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**THE FUNDAMENTAL FREEDOM OF EDUCATION
IN THE LEGAL RELATIONS BETWEEN THE STATE
AND DAY SCHOOLS IN ONTARIO**

by
MICHAEL VAN WIJK

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of
the requirements for the degree of
Master of Arts in Legal Studies

Carleton University

Ottawa, Ontario

18 July 1994

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**The Fundamental Freedom of Education in the Legal Relations Between the State and
Day Schools in Ontario**

**submitted by Michael Van Wijk B.A.(Hons.) Carleton University
in partial fulfilment of the requirements for
the degree of Master of Arts**

Thesis Supervisor

Chair, Department of Law

**Carleton University
September 13, 1994**

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ABSTRACT

In this thesis I develop an articulation of what I have called the fundamental freedom of education, and provide evidence of this legal principle in relationship to Ontario education law. In order to show how the principle functions, and how evidence of it may be recognized, the sociological theory of Dooyeweerd with respect to the idea of state is adapted to the school. The legal theory of Van Eikema Hommes is used to elaborate on the fundamental freedoms as constitutive legal principles of state law, and on the external legal relation between state and school. Attention is paid to the underlying methodologies of these theories and to the resulting legal pluralism. An explanation of the continuing juridification of state schools is offered, and the fundamental freedom of education is suggested as an internal limit upon the juridical sovereignty of the state in the area of formal education.

This thesis questions whether the modern day school system may be considered a part of the state, and develops theory to provide an alternative answer, in which the school is considered a social sphere in its own right with implications for the legal relations between school and state.

INTRODUCTION

In previous work (1992a) I have attempted to show that fundamental freedoms, in the sense used in the *Canadian Charter of Rights and Freedoms*, are grounded in the freedom spheres of private persons and of non-state communities; that they are adopted by the state as constitutive legal principles, and included in its Constitution; and that, when they, in fact, determine the material content of positive state law, they are the material legal limits on the juridical sovereignty of modern states. These limits of legal competence are boundaries beyond which state law lacks material validity and is experienced as having an oppressive and destructive character. In this thesis I propose to summarize these findings briefly, and to build upon them.

In particular, I will examine the case of the public school system in the province of Ontario. The very close relation between the state, as represented by the province of Ontario, which has juridical sovereignty in the area of education, and the Ontario public day school system provides an interesting example of heavy state intervention in a non-state area of activity. This raises immediately the question, to be addressed in this essay, whether the school is a part of the state, and if not, how they are to be distin-

guished from each other and how they are related, as well as how that relationship is to be described if not as a part-whole relationship, and in particular, how the legal relation between school and state may be understood if, as I shall argue, the school is not part of the state.

Of special interest is the question, which fundamental freedom delimits the legal competence of the state with respect to the school, if the latter is not an autonomous part of the state. And what evidence there is for such a fundamental freedom, which I have chosen to call the freedom of education. The latter is to be distinguished from the legal right to a free (i.e., state-subsidized) day school education.

I shall attempt to demonstrate that there is evidence of such a fundamental freedom of education in Ontario education law, as well as in the education law of other Canadian provinces. I will argue that the public school systems are excluded from its effects, and consequently suffer from an increasing juridification, which in part explains widespread unrest and discontent about the deteriorating quality of education in Ontario, its increasingly violent character, and a growing conviction that the public school system has failed.

In order to consider these questions, attention must be paid to the nature of education, its relatively invariable

structure and its variable purposes. Also to be considered is the organizational context in which day school education takes place, and its relation to the state (i.e., the various ministries, especially the ministry of Education, and the municipality in which the school has its individualized and concrete social form). Since I have found very little written on this subject, a portion of this thesis is devoted to the question: "What is a school?", and "How does it relate to parents, teachers, community and the state?". I shall limit myself to the legal relations between school and state, although economic relations also play a very important role.

In an attempt to locate this project in current discourses, I have discussed in the first chapter a study by Margaret Archer on the rise of state education, an article by Jürgen Habermas on state intervention in education, and a recent translation of an earlier work by Niklas Luhmann on the sociology of law and legal pluralism.

In the second chapter I review in some detail the methodological considerations underlying the approach chosen to deal with the theoretical questions that have been raised. I briefly outline their implications for a sociology of law, for a legal theory, for a socio-legal pluralism, as well as for an anthropological model that I have adopted.

The theoretical implications for state and school and

their legal relations will be discussed in chapter 3, in which I also discuss the question of day school education and the nature of its supporting community.

In chapter 4 I explore the history of the involvement by the state in day school education in Upper Canada; followed by a discussion of current Ontario education law, and the impact of the *Canadian Charter of Rights and Freedoms* on school law.

In the fifth chapter I deal with the idea of freedom of education as a fundamental freedom in the sense of the *Charter*, review freedom of education in international law, and present the evidence I have found in Ontario education law for the existence of such a fundamental freedom, and its implications.

In the final chapter I provide a summary of the underlying assumptions, the chosen methodology, the theoretical implications, the theoretical conclusions, the legal historical findings, and the implications I see for the possible legal reforms of public education in Ontario.

CHAPTER 1: CONTEMPORARY THEORIES

1.1. The emergence of state educational systems

In her book *Social Origins of Educational Systems* (1979), Margaret Archer takes a macro-sociological approach with regard to the relation between educational systems and the state, following the mainstream of the Weberian tradition (p.5). Her focus is on that type of formal education, which gave way in each of the countries studied (i.e., France, Russia, England and Denmark) to the development of state educational systems. The latter are defined as "a nationwide and differentiated collection of institutions devoted to formal education, whose overall control and supervision is at least partly governmental and whose component parts and processes are related to one another" (p.54). The common feature of the early educational systems of these four countries was that in all of them those who controlled education also owned it, in the sense of providing its physical facilities and supplying its teaching personnel. In mid-eighteenth century France that was the Roman Catholic Church and its religious orders; in late seventeenth century Russia it was the Russian Orthodox Church and its associated Brotherhoods; in mid-sixteenth

century Denmark is was the Lutheran Church; and at the end of the eighteenth century is was the Anglican Church in England (p.57).

The fact that these particular groups virtually monopolized educational ownership meant that education only had relations of interdependence with one other social institution, a situation which Archer describes with the term *mono-integration* (p.60). Interdependence indicates that there is an interchange between the two institutions of resources and services, and when this interdependence becomes unbalanced, one party ends up serving the other for little or no return, but correspondingly it also suffers a loss of autonomy. Since education has a high material resource requirement for its operations, it has always been the subordinate partner to the institutional supplier of these resources. Consequently, education tends to have low autonomy for the internal determination of its operations. As a result, educational change cannot be initiated endogenously. Moreover, the ownership group, who invest in instruction only because they require some particular kind of educational output, defines instruction in relation to its goals, and monitors it closely to ensure that it serves these purposes. This in turn means weak boundaries between education and the dominant institution, and a low level of differentiation between them. Thus in church-dominated

education we see, for example, the use of catechisation and disputation as methods of teaching and learning (p.64).

In addition to consequences for education itself, mono-integration has repercussions upon other social institutions. Archer distinguishes three situations. Firstly, there may be institutions that although not served by education are not impeded by it. The second category consist of those institutions that derive an adventitious benefit from it. For example, legal systems based on Roman law system, were quite well served by the classical education conducted by the most important Catholic teaching Orders. Institutions in this category will tend to be loci for support of the prevailing education and its controllers (p.67). The third category consists of institutions that are clearly obstructed by educational output, because they are incompatible with them. Thus the entrepreneurial elite in early nineteenth century England had limited access to secondary and higher education due to social and religious discrimination; and the classical nature of secondary instruction was irrelevant to capitalist development. Although there is no reason why there should be a single institution in any category at any given time, it seems to be common that several different spheres are suffering simultaneously from obstructions of varying degrees of severity. These spheres need not be allies, and may even

have opposite interests, but they play an important role in educational reform.

If education possessed some autonomy for the internal determination of its operation, then at least in theory, some educational change could be initiated. This seems to be excluded, however, in mono-integrated education with low autonomy implicit in a high degree of subordination. This means that the attempts to overcome the obstructions in education must be directed at the institution with which education is integrated, for it is the source of obstruction. If these owners have invested heavily in education, and have been able to determine the outcome of the education process in a way that they think suits them best, then those who are concerned to introduce the most far reaching changes are least able to do so by peaceful negotiations with the controlling group. Thus Archer concludes, that the only way large scale educational change can be brought about is by imposing it via a process of coercion (p.71).

If the dominant group is to retain its position of exclusive control it must continue to be the only supplier of the resources upon which the educational operations depend. It must in some way prevent others from converting financial and human assets into schools and teachers. This

can be done in two ways simultaneously. Other groups can be discouraged by convincing them that they lack the right, the ability and the experience to engage in educational activities, or that the type of education provided is the best, the most proper, and the only one possible. Thus an ideology legitimating this monopoly on traditional or rational grounds can be used by the dominant group to defend its conclusive control. Secondly, a series of constraints can be employed to prevent other groups from supplying the facilities, and these three, monopoly, constraints and ideology are considered the three necessary conditions for continued exclusive control (p.92).

The possession of an ideology performs three vital functions for an assertive group that wishes to challenge exclusive control by a dominant group. Firstly, it is a central factor in challenging domination, by unmasking the interest served and thus reducing support for the prevailing definition of instruction. Secondly, it is crucial to legitimating assertion itself. Finally, it is vital for the specification of an alternative definition of instruction, which is the blue-print to be implemented if the assertive group is successful (p.114).

Assertive groups can employ either a restrictive or a substitute strategy in devaluing the monopoly of the domi-

nant group, according to Archer. The former is usually employed when the assertive group has access to national legislative machinery or a supportive political elite, whereas the latter is most likely to succeed when there is access to an economic elite (p.123). Archer's main thesis is that the integration of education with the State and with a plurality of other social institutions emerges from the interaction of dominant and assertive groups. These external structural relations are accompanied by various changes taking place within the educational field. The most important of these are the development of 'unification', 'systematization', 'differentiation' and 'specialization' (p.144). The first two are typical of centralized State educational systems, and the latter of decentralized systems.

The key concept underlying Archer's thesis is that of differentiated institutional orders, for the notion of integration refers to the relations between differentiated units with relative high degrees of autonomy. Thus the theory is not applicable to earlier social structures such as historic Empires or ancient Eastern civilizations, which displayed relatively low levels of differentiation.

The process of interactions, which is responsible for the integration of the education with the State and with a

plurality of other social institutions is also responsible for education losing its mono-integration with its owner. When restrictive strategies are used, the assertive group uses legislative machinery to organize public educational financing, and with the mobilization of public resources for purposes of instruction, educational control and ownership become separated (p.148). Education remains subordinate, but now becomes dependent upon resources owned and supplied by the State. The capacity to define instruction becomes linked to political position of a dominant group, and, what is completely novel, can be lost with the declining political fortunes of the group (p.150). Since this group now needs support from other social institutions in order to remain dominant, the price it pays for such support is a certain diversification in educational outputs, which results in a certain degree of integration of education with other social institutions. The disadvantage of the restrictive strategy is its dependency on the legislative process. Educational change and reform will display a stop-and-go character, with spurts of change and long periods of stasis, in which discontent builds up sufficiently to trigger a change in the dominant political elite.

Substitution as a method of assertion is an attempt to

displace an existing dominant group through market competition. It develops and provides new schools and teachers, and thus imposes its own definition of instruction. Ultimately, however, competition can only reduce school enrollment and increase costs for the dominant group; it cannot deprive them of the facilities they own or the right to keep supplying them. Substitutional strategies mean, therefore, that various groups come to own and control independent networks of educational institutions of different size and importance, the owners of which may seek political support to consolidate their control.

In both strategies there is integration between education and the state. The restrictive strategy tends to favour the development of a monolithic, centralized State educational system that depends on legislative change for reform, whereas the substitutive strategy results as an unintended by-product in a diversified, decentralized State-supported educational system, in which educational reform is dispersed in various networks, and tends to have an ongoing, pluriform character.

Unification involves the incorporation or development of diverse establishments, activities and personnel under a central, national, and specifically educational framework of administration (p.174). A centralized system is a spe-

cial type of unified system, and unification goes hand in hand with systematization, whereby the various parts of the unified system are ordered into a system. The development of a hierarchical organization is characteristic. It refers to a gradual articulation of the different educational levels which previously may have been completely uncoordinated, hampering educational goals by a lack of complementary with inputs, processes and outputs at other levels (p.176). Other characteristics of systematization are the national examinations, which serve to standardize teaching and learning processes; regular forms of teacher recruitment, training and certification, valid throughout the system; and the development of services, establishments, and other trained personnel to complete the coordinating process (p.178).

The source of educational differentiation in state systems is located in the multiplicity of goals imposed on education by various influential parties. This is often accompanied by a certain degree of specialization to meet the demands whose diversity is incompatible with unitary processes (p.182).

Educational systems originating from substitutive strategies retain differentiation and specialization as their dominant pair of characteristics and these constantly

create strains and problems which are barely contained by simultaneous but weaker pressures toward unification and systematization. They may properly be referred to as decentralized, and their "looser" internal structure allows of experimentation and diversification. These systems also have a distinctive process of educational reform, which compared to the stop-and-go legislated reform of the centralized state systems is more continuous and experimental.

Discussion and evaluation

Archer has provided a sophisticated theory about the emergence and nature of state educational systems and has demonstrated its explanatory power in numerous examples of developments in the countries studied. Key to her approach is what she has termed the macro-sociological method by which she limits herself to the social interactions between institutions. This allows her to treat educational systems at a high level of abstraction as "black boxes", with educational input, process and output functions determined by different definitions of instruction. Her method presupposes a highly differentiated society with a multiplicity of institutions having different educational requirements, and she clearly states this as a limit upon the applicability of her theory.

The state receives little attention, except as a locus of power, and indirectly of wealth through the power of taxation, which makes it a prime supplier of educational resources. Power and wealth play a crucial role in her theory, in relation to the restrictive and substitutive strategies of assertive groups who wish to change the predominant definition of instruction.

The theory also has a number of weaknesses in my opinion. It does not deal with the nature of the integration between educational systems and the state or the multiplicity of other institutions. It does not distinguish clearly between the various kinds of integration, such as legal and economic integration, and it does not address the limits of this integration. This is an important shortcoming, as the rise of very powerful teachers unions in certain states like the United States of America and Canada receive little attention. These unions largely control the internal educational processes as well as the definitions of instruction, to make reform often difficult if not impossible.

Furthermore, the theory has no satisfactory explanation for the kinds of institutions that arise with a high level of societal differentiation, the role of the modern state in this process, or the role of school law and the resulting societal integration. Except in terms of institutions,

the theory does not account at all for the role of parents, who in modern international law have prime responsibility for choosing the education of their children.

Although Archer has a keen eye for the distorting influences of the State's unification and systematization of educational systems at all levels of education, and especially its effect on educational experimentation and reform, her theory does not really lead to a fundamental critique of state educational systems. The reason, I submit, is that she fails to deal with the integrating character of state law and its limits as expressed in fundamental freedoms.

1.2. Habermas on school law

In his essay "Law as medium and Law as institution" (1986), Habermas in contrast to Archer pays particular attention to the role of law in the integration of educational institutions and the state, and ignores the integration with other institutions. He approaches the modern welfare state from a historical-analytical perspective as the last stage of a process of 'juridification', in which the *Rechtsstaat* (constitutional state) goes through several phases. In each phase law expands to regulate additional areas of social life, which in a previous phase were left

to their own informal control and regulation. What drives this process of juridification, this expansion of written law, are the pathological side effects that become apparent during each phase, as well as the attempts to overcome them in the following phase.

The expression 'juridification' (in German: *Verrechtlichung*) "refers generally to the tendency towards an increase of written law which can be observed in modern society" (p.204). Habermas distinguishes this juridification as the expansion of law, i.e., the legal regulation of new, until now informally regulated, social situations, from the densification of law, or the specialized breaking up of global statutory definitions. As examples he refers to the development of school law and family law. "In both cases juridification means, in the first place, *enforcement of constitutional principles*: the recognition of the fundamental rights of the child against his parents, of the wife against her husband, of the pupil against the school, and of the parents, teachers and pupils against the state school administration. Under the headings of "equal opportunity" and "the welfare of the child" the authoritarian position of the *paterfamilias* . . . is being dismantled . . . " (p.215, emphasis in the original). "This expansion of legal protection and the enforcement of funda-

mental rights in family and school called for a high degree of differentiation of specific legal conditions, exceptions and legal consequences" (p.217). Based on this expansion Habermas distinguishes four stages or thrusts of the modern state. Each of them deals with a new expansion of law, which tries to overcome the pathological side-effects of the preceding stage.

The current and fourth stage of the Rechtsstaat he calls the social and democratic constitutional state, which is characterized at the same time by guaranteeing and by denying freedom. For instance,

"The net of welfare [that the] state guarantees is meant to cushion these external effects of the production process based on wage labour. Yet the more closely this net is woven, the more clearly appear ambivalences of another sort. The negative effects of this - to date, final - thrust do not appear as side-effects; they result from the structure of juridification itself. It is now the very means of guaranteeing freedom which endanger the freedom of the beneficiaries" (p.209, emphasis in the original).

It would appear from his characterization of this current stage that the modern welfare state is in danger of destroying society itself. As examples of this danger Habermas discusses the formalization of relationships in family and school, and the need to 'dejudicialize' juridified family and school relations, based on empirical re-

search of child custody law and school law in the Federal Republic of Germany. In both cases the juridification occurs as an *enforcement of constitutional principles*: the recognition of the fundamental rights of the child against his parents, of the wife against her husband, of the pupil against the school, and of the parents, teachers and pupils against the state school administration (p.215).

While the core areas of family law have been reformed through case law and legislation, "the bringing of the school under the rule of law, i.e., the legal regulation outside the law, as specified in the official prerogatives of the school, was initially stimulated by case law and then carried forward by the government educational bureaucracy through administrative channels" (p.215). This educational bureaucracy had to ensure that educational procedures took on a form in which they were accessible to judicial review. In turn, the judiciary called upon the legislature to act so as to guide the overflowing bureaucratic juridification into statutory channels. This expansion of legal protection and the enforcement of fundamental rights in family and school called for a high degree of differentiation of specific legal conditions, exceptions and legal consequences. In this way, these domains of action were opened up to bureaucratic intervention and

judicial control.

Of special interest is the way Habermas describes the limits of the juridification process: "There are structural differences between the legal form in which courts and school administrations exercise their powers, on the one hand, and an educational task which can be accomplished by way of action oriented to reaching understanding on the other" (p.219). These structural differences leave the teacher insecure and evokes reactions such as over-attention to or concealed disobedience of the law. Controlled by the judiciary, the school changes imperceptibly into a welfare institution that organizes and distributes schooling as a social benefit.

Discussion and evaluation

Habermas historical-analytical method has considerable explanatory power. His idea of the Rechtsstaat and its development runs parallel to the theory of the Rechtsstaat as developed by Van Eikema Hommes (1979, and summarized in Chapter XV). But unlike Hommes, Habermas does not consider the possibility of developing the material criteria of the limits of the Rechtsstaat's juridical competence, which would make it possible to break with what now appears to be

an inevitable historical process. Of particular interest is Habermas' example of the juridification of the school community, which in my opinion is very perceptive. He does not, however, deal with the question how the school might defend itself against this juridification.

It would also appear that Habermas confounds fundamental freedoms and human rights and ascribes "Drittwirkung" to the former in the areas of the latter¹. This legal doctrine, first introduced by the *Bundesverfassungsgericht* (the German Federal Constitutional Court) in its decision of 15 January 1958, teaches that the principle of human dignity applies equally to the public as well as the private legal spheres, resulting in the application of fundamental freedoms in the area of private law. Habermas speaks consistently about 'fundamental rights' and elsewhere (1974:116) has written ". . . the fundamental rights were once, in the liberal manner, understood as the recognition and not as the conferring of natural freedom belonging to

1. *Drittwirkung* (literally third working) or the effect on a third party, *in casu* the (inappropriate) application of fundamental freedoms, which delimit the juridical sovereignty of the state, in the private legal sphere, which orders interpersonal and intercommunal relationships. An example is the attempt to defend hateful and racist speech with reference to the fundamental freedom of expression, as in John Dixon, "The Keegstra Case: Freedom of Speech and the Promotion of Hateful Ideas", in John Russell, editor, *Liberties*, Vancouver, New Star Books, 1989.

an autonomous private domain, external to the state, but now they can derive their specific meaning only from the context of objective principles constituting a total legal order which encompasses both state and society."

Finally, it appears that Habermas does not recognise the juridical sovereignty or legal competence of the non-state life spheres to form their own internal legal order, and assumes that what he calls the informal law of these spheres, can indeed be taken over by state law, without destroying in the long run both these spheres as well as the state itself. This is remarkable, as Habermas has a keen eye for the pathological side-effects of this process in the subsequent phases of the Rechtsstaat. I shall argue in chapter 3 that a *material* concept of the Rechtsstaat, in contrast to a *formal* concept, will take this juridical sovereignty of the non-state life spheres into account.

1.3. Luhmann on positive law and social pluralism

The German sociologist Niklas Luhmann in his *A sociological theory of law* (1985) connects the legal aspect with an increasingly differentiated society, in which political power has developed that possesses the monopoly of sanction for the upholding of legal norms. Society is treated as an

autopoietic or self-organizing system, which has differentiated from its environment into a number of non-overlapping subsystems. This differentiation is possible only when society as a system is both closed and open to its environment. Luhmann describes society therefore as "an open system, but on the basis of recursive closedness" (p.282). The legal system as a subsystem of society is a *normatively closed system*, according to Luhmann (p.282). By this he means that it produces its own elements as legally relevant units by the fact that it lends normative quality precisely with the aid of these elements. At the same time the legal system is a *cognitive open system* (p.283). It remains oriented to its environment despite its closedness, indeed because of its closedness.

Legal norms as elements of the legal system are valid expectations of behaviour, which have been chosen from a universe of possible ought statements, and which are upheld by legal sanctions. Validity here is not only procedural correctness in making such choices, but also refers to generally approved choices. The connection between legal aspect and a differentiated society appears to lay in the conformity between the differentiation in society and a corresponding differentiation in law, which Luhmann indi-

cates with the term legal positivity². It appears to be a key concept of his sociology of law (*Rechtssoziologie*). Legal positivity does not simply mean positive law, in the sense of statute law as decided by legislatures, but it means especially law as it conforms and connects to changes in the social subsystems.

In this way Luhmann attempts to get a grip on what since Otto von Gierke's discovery of the existence of non-state legal orders has led to a variety of theories of modern legal pluralism, in the sense of a plurality of legal orders in the same social field (Griffiths, 1986), and to be distinguished from the old legal pluralism of a hierarchy of legal orders in the autonomous parts of the state (e.g., provincial laws, municipal by-laws). Luhmann's approach attempts to account for law formation in a causal relation to societal differentiation. Important in the concept of positivity of law (p.159) is the notion that law formation is in turn a cause of societal differentiation in the rise of a great number of specialized rule-administering agencies, which in turn generate their own specialized law. Furthermore, no matter how far removed from the origi-

2. Undoubtedly a translation of the German *Rechtspositivismus*. Luhmann (1985) refers in endnote 18 on page 345 to a discussion on the logical possibility of the *Rechtspositivismus*.

nal legislative decisions that set the process of differentiation in motion, there is no qualitative difference in legal norms. This suggests that Luhmann rejects legal pluralism in its modern sense.

Luhmann's concept of law may be described as 'congruently generalised normative behavioural expectations', which in his view is the essence of law. Law provides, therefore, premises of action in a programme of legislative decision-making. Legal science to Luhmann is a decision-making science, in contrast to sociology (p.275). It is founded in the pre-psychological and pre-sociological field of investigation, "where the foundations of elementary law-making structures and processes are to be found" (p.24). It is his starting point to explore the question how modern law comes to fulfill its central function. Law, according to Luhmann, "is an evolutionary achievement which comes into existence in dependence on the societal structure by way of differentiating specifically legal expectations." The boundaries of this concept of law are further clarified by relating it to "the more or less differentiated normative expectations" (p.81). Ultimately, law is defined "*as structure of a social system which depends upon the congruent generalisation of normative behavioural expectations*" (p.82, emphasis by Luhmann).

Of interest also is Luhmann's concept of normativity. His basic postulate is "that both the problematics of the field and the mechanisms of its resolutions are connected to the fact that the world situation of the human beings is *meaningfully constituted*" (p.24, emphasis by Luhmann). This postulate appears necessary, since human beings in their co-existence experience disappointments in their mutual expectations. These disappointments lead to a differentiation of cognitive (learning) and normative (non-learning) expectations. The former are associated with open systems, hence *cognitive open systems*, in which the system is open to its environment, and learns to adapt to the changes in that environment. The non-learning expectations are associated with closed systems, hence *normatively closed systems*, where the disappointments lead to a confirmation of the "ought" character of the expectation through possible sanctions in the legal system. According to Luhmann, ". . . normative expectations signify the determination not to learn from disappointments", and since "[a]ll expectations are factual, its fulfillment as much as its non-fulfillment", Luhmann concludes that "[t]he factual includes the normative. The usual contrast between the factual and normative should therefore be abolished", and "[a]ccordingly, norms are counterfactually stabilized behavioural expectations" (p.33).

Discussion and evaluation

It would appear that Luhmann stands squarely in the tradition of a sociology that derives its methodology from the natural sciences, where the foundations are found of modern systems theory, and upon which the analogical concepts of physical systems, biosystems, ecosystems, and communication systems are based, as well as Luhmann's notion of psychological systems (human beings as organisms guided by psychological systems, p.104). Here also are found the "mechanisms", another concept favoured by Luhmann (p.109), suggesting a mechanistic world view. In the physical aspect of interaction are found the foundations of social theory of human interaction, whereas expectations and disappointments are reduced to their psychological (behavioural) aspect.

The concept of a "closed" system is an abstraction, since if it really existed, it would be isolated from any observation (i.e., interaction with an observer) and we would have no knowledge of it. Physical systems can be isolated to a certain degree in order to study their interactions with a known physical thing. This isolation is, therefore, a methodological abstraction, which in classical physics was believed to be without limit. Quantum physics has shown that for microscopic systems such a limitless

isolation is unattainable, and that the observation itself interacts with the physical system.

In his *Conclusion (second edition)*, Luhmann (p.281) adapts this new understanding of physical systems to the legal system as a *normatively closed system*, and at the same time as a *cognitively open system* (p.283, italics by Luhmann). This must explain why laws have normativity (that is, have relative stability) and at the same time must be adapted to changes in "the environment".

Luhmann's concept of normativity appears closely connected with his naturalistic methodology. By denying the correlation between norm and fact that presuppose each other, and by relegating the normative side to the factual side of societal entities, he attempts to give his social theory of law a (natural) scientific status. The result is, however, that Luhmann's sociology of law evaporates in an abstract systems theory, in which the structural principles of the societal entities, to be discussed in greater detail in a following chapter, are reduced to "law as structure of society".

The part systems resulting from the functional differentiation of society according to Luhmann do not relate to each other in a vertical (i.e., a subordinate) relationship, but in a horizontal one (i.e., on a footing of equal-

ity)³. One could say that the functionally differentiated society is polycentric. This makes the central direction of society very difficult, if not impossible. Consequently, Luhmann's outlook of the future is rather pessimistic. This polycentricity would relativize the description of any one of the part systems, and make it dependent on the point of view of the system in which the observer is situated. If this interpretation is correct, it would make futile any attempt to construct a universal theory of social systems, including Luhmann's own general theory.

This emphasis on systems and their functional differentiation also signals a break with the old-European individualism. There is in Luhmann's concept of part systems hardly any place for individual persons with their own individual freedom spheres. It leaves unanswered the question if a person fits into any one of Luhmann's differentiated systems, and if so, whether in one only or in more than one. The question is important. The recognition of individual freedom spheres is also the result of a process of differentiation and, therefore, absent in so-called archaic societies. Furthermore, a great many people, in-

3. This may be the reason why Luhmann prefers the term 'part system', rather than 'subsystem', which latter term in General Systems theory refers to the hierarchical ordering of systems within an overall (world) system.

cluding children, have membership in or belong to a variety of different societal entities.

Finally, although Luhmann's social theory would seem to account for a kind of legal pluralism, with different part systems having their own law structure, Luhmann fails to distinguish between the various typical legal orders, such as school law, state law, church law, which brings his legal pluralism into question and suggest a turn in his thinking towards a legal positivism in which norms and principles have been reduced to the factual side of reality. Luhmann also fails to relate these typical legal orders to state law that, as I shall argue in chapter 3, integrates non-state law in an external manner. For this reason Luhmann's concept of autopoiesis remains vague with respect to the environment. It lacks a counterpoint that continues to integrate the recursively closed subsystems with their environment. In the next chapter I shall introduce the concept of 'enkapsis' that describes the relation of the autopoietic subsystems with their environment.

In the above discussions I have raised a number of critical questions and observations that the theories under review fail to deal with adequately. They touch on legal as well as sociological theory.

In Archer's theory the state receives little attention except as a locus of power and wealth, which play a crucial role in relation to restrictive and substitute strategies. Lacking especially is an account of the integrating character of state law, which asserts itself even when school systems are controlled by faith communities (parochial schools, denominational schools) or voluntary associations. Also lacking is an account of the role of parents, who in modern international law have prime responsibility for the direction of the education of their children in accordance with their philosophical or religious convictions.

Habermas' theory of the Rechtsstaat fails to deal with the internal material limits of the state in the context of what he calls *der Lebenswelt* (the life world). This is a serious shortcoming as in my view these internal limits are characteristic of the Rechtsstaat as I shall argue in chapter 3. The resulting juridification of the non-state 'social spheres' (the term is G. Teubner's) represents a powerful concept that I shall use and elaborate for the public school system.

Luhmann's general systems approach with its emphasis on autopoietic part systems that are mostly closed to their environment, lacks an adequate theory of the interlacement of these subsystems with their environment and the nature of its interaction with them.

In order to address the questions I have raised, I shall make use of a methodology first suggested by Dooyeweerd in the 1930's and further elaborated by Van Eikema Hommes in the 1970's. The former offers among others a sociological theory of the state and its relations to non-state communities, although not specifically in relation to the school community. The latter has elaborated a general legal theory with application to legal pluralism, although not specifically with application to school law. I shall develop these applications of the theories to the school community and to school law, respectively.

Both theories are of an adequate level of sophistication and have a well-developed, if unusual, terminology that makes the analysis of complex relationships possible. Each has a different methodology and rests on a number of suppositions, which is the subject of the next chapter.

CHAPTER 2: METHODOLOGICAL CONSIDERATIONS

2.1. Dooyeweerd's research methodology

In the opening chapter of his main work (1953-1958, NC I) the Dutch legal philosopher Herman Dooyeweerd (1894-1977) describes what he has called the three fundamental problems of a transcendental critique of theoretical thought. Transcendental in this context means an investigation into the internal structure of theoretical thought itself. Whereas Kant and Husserl have also offered transcendental critiques, these were directed to the problem of theoretical knowledge. They proceeded from the postulate that theoretical thought itself was neutral, and autonomous.

Dooyeweerd rejects the dogma concerning the autonomy of theoretical thought as an impediment to the mutual understanding among philosophical schools, and wants to investigate the connection between stand-point and the attitude of theoretical thought. His investigation is directed to "the universally valid conditions which alone make theoretical thought possible, and which are required by the immanent structure of this thought itself." (p.37)

The first transcendental basic problem of theoretical thought

Dooyeweerd phrases the first fundamental problem as follows: "How is the theoretical attitude of thought characterized, in contrast with the pre-theoretical attitude of naive experience?" (p.38) Here Dooyeweerd's own starting point becomes evident, which he describes in his Introduction (p.3). His answer is, that theoretical thought has a typically antithetic attitude, in which we oppose the logical or analytical function of our concrete act of thought, to the non-logical aspects¹ of our temporal experience (p.39). He uses the German word "Gegenstand"-relation, because theoretical thought *opposes* some aspect, e.g., the legal or the economic aspect to the analytical function of our concrete act of thought, and because reality *resists* this abstraction, due to the unbreakable coherence of these aspects, also called 'modes of experience'. These aspects have an internal structure that is referred to as a 'modal' structure.

The second transcendental basic problem of theoretical thought

1. For a discussion of aspects as modes of experience see section 2.2 hereafter.

Having abstracted some aspect of our integral experience of reality, the second research question can be formulated as follows: "From what standpoint can we reunite synthetically the logical and non-logical aspects of experience which we set apart in opposition to each other in the theoretical antithesis?" (p.45). Dooyeweerd shows, that if these standpoints are located in the aspects of experience, there are only two possibilities. Either these standpoints are sought in one of the aspects which are abstracted from reality, or they are sought in the analytical function that does the abstracting, that is, in theoretical thought itself. Both lead to theoretical antinomies. The first approach leads to the various '-isms' of theoretical thought: materialism, biologism, psychologism, historism, economism, moralism, etc. "The attempt must constantly be made," he writes, "to reduce all other aspects to mere modalities of the absolutized one" (p.46). The other leads to the absolutization of theoretical thought itself, and everything else becomes a construct of theoretical thought. Both approaches lead to the expulsion of reality, and makes it problematic. But the human selfhood or 'I-ness', who conducts the theoretical abstraction, and is part of this reality, does not accept its own elimination, or its reduction to one of the aspects, and that raises the third question.

The third transcendental basic problem of theoretical thought

This third problem is formulated as follows: "How is the critical self-reflection, this concentric direction of theoretical thought to the I-ness, possible, and what is its true character?" (p.52) Dooyeweerd concludes, from his consideration of the various answers to this question, that this human self-hood must necessarily transcend the diversity of aspects, which it discerns in the theoretical Gegenstand-relation, including theoretical thought (p.56). And this means, that theoretical synthesis is possible only from a supra-theoretical starting point. Only the contents of these starting points can be questioned, but not the very necessity of them (p.56). For this reason the dogma of the autonomy of theoretical thought, the so-called neutrality of reason, must be rejected.

All starting points are confronted with three basic questions, the question of origin, of the radical unity, and of the diversity and coherence of all things. The answers to these basic questions are the basic regulative ideas that give direction to the theoretical synthesis.

Dooyeweerd's supra-theoretical starting point assumes for instance, that the radical unity of all things excludes

the theoretical antinomy, which exclusion is the basis for his philosophical methodology; that the aspects to which he refers are mutually irreducible aspects of a universal order of time or temporal order, which guarantees the coherence of these aspects, and which becomes the basis of his methodology for discovering these aspects and their order. Furthermore, he assumes that all things, even's, human acts and all societal relations function in all aspects as typical structures, which like the aspects themselves are interrelated and at the same time are mutually irreducible; this forms the basis for his sociological methodology.

2.2. The aspects or modes of experience

With Dooyeweerd I distinguish several aspects or modes of experience in which all concrete events and things as well as human relationships and communities function. These aspects are mutually irreducible and at the same time form an unbreakable coherence. This means, for example, that the legal aspect cannot be reduced to the moral aspect, and neither of them to the cultural-historical aspect. It also means, that when this theoretical reduction is nevertheless attempted, the aspects that are ignored assert themselves as theoretical antinomies, or unresolvable contradictions.

A fundamental assumption of this theory is, therefore, that reality is not antinomic. This assumption provides in principle a methodology for identifying these aspects².

The coherence between the various aspects is reflected in the analogical moments of all these aspects in any one of them. The concept of juridical competence, for instance, is a reflection of the cultural-historical aspect in the legal aspect (see hereafter, p.43 and p.45). These analogies provide in principle a method of determining the temporal order of the aspects, in the sense of a ranking of "earlier" and "later." The later aspects are founded in all the earlier ones, and therefore, presuppose them. The earlier aspects are opened up or refined by the later aspects. For example, the physical aspect is incomprehensible without the kinematical aspect, which deals with (uniform) movement, and in which the physical aspect is founded. The kinematical aspect in turn is founded in the spatial aspect studied in geometry, which in turn is de-

2. The following aspects have been identified thus far: the numerical, spatial, kinematical, physical, organic, sensitive, logical, cultural-historical, symbolical, social, economic, aesthetic, legal, ethical and pistical (from *pistos* = faith) aspect or mode of experience. They are listed here in the temporal order of "earlier" and "later" (see text). For an extensive discussion of these aspects see Dooyeweerd (1953-1958, NC II: *The general theory of the modal spheres*).

pendent upon the numerical aspect³. The basic presupposition underlying this methodology, is therefore, that reality is not only not antinomic, but that it displays a temporal order, which makes knowledge of it possible.

Every aspect, except the numerical one, is founded in one or more earlier ones. This is called the foundational direction. Every aspect, except the pistical, or aspect of faith, is opened up by one or more later ones. This is called the anticipatory direction. The cultural-historical and the legal aspects will be discussed briefly in more detail as they have a special bearing on my argument.

2.3. The cultural-historical aspect of human forming

Of particular interest is the cultural-historical aspect, which deals with the power to give a cultural form to materials, plants and animals, and their products, and to human beings and their relationships. This cultural-historical aspect is not identical with history in the sense of what has happened. "What has happened" functions in every aspect, not just in the cultural-historical aspect. Fur-

3. For a discussion of this state of affairs in the first four aspects of the temporal order see Stafleu (1980:21-29) who discusses also the opening-process in these aspects and the role of this opening-process in the development of new paradigms in physics.

thermore, not everything that has happened is historically relevant. To emphasize that distinction I follow Van Eikema Hommes (1983:325) in using the term "cultural-historical", which refers, not to a concrete event, but to a *modus quo*, a mode of being, an aspect, in which concrete events, things, and relationships function. The term "culture", therefore, refers to a much broader area than the liberal arts.

Characteristic of this aspect is cultural forming, and only that which influences cultural formation and development is historically relevant. This cultural forming may be described as power⁴, in the sense of a controlled manner of forming in accordance with a free and variable design. It is to be distinguished from forming found in nature, or 'natural forming', e.g., stellar or geological formations, or certain animal constructions made according to an instinct-bound, and invariable design.

The cultural-historical development of a society may then be described as the temporal development of power formation that gives form to human relations within and between typical societal relationships following certain

4. For a detailed discussion of this cultural-historical concept of power, and its analogies in other aspects such as symbolic power, social power, economic power, artistic power, moral power and faith power, see Dooyeweerd (1953-1958, NC II:192-298).

leading cultural-historical ideas⁵. For example, political history is the development of political power formation by which leaders or groups give political form to relations between people in a state or between states, following leading political ideas. Similarly, educational leaders give an educational form to educational relations between people in a school community, in accordance with leading educational ideas.

Both the technical forming and the cultural-historical development of society have a normative character. Since the cultural-historical aspect follows in the temporal order upon the logical aspect, and is grounded in the latter, it shares with it the possibility of contradiction, that is, of anti-normative development⁶. This holds also for the aspects that follow upon the cultural-historical aspect in the temporal order. Therefore we speak of uneconomical in contrast with economical, of social and antisocial, legal and illegal, moral and immoral etc. This normative character must not be confused with the moral or

5. The technical forming of materials, plants and animals according to leading technical ideas also belongs to the cultural-historical development of power. However, this technical formation of power becomes historically relevant only when it begins to exert an influence upon societal relations between people.

6. The logical principle of excluded contradiction has a normative character as it presupposes the possibility of logical contradiction, which ought to be excluded.

ethical aspect and it is not exclusive to this latter mode of experience.

All societal relations of people, which are grounded in the cultural-historical aspect, likewise have a normative character. Dooyeweerd refers here to their structural principles that have to be positivized in a process of cultural-historical development and differentiation. The result is a historically variable social form in which the relatively constant structural principle finds expression.

These social forms are studied in what may be called a positive or empirical sociology, as distinct from a philosophical sociology, which studies the relatively invariable structural principles.

Day school education provides an opportunity to children for their cultural-historical forming. They receive a forming at school. However, it is important to note, that children are not to be objects of cultural-historical forming, although their skills and abilities are. In school as elsewhere, children are motivated and encouraged to take on responsibility for their own forming, under the guidance of parents, teachers and educators, and to a degree commensurate with their physiological and psychological development.

The cultural-historical aspect of our experience is reflected in all the subsequent aspects, and this is the reason why we speak of the power of communication, economic power, social power, the power of faith, etc. These concepts of power refer to the original cultural-historical power, and are analogies of this concept in the other aspects. Of particular interest in this connection is the legal aspect and the analogical concept of legal power or juridical competence.

2.4. The legal aspect

Dooyeweerd has shown (1953-1958, NC I:141) that the legal aspect cannot be reduced to any other aspect, including the moral aspect. It is, therefore, a fundamental mode of being, or modality, which has an irreducible, internal normative structure. It grounds the legal norms and their corresponding legal facts. These legal norms and facts presuppose each other. Legal facts do not exist apart from legal norms, and legal norms without corresponding legal facts are meaningless. What is called a "law", in the sense of an act of legislation, consists of a number of "typical" legal norms, usually of different branches of law, such as criminal law, criminal process law and administrative law for the typical structure of the state. Other typical

structures such as a private bank, a school, an industrial enterprise or a university have their own internal legal orders of legal norms.⁷

This legal aspect exists in an unbreakable coherence with the non-legal modes of experience, including the cultural-historical aspect. We may distinguish an external and an internal relation between these aspects (in general, between any two aspects). Concrete events as a legislative act, or a court decision, or concrete legal organs as a legislature or a court of law, have a cultural-historical aspect. This makes legal history possible. Legal development is possible only on the foundation of cultural-historical development. In a closed, undifferentiated society legal life has a rigid and primitive character, in which the almighty tradition rules supreme. In a culturally open, developed society, legal life becomes very differentiated and plastic. It develops the distinction between public and private law, for which there is no place in a primitive legal order (Van Eikema Hommes, 1975:15). Harsh law is

7. The word "typical" refers to different types of organized communities, examples of which are given in the text. Each one has its own typical legal order of typical legal norms (e.g., a church order, a set of by-laws of a voluntary association, internal university rules). The typical legal norms of the state are distinguished into two legal spheres: public law (including internal state law, constitutional law, criminal law, criminal process law, administrative law, taxation law) and private law. They integrate the legal orders of the non-state communities in an external manner.

tempered with the legal principles of good faith, equity, legal guilt and legal risk that are unknown in primitive law (p.15).

Besides this external coherence, there is also an internal coherence between the cultural-historical and the legal aspect. This latter relation is evident in the legal element of legal competence to the formation of legal norms, or positivization. This legal competence belongs to competent legal organs within a material legal sphere and refers to the giving of a legal form to material legal principles.

The legal element of competence is one of the basic elementary legal concepts and formal legal principles of law. No materially valid law is possible without the forming by competent legal organs. Although this concept refers back to the cultural-historical aspect, it is nevertheless an irreducible legal concept (Van Eikema Hommes, 1983:335-338).

In my view, the concept of legal power or competence of a competent legal organ⁸ to make positive legal norms for a

8. The concept of legal power or juridical competence functions at the normative side of the legal aspect. On the corresponding factual side Van Eikema Hommes (1983:366-370) identifies what may be called subjective rights, such as rights in property, which is a legal power over legal objects. In a closed legal system such subjective rights are absolute (compare the absolute power of the *pater familias* in ancient Roman law over his *patrimonium*, as well as over children and slaves). In opened (or developed) legal systems this legal power is also opened up and refined under the influence of

typical material legal area appears to provide a criterion or focus for legal-historical studies. This focus is not merely on the resulting positive law or the underlying juridical doctrines, or on the legal organ that gives law its form as well as its material content, but also on the societal sphere in which the law has material validity, and in which it orders legal relations between different legal interests.

I would argue, therefore, for the inclusion in the field of legal-historical studies not only the development of state law and legal organs of state, but also those of non-state organizations and their typical non-state legal orders and norms. Canon law, and its development, as well as the development of internal family law, internal university law, internal school law, to name a few examples, ought to receive legal-historical attention, together with the typical legal organs and their internal organization.

2.5. Van Eikema Hommes on methodology in legal theory

Van Eikema Hommes (Hommes) (1930-1984) taught legal theory and legal philosophy as well as sociology of law at

...Continued...

the moral aspect, so that the legitimate enjoyment of property excludes its use for the sole purpose of annoying someone else.

Amsterdam (1965-1984) as a successor of Dooyeweerd. He elaborated the latter's theory of the modal aspects (1954, NC II) for the juridical aspect into a general legal theory, first published in 1972 (1979, chapter XV provides a summary in English). Of interest for my subject is his methodology, which is summarized in Chapter XV, and which he discusses at greater length in his major work (1983, 2d ed. Chapter I).

Hommes' research question and his presuppositions

Hommes argues the need for a transcendental critique of legal philosophy in order to arrive at a more satisfactory concept of law. His investigation is, therefore, directed to the internal structure of the legal aspect, as a way of delineating the legal from the moral, the economical, the social etc. He follows Dooyeweerd's methodology of distinguishing the legal aspect from the others, using what he calls the transcendental-empirical method. His pre-theoretical presuppositions are, that these aspects are aspects of a universal order of time, or temporal order; that they are mutually irreducible; and that they at the same time form an unbreakable coherence. He rejects the inductive-empirical method followed by practical legal theory as inadequate, since the doctrinal concepts derived by this method of classification *per genus proximum et differentiam spe-*

cificam remain bound to the legal systems as they currently exist in the various jurisdictions and language areas, and cannot serve as the theoretical concepts of a legal theory.

The transcendental-empiri method

Hommes describes his transcendental-empirical approach as follows:

"The central, regulative idea of my investigations is the idea of the irreducible normative structure proper to the juridical aspect, which in its structural composition nevertheless displays an inner coherence with each of the non-juridical aspects of our temporal reality. The juridical aspect appears to be intrinsically bound to the numerical aspect, to the spatial, the kinematic and the physico-energetic aspect, to the aspect of organic life, the psychical-sensory aspect, the logical-analytical aspect, to the cultural-historical, the symbolic or lingual aspect, the aspect of social intercourse, and to the economic and the esthetic aspect. All these aspects, which in their turn display a mutual irreducible structure, are fitted within our temporal world of experience in a fixed order of earlier and later and so constitute the foundation of the juridical aspect (which is preceded by the esthetic). Two further aspects, the moral and the pistical (the aspect of faith) follow upon the juridical" (1979:372).

"These aspects are the fundamental modes of being (modalities) in which all things, facts, human acts, and societal relationships concretely function." They are the universally valid and necessary conditions for the temporal reality of man and every other existing thing, including our experience of them. They are, therefore, *transcendental* (1979:373). They are entirely bound to possible experience, while conversely reality could not be experienced without them (1979:373).

This "transcendental-empirical character of the aspects is expressed in the relation within their structural con-

figuration between a) the law-side (or norm-side as far as the aspects have a normative structure) and b) the factual side, subjected to the law- or norm-side" (1979:373).

Focusing on the juridical aspect, he distinguishes a norm-side in which the legal norms function, and the factual side of legal facts, legal subjects, subjective rights, factual legal obligations, which are subject to legal norms. Positive law in the sense of written law or unwritten law functions in all aspects. With respect to its juridical aspect positive law functions at the norm-side, and is normative in that sense.

In analyzing the structure of the juridical aspect Hommes determines the analogical structural moments of the other aspects in the juridical aspect. These analogies are referred to in traditional legal theory as the elements of law. Hommes' approach offers a systematic methodology of determining them, independent of the inductive method of legal doctrinal theory. The pre-juridical, or retrociprocal, analogical structures in the juridical aspect together determine his *concept* of law. The post-juridical, or anticipatory, analogies in the legal aspect, the so-called moral and pistical analogies determine his *idea* of law.

These latter analogies, also called *regulative*, refine and deepen the former, also called *constitutive*, without being able to take their places. The constitutive analogi-

cal structures in his concept of law are also the formal legal principles of all formally valid legal norms. They appear in all legal systems. They are, therefore, the fundamental theoretical concepts of legal theory. Only in developed legal systems do the regulative analogical structures appear. This distinction is the basis on which Hommes distinguishes primitive from developed legal systems.

As an example of a constitutive analogical structural principle Hommes discusses the legal order, which is an analogy of the numerical aspect in the juridical (1979:376). The numerical aspect characteristically deals with the order of numbers in a multiplicity of numbers. This is reflected in the legal aspect in a juridical analogy of the numerical aspect as a legal order, which is a unity in a multiplicity of legal norms. No legal norm can have *formal* validity without belonging to a legal order of legal norms. *Material* validity references the legal order to a material area of law (the state, or a university for instance), which is a juridical analogy of the spatial aspect.

This plurality of legal orders is thereby related to the plurality of societal structures of human relationships. The latter have what could be called a juridical sovereignty or an exclusive legal competence to formulate an inter-

nal legal order for their distinctive social spheres.

2.6. The typical societal structures and their relations

Since the societal structures of human relationships function in all aspects of the temporal order, these structures themselves are founded in this universal order of time. Hommes (1983:9) makes a connection between them when he observes that the typical societal structures and the aspects in which they function are related in an unbreakable coherence as two transcendental dimensions of our experience. The modal structures or aspects function only as aspects of 'structures of individuality'⁹ (such as the societal structures), and the latter cannot exist without the former. They may be distinguished by the two aspects in which they appear to function in a special way, the foundational aspect, in which the structure is founded, and the qualifying aspect, which puts a typical stamp on the structure. All organized communities are founded in the cultural-historical aspect of formative power, while having different qualifying aspects. Natural communities such as marriage and family are founded in the aspect of organic

9. 'Structures of individuality' is a general term for all concrete, individual things, events, human acts and human relations.

life and are qualified by the ethical aspect of (marital or family) love. The different qualifying aspects give rise to 'typical' differences between typical societal structures, which as relatively constant structural principles require human positivization in historically variable social forms. They differ in this respect from Weber's ideal-types that he constructs from the variable social forms, without penetrating to the underlying structural principles.

The categorical relations¹⁰ of legal norm and fact, of legal subject and object and of legal origination, duration and termination, form the bridge between the modal and typical structures and relate the former to the latter. A legal norm, for instance, as a complex basic legal concept receives its typicalness in relation to a societal structure in which it functions, and in which it is qualified as internal business law, church law, school rules, state law, university law, etc. For this reason "law", and "the law" as such do not exist in this view, and the identification of all "law" with state law is also rejected.

Similarly there are categorical relations of communal

10. A detailed discussion of these categorical relations as well as those referred to in the next paragraph falls outside the scope of this essay. The term 'category' is here used in the sense of belonging to the universal temporal order, not in the sense of some metaphysical ontological order.

and inter-individual and inter-communal relationships. Communal relationships integrate their members into a new entity, whereas 'coordinating' relations do not. Legal norms governing communal relations are called 'community law', whereas legal norms governing coordinating relations are called 'coordinating law'. Examples are state law as community law, and public international (treaty) law as coordinating law.

Like the modal structures the typical societal structures are mutually irreducible and form at the same time an unbreakable coherence, as they are each founded in the universal order of time. Of interest for my purpose is the distinction between the 'part-whole' relationships and the 'enkaptic' relationship. We may speak of a part-whole relationship between two or more communal relationships when all have the same qualifying function. The municipalities and the provinces of a unitary state are parts of that state. They are organized communities of the same type, each having the legal aspect as their qualifying function. Enkaptic relations are relations between societal entities with a different qualifying aspect. An example is the relation between a business enterprise as an economically qualified organization, and a labour union comprising a category of workers in that organization, which is quali-

fied by the ethical function of solidarity. In this example, the union is said to be enkaptically founded¹¹ in the business enterprise, as without the latter, the former could not exist.

2.7. The human body as an enkaptic whole

As noted above (p.42) day school education provides an opportunity to children for their cultural-historical forming. They receive a forming at school. Since children take on increasing responsibility for their own forming the question is what is being formed? This requires an anthropological model, which I adopt from an outline that Van Eikema Hommes (1982a:119-122) has provided of Dooyeweerd's incomplete theory.

Dooyeweerd distinguishes four structures in every human being, which form a hierarchical order in the sense that the latter structures are founded in the earlier ones, and

11. In addition to this foundational enkapsis, Dooyeweerd also recognizes a coordinational enkapsis. His theory of enkapsis applies to all structures of individuality. Stafleu (1980, p.204) in applying this theory to quantum physics writes: "In the structure of an atom the electrons and the nucleus can be treated as "point charges" (particles) even though the nucleus itself is an enkaptically bound structure composed of a number of nucleons (protons and neutrons). Again, the nucleons themselves are presumably enkaptically bound structures composed of quarks bound up by gluons in a manner that is not yet clear."

which together form an enkaptic whole in the 'form totality' of the human body, in which these structures are interwoven.

The fundamental structure is the physical-chemical structure, which forms the substrate of every human body. It has its own internal regime with its own sphere of natural laws, which can be understood to a certain degree by theoretical disclosure. Typical for this structure are the minerals and other chemical building blocks necessary for the human cells and the metabolic processes. This structure is qualified by the physical aspect, and it is opened up or developed by the next structure, the biotic or organic life structure, to which it is enkaptically bound¹², and that guides this development.

The biotic structure is qualified by the organic aspect, the aspect of life. Life in this view is not a substance, but an aspect in which living things function. The organic life structure in the human body reveals itself in a variety of systems in a close enkapsis with the physical-chemical structure. To this structure belong the so-called autonomic nervous system with the muscles it controls, the

12. Differently qualified structures are said to be enkaptically bound to each other, when the qualifying function of the leading structure becomes the leading function of the foundational structure, which thereby is opened up and, in the case at hand, transforms the chemical substances into organic matter.

bone systems, the various body organs and the glands in so far they are innervated by the autonomic nervous system.

This second structure in turn is opened up by the emotive structure of the human body, qualified by the psychological or emotive aspect. It includes the central nervous system, the sense organs, the brains, spinal system and the system of glands. These functions fall partly outside the control of the human will.

Finally, the third structure together with the first two that are enkaptically bound to it, is in turn enkaptically bound to the fourth, the so-called act-structure of the human body.

By 'acts' Dooyeweerd means all directions of the human consciousness that originate in the human selfhood or I-ness, whereby a human being directs him/herself intentionally under the guidance of a normative point of view to states of affairs found in the real world or in his or her imaginary world, and whereby these states of affairs are related to the human selfhood. Dooyeweerd distinguishes three basic directions of human consciousness, namely knowing, imagining and willing, which function only in an unbreakable coherence within the enkaptic whole of the human body on the basis of the three lower structures of the human body. Thus he rejects the idea that the three basic directions of human act-life are functions of an

animus rationalis, which are wholly or in part independent of a material body.

Of great importance is the fact, that the human act-structure is not differentiated. It is not bound to a typical normative aspect, and has, therefore, an open character. It is not, like the other structures, typically qualified. It expresses itself freely in all the normative aspects, without being bound to any one of them, and can take on all possible normative qualifications. Hence we can speak, for example, of economic, legal, artistic, social, linguistic, analytic acts and acts of faith. As a result of this open character of the human act-life within the form totality of the human body, the latter receives its typical human character.

These human acts are acts of human consciousness in their unbreakable coherence with the three basic directions of consciousness of knowing, imagining and willing. They are founded in the lower three typical structures that are enkaptically bound in the human body, and are internal 'acts of intention'. They must be transformed into action by human decision. The criminal intention, for instance, is the necessary (but not the sufficient) condition for a criminal action. In that criminal intention the thought, the contemplation of possible consequences, and the will to

pursue the contemplated action, together form what is called the intent.

The fundamental directions of human consciousness function in all aspects of the temporal order. The human will, for instance, as emotive will is bound to the emotive structure of the human body, and as legal will or aesthetic or social will it is bound to the normative aspects of the human act-structure¹³.

Using this model, I could describe the educational activity as directed and guided forming and shaping of the directions of consciousness of the act-structure, especially of the basic directions of knowing, imagining and willing in relation to all the normative aspects.

The subject matter of instruction, whether it be writing and spelling, language, art, social science, or math, serves in the first place to assist the student in forming his/her consciousness of the normative aspects of the temporal order, and to develop and sharpen his/her skills to act in accordance with this developing consciousness.

13. This explains why the human will is 'determined' by the emotive structure, and 'free' in the normative aspects. The importance of this state of affairs plays an important role in determining the legal question of criminal intent and temporary insanity.

The methodologies I have discussed and the general theories that are based on them offer a view of legal pluralism that is grounded in a social pluralism, and provides a general legal theory in a close relation to a sociology of law, in which "the law" is replaced by "typical law", that is, by the typical legal norms of the different types of societal organizations. This approach makes it possible to distinguish between state and school, and between state education law and school law. It also allows to deal with the question how they are related, to which I turn in the next chapter.

CHAPTER 3: LEGAL RELATIONS BETWEEN STATE AND SCHOOL

3.1. The state as Rechtsstaat

I shall refer to 'societal relations' as a shorthand for both communal relationships and the distinctly different inter-communal and inter-individual relationships discussed in section 2.6, and refer to 'society' as the immense variety of concrete societal relations.

It is impossible to get a theoretic grip on these societal relations except via the aspects in which they function, and which are abstracted in the theoretical Gegenstand-relation, as argued in the previous chapter. This raises the question how to distinguish these societal relations. Habermas (1981) has developed a communications approach to society, in which systems theory is based on action theory. The core of his action theory is a communicative conception of rationality. Thus Habermas emphasizes the aspect of communication. Luhmann (1990:4-6) offers a systems theory of society in which meaning always manifests itself as coherence within psychic and social systems. He emphasizes the psychic and social aspects.

Dooyeweerd approaches the problem by calling attention to the two aspects that in each societal relation play a

special role as the qualifying and foundational aspects. For example, the state as an organized community has the legal aspect as its leading or dominating or qualifying aspect that puts its stamp on all the other aspects of the state, including the aspect of cultural-historical power, in which the state community is founded. In principle, all the normative aspects may function as qualifying aspects, which makes it possible to distinguish all societal relations by their typical qualifying aspect. Moreover, the foundational and qualifying aspects show an unbreakable coherence, which makes it possible to make further distinctions. There is an unbreakable coherence between the state as *Rechtsstaat*, a public-legal community or *res publica*, and its monopoly of organized military or police power under the control of public law. While this state power has its own organization, command structure, legal organs, and courts and tribunals, it is qualified by the legal aspect of the state, and is lawful state power to the extent that it is in fact entirely controlled by state law. It differs from a criminal power organization in that the latter is qualified by the economic aspect as an organization for (unlawful) private gain.

I proceed, therefore, from an idea of the state as a public-legal organized community of government and subjects, which is founded in a state monopoly of organized

military or police power on a limited territory¹. I speak of a *Rechtsstaat* when this organization of military or police power is entirely governed by state law. The modern state is incompatible with the existence on its territory of military power in the service of private interests and outside the control of state law.

3.2. The distinction between public and private law is characteristic of the *Rechtsstaat*

As a public-legal organization the state is distinct from other types of organizations that are qualified by different aspects, and that cannot, therefore, be reduced to the state or a part thereof, without undermining that distinction. These non-state organizations (family, church, university, associations) exist either in whole or partly on the territory of the state and they form the basis of the public/private law distinction. This distinction, therefore, presupposes a differentiated society, in which state and non-state communities exist side by side on the territory of the state.

From this perspective public law is community law that

1. This idea of the state is oriented to Dooyeweerd (1953-1958, NC III, p.379-508), and, with respect to the distinction between public and private law, to the work of Van Eikema Hommes (1983a, p.43-88)

orders the authority/subordinate relations between government and all persons within the legal territory of the state, who, by being there, have an equal legal subject status, or in other words, who have equal standing as legal subjects. In contrast, private law is coordinating law. It orders the legal relations between persons and societal entities on a footing of legal equality in the sense that they are not subordinated one to another. This legal equality in the private law sphere corresponds to the equality in subject function in the public law sphere of all persons within the territory of the state, and applies to both citizens and non-citizens of the state. The latter differ in political rights only.

Both public and private law integrate the legal spheres of the non-state communities with that of the state in a manner that leaves the internal legal competence or juridical sovereignty of the non-state communities intact². The integration I have in mind, therefore, is an external integration, and only with respect to the legal aspect of the societal relations. This external legal integration is

2. By way of example I refer to the internal legal competence of a University through its own legal organs to make rules concerning the ordering of its internal affairs. Universities are externally integrated in the public (administrative) law sphere of the State through a Colleges and Universities Act. This does not, however, make their internal rules state law, nor does it turn academic offences thereby into criminal offences.

possible because within the territory of the state no organized community other than the state has the public legal aspect as its leading and qualifying aspect, and this explains the unique position of the state.

3.3. Fundamental freedoms as internal limits on the state's juridical sovereignty

Since the state has the monopoly of military power, it must provide safeguards against the misuse of this power by the government against its subjects and against the non-state communities on its territory. These safeguards are the fundamental freedoms, which as constitutive material legal principles of the state delimit the sovereignty, that is, the juridical competence or legal power of the state. These freedoms are grounded in the non-state private and societal freedom spheres, and the legal boundaries of these private and societal spheres are the boundaries of the state's legal power and competence. I speak of a *material Rechtsstaat* where these material fundamental freedoms are recognized and are constitutive of the state and of its public law sphere, and function in fact as the internal limits of the juridical sovereignty of the state in positive state law. A *formal Rechtsstaat* is a state in which state administrative discretion is subject to law and

judicial review, but where the material limits of the legal competence of the state are not recognized³.

The fundamental freedoms that guarantee a personal sphere of freedom to each person are, among others: the freedom of conscience, the freedom of forming and expressing opinions, the right to privacy, and the secrecy of the mails.

The fundamental freedoms that express the inner limits of the state's competence with respect to the non-state societal spheres are, among others: the freedom of religion (in the sense of organized public worship), the freedom of association, of founding a family, of educating one's children, the freedom of enterprise and the freedom of

3. Böckenförde (1991:63) also distinguishes between formal and material *Rechtsstaat* and discusses if the latter may be identified with the *Sozialstaat* (the welfare state). He concludes, correctly in my opinion, that the two are not identical, and that the welfare state can only exist within the *Rechtsstaat*. He points out that "the *Sozialstaat* can only have the function of creating the *social conditions* for realizing that liberty for *all*, which in particular means reducing social inequality. It therefore appears to belong to the level of administration, including legislation, and this is where it develops its full force" (emphasis in original). Böckenförde sees the formal *Rechtsstaat* as I do, but considers it a step backward from the classical liberal state, while I consider it an improvement. He relates the material *Rechtsstaat* to material or moral values, and argues that this introduces a contradiction in the concept of *Rechtsstaat*. In contrast I relate the material *Rechtsstaat* to the constitutive material legal principles in which the modern state is grounded, and consider the so-called values as the regulative ethico-legal principles, such as the principle of human dignity, which open up and deepen the state's public and private law spheres.

scientific research and academic instruction.

As constitutive legal principles of state law these freedoms form the internal limits of juridical sovereignty of the state. When public law moves beyond these limits, it begins to destroy the private freedom spheres on its territory, it begins to lose its material validity, and state power begins to lose its legitimacy. The state ultimately destroys itself as *Rechtsstaat*, and turns into its opposite, the *Machtstaat*, or power state, in which might is right. In the process the state also destroys the societal relations on its territory. Conversely, the legitimacy of state law depends not only on the formal and material validity of these laws, but also on the active or tacit support of the non-state societal spheres.

3.4. Civil freedom and legal equality presuppose the fundamental freedoms

None of the enumerated fundamental freedoms is absolute, because all subjects of the state also function in one or more non-state communities or societal entities within the territory of the state, besides having their private freedom spheres, where the private law coordinates their legal relations, harmonizing their legal interests. The development of this civil legal sphere depends, therefore, on a

functioning public legal state community, and not vice versa. This is the reason why the constitutive legal principles of the private legal sphere, namely, civil rights or civil freedom, and civil legal equality, presuppose the fundamental freedoms⁴. The principles of civil freedom and legal equality complement each other and a one-sided emphasis on the one is detrimental to the other⁵. As legal principles of coordinating law they are ineffective in delimiting the juridical sovereignty of the state.

3.5. The development of the modern Rechtsstaat

3.5.1. Consolidation of the monopoly of state power

The modern Rechtsstaat could not develop without the consolidation of the governmental monopoly of military power, which was the main aim of the states that arose in Western Europe during the 16th and 17th centuries in a continuous struggle of civil and religious wars. The aim of this struggle was to break down the governmental powers

4. It would, therefore, appear to be a serious error, when the principle of legal equality is used to delimit fundamental freedoms. The former determines the content of private coordinating law, whereas the latter governs the content of public law.
5. Søren Egerod (1975:12) has noted that "[i]t has been known since the French Revolution that freedom and equality can be abused to suppress each other". He argues that [f]reedom and equality must, by explicit political action, be delimited in relation to each other."

held in private hands, not only of the nobility and the church, but also of the cities and the guilds, which often had their own private armies. During this period little attention was paid to the internal limits of state governments. A state absolutism arose, justified by people like Jean Bodin (1583), who argued that the prince had absolute sovereignty, limited only by natural law and international treaties. One can hardly speak here of a *Rechtsstaat*. Habermas (1986:206) speaks of a *bourgeois state*, which he associates with the thinking of Thomas Hobbes⁶. The reaction against this absolutist state came from England, where John Locke in his famous work *Two treatises of civil government* (1690) provided a political justification of the "Glorious Revolution" (1688-9), and in which he makes the distinction between state and civil society. The latter would be entirely free from state intervention, and be controlled by the natural laws of economic intercourse between free individuals. The task of the state would be limited to the protection of this free interplay of market forces. This influential vision led in economics to the school of the physiocrats and later the classical economists. In political theory it led to the theory that in the

6. Habermas' treatment of the rise of the *Rechtsstaat*, a term that he translates into English as the constitutional state, is of great interest, but falls outside the scope of this paper.

original contract in the state of nature the contracting individuals had not assigned all their natural rights to the sovereign, as Thomas Hobbes had taught, but only their competence to protect and defend their inalienable rights. The power of the state was thereby limited by its purpose: the protection of the natural birthrights of liberty, life and property.

3.5.2 The early-liberal idea of the Rechtsstaat

This Lockean idea of the state is perhaps the earliest phase of the modern Rechtsstaat, which had a great influence on the constitutions of the American States. In the *Bill of Rights* of the state of Virginia (12 June 1776) we read in section 1:

"That all men are by nature equally free and independent, and have certain rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

These thoughts are also expressed in the American *Declaration of Independence* (4 July 1776) that reads in part: "we hold these truths to be self-evident: that all men are created equal; that they are endowed, by their creator, with certain inalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed;"

Via these American Bills of Rights, the Lockean idea of state found its way also in the French *Déclaration des*

Droits de l'Homme et du Citoyen, articles 1 and 2.

"1. Men are born and remain free and equal in rights; social distinctions may be based only upon general usefulness."

"2. The aim of every political association is the preservation of the natural and inalienable rights of man; these rights are liberty, property, security, and resistance to oppression."

These declarations illustrate how civil private law is grounded in the typical material legal principles of civil equality and liberty. This law acknowledges a fundamental freedom sphere of individual persons as well as societal entities in their societal relations. Art. 1 of the American *Civil Rights Act* (1866), which grants the former slaves "as citizens of the United States" the "enjoyment of civil rights", describes the civil freedom and equality as the right:

"to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . ."

In this way the connection between the idea of the *Rechtsstaat*, the civil private law sphere of the state and the fundamental human freedoms is clearly established. Habermas (1986:206) speaks here of the *bourgeois constitutional state*, which arose as a reaction to the absolutist state (his *bourgeois state*), and the extreme swing from absolutist state to the early-liberal form of the *Rechtsstaat* is indeed remarkable. Locke's theory of innate

human rights was entirely applied to the sphere of civil private law, with the result that his view of the Rechtsstaat was onesidedly directed to the protection of that law sphere.

3.5.3. The idea of the formal Rechtsstaat

According to Van Eikema Hommes (1982b:104), Hegel must be credited with the thought expressed in his *Grundlinien der Philosophie des Rechts* that "bürgerliche Gesellschaft" (civil society) with its "System der Bedürfnisse" (its economic character) and its legal protection of property (the sphere of civil private law with its legislation and jurisprudence) must find its complement in the public legal order of the state. Although Hegel discussed this problematic within the framework of his absolute-idealistic dialectic, in which the state is considered as the immanent essence of the family community and of civil society, he has nevertheless pointed to the importance of public law next to the civil private law sphere, as a complement and a limitation of the latter.

This new idea of the Rechtsstaat no longer restricted the purpose of the state to the protection of innate human rights and property, but acknowledged that the state in its public and administrative legislation may have many purposes, in so far they have a public character that concerns

the entire state community, and within a general framework of a law-making, in which the representatives of the state's subjects participate.

This idea was important for the development of administrative law in the public law sphere, whereby the old-liberal idea of the Rechtsstaat was transformed into that of the rule of (statute) law and the Rechtsstaat was now related to a public administrative legal order as a formal limit to which the magistrate would have to be bound in its administrative activities, when promoting cultural and welfare purposes (Dooyeweerd, 1953-1958, NC III:429). This legal restriction on the executive authority was accomplished by subordinating the administrative organs to legislation. Statute law was to protect the citizens from administrative arbitrariness. However, the non-juridical "purposes of the state", as Dooyeweerd has observed, [were] "not given any internal structural delimitations, if their administrative realization [was] only bound to the formal limits of legislation", resulting in what he calls a "formalistic concept of public law" (Dooyeweerd, NC III: 430). This formalistic concept of public law was unable to delimit the purposes of the state, and led in Kelsen's view

of the State to the identification of Law and State⁷.

3.5.4. Toward the material Rechtsstaat

As argued above, public state law, in its various branches of constitutional, administrative, taxation, criminal and criminal process law, may be described as typical internal community law, which binds the subjects of the state within a certain territory into a higher juridical unity of the state community. The state is not a natural community, but is grounded in a human organization of political power relations by which the government and its legal subjects are ordered in a juridical authority-subordinate relationship. Such authority relations are not unique to the state, of course, as one finds them also in universities, industrial enterprises, and other organized communities. Unique to the state is that its qualifying aspect is the juridical aspect itself, grounded in the military power of the state. Thus authority in the state, according to its inner nature, is governmental authority

7. Hans Kelsen, *Pure Theory of Law* (Knight transl., 1967) and "Kelsen's pure theory of law", in Harris (1980:59). In Kelsen's last work, *Allgemeine Theorie der Normen*, published posthumously in Vienna, 1979, and edited by Kurt Ringhofer and Robert Walter for the Hans-Kelsen Institut at Vienna, Austria (General Theory of Norms, in German), Kelsen distanced himself from his earlier views of the relation between legal norms and logical principles, defended in *Pure Theory of Law* (Van Eikema Hommes, 1983c:528).

over subjects enforced in the final analysis by the strong arm. Apart from the latter, the internal public legal order cannot display that typical juridical character, which distinguishes it from all kinds of private law. This public legal order, therefore, has a truly universally integrating character, which is lacking in the legal orders of the non-state communities.

This integrating character of public law is expressed in the principle of the "public interest", which must, like the state itself, have a legal qualification⁸, which delimits its meaning, and which qualifies the state as a public legal community. This public legal interest also qualifies and delimits the purposes or tasks of the state, and that in an unbreakable coherence with the material constitutive principles in which state law is founded, including the fundamental freedoms. The latter are a necessary but not a sufficient condition for the material Rechtsstaat, as they can be set aside in a formalistic approach to the purposes

8. Without such a juridical qualification, the notion of "public interest" loses any specific meaning and may become an instrument of the power-state, by which it encroaches upon the freedom spheres of private persons and non-state societal entities. For the sake of the public interest Plato and Fichte defended the withdrawal of the children from their parents and wanted their education to be entrusted to the body politic. Aristotle wanted education to be made uniform in "the public interest" (Dooyeweerd, NC III:442-443).

of the state. The public legal interest by itself cannot serve as the basis of a constitutional state, since no state can be founded on a regulative principle. Rather, the constitutive legal principles of the state must function in an unbreakable coherence with its regulative principle for a material limitation on the legal power of the state, and on its various legitimate purposes. Within these limitations on the sovereignty and purposes of the state, there appears to be, in principle, no task or purpose that the state may not undertake. These tasks may be distinguished into typical tasks, i.e., those that have a direct bearing on the state as a public legal community or government and subjects, and non-typical tasks, which may, however, equal the typical tasks in importance.

The formation of this organized state community is not a natural process, but one of human cultural shaping in a process of historical-cultural development with all the limitations and imperfections that this implies. This means that the concept of the material Rechtsstaat is a relative concept, in the sense that it implies a more or less successful realization of the structural principle of the state as an organized public legal community of government and subjects, based on the legal power monopoly of the state, which must be made serviceable entirely to the public legal interest of the state community and controlled

by public law in a harmonization of all legal interests.

3.6. The modern day school

The idea of state defended in the previous section is characterized by a distinction between the public and private law spheres, which presuppose the state and non-state communities within the territorial boundaries of the state. The distinction between public and private schools on the other hand may refer to the fact that they are often owned, funded and operated by the state, or some non-state organization, respectively. It may also refer to the fact that the public schools are often intended for the general public or 'the masses', whereas private schools are considered elitist. At any rate, the public school in North America is generally considered a state institution. I shall focus on the public school, and particularly the modern elementary day school, attended by several hundreds of children, where teaching takes place in graded classrooms.

3.6.1. The prevailing view

According to the prevailing American view the public school is a state institution. Edwards (1971, 23-24) has reviewed American court cases defining the function of the

public school in organized society and concluded that "[I]n legal theory the public school is a state institution"; that "[P]ublic education is not merely a function of government; it is of government"; and that "[T]he primary function of the public school, in legal theory at least, is not to confer benefits upon the individual as such; the school exists as a state institution, because the very existence of civil society demands it." Clearly, then, the public school is a legal organ of state for the implementation of state educational policy.

In Canada distinctions are made, dependent upon provincial jurisdictions, between publicly funded public, separate and denominational schools, reflecting the situation at the time of Confederation (1867), or at the time when other provinces joined the Union. These situations have been "frozen in time", so that the section 93 rights and privileges of the *Constitution Act* are not uniform across Canada⁹. With the adoption of the *Canadian Charter of Rights and Freedoms*, the courts have tended to hold that the *Charter* applies to actions of the public school boards

9. For an analysis of section 93 rights and privileges province by province, see Dickinson and MacKay, 1989:52-59. For a summary of the provincial systems of education see Martin and Macdonell 1978:152, who describe 5 distinct kinds of systems, and point out that "[I]n Ontario as well as in Saskatchewan the separate schools are organized as a recognized part of the public school system and subject to a common set of legislative requirements.

as "the actions of the 'legislature' or 'government' of Ontario¹⁰, teachers and administrative staff as "government agents", but not to the private schools.

A public school district, even when its district boundaries coincide with municipal boundaries, is not to be confused with a municipality. The latter is an autonomous part of the state, in the proper sense of that word, for the purpose of local government in accordance with the legal principle of territorial decentralization in the public interest. The school district, on the other hand, is an administrative organ of state. Its function is the execution of state education policy. It is an organization of state power to compel children to attend school, and with the taxation power of the state to compel property owners within its territorial boundaries to pay for this schooling.

According to this view staff members of the boards of education, the school principals and the teachers and

10. In *Re Ontario English Catholic Teachers Association and Essex County Roman Catholic School Board* (1987), 58 O.P. (2d) 545, (Div. Ct.) Anderson J. stated at p.561: "In my view, it is fair to conclude that a school board is created under a comprehensive statute dealing with education and has a clearly defined role within the scheme of the statute, and to conclude in consequence that the actions of the board may properly be said, for the purposes of the Charter, the actions of the "legislature" or "government" of Ontario." For additional case law see also the discussion in Zuker (1988:149-155).

school staff are civil servants of the state¹¹. They are to implement education policy as determined by the Minister of Education, who certifies teachers for this purpose.

As a result of this prevailing authoritative opinion it is not easy to think of a school system as not being part of a state. Hence the need for a methodology that facilitates the systematic investigation into the structure of the school. I shall use the methods discussed in the previous chapter and used in the previous section with respect to the state to identify the foundational and qualifying functions of the school¹².

3.6.2. An alternate view

The modern day school like the state is an organized community, not a natural community. It survives the turnover of staff and students. It requires organizing and human cultural forming and shaping in order to exist. It has an internal organization, an internal legal order, and internal school law. Like the state it is grounded in the his-

11. For an extensive discussion of teachers as low-rank civil servants, and the many detrimental effects of centralized state control on the practice of teaching and the education of teachers in Canada, see chapter 5 in MacKinnon (1962, 79-106).

12. Dooyeweerd has briefly touched upon the school in his discussion of the family (NC III, 286-287) and Hommes has not written about it at all to my knowledge.

torical-cultural aspect of the universal temporal order. Consequently, the school is the result of an organizing activity that gives the structural principle of the school its historically-variable social form. But unlike the state, which is founded in a monopoly of military power, the school is founded in an organization of power of the skill and knowledge to teach children, that is, to deliberately and systematically guide them in the forming and shaping of their act-structure.

Specifically, as I have argued in section 2.7, this involves the forming of the various directions of human consciousness of the relationship between norms and facts, whether in spelling or writing, math or communication, art or social science. This clear and obvious difference in the organization of historical-cultural power is the result of the unbreakable relation between the foundational aspect of the school and its qualifying aspect. I have argued that the state and its police power are qualified by the legal aspect, which makes the state a public legal community, and its police power subject to law. By contrast, the school is not a public legal community, although it functions also in the legal aspect. It is not a faith community, or an artistic community or a business enterprise, although it may teach subjects that touch upon these areas. In my view the school is qualified by the moral aspect of love, which in

the school receives a typical particularization as love of learning and of deliberate and systematic teaching and guidance. This makes the school an organized learning community of students, their parents or guardians, and staff under the guidance of competent teachers. This guidance takes on different qualifying aspects (social guidance, moral guidance, artistic guidance) as the focus of instruction moves to the different directions of the developing consciousness of the students in accordance with an established curriculum.

In my opinion the prevailing view of the school distorts day school education, when the qualifying legal aspect of the state begins to dominate learning and the state juridifies all aspects of schooling. Then there is no clear place for the responsibility of parents, students or teachers.

3.6.3. Parents and the school

The family differs from the school in its foundational aspect. The family as a typical structure of human society is founded not in the historical-cultural aspect, but in the biotic aspect. It is a natural community of parents and their child(ren). It lacks an internal organizational structure, and a particular family does not survive the loss of its members, unlike a school, which often survives a complete change in teaching and administrative staff and

a regular turn-over of pupils.

The lack of a formal organized structure in the family does not mean that it lacks relationships of authority and subordination, but these are forever changing, as children mature, and they disappear entirely as children become of legal age. This is not so in the school, where children may become young adults of legal age, but remain subordinate to the formal legal structure of the school community until they leave it.

The qualifying aspect of the school and of the family is found in the ethical aspect of love. The meaning of love is linked in an unbreakable coherence to the foundational aspect of the structure that is qualified by it. Love in a family is parental love of parents for their children, and childlike love of children for their parents. This bond of love that unites parents and children in the family relationship is distinguished from all other kinds of moral relationships by its typical biotic foundation¹³. In the

13. This immediately raises the question of parental authority. According to the Kantian principle of moral autonomy, true morality is incompatible with any relation of authority and subordination. Since parental authority is undeniable, this would mean that the immediate family relations would be devoid of any moral character. In contrast to this Kantian principle, Dooyeweerd (NC III:274) emphasizes the typical moral qualification of parental authority. This typical bond of love implies an authoritative character because of the immaturity of the children. And this is the reason why the education of children in the family sphere shows an irreducible inner nature that cannot really be replaced by any form of educa-

school, on the other hand, the qualifying aspect is expressed as a love for teaching and learning. For this reason parental discipline differs from school discipline as each aims at restoring a different kind of relationship. This was insufficiently recognized in the doctrine of *in loco parentis* that allowed teachers as being temporarily in the position of parents to administer corporal punishment to school children, often with the full approval and encouragement of parents¹⁴.

The development and formative shaping of children in the family context is often referred to as nurture, whereas this activity in the context of a school is referred to as schooling or formal education. Outside the school and family, children are formed in a variety of clubs and other organized activities. This is often referred to as informal education.

Parents have the primary responsibility for the nurture of their children, and for setting the direction of the education of their children. When parents abuse and neglect their children, the state has a duty to intervene on behalf

...Continued...

tion which lacks this character.

14. For a discussion on corporal punishment in the light of the *Canadian Charter of Rights and Freedoms* see Alisa Watkinson, "Corporal punishment: apply the Charter, spare the child", in *The Canadian School Executive*, November 1988 at 15.

of the children. This explains the important role that parents ought to play with respect to the modern day school.

3.6.4. Education as deliberate forming

All education aims at the deliberate forming, and school education aims at the deliberate forming of school children. This historical-cultural process of forming is a growing responsibility of the child itself, under the guidance and motivation by parents and teachers, who have a formative influence on the children in their care.

This process of guidance and motivation takes account of an underlying anthropological point of view, as well as a theoretical understanding of child development that is based on it. Education is not something that comes naturally to parents and teachers, but, as a cultural-historical process of forming, needs deliberate attention, in which intuitive insight and common sense need to be supported by theoretical insight in specific learning disabilities and developmental phases and problems, and by practical teaching methods which takes such theoretical insight into account. There are, therefore, practical limits to what individual parents can do, although these limits may vary widely between parents.

3.6.5. Structural principle and purposes of the school

I would tentatively describe the structural principle of a day school as an organized learning community of schoolchildren and their parents and guardians, and of teaching and administrative staff, which is qualified by the aspect of love of learning and teaching, grounded in the organized power of competent teaching staff, which provides deliberate and systematic guidance to the pupils in assuming increasing responsibilities for their development and forming. This structural principle receives a positive social form in a historical-cultural process of development of schools and schooling.

It has been common since Aristotle to confuse the purpose of a thing with its structural principle. Thus there is also much debate about the purpose of education in the context of defining what a school is. Since public education has been widely perceived in North America as a state institution, the courts inevitably have become involved in defining the purposes of education. Among these purposes Berkman (1971:37) has listed for American education overriding political aims: a means of taming and civilizing the anarchic instincts of the populace; of teaching discipline and respect for authority; of teaching good citizenship, morals and patriotic exercises; of removing ethnic differences, fostering social equality, and eliminating highly

individualistic conduct. In effect, since obedience and discipline were major purposes of education, virtually all school rules that taught respect for authority served an educational purpose in the opinions of the courts.

It is, therefore, important to emphasize that a school, like a state, may have a great number of tasks or purposes, the sum of which do not define what a school or state is. In fact, the structural principle of a school cannot be derived from the great variety of purposes to which a school legitimately may be put as this has proven also impossible to do for the state.

3.6.6 Internal organization of the school community

The modern day school is typically a grade school. At the elementary level is usually consists of a number of graded classroom communities, each one comprising a teacher, sometimes one or more teaching assistants, volunteer assistants, and a group of children belonging to one or two successive grades. The classroom has the same qualifying aspect as the school, and may be considered as an autonomous part of the school. The teacher is in charge of the classroom community, regardless of the number of parents present as volunteers. Although the classroom community typically does not last longer than the school year (some 194 teaching days), its structure within the school commun-

ity is relatively constant. The internal legal order of school rules finds its most explicit positivation in the classroom orders of the several classrooms. These may differ from classroom to classroom, depending on the development levels of the children in each class and the teachers involved who establish and maintain classroom order. I emphasize that the internal legal orders of the school and the classrooms are qualified by the qualifying aspect of the school. These school orders do not serve public justice, but education in the earlier defined sense. They do not thereby become moral orders, but remain legal orders. The qualifying aspect of the school also opens up the ethical-juridical moment in the legal aspect. This means that the practical idea of law with its emphasis on fairness, equity, good faith, and "natural justice" plays an important role in maintaining the classroom order. A teacher ought not only to be 'strict', but also 'fair'.

This holds true also for the school community. A fair and equitable classroom order conducive to learning can be maintained only, when teachers and other staff, as well as parents, support the principal in establishing and maintaining a sensible and just school order, compatible with school policy established by the school board.

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3.6.7. Voluntary and compulsory organization of school support

Dooyeweerd makes a systematic distinction between institutional and non-institutional communities. By institutional communities he understands

both natural and organized communities which by their inner nature are destined to encompass their members to an intensive degree, continuously or at least for a considerable part of their life, and such in a way independent of their will. (NC III: 187, italics omitted)

An example of an institutional natural community is the family in to which one is born. An example of an institutional organized community is the state, to which one similarly belongs by birth. Although there are other ways to obtain citizenship, no one can change citizenship at will. This institutional character must also be ascribed in a secondary sense to the undifferentiated (so-called undeveloped or primitive) societies, which also embrace their members independent of their will. The reason is that the undifferentiated character of such societies shows an interlacement of different structural principles in their undifferentiated societal form, in which an institutional structural principle always has the leading role, namely either that of kinship or that of a political community (NC III:188).

The non-institutional communities are, by contrast, voluntary in character. They are based on the principle of freedom to join or to leave. Membership in some of these non-institutional communities may have a compulsory character, which cannot be derived from their nature as voluntary organizations, but must be explained from an enkaptic interlacement with the state whereby their internal legal sphere assumes a public function. This is often the case in professional organizations that administer public law concerning the exercise of that profession. As long as the freedom to leave remains, we may speak of an indirect compulsion if leaving involves loss of freedom to exercise one's profession or being deprived of other major advantages. Were the freedom to leave is absent, a non-institutional community loses its voluntary character and becomes a compulsory organization. This is in my opinion the situation with the district boards of education of the public school system in Ontario, where one cannot switch at will one's support from the public to the separate school board and the schools under their respective control.

Voluntary organizations have either an authoritarian or a associatory form of governance (NC III:190, 572). In the latter case the highest authority is vested in all the members together, and, therefore, is exercised only when

they formally meet together. In the former case the authority is imposed. This is the case in universities, schools as well as in many industrial and other enterprises, where one freely joins in a subordinate relation to established authority.

The purpose of the voluntary organization plays an essential role in the choice of the form of governance of the organization. Hence the form of governance in a school is quite different from that of a university, and again quite different from an industrial enterprise, or a hospital. Nevertheless, the purpose must not be confused with the qualifying aspect of the organized community that is established by the voluntary organization. The qualifying aspect of a voluntary organization works internally, with respect to the intra-communal relations. The purpose of the organization works externally, in the inter-communal and inter-individual relations.

Using these distinctions, I suggest that the school organization that operates one or more school communities is, in principle, a voluntary organization, which elects a school board charged with establishing and operating the school(s). In a following chapter I shall try to demonstrate that most of the early schools in Ontario were organized in this manner. In fact, many so-called private

schools are operated by a voluntary school society or school association. Presently, public and separate school supporters form compulsory organizations, which they can neither freely join or leave. These organizations maintain vestiges of their original corporate character in the triennial elections of school board trustees by school district residents.

Whereas the ultimate authority in a voluntary school organization rests with the general membership meeting as its highest legal organ, the school community is organized by the school board in an authoritative way, through the employment of a principal, who in the school community represents the direction and policy of the board to students as well as to teaching and administrative staff, but who derives his or her authority from his or her position in the organizational structure of the school community (see section 3.7 hereafter).

In an organization as here suggested, the parents have a dual role. As members of the voluntary school society or of the compulsory organization of district residents they have an opportunity to participate in the election of the school board and participate in its work through board committees. They are also as parents of children attending a school community, members of that community, and have direct access to the teachers of their children for the purpose of

discussing progress and problems, and may, as volunteer assistants in the classroom, participate in the formal educational process under the supervision of the teaching staff.

All this is, of course, possible also when school systems are authoritatively established by a church organization, an organized faith community or by the state. I shall focus in what follows primarily on the public schools and their legal relationship with the state, using the idea of state and of the modern day school developed here. I shall argue that the state has important and legitimate tasks with respect to day school education, which can be accomplished without making the school over into a state institution.

3.7. Legal relations between state and school

There can be no doubt that the state has a legitimate interest in the systems of schools within its territory. This is evident from the nature of state law itself, which as I have argued above is integrating law, in the sense that it effects an external integration of the internal legal sphere of the school with the private and public law spheres of the state. An example of this were the frequent appeals in civil court against rulings by school boards

concerning their support of disciplinary action by the principal or a teacher against students for a breach of school rules, or, in the terminology I have proposed, the internal school legal order. Today these court cases make fascinating if quaint reading, as many concerned dress codes and hair codes, which, at the time were intended and designed to minimize distractions from "the learning environment." It is noteworthy, that the courts often sustained the disciplinary action taken by the school on the ground of educative purpose, namely the teaching of obedience to authority.

Edward (1971:604) provides an interesting instance in which the original authority of the principal is confirmed by the court and its relation to that of a state board of education is clarified. He writes:

"It is well established that a teacher may temporarily suspend a pupil from school for an offense which impairs the discipline and interferes with the orderly conduct of the school. While a teacher may not exclude a pupil in opposition to the rules or wishes of the board, all his authority over his pupils is not derived from the board. There is inherent in his position the authority to govern the school in a reasonable and humane way, and this authority includes the right to suspend pupils until the board of education has an opportunity to pass final judgment", with reference to the Supreme Court of Wisconsin in a case which has often been cited with approval:

"While the principal or teacher in charge of a public school is subordinate to the school board or board of education of his [sic] district or city, and must enforce rules and regulations adopted by the board for

the government of the school, and execute all its lawful orders in that behalf, he [sic] does not derive all his power and authority in the school and over his pupils from the affirmative action of the board. He stands for the time being *in loco parentis* to his pupils, and because of that relation he must necessarily exercise authority over them in many things concerning which the board may have remained silent." [State v. Burton, 45 Wis. 150, 30 Am.Rep.706], quoted in Edwards (1971:605)

In my view Edwards is correct in rejecting the court's position that the authority of the teacher derives from his or her relation *in loco parentis*, and in emphasizing instead that this authority, while subject to that of the school board, is inherent in his or her position as teacher. This authority as I have argued differs from that of parents over their children, and is refined by the ethical-legal principles expressed as "reasonable and humane way" (the regulative legal principles of reasonableness and of *dignitas humana*). I conclude that a teacher or principal has an inherent authority or original legal competence to make school rules, that do not conflict with board policy or state law.

The external integration of the internal legal sphere of the school with the public and private legal spheres of the state ought to leave the former intact with its legal competence to establish a school and classroom order conducive to teaching and learning. Where this competence is temporarily lacking the state has a duty to intervene in the public interest, in order to restore the relations

between parents, pupils and teaching staff.

The state as a public-legal community of government and subjects has also a major interest in the education system as it provides the elementary and higher education of its future public servants, whether in the various branches of government, in its military and police organizations or in its administration of public justice. There can be no doubt about the legitimacy of the state's interest in the quality of education, and of the duty of government to intervene when a system of education falls into disrepute. It is for this reason that the fundamental freedom of education that limits the legal competence of the state in the field of education as I shall argue in chapter 5, cannot be disassociated from the public interest in its qualified legal sense. This means that the state may, in the public interest, establish minimum guidelines for school curricula, and minimum qualifications for teaching staff, and establish a system of school inspections and tests, that ensures that educational standards are being met.

CHAPTER 4: ORIGIN AND LEGAL ASPECTS OF ONTARIO DAY SCHOOLS

4.1. Early nineteenth century schooling in Upper Canada

In this section I turn to the early nineteenth century schooling in Upper Canada in order to test some of the theoretical considerations developed in the previous chapter. My focus is on the legal relation between state and school. The research questions are: Was the school part of the state, or did it have a different origin? And if a different origin, which one?

The main archival sources regarding the early history of education in Ontario are contained in the Education Records Group of the Public Archives of Ontario. The Education Office preserved the major part of its enormous correspondence with field offices, trustees, parents, school supporters and others. A huge body of incoming general correspondence has been preserved, and a substantially smaller body of general outgoing correspondence has also survived. For a general survey of the Education Records Group (RG2) see Curtis (1988:383-385)

An important collection of primary source documents regarding education in Upper Canada has been compiled by John George Hodgins, the assistant superintendent for

Canada West under Egerton Ryerson, and published in the series *Documentary History of Education in Upper Canada*, now available on microfiche. I have used these to identify the pre-Confederation School Acts.

In addition, I have used selected secondary sources, each of which provides a legal history from a different perspective. The work by Phillips (1957) is perhaps the earliest comprehensive survey of the development of education in Canada. It is written from "an uncompromisingly democratic and rather strong equalitarian point of view" (p.xii), showing the writer's dedication to the ideology of the public school system.

The study by Houston and Prentice (1988) is a detailed look at Nineteenth-Century Ontario, written from the point of view of the scholar (i.e., the one attending the school). These authors have also published edited primary sources in their book on Family, School and Society (1975). Their point of view is that of the history of education and its impact on the pupil, in which they are critical in a scholarly way of the public school system.

The study by Curtis (1988) on 'the Educational State' focuses on the period in which the state achieved total control of education in Ontario, and covers the important years of transition from the radical reform views of the Duncombe report to the establishment of what the writer has

called the Educational State. His view "is grounded in a Marxism sensitive to cultural forms, and informed by Foucault's analysis of power and subjectivity" (p.19).

4.1.1 Upper Canada

The period of British rule over the territory of Upper Canada, then part of the old province of Quebec, began in 1763¹; and the history of Upper Canada as a separate British colony extended from 1791 to 1840 (Phillips 1957:97). During this period the population increased from an estimated 14,000 in 1791 to about 432,000 in 1840. In the following year Upper Canada became Canada West as part of the United Province of Canada, until Confederation in 1867, when the Province of Ontario was established as part of the Dominion of Canada.

The government of Upper Canada was of the same type as that of the other British North-American colonies. It consisted of a Lieutenant Governor, a Legislative Council appointed by him, an Executive Council similarly appointed and recruited largely from the Legislative Council, and a

1. Quebec had formerly been called New France and was part of the French Empire until its conquest in September 1759. The major legal matters arising from the conquest were not finally resolved until 1763 at the Treaty of Paris. Quebec, by Royal Proclamation of 1763, was placed under a governor and an appointed council (Cheffins and Johnson 1986:25).

Legislative Assembly elected by male voters who met the property qualifications for the franchise (Phillips 1957: 104).

Local government was in the hands of a magistrate at the quarter sessions, although township meetings were authorized to attend to minor matters like choosing a clerk and an assessor, deciding the height of fences, and carrying out the regulations of the quarter sessions.

The larger units of local administration were not the counties but districts, of which there were eight in 1816 (*Common School Act*) and eleven before 1830.

The colony was not a modern state in the sense defined previously, not because it was a colony, but because its government resisted those republican tendencies, which in France and the United States were beginning to give social form to the principle of *res publica*, leading towards the first (old-liberal) phase of the *Rechtsstaat*². In Upper Canada governmental power was mainly in the hands of the Family Compact, a network of powerful and related families,

2. These tendencies included an emphasis on certain legal principles that are constitutive of the modern state, such as the principle of representation (with free mandate), as well as the elimination of certain vestiges of feudal society, which allowed government power to be held in private hands, such as those of the church.

in a structural entanglement³ with the governing body of the Church of England in Upper Canada. Only after the establishment of responsible government in the United Province of Canada did the colony begin to enter an early phase of the modern state (1841).

4.1.2 Early schooling in Upper Canada

Early schooling in Upper Canada consisted mainly of what has been called domestic schooling or also family schooling. Houston and Prentice (1988:6) who point to the importance of domestic schooling argue that "any history of education in a pre-industrial society such as Upper Canada that focuses only on formal instruction in schools risks running very wide of the mark."

Although some 19 schools have been tracked down in the early history of Upper Canada, the bulk of schooling and instruction took place at home. Parents would instruct their children as well as their indentured servants, as part of the apprenticeship training in which some families were involved.

Besides this widespread home schooling there were also

3. I use the term 'entanglement' where the governmental powers of Church and State are not sufficiently distinguished, and are interlaced or entangled. Where such powers, even when held by the same person, are subject to different jurisdictions or legal orders, I use the term 'structural enkapsis' as defined in section 2.6, p.53.

the schools set up as private ventures by schoolmasters and schoolmistresses for the education of "young gentlemen or ladies." One of the earliest was a select classical school established by the Reverend John Stuart in 1785, who received a regular annual government grant of £100 from 1792 onward, when a school building was erected. Typical of the many private schools established in the first decades of the nineteenth century is this one in Niagara that offered elementary and practical education to boys and girls:

Mr. and Mrs. Tyler take the liberty of informing the public that on Monday, the 1st of February they will open their School for young people - Men and Ladies. They will keep a regular day School and night School. Children of each sex, above the age of four years will be received, and the price will be in proportion to the kind of instruction the parents may wish their children to receive.

They will teach in Reading, Writing and Arithmetic; the young ladies will be instructed in all that is necessary for persons of their sex to appear decently and be useful in the world, and of all that concerns housekeeping, either for those who wish to live in town or country. The situation is healthy and agreeable, and the house suitable for a number of boarders. (Phillips 1957:107).

Besides the private venture schools there were also common schools that could be called 'parental ventures', when parents jointly hired a teacher and made a building available. The weakness of these schools was undoubtedly the high turn-over of teachers and of children. The parental schools at first had little continuity, and were *ad hoc* schools set up to take advantage of the coming of an itin-

erant teacher. Schools were of necessity relatively small. One teacher had to teach all subjects to up to 80 scholars⁴ varying in ages from 5 to 25, who when not boarding at the school would attend when weather and home situation permitted. An early example was a school that opened in 1797 in the Township of Charlotteville, County of Norfolk, District of London.

"A certain William Pitt Gilbert, traveling by canoe in Lake Erie, was overtaken by a storm and left stranded on an uninhabited stretch of the northern shore. He managed after a few days to reach the Charlotteville settlement, exhausted and starving. After three weeks of rest, he was able to seek employment and offered to conduct a school. Nine residents jointly engaged him and provided temporary accommodations. The thirty or so pupils were lucky, for the teacher had "an easy and engaging manner of communicating instruction" which commanded their respect, so that "he never found it necessary to chastise, correct, reprimand, admonish or reprove" any of them during his three years' stay" (Phillips 1957:111).

4.1.3 Government Involvement in Education

a. The Aims of Government Involvement

The first Lieutenant Governor, Simcoe, whose most fervent wish was to transfer to Upper Canada, and to keep there intact, the institutions of England, sought an endowment of education for the few "that from ourselves may rise up a loyal, and in due progress, a learned clergy." He had in

4. The term "schoolchildren" was not used until much later, when secondary schools became more generally available and upper age limits were enforced.

mind the Clerical Reserves, or 500,000 acres of prime virgin land, established by the *Constitution Act* of 1791 for the education of the clergy.

This concern with the education of the clergy was the direct result of an attempt to establish the Church of England⁵ in the colony. This was also the main objective of John Strachan, the first Anglican bishop of York, who was the dominating figure in education in Upper Canada for at least the first four decades of the nineteenth century. Since many teachers in early Upper Canada were United Empire Loyalists, who believed in the separation of church and state, this belief was a major concern to the government of the colony.

In 1808 the Lieutenant Governor approved the grants given to grammar (i.e., the elite private) schools for securing the instruction of youth and "of instilling into their minds principles of Religion and Loyalty."

Educational leaders regularly emphasized moral and religious aims. The Reverend Robert Murray, Superintendent

5. The Church of England is established in the sense that it, its hierarchy and institutions, its courts and its law are recognized by Parliament as part of the constitution and general law of the land. The bishops are appointed by the Crown, the sovereign must be in communion with the Church of England, and a number of the bishops are Spiritual Lords of Parliament and sit in the House of Lords (cf. *The Oxford Companion of Law*, *sub voce* Church of England).

of Education in 1842 stated: " As morality and religion are the foundation and stability of all good governments, and as these are taught in their purity in the word of God, a portion of the scriptures should be read in the schools." (Phillips 1957:105)

Curtis (1988:29) has called special attention to the preoccupation by government leaders with morality. The national identity of the colony was believed to depend on national character, which in turn was the result of moral self-discipline to be taught in the schools. The question was frequently debated whether the common schools could provide such education. Among the ordinary people, however, there was less manifest concern about the loyalty, religious beliefs or moral behaviour of other people's children or their own. "The parents had neither the time nor the inclination to concern themselves about manners", said David Boyle. The Reverend Robert McGill of Niagara wrote in the 1840's, "Notwithstanding all the noise upon the subject, education is not really held in high estimation among us . . . cheap education is wanted; I have not seen much desire for improvement in quality." (Phillips 1957:105)

Thus from the outset the government tried to set the religious direction or ethos of the schools in Upper Canada. This was attempted by supporting the grammar schools, and by frustrating the establishment of common schools by

local groups of parents.

b. Government support for Upper Canada schooling

Government financial support for education came about, it would appear, for three reasons. First, there was a concern with the maintenance of English Institutions, particularly the Church of England in Canada. This required the education of an elite, who in due time would continue the struggle by the present government against the spread of American ideas through American teachers, especially, the idea of separation of church and state. Secondly, many British immigrants appeared to have come with expectations of government support from the general means for the establishment of the common schools. This led to serious discontent from the moment that the government began to support the grammar schools only. Finally, the Clerical Reserves were a constant and Constitutional reminder of promised government support for (a select type of classical) education, although prime land was in more than sufficient supply to make the Clerical Reserves especially attractive.

When it finally came, government involvement in education arrived in the form of limited financial support, first for the grammar (private) schools and later, after much struggle, an even more limited support for the common

schools. A brief discussion of the legislation follows.

c. Upper Canada Education Law

The *Public Schools Act* of 1807.

In 1807 the government passed a *Public Schools Act*, which provided for grants of £100 apiece to masters of grammar schools, one in each of the eight districts of the province. This Act marked the beginning of regular state support for secondary education. It lacked strong support in the Legislative Assembly, which tried in 1810 to prevent its provisions from becoming permanent, although without success (Phillips 1957:108). The essential reason for the unpopularity of the grammar schools as evidenced by widespread protests and petitions to members of the Legislative Assembly was that they served very few people (Adams 1968:5). They were accessible only to those who lived within the towns in which they were located and to those who could afford to send their sons away from home to board with the masters. Fees were high and the curriculum was of an academic type that had little value to those who were compelled to make a living in occupations other than the professions and the favored positions in government.

In 1819 an amendment to the Act was passed to provide for ten free places in each grammar school for children of the common schools. Candidates for scholarships were to be

chosen by lot from nominees of the trustees of the common schools. But in 1832 not a single grammar school had scholarship pupils from the common schools in attendance.

The *Common Schools Act* of 1816, amended in 1820, and in 1824.

In 1816 the government used the revenues of the province for the first time to encourage local initiatives, and common schools were given sanction and encouragement. The Act provided that when the people of any community had built a schoolhouse and could undertake to supply it with twenty pupils, they might elect three trustees who should have authority to examine and appoint a teacher. When the teacher had taught for six months, and had received from the trustees a certificate of acceptable service, he [sic!] was to present this chit to the district treasurer and receive his [sic!] portion of the public money voted for the purpose. The only qualification demanded of the teacher was that he should be a British subject, or have taken the oath of allegiance. The trustees had complete control over the school, although they were required by law to report every three month to a district board appointed by the Lieutenant Governor. The Act was to be in force for four years only and was passed with some reluctance by the Legislative Council in return for non-interference by the

Legislative Assembly with the grammar schools. The total amount of money to be received by a teacher depended on the number of pupils, and was in no case to exceed £25 per annum. The total grant was £6000, which was reduced in 1820, four years later, to £2500 in an amendment to the Act. This reduction was associated with a plan to provide for a different type of school for children of the people - a school calculated to fulfill more efficiently the aims that the minority regarded as appropriate for the education of the children of the majority.

In 1824 the Act was again extended, to include the education of Indians. Teachers' qualifications were made subject to check by a member of the District Board, from whom the certificate was henceforth to be secured. Money was also voted for the purchase of books and tracts to be distributed by the District Boards to Sunday Schools in the more remote and indigent areas. One of the first Sunday Schools was established in Kingston in 1817 for those who "from peculiar circumstances are unable to attend the common school." These Sunday Schools taught reading and spelling, initially from materials provided by the Sunday School Society in the United States. By broadening the purposes of the common school fund without adding substantially to its resources, and by having the teachers screened by District Board members, the influence by the

government over the common schools was gradually increased.

d. The Central Board of Education (1823-1833)

The Central Board of Education was appointed by the Lieutenant Governor in 1823 and presided over by Dr. John Strachan, who had arrived in 1799 from Scotland, to take charge of a non-existing university. Instead he became rector at Cornwall in 1804, where he opened a private grammar school. After having become the first Anglican bishop of Toronto, he was the dominating figure in education in Upper Canada for at least the first four decades of the nineteenth century.

The Board was given financial resources by a liberal grant of land. A special grant of £150 annually was "laid out for religious books and tracts for the children of the poor and destitute throughout the province", (quoted in Phillips 1957:113)⁶.

The Board also issued rules for the government of

6. With a colonial government dedicated to the maintenance of English Institutions, it is not surprising to find many parallels between English and Upper Canadian organization of schooling. An example is the National Society for Promoting the Education of the Poor in the Principles of the Established Church, an Anglican organization founded in 1811, which sought to establish a day school in every parish in England and Wales. For documents regarding the Voluntary Societies in England see J.M. Goldstrom 1972:44-102, and for the Plan of Union of the National Society, which proposes the relation between school committees and Diocesan committees, see p.49-50.

schools, but these had little effect, as the Board was in strong disfavour with most of the people and with their representatives in the Legislative Assembly. It went out of existence in 1833.

e. The Duncombe Reform Bill

In 1835 Charles Duncombe M.D., Thomas Morrison and William Bruce were appointed by the Legislative Assembly to a Committee of enquiry into the organization and management of systems of colleges and elementary education. The appointment was made while the School Act of 1835, passed by the Assembly was about to be vetoed by the Legislative Council. Duncombe, a member of the left wing of the Reform party, and later a leader of the rebels in the Western District in 1837, reported in 1836 after an extensive tour of the United States, and presented draft legislation for the implementation of his report. The reform proposals are of interest as they provided some of the scaffolding for the subsequent establishment of the public school system (Curtis 1988:25).

Duncombe's emphasis on moral education is striking. Education to him is first and foremost moral discipline. Without good moral habits, the student eventually undermines his physical health, and his intelligence would be engaged in activities dangerous for the state, religion and

social order. The failure of the existing schools to place moral education directly in the centre of educational process was not due to the incapacity of teachers to improve their students. Duncombe believed that its importance was simply underestimated (Curtis 1988:29). This suggested two major changes: more teachers had to be trained, and parents had to pay the price to give trained teachers time and opportunity to discharge their sacred duties. The large number of teachers required would make it necessary to train female teachers. A female Normal School was a necessary part of the educational reform. As far as "paying the price", Duncombe's plan introduced the principle of local property taxation to an annual maximum of £100 for the construction and furnishing of schools. The draft legislation sought to reform education, as its preamble put it, to produce 'peace, welfare and good government.' It emphasized the role of the representatives of the male property holders and taxpayers who were to organize the educational affairs of society. This emphasis on local control was, of course, in sharp contrast with the attempts at controlling education through the abandoned Central Board of Education, and through the central government elite.

Duncombe's draft legislation died on the order paper with the elections of 1836, and after the Rebellion of 1837-1838 the large Tory majority in the Legislative Assem-

bly vindicated the educational activities so sharply criticized by the Reformers during the early 1830s. The Burwell Common School Bill of 1838 passed the House of Assembly by a large majority. It was a close transcript of John Strachan's educational views expressed in 1832 before an educational committee of the House. Nevertheless, it was vetoed by the Legislative Council, as it had another use for the colony's educational resources. The *Grammar School Act* of 1839 appropriated a new body of land for the support of the elite grammar schools. The grammar schools established by the Act of 1807 were now declared private schools in order to qualify for the land grants established in 1797 for elementary education. As Curtis (1988:38) has put it, "the colonial executive was most concerned with reasserting its interest in control by a state church over secondary education funded out of public resources." Thus the government of Upper Canada to the very end attempted to frustrate the common school system, which by 1838 counted 651 common schools (Phillips 1957:114). Considering the little financial support from the colonial government, this was no mean achievement.

4.1.4 Internal school law and school attendance

Although the government's Central Board of Education was thus mainly ignored, and finally abandoned, the local

trustees gradually were no longer simply the representatives of the parent subscribers. In 1836, for example, the Oakville school trustees regulated both the teacher and other people's children with formal rules. Some of these rules are shown in the following quotation:

With respect to the teacher:

5. As all good children from their cradle are possessed by enquiring minds, that proper attention be given to all enquiries they make relative to education in mildness, with an approbation of their conduct in so doing.

9. That the teacher be required to take a paternal as well as pedagogical care over all pupils placed under his tuition.

With respect to pupils:

3. The pupils to be strictly required to observe good order at the intermission and noon hours, to avoid all screaming and useless noises, quarreling etc.

8. That all pupils in the school do not be allowed to whisper and laugh during the school hours, and but one allowed to be out of school at a time, and not then without the consent of the teacher. (Houston and Prentice, 1988:58).

In 1828 the number of schools was given as 291 with 7731 scholars. The total population was estimated at 215,000 in 1830, for an approximate attendance of 3.6%. By the end of the 1830s the total population has doubled in size to 430,000, and school attendance has risen to 20,000 in 1838, for an approximate attendance of 4.7% (based on data cited by Phillips 1957:135), and an average attendance per school (class) of 31 scholars.

Phillips estimates that in the various provinces between 1830 and 1840 from one-third to two-thirds of the children

received from twelve to twenty-four months of formal schooling, in periods of no more than six months at a time. There had not been a development of prescribed courses of study or textbooks, of inspection or supervision, or of teacher training (Phillips 1957:135).

4.1.5 The transition to state control of education

In the previous sections it has become clear that the schools in Upper Canada were basically local parental schools, supervised by three trustees, chosen locally, who had control of the hiring and certification of teachers as well as the distribution of government grant money to teachers. The parents built and maintained the schools. Since many adults locally were parents, or grandparents, or expected to be parents, it is easy to confuse this local community support for and supervision of the school with public education in the present sense of state-controlled public schooling. So, for instance, in a statement by Phillips who observed: "In Upper Canada, by 1840, or shortly after, schools for the people had become, nearly everywhere, schools of the people, built and controlled by the people themselves" (Phillips 1957:124). And it is easily overlooked that "the people" while welcoming handouts from the government, and clamouring for more, had rejected the Central Board of Education, and would soon be embroiled in

battles with the government concerning control of public education.

In Lord Durham's *Report on the Affairs of British North America*, he criticized existing political rule in both Canadas, and made special reference to the small group known as the 'family compact'. "The bench, the magistracy, the high offices of the Episcopal Church, and a great part of the legal profession, are filled with adherents of this party", Durham wrote (Curtis 1988:41). He particularly criticized the absence of effective local government organs in Upper Canada, and the absence of the means of instruction in the colony, which he suggested were due in part to the fact that the "lands which were originally appropriated for the support of schools throughout the country" had for the most part been "diverted to the endowment of the University, from which those only derive[d] any benefit who reside[d] in Toronto" (Curtis 1988:42).

In June of 1841, when the first parliament of the United Province of Canada met in Kingston, governor Lord Sydenham was determined to act immediately in the area of education, not only to alleviate "the deplorable state of education" as identified by Lord Durham, but also to devise a unified school jurisdiction throughout the Province, that is, both Canada East (formerly Lower Canada) and Canada West (formerly Upper Canada). The new *Common School Act* of 1841, was

an important part of a larger political scheme to create a cultural union of the new Province following Lord Durham's recommendations. It was rendered unworkable, however, because each section of the United Province had evolved over several decades its own educational structures (Wilson 1978:38).

New School Acts and their amendments followed each other in rapid succession during the 1840s and 1850s in an attempt to establish state control in various degrees of centralization over the common schools.

The history of these power struggles falls outside the scope of this essay. The important point to note is that the system of state control over education came about as the result of a political ideology espoused by Lord Sydenham. The state had its own agenda for the cultural integration of Upper and Lower Canada in the new united colony of Canada.

Significantly, section XI of the 1841 Act made the famous provision of "separate schools", without once mentioning the term. It provided "that any number of inhabitants of a different faith from the majority in [either] township or parish might choose their own trustees" and "might establish and maintain one or more schools" under the same conditions as other common schools. The Roman

Catholic church took prompt advantage of this opportunity.

4.1.6. Some conclusions

I have attempted to show that the schools in Ontario originated in private and parental ventures. Government involvement was initially limited to financial support for the grammar schools for the education of a future government elite. Under the influence of a political ideology it attempted to set the religious direction of these schools as part of a policy to establish the Church of England. The common schools were at first frustrated, and later supported in a very limited way, which support was further reduced over subsequent years. Government control over education in the so-called public school system was not established until the 1840s, when Upper Canada was a part of the United Province of Canada. The political ideology then aimed at the cultural integration of Upper and Lower Canada. The public school system was intended as a major instrument for achieving that purpose. The educational ideology inspired by this political aim led to a high degree of rationalization and standardization of schooling, accompanied by a growing administrative bureaucracy. The resulting very close entanglement of school and state has in my opinion not been beneficial to the resulting school system, or to the state. The disempowering of parents in the schooling of

their children has undermined the state by undermining its credibility and legitimacy.

This brief exploration of the legal history of education in Upper Canada clearly establishes in my opinion, that the day school or the school system did not originate in the state from which it only received reluctant support. Instead, it had its origin mainly in what I have called the parental venture schools and to a lesser extent in what are known as the private venture schools.

It also supports the suggestion that the modern school in the sense of a state-controlled school has its beginnings in the development of the modern state. It is at the early stage of this development that the questions of responsible government, rule of law and national interest began to be raised. A state-controlled school system would play a major role in the building of the national community of government and subjects, and publicly supported schools were considered, therefore, in the public interest.

4.2. Public schooling and Ontario education law

I distinguish 'school law' as the body of school rules, set by the school principal, in addition to those set by school boards, and referred to in chapter 3 as belonging to the internal school legal order, from 'education law', as

the body of state law that integrates school law in an external manner with the public and private law sphere of the state. Under section 93 of the *Constitution Act, 1867*, provincial legislatures are responsible for enacting the statutory law relating to education. Section 93, however, restricts provincial legislative authority in the field of education by the addition of four qualifying subsections in recognition of a reciprocity of educational rights and privileges at the time of Confederation between the Roman Catholic and Protestant minorities in Ontario and Quebec respectively, while a remedial and watch-dog role was assigned to the Governor General in Council and the federal Parliament.

93. In and for each Province the Legislature may exclusively make laws in relation to Education, subject and according to the following Provisions: -

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec;

(3) Where in any Province a System of Separate or Dissentient Schools exist by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education;

(4) In case any such Provincial Law as from Time to Time to the Governor General in Council requisite for

the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision⁷ of the Governor General in Council under this Section⁷.

All provincial legislatures have passed legislation occupying this provincial legislative field. For example, Ontario's *Education Act*, R.S.O. 1990 c.3, defines the powers and responsibilities of the Minister of Education (since 1993 Education and Training) and of the Ministry; makes school attendance compulsory for all children between the ages of six and sixteen, subject to some exceptions; describes the various kinds of school boards and the way they are established; outlines the obligation of school boards with respect to trainable retarded children; and sets out the duties and powers of boards, supervisory officers, principals and teachers.

The powers of the Minister are set out in Part I of the *Education Act* and derive from section 2(2) "The Minister shall preside over and have charge of the Ministry" and section 2(3) "The Minister is responsible for the adminis-

7. Section 93 was altered for Manitoba by section 22 of the *Manitoba Act, 1870*, for Alberta by section 17 of the *Alberta Act*, for Saskatchewan by section 17 of the *Saskatchewan Act*, and by Term 17 of the *Terms of Union of Newfoundland and with Canada*.

tration of this Act and the regulations and of such other Acts and the regulations thereunder as may be assigned to the Minister by the Lieutenant Governor in Council." The powers are detailed in 34 subsections of section 8(1), and include the prescription of courses to be taught, the textbooks to be used, and the requirements for diplomas and certificates.

Under section 11(1) of the Act, the Minister also has extensive authority to establish regulations detailed in 36 subsections, and includes school buildings, the school year, duties of pupils, and the powers, duties and obligations of teachers, principals and other personnel.

The Minister exercises executive control by formulating policy which is promulgated via circulars, memoranda and guidelines. Although these do not have the force of law as have the regulations, they are enforceable in a *de facto* sense, as the Minister may withhold fiscal support or graduation diplomas in the case of boards that refuse to comply with the ministerial policies (Dickinson and MacKay 1989:8)

In addition, the publicly supported schools in Ontario, which include the so-called public and separate schools, are governed or effected by other acts, both provincial and federal.

The *Teaching Profession Act* is almost entirely concerned with the organization of the Ontario Teachers' Federation, a compulsory organization of all public-supported school teachers. Regulations under this Act deal with professional obligations of teachers, as well as discipline and grievance procedures.

The *School Boards and Teachers Collective Negotiations Act* defines comprehensive rules and procedures for collective negotiations between a school board and teachers under its jurisdiction.

The *Teacher's Superannuation Act* and regulations under the Act govern the teachers' pension fund. It was replaced on Jan. 1, 1990 by the *Teachers' Pension Act*.

The *Human Rights Code*, S.O. 1981, c. 53 provides in subsection 18(1) that the rights set out in the Code are not to be construed 'to adversely affect any right or privilege respecting separate schools enjoyed under *The British North America Act, 1867* and the *Ontario Education Act*.'

Section 68(3) of the *Child and Family Service Act*, S.O. 1984, c. 55 makes it mandatory for teachers and principals to report suspicions that a child is or may be suffering or may have suffered abuse.

Some federal legislation, while not dealing with education *per se*, necessarily affects schools and their adminis-

tration, notably the *Young Offenders Act*, s.23(2), which states that a probation order may include the following condition "that the young person attend school . . ." This is a condition that possibly conflicts with the right of school boards to expel students, and since the courts are not allowed to inform the school of the presence of young offenders in class, contributes to an atmosphere of anxiety. It makes it also impossible for teachers to give these unknown offenders special help and assistance.

Of great importance is also the *Canadian Charter of Rights and Freedoms*. Prior to 1982 the law of education in Canada involved predominantly the examination by the courts of legislatively defined policy and practice. Court decisions were mostly confined to analyses of compliance with validly enacted legislation, regulations and school board rules (Dickinson and MacKay 1989:1). The *Charter* has provided the courts with authority to scrutinize legislation and administrative action for compliance with the rights and freedoms enshrined in it.

4.3. School law and the Canadian Charter of Rights and Freedoms

The arrival of the *Charter* has caused concern and confusion among educators and particularly among school adminis-

trators who are on the front lines of school rule enforcement. As Dickinson and MacKay (1989:293) have argued, before the *Charter* the individual school principal was given broad discretion to make and enforce rules within his or her school. Similarly, school boards were given broad authority to manage students within the school district. As school systems grew in size, however, school education became more centralized and provincial authorities eroded the autonomy of the both the principals and the school boards. The schools became cut off from the parental community and became emanations of the state and accountable to provincial authorities.

One of the areas of uncertainty is the applicability of the *Charter* to school boards and schools. Section 32 of the *Charter* states that it applies to all matters within the authority of Parliament and government of Canada and the legislature and government of each province. Although the meaning of this section is unclear, it has been interpreted by some legal experts to mean that the *Charter* is not universal in its application, that it applies to the actions of Parliament, the actions of legislatures, and probably to the actions of the agents of the state, but that it likely does not apply to private actions such as disciplining one's own child. There is uncertainty as to whether teachers will be considered as state agents per-

forming a government service and, hence, caught by the *Charter*, or considered more like parents and acting *in loco parentis* (Hurlbert and Hurlbert 1992:9). A. Wayne MacKay has stated: "There is some debate about whether the *Charter* applies to the private as well as the public sector but the majority of cases and academic comment suggest that it will only apply to agents of the state. This is also the literal reading of section 32 of the *Charter* which defines its application" (quoted in Dickinson and MacKay 1989:299, end-note 2).

The following case law illustrate the uncertainty. In *Re Ontario English Catholic Teachers Association and Essex County Roman Catholic School Board* (1987), 58 O.R. (2d) 545, (Div. Ct.) there was a challenge to the Board's mandatory retirement policy. Mr. Justice Anderson stated for the majority:

In my view, it is fair to conclude that a school board is created under a comprehensive statute dealing with education and has a clearly defined role within the scheme of the statute, and to conclude in consequence that the actions of the board may properly be said to be, for the purpose of the *Charter*, the actions of the "legislature" or "government" of Ontario.

This reasoning has been called into question by the decision of the Ontario Court of Appeal in *Re McKinney and Board of Governors of the University of Guelph et al* (1986), 57 O.R. (2d) 1. The Court there specifically rejected the notion that a body is governmental because it

derived from statute or government in some way. The focus instead was placed on the governmental nature or function of the body in issue.

In *J.M.C.* (1986), 56 O.R. (2d) 705 the Ontario Court of Appeal assumed without deciding that a school board, teachers, and principal of a school are subject to the Charter in their actions in dealing with the students. Mr. Justice Grange stated:

I do not find it necessary to decide this difficult issue [whether or not the school system (or at least the public school system) is an extension of government]. I am prepared for the purpose of this appeal to assume that the school board directing the affairs to the school and the school itself, including the principal and other teachers are subject to the *Charter* in their actions and dealings with the students under their care. *Ibid.*, at 708.

In *Tomen v. Federation of Women Teachers' Association of Ontario* (1988), 61 O.R. (2d) 489, Mr. Justice Ewaschuck of the Supreme Court of Ontario rejected an argument that a by-law of the Ontario Teachers' Federation compelling membership of women public school teachers in the Federation of Women Teachers' Association of Ontario was governed by the Charter. The applicants had argued that the by-law was not merely private law because it controlled the collective bargaining process of elementary and secondary schools, and was, therefore, "governmental matter."

Finally, a case involving the application of the Charter to a Code of Ethics. In *Cromer and B.C. Teachers' Federa-*

tion (1987) 5 W.W.R. 638 (B.C.C.A.) it was assumed that the *Charter* applied to the BCTF's Code of Ethics, which was made under a by-law of the federation pursuant to s.142 of the B.C. *School Act*, which authorized the federation to make laws governing the suspension and expulsion of teachers. Cromer, a teacher and member of the BCTF was charged by another teacher, Sauve, with criticizing her in breach of clause 5 of the Code of Ethics. Cromer objected that the charge was not proper, as an application of clause 5 was a violation of her freedom of expression. The Court found that the Code of Ethics was designed to avoid disharmony among teaching colleagues. Criticism was not excluded but it has to follow set procedures. Cromer's freedom of speech to make personal criticism did not override the public interest good incorporated in the Code of Ethics designed to ensure harmonious working relationships among the teaching staff.

Another area of uncertainty, in addition to whether the *Charter* applies, is how the *Charter* applies. As a consequence, there is a great deal of interest in decisions by the U.S. Federal and State Supreme Courts in the area of School Law, and expressed opinion on how these decisions

would apply in Canada, and why⁸. The areas of school law that have received attention since the enactment of the *Charter* are:

- 1) Students Rights, especially speech and expression; personal appearance; membership in associations; and equality, especially in school sports and the education of handicapped children;
- 2) Search and Seizure, Police, and Young Offenders;
- 3) Minority Language Rights; the right to an autonomous school system
- 4) Religion in the Public Schools; freedom of religion
- 5) Teachers' Rights; especially teachers' lifestyles; freedom of expression outside the school; freedom of association; academic freedom; mandatory retirement.

Of particular interest is the perception, both in the United States and in Canada, of the respective Supreme Courts becoming a "National School Board", or "Super-Board"⁹. In Canada this trend is said to have a positive,

8. Canadian textbooks such as Zucker (1988), Dickinson and MacKay (1989) and Hurlbert & Hurlbert (1992, 2nd ed.) deal extensively with U.S. case law and its implications for Canadian education.

9. See T.A. Sussel and M.E. Manley-Casimir, "The Supreme Court of Canada as a National School Board": *The Charter and Educational Change*, (1986), 11 *Canadian Journal of Education* 313-31, and "Courts as Super-Boards" in Larry Eberlein, "Judicial intervention in school administration" in *The Canadian School Executive*, November 1988, p.3-10 at p.3

while "nationalizing" influence, in that decisions of the Supreme Court of Canada regarding school law would tend to impose a general framework of education in Canada and counteract the fragmentation of provincial education.

Although this trend has been underway for some time, due to the extensive involvement by the Federal Government with provincial education systems in the areas of transfer payments, grants, and vocational training, and also as a result of national organizations like the Canadian Education Association, the Canadian School Trustees Association and the Canadian Teachers Federation, Dickinson and MacKay (1989:43) have argued that Supreme Court decisions provide this developing nationalizing influence with constitutional legitimacy. In contrast to the U.S. experience, where administrative non-compliance with judicial decisions is well documented, it might be anticipated that Canadians will accord greater compliance and legitimacy to the new constitutional rules, which, in turn, would reinforce the nationalizing influence of the *Charter*.

A review of academic opinion based on U.S. case law and on decided case law in Canadian law with implications for school law would in my opinion support the following general conclusions:

- 1) School rules ought to be in writing and available to

the students and their parents or legal guardians. This goes to the legal principle of fair warning.

2) School rules ought to be clear and ascertainable or "prescribed by law." They cannot be vague, overly broad, or lacking in due process. Thus a policy statement regarding activity requiring prior approval must outline a procedure for prior approval in clear terms and set out a definite time period for consideration of the proposal submitted for prior approval.

3) School rules ought to be flexible enough to provide the teacher or principal a certain amount of discretion in applying a rule to the individual circumstances of each case.

4) In applying the rules to a specific case, the principles of "natural justice" (or due process) are to be observed (unbiased consideration of all the relevant circumstances, and a fair hearing).

5) In addition to these procedural legal principles, school rules ought to comply with the relevant substantive rights and freedoms of the *Charter*, or in the alternate must be demonstrably justified under section 1 of the *Charter*.

For example, although the limits of freedom of expression have not yet been decided in Canadian courts, especially in the school setting, the Canadian jurisprudence

emerging on the subject reflects much of the reasoning and logic followed by the American courts. This reasoning in turn has been based on much of the reasoning used by the Canadian court in the *Ontario Film and Video* case, which has been applied by American courts in the school setting (Hurlbert & Hurlbert 1992:60).

Another example is that Canadian educators have a very restricted view of student association and assembly rights, and have often formulated very restrictive rules. An example is a pre-Charter case: *La Fédération des étudiants de l'Université de Moncton v. L'Université de Moncton*, Unreported Decision of the New Brunswick Court of Queen's Bench, dated 1982. A court challenge of similar restrictive rules under the *Charter* is not unlikely.

What emerges from a review of these general observations is a trend toward the disclosure or opening up of the school community through the application of the ethico-legal principles of procedural fairness to school law, which refines and deepens traditional school rules, and makes the discretion of school administration subject to judicial review. I see this as a positive trend, consistent with my idea of the material *Rechtsstaat*. Although the fundamental freedoms, as I see them, are limits on the juridical competence of the state, and for that reason do

not apply to private legal relations, some of the uncertainty concerning the applicability of the *Charter* is undoubtedly due to the very close enkapsis between the school system and the province. Without a theoretical insight into that relationship it is difficult to see how there would not be confusion. Although school boards and school staff originally represented voluntary organizations, these latter have become legal organs of compulsory organizations as discussed in section 3.6.7 and have acquired in that respect the nature of organs of state. Yet, in other respects, especially in relation to the activity of teaching, they retain their typical ethical qualification as distinct from typical juridically qualified government activity.

This insight also provides a handle on the problem of juridification of the school system. Where the latter becomes a department of state, education becomes a juridically qualified activity and, because of this reductionist trend, denatures into a juridified activity, in which the school must take on activities, which are intended to guarantee not only equal opportunities regardless of social status, but guaranteed "equal outcomes" as well, regardless of different abilities. It is expected that s.15 of the *Charter* with s.27 (multiculturalism) and s.28 (sexual equality) will play an increasingly important role.

CHAPTER 5: FUNDAMENTAL FREEDOM OF EDUCATION IN ONTARIO

5.1 Freedom of education as a fundamental freedom

A major thesis of this essay, argued in chapter 3, is that the legal competence or juridical sovereignty of the state is delimited by the fundamental freedoms, taken in the sense of constitutive legal principles of public state law, in an unbreakable coherence with the regulative principle of the public interest in a legal sense, when these fundamental freedoms determine the material content of positive state law. These freedoms are grounded in the personal and non-state freedom spheres, many of which pre-date the rise of the modern state as *Rechtsstaat*. I have also argued that the complementary principles of civil liberty and equality presuppose and delimit each other, but as constitutive legal principles of private state law are ineffective in delimiting the juridical sovereignty of the state, as they coordinate private legal relations and depend on public law for their effectiveness. These and other constitutive legal principles of public and private law are often enumerated in constitutional law documents. Among the non-enumerated fundamental freedoms in the *Canadian Charter of Rights and Freedoms* are freedom of enter-

prise, academic freedom and freedom of education.

Freedom of enterprise, I suggest, is not listed because from the beginning of the early-liberal phase of the Rechtsstaat, it was considered the sole purpose of the state to protect the system of so-called free market forces, the free enterprise system. Academic freedom¹ is not listed, I think, because initially the emerging modern state seldom if ever interfered with scientific discourse or the results of scientific research. Freedom of education, I suggest, is not listed because home schooling was the common way of teaching children numeracy and literacy, together with religion and moral virtues. Moreover, freedom of education in this limited sense is often associated with or derived from freedom of religion.

In this section I shall focus on the idea of freedom of education as a fundamental freedom in the sense of a consti-

1. By academic freedom I mean the freedom to do research and to teach at privately and state-funded organized communities or institutions such as research institutions, universities and colleges, without interference by the state in the results of such research, or in the course content of the instruction. This academic freedom is to be distinguished from academic freedom in the narrower sense of *Lehrfreiheit* (freedom to teach), which protects the teacher from arbitrary interference in the course content by the administration of the institution concerned or its governing board. It includes the freedom to teach unpopular or controversial theories and the right to be wrong. Hook (1969:35) has argued that this *Lehrfreiheit* is not a freedom or human right, but a professional right that has to be earned.

tutive legal principle, which delimits the legal competence of the state. I am concerned here with the question of limits to the intervention of the state in the educational sphere, in which the state itself has a major and legitimate interest as argued in section 3.7. I shall argue that the answer to this question involves the harmonizing of the legal interest of those who have the primary responsibility for the education of their children with the public interest as discussed in section 3.5.4.

Each fundamental freedom appears to presuppose one or more others. Freedom of religion in the sense of public worship, for example, presupposes freedom of conscience, of expression, of association and assembly, and of the press. This appears to be true also for academic freedom and freedom of education. Freedom of the press presupposes not only freedom of expression, but also of association and of enterprise. One could formulate this interdependency as a mutual coherence and note that the legal principles involved can be positivized in state law only in a mutual coherence with each other and with the principle of public interest. For this reason it would be a serious mistake to arrange the fundamental freedoms in a hierarchy of greater and lesser importance, and argue, for instance, that free-

dom of expression is the most fundamental freedom² that would override a prohibition of expressions of racial hatred. This is not to deny, that in the legal history of the formulation and articulation of different freedoms, some freedoms are earlier, such as the freedom of (private) devotion and conscience³, and others, such as academic freedom, are later.

Freedom of education is one of the older freedoms, and historically closely associated with the freedom of faith and conscience, as it involved the teaching of the tenets of a particular faith community and its moral doctrines by

2. For example, the Canadian Civil Liberties Association in a factum submitted to the Supreme Court of Canada as interveners in *R. v. Keegstra et al*, states in §12 "The importance of freedom of expression in democratic societies requires that it be given priority", and in §13 "... that given the fundamental position occupied by freedom of expression in a free and democratic society, and because there is 'a strong presumption in favour of freedom of expression, stronger than in any other of the important civil liberties', it is only where the freedom of expression of an individual or individuals collides with a freedom or right of equal import to society that the freedom of expression should be cut back to any extent."
3. This freedom first appeared in explicit terms in the Union of Utrecht of 1579, which formed the basis of the Republic of the Seven United Netherlands (1579-1789), and was also included in the Treaty of Westphalia (1648) by which the independence of the Dutch republic from Spain was confirmed (Böckenförde 1991:207, footnote 7). The substance and scope was admittedly restricted. In substance it related only to freedom from coercion to adopt or retain a particular belief or faith community, to the right to hold (simple) family devotions in accordance with one's own religion, and to the so-called *beneficium emigrationis*, the right to emigrate in order to be able to practice one's religion. In scope it related only to adherents of the three Christian denominations recognized in the Holy Roman Empire of the German Nation (Böckenförde 1991:208).

parents to their children.

In the following section I shall try to demonstrate that a modern articulation of the freedom of education must take into account that the primary responsibility for the education of children lies with their parents or legal guardians as the case may be. This responsibility, in addition to the parents' or guardians' own efforts in nurturing the children in their care, involves in my view a setting of the direction of the formal and informal education of these children, which they have entrusted to others.

The reason is, as discussed in section 3.6.4., that education involves the formation of the personal act-structure by which children become conscious of the normativity of the various spheres of life in which they function. This is not limited to the moral aspect of what is ethical or unethical conduct, but includes lawful and unlawful, economic and wasteful, artful and tasteless, social and anti-social activities as well, in addition to the basic skills of correctly reading, writing and reckoning. And since all educational formation is guided by a firm belief or conviction concerning the worthwhileness of this forming, it is this belief of the parents or guardians, shared with others to whom they entrust an aspect of the education of their children, that is involved in the setting of direction.

There is in my view no conflict between freedom of educa-

tion and compulsory school attendance. As the state has a compelling interest in an educated citizenry, it may compel school attendance within the limits recognized in the fundamental freedom of education⁴.

5.2. Freedom of Education in International Law

The following is a selection of relevant articles on freedom of education in several important international declarations of human rights as well as in constitutional documents, and arranged in chronological order. I have quoted extensively from the German and Indian constitutions as neither the Canadian Constitution nor the American Constitution articulates the fundamental freedom of educa-

4. There are several difficult issues surrounding the subject of compulsory school attendance. If compulsion is accompanied by adequate compensation that covers the cost of schooling, this compulsion has no longer the implication of strong coercion, which it has, when there is no or very inadequate compensation, and the full cost of school fees must be born by the parents who are compelled to send their children to a designated school. The situation is slightly different again, when parents are compelled to pay school taxes, which provide a "free schooling" for their own children, for a number of years, and to pay for someone else's children for the period during which they are subjected to these taxes. West (1973) has explored some of these problems from a political economic point of view. He notes that there is little evidence to support the assumption, usually made, that the educated child will be more law-abiding, and that this 'benefit' will compensate others sufficiently, including non-parents, for them to want to continue financing the education of others through taxes upon themselves.

tion⁵.

United Nations Organization, *Universal Declaration of Human Rights* (1948)

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of the respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

German Federal Republic: *Basic Law* (1949)

Article 7

1. The entire educational system shall be under the supervision of the state.

2. The persons entitled to bring up a child shall have the right to decide whether it shall receive religious education.

3. Religious instruction shall form part of the ordinary curriculum in state and municipal schools, except in secular (*bekenntnisfreie*) schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious communities. No teacher may be obliged against his will to give religious instruction.

5. Arguably, s.93 of the *Constitution Act, 1982* limits the legal competence of the state with respect to Education as it existed at Confederation or at the time as other provinces joined Canada, and for this reason represents a Canadian constitutional formulation of freedom of education, as if it were frozen in time. See also page 119, where s.93 is quoted.

4. The right to establish private schools is guaranteed. Private schools, as a substitute for state and municipal schools, shall require the approval of the state and shall be subject to the laws of the *Länder* [the constituent states of the Federal Republic]. This approval must be given if private schools are not inferior to the state or municipal schools in their educational aims, their facilities and the professional training of their teaching staff, and if a segregation of pupils according to the means of the parents is not promoted. This approval must be withheld if the economic and legal position of the teaching staff is not sufficiently assured.

5. A private elementary school shall be admitted only if the educational authority finds that it serves a special pedagogic interest, or if, on the application of the persons entitled to bring up children, it is to be established as an inter-denominational or denominational or ideological school and a state or municipal elementary school of this type does not exist in the commune (*Gemeinde*).

Republic of India, *Constitution* (1949)

Article 28 (in part)

1. No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

2. Nothing in clause 1 shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

Article 29 (in part)

2. No citizen shall be denied admission into any educational institution maintained by the State or receiving aid of State funds on grounds only of religion, race, caste, language or any of them.

Article 30

1. All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

2. The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Protocol No.1 to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (1954)

Article 2

No person shall be denied the right to education. In the exercise of any function which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

United Nations Organization, Declaration of the Right of the Child (1959)

Principle 7

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society.

The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with the parents.

The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

United Nations Educational, Scientific and Cultural Organization Convention against Discrimination in Education (1960)

Article 2 (in part)

When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of article 1 of this convention:

(a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes . . .

(b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians . . .

(c) The establishment or maintenance of private

educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities . . .

United Nations Organization, *International Covenant on Civil and Political Rights* (1966)

Article 18

4. The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to ensure the religious and moral education of their children in conformity with their own convictions.

United Nations Organization, *International Covenant on Economic, Social and Cultural Right* (1966)

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among the nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

a. Primary education shall be compulsory and available free to all;

b. Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

c. Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

d. Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

e. The development of a system of schools at all

levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to choose for their children schools other than those established by the public authorities which conform to such minimum standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

United Nations Organization, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981)

Article 5 (in part)

1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.

2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interest of the child being the guiding principle.

From the above survey it appears that freedom of education has the following characteristics:

1) Parents or legal guardians have the right, over against the state, to educate their children and have them

educated in schools that are in accordance with their religious or philosophical convictions, subject only to such limitations as prescribed by law.

2) Such education shall nevertheless meet the minimum requirements established by the state.

3) The state has the duty to make education compulsory at the elementary level and available free of charge.

4) The state may not compel children to receive teaching on religion or belief against the wishes of parents.

5) The legal interests of children and their parents or guardians in a formal education in accordance with their religious or philosophical convictions must be harmonized with those of the state in an educated citizenry through the provision of state supervision.

From this I would tentatively define freedom of education as the right of parents and guardians, over against the state, to either individually or in association with others to provide for the formal schooling as well as the informal education of their children in accordance with their shared belief or conviction in its impact on the educational formation of these children, subject only to state education law in the public interest that sets out the minimum requirements of formal schooling and provides for adequate inspection to ensure that these requirements are met.

5.3. Freedom of Education in Canada and in Ontario

In Canada freedom of education is recognized as the freedom to provide home schooling and the right to establish private schools. According to Finkelstein (1985:85-95) only Quebec and British Columbia have specific statutes respecting private schools. Pursuant to the *Private Education Act*, Quebec provides more state funding for private schools than any other jurisdiction in North America. Once the Quebec Minister of Education declares an institution to be in the "public interest", defined as an institution which "ensures services of quality and contributes to the advancement of education in Quebec", according to specific criteria, it is eligible to receive grants up to 80% of the average cost of educating each pupil.

In British Columbia, the *School Support (Independent) Act* established a group classification system for private or "independent" schools. The classifications are based upon the quality of the facilities and teachers and require that the curriculum not include programs which foster doctrines of racial or ethnic superiority, religious intolerance or social change through violence. The Act provides a formula for calculating government grants for schools which fall within these classifications.

Alberta, Saskatchewan, Manitoba and Newfoundland have

legislation which permits public funding of private schools, but their statutes are not specifically directed toward private schools. For example, in Alberta, the establishment and operation of private schools is governed by the *Department of Education Act* and the *School Act*. These two statutes read together provide that a child may attend a private school which is approved by the Lieutenant Governor in Council. Under the "School Grants Regulations" pursuant to the *Department of Education Act*, the Minister of Education approves grants to the private schools. A similar system for financing and regulating private schools exists in Saskatchewan, Manitoba and Newfoundland.

New Brunswick, Nova Scotia, Prince Edward Island and the Territories have no legislation governing the establishment of private schools. Each jurisdiction has compulsory school attendance requirements with exemptions made where, in the opinion of the designated authority, the child is receiving adequate instruction elsewhere. These exemptions indirectly allow for the operations of private schools.

In Ontario private schools are regulated by the government but they do not receive any direct financing. Government policy has been that, apart from the Roman Catholic separate schools, public funding should be restricted to public schools. According to Finkelstein (in Dickinson and MacKay, 1989:72), this policy has been based upon a concern

for the maintenance of a strong and viable public school system⁶. It should be noted that enabling legislation is in place to allow public funds for private schools should government policy change or the *Charter* require that such funding be extended. Section 11(3)(a) of the *Education Act* empowers the Minister of Education, with the approval of the Lieutenant Governor in Council, to make regulations governing the apportionment and distribution of money appropriated or raised by the Legislature for educational purposes. Government supervision of private schools is mandated under section 16 of the *Education Act*, which requires a notice of intention to operate a private school to be filed with the Minister of Education and Training. In addition, returns must be filed furnishing statistical information regarding enrollment, staff, courses of study and other information as and when required by the Minister. Subsections 16(6), 16(7), and 16(8) provide for inspections of private schools and of teachers. Section 21, dealing with compulsory attendance, excuses a child from attendance at school under subsection 21(2)(a) if the child is receiving satisfactory instruction at home or elsewhere.

6. This policy appears to be failing, considering the wide-spread discontent with public education. For an expression of that discontent see Nikiforuk (1993), *School's Out: The Catastrophe in Public Education and What We Can Do About It*. Nikiforuk writes a column on Education for *The Globe and Mail*.

The major restriction on freedom of education in Ontario is that private schools do not receive government financing. Those who want alternative educational programmes for the children under their care must pay both public or separate school taxes, and private school tuition fees. The question of whether this involves discrimination under section 15(1) of the *Charter* was recently decided by the Ontario Court and is presently before the Ontario Court of Appeal. In *Adler v. Ontario*, 9 O.R. (3d) 676 referring to two separate applications, the applicants sought declarations that the non-funding of, in one case Jewish day school education and, in the other case independent Christian schools in Ontario, infringed the applicants' rights under the *Charter*. Mr. Anderson J. of the Ontario Court (General Division) held that

The applicants' rights under s.15 of the *Charter* was infringed. The *Education Act* created a distinction which resulted in a violation of the applicants' right to equal benefit of the law. Those whose children attend public schools receive the benefit of an education for their children free of any direct costs attributable to that education. Those whose children do not attend public schools, because their religious convictions prevent them from allowing their children to do so, do not receive that benefit. This distinction is based on religion.

The applicants' freedom of religion guaranteed by s.2(a) of the *Charter* was also infringed. The *Education Act* makes school attendance mandatory, and the price of escape from that mandatory provision is the payment of tuition fees by those parents who, by religious and conscientious belief, are precluded from taking advantage of the publicly funded school system.

The legislation imposed a cost or burden on the applicants in securing for their children education consistent with their religious beliefs.

The impugned legislation was saved by s.1 of the *Charter*. The legislative objectives, which included the provision of a tuition-free, secular, public education universally accessible to all Ontario residents, and the establishment of a public education system which fosters and promotes the values of a pluralist, democratic society, were of sufficient importance to warrant overriding a constitutionally protected right or freedom (p.677)⁷.

The above discussion shows that freedom of education is indeed a legal principle that has found expression and positivization in different provincial education laws to different degrees. In Ontario education law, the *Education Act* is explicit in providing for private schooling and government supervision, while keeping government intervention within limits that harmonize the legal interests of children and their parents or legal guardians with those of the state. There is an economic penalty for the exercise of this freedom in Ontario, but less so in Western Canada and much less so in British Columbia and in Quebec. Public schools in Ontario, on the other hand, must suffer the brunt of highly centralized educational bureaucracy with a tendency to bring increasingly every facet of the educational process under state control. The reason for this

7. As this thesis was being printed, the newspapers reported that on July 6, 1995 the Ontario Court of Appeal overturned the lower court's decision that the applicants' rights had been infringed (Duffy, 1994:A4).

tendency is, in my view, that the state as a public legal community involved in state education cannot but view education under the legal aspect, which is the dominant aspect of the state. This dominant role of the legal aspect, imposed by the state on the school, is incompatible with the school as an organization qualified by the ethical aspect of love of learning and teaching. The state school tends to lose this ethical qualifying function and becomes qualified by the legal aspect as a part of the state. Under the influence of this dominant legal aspect, teaching and learning in a state-controlled school system is increasingly juridified in an attempt to deal with an increasing plurality of beliefs and philosophical convictions concerning education. I offer this as an alternate explanation of what Habermas has called the juridification of the school world.

An example of the resulting tensions in state education is the discussion of values in *The Common Curriculum, Grades 1-9*, issued by the Ontario Ministry of Education and Training in February 1993, in which it defines in Part I: Principles Underlying Education for Grades 1 to 9. In section 1: Principles underlying learning, it states as principle 1: that "Learning involves values as well as knowledge and skills", and elaborates as follows:

While schools do not have the predominant role in the development of values in children and youth, they do have a clear responsibility to address the values implicit in all curriculum [sic]. Schools cannot be value-neutral. The values that form the foundation of the curriculum described in this document are those that the majority of Canadians hold and regard as essential to the well-being of their society. These values transcend cultures and faiths, reinforce democratic rights and responsibilities, and are based on a fundamental belief in the worth of all persons and a recognition of the interdependence of all human beings and the environment (p.4).

Yet *The Common Curriculum* leaves unclear what these values are. They are said to transcend cultures and faiths, and cannot, therefore, be identical with these cultures and faiths, or with the fundamental beliefs on which they are said to be based. While these values are those that the majority of Canadians hold as essential to the well-being of their society, *The Common Curriculum* appears reluctant to spell them out.

In the last decade there has been a decline in the teaching of values in the homes for a variety of reasons. At the same time, the centralizing tendency in the state-controlled school system has led to the loss of influence of parents and their organizations. As a result, schools as state-controlled institutions are cast more and more in the role of a *parens patriae*, and are expected to instruct "the consumers of educational services" in an increasing number of subjects, including environmental protection, recycling,

animal rights, 'street-proofing', safe sex and awareness of AIDS, violence in the home and a host of other problems, in a curriculum that leaves less and less time for the core subjects.

In addition to this trend, the welfare state increasingly is asked to take responsibility for the employability of its students and hence, for their training and the creation of jobs. Witness, for example, the recent (1993) change in name from (Ontario) Ministry of Education to Ministry of Education and Training. As a result, the stake of the state in both day school and adult education is expected to increase even more.

Yet, as the demands on the state education system are increasing, satisfaction with the results of state education are steadily decreasing, giving rise to various educational reform movements. In Ontario, this has led to the adoption of *Bill 125, An Act to amend the Education Act*, which among others repealed subsection 11(17) of the *Education Act* and amended it by adding section 17.1 to established the Ontario Parents Council, composed of not more than eighteen members appointed by the Minister. Its mandate (17.1.(10)) is to advise the Minister on (a) issues related to elementary and secondary school education; and (b) methods of increasing parental involvement in elementary and secondary school education.

The Royal Commission on Learning has been appointed by the Ontario Ministry of Education and Training to recommend directions for the education system, and has scheduled numerous hearings throughout Ontario, in which the failings of the Ontario educational system have received confirmation⁸. The new provincial auditor Erik Peters dedicated a large part of his first report (released December 7, 1993) to Ontario's \$13.6 billion education system and found that it is inconsistent, not cost effective and not adequate to provide a good education to many of its 1.9 million students (Payne, 1993b:A1).

Not willing to wait for the report of its *Royal Committee on Learning*, the Ministry of Education and Training has released *The Common Curriculum, grades 1-9*, February 1993, which is to replace *The Formative Years, 1975* and the subject guidelines for Grades 7 to 9, including those developed under *Ontario Schools, Intermediate and Senior Divisions* (OSIS, 1989). This new curriculum is defined in terms of learning outcomes, instead of objectives; is designed for all students to accommodate various abilities,

8. For example, Evelyn Dodds, honorary director of the Organization for Quality Education, a provincewide reform group, reportedly told the Commission: "The evidence that Ontario is failing is overwhelming", reading from a list of international and interprovincial tests in which Ontario students consistently ranked near the bottom (Payne, 1993a:A3).

needs, and interests, as well as differing racial and ethnocultural backgrounds, of all students in the school; and is holistic in its view of an increasingly complex and interdependent world (*The Common Curriculum* p.1). This new 1993 curriculum is a response to the growing dissatisfaction with the 1975 curriculum. It also provides a striking illustration of what Archer has called the 'stop-and-go' character of educational change and reform in state school systems under a restrictive strategy (see section 1.1, p.11).

In addition to what is evidently a wide-spread dissatisfaction with the Ontario education system, reported by Peters to be one of the most expensive in the world, there is also a beginning of a discussion about the way in which this educational system is funded. The leading edge of this reform movement appears to be the government of Alberta, which according to an editorial in the *Edmonton Journal* of 27.1.1994 intends to take away the power from local school boards to raise their own basic funds. Ontario teachers and school boards are lobbying Ontario government not to shift education funding from property tax to income tax as recommended by Ontario's Fair Tax Commission in its report released in December 1993. The reported reason for the objection by the Ontario Secondary School Teachers Federation is: "The great danger in lifting the educational levy

from the property tax is that one creates a vacuum" (Payne, 1994:A12). And this in spite of the fact that property tax is widely considered a regressive form of taxation, because it bears no relationship to a person's ability to pay, which may be considered a constitutive legal principle of taxation law in the Rechtsstaat.

Among all the voices calling for education reform the question of the nature of the limits of the state's competence in the field of education has not received much current attention in Ontario.

CHAPTER 6: SUMMARY AND CONCLUSIONS

In this thesis I have attempted to articulate the legal principle of freedom of education in Canada and particularly in Ontario as a fundamental freedom. This freedom would limit the juridical sovereignty of the state, *in casu* the province, in the area of formal schooling by recognizing the prior responsibility of parents or legal guardians to set or choose the direction of such education. I found evidence of this fundamental freedom in statute law, particularly in the Ontario *Education Act*, 1990 as amended in which this legal principle has found expression in a way that indeed limits the intervention of the state, without abandoning its legitimate interest in formal education, both in terms of the integrating character of all state law, and in terms of the state's own functioning as an organized community of government and subjects.

In order to recognize evidence of such a fundamental freedom of education it was necessary to work from a perspective that would provide both a sociological theory or framework and a legal theory in which the school system, the state and the family could be distinguished and defined in a consistent manner, and at the same time could offer the possibility of clarifying their respective internal

legal organizations as well as their mutual external legal relations. Furthermore, it was necessary to clarify what was to be understood by fundamental freedoms, and how these could be distinguished from other human rights, such as civil rights and political rights.

The perspective that I adopted is one of a universal order of time, in which a number of aspects or modalities may be distinguished that are mutually irreducible and at the same time form an unbreakable coherence. These aspects, in which all things and events function, form an order of earlier and later, in the sense that the later aspects presuppose the earlier ones, and are grounded in them, and so that the earlier aspects precede and anticipate the later ones, and are opened up or disclosed, and refined by them. Furthermore, the individual things and events, plants, animals and human beings and their relationships, function in all these aspects in specific ways, which makes it possible to distinguish between them with reference to their foundational and qualifying aspects. Specific attention was paid to the historical-cultural aspect of formative power in which all organized individual and communal human relationships are founded, and to the legal aspect in which all these relationships function, but by which only the state community is qualified. The latter was then defined as a public legal community of government and

subjects organized on the basis of a monopoly of military power over a limited territory. This allowed a clarification of the unique position of the state among all other human relationships, as it alone has a territorial power base, while its public legal qualifying function enables it to integrate the legal aspect of all human relationships on its territory in an external manner. From this unique position, it is argued, state law in both the public and private legal sphere derives its integrating character, which is lacking in other types of law such as internal church law, university law, school law, business law, and association law. All these legal spheres lack a territorial power base, having a personal contract base instead, and are unlike the state qualified by an aspect other than the legal aspect.

The resulting legal pluralism, which finds its external integration in state law, is grounded in a diversity of organized communal human relationships, each of which has its own internal legal order of laws, rules, or by-laws, together with its own internal juridical sovereignty or legal competence to make such laws, rules or by-laws.

It is argued that in order that the state's monopoly of military power remains at all time controlled by public law, it is necessary for the state to limit its own juridical sovereignty by recognizing in state law the individual

and communal freedom spheres over which it has an external and integrating jurisdiction, that leaves the internal juridical sovereignty of these communal freedom spheres intact. These freedom spheres find their legal expression in the so-called fundamental freedoms, which I argue belong to the constitutive legal principles of the Rechtsstaat that must determine the substantive or material content of positive law in order for it to have material validity. These fundamental freedoms, I argue, are to be distinguished from civil freedoms and equality, which are the constitutive legal principles underlying private state law that co-ordinates the legal relations between individual persons as well as organized communities. Both are in turn to be distinguished from social rights, which insofar as they have not been positivized into law, are to be considered as regulative legal principles that give direction to public social-economic policy, subject to the availability of economic resources.

I also argue that these fundamental freedoms and civil rights presuppose a differentiated society in the sense of a plurality of socially diverse, interpersonal, intercommunal and organized community relationships, which are presupposed in the public and private legal spheres of the modern Rechtsstaat. Thus the fundamental freedoms in their mutual interdependence and as constitutive legal principles

are characteristic of the Rechtsstaat, even though the state is founded in the monopoly of military power. The complementary legal principles of civil liberties and equality are ineffective in limiting the juridical sovereignty of the state, since they presuppose public law. For this reason the distinction within state law between a public and a private legal sphere remains of crucial importance for maintaining the state community as a Rechtsstaat.

If a fundamental freedom of education were to be found at all, it would be found in constitutional documents and international declarations of human rights. This raised a second major research problem. What is to be understood by education, and what was the nature of the freedom sphere in which such a fundamental freedom was to be grounded? This led to a discussion of the day school, and its internal organization, as well as the nature of the organized community that established and maintained these schools.

It was found in Upper Canada, and before the rise of the Canadian form of the Rechtsstaat, that the common school communities were established and maintained by voluntary associations, in what could be called parental ventures. With the rise of the state and of the state-controlled education system these voluntary associations have been transformed into compulsory associations of district electorates for the purpose of electing school boards.

The structural principle of a school community, it is argued, may be described as an organized learning community of teachers, parents and students founded in the historical-cultural aspect as an organization of teaching skills of competent teaching staff, and qualified by the ethical aspect of love of teaching. This staff provides structured and systematic guidance to children in their educational development and formation, and in accordance with a common conviction shared between parents and teachers concerning the direction or ethos of this schooling. This normative description finds its concretization in historically variable social forms of actual school communities and in shared convictions of the purposes of the school.

In order to gain a better insight into the nature of school education and of the guidance it provides, an anthropological model was outlined consistent with the basic premises of the adopted sociological framework and legal theory. This model identified in each person a physico-chemical structure, an organic life structure, an emotive structure and an act structure that together are interlaced into the human body as an enkaptic whole. Unlike the first three structures, the act-structure of the human body is not qualified by an aspect, and a human act, therefore, can take on the qualification of any normative aspect. This makes the process of education possible on the basis of the

development of the first three structures, in which the act-structure is grounded. Formal as well as informal education was then conceived as a process of formation of the act-structure of each individual child under the systematic and structured guidance of competent teachers, and the encouragement of parents. As a result, the child's normative consciousness continues its development from the unstructured nurture at home through the more structured education at school in all the normative aspects of the temporal order. This development is, therefore, not restricted to a development of a moral consciousness, but encompasses in a coherent way all the various subject-areas of teaching, including the basic skills of arithmetic and spelling.

From this idea of education and of schooling it became evident that school and state are very different, both in their foundational functions as well as in their qualifying functions. This warrants the conclusion that a school, even in the very close enkapsis of a state school, cannot possibly be an organ or part of a state, and that internal school law, even in the state school, may not be confused with state education law.

The relation between school law and state law, even in the state school, can be clarified by viewing the former as the internal law of the school that is integrated in an

external manner with state education law, so as to leave the internal juridical sovereignty of the school intact. Where the state goes beyond this limit, and imposes internal school law via administrative state organs, it juridifies the school, destroys its internal structure, undermines the responsibilities of teachers and parents, and in the long run destroys the state and its state education system by undermining its legitimacy.

Thus the school community is a freedom sphere where the fundamental freedom of education functions as a legal limit on the competence of the state. I have argued that each fundamental freedom presupposes other fundamental freedoms and must be understood in a mutual interdependence of these freedoms. Furthermore, freedom of education is opened up and refined by the regulative principle of the public interest in its legal sense. As a regulative principle, the public interest cannot be a substitute for the fundamental freedom of education. It cannot be in the public interest in its legal sense to eliminate freedom of education, or any other fundamental freedom.

Freedom of education is a legal principle, it is argued, not a moral principle, even though education is qualified by the ethical aspect of love of learning and teaching, and historically, freedom of education has been closely associated with the freedom of (private) devotion and of con-

science. As a constitutive legal principle of public state law, it needs to be positivized in state law. Based on a survey of statements in state constitutions and international declarations of human rights, the fundamental freedom of education is tentatively defined as the right of parents and guardians, over against the state, either individually or in association with others to provide for the formal schooling as well as the informal education of their children in accordance with their shared belief or conviction in its impact on the educational forming of these children, subject only to state education law that sets out in the public interest, taken in its legal sense, the minimum requirements of formal schooling, and provides for adequate inspection to ensure that these requirements are met.

It was found that the Ontario *Education Act* contains legal norms that positivize the legal principle of freedom of education in the above sense. This freedom comes with an economic penalty in Ontario for those who wish to avail themselves of it.

It was also found that the provinces of Quebec and of British Columbia through their education legislation have substantially reduced this economic penalty still found in Ontario, and that the other Western provinces have reduced it, so that there is in Canada a growing body of practical

applications of the fundamental freedom of education upon which the thesis here presented may be tested further and in greater detail.

Some of the implications of this thesis may be summarized and developed as follows:

It would appear impossible to distinguish a school from a state, and hence not to view the state school as part of the state, without a theoretical idea of a school or of a state. Historical research into the variable social forms of school and state is forced to assume such an idea, since as Dooyeweerd has argued, the typical structures of societal relations are inaccessible to theoretical analysis except via the aspects in which they function. This is why the United States of America in legal theory considers schools as agents of the state, a view that, as I have tried to show, is also gaining ground in Canada, particularly with respect to its *Charter of Rights and Freedoms*.

Once the school is seen as a part of the state, the relationship between the two is non-problematic. However, Habermas has called attention to the growing juridification of the school, as well as other areas of life, and of its potential for destroying the state itself. My thesis highlights an additional dimension of this juridification, namely the dominant role of the legal aspect in the state,

that is imposed upon the different social life spheres when conceived as parts of the state.

Of particular interest is the question of the limits of state intervention. Since the state has the monopoly of military power, there are no formal external limits to the power of the state. And this brings into focus the importance of the fundamental freedoms as distinct from civil rights. The fundamental freedoms refer to personal and communal freedom spheres, which on the territory of the state form a necessary counterweight against the power of the state, provided these fundamental freedoms are not only formally acknowledged in state constitutions, but in fact determine the material content of state law.

Closely related to the limits of state legal competence is the matter of legal pluralism that has received a further elaboration in this thesis. The communal freedom spheres such as school, university, business, enterprise, voluntary association etc. not only have their own internal order of legal norms that is integrated with state law in an external manner, but they have also an original legal competence. This competence is original in that it doesn't derive from the state, but from the highest legal organ of each organized community as determined by its own internal organization.

The legal pluralism here defended implies a moral plu-

ralism, since the moral aspect is founded in the legal aspect, contrary to the opinion of some that "law" is founded in "morality." This means that the various communal freedom spheres not only have a typical legal order, but a typical moral order also. Hence we speak of business ethics, professional ethics, public morality, family morals, medical ethics, a university code of ethics, etc. These typical moral orders may not conflict with the legal orders in which they are grounded, in order not to lose their moral validity. For this reason they cannot be imposed "from the outside", and still have material moral validity. This result is in striking contrast to classical natural law doctrine, which makes validity of positive law dependent upon conformity to natural law.

This brings me to a few comments on the implications of this thesis for school reform. The present attempts to get parents involved again in the formal education of their children would be supported by the theory here defended, since in my view the school community includes the parents and legal guardians of the children in their care. These adults are normally the prime motivators of their children in having them take their schooling seriously, and upon whom the teachers depend for support in maintaining classroom order. The suggested approach to school discipline in the light of the Canadian Charter demands the involvement

of parents.

The desire by the educational bureaucracy for uniformity and standardization in formal schooling ought to be questioned. What are needed are clearly defined minimum standards of a core curriculum, beyond which the state should not intrude in the curriculum design, which should be left to teachers with the input and support by parents. The number of 'educators' or staff at the school board level or Ministry of Education level, which is reported to approach 50% of the number of classroom teachers, needs to be questioned.

The government should get out of the business of promoting and enforcing with the strong arm of the law a particular educational ideology as embodied, for instance, in the 1975 Ontario curriculum, which turns a whole school system into a laboratory, and deprives many children of a meaningful education.

The above alternatives to government imposed and controlled uniformity and standardization of all formal schooling in Ontario with a growing expectation of equality in learning outcomes, would re-introduce differences and variations between schools through a gradual dejuridification of the public school system. This would not lead to its destruction or elimination, but contribute rather to its survival in a different social form.

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