**THE MULTI-ASPECTUAL THEORETICAL PERSPECTIVE APPLIED IN DISCIPLINARY AND INTERDISCIPLINARY SCHOLARSHIP: PART ONE: THEORY OF LAW AND THE DISCIPLINE OF LAW**

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**Introduction**

This article illustrates how the multi-aspectual philosophical perspective developed by the late Herman Dooyeweerd (Dooyeweerd, 1953-58, 1997) and his successors applies to his own specialist academic discipline, law. According to Dooyeweerd the test of the viability of his philosophical approach is its applicability within the diversity of specialist academic disciplines (Dooyeweerd, 1997: *Foreword,* vii). It is therefore of especial significance to provide an indication of how he saw it applying to his own field.[[1]](#footnote-1)

The second part of this two-part study will appear in a following issue of this journal. It will provide an application of the multi-aspectual perspective to an interdisciplinary exploration. This exploration has resulted from bringing the writer’s familiarity with the Dooyeweerdian (“reformational”) theory into contact with the concepts and ideas at the basis of the Feldenkrais® Method of teaching somatic self-awareness.

**Multi-Aspectual Approach and Contract Law**

Dooyeweerd’s major systematic work was intended to be the philosophical underpinning for developing the theoretical-conceptual basis encompassing all academic disciplines. His striving to find answers to deep theoretical problems within his own discipline of law resulted in the general philosophical work (Henderson, 1994: 24-5, 26-7). The development of the general philosophy was accompanied by the construction of a theory of law containing a closely interconnected array of concepts founded on a multi-aspectual approach and intended to serve as a comprehensive theoretical basis for the discipline of law (Dooyeweerd, 1967). This article draws on the Dooyeweerdian philosophy and its legal disciplinary expression in the theory of law in order to demonstrate its application to one area of law, contract.

**Contract-Contract Law Distinction**

Contract is a fact of life in any contemporary reasonably developed society. It is almost impossible for any adult and many “minors” to avoid daily entering into contracts when taking a ride on public transport or in a taxi cab, buying a newspaper or other goods from a supermarket. Then there are the myriad of commercial and consumer contracts involving business activities and significant domestic transactions such as purchase of a house property, car etc. Hence contract law world-wide is a core subject in the higher legal education of both intending legal practitioners and non lawyers whose professions involve the practice of making and performing contracts.

Implicit in this last statement is a fundamental distinction between contract and contract law. Whilst contract law scholars and theorists no doubt recognise the distinction, nonetheless they often have great difficulty in clearly explaining it. There is a conundrum here, which contributes to the explanatory difficulty in both theory and practice. For example, we might explain the distinction by saying that contract law is the law administered by the courts that regulates contracts as an economic event – an explanation which no doubt would receive broad agreement from contract specialists and commercial practitioners.

The problem arises from the fact that it is also widely held that the contract itself in some sense or other is already a legal “thing”. One theoretical answer (legal positivist) is to say that it is the law of contract itself that gives to contract its legal quality. But this is not satisfactory because it may simply mean that the law of contract is what gives the contract “official” (public legal) recognition for the purposes of state legal enforcement through the courts. It does not explain the existence of the contract itself. Even saying that the state law of contract goes further by providing “facilities” for promoting the contract-forming practice, not just remedies when contracts are breached (Hart, 1961: 27-8), still does not explain why the action of contract formation and the formed contract itself is regarded as having a jural (legal) quality in itself distinct from the state law that governs it. However important the state law of contract is to the emergence and maintenance of contracting as a societal phenomenon it is not the state that forms the contract. It is the parties themselves that do that. One theorist has correctly pointed out that it is quite possible in a particular societal context to have an established practice of contracting that does not practically depend on the state law of contract at all (Collins, 1999). Yet no one denies that these are contracts which vis `a vis the parties and the wider community are viewed as *binding*.

So the problem here is that of explaining the nature of different but interconnected “social” “things – in this case a contract as a socio-economic-legal practice and the (state) law of contract.

**Multi-Aspectual theory, contract and contract law**

The positivist influence on contract law theory, doctrine and practice which tends towards reducing an explanation of the contract into an account of the (state) law of contract has meant that the theoretical and practical significance of making the sociological distinction between contract and contract law has been under-appreciated. It is in the theory of entities of all kinds, in this case “social” entities that the theory of multiple aspects comes to the fore. The question, what *kind* or *type* of thing is a *contract*, and what *kind* or *type* of thing is the *law of contract*,invite answers which recognise that different kinds of things function in different *ways* or *modes.*  Furthermore, it is only *one* of those modes of functioning that *typifies* that thing as being the *kind* of thing it is often described as being. Let us accept for the moment the widely held view that contracts are the result of mutual agreements of usually two persons (individuals or entities) that are economic in kind or type (Bigwood 2003: Ch 2). By contrast, the law of contract that regulates that economic thing is correctly described as legal or *jural* in kind or *type*. This account is consistent with the multi-aspectual approach, but does not as yet resolve the conundrum. For how is it that the contract can also be described as being in itself “legal” or *jural* without necessarily referring to the “legal” sanctioning of the state law of contract?

**Multi-aspect theory and entities**

A key element of the multi-aspectual approach is the insight that *every* thing (entity), indeed every phenomenon, of whatever kind (*type)* – social communal “physical”, biotic etc – functions in multiple ways or modes even though only one of those modal ways of functioning (functions) *typifies* the entity (or phenomenon) as the kind of thing it is. More remarkably it seems that every thing, irrespective of its typifying function, also functions in *every* possible mode or aspect of experiential reality (“life”) – a phenomenon that points also to the unbreakable interconnection of all experiential reality. Even though a plant is not an ethical or legal entity in its *subjective* functioning – it cannot do legal acts or love – it can function in the ethical/moral aspect as the *object* of love (Strauss, 2009: 76-7; 344-48). In other words there is a capability that is objectively part of the plant’s functioning that enables it to be *subjectively* loved by some human subject. This can even apply to legal “things”. (Dooyeweerd, 2002: 185-95) For example some laws or legal systems or individual laws may be revered for their justice and fairness.

**Multi-aspectual account of contract and contract law: a pluralist theory of law**

Arising out of his multi-aspectual philosophy, Dooyeweerd’s theory of the sources of law, even now, compared with modern pluralist theories of law, stands out as a radical theory of legal pluralism. That is to say, he advocated a theory that law “properly so-called” has multiple original sources and is not confined to the rules, principles and decisions that emanate from State institutions either directly or indirectly (Dooyweerd 1966). And this, it is argued, is fully congruent with everyday legal experience as we shall see. The theory of sources of law is built upon three key elements of the multi-aspectual perspective: the theory of the modal aspects, of entities (“individuality-structures” or entity *types* (Strauss 2009: 25, 79)) and the theory of the interconnection of entities (“encaptic interlacements”) (Dooyeweerd, 1997: vols 1-3).

The generation of law of whatever kind and whatever its source is never *merely* the product of an isolated individual person but is always associated with a community, institution or communal relationship. Extreme legal positivism confined law “properly so called” to the commands of a sovereign” (e.g. Hobbes and J. Austin). Forms of legal positivism of whatever version however, have identified law as emanating from state institutions. By contrast, it is a logical consequence of the theory of modal aspects confirmed by experience that every human communal or social thing functions in a universal, irreducible jural (not merely “legal” in a positivist state law sense) way, within a jural modal aspect or “sphere”. Any attempt to resolve conflict by the establishing of norms, principles, and rules that involves a process of weighing legitimate interests proportionately to obtain a “fair” or “just” outcome implies the positing of law or legal (jural) norms of some type depending on the context in which this jural weighing is embedded. Every human being functions subjectively in the modal jural aspect. Therefore most persons, that is mature adults, possess a jural competence for law making of one or more types of law. In the case of not yet fully mature persons, for example, very young children, there is a potential competence for law-making. Others, however, may never possess the capacity for law-making owing to some disability, for example “unsoundness of mind”.

**The contract as economic form of law**

While there is a public need for a general state law of contract that regulates individual contracts and the practice of contracting as a whole (Bigwood, 2003: 59-61), the contract itself as a type of legal instrument *is not* a state law and *does not* originate in the state law of contract. It is nonetheless true that every contract constitutes a law of a particular type for the parties to it. It is merely a *different form-type* of law from that of the state law of contract. In the jurisprudential theory arising from the multi-aspectual perspective a *private* contract between commercial parties is as much law as any state law whether a statute or a common law rule, where the former applies only to the parties to the contractual agreement while the latter embrace the general public or citizenry.

This conclusion invites answers to further important questions. First, what is it that makes *any* law a law? That is, what are the defining characteristics of law in a jural sense? Secondly, what determines the different *types or originating (genetic) forms of law* (Dooyeweerd ?[[2]](#footnote-2)). And finally, in the context of the present inquiry, if a contract is indeed a type or original form of law, what specific type or original form of law is a contract? The three key theoretical elements of the multi-aspectual approach mentioned above allow us to find answers to these questions.

**What is law?**

In Dooyeweerd’s theory the modal aspects are the diverse irreducible (ontic) ways in which all of reality functions. The normative jural aspect is one such irreducible mode of functioning. All of reality functions in this mode but only human beings function *subjectively* in this aspect. All other beings, things, etc can only be jural objects.[[3]](#footnote-3) Human social entities – communities and associations of all kinds – in virtue of their human membership all function subjectively in the jural aspect. The concrete expression of human entities functioning in the jural aspect are the laws generated by those communities through the agency of human persons with the competence to make law. Irrespective of the type*-form* of the law (a contract, statutory enactment, local authority regulation, court legal ruling, etc.) what makes a (jural) law of any type law, what makes it a distinctively jural modal expression and not some other normative mode of human functioning such as social, historical, moral etc., is found within the distinctive normative core of this aspect. Dooyewerd summed this up in the Latin phrase suum cuique tribuere – to each is owed what is that person’s due. This in his view points to “retribution,” understood its original more-than-criminal global sense, as the single term that captures this normative core meaning of the jural aspect. Though he vigorously defended this term choice (Dooyeweerd 1961: 2-9) some of his followers who accept the substance of his argument prefer “tribution” as referring to the original normative jural state of reality. Retribution in their minds presupposes an original normative position of “tribution” to which re-tribution is seeking to restore as far as is humanly possible. For example, to relate this to our contract law focus, a contract sets for the parties there mutually agreed dis-*tribution* of contractual rights and duties. When this agreement is violated by one of the parties, the “innocent” party is able to look to the law of contract to bring about a re-*tribution* to accord with the original agreement and the overall public legal (state) requirements of contractual justice. This choice of “tribution” also avoids the problem of having to constantly distinguish the jural modal core meaning of retribution from the commonly understood, but narrower, penal legal and moral sense of that term with all the associated controversy over its meaning and place in morals and criminal law.

**Law, Things and Legal/Jural Things**

A problem with Dooyeweerd’s theory of law is that it does not seem adequately to acknowledge the *concreteness* of laws, that laws are as much (jural) “things” as the communal, institutional things in which they are found or to which the laws relate. (Dooyeweerd 2002: 4-5) He only saw laws as expressing the jural aspect of concrete things, persons, relationships, etc. Hence on his approach an actual concrete contract could only be viewed as the jural modal expression of an economic relationship. The form-type of the law was economic because the concrete relationship from which the contract arose is qualified by its economic aspect though it is clear on his multi-aspectual approach that the two parties to a contract are functioning in more than merely the economic and jural aspects within their interactions. To mention some key, but not all, modes of the relationship, the *social* dimension of the relationship (social intercourse) necessarily precedes the development of an *economic* and *legal* relationship, which may flower through realisation of *ethical* aspect of trust and confidence that is often evident in long-term economic relationships - the so-called relational contract (Macneil 1985).

Compared with the private (non-state) jural formation (law) of contracts, any law emanating from *state* legal organs according to this approach is of a form-type *whose qualification is itself jural.* This is because the core business of the state is jural (public legal) in its normative type and purpose. Here the radical character of Dooyeweerd’s legal pluralism emerges. It is only the state as a concrete human entity that is qualified by the jural aspect and therefore directed towards promoting justice (tribution) both within and without its own institutional structure. Hence the state’s own law, and *only* the state’s law, is jural in its form-type *qualification*. Therefore the *state* law of contract has an overriding state (public) jural purpose of ensuring justice between the parties to the contract, the contract being a (*private*) non-state *law* formed by the parties for themselves which governs their economically qualified relationship in one or more economic transactions. Part of the public jural “justice” function of the state law however is a normative requirement to respect other jural spheres – to regulate but not obliterate the parties’ own private law (hence “free” contracting) by the state’s public legal instrument. (Dooyeweerd, 1967: vol II, 433-67). The courts in the common law tradition at least insist that it is not their function to make the contract for the parties.

Economic relationships are not the only sites for the generation of non-state (‘private) law however. Private associations, clubs, even families and intimate personal relationships generate their own informal rules expressing the jural dimension of those relationships – which the state law for regulating them must also respect for a healthy functioning of non-state entities. These express the distinctly different types of societal entities which have their own normative type qualifications though they all function in every aspectual mode of reality. It is this irreducible ontic (embedded in reality prior to human construction) modal/aspectual basis of these normative qualifications that guarantees their distinctiveness, even if in practice this is not respected by individuals, states and other societal communities in the course of their history.

**Concepts of Law Grounded in Multi-Aspectual Perspective**

The purpose of a specialist academic discipline from the multi-aspectual perspective is to be open to explore as much of reality as available for study *from the point of view, angle of approach, (ontic) perspective of* one or more (abstracted) aspects of reality with which the discipline is concerned (Strauss, 2009: 53). The discipline of law in principle excludes or *ought* to exclude nothing in human experience from its gaze but should confine its focus on that expanse of experienceable reality to its functioning in the jural modal aspect. It can only do this via the intellectual instruments of *theoretical* concepts that presuppose the analytical distinguishing of aspects of reality. Hence one of Dooyeweerd’s great insights was to realise that it is not possible to meaningfully theorise on any subject without a prior analytical distinguishing of irreducible aspects of reality that makes possible the formation of distinctive concepts for any specialist discipline. For his own specialist discipline of law he realised that one cannot meaningfully theorise about law in its *concrete* social reality without first appreciating its *non-concrete* modal character which gives to actual (concrete) law and legal things (Courts, state legislature , contracts, etc) their distinctive jural character.

However, Dooyeweerd’s jurisprudence elaborates the overarching general concept of law in all its breadth and depth, including all of the basic “elementary” and “complex” or “compound” concepts of law (Dooyeweerd 1967: 11-97; 98-266), by grounding this entire conceptual apparatus in the modal *interconnections* of all aspects of reality (intermodal coherence). Within each aspect including the jural are connections, (ontic) analogies to all the other aspects, which in the case of law grounds the basic concepts of law. For example, *legal formation* is a basic jural concept that relates not only to the generation of state laws but to every jural sphere where law formation is possible. Formation is therefore a basic concept of contract law that relates to an issue often contested in contract law cases: was a contract actually formed?

Formation is a jural concept that appeals to the historical (cultural) aspect of forming or shaping, not in its original historical meaning, but in an *analogical* jural meaning of legal (jural) formation. Therefore the contractual formation issue can only be understood and answered in the courts from the standpoint of insight into the jural aspect of reality. The concepts of (contractual) legal *force* and *bindingness* or ob*-ligation* appeal to an original *physical aspect* of reality*.* Yet the meaning of these *physical terms* introduced into legal analysis are only *analogically* physical, that is, they have a distinctive normative jural meaning (qualification) only analytically understood from the jural-aspectually defined standpoint of the discipline of law. A contract is *legally* binding, has contractual-legal force and so forth.

**Solution for the Contract versus Contract Law Condundrum**

Without attempting, in this short article, the impossible task of presenting a fully-fledged theory of contract and contract law, it is nevertheless possible to give an indication of the direction towards an answer to the contract-contract law conundrum outlined above employing the multi-aspectual approach. This requires enlisting the support of the theory of interconnecting entities, the third key theoretical element of the multi-aspectual approach. Dooyeweerd himself did not provide this answer for the reason mentioned earlier that he failed to apply his own theory towards explaining sufficiently the multi-aspectual *concreteness* of laws as concrete jural *things* that interwine with other types of concrete things.[[4]](#footnote-4)

It is necessary to modify our earlier statement accepting the widely held view of contracts as economic in nature. While it is true that underlying any commercial or consumer contract is an economic transaction or “bargain” (Bigwood 2003: 25-58), contracting as a practice developed later as a private jural instrument to enhance the bargain by providing certainty of performance of the bargain in its allocation of rights and duties that jurally binds the parties to the performance. That is to say, the contract embodies the bargain in a distinct jural form that has the *force*  of (private) law for the parties who are now mutually obligated (jurally) to perform the economic transaction with its own economic normative requirements (efficiency, avoidance of unnecessary waste and expense, application of business acumen etc). The difference between the jural obligations of the contract and the merely economic obligations of the underlying transaction is reflected in the jural response to economic non-performance to which either party is entitled if the other fails to perform. It is not often fully appreciated that, even without the heavy sanctioning weight of the state law of contract, the parties themselves will frequently explicitly provide their own private remedies in the event of breach or non-performance which the contract entitles them to privately enforce. Before the advent of state systems of law there developed private (non-state) adjudicative and arbitrative institutions associated with particular commercial practices and industries to make more efficacious the individual private contractual agreements (associated with the rise of the ancient *lex* *mercatoria*, Law Merchant). The contractual instrument is vital to the flourishing of successful commercial and business enterprise. In turn, the modern state law of contract is vital to the flourishing of the private jural practice of contracting. But without a clear conceptual framework of analysis, such as the multi-aspectual approach provides, it is difficult to clearly distinguish the distinct types of societal phenomena that are closely interwoven together in quite complex ways. Yet such analytical clarity is essential for truly constructive contributions which only theories can provide when they are oriented to concrete experience in order to elucidate and enhance human activities in communal and institutional settings.

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1. Dooyeweerd’s doctoral dissertation was on the institution of the Cabinet in Dutch Constitutional Law [↑](#footnote-ref-1)
2. Uncertainty in the date is on account of the text, in which the concept of originating forms of law is discussed, is apparently a continuation (*Vervolg*) of the 1966 student notes (*dictaten*) cited earlier as Dooyeweerd 1966, though no date is attached to the copy in my possession edited by H.J. Hommes, presumably sometime subsequent to 1966. [↑](#footnote-ref-2)
3. Hence denying the notion of animals, trees etc having subjective rights; they can only be the object of human subjective jural protection. [↑](#footnote-ref-3)
4. But he did provide a highly sophisticated account of the interweaving of different originating types of law within the *form* of law as the “nodal point” of interconnection (for example, originating legal norms of a private law type found within a public originating form such as a statute). See Dooyweerd 1966 and its continuation in the undated unpublished volume of “student notes” cited earlier. [↑](#footnote-ref-4)