

ON THE CHARACTER OF SOCIAL COMMUNITIES,  
THE STATE AND THE PUBLIC DOMAIN

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The view that organized social communities or associations differ from unorganized communities by having a kind of government or management exerting authority over the community appears almost obvious. Nevertheless it contradicts Dooyeweerd's view, distinguishing organized communities from natural communities because of their being founded in the technical relation frame (or modal aspect) respectively the biotic one. This paper discusses the dual character (or structure of individuality) of associations, requiring the introduction of a new relation frame. Determined by authority and discipline, the political relation frame succeeds the frames of social intercourse and economic relations, and precedes the frames of justice and loving care. It qualifies the *generic* character of any association, founded in that of social intercourse. Besides, each association has a *specific* character, distinguishing various types of associations. These insights shed new light upon the dual character of a state as the guardian of the public domain. Constituting various networks of human relations, the public domain does not have the character of a community.

1. *Associations have a dual character*

An unorganized community is primarily characterized by the relation frame of social intercourse or companionship (commonly called the 'social modal aspect') and secondarily by another relation frame. For example, the community of all German speaking people is founded in the semiotic relation frame, the community of all Christian believers in that of faith. People belonging to them have a communal bond because of their language, respectively their religious belief. Both communities lack an authoritative government and discipline, although both language and belief are subject to norms.

In contrast, an organized community, to be called an *association*, has a *dual* character. This consists of a leading or *generic* character, distinguishing associations from unorganized communities, and an accompanying or *specific* character, making difference between various types of associations.<sup>1</sup> In this paper, I shall mostly pay attention to the specific character of the state, but first I shall discuss the generic character of any association. This, I believe, is qualified by the political relation frame and founded in the relation frame of social intercourse. The distinction between an organized association and an unorganized community cannot be made clear without the recognition of the political relation frame of decision making, authority and discipline. It appears to be

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<sup>1</sup> M.D. Stafleu 2003, 'On aesthetically qualified characters and their mutual interlacings', *Phil. Ref.* 68: 137-147 introduces the concept of the dual character of an object of art, but does not use the terms *generic* and *specific*. H. Dooyeweerd 1953-58, *A new critique of theoretical thought*, 4 volumes, Amsterdam: Paris, III, 393 observes correctly that Aristotle's distinction of *genus proximum* and *differentia specifica* does not apply to the modal aspects, and he criticizes an attempt to apply it to the state. However, I do not introduce the duality of a generic and a specific character on logical but on empirical grounds.

more important than the distinction between natural communities, free associations and institutes or that between 'associatory and authoritarian forms of association'.<sup>2</sup>

Any association unites its members under some kind of authoritative rule<sup>3</sup>: the government of a state; the bishop, synod or board of a church; the management of a business; the executive of a party; the headmaster of a school; the superintendent of a hospital; the director of a factory; the committee of a club; or the parents in a nuclear family. Internally, the government rules the association. Its members respond to the government by discipline, actively participating in the community. The intersubjective relation of authority and discipline qualifies the generic character of an association, which is founded in the relation frame of social intercourse, as I shall argue presently. Externally, the association is represented by the management (or somebody authorized by the latter), acting on behalf of the association. Contrary to an unorganized community, an association is able to *act as an individual subject* in all relation frames.<sup>4</sup> In its relations to individuals outside the association or to other associations, the board of an association can neither exert authority nor require discipline. Hence, the relation between an association and its clients, if it has any, differs from its relation with its members. The association's external subject-subject relations are not necessarily political. They may be economical, for instance, or juridical.

The members of an association are not only united because of their being subject to authoritative rule, but also by solidarity: they form a community. The discipline required by the management implies cooperation and shared interests besides participation in ruling the association. Hence, the generic character of any association is founded in the relation frame of social intercourse. Nevertheless, the identity of an association is independent of the identity of its members, as long as it has members. It depends on the effective rule of its government. Hence, unlike a nuclear family, neither a marriage (having a unique character) nor an extended family (being a biotically founded unorganized community) constitutes an association. An association may passively cease to exist for lack of members, but usually its existence only ends

<sup>2</sup> Dooyeweerd *op. cit.* III, 187-191.

<sup>3</sup> Dooyeweerd *op. cit.* III, 180-181: 'Durable organization necessarily implies the *societal relation of authority and subordination* in its different modal aspects... it is only found in organized communities ... and in addition in some natural communities ... the relation of authority and subordination is only to be understood from the structural types of the different communities in which it is inherent.' Observe that I replace authoritarian 'subordination' by participatory 'discipline' (section 2).

<sup>4</sup> Dooyeweerd *op.cit.* III, 198: 'The only radical difference between a human community and a "thing" is to be found in the fact that the former has subject-functions in all the modal aspects of human experience and human social existence. This means that a communal whole can never be a societal object.' See also *ibid.* III, 472. I concur with Dooyeweerd that an association is a subject in all relation frames, even in the so-called natural ones. Philosophers who doubt this seem to overlook that an association is a human *community* being represented by *somebody* who acts on behalf of the association, which is supposed to act as a *unity*. The members of an association may be associations themselves, for instance, football clubs are members of a football association. On the other hand, an unorganized community cannot act as a subject.

if its management actively dissolves it. The specific character of an association determines its membership forming a community. Nationality, the membership of a state, differs from that of a club, a local church or a business.

2. *The principle of sphere sovereignty is the primary characteristic of an association*

In the words of Abraham Kuyper (1880), any association is sovereign in its own sphere. In a civilized and free society, this sovereignty is never absolute; being restricted both by the individual freedom of its members and the internal sovereignty of other associations. The authority of its management should not be extended beyond its competence, and only its members are required to observe discipline. The fact that this Protestant view is effectively dominant in present-day Western society is remarkable, for it contradicts both the humanist ideal of autonomous individual subjects and the Roman-Catholic view on church and state, even with the mitigating principle of subsidiarity.<sup>5</sup> Sovereignty presupposes some kind of authoritative rule. Therefore, the principle of sphere sovereignty only applies to associations, not to unorganized social communities.

Kuyper's political view of sphere sovereignty differs from Dooyeweerd's, who interprets it as the ontological principle of *creational diversity*. For example, Dooyeweerd applies the term sphere sovereignty to the mutual irreducibility of the modal aspects, ignoring the fact that no modal aspect is ruled by a sovereign.<sup>6</sup> He puts sphere sovereignty at the law side of reality, applying it both to modal aspects and to types. However, a sovereign is a subject, even if she positivizes norms into laws or rules, and the political principle of sphere sovereignty applies to associations being subjects as well. For instance, according to Dooyeweerd *the* university (as a type) would have sphere sovereignty with respect to *the* state, whereas I maintain that the principle of sphere sovereignty implies that *any* university (as an individual association) should

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<sup>5</sup> The principle of subsidiarity, developed by Thomas Aquinas and in 1931 confirmed in the encyclical *Quadragesimo Anno* by pope Pius XI, says that each societal activity should be *subsidiary*, it has to support the members of all corporations. It assumes that secular society consists of a hierarchy of higher and lower communities or organs, which are all enclosed by the state. Whether this principle also applies to the church (in the Roman-Catholic view identical with the community of Christian believers) is a matter of dispute. A higher organ should refrain from everything that can be done by a lower organ. If taken apart from the Roman-Catholic view on society, the principle of subsidiarity is applicable whenever an association as a whole has more or less autonomous parts, but it is not applicable to mutually independent associations and is therefore no substitute for the principle of sphere sovereignty. Christian-democrats consider both principles not to contradict, but to complement each other.

<sup>6</sup> Dooyeweerd *op.cit.* I, 101-102. See A.M. Wolters, 'The intellectual milieu of Herman Dooyeweerd', in C.T. McIntire (ed.) 1985, *The legacy of Herman Dooyeweerd*, Lanham: University Press of America: 1-19, p. 7: 'Whereas for Kuyper sphere sovereignty had been primarily a sociological principle which provided a guideline in practical politics, Dooyeweerd expanded it into a general principle of ontological irreducibility, applicable also to such categories as life and matter, faith and emotion.' See also P. Marshall, 'Dooyeweerd's empirical theory of rights', in McIntire (ed.) *op. cit.*: 119-142, p. 126.

have sphere sovereignty with respect to *any* state. Contrary to Dooyeweerd's, my view has the consequence that two universities have sphere sovereignty with respect to each other. However, I fully agree that *the* university as a type is irreducible to the type of *the* state.

The relation between authority and discipline is not a subject-object relation but a normative subject-subject relation. Authoritative rule becomes authoritarian or autocratic if the authorities treat their subjects like objects, if discipline becomes subordination, in the extreme if discipline reduces to slavery. Being a member implies to play an active part in the association. In any association, the membership should *participate* in the decisions of the authority, which ought to consult its members about its decisions. Participation in whatever form is not a peculiar Western cultural phenomenon. Rather, it is a universal political *normative principle* to which any association should conform according to its specific character.<sup>7</sup> State democracy differs from the voice of the people in the church or labour co-partnership. Like any normative principle, it can be positivized into norms and rules in many different ways.

It should be observed that we are describing various *types* of social communities and their characters. According to the Philosophy of the Cosmogenic Idea, these types belong to the law side of creation. Types are given and can be discovered as laws for the creation. A type is determined by a set of *invariable* natural laws and normative principles like those of justice or love of one's neighbour. On the other hand, with the exception of natural characters, a character is a set of natural laws and normative principles *as well as* variable positivized norms. Hence, the character of a particular social community is in part the product of human activity, starting from the technical relation frame of human labour. In my view, the historical development of natural characters is *guided* by the technical frame, and the historical development of human activity *starts from* this relation frame, which therefore has a pivotal function in history. For this reason, Dooyeweerd calls the technical relation frame the 'historical' or 'cultural' modal aspect of 'control, command, mastery or power'. By assuming that all associations (except for the natural ones) are founded in this modal aspect, Dooyeweerd reduces authority to power, control or command over people, in the state to be conducted by justice, in the church by faith, in a business by economical principles.<sup>8</sup> In both respects, I offer a different opinion.

First, the fact that associations are actualized and differentiated in the course of history should have no consequences at all for the characterization of various *types* of social communities. It is not an argument against the assumption that the *generic* character of any association is founded in the relation frame of social intercourse, and we are free to investigate the foundation frame of its *specific* character without presupposing that it is invariably the technical one.

<sup>7</sup> J. Chaplin 1995, 'Dooyeweerd's notion of societal structural principles', *Phil. Ref.* 60: 16-36 argues that democratic participation is a structural norm for the state.

<sup>8</sup> On the historical modal aspect, see Dooyeweerd *op. cit.* II, 68-71; on the foundation of associations, see *ibid.* III, 178-179: an organized community '... is typically founded in a historical power-formation ...'.

Secondly, in my view authority cannot be reduced to power, control or command over people. If some authority has to resort to the exertion of power, it is a *testimonium paupertatis*, a testimonial of incompetence, only excusable if the relation of authority and discipline is severely disturbed. The political principle of sphere sovereignty is not expressed in the secondary foundation, but in the primary qualification of the generic character of associations.

### 3. *The analysis of associations requires the recognition of the political relation frame*

Like all human activities, the management of an association is subject to norms of justice. Nevertheless, the generic character of any association is not qualified by principles of justice, but by principles of good management and discipline besides the principle of sphere sovereignty. Modern management has become a profession, qualified by the political aspect and quite different from the profession of lawyers. People do not easily change of profession, and to become a manager requires skills that can be learned and developed. Often, a manager is involved in the government of quite different associations, and managers switch easily from one specific kind of association to another, without changing of profession. The conduct of an association may be unjust, even criminal, and still be effective. But if the management loses its authority and the members of the association forgo their discipline, the association will resolve.

My analysis of the generic character of an association and of the generic and specific character of the state will provide a number of arguments pointing to the existence of a political relation frame, to be distinguished from that of justice. In the next two sections I shall argue that this frame is irreducible to those of economy and justice.

Before, I like to point out that the political is really a *universal* relation frame, not only characterizing associations, but determining subject-subject relations and subject-object relations as well. The political subject-subject relation of authority and discipline is not restricted to associations having sphere sovereignty, but is observable in any kind of deliberation or meeting, if its purpose is to reach an agreement. Outside the context of sovereignty, authority is recognizable as leadership. Decisions and resolutions are the objects of political activity. Policy as a subject-object relation means preparing, deciding, exerting and evaluating of decisions, usually in subject-subject relations which are not necessarily politically characterized. In the preparation of a decision one determines requirements, desirabilities and possibilities, when deciding one makes choices or establishes priorities. Decisions make little sense if not exerted, and are only effective if evaluated in time. Policy is not restricted to the government of a state, but applies to the management of any association. In a less structured sense, all people make decisions all the time. Deciding is a universal human condition.

Good management as a normative principle refers to the preceding relation frames, in particular to the economic one and that of social intercourse. It

makes an assessment of the economic consequences of any decision (a cost-effect analysis), not only for oneself, but also for others. It takes into account the social interests of members, clients and neighbours, and is often influenced by organized and unorganized lobbies. Good management also refers to later relation frames, if it abides to principles of justice and loving care.

#### 4. *The political relation frame is irreducible to the economical one*

I propose to insert the political relation frame between the economic and juridical ones.<sup>9</sup> I do not believe that the former is characterized by either scarcity or rational choice.<sup>10</sup> In all normative activities, human beings are free and responsible actors, implying choice. In my view, economic activity concerns the profitable exchange of goods and services, depending on both scarcity and affluence: a buyer needs something that a seller has in abundance. Economy is based on differentiation of abilities and division of labour of all kinds. An economic subject-subject relation is objectified by a contract, which does not require authority or discipline, even if it has juridical consequences (section 6).

On the other hand, the political normative principle of authority and discipline presupposes the economic one of mutual servitude. Both small and large associations have an internal organization with division of tasks, in their management as well as in their membership. Even a nuclear family shows a division of tasks, between the parents in the exertion of their authority, as well as between the members of the family (parents and children), in the proceedings of family life. But the economic normative principle of mutual servitude cannot be reduced to the political one of authority and discipline.

The internal organization of an association, its hierarchy and division of tasks, guided by the political principle of authority and discipline, is founded in the economic relation frame. In a business considered as an association, the employer and employees are members. Their relation of authority and discipline is determined by the *generic* character of the business, objectively expressed by rules and assignments. Its *specific* character determines their relation as an economical subject-subject relation, objectively expressed by a labour contract. The latter relation also occurs in an association that is not a

<sup>9</sup> The observant reader will be aware that I am diverting from the order of the modal aspects given by Dooyeweerd *op. cit.* I, 3. On the position of the aesthetic relation frame, see Stafleu *op. cit.* and references therein. After the psychic relation frame, I recognize the technical, aesthetic, semiotic, logic and pistic relation frames as being *cultural*, followed by the frames of social intercourse, economics, politics, justice and loving care as aspects of *civilization*. I intend to argue this order in a separate publication.

<sup>10</sup> Dooyeweerd *op. cit.* II, 66: '...the sparing or frugal mode of administering scarce goods, implying an alternative choice of their destination with regard to the satisfaction of different human needs.' See B. Kee, 'Filosofie van de economie', in R. van Woudenberg *et al.* 1996, *Kennis en werkelijkheid*, Amsterdam: Buijten en Schipperheijn: 267-292; A. García de la Sienra 1998, 'The modal laws of economics', *Phil. Ref.* 63: 182-205; *ibid.* 2001, 'Reformational economic theory', *Phil. Ref.* 66: 70-83. These authors conceive of economy in the sense of efficiency, which I don't believe is characteristic of economic activity.

business, yet employs people. Whether the employees of an association should be considered members depends on the character of their labour contract.

If an association's specific character is not economically qualified, it may be interlaced with an organization having the economically qualified *specific* character of a business. For instance, a hospital's specific character is qualified by the relation frame of loving care. It may be managed by a medical doctor. It has a specific organization (the hierarchy of doctors, nurses, secretaries, cleaners, *etc.*) and division of tasks with respect to medical care. Its character is interlaced with an organization having the specific character of a business, which may be managed by a financial expert but should be subservient to the character of the hospital as a health institute. It should be considered wrong to reverse this interlacement, *i.e.*, to manage a hospital like a business, and to treat patients first of all as economical clients.

##### 5. *The political relation frame is irreducible to that of justice*

Although political philosophy is nowadays firmly distinguished from the philosophy of justice, it may still be controversial to state that the political relation frame is irreducible to that of justice. The best way to make this clear is to point out some undesirable consequences of their identification. I shall do that referring to the generic and specific character of the state. I propose that both are politically (not juridically) qualified. In the present section, I shall discuss the relation of state law and justice besides the idea of a constitutional state, in the next section the juridical character of courts of justice.

From the eighteenth till the first half of the twentieth century, legal positivists identified justice with state law.<sup>11</sup> *Legalism* assumes that almost all rules of justice are state laws, that the state laws are complete in principle, and that the judge has no other task than to apply the state laws.<sup>12</sup> This implies the separation of the political formulation from the juridical application of justice. With respect to the former, the courts are subject to the legislative organs of the state, with respect to the latter they are independent organs of the state, whereas the executive organs of the state are subject to the justice applied by the courts. This system of checks and balances, essentially Montesquieu's *trias politica* (1748), assumes that the three powers (executive, legislative and judicature) are organs of the state. It has the intention to warrant the freedom

<sup>11</sup> Contrary to the Dutch *wet* and the German *Gesetz*, the English word *law* often means justice (*recht* in Dutch, *Recht* in German). In order to make myself clear, I shall use the expression *state law* meaning any written law decreed by a state, avoiding the word *law* in the sense of *justice*, wherever possible.

<sup>12</sup> H. Franken *et al.* 2003, *Encyclopedie van de rechtswetenschap* (tiende herziene druk), Deventer: Kluwer, 115-116. In the twentieth century, influential legal positivists were *e.g.* H.L.A. Hart in England and H. Kelsen in Austria. Until the beginning of the twentieth century, Dutch courts were strictly bound to state laws, see *ibid.* 115, citing the 'Wet Algemene Bepalingen' (1829): 'Gewoonte geeft geen recht, dan alleen wanneer de wet daarop verwijst ... De rechter moet volgens de wet rechtspreken; hij mag in geen geval de innerlijke waarde of billijkheid der wet beoordelen.'

of the citizens. Arisen in the framework of humanist philosophy, it does not even consider the possibility that justice and authority *cum* discipline are mutually irreducible normative principles. Dooyeweerd (who developed his views before the Second World War) was aware of the difference between politics and justice and of the pitfalls of legal positivism. Nevertheless, he assumed that the juridical aspect qualifies the character of the state, and he did not recognize the existence of a political aspect irreducible to the juridical one.<sup>13</sup> However, in the second half of the twentieth century, legal positivism came under fire, first because people became aware that courts of justice are at liberty to *interpret* the state laws. Jurisprudence is as much a source of justice as state laws. Legalism assumes that only the state legislative is allowed to interpret its own laws.

Legalism has two contrary variants. In the liberal variant, stressing individual freedom from the state, everything is allowed that is not forbidden by state law. In the name of this view a lot of injustice has been performed. For instance, in the nineteenth century slavery and child labour were considered to be just (*i.e.*, legal) until the governments introduced laws prohibiting it, when it became illegal. People defending this view sometimes distinguish between what they consider to be just or unjust (legal or illegal) from what may be considered ethically or morally right or wrong. What is not forbidden is legally just, but is not necessarily ethically right. As long as there is no law against it, it is a moral matter whether one takes part in slavery or child labour. This is a consequence of the view that state law defines what is justice. It is contrary to the view that principles of justice are given in the creation, and should be *positivized* into norms, including state laws. This means that one makes laws because one considers slavery and child labour *to be* unjust, not in order *to make them* unjust. Something may be unjust, even if it is legal.

In the socialist variant of legalism, everything is forbidden that is not allowed by the state government. In practice this view leads to an abundance of rules and suppression of unavoidable resistance. Its best illustration is the Soviet-Union, which downfall in 1990 was caused by its top-heavy bureaucracy. We find this variant in a weaker form in countries influenced by social democracy, prohibiting many kinds of activities unless licensed by the state.

Both variants identify justice with state law. In an extreme form, legalism leads to the attitude known by the German *Befehl ist Befehl*: to defend a legally correct but (according to universally accepted normative principles) unjust act, because one is ordered to do so by some authority. It identifies justice with the political principle of authority and discipline. This view has become notorious during the *Nazi*-regime, and has been rejected afterwards by Western courts. However, it did not only occur in Germany, for it is a consequence of legal positivism. It deprives both individual citizens and

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<sup>13</sup> Dooyeweerd *op. cit.* III, 437: 'The leading function in the structure of the State has proved to be a public legal relationship uniting government, people and territory into a politico-juridical whole.' On Dooyeweerd's views of the state, see Dooyeweerd *op.cit.* III, 379-508; Chaplin *op. cit.*; J. Zwart, 'Rechts- en staatsfilosofie', in Van Woudenberg *op. cit.*: 293-309; and references given in these two papers.

associations of their freedom and responsibility to act not only lawfully, but rightfully as well.

From the assumption that the state laws determine what is justice, legal positivists concluded that any state is a constitutional state.<sup>14</sup> Twentieth century history has made us painfully aware that legalism does not exclude the existence and functioning of dictatorial states, whose conduct may be lawful but is unjust. Nowadays most people consider a constitutional state to recognize fundamental human rights; to have independent courts of justice and to submit itself to its own laws; to have constitutional rules according to which valid laws are made; and sometimes to be a democracy.<sup>15</sup> This is a mixture of juridical and political principles, intended to restrict the *power* of the state, referring to the foundation of the specific character of a state (section 7). In my view, the definition of a constitutional state that only refers to the foundation of the state's character may be necessary but is not sufficient.

I suggest that the idea of a constitutional state (*rechtsstaat*) discloses the original character of the state. It points to an important historical stage in the development of the state. It does not mean that the state laws are always just (according to legal positivism) or should be just (according to people who reject legalism), but it requires that the state government is itself subject to justice. In matters of justice, the state is not a sovereign. The sovereignty of the state refers to its members (the citizens), its internal organization, and to the public domain. Sovereignty is not a juridical but a political principle, a matter of authority and discipline, even if these have juridical implications (section 6). The Protestant principle of sphere sovereignty does not rest on a right, but on the character of each association having its own management, exerting authority, requiring discipline from its members, and representing the association. The state's sovereignty is no exception to this political normative principle. Human rights do not constitute the basis of the state, even though they limit the rights of the state and other associations (section 6).

A constitutional state is always a state; it cannot exist without authority and discipline, without dominion of its territory. But a state (even a democratic state) can exist without being a constitutional state, as long as it exerts authority in the public domain.<sup>16</sup> This is not only the case when (for instance) a state conquers another one, ruling the conquered land and its inhabitants. The international recognition of the government of a state does not depend on its being rightful (*de jure*), but on its factual political power (*de facto*). A state ceases to exist (for instance after a revolution or an invasion) if its

<sup>14</sup> Dooyeweerd *op. cit.* III, 425-467 criticizes the German idea of a *Rechtsstaat* (constitutional state) in the sense of 'law-State'. It should be observed that the German or Dutch concept of *Rechtsstaat* is not quite the same as the Anglo-Saxon concept of *constitutional state*. The United Kingdom is considered a constitutional state, even if it has no written constitution.

<sup>15</sup> Franken *op. cit.* 366-367 gives four formal characteristics of the 'democratische rechtsstaat'. *Ibid.* 379 makes distinction between *rechtsstaat* and democracy.

<sup>16</sup> Hence, I disagree with Dooyeweerd *op. cit.* III, 434: 'A real State cannot find its qualifying function in any other than the juridical aspect, and without this leading function it would degenerate into an organized military gang of robbers, because of its very foundation in armed force.'

government can no longer maintain public order, even if that government is just. We should firmly distinguish between a state that submits itself to justice and a state that does not. Only the former should be considered a constitutional state (*rechtsstaat*).

I conclude that the rejection of legal positivism implies the recognition of the mutual irreducibility of the political and juridical relation frames.

#### 6. *Courts of justice should be independent of the state*

A court of justice deals with juridical subjects and objects. In a humanist philosophy, based on the autonomy of human beings, only individuals can be juridical subjects. The influence of the Protestant principle of sphere sovereignty in Western culture can be seen in the concept of a *legal person* (*rechts-persoon*, better to be replaced by *juridical subject*), applicable to any association besides individual persons. The principle of sphere sovereignty acknowledges associations to be subjects and would lose its meaning if the concept of a juridical subject were considered fictitious. In order to be able to act on the public domain, an association must be known by the state government, requiring some kind of registration. In a constitutional state, to be acknowledged as a juridical subject should be a *right*, only to be denied by court order, for instance if the association has a criminal purpose. In a country with an absolute government (an absolute monarchy or a dictatorship), it is not a right, but a *privilege*, granted by the state. For instance, the Soviet-Union did not recognize the freedom of people to form associations or to convene meetings without explicit consent of the state. On the other hand, the European Union requires its member states to be constitutional states. European citizens and associations have the possibility to appeal to the European Court of Justice if they believe that their rights are violated by their government.

Sovereignty is not a juridical but a political principle. The principle of sphere sovereignty does not rest on a right, but on the fact that each association has its own management, exerting authority, requiring discipline from its members, and representing the association. The idea of the constitutional state implies that the state itself is a juridical subject, not an absolute sovereign. As a juridical subject, it can be and often is a party in the course of justice. For example, in criminal justice the attorney represents the state as a juridical subject, but he is not the judge.

Juridical subjects have both *rights* and *duties*, being man-made objects qualified by the relation frame of justice. However, both rights and duties only function in subject-object relations,<sup>17</sup> and in particular in subject-subject relations. An isolated person like Robinson Crusoe has little use of his rights. The right of one subject often implies duties for another one. The rights of one subject, whether a person or an association (*e.g.*, the state), are limited by those of other subjects. Hence, rights and duties are often in conflict, that's

<sup>17</sup> Dooyeweerd *op. cit.* II, 391-413. See Marshall *op. cit.*

why we need judges, even if there is no question of criminal conduct. No right should ever be absolutized.

If objective rights and duties are originally juridical, we call them *fundamental*.<sup>18</sup> The fundamental rights should not be *derived from*, but *recognized in* the state's constitution. This view is expressed by the United Nations Organization requiring its member states to recognize the 'universal declaration of human rights'. Only by court order can somebody be deprived of his fundamental rights, for instance his liberty to act in the public domain.

Other objective rights and duties follow from objects playing their typical part in subject-subject relations characterized by relation frames *preceding* the juridical one. Typical artefacts qualified by the relation frame of social intercourse are customs. The kind of rights and duties following from customs is sometimes called common law (*gewoonterecht*). In a lawsuit, the interests of people or associations are taken into account, besides the public interest. Contracts are economically qualified artefacts giving rise to various rights and duties. Finally, state laws as well as rules and other decisions made by the management of any association have juridical consequences. In all these cases, whenever there is a conflict about objective rights or duties, the parties in the conflict may appeal to a court of justice. Objective justice, referring to the relation frames preceding the juridical one, is not only found in state laws, but at many other places too.

Courts of justice are concerned with juridical aspects of any kind of human activity. Their independence from state government means that courts of justice are not necessarily organs of the state. In private law, the state is usually not even a party. On the public domain, the state sometimes acts as an organ of justice, in particular with respect to criminal acts. The office of public justice, being an organ of the state and a specific juridical subject, brings criminals to court and executes the judgments of courts. However, even on the public domain, the state does not only act in a juridical sense (section 7).

In a civilized country, a court of justice (or a system of such courts) forms an association with a dual character. Its *generic* character is like that of any association qualified by the political relation frame, for higher courts have authority over lower courts, which assert discipline by adhering to the rulings of the higher courts. Its generic character is founded in the frame of social intercourse. Its members are judges, adhering to many typical customs. Its *specific* character is qualified by the juridical relation frame. The character of the courts of justice is interlaced with that of the office of public justice.

Only by distinguishing the political from the juridical relation frame is it possible to explain why in a constitutional state the courts of justice should be independent of the government; why the courts are competent to judge whether the state adheres to its laws; why the courts are competent to judge

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<sup>18</sup> According to Roman-Catholic and humanist 'natural law' scholars, fundamental rights can be derived from human nature. Others assume that the fundamental rights are products of cultural development, see Franken *op. cit.*, hoofdstuk 2. The Philosophy of the Cosmomic Idea considers fundamental rights to be temporary positivations of invariable normative principles of justice.

whether lower laws are consistent with higher laws; and why the acceptance of international courts of justice does not infringe on the sovereignty of the state.

#### 7. *The state has an exceptional dual character*

We can now summarize the dual character of the state. Its *generic* character as an association is qualified by the political relation frame and is founded in the frame of social intercourse. In this respect, the state's members are its citizens, forming a *people* or *nation* as a community organized by the state. Nationality means state membership and includes national solidarity. Since the nineteenth century, romantic philosophy has tried and failed to found the character of a nation in ethnicity, race or language, on the expense of many wars and much suppression.

The *specific* character of the state is politically qualified as well, in a unique way. Whereas the state governs its citizens and properties according to its *generic* character, on its territory it governs the public domain according to its *specific* character. The state is the guardian of the *res publica*. In public, people do not act as citizens of the state. For instance, the state regulates traffic on public roads and in public transport, and *all* travellers should obey these rules, whether they are citizens or visiting tourists. In the past, women and slaves were not recognized as citizens, but they freely used the public domain. Besides individual persons, associations act in public, not as citizens of the state, but as *clients* of the public networks, for which they have often to pay. The public domain does not form a community, but an *intersubjective network*, or rather a set of networks.<sup>19</sup> Even *society* is neither an organized nor an unorganized community, but the public intersubjective network of social intercourse, open to anyone. The idea that society is, was or should be a community comprising the whole of humanity is a romantic fiction. The unity of mankind is neither to be found on the public domain, nor in any association, but only in the religious community of the body of Christ.<sup>20</sup>

Let us consider the concept of the public domain related to the specific character of the state in some detail. Each animal species experiences its own specific environment, called its *Umwelt*, determined by the animals' biotic and psychic needs. Humanity is not restricted to an *Umwelt*, for the whole cosmos is its boundless home. Human beings explore and develop their environment in many ways, first of all by technical labour. They transform the natural environment into the public domain. The public domain arises from technical

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<sup>19</sup> M. Castells 2000, *The information age: economy, society and culture*. Volume I: *The rise of the network society* (second revised edition), Oxford: Blackwell. Associations acting on the public domain are *nodes* in a network of their own, connecting the association with other associations and with persons, *e.g.*, the *clients* of the association, according to its *specific* character. These external relations should be distinguished from the internal political relation of authority and discipline between the members of the association according to its *generic* character. Members of an association acting as if they were its clients undermine the internal discipline and mutual solidarity.

<sup>20</sup> Dooyeweerd *op. cit.* III, 214-216.

labour, for it consists first of all of a technical infrastructure: roads, supplies of gas, water and electricity, telephone, internet. As an artificial objective network, it refers not only to the spatial, but to all relation frames preceding the technical one. This means that the specific character of the state is founded in the technical relation frame.

The technical infrastructure forms the basis of all other networks constituting the public domain, consisting of relations between subjects, both individuals and associations. Each relation frame succeeding the technical one determines its own characteristic network of public subject-subject relations, in which both individuals and associations partake. Architecture is the public art *par excellence* and public buildings serve the arts, sports and cults. Public opinion is its semiotic expression, public science its logical one. Churches and political parties make propaganda in public. Public relations define society as a network of public social intercourse. Markets and financial networks have an economic public character, where the government imposes taxes. The states themselves, their provinces and cities as well as their governments form a public political network. The courts form a network of public justice sustained by the state, and the public health and welfare networks are increasingly important in all Western countries.<sup>21</sup>

In a free society, the state warrants the liberty of people to make use of the public domain and it stimulates the development of public networks. It maintains the objective structure and the functioning of the public network. Besides, the state maintains the public order and defends the public domain by means of its intervention powers (section 8).

Hence, the state has an exceptional dual character. Its generic character as a political association differs from that of other associations because its membership is compulsory and its internal organization is mapped on the public domain. Its specific character differs from that of other associations because it is founded in the public domain which guardian it is, and to which not only its citizens, but all people and all associations have access; or rather should have access, for the public order is a normative one.

The state should not be identified with the public domain. With respect to its generic character, it acts on the public domain as a subject like any other association. With respect to its specific character, it should be emphasized that the state *oversees* the public domain, but does not necessarily *own* it. Technical public networks (traffic, telephone, internet) may be owned by various kinds of competing associations. Markets and the channels of public opinion had better not be owned by the state. People ought to be free to use the public domain, and the public rules of the state should have no more ambition than to warrant this freedom and to facilitate public networks. The Protestant principle of sphere sovereignty implies that besides individual persons, associations should be free to operate on the public domain. The Roman-Catholic principle of subsidiarity (section 2) can be interpreted such that on

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<sup>21</sup> Hence, I reject the view expressed by Dooyeweerd *op. cit.* III, 438 ‘... the principle of public interest must itself have a typical *juridical qualification which delimits its supra-arbitrary structural meaning.*’

the public domain the state should refrain from activities that had better be done by other associations.

8. *Coercive power and territory are not fundamental characteristics of the state*

Historically, the defence of the public domain was probably an important incentive to develop tribal coalitions into warrior states. The assumption that the state is characterized by its 'sword power' has led many Christian theologians and philosophers to believe that the state exists 'because of sin'.<sup>22</sup> Dooyeweerd too, supposing that the character of all non-natural organized communities are founded in the 'historical' aspect characterized by human command, based the character of the state in coercive power.<sup>23</sup> I believe that the armed power is merely a historical consequence of the specific character of the state as guardian of the public domain.<sup>24</sup> It does not characterize the state, but rather the intervention powers as organs of the state, which indeed are necessary 'because of sin'. Like all types of characters, that of the state is given in the creation, and is not caused or changed by the fall into sin. Because the public domain is expressed in all relation frames, in a developed historical situation the state as its guardian has a protective function in any frame. The specific political character of the state means that it orders the public domain, by formulating and maintaining its positive laws. The state maintains peace on the public domain. Even imperialism is always defended by the intention to bring peace, from *pax Romana* to *pax Americana*. Nowadays, the maintenance of peace is considered the shared responsibility of all states.

Besides the police and the army the intervention powers include many other organs of the state, including inspectors of public education, health or safety. Intervention powers do not rule the public domain, but intervene if people or associations threaten to disturb the public order. The intervention powers are not intended to restrict the freedom and responsibility of individual people or associations. Rather, they ought to ensure that anybody is free to use the public domain according to his or her own responsibility. Even a free market cannot function without public order.

The words 'domain' and 'network' should not induce the assumption that the public domain is spatially founded. No doubt, the state's *territory* is spatially

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<sup>22</sup> This view, due to Augustine and criticized by Thomas Aquinas, was accepted by A. Kuyper 1898, *Het calvinisme, Zes Stone-lezingen*, Kampen 1959 (derde druk, vertaald uit het Engels): Kok, 64-66, 74-75 and by Dooyeweerd *op. cit.* III, 423-424, 506, in contrast to Chaplin *op. cit.* 25-29 and R.A. Clouser 1991, *The myth of religious neutrality*, Notre Dame: University of Notre Dame Press, 268-269.

<sup>23</sup> Dooyeweerd *op. cit.* III, 414: 'There has never existed any State whose internal structure in the last instance was not based on organized armed power, at least claiming the ability to break any armed resistance on the part of private persons or organizations within its territory.' *Ibid.* III, 420-421: '... the universal validity of the normative structural principle of the State, which implies the territorial monopolistic organization of military power as its typical foundational function.'

<sup>24</sup> Chaplin *op. cit.* 27: '... in a post-fall situation, coercion is a normative necessity for the state to realise its creational purpose.'

determined, but it does not characterize the state. It merely points to the fact that the sovereignty of each state is limited by that of other states. Since the seventeenth century, the open sea is considered to be free, a public domain not subjected to state sovereignty. This also applies to the Antarctic and the moon. National public networks are coupled to each other, forming international public networks. Mediated by treaties and organizations like UNO and NATO and influenced by NGO's (non-governmental organizations), even the states themselves form a political network, in many respects dominated by one or a few 'super states'. The term 'globalization' points to the increasing international character of trade, economic associations and public markets, but it could be used with respect to the other relation frames as well. The modern public domain cannot be restricted to one's country. Associations, freely acting on the public domain, have a tendency to transgress state boundaries. It is inevitable that the states become more and more integrated with each other, and people become inhabitants of the world rather than their country.