Beyond *Staatswissenschaft*: The Conception of the State and Rights in Kelsen and Weber

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Introduction

The tradition of *Staatswissenschaft*—a general theory of the character and organisation of the state—is a distinctive phenomenon, both in its concern with a method of theory construction which founds itself on its scientificity (the assertion of a comparable degree of objectivity in its theoretical framework to that of the natural sciences), and in its emergence as an almost exclusive concern within German-speaking lands. Its emergence and formal recognition as an academic discipline within the Universities of German-speaking lands, in the nineteenth century, is to be understood as a theoretical response to the enduringly negative conception of the French Revolution and to the particular trajectory of state formation or transformation. The process of German Unification, undertaken by Prussia, during the later nineteenth century, eventually resulted in the constitutional monarchy of the German Reich (1871). The Austro-Hungarian Empire, defeated as part of this process of German Unification, had, in the earlier 1860s, transformed itself into a constitutional monarchy.[1]

The theoretical framework of *Staatswissenschaft* is one predominantly orientated to integrating a monarch, within a juridical and parliamentary legislative framework, in a manner in which the monarch remains the principal source and origin of sovereign power and authority. The monarch, while no longer a source of absolute, unconditioned sovereignty or authority, is related to non-monarchical institutions by according them a lesser position.

Within this tradition, the specific conceptualisation of law—*Staatsrechtlehre* or *Staatsrechtswissenschaft*[2]—is exemplified in the work of Paul Laband (1838-1918) and Georg Jellinek (1851-1911).[3] A central difference between Laband and

[1] The transformation of the Habsburg Emperor into a constitutional monarch in the early 1860s, is one which remains founded, through recourse to Laband's theory, on the Emperor as the sole legislator. See Schmetterer (2010, 2012). For Jellinek's early attempt to formulate this theoretically, see Jellinek (1887).

[2] See (Pauly, 1993).

[3] The central work of Laband, in five editions, is the three-volume, *Das Staatsrecht des Deutschen Reichs (1876-1914)*. See also the broader reflections in the lectures at the University of Strasbourg (1872-1918) collected in Laband (2004), in which Laband furnishes broader reflections on the history of state thought, on state theory and constitutional history and on German constitutional law of the 19th century. For interconnections between Laband's theory and the distinct intellectual environment at the University of Strasburg, see Schlüter (2004). See, also for the broader intellectual context, Friedrich (1986) and Pauly (1993). For the theoretical and methodological construction of Laband's theory, see Herberger (1984) and Montella (2019). For the origins of Laband's methodology of the state in the preceding nineteenth-century German legal science of civil or private law, see Wilhelm (1958); and, for Laband's relationship to preceding nineteenth-century German

Jellinek, beyond their distinct, initial intellectual formation, is that Jellinek develops his theoretical position through the theoretical difficulties arising from within Laband's theoretical framework.[4] This process is also contributed to by an academic career trajectory commencing in Vienna and concluding in Heidelberg, and the accompanying movement (Vienna-Basel-Heidelberg) away from the Austro-Hungarian Empire to the comparatively freer intellectual environment of Heidelberg.[5]

The differing position of Jellinek is evident from the development in his thought of the origin and character of rights in relation to the state. This is exemplified through a comparison of Jellinek's works of 1892 and 1895 (the latter republished in 2016), in which public rights are initially thematised[6] and then, their historical origin is traced, prior to their reintegration within the conceptual framework of the *Staatsrechtlehre*. This process of reintegration is then subsumed within Jellinek's later conceptual framework of the *Allgemeine Staatslehre*.

The importance of Jellinek's short work of 1895,[7] as the preliminary preparation for the subsequent reintegration, is, as explicitly recognised in the critical exchange between Boutmy and Jellinek on this text,[8] to adopt a juridical approach to the text of the *Declaration of the Rights of Man and the Citizen* 1789, and to seek the origin of the *Declaration* in a detailed textual examination of its historical precursors.[9] In this manner, Jellinek seeks to effect a double displacement: to displace the origin of the *Declaration* and to then re-centre that origin upon a particular fundamental freedom. The origin is displaced from Rousseau's *Social Contract*—the purportedly contemporaneous French origin—by situating it as the further development of an origin in the American *Declaration*. From this historical origin, the development is held to reside in the freedom of religion, and, from the perspective of this trajectory, the *Declaration of the Rights of Man and the Citizen* ceases to have a distinct, exceptional position.

This internal development,[10] by Jellinek, within the *Staatsrechtslehre* tradition, indicates an increased recognition of rights,[11] whilst continuing to conceive them from the perspective of a state-centred positivism: the self-limitation of the state.

Staatsrechtslehre and its notions of constitutionalism, see Pauly (1993a, pp. 168-209). The central work of Jellinek, in three editions, is *Allgemeine Staatslehre* (1900, 1907, 1914). The origin of this work is now held to arise from a lecture course of 1896: see Jellinek (2016).

[4] For the development of Jellinek's methodological position, see Schönberger (2000), but qualified by Ghosh (2008, pp. 90, 320-1) and La Torre (2000). See also Anter (2020), Beaud (2021), Boldt (2020), Jouanjan (2005) and Kersten (2000).

[5] On this, see Lagi (2015, 2016a, 2016b), and for Jellinek in Heidelberg, see Graf (2018).

[6] On Jellinek (1892), see Pauly (2000).

[7] All references are to the English translation, Georg Jellinek, *The Declaration Of The Rights Of Man And Of Citizens: A Contribution to Modern Constitutional History*, New York: Henry Holt, 1901.

[8] Boutmy (1902), Jellinek (1902). See, on this exchange, Klippel (1995).

[9] For Jellinek, "The achievement of this task is of great importance both in explaining the development of the modern state and in understanding the position which this state assures to the individual" (Jellinek, 1901, p. 6).

[10] For Kersten (2021), this is part of the wider reflective character of Jellinek's legal positivism.

[11] This recognition is, however, based upon a conception of a spectrum of statuses. See Jouanjan (2004) and Pauly and Siebinger (2004). See, also, the later, short work on the law of minorities (Jellinek, 1898), and the introduction to the German reedition by Pauly (1996) and the wider analysis by Kersten (2001).

A subterranean critique of the *Staatslehre* tradition is formulated from the initially privately printed first part of Nietzsche's *Thus Spoke Zarathustra* in 1883.[12] In 'The New Idol' section, Zarathustra inveighs against the state—the "coldest of cold monsters" (Nietzsche, 2006, p. 34)—which has substituted itself for the people, and in this mendacious substitution is the historical origin of the phenomenon of the state's generalised lying and stealing. Zarathustra's emphatic rejection of the state—an idol which creates its worshipers (Nietzsche, 2006, p. 35)—is the prelude to the conclusion of the section, in which the "end of the state" (Nietzsche, 2006, p. 36), namely, that place or position beyond the state, prefigures or gestures towards a different image of the political.[13]

The condensed Nietzschean critique, delivered through the figure of Zarathustra, within the distinctive textual form of *Thus Spoke Zarathustra*, is articulated outside the methodological concerns and parameters of the *Staatslehre* and the *Staatsrechtslehre*. The place or position of the "end of the state" is, however, reached in a different manner, with the defeat of Germany and the Austro-Hungarian Empire in World War I, and the installation of the Weimar Republic and the First Austrian Republic with their respective democratic constitutional states. This defeat is also the end of the nineteenth-century tradition of the *Staatsrechtlehre* and, in its later nineteenth-century formulation, the end of a theory of the state as a constitutional monarchy.

Hans Kelsen and Max Weber, who, however, died in 1920, were directly situated in this transition, contributing, respectively to the elaboration of the Constitution of the First Austrian Republic and the Constitution of the Weimar Republic.[14] The transition, which is also a methodological critique of the preceding tradition of both the *Staatswissenschaft* and the *Staatsrechtlehre*, is then the attempt to combine the state and the people within a democratic constitution. Kelsen and Weber are, however, distinguished by the manner in which this critique is developed and articulated in what will become the contrast between a Kelsenian legal science of positive law and theory of democracy and a Weberian sociology and sociological theory of law.[15]

Hans Kelsen: State and Rights in a Legal Science of Positive Law

State

[12] This critique expresses an increasingly negative reaction of Nietzsche to the establishment of the German Reich and Bismark. See, for this transformation and the wider character of Nietzsche's position, Hofmann (1971) and Steinbach (2006).

[13] The analysis leaves aside the question of the further determination of the political in *Thus Spoke Zarathustra*, and its relationship to the political in the final works of *Ecce Homo* and *The Antichrist*. On this, see Meier (2021, 2024)

[14] The analysis will concentrate upon the interwar work of Hans Kelsen.

[15] The analysis acknowledges, but leaves aside, the wider academic discussion of the relationship between Nietzsche and Weber but follows Treiber (2016) in the difficult task of delimitating the influence of Nietzsche on Weber. In relation to Kelsen, there is, in the second edition of the Essence and Value of Democracy (1929), a quotation of this passage from Nietzsche's Zarathustra, but it is utilised and methodologically delimited as the exemplary preliminary critique of the fusion of state and people. From which Kelsen proceeds to indicate the necessity of a distinction between two notions of the People: a unity of human individuals based upon participation "in the creation of the state order" and a unity of human individuals based upon their common subjection to normative regulation by the legal order (Kelsen, 2013, pp.36-37).

For Kelsen, the legal science of positive law is developed from a direct critique of this preceding tradition. It centres upon displacing the primacy of the state with the primacy of law, and, in this displacement to juridify the notion of the state. In this displacement, the notion of the state, is transformed from one which designates a substantive entity to one which, as a juridical notion, designates a formal entity. The initial critique is elaborated in Kelsen's *Hauptprobleme Der Staatsrechtslehre* 1911 (Kelsen, 2008), which provides a comprehensive critique of the methodological presuppositions and approach of the *Staatsrechtslehre* tradition. This is the preparatory or preliminary methodological critique which is then further modified and extended during the interwar years,[16] concluding with the first pure theory of law (*Reine Rechtslehre*) in 1934.

The methodological purpose of juridification is to be understood as the methodological dissolution of any continued adherence to a conception of the state as an entity which exists prior to law. Juridification is the counterpart of the demonstration that all attempts to situate the origin of the state prior to law or to accord primacy to the state in relation to law are characteristic of a hypostatisation: the presentation of a category of thought—the state—as a distinct substance or physical entity. The methodological dissolution retains the notion of the state, but as one which is now entirely juridical in character and, therefore, part of, rather than prior to, the hierarchical normative order of positive law. Positive law is itself understood as a normative order of coercion—*Zwangsordnung*—which exists autonomously and externally to the individuals whose behaviour is guided or shaped by it.

The dualism of state and law is, thereby, overcome, and the notion of the state is conferred with an entirely heuristic purpose of designating a certain level within the hierarchical normative order of positive law. It is from this position that Kelsen then considers that the further dualism between national and international law is to be dissolved[17] in an analogous manner with a theory of legal monism: the state, as a legal category designating a level within the hierarchical normative order of positive law, is an *internal* component of a normative hierarchy in which international law is situated above the level encompassed by the state.

The methodological effect of the development of the Kelsenian legal science of positive law extends to the notion of a *Rechtstaat*. The dissolution of the dualism of state and law results in the generalisation of the notion of a *Rechtstaat*: it becomes, in itself, an entirely descriptive, rather than, prescriptive or evaluative notion. This is initially expounded in the final section of the first part of the *Allgemeine Staatslehre* (1925) (Kelsen, 2019, pp. 230-31), and finds its most concise and radical formulation in the Pure Theory (*Reine Rechtslehre*) of 1934:

> The attempt to legitimise the state as a *Rechtstaat* is exposed as completely inappropriate, since every state must be a *Rechtstaat*—if one understands

[16] Kelsen, in the preface to the second edition of the *Hauptprobleme* in 1923 (Kelsen, 1998), designates the critical analysis in the *Hauptprobleme,* as the first, preliminary articulation which his subsequent work has further extended and developed.

[17] See, (Kelsen, 1920; Kelsen, 1922; Kelsen, 2019 (1925)). See, also, Jestaedt's introduction of the *Allgemeine Staatslehre*, (Jestaedt, 2019).

> by '*Rechtstaat*' a state which 'has' a legal system. There can be no state that does not have, or does not yet have, a legal system, since every state is only a legal system. (Kelsen, 1997, p.105).

This, in turn, introduces the distinction between the notion of a *Rechtstaat* as a legal *form* and the particular legal *content* of the specific legal system of a state. With the Pure Theory, the Kelsenian legal science of positive law has confined itself to legal *form* in which the *Rechtstaat* has become merely a generic, descriptive term. For neither the state nor the law, as notions within a legal science of positive law which has dissolved the dualism of state and law, has the purpose of justification of the other. The methodological coherence of the Pure Theory which, as "objective cognition" (Kelsen, 1997, p. 106), relinquishes a position of justification, as one of subjective evaluation: "a matter of ethics and politics" (Kelsen, 1997, p. 106).[18]

The methodological stringency of the Pure Theory is tempered by returning to Kelsen's work of the late 1920s, 'La garantie juridictionnelle de la Constitution (La justice constitutionnelle)'[19], and early 1930s—the exchange between Carl Schmitt and Kelsen over the 'guardian of the constitution'[20]. It is in these works of Kelsen, and, in particular, in the conception of a constitution, rather than that of a *Rechtstaat*, that a regulatory, rather than an entirely descriptive approach to positive law is articulated. The Kelsenian analysis situates the constitution and a constitutional court *within* the structure of the normative levels of a system of positive law. This, in turn, situates the question of regulation through the notion of an unconstitutional law—the possibility of the divergence between a statute and the constitution—and its institutional corollary, a constitutional court (an institution other than the state or a parliament) with the authority to declare a law unconstitutional.

The Kelsenian notion of 'constitutional justice', contained in the brackets of the title of the 1928 article, is, therefore, to be understood as *internal* to a hierarchical order of norms of positive law. However, as Kelsen emphasises, this is not necessarily confined to the mere determination of procedural conformity by establishing the process of formulation of the particular law:

> It also goes without saying that the control must cover both the procedure according to which the act was drawn up and its content, if the standards of the higher level contain provisions on this point as well. (Kelsen, 1928, p. 236)

[18] See, also, the wider contrast which Kelsen draws between the objectivity of the natural sciences and the social sciences and the consequences of this for a legal science of positive law (Kelsen, 1997, p. 4). The objectivity of a legal science of positive law – its recognition as "an absolute value" (Kelsen, 1997, p. 4) – is also held to be affected by the degree of political stability "between states as well as within states" (Kelsen, 1997, p. 4).

[19] (Kelsen, 1928) ''La garantie juridictionnelle de la Constitution (La justice constitutionnelle)', *Revue du Droit public*, 1928, p. 197- 257

[20] The exchange is now collected in Vinx (2015a). On the exchange, see Beaud & Pasquino (2007), Paulson (2013), Vinx (2015b) and Grimm (2020).

The limits of Kelsenian constitutional justice are also determined by the overarching methodological framework of a legal science of positive law. The constitutional court, dependent upon its prior constitutional creation,[21] as an institution of the juridified notion of the state, is potentially open to draw upon the general principles of international law in its regulatory function. However, this openness, or recognition, is entirely determined by the prior recognition of these principles of international law by the constitution at the level of the particular domestic legal system (Kelsen, 1928, pp. 238-239). These limits are accompanied by the insistence upon the maintenance of the exclusion of ""super positive"" norms insofar as these norms remain untranslated into norms of positive law (Kelsen, 1928, p. 239). Insofar as these norms are explicitly contained in, and referred to, in a constitution,[22] Kelsen considers that these should not condition the determinations of the constitutional court. The conformity of the legislature, and, therefore, the statute, with the constitution should not be undertaken by recourse to these norms. The prohibition is corollary of the wider relationship, within a constitution, between a democratically elected Parliament, as the legislative body, and a constitutional court. The constitutional court, in relation to the content of the Parliamentary legislation, regulates, rather than substitutes, its position for that of provisions of the particular statute, through the prohibition of recourse to these norms. For Kelsen, in order prevent this potential institutional conflict, and

> [t]o avoid a similar shift of power – which it [the constitutional court] certainly does not want and which is politically completely contraindicated – from Parliament to an authority which is foreign to it and which can become the representative of political forces quite other than those who express themselves in Parliament, the Constitution must, especially if it creates a constitutional tribunal, refrain from this type of phraseology, and, if it wants to lay down principles relating to the content of the laws, to formulate them in a manner which is also as precise as possible. (Kelsen, 1928, pp. 241-242).

The delineation of the boundaries of the criteria for the determination of the compatibility of legislation with the constitution in a democratic republic is one in which regulation assumes a centrally important position. The boundaries which Kelsen determines for the constitutional court and which, thereby, determine its distinct judicial role, are also those which provide for the regulation of Parliamentary democracy.

The importance of 'constitutional justice', as the capacity for a constitutional court to annul an unconstitutional law, is, for Kelsen, demonstrated by considering a constitutional framework in which there exists no capacity for annulment. Here,

[21] The constitution, from the perspective of the legal science of positive law, is the first or primary concretization of the basic norm (*Grundnorm*) as the necessary presumption by legal consciousness of the underlying unity of the legal system.

[22] Here, Kelsen, considers these norms as exemplified by "the ideals of equity, of justice, of freedom, of equality of morality, etc…" (Kelsen, 1928, p. 238).

for Kelsen, the reduction of the possibility of juridical regulation—the effective disappearance of constitutional justice—is evident from its restriction to, and the difficulties of attribution of individual responsibility to, the relevant government minister (Kelsen, 1928, pp. 250-252). It is in a constitution with a constitutional court, in a democratic republic, that the sense of constitutional justice becomes apparent. For the regulation of legislation by the constitution, through the constitutional court, becomes the procedural regulation of political parties within a representative democracy: "it is an effective means of protection of the minority against the encroachments of the majority" (Kelsen, 1928, p. 253).

For Kelsen, this protection relates primarily to legislation, as any proposed revision or amendment of the constitution itself will normally require a reinforced, rather than a simple majority, thereby necessitating that the proposed revision includes the support of the minority (Kelsen, 1928, p.253). Thus, the primary locus of constitutional justice arises from within the sphere of Parliamentary legislation, which remains determined by simple majority and, therefore, by the government resulting from the election of the largest political party. This, in turn, creates the continued potential for the largest political party to pass legislation which "encroaches upon the freedom of the minority in the sphere of its constitutionally guaranteed interests" (Kelsen, 1928, p.253).

Thus, for Kelsen, "[e]very minority—of class, nationality, religion—whose interests are protected in any manner by the Constitution has, therefore, an eminent interest in the constitutionality of laws." Constitutional justice is an institutional means of reinforcement of the character of representative democracy—"the constant compromise between groups represented in Parliament by the majority and the minority" (Kelsen, 1928, p.253). The interest of the minority is furnished with institutional support, which, as "the simple threat of recourse to the constitutional tribunal" becomes the "correct instrument to prevent the majority from violating unconstitutionally its juridically protected interests" (Kelsen, 1928, p.253). The particular interest of the minority is simultaneously the interest in the prevention of the "dictatorship of the majority, which is no less dangerous to social peace than that of the minority" (Kelsen, 1928, p.253).[23]

The procedural guarantee of the constitutional conformity of legislation provided by the existence and operation of a constitutional court is also, for Kelsen, the procedural guarantee of the compromise essential to representative democracy.

Rights

The position accorded to rights in the Kelsenian legal science of positive law arises from the preceding juridification of the state and the critique of natural law of the later 1920s.[24] In the critique of natural law, Kelsen seeks, through the comparison with a legal science of positive law, to demonstrate that natural law confronts an insoluble, internal contradiction in its movement from an absolute, invariant

[23] Kelsen concludes by emphasising the centrality of 'constitutional justice' to a federal system (Kelsen, 1928,253-257).

[24] See, (Kelsen, 1973; Kelsen, 2006). Both essays originally published in 1928.

material foundation to "its application to the concrete conditions of social life" (Kelsen, 2006, p. 397).

This application indicates that "the norms of natural law, which are ideally independent of human action and volition, ultimately do require the mediation of human acts in order to fulfil their purpose" (Kelsen, 2006, p. 398). The application, through human action and volition is, therefore "dependent upon the knowledge and will of men by whose doing more abstract natural law is transmuted into a concrete legal relationship" (Kelsen, 2006, p. 398).

Thus, the Kelsenian critique of natural law is an immanent critique of natural law: it must, to become law, posit itself in the form of legal norms of positive law, thereby creating a distinct, external form.[25] This external from is, then, positive law detached from the 'origin' of natural law, and the process through which natural law posits itself as law is the process of the positivisation of natural law. In the process of positivisation, natural law has become positive law, and the transformation in form entails that it is to be defined as positive law. The transformation is also its insertion within a system of positive law which, from the perspective of a legal science of positive law, is *both* static and dynamic: legal norms of positive law exist as a system which is perpetually open to modification and change solely as the result of human action.

The methodological demonstration of the inherent, internal contradiction of natural law, then affects the position and character of natural rights which may be held to derived from natural law. Natural rights require an analogous process of positivisation—to be posited in the legal form of norms of positive law—and exist, prior to or beyond positive law, only as the subjective values of ethics and politics.

The Pure Theory of Law (1934) proceeds beyond the critique of the later 1920s to engage in an extended critique, within the system of positive law, of the dualism of subjective rights and objective law. For Kelsen, this dualism, which is the residue of natural law theory in later nineteenth-century positivism, presupposes that there exists an objective law, composed of legal norms, and a subjective right, composed of the individual's interest or will.

This dualism is one in which logical and temporal priority is accorded to subjective rights in relation to objective law; subjective rights are held to exist "prior to and independently of, the objective law, which emerges only later as a state system protecting, recognising, and guaranteeing subjective rights" (Kelsen, 1997, p. 38). The dualism is to be overcome not by a simple reversal of the primacy between objective law and subjective law, but by demonstrating that subjective law is an integral part of objective law.

This requires, for Kelsen, that subjective right be "confronted [with] the concept of legal obligation", as the "sole essential function of the objective law" (Kelsen, 1997, p. 43). In this manner, subjective right and objective law become two aspects of the same law, for, "there is subjective right (*qua* legal right) only insofar as the objective law aims – with the consequence that it establishes an unlawful act—at a concrete subject" (Kelsen, 1997, p. 44). This reconceptualisation has the further consequence that it enables the expansion of legal rights, as subjective

[25] This is the emphasis of the critique of natural law in Kelsen (1973).

rights within an objective legal order, to proceed beyond the realm of civil law to encompass political rights: "granting participation in creating law" (Kelsen, 1997, p. 45).

From this, however, Kelsen then proceeds to reconfigure the understanding of the legal person as an entirely heuristic concept which indicates the "unity of a bundle of legal obligations and legal rights, that is, the unity of a complex of norms" (Kelsen, 1997, p. 47). The effect of this reconceptualisation is to reveal:

> legal connections between human beings, more precisely, between material facts of human behaviour, which are linked together by – that is, as the content of – the legal norm. The legal relation is the connection of two material facts, one of which consists in human behaviour established as a legal obligation, the other in human behaviour established as a legal right […]. In understanding so-called law in the subjective sense simply as a particular shaping or personification of the objective law, the Pure Theory renders ineffectual a subjectivist attitude toward the law, the attitude of so-called law in the subjective sense. (Kelsen, 1997, pp. 52-53)

Hence, the legal person is situated heuristically at a different level from the state *within* the hierarchical system of norms of positive law.

Max Weber: State and Rights in the development of Weberian Sociology

For Weber, the critique of the preceding tradition of *Staatswissenschaft* and *Staatsrechtlehre* develops more slowly, incrementally and indirectly as part of the development of a distinct Weberian sociology.[26] The early period of Weber's work, prior to the *Protestant Ethic* (1904), involves the first stage of his academic formation and of his conceptualisation of law. It is concerned with delimited historical investigations of medieval commercial partnerships in Italy (1889) and Roman agrarian history within roman civil and public law (1891) (Weber, 1986; Weber, 2008).[27] The principal orientation of Weber's work in this period is to the German historical school of law.[28] The emergence of a general methodological approach to the analysis of law arises through Weber's critical engagement, in 1907, with the work of Rudolf Stammler (Weber, 2012a, 2012b).[29] It is in this critique that Weber develops and distinguishes a set of concepts for the delineation of legal rules and the definition of legal norms. These concepts are drawn upon, and reinforced, in Weber's response, at the 1910 German Sociological Association General Meeting, to Hermann Kantorowicz's presentation on Legal Science and Sociology (Weber, 2012c). The Weberian conceptualisation of the state and of rights are comparatively later developments which find their most comprehensive

[26] On the broader question of the development of Weber's sociology, see Lichtblau (2015).
[27] On this period of Weber's work, see Marra (1992, 2014, 2022).
[28] See Dilcher (2008).
[29] Here, following the analyses of Coutu (2013, 2017). For the question of the wider effect of this critique on the development of Weber's sociology, see Treiber (2023).

articulation in the posthumously edited and published *Economy and Society* (*Wirtschaft und Gesellschaft*).[30]

The State

The Weberian conceptualisation of the state[31]—its sociological preconditions—commences from paragraph 17 of Part 1 (Basic Concepts of Sociology) in *Economy and Society*:

> A political institutional organisational enterprise (*Anstaltsbetrieb*) will be called a State to the extent that its administrative staff can exercise a monopoly of legitimate physical force in the execution of its orders. (Weber, 2013a, p. 54).[32]

This condensed definition is also to be understood as shaped by a wider interpretative methodology which orientates Part 1: the concept of a State is attributed to the combined or collective effect of reciprocal individual social action.

The further precision and delimitation of the categories with which to grasp this Weberian concept of the State, leads to the distinction between an organisation (*Verband*), an association (*Verein*) and an *Anstalt*. Thus, paragraph 17 is, for Treiber (2015, p. 69) necessarily linked to paragraph 15, in which it is the *Anstalt*, an organisation distinguished by an administrative staff implementing a statutory order in which membership is compulsory, which, for Weber, represents the sociological preconditions for the formation of a State.

It is with this category of *Anstalt* that Weber appropriates a category of the preceding *Staatsrechtslehre* tradition[33], and strips it of its limitation to "the Prussian-German constitutional monarchy" (Treiber, 2015, p. 71), by reconfiguring it as the description of a collective orientation of reciprocal individual social action: an apparatus of compulsion which combines obedience—conformity of external action—with "legitimacy-compliance"—inner conformity of individual belief.

Thus, the *Anstalt*, as a Weberian category, expresses the socio-historical transformation in the use of force in which the combination of 'the monopoly of force and the capacity to enact statutes' (Treiber, 2015, p. 73) demarcates the modern State as "the use of legitimate force" (Treiber, 2015). It is also, and equally, the expression of a process of legal rationalisation, and, thus, paragraph

[30] Its initial posthumous publication, presentation and understanding, in 1921, as a complete, unified work, has now been replaced by the division into six separate volumes in the German edition of the collected works of Max Weber, each reflecting its own distinct degree of completion.

[31] Here, following the analyses of Treiber (2015).

[32] Here, the translation follows that provided for this paragraph by Treiber (2015, p. 61) and the translator, Keith Tribe.

[33] For Treiber (2015, pp. 67-69), the sources of the *Staatsrechtslehre* tradition which Weber appropriates are Paul Laband and Otto Meyer. There is also an acknowledgement, beyond the *Staatsrechtslehre* tradition, of the ecclesiastical origin of the notion of *Anstalt* drawn from the particular interpretation of medieval Canon Law in Otto von Gierke's *Das deutsche Genossenschaftsrecht*. This is also explicitly acknowledged in the later Sociology of Law section (Weber, 2013b, p. 714).

17 is necessarily linked to paragraph 2 of the Sociology of Law, in Volume II of *Economy and Society* (Weber, 2013b, p. 644; Treiber, 2015, p. 67).

It is rule, through law, in the particular Weberian sense of the enactment of maxims for the orientation of human action (predicated upon the combination of external obedience and internal compliance), underpinned by the capacity for their enforcement, that the extent of Weber's recognition of "a State based on the rule of law (*Rechtstaat*)"is contained (Treiber, 2015).

The Weberian conception of the state based on the rule of law is accompanied, in paragraph 13, by the explicit appropriation, and reinterpretation, of Ferdinand Lassalle's notion of a constitution (Weber, 2013a, p. 51).[34] This appropriation is of a materialist theory of the constitution – the constitution is a form for the expression of the interests of social classes—which strips it of its Lassallean articulation within the emergent German workers movement—and generalises it, conferring on it a wider, non-legal form[35] and sociologically descriptive purpose:

> The only relevant question for sociological purposes is when, and for what purposes, and *within what limits*, or possibly under what special conditions (such as the approval of gods or priests or the consent of electors), the members of the organisation will submit to the leadership. Furthermore, under what circumstances the administrative staff and the organised actions of the group will be at the leadership's disposal when it issues orders, in particular, new rules. (Weber, 2013a, 51)

The effect of this understanding is particularly evident in Weber's Reich President proposals which, if lacking full realisation in the final text of the Weimar Constitution, [36] is indicated in his writings (Weber, 2002a, 2002b), the reintroduction of a figure or personification of authority who is directly elected – the plebiscitarian Reich President. The Reich President establishes a locus of authority which is distinct from the Parliament of representative democracy, and the party system; and is both directly elected and with distinct legal authority to dissolve parliament and to authorise referendums.

The Reich President, as an individual, is to embody the Weberian vocation for politics, and this embodiment becomes the basis, beyond direct election, for the combination of external obedience and internal compliance which is the sociological condition for the maintenance and continued existence of the state within the Weimar Republic.

Rights

The Weberian conceptualisation of the State is accompanied by a conceptualisation of rights which develops and maintains a distinct position in

[34] (Lassalle, 1862).

[35] For Weber, (Weber, 2013, 51), the sociological conception of a constitution is not determined by, or confined to, the legal distinction between a written or unwritten constitution.

[36] On this, see Mommsen (1990, pp. 332ff) and Marra (2020). This Weberian conception of the constitution is also prefigured in the analyses of the Russian Revolution of 1905 (Weber, 1995, pp. 148-240).

relation to Jellinek's work of 1895.[37] This position, rather than seeking to adopt or repeat Jellinek's 'origin' of rights, in the right to religious freedom, and the consequent displacement of a historical origin from the French Revolution to the American Revolution, arises from a conception of rights which has already detached itself from a necessary inherence in a wider juridical or political theory of rights.

The Weberian position, which finds its expression, among other texts, in the analysis of the Russian Revolutions of 1905 and 1917 (Weber, 1995), and, within a broader framework, in Part 2 of Economy and Society, entitled 'Sociology of Law' (Weber, 2013b) is the reflection of a specifically Weberian 'liberalism'. This has relinquished a connection to the Enlightenment and seeks, instead, to comprehend rights within a socio-historical presentation of the distinction between state and economy.

This, in turn, arguably reflects a certain degree of continuity or affinity with Weber's initial formation in civil law, and his dissertation, 'The History of Commercial Partnerships in the Middle Ages' (*Zur Geschichte der Handelsgesellschaften im Mittelalter*), 1889 (Weber, 2008), in which an intertwining of 'rationality' and 'rationalisation' of law is given its first, preliminary articulation.

This Weberian approach is combined with a continued acknowledgement of a non-positivist source of rights and law as a socio-historical redescription of natural law.[38] In the Sociology of Law section of Volume II of *Economy and Society*, (Weber, 2013b, pp. 865-880), Weber presents a particular description of the emergence and disintegration of modern natural law, commencing from the French Civil Code of 1804.[39] This is itself situated within a broader sociological analysis of the formal and substantive rationalisation of law and the discussion of modern natural law – its emergence and disintegration – is orientated by this overarching framework. The emergence and disintegration is, therefore, also a description of a process of 'positivisation' of natural law which, having "advanced irresistibly", entails that

> [t]he disappearance of old natural law conceptions has destroyed all possibility of providing the law with a metaphysical dignity by virtue of its immanent qualities. In the great majority of its most important provisions, it has been unmasked all to visibly, indeed, as the product or the technical means of a compromise between conflicting interests. (Weber, 2013b, p. 875).

[37] It is distinct, in the sense of its lack of direct influence or determination of Weber's *Protestant Ethic* (Ghosh, 2008a, 2008b), but also with regard to both the notion of rights (Ghosh, 2008b) and the French Revolution. For the French Revolution, this is evident from Weber's short statement comparing the Russian Revolution of 1905 with the French Revolution of 1789, where the basis for comparison is that of the notion of property, and right to property, not freedom of religion (Weber, 1995, p. 232).

[38] For Ghosh (2008b), this originates in the *Protestant Ethic*, and indicates a further divergence between Weber and Jellinek.

[39] This indicates a further divergence between Jellinek and Weber,

This process of positivisation is also accompanied, for Weber, by the increased centrality of the legal profession and their "vocation" in regard to the orientation of the system of positive law (Ibid., 875-876); and, in relation to a system of modern, formal, positive law, the sociological analysis centres upon the further analysis of these formal qualities (Weber, 2013b, pp. 880-895).

Weber's 'sociological approach' retains the dualism of subjective rights and objective law but provides this with a sociological reinterpretation. This is particularly apparent in the Weberian responses to the Free Law Movement (Weber, 2012c, 2013b, pp. 886, 886 fn.20) in which Weber insists upon retaining the formalism of general legal norms of positive law. This is combined with the resistance to the expansion or alteration of these general legal norms to actively intervene in, and respond to, social and economic conditions. These, for Weber, indicate one of the anti-formal tendencies of modern law – the re-materialisation of formal law – which undermine its essential generality: re-materialisation is to render modern, positive law formally *irrational*.[40]

Weber, by designating these directions as possibilities or tendencies, leaves open the question of how they will affect the "form of law and legal practice" (Weber, 2013b, p. 895). The openness with regard to these possibilities is combined with the attribution of inevitability or "fate" (Weber, 2013b) of other aspects of modern, formal, positive law. These inevitable or invariant aspects relate to the continued development of the technical elements of this modern law, reinforcing its specialised character and a domain of specialists (Weber, 2013b). From this, for Weber, "the notion must expand that the law is a rational technical apparatus which is continually transformable in the light of expediential considerations [i.e., not these anti-formal directions] and devoid of all sacredness of content" (Weber, 2013b).

As Treiber concludes, in *Reading Max Weber's Sociology of Law*, "it is possible to connect the trend towards re-materialisation with Weber's fundamental belief that modernisation and rationalisation also produce wholly negative side effects" (Treiber, 2020, p. 169).

Conclusion

Kelsen and Weber, in their critical engagement with, and transformation of, the preceding German language tradition of *Staatswissenschaft* and *Staatsrechtswissenschaft*, recognise the problematic conceptualisation of the character of the state in this tradition. In place of the subterranean Nietzschean denunciation of *Thus Spoke Zarathustra*, there is a concerted attempt to undertake a methodological comprehension and regulation of the state's importance and power. This is accompanied by an equally explicit presentation,

[40] For Weber, these "anti-formal directions" of modern, formal, positive law, which consider that "it be more than a mere means of pacifying conflict of interest" are: "the demand for substantive justice by certain social class interests and ideologies, they also include the tendencies inherent in certain forms of political authority of either authoritarian or democratic character concerning the ends of law which are respectively appropriate to them, and also the demand of the "laity" for a system of justice which would be intelligible to them; finally, as we have seen, anti-formal tendencies are being promoted by the ideologically rooted power aspirations of the legal profession itself" (Weber, 2013b, p. 894).

within their respective methodological positions, of the essential fragility of political organisation maintained by a legal framework composed of norms of positive law.

It is their distinctive combination of methodological regulation and fragility against which post-World War II juridico-political thought has sought to define itself. In particular, there has been a sustained reconsideration of the continued pertinence of the dualism between values (inherently subjective) and validity (a methodological operation to establish a position of objectivity beyond all value) from which both Kelsen and Weber commence, and which determines the parameters of their respective methodological frameworks.

This reconsideration has then led to the reopening of the question of the relationship between morality and law, the existence and justification of fundamental or basic human rights and freedoms, themselves now further delineated as civil rights, political rights and socio-economic rights, and the reconception of the character and purpose of a constitution and the notion of a *Rechtstaat* or the rule of law.

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