

Author: JA Robinson

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THE RELEVANCE OF A CONTEXTUALISATION OF THE STATE-INDIVIDUAL RELATIONSHIP FOR CHILD VICTIMS OF ARMED CONFLICT

JA Robinson*

1 Introduction

In the previous issue of PER¹ it was concluded that a child victim of armed conflict may have legally enforceable claims under certain circumstances in terms of article 39 of the *United Nations Convention on the Rights of the Child* (1989) (hereafter CRC) against a State Party to the CRC of which he is a national to act in his interest. In terms of this article a child may claim that the State will re-unite him with his family, provide education, de-mine an area *et cetera*. This contribution aims at providing a legal theoretical framework within which these claims may be explained and therefore serves to contextualise the legal relationship between such a child and a State. For the sake of convenience the discussion will be conducted in theoretical fashion.

From the discussion of the application of article 39 it is clear that its provisions are prone to create tension between a State Party and a child victim of armed conflict. In a South African context the Constitutional Court has expressed itself already on the issue of such tension. In *S v Makwanyane*² it was decided that:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in s 33 (of the Interim Constitution). The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing

* Robbie (JA) Robinson. B Juris LLB LLM LLD. Professor of Law, North-West University (Potchefstroom Campus), Robbie.robinson@nwu.ac.za.

1 Robinson 2012 PER.

2 *S v Makwanyane* 1995 3 SA 391 (CC) para 104.

process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33(1) (of the Interim Constitution) and the underlying values of the Constitution, bearing in mind that ... "the role of the Court is not to second-guess the wisdom of policy choices made by legislators".

In this contribution it will be endeavoured to provide a formula for the "weighing up of competing values, and ultimately an assessment based on proportionality" as set out by the Court. In paragraph 8, however, the conclusions will be applied to the position of child victims in terms of article 39 as discussed in the previous publication.

2 Public subjective rights

It is accepted as a point of departure that the child *qua* individual and the State are involved in a legal relationship as legal subjects endowed with legal subjectivity.³ For purposes hereof the relationship will be referred to as the public law relationship. Within the relationship it must be accepted as a *sine qua non* that the State is not only endowed with State sovereignty, but also that it makes use of its authority to act prescriptively.⁴ As an explanatory model for the public law relationship the theory of public subjective rights, which is of German origin, recognises that the relationship is multi-dimensional, and it also accepts the existence of State sovereignty as a given. However, as will be set out *infra*, it does not consider the State as a legal subject in the relationship. In order to substantiate the argument that this approach is

3 See, however, para 2.1.1 *infra* from which it is clear that in German jurisprudence only the individual is viewed as a legal subject in the public law relationship. In similar fashion as in private law, a legal subject may typically be described as the bearer of juridical competences and subjective rights. Such competences and subjective rights distinguish the legal subject from the legal object in the sense that the legal subject acts as a subject in legal intercourse and not as an object. Being a legal subject means, *inter alia*, that the subject is endowed with legal subjectivity which encompasses the subject's legal capacity/competence, his competence/capacity to act and his capacity/competence to litigate.

4 State authority denotes the capacity of the State to act. By virtue of its authority the State acts prescriptively through its organs towards other legal subjects. Its capacity to act flows from its (State) sovereignty and the extent to which it may be exercised may be determined *inter alia* by municipal Bills of Rights, legislation, the internal calling of the State, *et cetera*.

fundamentally wrong, viewpoints of authors of the so-called Reformed Tradition will be applied to the German exposition.⁵ It will be argued not only that the State is by its very nature called upon to recognise the (public, subjective) rights of the individual and to create legal channels by means of which the rights may be enforced, but also that it must provide an infrastructure that makes provision for the fundamentally secure living of the everyday lives of individuals. In this fashion it is endeavoured to nuance the legal position of the State and the individual *vis-à-vis* each other in order to move away from the idea of the public law relationship as one characterised by an abuse of State authority or one characterised by excessive individual claims against the State.

It will be argued that the public law relationship should not be viewed as one characterised by State authority but rather that its balance-point should be determined legally; it is indeed possible to balance the State's competence to act prescriptively with the reciprocal claims, rights and obligations of the individual. This conclusion is substantiated by the fact that the public law relationship should be characterised by the subjective legal claims of both the State and the individual to certain legal objects on the one hand, and on the other that the subjective legal claims and obligations of both the State and the individual are to be traced back to the fact that the State, being a social entity, is historically founded and juridically destined. As will be explained later herein, this viewpoint of the State activates different status aspects of the individual, which serves not only to explain the obligation of the individual to respect the sovereignty of the State, but also his competence to establish subjective rights against the State.

5 See eg Kuyper *Antirevolutionaire Staatskunde*; Barth *Rechtfertigung und Recht* and the works of Dooyeweerd referred to in n 25 *infra*.

2.1 *The notion of public subjective rights*

2.1.1 *Introduction*

The concept at the core of this chapter is that of public subjective rights. Public subjective rights are similar to private subjective rights and can in essence be regarded as a legal subject's legally protected claims to a certain legal object.⁶

Epping provides the following explanation for the concept:

Ein subjektives Recht ist die Rechtsmacht die dem Einzelnen von der Rechtsordnung zur Wahrung seiner Interessen verliehen worden ist. Dem steht das objective Recht gegenüber, dem eine solche Rechtsmacht des Einzelnen nicht zu entnehmen ist.

A modern, authoritative exponent of the theory is Alexy. He explains that the theory in essence entails that A (a natural or juristic person) has a right to O, an object, against S (the State).⁷ In this example A is the bearer of a right whereas S is the addressee of the right. In the public law relationship S is always the State. A and S

6 A legal object may simply be viewed as that to which a legal subject has a subjective right. In private law corporeal things, immaterial property, performance and aspects of personality have been identified as legal objects. In public law there appears to be a measure of uncertainty regarding the nature of such objects. However, there seems to be fairly wide consensus that by its very nature, a legal object in public law must at least be capable of being applied in ordaining fashion with regard to the legal community See *inter alia* Epping *Grundrechte* 438. See also Ipsen *Staatsrecht II* 20, who describes the structure of public subjective rights as follows: "Zu dem Begriffsmerkmales des subjektiven Rechts gehört die dem Einzelnen Eingeräumte (klagbare Rechtsmacht, von einem anderen ein Tun oder Unterlassen zu verlangen." He explains that there are always three entities involved in the relationship; the subject as the bearer of rights, the third party against whom the right is enforceable, and the legal object. See also Schmidt *Grundrechte* 5; Sachs *Verfassungsrecht II* 36; Klement *Verantwortung* 264; Detterbeck *Öffentliches Recht* 300. Detterbeck explains that legal prescripts do not always clearly afford the individual claims against the State. However, such a prescript will be considered as a public subjective right if it also aims at the protection of the interest of the individual. Scherzberg 2006 *Jura* 839 *et seq* summarises public subjective rights as a model for explaining the public law relationship as follows: "Im subjektiv-öffentlichen Recht verwirklicht sich die Subjektstellung des Bürgers, der nicht nur dem Recht unterworfen und durch das Recht verpflichtet sein soll, sondern sich auch auf das Recht berufen und aus ihm Befugnisse ableiten kann. Die Subjektstellung des Bürgers verwirklicht sich *materiellrechtlich* in den Grundrechten und in einer Vielzahl einfachgesetzlicher subjektiver Rechte, mit denen der Gezeitsgeber dem Verfassungsauftrag zur Konkretisierung, Ausgestaltung und wechselseitigen Begrenzung grundrechtlich geschützter Güter und Interessen nachkommt, und prozessrechtlich in der Eröffnung des gerichtlichen Rechtsschutzes." See also Baur 1988 *Archiv des Öffentliches Rechts* 133, 582.

7 Alexy *Theorie der Grundrechte* 171: "Die allgemeinste Form eines Satzes über ein Recht auf etwas lautet: a hat gegenüber b ein Recht auf G." For purposes hereof a in Alexy's definition is A (individual); b is S (the State) and G is O (the legal object).

are in their respective capacities not only in a legal relationship *vis-à-vis* each other but also in respect of O. In the public law relationship the object of A's right is the conduct of S.⁸ Alexy elucidates the relationship between A, S and O by providing a practical example commonly found in Bills of Rights, namely that everyone has the right to life. Clearly O is the condition of A to be alive and as such is an object of a subjective right of A's. However, A's relation to O is only an abbreviated exposition of a complex relationship of subjective rights and competences also in relation to S in terms of which A is endowed with the subjective right to demand from S "*negativ ein Recht auf Leben*"⁹ and positively that S shall protect and further his life ("*sich schützend und fördernd vor dieses Leben stellt*").¹⁰ In terms of this exposition A therefore has not only a right against S (negatively) not to kill him, but also (positively) that S must protect his life from wrongful infringement. A distinction can therefore be drawn between individual rights to negative State conduct ("*die Rechte auf negative Handlungen*"), which may be termed preventative rights ("*Abwehrrechte*"), and rights to positive State conduct ("*Leistungsrechte*").¹¹

8 Alexy *Theorie der Grundrechte* 172: "Der Gegenstand eines Rechts auf etwas ist stets eine *Handlung* des Adressaten. Dies ergibt sich aus seiner Struktur als dreistellige Relation zwischen einem Träger, einem Adressaten und einem Gegenstand. Wäre der Gegenstand keine Handlung des Adressaten, so würde es keinen Sinn haben, den Adressaten in die Relation einzuschließen."

9 *BVerfGE* 1, 97 at 105.

10 *BVerfGE* 46, 160 at 164. It needs to be noted, though, that the distinction between negative and positive State conduct is progressively coming under fire. In *Government of the RSA v Grootboom* 2001 1 SA 46 (CC) para 23 the Constitutional Court argued that the *Constitution* entrenches both civil and political rights (negative) and socio-economic (positive) rights. These rights are inter-related and mutually supporting since the foundational values of human dignity, freedom and equality are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people consequently enables them to enjoy the other fundamental rights which are enshrined in the Constitution. See also Currie and De Waal *Bill of Rights Handbook* 567. The authors also refer to the *International Covenant on Economic, Social and Cultural Rights* (1966), which conveys that the ideal of free human beings enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.

11 It will be accepted for the purposes hereof that there is a distinction between negative and positive State conduct. However, this is not generally accepted. See also para 6.1 and 6.2 *infra*. A particular question that arises in this respect is if A or S can renounce their subjective rights. It is submitted that it is indeed possible. As discussed in par 3.2 *infra* the subjective rights of a natural or juristic person flow from his legal subjectivity. Disposing of these competences directly relates to his legally being able to be the bearer of a subjective right and to enforce his subjective right, ie to participate in legal intercourse. Against this background it may safely be assumed that in the situation where A and S have the legal ability to be the bearer of a subject right and to enforce it, it is also within their legal ability to eg renounce enforcing their respective subjective rights. See Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 371-439.

2.1.2 Preventative rights ("Abwehrrechte")

Preventative rights may be sub-divided into three categories. The first is the right of A that S will not prevent or impede particular conduct of his, the bearer of the right. The second is the right that S will not prejudice certain qualities ("*Eigenschaften*") or situations ("*Situationen*") of A. The third is the right of A that S will not terminate particular relations of A, the bearer of the right.

A's right that S will not prevent or impede specific conduct of A's ("Nichtthinderung von Handlungen")

Typical examples of conduct that may be prevented or impeded may include the prevention or impeding of A's right to *movement* ("*Fortbewegung*"), *expression of opinion* ("*Meinungsäußerung*") and *confession of faith* ("*Kundgabe des Glaubens*"). The difference between the prevention and the limitation of A's preventative rights can be explained as follows: conduct of A will be prevented when S creates conditions which make it factually impossible for A to exercise his rights. On the other hand, S will limit the right to act of A when he (S) creates conditions that might cause an impediment for A to exercise his right. Alexy explains it as follows:

Definiert man die Begriffe der Ver- und der Behinderung auf diese Weise, so verhindert eine Erhöhung der subjektiven Zugangsvoraussetzungen für einen Beruf, die A, wenn auch unter größten Mühen und Opfern, erfüllen kann, das Ergreifen dieses Berufs durch A nicht, sie behindert es aber.¹²

In relation to preventative rights, one must also distinguish the possibility that S can make it legally impossible for A to exercise his right. In this respect it is important to note that it is only a "*Rechtsakt*" that can be made legally impossible. A "*Rechtsakt*" is one which came into force in terms of constitutive legal prescripts ("*konstitutive Rechtsnormen*") and which may be exercised in terms of such legal prescripts only.

12 Alexy *Theorie der Grundrechte* 174. It is clear that this distinction relates to the limitation of constitutional rights. S 36 of the *Constitution of the Republic of South Africa*, 1996 in essence provides that rights provided for in chapter 2 of the *Constitution* may be limited by law of general application. The leading authority in South African jurisprudence in this respect is *S v Makwanyane* 1995 3 SA 391 (CC) para 104. See the text accompanying n 2 *supra*.

For instance, it would not be possible to exercise the right to elect (members of parliament) if it was not made possible by legal prescripts allowing for and regulating elections. Due to the fact that such acts come into existence by reason of constitutive norms, they may be described as institutional acts ("*institutionelle Handlungen*"). Institutional acts become impossible when the constitutive norms in terms of which they exist are terminated. It will be explained *infra* that when a "*Rechtsakt*" is made impossible the competence of A is directly affected as he is deprived of the opportunity to effect legal change/take part in legal intercourse in terms of the particular constitutive legal prescript. The right that this may not happen falls in the category of rights to negative State conduct ("*Abwehrrechte*") as it entails that S may not terminate constitutive norms in terms of which A's institutional acts are made impossible.

A's right that S will not terminate qualities and situations of A ("Eigenschaften und Situationen")

The second group of negative acts of S which serve as the basis for individual rights comprises individual qualities or situations which may not be terminated by S. Such include A's right to life and to be healthy.

A's right that S will not terminate certain legal relations ("Rechtlichen Positionen")

The third group of rights to negative acts of the State include the right that S will not terminate certain legal relations of A. Such may include the right to property.

2.1.3 The right to positive State action ("Leistungsrechte")

Two categories of rights to positive State action may be distinguished; the right to factual and the right to normative conduct of the State respectively. The right to factual conduct of the State would, for instance, include the right to provision of an "*Existenz-minimum*". The right to positive normative conduct of the State on the

other hand would include the right that S establishes legal norms ("*staatliche Normsetzungsakte*"). Alexy provides examples to explain the nature of these rights, but regrettably refrains from furnishing reasons for the activation of this right of A. It will be argued in paragraph 6.2 *infra* that this right of A relates to the juridical destination of the State.

3 Competence/Capacity ("*Kompetenz*")

It is trite that legal subjectivity concerns the legal ability to participate in legal intercourse as a legal subject. In this way the term corresponds with the Afrikaans concept "*kompetensie*".¹³ For purposes hereof the term competence will be used. The term *competence/capacity* (Afrikaans – "*kompetensie*"; German - "*Kompetenz*") refers to the ability to take part in legal intercourse. However, in German jurisprudence the concept is also seen as the ability to cause legal change. It is submitted that *prima facie* the ability to take part in legal intercourse and the ability to cause legal change are interchangeable concepts. The concept comprises *legal capacity* (the capacity to hold offices as a legal subject and to have the rights and obligations resulting from the holding of such offices), the *capacity to act* (the capacity to conclude juridically relevant acts,¹⁴ and the *capacity to litigate* (the capacity to act as a litigant). The extent to which it is possible for a legal subject so to participate is determined by his legal status.¹⁵ Competence *qua* ability does not pertain to a legal object.

3.1 Private law

In private law a legal subject's competence indicates his ability to participate in legal intercourse, for example by concluding a contract, entering into a marriage, drawing

13 Robinson *et al Introduction to the SA Law of Persons* 9; Jordaan and Davel *Law of Persons* 6; Cronjé and Heaton *South African Law of Persons* 33.

14 A juridically relevant act may be described as a lawful act to which the law attaches the same consequences as had been contemplated by the acting legal subject.

15 Robinson *et al Introduction to the SA Law of Persons* 9.

up a will, *et cetera*.¹⁶ The nature and extent of a person's competences depend on a variety of factors. Such include, amongst others, age, domicile and extra-marital birth. It is commonly accepted that a legal subject disposes of the following competences: legal capacity, the capacity to act, and the capacity to litigate.

3.2 Public law

In German jurisprudence the concept goes under various names such as "*Macht*", "*Rechtsmacht*", "*Kompetenz*", "*Ermächtigung*", "*Befugnis*", "*Gestaltungsrecht*", or "*rechtliches Können*".¹⁷ Alexy defines it as:

[d]aß durch bestimmte Handlungen des oder der Inhaber der Kompetenz die rechtliche Situation geändert wird.¹⁸

The concept is not further refined in the public law sphere. However, it will be endeavoured to indicate that in principle there is no reason to limit the classification to private law. It will also be accepted for the purposes hereof that participation in legal intercourse and the ability to effect legal change, as Alexy describes it, are interchangeable.

The State is a legal subject. As such it has competences accruing to it, which competences stem from its *legal subjectivity*. It will be argued *infra* that the State's foundation in the historical aspect of reality activates its competence to be the bearer of subjective rights that relate to its foundation and to enforce them. On the other hand, its destination in the juridical aspect of reality activates the competence of the individual to be the bearer of subjective rights against the State and to enforce them.

16 Van der Vyver and Joubert *Persone- en Familiereg* 4 explain that the capacities that a person has to be a legal subject and to perform certain acts in legal intercourse, are his or her competences and that which a person cannot legally do is that in respect of which he is not competent.

17 This explanation corresponds with the view commonly held that capacity reflects the (juridical) ability of the legal subject to take part in legal intercourse. See eg Van der Vyver and Joubert *Persone- en Familiereg* 53.

18 Alexy *Theorie der Grundrechte* 211.

The above exposition can be illustrated by referring to the capacity to act in private law. If an individual meets the necessary legally prescribed age requirements he has the competence (the capacity to act) to conclude a contract. When he does so, he has a subjective right to performance from the other contracting party. As far as the public law relationship is concerned it can be said that the State is a legal subject endowed with the competence to have subjective rights to certain conditions (State security, law and order), to certain property and immaterial property, and to specific conduct. In other words, it has subjective rights to these legal objects which stem from its foundation and it may demand of the individual to respect its subjective rights to these objects.

The competence of the individual to be the bearer of subjective rights against the State is activated when the State makes legal provision for his claim to negative or positive State conduct in his favour. For instance, if an Act of Parliament creates a right to specific State conduct for owners of fixed property, such owners are endowed with the competence to hold the State liable in terms of the particular legislation. In this instance the individual's legal capacity, capacity to litigate and capacity to act are activated by the statutory provision. In terms of legal capacity he is the bearer of subjective rights against the State as set out in the relevant legislation and in terms of his capacity to act he can demand from the State to act in terms of the relevant legislation.

4 A brief evaluation of the notion of public subjective rights

It is submitted that the theory of public subjective rights can serve only as a starting point to explain the public law relationship; that it needs to be elaborated upon as it fails to define the relationship comprehensively. An evaluation of the concept should be conducted with reference to two of its key concepts; firstly the bearer of the subjective right and secondly the nature of a legal object.

4.1 *The bearer of a subject right in the public law relationship*

Alexy makes it clear that in the public law relationship the individual is endowed with subjective rights, which rights are enforceable against the State.¹⁹ The State is not endowed with subjective rights in the relationship.²⁰ From this exposition it becomes clear that Alexy does not view the State as a legal subject, but indeed as a subject bearing obligations (a "*duty subject*") only. It is suggested that this viewpoint reflects an impoverished perspective of the position of the State, and it may well be concluded that from the State's perspective the theory of public subjective rights views the relationship as one of obligations and duties. Weight is added to this argument by Alexy's exposition of a competence. If it is accepted that a competence is the ability to cause legal change, it follows as a matter of course that State sovereignty, which underlies the authority of the State to act prescriptively, must be a "*Kompetenz*". As it is trite that a competence of a legal subject is inherently related to his legal subjectivity, there can be little doubt that the State is a legal subject also in the public law relationship and that its sovereignty enables it to be the bearer of subjective rights and to exercise and enforce them.

19 See also eg Bühler *Subjektiv-öffentlichen Rechte* 224, who defines public subjective rights as follows: "Subjektives öffentliches Recht ist diejenige rechtliche Stellung des Untertanen zum Staat, in der er auf Grund eines Rechtsgeschäftes oder eines zwingenden, zum Schutz seiner Individualinteressen erlassenen Rechtssatzes, auf den er sich der Verwaltung gegenüber soll berufen können, vom Staat etwas verlangen kann oder ihm gegenüber etwas tun darf." Scherzberg 2006 *Jura* summarises public subjective rights as model for explaining the public law relationship as follows: "Im subjektiv-öffentlichen Recht verwirklicht sich die Subjektstellung des Bürgers, der nicht nur dem Recht unterworfen und durch das Recht verpflichtet sein soll, sondern sich auch auf das Recht berufen und aus ihm Befugnisse ableiten kann. Die Subjektstellung des Bürgers verwirklicht sich *materiellrechtlich* in den Grundrechten und in einer Vielzahl einfachgesetzlicher subjektiver Rechte, mit denen der Gezetssgeber dem Verfassungsauftrag zur Konkretisierung, Ausgestaltung und wechselseitigen Begrenzung grundrechtlich geschützter Güter und Interessen nachkommt, und prozessrechtlich in der Eröffnung des gerichtlichen Rechtsschutzes". It is submitted that the public subjective rights of the individual may be enforced in municipal courts and tribunals and also in international tribunals if the particular State happens to be a contracting party to an international treaty creating such a tribunal.

20 If it is accepted that the State functions as a legal subject in the public law relationship, the following argument of Van der Vyver is bound to create uncertainty: "[W]anneer dit egter om die publiekregtelike funksies en optrede van die staat en staatsowerheid gaan ... kom daar 'n bykomstige element ter sprake as integrale deel van die staat en staatsowerheid se regspersoonlikheid, naamlik staatsgesag: dit wil sê as subjek van die publiekreg is die staat en staatsowerheid, bo en behalwe die elemente van regspersoonlikheid ... ook nog die draer van staatsgesag." (Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 440). It will be argued *infra* that the "staatsgesag" does not elevate the State to a position over and above the public law relationship with the individual. The existence and application of State sovereignty is not sufficient reason for excluding the State as a legal subject from the public law relationship.

From the above conclusion it follows logically that the State must have subjective rights flowing from its sovereignty. It will be argued later herein that the competence of the State (in other words its sovereignty) to exercise its authority (its capacity to act) flows from its historic foundation and that it is indeed its historic foundation that serves as the basis of the State's subjective rights to legal objects such as State security and law and order.

4.2 *The legal object*

It is suggested that the recognition of only "*Leistungs*" and "*Abwehrrechte*" to State conduct as a legal object does not only fail to take into consideration that the State is also a legal subject in need of legal objects, but also that other *things* may qualify as legal objects. The viewpoint of Venter may, it is suggested, be applied fruitfully in this respect. He rejects arguments to the effect that something must be susceptible of a monetary value before it may be recognised as a legal object. In fact, the determining aspect to establish whether *something* qualifies as a legal object or not is to ask if *it* can be applied in the creation and maintaining of legal order ("of die 'iets' in die juridiese ordeningsproses aangewend kan word om die gemeenskap te orden"). Such determination is done in *ad hoc* fashion.²¹ He suggests a classification of legal objects with reference to their nature and identifies the following categories:

21 Venter *Publiekregtelike Verhouding* 158. Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 442 maintain a similar view even though their exposition relates to the private law relationship. They argue that both individual members of society and society itself have a need for certain things for their sensible participation in legal intercourse and their existence. Since these things have qualities that gratify the needs of people and society, they are valuable. In order to gratify the needs of human beings peacefully and in orderly fashion, the law giver ("regsvormer") must protect the needs of every member of society against unwanted infringement by other members of society. The law giver does this by demarcating and harmonising the interests in value objects of the different members of society. It can therefore be said that the value of a value object is assigned to a legal subject *vis-à-vis* other legal subjects. In this sense the value becomes juridically "objectified". Their definition of a legal object therefore reads as follows: "[a]s daardie aspek (faset, sy of funksie) van 'n entiteit wat 'n regs waarde vir 'n bepaalde regs subjek behels op grond daarvan dat een of meer buite-juridiese waardes van daardie entiteit regtens bestem is om, ter uitsluiting van ander regs subjekte, die regs subjek tot behoeftebevrediging te dien." (Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 402-405.) The qualities an entity should possess to qualify as a legal object may include that it has a value for the legal subject (since if it didn't, it would be rather senseless to consider it as a legal object) and the value that is made a legal value must be such that the juridical assignment thereof to a legal subject must have community ordaining value (Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 406-407). The gratification of a legally recognised need of the legal subject therefore lies at the core of a definition of a legal object. In the public law

- property; for instance the *territorium* of a State;
- the conduct of other legal subjects; for instance the right to be registered as a voter when application is made by someone entitled to vote, to disclose one's income to the Receiver of Revenue, to assist a police official with an arrest when ordered to do so by the official, *et cetera*,²²
- conditions; for instance the conditions of State security, law and order;²³ and
- certain immaterial property; for instance the national anthem or national flag.

Taking Venter's exposition as a point of departure it is clear that it is insufficient to acknowledge only "*Leistungs*" and "*Abwehrrechte*" *qua* conduct, as does Alexy.

relationship it is submitted that the same argument holds true and it needs no further elaboration that this exposition would comfortably sit with Venter's definition of a legal object even though he relates the concept to the public law relationship.

- 22 Venter *Publiekregtelike Verhouding* 160 argues that the law grants to legal subjects who are active in public law claims to certain actions/conduct of other legal subjects. Such conduct bears an ordaining value and may therefore be considered as a legal object. Examples that may be alluded to are the duty to disclose, which entails that persons and companies must disclose their income to the Receiver of Revenue; the act of registration by an election officer when a person who is entitled to vote applies for such registration; the duty of an individual to assist with an arrest when a police officer orders him to; and the duty which rests on the Master under certain circumstances to grant a person access to documents under his supervision. Venter concludes that it is evident in these cases that the relevant conduct is the object in the relationship between the State and other legal subjects in the public law relationship. The Receiver of Revenue has a subjective right to the disclosure of the tax payer's income and the policeman as a State organ has a subjective right to assistance during an arrest. Likewise, the person who is entitled to vote has a subjective right to register as a voter and the interested party has a subjective right to insight into a will at the Master's office. In this way these rights can also be said to be subjective rights.
- 23 In public law various legally created conditions/situations can be objectified as legal objects with an ordaining value. Due to their ordaining value such conditions/situations may serve as valuable objects in the relationship and may therefore also be objects of (public) subjective rights. However, not all public-law-relevant conditions/situations are capable of being legal objects. This is so because not all such conditions/situations relate to the public law relationship. The State form, for example, is a condition/situation with regard to which the State does not stand in a public law relationship. Conditions/situations which can indeed be seen as legal objects in the public law relationship are the condition/situation of citizenship, which is of material importance in the State-citizen relationship, the condition/situation of State security, which is especially important to the State *qua* juristic person and which applies in the relationship of the State with other legal subjects, and also the condition/situation of law and order, which as a condition/situation serves as a legal object worthy of protection. See Venter *Publiekregtelike Verhouding* 160. According to Venter conditions/situations are juridically multi-faceted and a variety of rights, competencies and obligations may result from them. However, in the event where a pure condition/situation is the object of a right, a person who meets all of the requirements for example for citizenship can rely on a subjective right against the State to appropriate action to confer citizenship on him. The safety of the State and the consequent continued existence of the legal order are likewise legal objects with ordaining value accruing to the State. In his opinion the State definitely has a subjective right to State security and 'law and order' *qua* legal objects.

These concepts correspond with the concepts of "*facere*" and "*non facere*" as they apply to the legal object in private law. It is suggested, however, that the view of a legal object should be elaborated not only to include "*dare*" as a legal object in public law, but also certain conditions, property, conduct, immaterial property and situations. It would appear with regard to "*dare*" that the socio-economic rights of the individual (rights to an "*Existenz-minimum*") may serve as an example of the subjective right of the individual that the State provide him with tangible goods. On the other hand, the objects identified by Venter may serve as examples of a subjective right accruing to the State in terms of its historical foundation. It will be argued in paragraph 6 *infra* that the juridical destination of the State activates the so-called negative and positive status aspects of the individual as described by Alexy, and that it endows him with the competence in terms of which subjective rights are established to demand *inter alia* State conduct ("*Abwehr*" or "*Leistungsrechte*") *qua* legal objects in his favour.

4.3 Conclusion

It is suggested that both the State and the individual are bearers of subjective rights to legal objects in the public law relationship. It may also be concluded that the view of a legal object in the public law relationship as merely a negative or positive act in the individual's interest is fundamentally wrong. It is suggested that it may include both a "*dare*" and, *inter alia*, situations and conditions which for instance fall in the category of State security and law and order and also other objects which Venter has identified. In this respect it is argued that the State is indeed a legal subject in the public law relationship and that it also disposes of subjective rights to legal objects.

There is a clear difference in the situation, for example, of the individual's subjective right to official languages on the one hand, and the act of registration of the registration officer when a person who is entitled to vote applies for it, on the other. It seems as though an entity will in certain cases first be recognised as a legal object when a specific legal subject is endowed with a subjective right. In other situations the legal object may exist generally.

It is not the intention to provide a comprehensive exposition of the theory of public subjective rights. In as much as it accepts that the individual is the bearer of rights against the State, it may be accepted. However, it must be borne in mind that the theory does not provide definite answers to certain fundamental questions. It does not explain, for instance, why the State is not seen as a legal subject in the public law relationship or why a narrow approach is followed in the definition of a legal object so that only "*Abwehr*" and "*Leistungsrechte*" are considered as legal objects of subjective rights in the relationship. In what follows, the so-called *Wijsbegeerte der Wetsidee* of the so-called Reformed Tradition²⁴ will be alluded to for further dimensions to the relationship.²⁵

24 The theology of Jean Calvin (1509-1564) is the foundation of the Reformed tradition. His viewpoints led not only to a theological reformation but also brought about new perspectives on the public law relationship, as he set out clear principles with regard to the social calling of the State, the responsibility of Government, and the obligations of Christians in everyday life. His concern primarily related to church polity and not to the civil authority. Bearing in mind that he initially was a student of law commentators we may conclude that Calvin's political ideas were set in the context of his theology, which focused on the sovereignty and sublime majesty of God. In fact, his emphasis on the sovereignty of God determined his perspective on civil authority and individual rights. Calvin's understanding of the *ius naturae* led him to conclude that the law of God is more than that which is contained in the Ten Commandments; the law given to all people includes not only the commandments contained in the two tables but also the laws dictated to man by an internal law which is in a manner written and stamped on every heart. He explains that a concept of justice is engraved in the minds of all people. Every individual therefore has a sense of justice and civil authority bears the obligation of developing this sense of justice. From this perspective Calvin concluded that the State is charged to foster and maintain the external worship of God, to defend sound doctrine and the condition of the Church, to adapt man's conduct to human society, to form man's attitude to civil justice, and to cherish common peace and tranquillity. Therefore civil authorities should be obedient to God (because they represent His tribunal on earth) and accountable to the people in the exercising of their power. He makes it clear that civil authority must rule for the common good. The bearers of the power are not endowed with an infinite or unlimited power as their power is tied to the health of their subjects. Government may therefore not exploit its people and is ultimately responsible to God and accountable to its subjects. It is to be noted, though, that Calvin did not proffer a particular explanation of the kind of government that would be ideal for Christians but nevertheless took a strong stand against any form of tyranny, as it was considered a violation of human dignity. Calvin strongly argued that Church and State are separate entities. Although they are co-ordinate powers, the State is called upon to defend true worship and to take care of the well-being of the Church provided that such intervention does not lead to the disturbance of order and discipline in the Church. The State consequently is not a neutral institution - *qua* community it is a unitary Christian society under God's sovereignty and the law. Calvin held strong views about the rights and responsibilities of individuals. According to his teachings all people are equal before God since all are totally depraved. Yet all share God's common grace. From this proposition it flows that all people should be treated as equals and are equal before the law. As for individual freedom and liberty, Calvin stressed that it is the responsibility of the individual to be obedient to the ruler. However, he also acknowledged the right and the liberty of resistance against civil authority. He explained that "[W]e are subject to the men who rule over us, but subject only in the Lord. If they command anything against Him let us not pay the least regard to it, nor be moved by the dignity which they possess as magistrates – a dignity to which no injury is done when it is subordinated to the special and truly supreme power

of God." It is therefore clear that Calvin argued for the limitation of the authority of the State and for the rights of the individual *vis-à-vis* the State. See Vorster *Ethical Perspectives* 25-42.

Those who elaborated on the ideas of Calvin as far as human rights are concerned include Groen van Prinsterer (1806-1876) and Kuyper (1837-1920), whose better-known works include *Het Calvinisme, oorsprong en waarborg onzer constitutioneele vrijheden* (1874), *De gemeene gratie* Volume III, and *Calvinism. Six Stone Lectures* (1898). See also Barth *Rechtfertigung und Recht* 16-18. Vorster *Ethical Perspectives* 53 quotes as follows from Kuyper's *Six Stone Lectures*: "[L]et it suffice to have shown, that Calvinism protests against state-omnipotence; against the horrible conception that no right exists above and beyond existing laws; and against the pride of absolutism, which recognies no constitutional rights, except as the result of princely favour".

- 25 The views of Dooyeweerd in particular will be alluded to. They can be found in Dooyeweerd *New Critique of Theoretical Thought* 414 and further; Dooyeweerd *Wijsbegeerte der Wetsidee Boek II* 217; Dooyeweerd *Wijsbegeerte der Wetsidee Boek III* 414; Witte *Christian Theory of Social Institutions* 21 *et seq.* The basic beliefs from which his world-views developed can be summarised as follows: All social institutions find their ultimate origin in creation, where all things were separated after their own kind and vested with the right to exist and to develop. God is the absolute sovereign over all creation both at its inception and in its unfolding. He called creation into being through His Word and through His providential plan He guides its becoming. Furthermore His sovereignty is absolute and constant. God's authority is also a legal authority since He established creation and governs His creatures by law. He is above law and not bound by it. His will is communicated by the laws of creation, which provide order and consistency, not chaos and indeterminacy.

Each social institution has a right to exist alongside other individuals and institutions. It also has a "legal duty" to function in accordance with God's creation ordinances and providential plan with the aim of fulfilling its calling in history. A plurality of social institutions, each with a measure of sovereignty *vis-à-vis* all others, is therefore made possible by the laws of creation. The sovereignty of a social sphere is always limited by the sovereignty of co-existing spheres and limited to the task/function to which it is called. Such sovereignty is subservient to the absolute sovereignty of God since it is delegated by Him and always remains dependent upon Him. See Witte *Christian Theory of Social Institutions* 16 *et seq.* The structure of the State can be discerned against this background. Dooyeweerd argues that one can distinguish modal aspects in temporal reality. These aspects do not appear in isolation but always in an inseparable and mutual coherence. The following 15 aspects are discerned:

Aspect	Meaning-nuclei
15 Pistic	Faith
14 Moral	Love in temporal relationships
13 Juridical	Retribution
12 Aesthetic	Harmony
11 Economic	Frugality in managing scarce goods
10 Social	Social intercourse
9 Lingual	Symbolic meaning
8 Historical	Formative power
7 Logical	Distinction
6 Sensitive (psychic)	Feeling
5 Biotic	Vitality (life)
4 Physical	Energy
3 Kinematic	Motion
2 Spatial	Continuous extension
1 Arithmetic (numerical)	discrete quantity (number)

Each modal aspect is distinct and irreducible. Irreducibility reflects what is called "sphere sovereignty" of the modality and means the inviolable and irreducible status of these various aspects that creatures display. For instance, the justice of a man's act cannot simply be understood as a product of economic, logical or mathematical calculus – that is, the jural aspect cannot be reduced to the economic, logical or numerical modal aspects. Each modal aspect builds on the aspects below it. Dooyeweerd argues that spatial extension, for example, cannot be

understood without a concept of numerical multiplicity. Beings that are alive move in space and can be counted. This means that they have physical, spatial and numerical functions.

Dooyeweerd further argues that the reason why the modalities remain distinctive and ordered is because they are ordered by the laws of creation. God created groups of specific laws for each modality. Therefore, alongside the hierarchy of modalities, there is also a hierarchy of modal laws – laws ordaining counting and arithmetic, geometry, motion, life, sensitivity, logic, history, language, society, economics, aesthetics, legal science, ethics and theology. According to his exposition, these laws which are "*ontic a prioris*" provide order and consistency in creation.

The plurality of modalities as set out above is an essential source of the plurality of distinct creatures and all inanimate things, living beings, cultural things and relationships, including social institutions are subject to (at least some of) these modal laws. These laws govern the function of each of these creatures in each aspect. Creatures may be classified, therefore, by the laws to which their functioning is subject. Dooyeweerd explains that inorganic things are subject to the first three modal laws of number, space and motion; plants to the first four laws through the biotic laws; and animals to the first five through the psychic. Man is subject to all of the laws but human social institutions are subject to only a select number of higher modal laws. The highest modal law to which each creature is subject contributes to rendering it distinctive by furnishing the creature with its distinguishing character (its unique calling). It also prescribes a creaturely form in which this calling can be fulfilled. Dooyeweerd refers to it as the structural principle, or the internal law of the creature. See Witte *Christian Theory of Social Institutions* 23 *et seq.*

According to Dooyeweerd a plurality of social institutions is made possible by the plurality of modal laws which govern them. The sovereignty of these institutions is guaranteed by the sovereignty of the underlying modal laws. "The abiding structural principles, the inner constitution of each social institution – and thus also its "typical" nature and function – are prescribed by the modal laws to which that institution is subject." Furthermore he identifies the grounding (foundation) and leading modal functions (the destination) of each institution. See Witte *Christian Theory of Social Institutions* 24. Dooyeweerd identifies a range of social institutions by application of this modal analysis. In the first place he distinguishes between undifferentiated and differentiated societies, the former normally being found in earlier cultures that have not yet developed separate institutions, each with a uniquely defined form and task. This results in one or two institutions performing several tasks. Examples of such societies are the tribe, the folk sib, the Roman family and medieval guilds. Differentiated societies, on the other hand, show a clearer separation of institutions and a greater specification of the distinctive task and social role of each. Secondly, natural institutions may be separated from social institutions. Natural institutions are characterised by their being founded on the biotic modality of life and qualified by the moral modality of love. Included in such relationships are marriage, the family and the cognate family. All other institutions are social institutions which are founded on the historical modality. In essence this means that they are the product of human cultural formation. Their destination may be found in a variety of higher functions ranging from the analytical to the faith aspects. In the third place a distinction may be made between communities and inter-communal or inter-individual relationships. Communities bind people together more or less permanently as members of the same social whole. Examples in this respect are the State, church or family. Inter-communal or inter-individual relationships are the cooperative or antagonistic relations between two institutions, two individuals or an institution and the individual. Lastly he distinguishes between authoritative social forms and free social forms. Forms of the former type are institutions which are organised and which have a relatively permanent internal communal character and a definite division of authority and subjects. Members are embraced non-voluntarily for their entire lives or a substantial portion thereof. The State is an example in this regard. See Witte *Christian Theory of Social Institutions* 24-25; Dooyeweerd *New Critique of Theoretical Thought* 187 and 179-181.

It may therefore be concluded that Dooyeweerd views the State as a social institution and more specifically as an institutional community, which community can be either a natural or an organised community which by its inner nature is destined to encompass its members to an intensive degree, continuously or at least for a considerable part of their lives, and such in a way independently of their will (Dooyeweerd *New Critique of Theoretical Thought* 187, 413). *Qua* institution it is founded in an organised historical power formation. The organisation provides a community that lacks a natural foundation with a more or less continuous existence. In this way it

5 The individual and the State as legal subjects involved in the public law relationship – reflections on the points of departure of the Reformed Tradition

5.1 Introduction

The outstanding characteristic of the public law relationship is that the State, *qua* bearer of State sovereignty, exercises its authority in this relationship. One possibility for explaining the State as an institutionalised social entity is that it is a historically founded organisation which finds its destiny in the juridical sphere.²⁶ Although it is not denied that other valid explanations exist, this approach offers certain perspectives according to which the legal position of both the State and the individual can be satisfactorily explained. In this contribution the argument is put forward that *State sovereignty* should be seen as a legal competence – the competence of the State to be the bearer of legal subjectivity and to take part in legal intercourse.²⁷ It is vitally important, though, to understand that the concepts legal

becomes independent of the duration of life of its individual members (Dooyeweerd *New Critique of Theoretical Thought* 179-181). Durable organisation of necessity implies a societal relation of authority and subordination.

26 Dooyeweerd *New Critique of Theoretical Thought* 414; Dooyeweerd *Wijsbegeerte der Wetsidee Boek II* 217; Dooyeweerd *Wijsbegeerte der Wetsidee Boek II* 414. See eg Nagler *Über die Funktion des Staates* 107, 111 *et seq* for a brief exposition of the theories of Kant, Locke and Hobbes.

27 It must at the outset be made clear that the idea of State sovereignty as an absolute power is an outdated concept. This is due, *inter alia*, to a growing trend of interdependence and cooperation between States. See Ferreira-Snyman *Erosion of State Sovereignty* 32. She refers to MacCormick *Questioning Sovereignty* 127, who explains that "[P]ower of one kind, normative power or 'authority', is conferred by law. This may be a power of law-making in a certain territory conferred by a certain constitutional order that is effectively observed in that territory. Sovereign power is that which is enjoyed, legally, by the holder of a constitutional power to make law, as long as the constitution places no restrictions on the exercise of that power ... If the constitution then confers such a power but contains no limits upon the power (other than the discretion and judgment of those who exercise the power) we may say that sovereignty is vested in the holder of the law-making power. But what of political sovereignty? ... Political power is interpersonal power over the conditions of life in a human community or society. It is the ability to take effective decisions on whatever affects the distribution of the economic resources to them." It is therefore clear that the concept of sovereignty can be neither fixed nor constant. Makinda "Recasting Global Governance" 168-172 consequently explains that three types of sovereignty may be discerned: external or juridical sovereignty, which stems from the notion that the State is under exclusive authority of international law; internal or empirical sovereignty, which results from the point of departure that States have the right and capacity to control the people, resources and institutions within their territories; and individual or popular sovereignty, which is based on the claim that all people are entitled to fundamental freedoms and that the State may exercise

subjectivity and status are inextricably linked. Every legal subject is the bearer of legal subjectivity – that is trite. However, the status of a legal subject will be the determining factor to establish the extent to which he can participate in legal intercourse. Therefore, even though the status of the State to be a subject in legal intercourse cannot be doubted, its competence to exercise its authority (its capacity to act) may legally be curtailed. This may happen, for instance, if a State becomes a signatory to an international convention in terms of which limitations are placed on its capacity to act. On the other hand, there are also internal qualifications to the sovereignty of the State. These flow from its internal calling. It is therefore clear that State sovereignty should not be seen as an unbridled power accruing to the State.²⁸

For the purposes hereof the State and the individual²⁹ are identified as the two participants in the public law relationship. There is, however, a clear distinction between their respective positions. Because of the complexity of the relationship and

control over them only because they have consented to it. In terms of this type of sovereignty States dispose of rights and responsibilities that other international actors do not possess.

The emergence of the concept of sovereignty as a responsibility to protect, it is submitted, stems from individual sovereignty. Falk "Sovereignty and Human Dignity" 697 explains that government legitimacy that validates the exercise of sovereignty involves *adherence to minimum humanitarian norms and a capacity to act effectively to protect citizens from acute threats to their security and well-being that derive from adverse conditions within a country*. It is suggested that this exposition corresponds with the discussion in paras 2.1.3, 4.2 and 6, where it is stated that the State is called upon to provide an '*Existenz-minimum*' to the individual in terms of its juridical destination. Ferreira-Snyman *Erosion of State Sovereignty* 55 refers in this respect to the report of the Independent International Commission on Intervention and State Sovereignty (*The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* December 2001), which indicates that sovereignty should be seen as a duty to protect. Sovereignty should therefore be seen, in the first place, as entailing that State authorities bear the responsibility for the functions of protecting the safety and lives of citizens and for the promotion of their welfare. In the second place, and flowing from the State's duty to protect, this notion of State sovereignty suggests that political authorities have a responsibility to citizens internally and to the international community through the United Nations. In the third place agents of the State are responsible for their actions and therefore accountable for their acts of commission or omission. Against this background sovereignty as a duty to protect intervention for human protection is supported when major harm to civilians is occurring and the State in question is unwilling or unable to end it, or is itself the perpetrator. For the sake of completeness it may also be mentioned that sovereignty may be viewed as a status consideration, in the sense that the exercise of sovereignty requires participation in international and regional organisations. Against this background sovereignty is not measured by the extent of a State's autonomy but rather by the extent of its membership and participation in international and regional organisations. See Ferreira-Snyman *Erosion of State Sovereignty* 57-58.

28 See the text accompanying n 44 *infra*.

29 For the sake of convenience it is necessary to be content for the moment with the term individual as one participant in the public law relationship. It is, of course, just as possible that juristic persons can also figure as parties in the public law relationship.

the multitude of relevant factors which impact on it, it will be more functional to discuss the relationship with simultaneous reference to the respective legal positions of both the State and the individual.

5.2 The State as a historically founded social entity and the corresponding individual status

It is suggested that an understanding of the State as a legal subject disposing of subjective rights is incomplete if it is not understood that legal objects such as the condition of State security and law and order typically accrue to it.³⁰ These legal objects, as indicated above, are inherent in the subjective rights of the State, and the exercising of State authority should therefore be directed at maintaining and protecting them.³¹

In his argument about the way in which the terms "law" and "power" with regard to State authority should be dealt with in a purely legal theoretical way, Dooyeweerd convincingly indicates that the unique, typical nature of the State can be found in the historic sphere, and that it is indeed this distinctive nature which guarantees the unity of the State as a social entity.³² The historic nature can be traced back to the fact that the State as an institution first came into being with the destruction of the political power which existed with non-institutionalised communities and tribes.³³ The founding of the State in the historic sphere therefore typically rests on the destruction of the independent (political) structures of non-institutionalised social entities.³⁴ There exists no State of which the State sovereignty does not in the final instance

30 See para 3.2. See also De Jouvenel *Über die Staatsgewalt* 39.

31 Wiechers *Administratiefreg* 8; De Jouvenel *Über die Staatsgewalt* 29; Dooyeweerd *New Critique of Theoretical Thought* 413-418.

32 Dooyeweerd *New Critique of Theoretical Thought* 405, 419. See also De Jouvenel *Über die Staatsgewalt* 40.

33 From a German perspective this point of departure is substantiated by De Jouvenel *Über die Staatsgewalt* 32, who explains that: "[B]edeutet das, die Staatsgewalt verdanke ihre Kraft nicht dem Gefühl der Furcht, sondern dem des Beteiligtseins? Eine menschliche Ganzheit besäße eine gemeinsame Seele, einen Nationalgeist, einen Gemeinwillen? Und die Regierung personifizierte die Ganzheit, manifestiere die Seele, verkörpere den Nationalgeist, verkünde den Gemeinwillen? Das Rätsel des Gehorsams wäre gelöst, da wir dann im Grunde nur uns selber gehorchten."

34 Dooyeweerd *New Critique of Theoretical Thought* 413.

underlie the competence to use the "power of the sword" – the competence to use the force of arms to suppress any armed resistance.³⁵ Therefore, the sovereignty of the State resulting in its establishing and maintaining State security and law and order *qua* legal objects typically arises from its historical foundation.³⁶

The historic foundation of the State is the structural basis on which it rests and is situated in the confirmation and application of State authority by the armed forces over a certain cultural area within certain territorial boundaries.³⁷ The power of the sword does not, however, comprise only of a disposition over military weapons, airplanes, airports and so forth, but also of an organised army and police force:

Only subjective military bearers of power can actualize this apparatus: without them it remains dead material.³⁸

Dooyeweerd emphasises that this structural function, the confirmation of State sovereignty by the armed forces, should not be regarded as meaningless, because it embodies the calling and task of the State in a normative way; it embodies the calling to control the "normatieve roepingsmacht in den zin der vormende behersching" as its internal goal.³⁹ The State may not exercise its authority over

35 Dooyeweerd *New Critique of Theoretical Thought* 414.

36 Dooyeweerd *New Critique of Theoretical Thought* 413. On 416, 417 Dooyeweerd emphasises that the "sword power" does not merely consist of military control over a certain area, because it would for example be impossible for the State to create military organisations if it did not also possess economic, moral, religious, and other forms of authority. These other forms of authority are, however, not typical of the State, while the "monopolistic application of the sword power" is the only typical authority form which is not the founding function of any of the other social entities. The other authority forms can consequently be understood within the State context only with reference to the historic founding functions of the State. Dooyeweerd indicates that in spite of the fact that it is important for the State to have well developed trade and industry, this does not represent the internal characteristic of the State. It could happen that there could be antagonism between organs of State on the one hand and trade and industry on the other if the behaviour of the latter were contrary to the national interest, and a State with a weak military organisation will therefore be a weak State despite the strong development of trade and industry.

37 Dooyeweerd *New Critique of Theoretical Thought* 414. In this regard Dooyeweerd talks about the internal monopolistic application of sword power. See also De Jouvenel *Über die Staatsgewalt* 121; Nagler *Über die Funktion des Staates* 107.

38 Dooyeweerd *New Critique of Theoretical Thought* 422.

39 Dooyeweerd *Wijsbegeerte der Wetsidee Boek II* 185. De Jouvenel *Über die Staatsgewalt* 30 explains that "[i]st die politische Wissenschaft, oder was als solche bezeichnet wird, getreulich den Direktiven des Meisters gefolgt. Da keine Gesellschaft ohne Befehlsgewalt auskommt, ist die Diskussion um ihre Form stets aktuell, müssen ihr Ausmass, ihr Aufbau, ihre Handhabung für jederman von Belang sein." See also Klement *Verantwortung* 266; Michael and Morlok *Grundrechte* 140.

private property in an uncontrolled fashion, but rather its authority must be aimed at protecting the development of human civilization and at promoting it in subordination to the principles set by God⁴⁰ - its sovereignty will only then really be developed when there is what is called obedient subjection to the assignment given by God with regard to the development of culture.⁴¹ Ultimately God appointed man as ruler over creation with a cultural assignment. Therefore the State as an institution must always serve as *res publica*, an institution in favour of the public interest – State sovereignty is indeed nothing but a public position and State authority is not private property which can be applied by the State in an unqualified way.⁴²

It may be concluded that only the State has State sovereignty within a certain area, and that it alone has the authority (the capacity to act) to use armed forces for the protection thereof. The founding function of the State does not exist only in the application of State authority for purposes of military power, but it is also aimed at the orderly promotion of culture and the creation of the controlling activities of the

40 Dooyeweerd sees this obligation of the State as an imperative. It is, however, unclear what the position will be if the State does not adhere to this task. See also De Jouvenel *Über die Staatsgewalt* 39.

41 Dooyeweerd *Wijsbegeerte der Wetsidee Boek II* 185. Here Dooyeweerd adds to Kuyper who, in his famous *Zes Stone Lezingen* under the title *Het Calvinisme* on 69 and further, came to the conclusion that only God has sovereign power. It is so because He created the earth and all institutions, including the State. As a result of the fall of man He does not directly rule over States any more and He appoints peoples to rule over others mechanically (in contrast to organically). The sovereignty to rule over other people therefore originates from God alone and the State must, in order to rule well, keep to the principles of sovereignty in its own sphere. This means that stately authorities (which as institutions affected by sin still want to acquire more power) still need to keep in mind that life will be unbearable without law and order and proper institutionalised government. De Jouvenel *Über die Staatsgewalt* 39 explains that "[D]er Gehorsam ist Pflicht, weil "es in der Gesellschaft ein höchstinstanzliches Befehlsrechts gibt, das sich Souveränität nennt, und das anzuerkennen wir verpflichtet sind, ein Recht die Handlung der Glieder der Gesellschaft mit Zwangsgewalt zu dirigieren, dem sich jeder einzelne unterordnen muss, dem sich niemand widersetzen kann." See also Nagler *Über die Funktion des Staates* 107; Michael and Morlok *Grundrechte* 260.

42 Dooyeweerd *New Critique of Theoretical Thought* 412. See also De Jouvenel *Über die Staatsgewalt* 39. Currie and De Waal *Bill of Rights Handbook* 13 explain that at least since the French and American revolutions it has been accepted that no person or institution has a divine right to govern others. Government can consequently be legitimate only in so far as it rests on the consent of the governed. In a democratic system of government the relationship between the government and the people is not simply based on power – rather, the consent of the governed is the defining characteristic of the relationship. Furthermore, the authors explain that democracy is enhanced where the role of the representative structures is supplemented by allowing and encouraging direct and participatory forms of democracy so that individuals or institutions are given the opportunity of taking part in decisions that affect them.

State.⁴³ The maxim *salus rei publicae suprema lex est* should therefore have application only within this context. If this were not the case, it would tend towards State absolutism.⁴⁴

It has been suggested *supra* that the authority (the capacity to act) of the State to maintain its legal objects stems from its sovereignty. The historic founding of the State as a social entity has the purpose of guaranteeing the unity of the social entity, and it is imperative that the authority of the State to use armed forces should exist generally to protect and promote its legal objects.⁴⁵ The competence of the State to maintain State security and law and order by utilising its authority therefore relates to the necessity of the general and continued existence of State security and law and order. It speaks for itself that these legal objects are a *sine qua non* for the continued existence and unity of the State.

It appears that the position of the individual can readily be explained within the framework above. On the one hand it is clear, with regard to the State's subjective right to State security, law and order and the other legal objects that were identified, that the individual has the obligation to respect it.⁴⁶ On the other hand it is also clear

43 It must be borne in mind, as Nagler *Über die Funktion des Staates* explains, that "[M]it Einrichtung eines Staates geben alle Personen ihren natürlichen Anspruch auf, das Rechtsprinzip nach eigenen Vorstellung auszulegen und durchzusetzen. Dieser entscheidende Vorgang wird bei allen Rechtssystemen entweder ausdrücklich benannt oder aber stillschweigend vorausgesetzt, weil sonst die Gründung eines Gemeinwesens weitgehend sinnlos wäre."

44 Dooyeweerd *New Critique of Theoretical Thought* 444. Venter 1977 *THRHR* 237 indicates that in spite of the fact that the historical source of this maxim cannot be determined with certainty, it still has application today in South Africa. In *S v Baker, S v Doyle* 1965 1 SA 821 (W) 827 it is worded as the State's inherent right and obligation to defend itself. In *S v Essop* 1973 2 SA 815 (T) 815 it was decided that the safety of the State is "the supreme law of a state". The far-reaching competence of the State to infringe individual rights and competences in a time of emergency is stipulated in *Krohn v Minister of Defence* 1915 AD 191 210 as follows: "[I]t becomes necessary for the military authorities to assume control and to take the law into their own hands for the very purpose of preserving that constitution which is the foundation of all the rights and liberties of its subjects. When such a state of things arises in any district, the ordinary rights and liberties of the inhabitants are subordinated to the paramount interests of the state." Innes CJ explains on 197 that every State has the inherent right to protect itself if its prolonged existence is at stake. Compare in the same way *R v Bekker* 1900 SC 340 355; *Trümpelman v Minister of Justice* 1940 TPD 242 246. See also De Jouvenel *Über die Staatsgewalt* 83; Krabbe *Lehre der Rechtssouveränität* 124 *et seq.*

45 De Jouvenel *Über die Staatsgewalt* 39. See also Michael and Morlok *Grundrechte* 37.

46 De Jouvenel *Über die Staatsgewalt* 29; Klement *Verantwortung* 266 *et seq.*

that the individual can be an organ through which the State can protect its entitlement to these legal objects.

The explanation of *Georg Jellinek* serves to illuminate the individual status in the public law relationship.⁴⁷ He distinguishes certain aspects of the individual status in the relationship with reference to the legal position the individual holds *vis-à-vis* the State, and it seems as though the *passive and active* aspects of the individual status which he describes can indeed be brought in line with the historical foundation of the State. The negative and positive aspects of the individual status are also distinguished and will be discussed *infra*.⁴⁸ The different status possibilities of the individual, jointly seen, offer a complete picture of the legal position of the individual as a member of the State.⁴⁹ Jellinek wrote against a strong legal positivistic background, yet his exposition is still accepted as valid in German public law despite the fact that the current *Grundgesetz* expressly acknowledges pre-positive law principles.⁵⁰

47 Jellinek *System der Subjektiven Öffentlichen Rechte*. By the "status aspect" is meant that different aspects of the individual status *vis-à-vis* the State are activated in different situations in his various relations with the State. In certain relationships he can practically be a pure duty subject, but in respect of other aspects of his status he can be endowed with competences to claim that the State should act towards him according to law or comply with legally binding provisions to provide him with an "*Existenz minimum*".

48 See paras 6.1 and 6.2 below. It should be noted though that modern German legal theory departs to some extent from Jellinek's exposition thereof. Sachs *Verfassungsrecht II* 44 explains that the different aspects of status have changed in meaning in some instances. In this respect the so-called "Freiheitsrechte", for instance the freedom of expression of opinion, is not considered as belonging to the *status negativus* but is now considered as part of the *status positivus*. This development is due to the fact that it is argued that in this way a contribution is made to democratic "Willensbildung". Other aspects of status have also been identified. In this respect, one may refer to the *status constituens*, the *status activus processualis* and the *status positivus socialis*.

49 See also Venter *Publieke Subjektiewe Regte*.

50 Article 1 of the *Grundgesetz*. See also Katz *Staatsrecht* 232 and further De Jouvenel *Über die Staatsgewalt* 33.

5.2.1 *The passive status aspect of the individual*

The background above offers the motivation for the first aspect of the individual status which Jellinek distinguishes, namely the passive status. This aspect of the individual status exists in a sphere of individual obligations (the "*individuellen Pflichtenphäre*") so that the self-determination, and consequently also the legal subjectivity, of the individual is excluded from this sphere.⁵¹ Against this background it appears that the individual status may be limited. The passive aspect of the individual status would result in the individual being a pure "duty" subject in a state of complete and "right-less" subordination to the State if he did not also hold other status positions.⁵²

Jellinek apparently sees this aspect of the individual status as purely theoretical and non-historic. Nevertheless, it fulfils an important role in his system because it serves as a point of departure for the other three aspects of individual status which he identifies. These other aspects are preceded by the assumption of the passive status and Jellinek's legal positivistic viewpoints lead him to conclude that the individual frequently finds himself "in one or the other residual form of the passive status".⁵³ However, he indicates that as individual legal status grows, the scope of the passive status reduces, as does the power sphere of the State. The opposite is of course also true, namely that the power sphere of the State increases as the passive status of the individual grows.⁵⁴

51 Jellinek *System der Subjektiven Öffentlichen Rechte* 87. According to Jellinek the legal subjectivity of the individual is the total of all of his competences. See also De Jouvenel *Über die Staatsgewalt* 30 *et seq*; Alexy *Theorie der Grundrechte* 230.

52 With this exposition reference is made to the negative and positive aspects of the individual status, which are discussed in paras 6.1. and 6.2 *infra*. See also Krabbe *Lehre der Rechtssouveränität* 125.

53 Van Wyk *Persoonlike Status* 114.

54 Jellinek *System der subjektiven öffentlichen Rechte* 86 explains the position as follows: "Ist die Leistungsfähigkeit des Staates heute eine unvergleichlich grössere als früher, so hat dies seinen Grund darin dass der Staat der Gegenwart, für die Verengerung seiner Sphäre sich nach anderer Richtung hin furthwährend entschädigt, indem er ein Gebiet nach den anderen, von dem seine Herrschermacht bisher rechtlich ausgeschlossen war, durch Erzeugung neuer Pflichten der Subjizierten zum Objekt seiner Verwaltung macht." See also De Jouvenel *Über die Staatsgewalt* 34.

5.2.2 *The active status aspect of the individual*

The active aspect of the individual status can be discerned to be the opposite of the passive aspect of the individual status which Jellinek distinguishes. This aspect is summarized by Jellinek as follows:

Die Tätigkeit des Staates ist nur durch individuelle Tat möglich. Indem der Staat dem Individuum die Tätigkeit zuerkennt, für den Staat tätig zu werden, verzetst er es in einem Zustand gesteigerter, qualifizierter, aktiver Zivität. Es ist der aktive Status, der Status aktiver Zivität, in welchem der sich befindet, der die s.g. politischen Rechte im engeren Sinne ausüben berechtigt ist.⁵⁵

Consequently the active status of the individual is about his involvement with acts of State regardless whether as an individual or as member of a group.⁵⁶ "State will forming" takes place factually through individuals in their capacity as organs of State; the individual is promoted to be a member of the State organisation and this aspect of his status then figures in his relation with the State.⁵⁷ It is also clear that this exposition relates to that of Dooyeweerd, that the application of the power of the sword is exercised by an organised army and police force.⁵⁸

The active and passive aspects of the individual status are distinguished from each other in that the individual is involved with the "State will" in terms of his active status,⁵⁹ while he is subordinate to it in terms of the passive aspect. According to Jellinek two possibilities exist in which this involvement can manifest; on the one hand it may happen through obligation and on the other hand through adjudication.⁶⁰ Compulsory military service and the official relationship through which individuals are compelled to act as State organs serve as examples of an obligation. However, in the case of adjudication the State grants the individual the competence to act as an organ of State. This promotion to being a member of the State organisation therefore

55 Jellinek *System der Subjektiven Öffentlichen Rechte* 87. See further De Jouvenel *Über die Staatsgewalt* 53; Klement *Verantwortung* 266, who explains that "[J]ede Kompetenz und Aufgabe hat der Staat durch mehr oder weniger allgemeine verhaltensermächtigende Rechtsakte. Ausserhalb dieser Ermächtigungen hat er keine Handlungsbefugnis."

56 Van Wyk *Persoonlike Status* 129.

57 Jellinek *System der Subjektiven Öffentlichen Rechte* 139.

58 See para 5.2 *supra*.

59 Van Wyk *Persoonlike Status* 131.

60 Jellinek *System der Subjektiven Öffentlichen Rechte* 139.

is indicative of individuals' increased status - "[d]em Individuum wächst einen neuen Status zu".⁶¹

5.3 Some thoughts regarding the relation between the historical foundation of the State and the corresponding individual status

It is abundantly clear that the historical foundation of the State does not result in its being allowed to use its authority as an unbridled instrument of power. In this regard the internal calling ("*interne roepingsmacht*") as the internal qualification of the State's sovereignty deserves further consideration. The question that should be asked is how the State should behave in order to meet the requirement posed by the internal calling; the balancing of its sovereignty with the achievement of justice.⁶²

By way of introduction reference can be made to Du Plessis' explanation that the obligation of the State to maintain law and order is a legal duty; the State-order is a legal order in a bi-articulate sense. Firstly, because the State-order is the base order on which the scaffolding of the State organisation rests, it cannot do without a legitimising order in terms of which inter-human relationships in its competence sphere are described. This base order which should be maintained by exercising State authority should necessarily be a legal order. The State authority which organs of State may exercise therefore finds its legitimacy in the existence of this base order. The base order of the State exists for the sake of citizens of the State to have a secure ("*geborge*") living space which the State as institution must provide in order to give content to its institutional purpose and also for them to achieve their personal goals as members of the State. It is suggested that one may conclude that the achievement of personal goals as members of a State corresponds with the provision of an "*Existenz-minimum*" qua "*Leistungsrecht*" in the theory of public subjective rights.

61 Jellinek *System der Subjektiven Öffentlichen Rechte* 139.

62 See Du Plessis 1981 *Koers* 248 *et seq*; Du Plessis *Reg, Geregtigheid en Menseregte* 176-216; Du Plessis 1980 *Obiter* 51 *et seq*.

Secondly the so-called primary goal order is distinguished. This is the scaffolding which aims at the legal orderly co-existence of subjects within the jurisdictional area of the State. The purpose of the State is uniquely aimed at the realisation, maintenance, sustaining and promotion of a legal order in a certain territorial area in such a way that individuals in the living of their everyday lives are fundamentally secure within the State's competence sphere. The State is therefore primarily a goal-ordered legal community; the legal communality of the State is public and general in nature.

Against this background, and more specifically to determine how the State should conduct itself in order to activate its primary goal order or rather to fulfil its function of community building, Du Plessis specifically deals with the nature of justice and the exercising thereof. He distinguishes mainly between justice (as such) and institutional justice, which entails the "prevailing" of justice through the establishment of legal institutions. These institutions of justice are the result of human culture formation and therefore fallible.

Du Plessis explains with reference to Aristotle that justice should be achieved through the formation of human institutions designed to achieve that purpose. This pertains to the so-called institutional justice.⁶³ These "channels" are the pathways which a human being can follow in obedience to the norms of justice. On this point it should be noted that institutional justice closely relates to the primary goal order as the legal order of the State institution. The goal of the scaffolding is the orderly co-existence of subjects within the jurisdictional area of the State. It can therefore be concluded that the achievement of justice through the use of the channels provided by the State embodies the internal qualification of the historical foundation of the State. Should the State not provide these channels, the State would be nothing but a gang of robbers. As will be illustrated later, it is indeed the internal qualification of the historical foundation of the State that needs to lead to the creation of channels along which justice can be done, and through which the individual in the public law

63 Du Plessis 1980 *Obiter* 61; Du Plessis *Reg, Geregtigheid en Menseregte* 189.

relationship is endowed with the competence to be the bearer of (public) subjective rights with regard to (justice qualified) State behaviour as a legal object.

Institutional justice, according to Du Plessis, has two forms, namely institutionalising and institutionalised justice. Institutionalised justice mainly comes into play with the creation of appropriate (in other words fair) societal institutions. The institutions which are created by those with State sovereignty must be fair in the sense that they are accommodating in their relationship with other legal subjects. Institutionalised justice on the other hand is the form of justice which, given the existence of institutions, applies along the line of institutions. The achievement of justice, it is suggested, relates to "*Abwehrechte*" in German jurisprudence.

5.4 Summary

The historical foundation of the State is qualified internally in that the State's conduct should be indicative of the fulfilment of its ordaining function. According to the exposition of Du Plessis *supra*, the conclusion can safely be drawn that the function of community ordaining is intrinsically aimed at the achievement of justice through the use of the means created by the State. As will be explained *infra*, it is by the creation of "justice-achieving channels" that the positive and negative status aspects of the individual are activated by the State. The activation of these status aspects bestows the competence on the individual to be the bearer of subjective rights to legal objects such as just conduct and the provision of an "*Existenz-minimum*". Differently put, it can be said that the internal qualification of the historical foundation of the State offers the bridge between the historical foundation of the State and the accompanying passive and active status aspects of the individual on the one hand, and the juridical destination of the State and the accompanying negative and positive status aspects of the individual on the other hand.⁶⁴ By the State's having to exercise

64 It is submitted that the entering of a State into a human rights convention may be indicative of its internal calling. Bearing the difference between whether a State Party follows a monist or a dualist approach (and also the argument of Malan 2008 *De Jure* 81 that the entering of a State Party into a human rights convention creates a *stipulatio alterius*) it may be argued that such a convention underlies the basis for State performance to the benefit of the individual. In this respect reference may again be made to Malan's explanation. In essence he argues that

the subjective rights which flow from its historic foundation in such a way that it presents itself as a *res publicae*, the possibility for the creation of the competence to be the bearer of subjective rights is created for the individual. This stems from the fact that he is endowed with negative and positive status aspects by the State,⁶⁵ which means that the State is conferring the competence to activate the juridical destination of the State on the individual.

By granting the individual by way of law the competence to test its conduct against both the norm and the achievement of justice along the channels created, and by providing an "*Existenz-minimum*" the State already from its historical foundation

multilateral human rights conventions are in the nature of a *stipulatio alterius*, which means that States which are contracting parties to a particular treaty individually pledge to all other parties to the treaty to provide the protection as set out by the convention to individuals under their jurisdiction. The third parties are the individuals in the jurisdiction of the State Parties to the particular treaty for the benefit of whom the treaty is concluded; even though they are not parties to the initial negotiation and conclusion of the treaties, they become benefiting parties at the moment when the convention enters into force. He further contends that such treaties have a self-executing character so that individuals acquire rights on the plane of international law at the same time as States incur liabilities under international law pursuant to such treaties. (For the specific construction of such an agreement, see Malan 2008 *De Jure* 85.) Malan also does not see any difficulties in the fact that the *stipulatio alterius*, ordinarily being a private law construct, is now applied as a source for public international law. He argues, *inter alia*, that there is no need to transplant private law notions with precisely the same content from the plane of domestic law into public international law and pleads for a more pragmatic rather than a purely dogmatic approach. He quotes as follows from the *International Status of South West Africa Case*: "The way in which international law borrows from this source is not by way of importing private law institutions lock, stock and barrel, ready-made and fully equipped with a set of rules. In my opinion, the true view of the duty of international tribunals in this matter is to regard terminology or any features that are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions." (Malan 2008 *De Jure* 87)

With regard to the application of *stipulatio alterius*-related principles Malan remarks that the individual inhabitants in the jurisdiction of a particular State Party "[a]re the beneficiaries in the interests of whom the agreements are concluded, *and it is in their favour that states compromise their sovereignty* and make mutual undertakings ..." (italics added) (Malan 2008 *De Jure* 89). What a State Party therefore expressly does in terms of a human rights treaty is on the one hand to undertake to all the other parties to the treaty to act in a particular manner in relation to those under its jurisdiction, and on the other hand *to undertake to everyone under its own jurisdiction to act as defined in the treaty in question*. This conclusion stems from the true intention of human rights treaties to put an international instrument to the use and benefit of the best interests of those falling under the jurisdiction of the various States Parties. For the purposes hereof no further attention is paid to Malan's explanation of the question of how individuals become beneficiaries or why such treaties are self-executing (see Malan 2008 *De Jure* 90 *et seq*). It is suggested, however, that the argument "that states compromise their sovereignty" by acting towards everyone in their jurisdiction as required in the treaty serves as an example of the internal calling of the State. It is this very notion that illustrates the channels the State must create to provide for justice being done to individuals and the infrastructure that it has to provide in terms of a convention.

65 See paras 6.1 and 6.2 *infra*.

creates the possibility that the individual can have subjective rights against it in terms of its juridical destination.

6 The internal calling of the State and the State as a social entity with a destination (leading) function and the corresponding individual status

The destination of the State as a social entity is typically found in the juridical sphere.⁶⁶ This is obvious seeing that State sovereignty, which is confirmed by the use of armed force, also requires that such a force be subordinate to civil government. The typical characteristic of a State, namely the stability of the public legal order, will consequently be reflected in its sovereignty being continually qualified by law. It is also true that a perspective of the destination of the State will be deficient if it does not also take the historic foundation of the State into account. It is important therefore that it be understood that the destination function of the State must be directed at binding together the State government, citizens and territory as one political and juridical unit.⁶⁷

The State typically represents an integrated political unit of citizens, who are also active in various social relationships within the context of the State.⁶⁸ The State as the representative of the public interest ought to harmonise these different legal interests in such a way that it regulates the community and consequently the public interest itself.⁶⁹ In fact, the public interest typically ought to embody order. The political unity which is guaranteed by the historic foundation of the State may not result in the State disturbing the principle of sovereignty within its own sphere of other, non-political social spheres.⁷⁰ The relationship between the State and the individual and the State and other social entities should thus be typically legally qualified, which qualification will at the same time also imply that the rules of

66 Dooyeweerd *New Critique of Theoretical Thought* 434.

67 Dooyeweerd *New Critique of Theoretical Thought* 437.

68 Dooyeweerd *New Critique of Theoretical Thought* 438. See also De Jouvenel *Über die Staatsgewalt* 39.

69 See para 5.3 *supra*.

70 Dooyeweerd *New Critique of Theoretical Thought* 442.

*distributive justice*⁷¹ are applicable. This relationship is described by Dooyeweerd as follows:

The *salus publica*, thus conceived, is a political integrating principle binding all the variable political maxims to a supra-arbitrary standard. It binds the entire activity of the State to a typical leading idea of public social justice in the territorial relations between government and subjects.⁷²

The internal authoritarian activity of the State should always be qualified by the idea of social justice. This requires the harmonising of all the interests within the national *territorium* by weighing them up in retributive sense,⁷³ as well as the acknowledgement of the sovereignty within its own sphere of other social (non-political) entities.⁷⁴

In conclusion it can be said that the harmonising of the community's interests is a typical occurrence of the destination function of the State and that the demands of (distributive) justice ought to determine the method of harmonising. It is thus necessary in the juridical sphere to determine the ways in which a balancing of interests can take place in order to comply with the demands of the *iustitia distributiva*. Du Plessis makes an important contribution in this regard. He considers the matter from the perspective of the security of office ("*ampsgeborgenheid*"), since the State's safety rests upon the institutionalised order, and human beings as the other party to the public law relationship have a typical human need for experiencing

71 This is the form of justice that describes the relationship between the State and the individual in a wider context. See also Van der Vyver *Seven Lectures* 3.

72 Dooyeweerd *New Critique of Theoretical Thought* 445. It appears that Du Plessis' discussion in para 5.3 *supra* is influenced by the views of Dooyeweerd *New Critique of Theoretical Thought* 442 *et seq.* Dooyeweerd argues that in its qualifying juridical aspect the public interest implies the typical legal measure of distributive justice. This measure requires a proportional distribution of public communal charges and public communal benefits in accordance with the bearing power and merits of the subjects.

73 See in this regard Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 154.

74 Dooyeweerd *New Critique of Theoretical Thought* 446. On 169-70 he explains that each social entity is sovereign within its own sphere. This entails that each social entity has its own nature which is determined by its internal structure. This typical structure is not determined by historical circumstances or the social condition of society. Each type of social entity (among which are the State, the church etc) is therefore irreducible. One entity can therefore be made an accessory of another.

safety and freedom from want.⁷⁵ These different needs should be seen as supplemental to one another. One cannot exist without the other.

According to Du Plessis the rights of the State and the individual ought to be harmonised with reference to the nature of the law. The law, according to him, is primarily aimed at the safety of office of its legal subjects by defining everyone's status in the context of order in an authoritative way. In the relationship that exists between the normative protection of subjects, the status of the subjects and the institutional order, these three relationship components correlate with a view to the safety of office of the people and community institutions. The State provides a legal order that should be mindful of individuals' and community institutions' safety of office. As a result of this obligation on the State to provide a legal order (as a result of the internal qualification of the historic foundation thereof) the State is responsible for exercising authority and maintaining law.⁷⁶ It appears that the human need for

75 Deterbeck *Öffentliches Recht* 33; Du Plessis 1980 *Obiter* 51 *et seq.*

76 Du Plessis 1980 *Obiter* 51 *et seq.*; Du Plessis 1981 *Koers* 260. It is noteworthy that this exposition corresponds with that of the *International Covenant on Economic, Social and Cultural Rights* (1966). In its preamble it conveys that States Parties to the Covenant agree that in accordance with the principles contained in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom and justice and peace in the world. States parties recognise that these rights derive from the inherent dignity of the individual person and agree that in accordance with the *Universal Declaration of Human Rights* (1948) "[t]he ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights" (italics added). It is furthermore stated that it is the obligation of States to promote universal respect for, and observance of, human rights and freedoms. Article 2 of the Covenant reads that each State Party must take steps to progressively achieve the full realisation of the rights recognised in the Covenant to the maximum of its available resources and by all appropriate means, including the adoption of legislative steps. States Parties undertake to guarantee that the rights enunciated in the Covenant may be exercised without discrimination of any kind. It is clear that the *raison d'être* of the Covenant is to establish definite obligations for States Parties for the full realisation of the rights in the Covenant. The fulfilment of these rights poses a minimum core obligation on States Parties, which must ensure at the very least minimum essential levels of satisfaction of each of these rights. Therefore, a State Party in which a significant number of individuals are deprived of essential foodstuffs, or of essential primary health care, or of basic shelter and housing, or of the most basic forms of education is *prima facie* failing to discharge its obligations under the Covenant. In fact, if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would substantially be deprived of its *raison d'être*. By the same token it is also clear that in any assessment as to whether a State Party has discharged its minimum core obligation, cognisance must be had of resource constraints that may apply within a particular country. In view of the fact that States Parties must take steps to the "maximum of [their] available resources" it is incumbent upon them if they want to explain their failure to meet at least such minimum core obligations, to demonstrate that every effort has been made to use all of the resources that are at their disposition in an effort to satisfy such minimum obligations as

experiencing safety and freedom from want may denote an "*Existenz-minimum*" for the individual, which is reflected in "*Leistungsrechte*" in German jurisprudence.

The juridical destiny of the State pertains to the justice norm according to which the interests of the State can be harmonised with those of the individual. It goes without saying that an individual can call upon this justice norm to be implemented only after he has made use of the channels created by law. If no such channels exist, it is clear that nothing will come of his call upon State authorities to comply with the norms of justice. It must be stressed that norms of justice are not dependent upon the existence of channels. As has already been shown above, the responsibility of creating channels through which justice may be served rests on the State, specifically as a result of the internal qualification of its historic foundation. Consequently it is clear that the norms of justice are in principle already present in the historic foundation of the State and the internal qualification thereof. The juridical destiny of the State relates to their practical realisation.

It is submitted that this exposition of the norms of justice can be achieved by developing the notion of public subjective rights. By legally endowing an individual with both negative and positive status aspects *situ situ* endows him with the competence to be the bearer of subjective rights in his relationship with the State.⁷⁷ As has already been shown, these status possibilities are dependent on their creation by law, but it is the internal qualification of the historical foundation of the State by which the responsibility is placed on the State to endow the individual with this competence to be the bearer of subjective rights and to exercise them. When the State creates this possibility for the individual it also defines the extent of its juridical destiny.

Some of the legal objects which are created and ought to be created by this tempering of the authority of the State will not, like some of the legal objects of the

a matter of priority. See Committee on Economic, Social and Cultural Rights *General Comment 3* A 2, para 1.

⁷⁷ See paras 6.1 and 6.2 *infra*.

State (amongst which are State security, law and order), exist generally⁷⁸ but will be dependent upon law for the creation thereof. In these instances it would seem that this will come into existence only after the individual has stood in an individual relationship with the State.⁷⁹ It is clear that he will stand in such a relationship with the State only if it is provided for by law. The example given by Venter of an individual legal object in the public law relationship testifies to this conclusion: only those who have the right to vote have a subjective legal claim to the conduct of the voting official. Consequently the individual is endowed with this competence only after he has complied with the statutory prescribed requirements.⁸⁰ His subjective right to specific State conduct can exist only after the competence in terms of which he disposes of such a right has been recognised by law.

It may be concluded that the demands of justice which are reflected by the destiny of the State are embodied in some of the individual's legally recognised public subjective rights. It is apparent that this pertains to those legal objects which Venter identifies as conduct.⁸¹ Bearing the demands made by the norms of justice to State conduct in mind, the conclusion may be drawn that such conduct, as the legal object of the individual subjective right, should be qualified by the State acting in a way that does not infringe upon the demands compelled by justice. In the first place this would mean that the individual has a subjective legal claim that the State will adhere *inter alia* to the rights and entitlements in Bills of Rights, rules of natural justice, presumptions in favour of the individual when interpreting legislation, and the broad interpretation of statutory and common law presumptions in the individual's favour in his relationship with the State in its conduct towards him.⁸² These rights, it is submitted, correspond with "*Abwehrrechte*" in German jurisprudence, and to the extent that these presumptions and rules are recognised by law, the individual disposes of a subjective right to the legal object that the State will keep out of an

78 In my view the existence of these legal objects is the inevitable result of the fact that the State is historically founded.

79 See para 6.2 *infra*.

80 Para 6.2 *infra*.

81 See para 3.2 *supra*.

82 Venter's comment in the text accompanying n 21 *supra* (Venter *Publiekregtelike Verhouding* 158) must, however, not be lost from sight. According to him, unjust law which regulates affairs capable of legal regulation and which is regularly objectified and which is directive and able to maintain order is still positive law, even though it is "bad law".

imperium-refusing freedom sphere. The activation of the negative status aspect of the individual will be discussed in paragraph 6.1 *infra*. In the second place there can be little doubt that Du Plessis' contribution provides a theoretical explanation for the recognition of positive conduct of the State in the socio-economic sphere *qua* legal object. The recognition of "*Leistungsrechte*" normatively denotes the obligation of the State to provide for the "safety of office" of the individual. In terms hereof, the State is called upon to provide for an "*Existenz-minimum*" for the individual and opportunities in terms of which personal goals as members of the State can be achieved. See paragraph 6.2 for a discussion of the positive status aspect of the individual.⁸³

These demands of justice and the provision of an "*Existenz-minimum*" should as a result of their justice-creating effect be recognised as validity requirements for State conduct, and consequently as legal objects for the individual. In this respect it is submitted that such demands cohere with those aspects of the individual status Jellinek identifies as the negative and positive aspects thereof.

6.1 The negative status aspect of the individual

Jellinek's opinion of legal subjectivity serves as the background for his distinction between the negative and positive aspects of the individual status. He characterises the negative aspect of the individual status as:

Die Herrschaft des Staates ist eine sachlich begrenzte, im Gemeininteresse ausgeübte Herrschaft. Sie ist eine Herrschaft über nicht allzeitig Subjizierte, d.h. über Freie. *Dem Staatsmitglied kommt daher ein Status zu, in dem er Herr ist, eine staatsfreie, das Imperium verneinende Sphäre.* Es ist die der individuellen Freiheitssphäre, des negativen Status, des Status libertatis in welcher die streng individuellen Zwecke durch die freie Tat ihre Befriedigung finden.⁸⁴ (emphasis added)

83 See paras 2.1.3; 4.2 and 5.3 *supra*.

84 Jellinek *System der Subjektiven Öffentlichen Rechte* 87. See also Stern *Das Staatsrecht der Bundesrepublik Deutschland* 1216, who states that the "*Klagebefugnis*" is the most effective remedy of the individual against unlawful infringement of his "grundrechtlich gesicherten Freiheitssphäre" by organs of State. See also Loewenstein *Verfassungslehre* 333.

By virtue of this aspect of his status, the individual can demand from the State to keep out of an imperium-refusing freedom sphere.⁸⁵ Such a sphere of individual sovereignty relates to categories of action that are irrelevant for the relationship between the State and the individual and will qualify as such if they are neither prohibited nor demanded. Examples of such actions may be walking in one's own garden or enjoying one's own wine.⁸⁶

The negative status aspect of the individual is reinforced by his claim that the State is prohibited from infringing upon his freedom sphere without a "gesetzlich begründeten Befehl(es) oder Zwang(es)". Alexy explains therefore that the negative status aspect of an individual at a given moment may be described as the totality of all protected freedoms that he may have against the State.

Der Inhalt des negativen Status eines Individuums a zum Zeitpunkt t besteht aus der Gesamtheit oder der Klasse aller (unbewehrten rechtlichen) Freiheiten, die a im Zeitpunkt t in Relation zum Staat hat. Die Klasse dieser unbewehrten Freiheiten kann als "Freiheitsraum des a zum Zeitpunkt t in Relation zum Staat" bezeichnet werden.⁸⁷

85 Dreier 1994 *Jura* 505 correctly indicates that "*Grundrechte*" in this context are to be understood as "*Abwehrrechte*". He emphasises, though, that these rights do not prevail without limit. Dreier 1994 *Jura* 506 explains that "[G]enau genommen meint die Rede von der Abwehrfunktion der Grundrechte nicht vollständige Exklusion des Staates, sondern die Formalisierung und Beschränkung seines Zugriffs, also die Bindung an bestimmte prozedurale und materielle Voraussetzungen. ... Grundrechtsdogmatisch gesprochen: Eingriffe in den Schutzbereich von Grundrechten sind nicht per se unzulässig; erst der nicht Verfassungsmässige Grundrechtseingriff führt zur Verletzung." See the discussion in para 2.1.2 *supra*.

86 Alexy *Theorie der Grundrechte* 233.

87 Alexy *Theorie der Grundrechte* 235. It is also noteworthy that there is a relation between the negative and passive status aspects of the individual. Jellinek explains that both subjection (the passive status aspect) and freedom from subjection (the negative status aspect) are possibilities that are available to the State in its relationship with the individual. All actions that are neither prohibited to nor demanded from the individual therefore belong to his sphere of freedom. However, all actions that are either demanded or prohibited belong to the sphere of individual obligations. "[S]o wie der Freiheitsraum der Inhalt des negativen, so ist der Pflichtenraum der Inhalt des passiven Status. ... Jede Vergrößerung des (rechtlichen) Pflichtenraumes, ist deshalb aus logischen Gründen eine Verkleinerung des (rechtlichen) Freiheitsraumes, und umgekehrt." See also the discussion in para 2.1.2. It is the discussion of a "Rechtsakt" that is of especial relevance in this regard.

6.2 *The positive status aspect of the individual*

In terms of the positive status aspect of the individual, he is placed by the State in the so-called "*Status der Zivität*", in terms of which he is guaranteed not only claims to State conduct in his favour but also the means ("*Rechtsmittel*") to enforce such claims. In terms of the theory of public subjective rights this means that the individual disposes of rights to something (legal objects) against the State and also the right to enforce such rights. In brief it can therefore be said that the positive status aspect denotes the juridically protected ability (competence) to demand positive conduct from the State.⁸⁸

Die gesamte Tätigkeit des Staates ist im Interesse der Beherrschten ausgeübt. Indem der Staat Erfüllung seiner Aufgaben dem Einzelnen die rechtliche Fähigkeit zuerkennt, die Staatsmacht für sich in Anspruch zu nehmen die staatlichen Institutionen zu benutzen, also dem Individuum positive Ansprüche gewährt, erkennt er ihm den positiven Status, den Status civitatis, zu der als die Basis für die Gesamtheit staatlicher Leistungen im individuellen Interesse sich darstellt.⁸⁹

Van Wyk demonstrates that Jellinek's opinion of the positive status means that every act of State amounts to conduct in the general interest. The general interest and the individual interest can coincide but this is not necessarily the case. To the extent to which the interests coincide and are recognised by the State, this guarantees the individual certain claims to State conduct and at the same time puts at his disposal

88 Alexy *Theorie der Grundrechte* 238. See further Alexy *Theorie der Grundrechte* 240-241 for a discussion of the difficulty in distinguishing between the negative and positive status aspects of the individual. Jellinek *System der Subjektiven Öffentlichen Rechte* 121 argues that the positive and negative status aspects are mirror images of each other: "Dem Recht des *a* gegenüber dem Staat auf dessen Handlung *h* korrespondiert die Verpflichtung des Staates gegenüber *a*, die Handlung zu vollziehen. So wie es in einem Streit um den Inhalt des negativen Status des *a* darum geht, ob dem *a* die Vornahme oder Unterlassung einer Handlung *h'* geboten ist oder ob er in Bezug auf *h'* frei ist, so geht es bei einem Streit um den Inhalt seines positiven Status darum, ob dem Staat die Vornahme oder Unterlassung einer Handlung *h* geboten ist oder ob er in Bezug auf *h* frei ist; es ist also "über die Freiheit des Staates zu entscheiden". Die Rede vom Widerspruch zielt also darauf, daß dem Umfang des positiven Status des Bürgers der Umfang dessen, was man den 'passiven Status des Staates' nennen kann, entspricht, sowie darauf, daß in der Staat/Bürger-Relation alles das, was nicht zum positiven Status des Bürgers gehört, zu dem, was als "negativer Status des Staates" bezeichnet werden kann, zählt."

89 Jellinek *System der Subjektiven Öffentlichen Rechte* 87. Dreier 1994 *Jura* 507 explains that in this respect "[N]ormstrukturell ist die Sachlage einfach: Rechte auf Staatliche Leistungen lassen sich geradezu als Prototyp einer Berechtigung ... verstehen. Das Gesetzrecht des modernen Sozialstaates kennt derartige Ansprüche auf Staatliche Leistungen in grosser Vielfalt."

legal remedies to realise his claims. The individual as "*positiv berechtigter Staatsglied*" is hereby put in the *status civitatis*.⁹⁰

The connection between the negative and positive aspects of the individual status can be explained by noting that the negative aspect of the individual status finds its fulfilment in the individual's being legally placed in that status – non-acknowledgement thereof by the State will consequently be unlawful and infringement thereof by the State may occur under juridical mandate only. Consequently, the negative aspect of the individual status is seen as an absolute status, so that the responsibility to always and only act according to law towards the individual applies to all organs of State.⁹¹

The positive aspect of the individual status, which pertains to State conduct in the general interest, is seen as an exact mirror image of the negative status when the legally acknowledged and protected competence of the individual to claim positive conduct on his own behalf from the State places the juridical obligation on the State to act in his individual interest. The question of whether or not the individual has a right to specific State conduct has, as an opposite, the question of whether or not there is an obligation on the State to satisfy the individual need.⁹²

90 Van Wyk *Persoonlike Status* 20. The distinction between subjective legal claims and "reflex actions" of the objective law is brought in connection with the positive aspect of the individual status. All stately actions taken in the general interest are also of service to a multiplicity of individual interests. Police conduct protects the lives and property of all individuals as members of the community. Legally, every individual interest is not protected separately, only the general interest is protected. According to Jellinek, the individual can request for his individual interests to be considered, but he does not have a legal claim to police conduct solely on his behalf. This exposition of the reflex actions of the objective law by Jellinek in my view accords with the fact that the legal subject obtains a subjective legal claim to the legal object which flows from the negative and positive aspects of his status only after the law endues him with the competence to stand in an individual relationship with the State and he has so entered into this relationship. The enforcement of his subjective legal claim to a legal object is accordingly dependent upon the question of whether the competence to dispose of such claims has by law been bestowed on him or not.

91 Dreier 1994 *Jura* 506.

92 Van Wyk *Persoonlike Status* 122. See also Detterbeck *Öffentliches Recht* 300 *et seq*, who explains the position as follows: "Allein der Umstand, daß der Staat zu einem bestimmten Verhalten verpflichtet ist, bedeutet aber noch nicht, daß der Bürger einen Anspruch gegen den Staat auf dieses Verhaltens haben. Art. 20a GG gewährt den Bürgern keinen Anspruch darauf, daß er die natürlichen Grundlagen tatsächlich schützt. ... Die Bürger mögen in diesen ... Fällen zwar tatsächlich begünstigt sein, wenn der Staat seine Rechtspflichten erfüllt. Sie haben aber keinen entsprechenden Anspruch. Bei diesen lediglich rein faktischen Vorteilen der Bürger spricht

Accordingly the positive aspect of the individual status is about positive State conduct towards the individual. This positive conduct naturally ought to be tempered by claims of justice and it goes without saying that through this tempered conduct the State will create a state of safety for itself and a feeling of safety of office for the individual.

On closer inspection it appears that the negative and positive aspects of the individual status are also relevant to what is called the individual relationship that may exist between the individual and the State.⁹³ The individual relationship differs from the general relationship in that, in the general relationship the same legal rule applies indefinitely and impersonally to legal subjects within that group, while a particular legal rule applies to fixed, identified legal subjects within the individual legal relationship. The individual legal relationship originates by virtue of the legal rule that governs the general relationship so that it can be said that the individual relationship is a concretisation of the indefinite, impersonal legal rule which applies within the general relationship.⁹⁴ Wiechers also shows that a general relationship can be characterised as that kind of relationship in which the same legal rules apply to all persons in the relationship. The individual relationship's content can, however, differ on a case by case basis, since different circumstances confer upon each individual relationship its own, special character.⁹⁵

6.3 Summary

It may be concluded that the connection that exists between the negative and positive aspects of the individual status on the one hand and the individual relationship that exists between the individual and the State on the other is denominative of the fact that legal objects which are due to legal subjects under the

man von Rechtsreflexen. Die in Rede stehenden Rechtsvorschriften sind nur objectives öffentliches Recht. Das subjektive öffentliche Recht ist dadurch gekennzeichnet, daß es nicht nur objective Rechtspflichten statuiert, sondern auch hierauf gerichtete Ansprüche einräumt."

93 Wiechers *Administratiefreg* 58. This is not to say that it can be compatible only in an individual relationship. However, as a general observation it can be stated that it is more likely to come into play in this relationship.

94 Wiechers *Administratiefreg* 59.

95 Wiechers *Administratiefreg* 60.

public law are dependent upon the individual's being legally endowed with the competence to be the subjective right bearer of the specified legal object. In these instances it would also seem that the existence of a possible subjective right to the legal object will be dependent upon the question of whether or not the individual stands in an individual relationship with the State.⁹⁶ In the individual relationship the positive and negative aspects of the individual status are emphasised, seeing that the individual is not merely endowed with the claim against the State to keep out of an "imperium-refusing freedom sphere" and to act according to law, but it is also in this relationship that the individual can claim positive conduct from the State in his favour.

7 Concluding considerations regarding the State's juridical destiny and the corresponding individual status

From the above discussion it is clear that when the State, owing to the internal qualification of its historic foundation, provides for the compliance of individual claims for justice and an "*Existenz-minimum*", it endues the individual with the competence to establish subjective legal claims against it.⁹⁷ As this is done the individual is given the ability to activate the juridical destiny of the State. The opposite of this situation is that the State is rendered guilty of abuse of power if it prevents the individual (given his subjective legal claim to State security and law and order) from establishing subjective legal claims to State conduct which bears witness to the embodiment of both the nature and the norms of justice. For example, by deterring the individual from testing the State's conduct against the claims of justice before a tribunal, the State is "withdrawing" the scaffolding coupled with its historic foundation and is strongly gravitating in the direction Dooyeweerd characterises as an organised band of robbers. Similarly, if it does not provide for an "*Existenz-minimum*" it does not

96 This is not to say that the situation as set out above will always apply. The individual subjective right to the protection of the official languages serves as a telling example of individual legal objects of which the legal force is not dependent upon statutory recognition or the existence of a possible legal relationship.

97 It is suggested that the provision of an "Existenz-minimum" as an object of "Leistungsrechte" in the theory of public subjective rights corresponds with the exposition in *S v Makwanyane* 1995 3 SA 391 (CC) that competing values must be weighed up against one another and that ultimately an assessment based on proportionality must be made to establish whether or not the limitation of constitutional rights is reasonable and necessary.

adhere to its destined calling, since the individual is not enabled to achieve his personal goals as a member of the State.

The argument is put forward that the public law relationship can be explained through legal theory which distinguishes between the State's juridical destiny and historic foundation. The status of the individual *vis-à-vis* the State should be explained within this exposition. The negative and positive aspects of the status of the individual relate to the juridical destiny of the State and comprise of justice-qualified State conduct and the provision of an "*Existenz-minimum*". *Qua* legal object such conduct is activated by the availability of channels through which it may be claimed that the State adheres to the demands of justice. On the other hand the active and passive status aspects of the individual may be discerned. These aspects relate to the historic foundation of the State, and it is clear that no subjective rights are created for the individual in terms of this aspect of his status. Thus, the subjective legal claim *inter alia* to State security and law and order relates to its historical foundation. This is clear, given the fact that the State is endowed with State sovereignty and is therefore legally able to act coercively towards other legal subjects. The enforcement of the State authority in the public law relationship is possible only if one proceeds from the assumption that the individual is subject to the State's will on account of the passive status. Thus, the historical foundation of the State presumes the individual's responsibility, which flows from his subjective legal claim to State conduct. On the other hand, the juridical destiny of the State presumes the responsibility (as the legal object of the individual) which, for the State, flows from the subjective legal claim to State security and law and order. To put this differently, it can be said that on account of the State's historic foundation it has a subjective legal claim to legal objects such as State security and law and order. The corresponding responsibility of this subjective legal claim of the State is the responsibility which, for the State, flows from its juridical destiny, as the individual has subjective legal claims to State conduct (qualified by justice) and this subjective legal claim must not only be activated by the State but must also be respected. Against this exposition the individual, as a result of the juridical destiny of the State, has a subjective legal claim to State conduct qualified by justice and to the provision

inter alia of an "Existenz-minimum". The correlative responsibility which for the individual flows from this subjective legal claim is the responsibility which is connected to the historic foundation of the State on account of which the individual must, in terms of the passive aspect of his status, respect the State's subjective legal claim to State security and law and order as legal objects.

8 The application of the theoretical exposition to the position of child victims of armed conflict

8.1 *The status of the child victim within the public law relationship*

The theory of public subjective rights serves as a point of departure to balance the interests of the State and the individual. It was argued *supra* that the respective relations between the State and its legal objects and the individual and his legal objects on the one hand and the corresponding obligations of the State and the individual *vis-à-vis* each other and its/his legal object on the other serves this very purpose. It is suggested that the gratification of the legally recognised needs of legal subjects by demarcating and harmonising their subjective rights to legal objects provides the balancing mechanism of State and individual interests respectively.

Some conclusions in respect of the child victim of armed conflict may be drawn from this exposition.

8.1.1 *The passive status aspect of the child victim in relation to the historic foundation of the State*

In this respect the individual status of the child victim is limited, and he stands *vis-à-vis* the State as a mere "duty subject" in a state of complete and "right-less" subordination. He is therefore legally obliged to respect the subjective rights of the State to its legal objects, including as it were, its rights to its territory, to State security and law and order, and to certain immaterial property. In this respect the State is endowed with State sovereignty, more particularly with the competence to

enforce its authority (its capacity to act) to compel the child to respect its subjective rights to the said legal objects.

It may be concluded that the State exercises its capacity to act in its decision whether or not to prosecute the ex child soldier.⁹⁸

8.1.2 The active status aspect of the child victim in relation to the historic foundation of the State

In conjunction with the exposition above, the State's need of individual people to exercise its subjective rights to its legal objects must be borne in mind. Such individuals may include bearers of military power to actualise military apparatus and also ordinary civil servants. As Jellinek explains, the individual may be involved with the State's 'will forming' either through obligation or through adjudication.⁹⁹

Article 38(3) requires of States Parties to the CRC to refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. It further stipulates that in recruiting among those persons who have not attained the age of eighteen years, States Parties shall give priority to those who are oldest.¹⁰⁰ It has been explained in paragraph 2.2.2 in chapter 2 *supra* that this prohibition corresponds with that of AP (II) under the GC's of 1949. Children below the age of fifteen may therefore not even volunteer to participate directly in armed conflict. In fact, the *Rome Statute for the International Criminal Court* states that it is a war crime to conscript or enlist children under the age of fifteen years into national armed forces or to use them to participate actively in hostilities. The Additional Protocol which entered into force on 12 February 2002 amends the age of direct participation in armed conflict to eighteen years for parties to the Protocol. Clearly this means that children under 15 do not dispose of the competence to have their active status aspect activated, in the sense that they are legally not allowed to be recruited. Between the ages of 15 and 18 the position is not clear but at least if such children

98 See paras 2.2.1 and 2.2.2.

99 See para 5.2.2.

100 See Robinson 2012 *PER* para 2.2.2.

are recruited priority must be given to older children. In as much as child soldiers may also be seen as victims of armed conflict, there is a measure of uncertainty as to whether to prosecute them or to grant them amnesty.¹⁰¹

The State organisation is bound by the demands posed by its internal calling.¹⁰² In the case of child victims this means that the State must provide "channels" by means of which the child is legally enabled to demand from it to perform in terms of the obligations it incurred by ratifying the CRC and other international instruments. In essence this means that from the moment of its historic foundation the State is called upon *inter alia* to make provision for school facilities for child victims, to de-mine areas, and to re-unite children with their parents where possible. It has been suggested that the legal theoretical explanation for the obligation in this respect is to be found in the *stipulatio alterius* construct.¹⁰³

8.1.3 *The negative status aspect of the child victim in relation to the destined function of the State*

In this respect the *salus publica* as a principle binding the entire activity of the State to a leading idea of public social justice between government and subjects comes to the fore. It is submitted that the criterion against which the *salus publica* must be measured is, *in casu*, the child's security of office ("*ampsgeborgenheid*").¹⁰⁴ It has been suggested that State conduct *qua* the legal object of the individual should ideally be qualified by the State's acting in a way that does not infringe upon the demands made by justice. Specifically with regard to the negative aspect of his status, the individual is legally entitled to demand from the State to keep out of an imperium-refusing freedom sphere.¹⁰⁵

As far as former child soldiers are concerned, it appears that the matter of a minimum age for criminal responsibility may be of relevance in the determination of

101 See Robinson 2012 *PER* para 2.2.2 b.

102 See para 5.3.

103 See Robinson 2012 *PER* n 57.

104 See para 6.

105 See paras 6.1 and 2.1.2.

such a child's negative status aspect. There appears to be consensus that children below the age of 15 years do not possess the mental maturity to express valid consent to join an armed group.¹⁰⁶ Such children are therefore more likely to be the victims of armed conflict than its perpetrators. It may consequently be concluded that such children may demand from States to refrain from prosecuting them.¹⁰⁷ The position of former child soldiers between the ages of 15 and 18 years is more complicated. There are indications in treaty law that such children should not be prosecuted. In view of the fact that the CRC specifically provides that a child is someone below the age of 18 years and that a child's best interest is a primary consideration in every matter affecting him, it is suggested that the best interests principle pertains to the negative status aspect of the child. As such it creates an imperium refusing freedom sphere in terms of which children falling in that age category may demand from the State not to prosecute them. However, should such a child indeed be charged criminally the presumption of innocence and right to privacy may in similar fashion be considered as such a freedom sphere that may not be infringed upon by the State.¹⁰⁸

106 See Robinson 2012 *PER* paras 2.2.2 b. and c.

107 See in this respect the discussion in para 2.1.2 regarding the negative status aspect of the individual. The preventative rights ("*Abwehrrechte*") of the individual that the State will not make it legally impossible for him to exercise his rights means that the State will adhere to the prescripts of relevant international (and national) instruments to which it is bound and refrain from prosecuting him. Should he be prosecuted it may be argued that the State makes it impossible for him to rely on the best interest principle, for example.

108 In as much as the *Rome Statute* provides that a Court shall not have jurisdiction over a person who was under the age of 18 when the crime was committed, it may be argued that such children may not be prosecuted; which is indicative of the activation of their negative status aspect. Put differently, it appears that even though they may have taken part in war crimes, their active status aspects have not been activated as they are considered as not having attained the age of criminal responsibility. A very interesting conclusion may be deduced from this exposition: there appears to be an interaction between the negative and active status aspects of the child. The active status aspect can be viewed as a "negative" attribute in the sense that a child who committed war crimes and who is kept criminally responsible is seen as disposing of the active status aspect while committing the crime as a bearer of military power. The implication of this conclusion is simply that the negative status aspect of such a child is not activated if he is legally kept responsible. However, the rules of the various international instruments providing for the special protection of such a child activate the positive status aspect of the child once it has been decided to prosecute him. He can legally demand from the State to adhere to relevant provisions of the CRC, the *Rome Statute* and the *Beijing Rules*. In particular Rule 5 of the *Beijing Rules* states that the aims of juvenile justice should include an emphasis on the well-being of the juvenile. (See Robinson 2012 *PER* para 2.2.2)

The obligation of the State (and the corresponding status aspect of the child) is influenced by its following either a monist or a dualist system of implementation of treaty law into domestic law. Despite the views of Malan that human rights treaties are self-executing in nature, it is commonly accepted that the provisions of the CRC do not endow the child with legally enforceable rights.¹⁰⁹

8.1.4 The positive status aspect of the child victim in relation to the destination function of the State

It can be accepted that the requirements posed by article 39 of the CRC activate the positive status aspect of child victims of armed conflict. It should be emphasised, however, that there is a close correlation between the internal calling of the State and the positive status aspect of the child – the extent to which the State adheres to its internal calling is indicative of the existence, nature and extent of the positive status aspect of the child. In practical terms it can be said that the implementation of article 39 and the extent to which its provisions are enforced reflect the existence and/or extent of the child's positive status aspect.¹¹⁰ It also appears that the views of Malan¹¹¹ that multilateral human rights conventions are in the nature of *stipulationes alteri* may be indicative of the activation of the positive status aspect of the child. It may be deduced from his argument that the rights negotiated for in the CRC accrued at the same time the CRC entered into force for the particular State Party.

The provisions of article 39 must be read in conjunction with and against the background of other provisions of the CRC to determine the child victim's positive status aspect. In this respect it goes without saying that States must adhere to article 3, which requires of them to ensure that the best interests of children are a primary concern in all actions concerning them. In fact, it is demanded of States to ensure that all of the provisions of the CRC are reflected in legislation, policy development and delivery at all levels of government. Furthermore the CRC requires a continuous process of child impact assessment to predict the impact of any proposed law, policy

109 Robinson 2012 *PER* para 3.

110 See para 6.

111 Robinson 2012 *PER* n 57.

or budgetary allocation on children. The child may certainly demand adherence to these provisions in terms of the activation of his positive status aspect.¹¹²

From the provisions of article 39 it appears that the child victim may demand to be socially reintegrated and to be recovered from the experience of armed conflict. As set out above, the child victim may also demand a physically safe environment from the State,¹¹³ and as far as psychological recovery is concerned the child victim may legally demand from the State a safe environment within which he will be able to recover psychologically. Education and reunification with the child's family may be of particular importance in this respect.¹¹⁴

8.1.5 The balancing of the rights and obligations of the State and the child - the application of the internal calling of the State

The public interest typically implies the public legal measure of distributive justice.¹¹⁵ Distributive justice has been shown to require a proportional distribution of public communal charges and public communal benefits in accordance with the bearing power and the merits of the subjects. The public interest is therefore a political, integrating principle which binds all of the variable political maxims to a supra-arbitrary standard in the sense that it binds all of the activity of the State to the typical leading idea of public social justice in its relationship with the individual/child. It is required of the State to harmonise all of the interests obtaining within its territory insofar as they are interwoven with the requirements of the body politic as a whole.¹¹⁶

In conclusion it is suggested that the balancing of the rights and obligations of the State and the child victim of armed conflict may be explained as follows in respect of the child's right to education: article 39 requires of the State to recover such children and reintegrate them into society. As set out in chapter 2 paragraph 4.4, this can be

112 Robinson 2012 *PER* para 4.3.

113 Robinson 2012 *PER* para 4.4.

114 Robinson 2012 *PER* para 4.4.1.

115 Para 5.3.

116 Para 6.

done *inter alia* by providing education to such children. The right to education relates to the social aspect of the national community. However, the regulation of their education should be guided by the principles inherent in the public interest as set out above. The regulation of education therefore aims at serving the particular political purpose of education *qua* a means of serving society. In a sense this aspect of the regulation of education may be viewed as an external juridical qualification of the measures taken by the State. However, these measures also have an internal public juridical qualification which obliges the State (the government) always to weigh the various private legal interests not only against one another but also against the "public interest" in a retributive sense, so that private interests are harmonized and integrated in the public juridical interest.

It is therefore clear that the right to education of child victims of armed conflict must be considered in harmony with both the interests and the rights to education of other individuals and with the interests of the State – the public interest. The question remains how to balance the (subjective) rights of the State and the child; to what extent is the State called upon to provide channels to achieve justice? It has been shown that the theory of public subjective rights does not provide a definitive answer in this respect. It merely describes the position of the State and the individual *vis-à-vis* each other and defines the demands of the individual. Drawing on the argumentation of Dooyeweerd and Du Plessis it is argued that the answer to this question is also to be found in the internal calling of the State. *In casu* the internal calling is borne out by the provisions of article 4 of the CRC. States Parties must undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the CRC. However, in respect of social, economic and cultural rights, States Parties need to take such measures only to the maximum extent of their available resources. The internal calling of the State in terms of article 39 of the CRC is hereby qualified so that the child's subjective right to positive State action should not exceed what the State is reasonably able to perform.

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List of abbreviations

AP (II)	Second Protocol Additional to the Geneva Convention
CRC	United Nations Convention on the Rights of the Child
GC's	Geneva Conventions
PER	Potchefstroom Electronic Law Journal
SAPL	South African Public Law
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg