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THE DEVELOPMENT OF HERMAN DOOYEWEERD'S CONCEPT OF RIGHTS*

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INTRODUCTION

For all of his renown as a general philosopher and Christian apologist, Herman Dooyeweerd (1894-1977) was first and foremost a jurist.¹ He studied law for five years at the Free University of Amsterdam and in 1917 completed his dissertation on the role of the Cabinet in Dutch public law.² For three years thereafter he worked in the Dutch Department of Labour as a clerk and legislative draftsman. From 1926 until 1965 he served on the Faculty of Law of the Free University of Amsterdam, where he taught legal philosophy, legal history, and legal science. He presided over the distinguished Society of Legal Philosophy and numerous other legal organizations. He engaged in ample and able debate with such leading jurists of his day as Giorgio del Vecchio, Georg Jellinek and Hans Kelsen, and filled his library with a vast array of legal tomes. Well over half of his 200-odd professional publications are on legal subjects.

This article focuses on one small part of Dooyeweerd's jurisprudential legacy, his concept of rights. Dooyeweerd addressed the subject of rights several times in his career, each time seeking to develop a comprehensive Calvinist concept of rights. His initial efforts led him to a rather traditional Calvinist concept of political liberties, rooted in simple theological principles. His later efforts yielded an intricate modal concept of legal competences and subjective rights, rooted in a complex philosophical system. The analysis

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For a brief account of Dooyeweerd's career, see Marcel E Verburg *Herman Dooyeweerd: Grenzen van het theoretisch denken* (Baarn: Ambo 1986); H van Eikema Hommes *Inleiding tot de Wijsbegeerte van Herman Dooyeweerd* (The Hague: 1982) 1-4; and my editor's introduction to *Herman Dooyeweerd A Christian Theory of Social Institutions* Magnus Verbrugge (trans) John Witte (ed) (La Jolla, CA: The Herman Dooyeweerd Foundation 1986) 7-30 and the sources cited in it.

² H Dooyeweerd *De ministerraad in het Nederlandsche staatsrecht* (Amsterdam: Wed. G. van Soest 1917).

that follows will pay particular attention to the analytical stages through which Dooyeweerd passed to develop his concept.³

DOOYEWEERD'S EARLY FORMULATIONS

Already early in his career Dooyeweerd developed a method for the formulation of a distinctively Calvinist concept of rights. 'Every concept of rights', he wrote in 1926, 'must be part of a more general legal philosophy.' 'Every legal philosophy must be built upon' certain cardinal religious beliefs or 'law-ideas' (*wetsideen*).⁴ For a concept of rights depends upon the views of law, authority, and the state that are taught by legal philosophy. A legal philosophy depends upon the views of the person, being, and knowledge that are taught by a religious 'law-idea'. Thus to develop 'a distinctly Calvinist' concept of rights, Dooyeweerd felt obligated (1) to identify the core beliefs that comprise the Calvinist 'law-idea'; (2) to elaborate a philosophy of law, authority, and the state on the basis of these beliefs; and, only then, (3) to analyse the origin, nature, and purpose of rights.⁵

Accordingly, in the later 1920s Dooyeweerd isolated a number of religious beliefs that would become the core of his 'Calvinist law-idea' and the cornerstone of his legal philosophy. Neither his emphasis upon these beliefs nor his formulation of them strayed far from the traditional views of John Calvin, Theodore Beza, Herman Bavinck, or Abraham Kuyper. Unlike his predecessors, however, Dooyeweerd was able to derive direct and dramatic legal implications from these religious views.

Although he vacillated in the formulation of his early religious views, they can be reduced to four propositions.⁶

(1) All human laws, rights, and authorities, whether past or present, are ultimately rooted in the creation of God. In creation, all organic and inorganic things, and all human persons and institutions, were separated after their own kind and given their distinctive form and function.

³ For other treatments of Dooyeweerd's concept of rights, see J D van der Vyver 'The doctrine of private-law rights' in S A Strauss (ed) *Huldigungsbandel vir W A Joubert* (Durban: Butterworths 1988) 201, 208-14, 224-7; Paul Marshall 'Dooyeweerd's Empirical Theory of Rights' in C T McIntyre (ed) *The Legacy of Herman Dooyeweerd* (Lanham, MD: University Press of America 1985) 119-42; H van Eikema Hommes *De samengestelde grondbegrippen der rechtswetenschap* (Zwolle: W.E.J. Tjeenk Willink 1976) 115-276.

⁴ H Dooyeweerd 'Lecture Notes on Law and Politics—December, 1926' (unpublished; in personal library of H Evan Runner, Grand Rapids, Michigan) 17-18.

⁵ *Ibid.* See also Herman Dooyeweerd *De betekenis der wetsidee voor rechtswetenschap en rechtsphilosophie* (Amsterdam: J.H. Kok 1926) 63; Herman Dooyeweerd *De structuur der rechtsbeginselen en de methode der rechtswetenschap in het licht der wetsidee* (Amsterdam: N.V. Dagblad en Drukkerei De Standaard 1930) 223.

⁶ See, generally, Herman Dooyeweerd *Calvinisme en naturrecht* (Amersfoort: Referaat voor de Calvinistische Vereniging 1925) 11-32; Herman Dooyeweerd 'Tweeërlei kritiek om de principele zijde van het vraagstuk der medezeggenschap' (1926) 2 *Anti-Revolutionaire Staatkunde* 1 (hereinafter *ARS*); Herman Dooyeweerd 'Het oude probleem der christelijke staatkunde' (1926) 2 *ARS* 63; Dooyeweerd *De betekenis* op cit note 5 at 60ff; Herman Dooyeweerd 'De oorsprong van de antithese tusschen christelijke en humanistische wetsidee en hare betekenis voor de staatkunde' (1927) 3 *ARS* 73. This summary is adapted from my editor's introduction to Dooyeweerd op cit note 1 at 15-17.

(2) God is the absolute sovereign over all creation—both at its inception and in its unfolding. Through His Word, He called creation into being. Through His providential plan, He guides its becoming. His sovereignty is absolute and constant. No creature and no activity are exempt from His authority.

(3) God exercises this sovereignty through the natural laws of creation. The laws of creation command the constant will of the Creator. They provide order and constancy, not chaos and indeterminacy. Because God's sovereignty is absolute and constant, His law is comprehensive and continually obligates all creatures in all their activities. The laws of creation, therefore, assume a plurality of forms. Some govern the activities of inorganic and organic things. Others govern the multiple activities of persons, such as their language and logic, their social and legal activities, their morality and faith. Still others govern the formation and functioning of human institutions, such as the family, Church, and state. The creation order is a legal order, one bound and determined by law.

(4) Under the laws of creation, each person and each social institution has both a 'legal right' to exist alongside others and a 'legal duty' to discharge the unique calling or responsibility that God has prescribed for it. The laws of creation, therefore, make possible a plurality of persons and social institutions, each with a measure of autonomy or sovereignty vis-à-vis all others. The autonomy or sovereignty of any person or social institution, however, is limited by the sovereignty of coexisting persons and institutions, and to the task or function to which it is called. Moreover, this limited sovereignty of the creature is always subservient to the absolute sovereignty of the Creator.

These four religious beliefs—in the created order, the absolute sovereignty of God, the laws of creation, and the created sovereignty of institutions and individuals—recur as a constant refrain in Dooyeweerd's early writings on law, politics, and society.

On the basis of these religious beliefs, Dooyeweerd, inter alia, developed the rudiments of his legal philosophy. Like his early religious views, his early legal philosophical views drew heavily upon traditional Calvinist learning—particularly as formulated by the late sixteenth-century jurist Johannes Althusius and Dooyeweerd's contemporary Josef Bohatec.⁷ 'A truly Calvinist legal philosophy . . .',

⁷ For the following discussion, see generally Dooyeweerd *Calvinisme en naturrecht* op cit note 6 at 15-32; Dooyeweerd *De betekenis* op cit note 5 at 70-2, 110-11; Herman Dooyeweerd 'Calvinisme contra neo-Kantianisme. Naar aanleiding van de vraag betreffende de kenbaarheid der goddelijke rechtsorde' (1926) 20 *Tijdschrift voor Wijsbegeerte* 29; Herman Dooyeweerd *De universaliteit der rechtsgedachte en de idee van den kultuurstaat* (Amsterdam: Almanak van het Studentencorps aan de Vrije Universiteit 1927); Herman Dooyeweerd 'De bronnen van het stellig recht in het licht der wetsidee. Een bijdrage tot opklaring van het probleem in het inzake de verhouding van rechtsbeginsel en positief recht' (1930) 4 *ARS* 1 at 3-15 and (1934) 8 *ARS* 57-94. Unlike some commentators, I see in Dooyeweerd's early writings more of the residue of a

he argued, 'must naturally be based on a *natural law* foundation. It must seek to base both statutory law and customary law on godly legal ordinances. Without this foundation, the problems of legal authority, responsibility, right, fault, and punishment will remain choked in a net of irresolvable antinomies.'⁸

Dooyeweerd distinguished two types of 'godly natural law' that govern legal and political life: (1) a 'formal' or 'primary' natural law, which delineates the office and authority of the state; and (2) a 'material' or 'political' natural law, which defines and undergirds the positive laws formulated by the state. The formal natural law establishes that the state is a distinctive office created by God, that it represents and reflects God's political authority and sovereignty, and that it is called to appropriate and apply God's law for the governance and the good of the community. The material natural law establishes that the positive law 'is in essence not a human creation, but an ordinance of God' and thus that the state must predicate its laws on 'explicit natural law principles'.⁹ Such principles, Dooyeweerd believed, are both 'absolute' and 'relative' (hypothetisch) in character. On the one hand, it is 'absolutely indispensable' that the state seek to protect the person and property of its citizens, to punish crime and other misconduct, and to protect and respect social institutions like families, churches, unions, and others. On the other hand, the particular application of these absolute principles has to be tailored to the 'individual circumstances' and to the 'level of social differentiation' of the political community being governed.¹⁰

Dooyeweerd's early concept of rights grew out of these basic philosophical and religious views. Rights, for him, were simultaneously *liberties* of political subjects and *limitations* on political authorities.

The liberties of political subjects stem from their created 'sovereignty'. Human persons and social institutions, Dooyeweerd believed, are created by God with unique characters and callings. Each is inherently 'sovereign in its own sphere' and 'competent' to retain its character and pursue its calling. This created 'sovereignty' does not depend upon the state. It does not dissolve when the person or institution becomes subject to the state's authority. All political subjects enjoy 'a fundamental social freedom' (principele maatschappelijke vrijheid), regardless of the form of political authority that governs them.¹¹ On the basis of these assumptions, Dooye-

traditional Calvinist natural-law theory than the rudiments of his later, philosophically sophisticated view. For contrary interpretations see, for example, O Albers, *Het natuurrecht volgens de Wijsbegeerte der Wetsidee: een kritische beschouwing* (Nijmegen: Janssen 1955) 3ff; H van Eikema Hommes *Een nieuwe herleving van het natuurrecht* (Zwolle: W.E.J. Tjeenk Willink 1961) 238ff.

⁸ Dooyeweerd *De betekenis* op cit note 5 at 70 (emphasis added).

⁹ Dooyeweerd *Calvinisme en natuurrecht* op cit note 6 at 16, 29.

¹¹ --man Dooyeweerd *De crisis der humanistische staatsleer in het licht eener calvinistische kos en kennisleer* (Amsterdam: Ten Have 1931) 182.

weerd condemned vehemently undue state intrusions on the person or property of citizens or on the formation and functioning of families, churches, universities, labour unions, and other social institutions. He likewise endorsed enthusiastically traditional freedoms of contract, property, and association, and traditional liberties of conscience, speech, and assembly.¹² Such rights, Dooyeweerd believed, were not only consistent with Calvinist beliefs, but in fact had been catalysed by them. 'Calvinism has, in its historical development, stood in the breach for human freedom', he wrote. 'The declaration of human and civil rights in the American constitutions, though influenced in part by the ideas of the French Revolution, were grounded primarily in Puritan Calvinism.'¹³

The liberties of political subjects were also rooted in the limitations on political authorities. The doctrine of political liberty, Dooyeweerd insisted, cannot be viewed simply as 'a doctrine of the freedom of personal arbitrariness' (willekeur).¹⁴ The doctrine of 'sphere sovereignty cannot be seen as [a doctrine of] *personal* sovereignty of the individual or institution against the state'.¹⁵ These doctrines speak, instead, to 'the inherent limitation on the competence of the state . . . prescribed by God in his natural law'.¹⁶ Persons and individuals enjoy liberties from the state because God has limited the sphere, the authority, the jurisdiction of the state. 'The state can thus . . . never possess the competence to intervene in the internal structure [and government] . . . of non-state associations [or to dictate] the legal substance of private contracts, . . . trusts, or testaments.'¹⁷ Such matters lay outside the province of the state.

The limitations of Dooyeweerd's early concept of rights soon became readily apparent. His early formulation provided no criteria to define concretely the class of subjects which could lay claim to liberties. It offered no clear delineation of the boundaries between and among the spheres of states, social institutions, and individuals. It offered only vague principles to govern the promulgation and enforcement of positive law.¹⁸ It offered no account at all of a subject's positive rights or entitlements to things, services, or other goods. Without a greater degree of specificity and elaboration, Dooyeweerd's natural-law concepts could easily be adduced to

¹² See Herman Dooyeweerd 'Het vraagstuk der gemeentemonopolies in het belang der volksgezondheid, beschouwd in het licht van de nieuwe opvattingen inzake de bedrijfsvrijheid' (1920) *Rechtsgelcerd Magazijn Themis* 126; Herman Dooyeweerd 'De band met het beginsel. Inzake het vraagstuk der medezeggenschap' (1926) 7 *Nederland en Oranje VIII* 2, 33; Dooyeweerd 'Tweeërlei kritiek' op cit note 6 at 15-17; Dooyeweerd op cit note 11 at 136ff, 170ff, 181ff; Herman Dooyeweerd 'Het Amsterdamsche rapport inzake de medezeggenschap van het personeel in de gemeentebedrijven en diensten' (1932) 8 *ARS* 71, 121, 157.

¹³ Dooyeweerd *Calvinisme en natuurrecht* op cit note 6 at 31.

¹⁴ Op cit 29.

¹⁵ *Ibid* (emphasis added).

¹⁶ *Ibid*.

¹⁷ Dooyeweerd op cit note 11 at 181.

¹⁸ Dooyeweerd was painfully aware of this defect. Already in 1925, he wrote: 'The burning question is now, where does the state find God's normative principles, which form the political natural law?' Dooyeweerd *De betekenis* op cit note 5 at 27-8. His answer—they must be found in Scripture, conscience, and history—was not too satisfying.

rationalize any number of legal and political forms. They could easily be reduced, as he once put it, to 'the vague political slogans of a . . . Christian political party'.¹⁹

In the mid-1930s, therefore, Dooyeweerd abandoned many of his early formulations. He maintained his basic religious views of the sovereignty of the Creator and the sphere sovereignty of creatures. He also insisted that God ruled His creation by law and that such a law assumed a variety of forms to govern the multiple functions of creatures. Dooyeweerd disavowed, however, his earlier views of a formal and material natural law and criticized sharply both Christian and secular theories of natural law and natural rights.²⁰ He dropped his earlier references to 'fundamental social freedoms' and grew increasingly sceptical of the historical connections between Calvinism and constitutional rights and liberties.²¹ He dissociated his views sharply from the many Rechtsstaat and Machtstaat political theories that had gained prominence on the Continent.²²

Vestiges of his earlier concept of rights occasionally appeared in his writings thereafter—particularly in his passionate popular articles written in the throes of World War II. Appalled by Nazi and fascist travesties against human rights, for example, he offered an unusually benign assessment of liberal theories of rights. 'The eighteenth-century Enlightenment and the French Revolution were indeed renewing and progressive forces in historical development', he wrote. For they gave rise to 'the idea of human rights and the idea that the state is a republican institution serving the common good. . . . Freedom and equality in a civil-legal sense were clearly not just hollow slogans of the French Revolution. . . . Under nazism we have experienced what it means when civil-legal freedom and equality are abolished and man's legal status depends upon the community of "blood and soil"'.²³ Appalled by the rapid rise of state absolutism

¹⁹ The phrase is from Herman Dooyeweerd *In de strijd om het soevereiniteitsbegrip in de moderne rechts- en staatsleer* (Amsterdam: H.J. Paris 1950) 51, where Dooyeweerd comments on such use of his early teachings.

²⁰ See Dooyeweerd 'De bronnen' op cit note 7 at 57; Herman Dooyeweerd 'De wetsbeschouwing in Brunner's boek "Das Gebot und die Ordnungen"' (1935) 9 *ARS* 334; Herman Dooyeweerd 'Das natürlichen Rechtsbewusstsein und die Erkenntnis des geoffenbarten göttlichen Gesetzes' (1939) 13 *ARS* 157. See also his later sentiments in Herman Dooyeweerd 'Een nieuwe studie over het Aristotelisch begrip der gerechtigheid' (1958) *Rechtsgeleerd Magazijn Themis* 3 at 60ff.

²¹ See Herman Dooyeweerd *De christelijke staatsidee* (Rotterdam: Libertas 1936), translated as *The Christian Idea of the State* J. Kraay (trans) (Nutley, NJ: Craig Press 1978) 26-7.

²² See, for example, op cit at 44ff and Herman Dooyeweerd *De wijsbegeerte der wetsidee* (Amsterdam: H.J. Paris 1935-6), 3 volumes translated as *A New Critique of Theoretical Thought* D Freeman and W Young (trans) (Philadelphia, PA: The Presbyterian and Reformed Publishing Company 1953; reprint ed 1969) vol 3 at 425ff (hereinafter referred to as Dooyeweerd NC). Dooyeweerd's criticisms are elaborated in the work of his student J P A Mekkes *Proeve eener kritische beschouwing van de ontwikkeling der humanistische Rechtsstaattheorieën* (Utrecht-Rotterdam: Libertas Drukkerijen 1940).

²³ Herman Dooyeweerd *Roots of Western Culture: Pagan, Secular, and Christian Options* John Kraay (trans) M van der Vennen and Bernard J Zylstra (eds) (Toronto: Wedge Publishing Foundaⁿ 1979) 185-6. See also op cit 156-70. This volume contains a translation of a series of

and the levelling of social structures during the war, he argued that 'the differentiated life spheres of disclosed culture possess an *original right* [to function on] their own', free from state intrusion or interference.²⁴

These sentiments, however, were more aberrational than exemplary. In much of his other writing—both before and after World War II—Dooyeweerd strove to develop a more philosophically sophisticated and politically viable concept of rights.

PHILOSOPHICAL REFINEMENTS

Dooyeweerd's mature concept of rights emerged out of a more refined method of 'legal-concept formation' (*rechtsbegripsvorming*).²⁵ As before, Dooyeweerd insisted that any legal concept, including a concept of rights, must proceed out of a broader legal philosophy. But such a legal philosophy, he now argued, must be drawn not out of simple religious beliefs, but out of systematic philosophy of the created order. 'Fundamental legal concepts can be fruitfully formed only if they are understood in their proper relationship to . . . the fundamental concepts of other aspects of reality.'²⁶

Accordingly, Dooyeweerd embarked on a lengthy effort to develop a systematic philosophical account of the created order. In his seminal three-volume work *The Philosophy of the Law-Idea* (1935-6), and a variety of shorter works published thereafter, Dooyeweerd explored at great length the various aspects and laws of the created order and the unique nature and function of persons and institutions. Much of this general philosophy must remain beyond our purview, save those doctrines and terms that shaped his general philosophy of law and specific concept of rights.²⁷

articles that first appeared in the weekly *Nieuw Nederland* in 1945-8 and that were published in edited form as Herman Dooyeweerd *Vernieuwing en bezinning om het reformatorsich grondmotief* (Zutphen: J.B. van den Brink 1959).

²⁴ Dooyeweerd *Roots* op cit note 23 at 89 (emphasis in original). See further discussion in Marshall op cit note 3 at 125ff. Unlike Marshall, however, I see Dooyeweerd's statements in *Roots* and other popular writings as vestiges of an earlier concept of rights that he had largely abandoned, not as indicia of a second concept of rights separate from his mature modal theory discussed below.

²⁵ Dooyeweerd addressed these methodological concerns throughout the 1930s and 1940s. See, for example, Dooyeweerd *De structuur* op cit note 5 at 223-66 and his introduction to the various editions of the *Encyclopaedie der Rechtswetenschap* (hereinafter Dooyeweerd *Encyclopaedie*). (The *Encyclopaedie* was first drafted in the mid-1930s, first published in Amsterdam by Drukkerei D.A.V.I.D. in 1946, and subject to numerous revisions thereafter. I have used the 1946, 1958, and 1967 editions; all references hereafter are to the 1967 edition, unless otherwise indicated.) Among later writings, see particularly Herman Dooyeweerd *Wat is rechtswetenschap?* (Amsterdam: Vrije Universiteit 1950) 33-53; Herman Dooyeweerd 'Over de methode van begripsvorming in de rechtswetenschap' (1953) *Rechtsgeleerd Magazijn Themis* 298.

²⁶ Dooyeweerd *Encyclopaedie* op cit note 25 vol 1 at 6.

²⁷ The cryptic discussion of Dooyeweerd's ontology that follows is a distillation of the rich discussion in Dooyeweerd NC op cit note 22 vol 2 at 1-413. To do justice even to the highlights of that discussion requires more space than is available here. For a more comprehensive introduction to his ontology, see Herman Dooyeweerd *In the Twilight of Western Thought: Studies in the Pretended Autonomy of Theoretical Thought* (Nutley, NJ: Craig Press 1980) 1-26. See also L Kalsbeek *Contours of a Christian Philosophy: An Introduction to Herman Dooyeweerd's Thought*

The created order, Dooyeweerd believed, reveals a number of distinct aspects or modes of being. He distinguished fifteen such aspects, each with a core meaning, which he arranged hierarchically—the numerical (discrete quantity), spatial (extension), kinematic (motion), physical (energy),²⁸ biotic (organic life), psychic (sensitive or feeling), logical (analytical distinction), historical (cultural formation), lingual (symbolic meaning), social (associational), economic (frugality), aesthetic (harmony or balance), juridical (just recompensing or retribution), moral (love), and pistical (faith) aspects respectively.

Each modal aspect is distinct and irreducible. Dooyeweerd now called this the sphere sovereignty of the modality—a phrase which he had earlier used to describe the independence of creatures per se. With this phrase, he expressed the inviolable and irreducible status of these various modes of being which creatures display. A living thing, for example, cannot be understood simply as matter in motion—that is, the biotic aspect cannot be reduced to the physical or spatial aspects. The justice of a person's act cannot be understood simply as a product of economic, logical, or mathematical calculus—that is, the juridical aspect cannot be reduced to the economic, logical, or numerical aspects.

Each modal aspect, though distinct, builds on those below it. Spatial extension, for example, cannot be understood without an underlying concept of numerical multiplicity. Beings that are alive do move in space and can be counted—that is, they have physical, spatial, and numerical functions. For a thing to be symbolic presupposes that its symbolic character has previously been formed in an analytically discernible manner which can be perceived by living beings—that is, it has underlying historical, analytical, psychic, and biotic aspects, which, in turn, presuppose the lower aspects. This relationship Dooyeweerd called the necessary 'analogical relationship' among the modalities.

Each modal aspect, Dooyeweerd argued, has both a normative dimension (a 'law side') and a functional dimension (a 'subject side'). The modes of being remain distinctive and ordered because they are governed by a group of specific laws that God has created and commanded for that mode of being. Thus there is a hierarchy of modal laws that are part of, and help to define, each of these modes of being—laws of counting and arithmetic, geometry, dynamics, energy, life, feeling, logic, history, language, society, economics, aesthetics, juridical matters, ethics, and theology. These laws are not

(Toronto: Wedge Publishing Foundation 1975) 76–159; C Seerveld 'Dooyeweerd's Legacy for Aesthetics: Modal Law Theory' in C T McIntire (ed) *The Legacy of Herman Dooyeweerd* (Lanham, MD: University Press of America Inc 1985) 41.

²⁸ In his 1935–6 *Philosophy of the Law-Idea*, Dooyeweerd recognized only fourteen modalities. In the 1953 edition and English translation, Dooyeweerd distinguished the physical modality from the kinematic modality, and assigned each an irreducible meaning. See Dooyeweerd NC op cit note 27 vol 2 at 98ff.

derived from special scientific inquiry. They are discovered by special scientists in each of these fields and given positive form. They are 'ontic a priors' which provide order and constancy in the creation and make possible these distinctive modes of being and disciplines of study.

These modal laws, Dooyeweerd believed, govern the function of all creatures. All inanimate things, living beings, cultural things and associations are subject to at least some of these modal laws. The laws govern the functions of each of these creatures in each aspect. Creatures can thus be classified, in part, by the laws to which their functioning is subject. Inorganic things are subject to the first four modal laws of number, space, motion, and energy; plants, to the first five laws through the biotic modality; animals, to the first six laws through the psychic modality. Human beings themselves are subject to all fifteen modal laws, but human activities or social institutions are subject only to a select number of higher modal laws.

The highest modal laws to which each creature is subject renders it distinctive. It gives each creature its distinguishing character or purpose. Dooyeweerd frequently described this highest modal law as the qualifying modality, the structural principle, or the internal laws of the creature. Thus physical laws, for example, dictate that physical things move in space. Biotic laws mandate that the constituent parts of a plant not only move in space but that this motion be in service of and directed by a living process. Psychic laws prescribe that the animal feel or sense things or events around it and react in a way that preserves life. Juridical laws, which qualify the state, command that the institutions of government implement laws and policies of justice, peace, and harmonious balance. The moral laws obligate the family and marriage communities to serve the ends not only of justice but also of love, service, and co-operation.

Though inorganic things, plants, and animals function as subjects only in certain lower spheres, they function as objects in all modal spheres. Thus a piece of marble can be carved into a handsome statue and sold on the market—that is, it can become the object of historical, economic, and aesthetic subjective functioning. Or the same piece of marble inscribed with the words of the Decalogue can be placed in a courtroom or a church as a binding norm—that is, it can become the object of symbolic, juridical, and pistical functioning.

In his provocative multi-volume *Encyclopedia of Legal Science* (1946) and several other books and articles Dooyeweerd tailored these basic doctrines of general philosophy into specific concepts of legal philosophy and legal science. Legal philosophy and legal science, Dooyeweerd argued, are focused primarily on the juridical modality. Legal philosophy (*rechtsphilosophie*) treats the relationship between the juridical modality and all other modalities and the typical modal features of the juridical modality. Legal science (*rechtswetenschap*)

treats the specific doctrines and concepts that are endemic to law, including the concept of rights.

Dooyeweerd's legal philosophical writings offer a profound analysis of the nature of positive law and its relationships with other modal aspects and disciplines. He described at length the distinctive norms of justice, retribution, and equity that comprise the juridical modality. He defined in detail the nature of juridical functionality. He also used the analogical relationship between the juridical modality and other modalities to delineate and describe an array of interlocking legal concepts and subjects—the multiplicity and conflicts of laws (based on the numerical analogy); the jurisdiction or sphere of competence of the state (based on the spatial analogy); obligation and causation (based on the kinematic analogy); life or legal organs (based on the biotic analogy); legal will and legislative intent (based on the psychic analogy); legal analysis (based on the logical analogy); legal power (based on the historical analogy); legal meaning and interpretation (based on the lingual analogy); legal intercourse or association (based on the social analogy); legal economy or preservation (based on the economic analogy); and legal harmony or equity (based on the aesthetic analogy). What emerges is a jurisprudential apparatus exponentially more refined and far-reaching than Dooyeweerd's earlier rudimentary views on law and politics.

DOOYEWEERD'S MATURE FORMULATIONS

It was in this broader philosophical context that Dooyeweerd elaborated his mature concept of rights. His concept drew more upon his now further refined definitions of (1) legal subjects; (2) legal competences; and (3) subjective rights.

Legal subjects

Dooyeweerd first refined his definition of 'legal subjects' (*rechts-subjecten*) or 'legal persons' (*rechtspersonen*). Consistent with his earlier views, he insisted that legal subjects be viewed as 'creatures of God, . . . not creations of the state' and that they include both human persons and social institutions.²⁹ But he now limited the class of legal subjects to those creatures that 'are competent [hoedanig, bekwaam] to operate on the subject side of the juridical sphere' in accordance with the norms that govern juridical functionality.³⁰ Dooyeweerd included in this class 'legal individuals' (*rechtsindividuen*) who have reached the age of majority, are lucid, able, and unencumbered by

²⁹ Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 116.

³⁰ Op cit vol 3 at 103-4, 112-13.

criminal or civil sanctions or restrictions.³¹ He also included 'well-organized social institutions' (*rechtsverbanden*) 'that both function as subjective juridical unities in their internal legal spheres and . . . are recognized as organized legal subjects in their external commercial and social interactions'.³² Such institutions can be qualified by the juridical modality itself (like municipalities, Cabinets, or agencies) or by other modalities (like corporations, clubs, or churches). What is critical is that they are recognized as sufficiently well organized and independent entities.³³

Such legal subjects, Dooyeweerd argued, are vested with both legal competences or capacities (*rechtsbevoegdheden*) and legal rights or subjective rights (*subjectieve rechten*). These two categories originate respectively in the law side and the subject side of the juridical modality. They are thus ontically distinct and cannot be conflated in practice.³⁴

Legal competence

A legal competence is the capacity of a legal subject to assume a legal status and to perform the appropriate legal actions that accompany that status.³⁵ Individual legal subjects, he argued, have the capacity to assume the legal status of a parent, priest, trustee, testator, plaintiff, property owner, and so forth and to perform a variety of acts in compliance with the rules that govern that status. Groups of legal subjects have the capacity to organize themselves into churches, corporations, clubs, families, labor unions, or universities, and to perform a series of acts in compliance with the rules that govern the particular institution.³⁶

The rules that govern legal subjects in each legal status Dooyeweerd called 'private laws' or occasionally 'non-state civil laws' (though

³¹ Herman Dooyeweerd 'Perikelen van een historische rechtstheorie. Een kritische beschouwing van de Inleiding tot de studie van het Nederlandse Recht door Prof. Mr. L. J. van Apeldoorn' (1954) *Rechtsgeleerd Magazijn Themis* 25, 44; Dooyeweerd *Encyclopaedie* (1958 ed) op cit note 25 vol 2 at 59-60.

³² Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 155. See also op cit 155-6 ('The juridical unity of the legal person lies in the actual juridical organization of the legal associations, which is regulated by statutes and rules.')

³³ Op cit vol 3 at 113-14. See also Dooyeweerd 'Perikelen' op cit note 31 at 44.

³⁴ Dooyeweerd *NC* op cit note 22 vol 2 at 402-3.

³⁵ On the concept of 'legal competence', see Herman Dooyeweerd 'Grondproblemen in de leer der rechtspersoonlijkheid: een kritische beschouwing naar aanleiding van H.J. Wolf's standaardwerk "Organschaft und juristische Person"' (1937) *Rechtsgeleerd Magazijn Themis* 199, 367, 401, 409 (hereafter Dooyeweerd 'Rechtspersoonlijkheid'); Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 170ff, 220ff; Dooyeweerd *NC* op cit note 22 vol 2 at 402ff. Those legal subjects that devise their own rules and government exercise 'active' subjective competence. Those that adopt or submit to existing rules exercise 'passive' subjective competence. Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 103-4.

³⁶ See Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 104, where Dooyeweerd describes this competence as 'the legal power to perform valuable legal transactions, . . . a competence to promulgate (or participate in the promulgation of) just statements of will which have juridical existence as actual legal relationships, and eventually from this position function as positive legal norms'.

he does not always use these terms consistently). Private laws are produced both by the state and by the legal subjects that are bound by them. On the one hand, Dooyeweerd insisted that 'the *original* competence' to determine the *form* of private law 'cannot belong to any other organized community but the state', which assures that such private laws respect the 'juridical norms' of 'inter-individual justice, legal security, and equity'.³⁷ The state thus defines basic rules for the formation of contracts, the disposition of property, the litigation of a tort, or the formation of a corporation, club, or church. On the other hand, Dooyeweerd insisted that the competence to determine the *content* of these private laws lies not with the state but with the legal subjects that will be bound by them. '[T]he internal spheres of these kinds of private law, qualified by the non-juridical leading function of the societal relationships to which they belong, remain exempt from the competence of the State.'³⁸ Thus the individual legal subject determines for himself the content of his contract, the character of his property, or the gravamen of his tort suit. The corporation, club, or church determines for itself the internal rules for selecting members, electing officials, or disciplining its wayward. So long as legal subjects abide by the basic norms of the judicial modality which are positivized by the state, they 'have power to form their own private law . . . and have it obeyed'.³⁹

The state must respect and protect the legal competence of legal subjects. It cannot generally obstruct the individual legal subject from entering into a valid contract, litigating a valid claim, or devising legally held property. It cannot prevent the church from holding unobtrusive religious assemblies, the family from adopting rules of discipline, or the business from specializing in certain types of legal commodities. Such interference in the internal competence of legal subjects generally lies beyond the state's competence (except, perhaps, in times of war or emergency). The state must also protect legal subjects against similar interference with the exercise of their competence by third parties and provide appropriate legal or equitable remedies in the event of such interference.⁴⁰

The state can intervene, however, when a legal subject exceeds its sphere of competence or obstructs the competence of another legal subject. Thus the state can invalidate a contract induced by fraud or duress, forestall a law suit designed only to harass or bankrupt a defendant, or invalidate a testament designed to disinherit illegally a family member. The state can prevent the church from performing obtrusive or dangerous ceremonies, the father from abusing or

³⁷ Dooyeweerd *NC* op cit note 22 vol 3 at 451.

³⁸ See Dooyeweerd 'Rechtspersoonlijkheid' op cit note 35 at 401, 409. See similar discussions in Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 170-1, 220-1; Dooyeweerd *NC* op cit note 25 vol 2 at 402-3; Dooyeweerd *The Christian Idea of the State* op cit note 21 at 28-9.

³⁹ Dooyeweerd 'Rechtspersoonlijkheid' op cit note 35 at 409. See also Dooyeweerd *NC* op cit note 27 vol 2 at 402.

⁴⁰ See also Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 170-1.

neglecting his child, or the corporation from trading in illegal or top-secret commodities. For, in each case, the legal subject is operating in *excess of its own* competence, in derogation of another's competence, and in violation of basic social norms.⁴¹

Dooyeweerd's concept of legal competences thus encapsulated and elaborated his earlier concept of political liberties and limitations. As before, he coupled the liberties of political subjects with the limitations on political officials. Now, however, he offered a more refined principle for determining which individual and institutional subjects could claim such liberty. He also tied their claims to political liberties to their created callings and responsibilities. Simultaneously, he offered a more refined principle for determining the boundaries of state responsibility and for differentiating public law and private law.

Subjective rights

While legal competences involve the capacity of the subject to engage in certain actions, legal rights involve the claim of the subject to certain objects.⁴² Legal rights, Dooyeweerd argued, are comprised of both legal entitlements and legal interests. On the one hand, the right vests in the legal subject (1) an entitlement to have the object of its right in hand or at his disposal (*beschikkingsbevoegdheid*); and (2) an entitlement to enjoy and benefit from the use or control of this object (*genotsbevoegdheid*).⁴³ Legal entitlements thus define the relation between the legal subject and the legal object.⁴⁴ On the other hand, the right vests in the legal subject 'a retributive interest' to prevent third parties from interfering in the use and enjoyment of the object of its right.⁴⁵ Legal interests thus define the relationship between the legal subject and third parties.

The exercise of a legal right is neither automatic nor autonomous. First, the legal subject can exercise its rights only if it is legally competent to do so.⁴⁶ Second, even if competent, the legal subject can

⁴¹ *Ibid.* See also Dooyeweerd op cit note 19 at 50-61.

⁴² Dooyeweerd 'Rechtspersoonlijkheid' op cit note 35; Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 168-9, 188.

⁴³ *Ibid.* The terms '*beschikkingsbevoegdheid*' and '*genotsbevoegdheid*' are translated in *A New Critique* as 'the power of use and enjoyment', but this translation is, to my mind, neither nuanced nor broad enough. Dooyeweerd *NC* op cit note 22 vol 2 at 402. These terms do not, however, speak to the entitlement to acquire or alienate a legal object. Acquisition and alienation, Dooyeweerd believed, were matters of competence, not right. See *ibid.*, where he speaks of the 'competence to transfer subjective rights', a maxim which I assume applies to transfers both to and from the legal subject. See also the penetrating discussion in Van der Vyver op cit note 3 at 212ff.

⁴⁴ For the sources of this view in Dooyeweerd's theory of the 'Gegenstand' relation between subject and object, see Dooyeweerd *NC* op cit note 22 vol 2 at 391, 398. See also Marshall op cit note 3 at 131-5.

⁴⁵ See Dooyeweerd *NC* op cit note 22 vol 2 at 130-40, 407.

⁴⁶ See Dooyeweerd 'Rechtspersoonlijkheid' op cit note 35 at 401-2; Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 175-6; Dooyeweerd *NC* op cit note 22 vol 2 at 402-3. See also the excellent discussion in Van der Vyver op cit note 3 at 212-13 on the distinction between competence and right.

exercise its rights only if the legal object is at its disposal. Third, the legal subject must always exercise that right 'within the context of both a legal community and inter-individual relations'.⁴⁷ The legal subject can thus, in the exercise of its right, neither violate the general norms of 'inter-individual justice, legal security, and equity' by which the state governs the legal community, nor interfere in the competences or rights of other legal subjects.⁴⁸

The content of a legal right, Dooyeweerd insisted, must be determined by the nature of the legal object. Dooyeweerd was not content with the traditional distillation of rights into 'life, liberty, and property' or the traditional divisions of rights into 'natural and civil' or 'real and personal'. Such formulations, he believed, were inherently focused on the nature of the legal subject and provided no 'strict scientific boundary on the [subject's] right'.⁴⁹ By shifting the focus from the nature of the legal subject to the nature of the legal object, he was able to find such a 'scientific boundary'.

To define the nature of the legal object, Dooyeweerd embarked on a rather intricate and involved modal analysis. For all of his discussion, two modal criteria appear to be most critical to his definition and delimitation of the objects of legal rights.⁵⁰

First, an object of rights must be qualified by the juridical modality or one below it. Numerous objects meet this criterion and can (if they also satisfy the second modal criterion) be included in the class of legal objects. The class of legal objects can include animals, plants, and concrete physical things, for they are qualified by the psychic, biotic, and physical modalities respectively.⁵¹ It can include many forms of 'performance owed by other persons' (dienstverrichting), based on debt, custom, or contract, for these obligations are qualified by the juridical, social, and economic modalities respectively.⁵² It can also include rights themselves, as in the case of a mortgage, secured

While legal rights depend upon legal competences, legal competences do not depend upon, nor can they be conflated with, legal rights. The parent may be competent to raise and discipline a child, but has no right to the child's obedience. Likewise a state may be competent to govern, but it has no right to the conformity of its citizens. That conflation, Dooyeweerd argues, 'promotes a legal duty to the rank of a legal object' and 'paradoxically renders the doctrine of rights a pillar of power-state [*Machtstaat*] theories'. Dooyeweerd *NC* op cit note 22 vol 2 at 402; Dooyeweerd *Encyclopaedie* (1958 ed) op cit note 25 vol 2 at 98-101; Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 221-8.

⁴⁷ Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 188. See also op cit vol 3 at 169-71, where Dooyeweerd argues: 'There is no subjective right that is not regulated by legal norms. . . . Every subjective right has its juridical form of existence inside the juridical order of time. . . . Subjective rights receive a positive form through regulative legal norms.'

⁴⁸ Dooyeweerd *NC* op cit note 22 vol 3 at 451.

⁴⁹ Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 172-3 at 217-20.

⁵⁰ Op cit vol 3 at 169-235 and the summary in Dooyeweerd *NC* op cit note 22 vol 2 at 406-8, 411-13. See also Marshall op cit note 3 at 135-6.

⁵¹ Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 173-4.

⁵² Op cit vol 3 at 174. In the same passage, Dooyeweerd also included among such objects a catch-all category of 'generally, any social goods . . . [that are] amenable to subjective legal power' but offered no further elaboration of this point. For a possible inference, see below note 66 and accompanying text.

transaction, or claim to subrogation, for they are qualified by the juridical modality.⁵³ These classes of legal objects correspond rather closely to the classes of real rights, personal rights, and incorporeal rights that are adopted by many rights theorists still today.

Dooyeweerd's first modal criterion, however, excludes other objects in which many contemporary theorists would readily vest a right. It excludes a right to performance of moral and religious obligations, for these objects are qualified by the moral and pistical modalities, which stand above the juridical sphere. Thus a legal subject cannot insist on performance of another's promise made only in good faith or without the usual formalities of contract formation. A spouse has no right to the other spouse's performance of connubial duties. A parent has no right to a child's obedience, nor the child to a parent's care. A parishioner cannot insist on receiving from the church the administration of a sacrament, the consecration of a wedding, or the rite of ordination to the clergy.⁵⁴ A cleric has no right to the parishioner's faithful payment of tithes or attendance at services. Such morally- and pistically-qualified claims cannot be the objects of subjective rights.

Dooyeweerd's first modal criterion also excludes a variety of personality and civil rights. For every person performs functions as a subject in all modal spheres and thus cannot serve as the legal object of a subjective right. The parent has no right to her child. One spouse has no right to the other. The master has no right to his servant. The creditor has no right to the debtor. In each case, the claimant may have competence to perform legal actions with respect to the other person and may also demand that he perform certain obligations (so long as he is not qualified by the moral or pistical spheres). But the claimant has no right to the other person per se. Likewise, the individual has no rights to her own life, limb, or liberty, or her own reputation, dignity, or honour. All these are qualities inherent in the person, not objects to which rights can be attached.⁵⁵ They, too, are matters of competence, not of right.

Earlier in his career, Dooyeweerd also used this first criterion to exclude so-called immaterial property rights, such as copyright, patent, and trade mark. Each of these objects, he argued, is neither a material thing nor a legal duty owed by a third party. It is, in effect, the 'brain child' (geestesprodukt) of the person, an extension or manifestation of an individual's personality. It cannot, therefore, become the object of a right.⁵⁶ Near the end of his career, Dooyeweerd

⁵³ *Ibid.* See also op cit vol 3 at 170-1, 182-8; Dooyeweerd *NC* op cit note 22 vol 2 at 408-11.

⁵⁴ Op cit vol 2 at 407-8.

⁵⁵ See Dooyeweerd 'Rechtspersoonlijkheid' op cit note 35 at 406-7; Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 172-3 at 197-8, 208-9, 217-20; Dooyeweerd *NC* op cit note 22 vol 2 at 412-13.

⁵⁶ Dooyeweerd *Encyclopaedie* (1946 ed) op cit note 25 vol 2 at 87; Dooyeweerd *NC* op cit note 22 vol 2 at 412-13.

disavowed this position and argued that copyrights, patents, and trade marks be considered a special class of things to which real rights can attach.⁵⁷

Second, the objects of legal rights must not only be qualified by the juridical modality or one below it. They must also function as an object of the modalities below the juridical. Some of these analogical relationships, such as those with the logical, psychic, and aesthetic modalities, are innocuous enough. That an object has been subject to psychic feeling, logical analysis, or aesthetic harmonization does little to delimit the class of legal objects. The analogies with the cultural, economic, and lingual modalities, however, have more impact.

Based on the cultural analogy, Dooyeweerd restricted the class of legal objects to those things that have been 'the object of legal formative power [juridische beschikkingsmacht], exercised either by the legal subject itself or by some other legal subject'.⁵⁸ 'Things which in the present state of human culture are not controllable by cultural activity cannot function as legal objects of human rights'.⁵⁹ Thus there can be no right to natural things like wild animals, open seas, undiscovered lands, or hidden minerals (though there may be a right to an exclusive licence to locate or pursue them). There can be no right to natural conditions like rain, sunshine, clean air, or open views (though, perhaps, one can have an easement or prescriptive interest in them enforceable against third parties).⁶⁰ There can be no right to natural processes like 'breathing or sleeping, which are altogether beyond human cultural formation'.⁶¹ Legal objectification of a thing requires prior cultural formation.

Legal objectification, Dooyeweerd believed, also requires prior economic valuation. Based on the economic analogy, he further restricted the class of legal objects to 'relatively scarce goods, serviceable to human needs, whose value can be objectified by law'. 'Nothing can be the object of a subjective right', he wrote, 'that is not now, no longer, or not yet subject to economic valuation'.⁶² In later years, Dooyeweerd softened this requirement somewhat. The value of the thing, he argued, need not necessarily be financial, so long as it is capable of 'legal objectification'.⁶³ Yet Dooyeweerd offered no method by which such 'objectification' should proceed. He did not appreciate sufficiently that any legal enforcement of a right to such an

⁵⁷ See Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 178-9, 208-9. See also the discussion in Van der Vyver op cit note 3 at 226; Hommes op cit note 3 at 219ff.

⁵⁸ Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 174.

⁵⁹ Dooyeweerd *NC* op cit note 22 vol 2 at 407.

⁶⁰ Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 176-7; Dooyeweerd *NC* op cit note 22 vol 2 at 407, 412-13.

⁶¹ Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 176. But cf Dooyeweerd *NC* op cit note 22 vol 2 at 407, where Dooyeweerd argues that such natural organic functions cannot be objects of rights, because they lack an 'economic' (rather than a 'cultural') analogy.

⁶² Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 177-80. See also Dooyeweerd 'Rechtspersoonlijkheid' op cit note 35 at 405-6; Dooyeweerd *NC* op cit note 22 vol 2 at 406-7.

⁶³ Dooyeweerd *Encyclopaedie* op cit note 25 vol 3 at 180-1.

object would invariably require some form of financial calculation by a court. He also did not relax his requirements that legal objects be 'relatively scarce' or 'serviceable to human needs'.

Finally, based on the symbolic analogy, Dooyeweerd restricted the class of legal objects further to those that 'have a legal significance that can be defined through juridical interpretation'.⁶⁴ This restriction effectively eliminated all claims to 'inherent' or 'natural' rights that have not yet been positivized by state law. 'There is no subjective right that is not regulated by legal norms', Dooyeweerd wrote. 'The imperative [gebiedende] and prohibitive [verbiedende] norms' promulgated by the state 'define the . . . positive forms [and] boundaries of rights. . . . Natural subjective rights that fall outside the positive legal order have no actual *juridical* content'.⁶⁵

CRITICAL REFLECTIONS

Although forged in the context of his polemics with Continental jurists and in the contours of a civil-law system, Dooyeweerd's concept of rights offers many valuable insights even for a contemporary common lawyer like myself.

Dooyeweerd's concept of legal competences (as well as his earlier concept of political liberties) illumines our understanding of 'rights' at public or constitutional law. Dooyeweerd's theory provides clear criteria to determine the class of subjects who have standing to claim competences or liberties. It recognizes that competences or liberties belong to both persons and institutions alike. It argues that each person's and each institution's exercise of this competence or liberty is to be defined not simply by political precept or personal predilection but by created callings and mandates. It recognizes that liberties of political subjects and limitations on political authorities are inextricably tied.

Dooyeweerd's concept of subjective rights provides important insights for our understanding of 'rights' at private law or common law. Perhaps his most brilliant insight was that no legal right can exist without a legal object, and that the nature and scope of rights should be determined by the nature of the legal object. On that basis, he was able to distinguish a variety of different rights of property, contract, tort, and inheritance. He was also able to provide principled arguments against 'rights' that are rooted in moral or religious claims or in the 'personality' of the legal subject or another party.

Some of Dooyeweerd's formulations can be easily extended to address current rights issues. Dooyeweerd, for example, would likely endorse current theories of welfare rights and benefit rights to public education, social security, unemployment compensation, police protection, and the like. The distribution of such benefits lies within the

⁶⁴ *Ibid* vol 3 at 177-8.

⁶⁵ *Ibid* vol 3 at 169, 171 (emphasis in original).

competence, if not the mandate, of the state. The objects of such rights are tangible social goods, which have been subject to cultural formation, economic valuation, and legal positization.⁶⁶ Dooyeweerd would also likely embrace the efforts of those who are seeking to protect animals, plants, and other natural resources from human exploitation and abuse. His argument, however, would not be based on the rights of these natural resources, for they are incapable of the subjective juridical functions which rights presuppose. His argument would be based on the competence of the state. Just as the state is called and competent to respect and protect *human* creatures and their activities regardless of their qualification, so it is called and competent to respect and protect *natural* creatures and their activities, regardless of their qualification.

Despite its many virtues, Dooyeweerd's mature concept of rights is not free from difficulty. This is not the place to recite a litany of criticisms, but a few points merit mention.

First, although Dooyeweerd purported to provide a comprehensive Christian concept of rights, there are several gaps in his treatment. His analysis of rights is decidedly 'Western', even 'European', in orientation. He offered few reflections on the theory and law of rights in 'primitive', Southern, and Eastern cultures, and drew most of his legal examples from Roman-Dutch, and occasionally Anglo-American, law. Despite his desire to develop a Christian concept of rights, a sceptic could see in his formulations more of an apologia for the status quo than Dooyeweerd recognized. Moreover, in his mature formulations Dooyeweerd omitted from analysis several classes of rights (or competences) that were firmly in place in Western law when he wrote and that he had enthusiastically embraced in his early concept of rights. For example, he touched only lightly, in his discussion of competences, on the subject of criminal-law rights, such as the rights to be free from illegal searches and seizures, to have a fair trial, to face one's witnesses, to defend oneself, and to be free from cruel and unusual punishment. He made only passing references, in later editions of the *Encyclopedia of Legal Science*, to civil-procedural rights—to have standing, to sue, to cross-examine witnesses, to appeal. He took virtually no account at all of the large cadre of constitutional and political rights and liberties that emerged in Europe and North America after World War II. Whether these 'rights' are classified as subjective rights or legal competences, they need to be analysed.

Secondly, Dooyeweerd offers little direction to resolve conflicts between the rights and competences of different legal subjects. He describes at length the various rights and competences which both individuals and institutions can claim. He also describes the compe-

⁶⁶ This perhaps is what Dooyeweerd meant when he included in the class of legal objects 'social goods... that are amenable to subjective legal power'. See note 52 above.

tence and power of the state to intervene when an individual or institution exceeds its sphere of competence or claim of right. Yet the complex disputes that his broad system raises require more specific principles of decision than he offers. Dooyeweerd describes well enough the resolution of simple disputes between the rights of two individuals. He also touches lightly on disputes between the competence of one individual and the rights of another. But he largely ignores the legal resolution of disputes between the competences of two institutions, between the competence of an institution and the rights of its individual members, and between the competence of the individual and the rights of an institution. Failure to provide such principles has been the bane of many modern concepts of institutional rights.

Thirdly, Dooyeweerd's insistence that to be legitimate all rights must be positivized by state law vests too much confidence in the state. Dooyeweerd was understandably averse to natural-rights theories that placed the source of rights beyond state law. He had, after all, dismissed his own early natural-law concepts because of their indeterminacy. Yet leaving the definition, or positization, of rights to the state alone is both indeterminate and dangerous.⁶⁷ What happens if the state breaches its created mandate and becomes totalitarian and repressive? What happens if an individual or group is prejudicially excluded from certain rights and privileges? Paradoxically, Dooyeweerd's aversion to natural-rights theories drove him dangerously close to the theories of legal positivism and political absolutism that he so sharply criticized throughout his career.

Finally, to my mind, Dooyeweerd circumscribed the class of subjective rights far too narrowly by insisting that they be (1) restricted to relatively scarce goods; (2) serviceable to human needs; and (3) subject to economic valuation and administration. Taken literally, this requirement would effectively preclude rights to anything that exists in abundance, is idle, or has no present market value. Yet there are many objects in modern culture, from cows to cars, that are not at all 'relatively scarce' but should, none the less, be subject to claims of right. There are innumerable objects, such as luxuries and playthings (for instance, rugby balls), that serve no obvious 'human needs', but should clearly be included among objects of rights. There are innumerable objects and opportunities that have no inherent economic value (or legal objectification), but cannot be so readily precluded. Surely Dooyeweerd did not mean to preclude rights to objects that have only sentimental value (such as a worn family picture), heuristic value (such as an unpublished manuscript), aesthetic value (such as a well-manicured lawn), or potential

⁶⁷ In defence of Dooyeweerd, it can be argued that he recognized that other non-state social institutions also are competent to define and positive the subjective rights of their members. None the less, legal subjects invariably turn to the state for the enforcement of their subjective rights, thereby rendering critical the state's definition or positivizations of enforceable rights.

economic value (such as a product in progress). Surely he did not mean to preclude rights to opportunities to vote, to travel, to work, and the host of other civil and political rights currently in vogue. This part of Dooyeweerd's modal analysis of subjective rights requires considerable amendment and emendation.

Despite its difficulties, Dooyeweerd's mature concept of the competences and rights of legal subjects offers a formidable challenge to both adherents and antagonists. Adherents are challenged to refine Dooyeweerd's formulations still further and apply them afresh to the myriad rights controversies currently besetting legal academies and courts. Antagonists are challenged to offer alternative concepts of rights that reveal the same methodological rigour and intellectual acuity as Dooyeweerd's formulations.

JUSTICE NOT TO BE MEASURED BY THE JUDGE'S FOOT

'... The law usually must speak in general terms. It is necessarily somewhat mechanical in operation. We have concluded, long ago, that it is better to have some standardization in the application of legal rules. The ideal of justice being distributed on an individualized basis by Haroun al Raschid sitting under a tree, has long since been put away because of the disparities and discrimination inherent in that approach. Even the English Chancellor, whose duty it was to "see that justice was done", found it necessary to develop some rules. As John Selden [1584-1654] said ("*Equity*", *Table-Talk* (London 1689) 46), it would not work to have justice measured by a Chancellor's Foot; "what an uncertain measure would this be? One Chancellor has a long Foot, another a short Foot, a third an indifferent Foot. 'Tis the same thing in the Chancellor's Conscience": Erwin N Griswold (one-time Dean of the Harvard Law School and United States Solicitor General) *Ould Fields, New Corne* (1992) 401-2.

THE PARADOX OF A JUDGE'S WORK

'The antinomy at the basis of a judge's work has been so often discussed that I can justify no more than a bare restatement of it. His authority and his immunity depend upon the assumption that he speaks with the mouth of others: the momentum of his utterances must be greater than any which his personal reputation and character can command, if it is to do the work assigned to it—if it is to stand against the passionate resentments arising out of the interests he must frustrate. He must pose as a kind of oracle, voicing the dictates of a vague divinity—a communion which reaches far beyond the memory of any now living, and has gathered up a prestige beyond that of any single man. Yet the customary law of English-speaking peoples stands, a structure indubitably made by the hands of generations of judges, each professing to be a pupil, yet each in fact a builder who has contributed his few bricks and his little mortar, often indeed under the illusion that he has added nothing. A judge must manage to escape both horns of this dilemma: he must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of his time—at all hazards he must maintain that tolerable continuity without which society dissolves, and men must begin again the weary path up from savagery': Judge Learned Hand (1872-1961) of the United States Court of Appeals, Second Circuit 'Mr Justice Cardozo' (1939) 52 *Harvard Law Review* 361.