutional law to which he term "democracy" is referring. However, once a government is put into office, no single issue facing the actual governing task of a government is settled. The legal order of a just state applies those typical jural principles guiding constitutional law, administrative law, criminal law and criminal procedure. No decision within anyone of these legal domains depends on a "democratic" vote. Suppose a person is found guilty of murder beyond any

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26    Gould SJ. 1980. "Is a new general theory of evolution emerging?", *Paleobiology* 6:120 and Gould SJ. 2002. *The Structure of Evolutionary Theory*. Cambridge, MA: The Belknap Press of Harvard University Press, 1002-04.

reasonable doubt (after due process in a criminal court), then it would be absurd to subject the validity of this judicial decision to the majority-vote of all the citizens. The majority fallacy is well articulated in informal logic. The majority is not a criterion of truth nor is it a measure of justice. If applied in this sense, it terminates in a meaningless infinite regression: Does the majority decide what truth or justice is? And does the majority decide that what the majority decide is true or just? And so on *ad infinitum*.

The public legal freedoms of a citizen encompass the right to attend and organise political gatherings, the right to organise freely within the domain of public interaction, to express political opinions in public, the right to establish public media, the right to criticise, and the right to protest. Of course, the capstone of our public freedoms is given in the active right to elect and the passive right to be elected. Clearly, the adjective "democratic" solely refers to this the public-legal competence of co-determining who will occupy the office of government and the co-responsibility of the citizenry for testing the practices of government against the demands of public justice. The legitimate authority of a government is dependent upon the nature of the office of government which brings with it the responsibility to respect the limited legal competence of a state while acknowledging the fact that the internal spheres of law of those societal forms of life distinct from the state.

Unfortunately, the adjective "democratic" acquired a new life in its use as a noun, for in this case, the state itself was identified with the substantive "democracy", and subsequently it was combined with a wide array of adjectives. Just contemplate composite phrases such as direct democracy, representative democracy, social democracy, consociational democracy, liberal democracy, deliberative democracy, and so on. This practice loses sight of the fact that the adjective "democratic" has a very limited scope, for it merely refers to the above-mentioned restricted element of constitutional law. It is therefore preferable rather to use the adjective "just" (derived from the Latin *ius*), which has a much wider scope, as it appears in the phrase: a just state. As noted, this phrase not only captures an acknowledgement of the domain of public legal freedoms, but also those of civil private law (civil freedoms) and non-civil private law (societal freedoms).

The idea of a just state also avoids the problematic idea of popular sovereignty (majority rule). In a work on theories of democracy Cunningham strikingly here speaks of the "tyranny of the majority".[27] This "tyran" confuses the relationship between the government and its subjects because the government is relegated to become the servant of the true sovereign, the "people". Thus the authority structure of the state, and its inherent relation of super- and subordination, is turned upside down. Restoring this relation of "above" and "below" allows for acknowledging that a just state is always guided by a jurally delimited and competent legal power, embedded in the office of

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27 Cunningham F. 2002. *Theories of Democracy*. London: Routledge, 119 ff.

government. On the one hand, it accounts for the formation of positive law through competent state organs, and on the other, it prohibits any interference in the legal spheres of the non-political communities and collectivities within a differentiated society.

We may conclude in this context that the adjective "democratic" has a much more modest domain of application, restricted merely to the election process as stipulated in the constitution of a just state. The constitutionally granted competence of citizens to decide by vote who will occupy the office of government, presupposes this office with its inherent public legal competencies destined to integrate the multiplicity of jural interests within the territory of the state into one public legal order in such a way that, whenever an infringement occurs, the government is entitled to harmonise and balance these legal interests in a truly retributive sense. The real concern of the government in office within a just state is therefore to maintain a public legal order in which political freedoms, civil freedoms and societal freedoms are guaranteed. Only within this context a meaningful account of the relationship between law and religion can be given.

*State-law and ecclesiastical law*

We have noted the universal scope of the jural aspect makes it possible for individuals and different kinds of societal communities to function within it. State-law specifies the meaning of the jural mode as a public legal institution and it imposes the public legal task of harmonizing and balancing the multiplicity of legal interests on its territory on the shoulders of whoever occupies the office of government. Ecclesiastical law – the inner legal sphere of competence of faith communities (church law) – specifies the private legal status of these faith communities and acknowledges at once the external civil legal side of ecclesiastical law. The religious freedom of faith communities embodies the principle of sphere-sovereignty and safe-guards such faith communities from any unlawful encroachments upon their freedom. Correlated with ecclesiastical law as part of non-civil private, law, we find civil private law geared at protecting the personal freedoms of individuals insofar as they are not acting as parts of larger societal wholes. Amongst these personal freedoms, such as personal freedom of thought, of cultural articulation, of lingual expression, of social choices of association, and of economic entrepreneurship, one also finds religious freedom.

The idea of the just state has to account for political freedoms, personal freedoms and societal freedoms. As we have seen, these forms of freedom are correlated with three irreducible jural spheres, namely the sphere of public law, civil private law and non-civil private law. If they are threatened or abolished we meet a totalitarian and absolutistic state (a "power-state" which is the opposite of a "just state") with no guarantees for any form of religious freedom.

A proper idea of the just state also precludes a depreciation of the meaning of law, as if it is something inherently lacking, something "worldly". Such an approach is found within the Lutheran tradition, in the thought of Rudolph Sohm and within the circles of dialectical theology.[28] In Germany and Austria the tradition of *Staatskirchenrecht* transposed elements of ecclesiastical law to public law, explaining the phenomenon of something like *Kirchensteuer* – church taxes – collected by the state.[29] When law is not identified with the state and when state-law operates within its proper orbit, religious freedom can be protected without violating the inner sphere of law of diverse faith communities in South Africa. At the same time the public domain will accommodate diverse directional choices within all walks of life.

The powerful, world-encompassing scope of the Kingdom message of the New Testament, opens up a dynamic cultural-historical process of differentiation and disclosure in which the state emerges as guided by its sphere-sovereign juridical qualification, alongside a multiplicity of non-political societal entities with their own intrinsic competence to form (non-state) law. When Christians assume responsibility for the unfolding of human society in obedience to the sphere-sovereign structural principles norming human societal relationships, the public legal order of the state will not threaten, but *protect* religious freedom in all its forms. This should be done without expecting individuals to compromise their own life-orientation (life and worldview) while participating in the public sphere of society, as long as these life view preferences do not encroach upon the personal freedom of (other) individuals or of other societal spheres of life. Thus a *structural pluralism* is advocated leaving room for *directional pluralism* – each sphere-sovereign domain of society leaves room for different life-orientations.

The underlying basis of our preceding analysis is found in a non-reductionist ontology which accepts the unity and goodness of creation and avoids any *ismic* orientation which elevates something creaturely to be divine. *Isms* such as physicalism, vitalism, psychologism, logicism, historicism and so on, all get entangled in insurmountable *antinomies*. As Al Wolters phrased it:

> In my view, it ought to be a mark of philosophy which seeks to
> be as radical as the Bible that it renounces this whole enterprise,
> and simply accepts, as a point of departure, that every creature of

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28  This dualism is also found in the thought of Emil Brunner. See his works Brunner E. 1932. *Das Gebot und die Ordnungen. Entwurf einer protestantisch-theologischen Ethik.* [The Divine Imperative]. Tübingen: JCB Mohr (Paul Siebeck) and Brunner E. 1943. *Gerechtigkeit: eine Lehre von den Grundgesetzen der Gesellschaftsordnung.* [Justice: a Doctrine regarding the basic laws of societal order.] Zürich: Zwingli Verlag.

29  For the statistic, see: http://wwkn.de/en/about-german-taxes/church-tax-kirchensteuer/. [Accessed 30 March 2015].About 70% of church revenues in Germany come from church taxes – it was more than 9 billion euro in 2010.

God is good, and that sin and salvation are matters of opposing religious direction, not of good and evil sectors of the created order. All aspects of created life and reality are in principle equally good, and all are in principle equally subject to perversion and renewal.[30]

30 Wolters A. 1981. "Facing the Perplexing History of Philosophy." *Journal for Christian Scholarship*, 17 (4):10-11.