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On: 23 April 2014, At: 11:32

Publisher: Routledge

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Politikon: South African Journal of Political Studies

Publication details, including instructions for authors and subscription information:

<http://www.tandfonline.com/loi/cpsa20>

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Published online: 10 Mar 2014.

To cite this article: D.F.M. Strauss (2014) The Place of the State in a Differentiated Society: Historical and Systematic Perspectives, *Politikon: South African Journal of Political Studies*, 41:1, 121-139, DOI: [10.1080/02589346.2014.885681](https://doi.org/10.1080/02589346.2014.885681)

To link to this article: <http://dx.doi.org/10.1080/02589346.2014.885681>

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The Place of the State in a Differentiated Society: Historical and Systematic Perspectives

D.F.M. STRAUSS*

ABSTRACT *What used to be called primitive societies may best be designated as traditional societies or as undifferentiated societies. While focusing on the place of the state within a differentiated society, it is meaningful to account for the differences between differentiated societies and undifferentiated societies, because such an analysis will help us to advance important systematic distinctions. Usually, the extended family (Grossfamilie) is seen as the smallest undifferentiated society with a typical undifferentiated form of organization. Even the lowest level of undifferentiated societies contains an ordering and relations of super- and subordination. Paying attention to the sib or clan is followed by a characterization of the tribe and Roman law. Diverse undifferentiated societies of the medieval era are found in the feudal system, guilds, and manors. All of these societies included activities which within a differentiated society are performed by societal entities with their own distinct forms of organization. Therefore, the state was not yet visible as a distinct societal entity. In the absence of tribal punishment, only relatives would take revenge, owing to the fact that there was not yet an integrated monopoly of power on a limited territory capable of enforcing the resolution of legal conflicts. Within early Germanic as well as early Greek and Roman Law, the practical enforcement of liability therefore had to appeal to private execution. After the Renaissance, the idea of popular sovereignty surfaced, but it was only when church and state parted ways that we observe the process of development which led to what we currently experience as differentiated societies. In such societies, the limitations of undifferentiated societies are superseded through an acknowledgment of the fact that every human being transcends any and all societal collectivities in which such a person merely functions without being fully absorbed by these functions. Finally, attention is briefly given to the legal competence of a government and to the nature of cultural–historical power within the state (its ‘sword-power’). As a public legal institution, the state is supposed to integrate all (and only) legal interests on its territory within one public legal order. Just as little as societal entities which are distinct from the state are parts of the state, is it correct to sacrifice the state by surrendering it to any non-political community or collectivity. Only this perspective avoids a totalitarian view regarding the place of the state within a differentiated society.*

Traditional societies do not know the state

In order to understand the *place* of the state in a differentiated society, this article will commence by highlighting the differences between undifferentiated and differentiated societies.

It is customary to refer to *traditional societies* when *undifferentiated* societies are investigated. Lowie, for example, who is known for his work on *Culture and Ethnology* published one of the classical works in the field of ethnology under the title, *Primitive Society* (1921). At the time, he was the Associate Curator, *Anthropology*, at the *American Museum of Natural History*. Normally the *extended family* (*Grossfamilie*) is identified as the smallest *undifferentiated society*. It is striking that societies such as these are bound together on the basis of an *undifferentiated form of organization*.

The cultural anthropologist, Kammler, identifies the following characteristics of undifferentiated societies. First of all, technology is undeveloped in such societies. In the second place, they lack a large degree of societal differentiation, which entails that most of what we are familiar with in a differentiated society are at most present in a *rudimentary* form in undifferentiated societies. Kammler (1966) therefore distinguishes between *differentiated societies* and *undifferentiated societies* (17–18). It should be noted that even at the lowest level of technological and economic developments, undifferentiated societies display elements of *social ordering* which in particular include a political element, evinced in relations of super- and subordination (Kammler 1966, 30). We shall return to this point below in connection with the distinction between subject–object relations and subject–subject relations.

An undifferentiated form of organization

Within differentiated societies, each distinct social form of life has its own form of organization. The administration of the state differs from that of a business enterprise, a university, an ecclesiastical denomination, and so on. These distinct forms of organization are dependent upon some or other unique aspect of reality serving as its *characteristic* or *qualifying function* (*guiding function*). This means that the actions of a state, embracing government and subjects, are directed by jural considerations, focused on the integration of a multiplicity of legal interests into one public legal order. Similarly, a business enterprise finds its guiding principle in the economic aspect, a sport club in the social aspect, a church denomination in the aspect of faith, and so on.

Yet within undifferentiated societies, such a distinct qualifying function is absent, because within them the leading role is assigned to one of the intertwined of *societal entities*.¹ Since one of the interlaced societal entities fulfil the leading role, such an undifferentiated society in its totality will act in *different societal capacities*. As a whole, it will act as an *economic entity* which is equivalent to what we discern within a differentiated society as a business enterprise. The same applies to the whole of society acting as a *political unit*, which within

differentiated societies will assume the form of a state. Because undifferentiated societies share in an undifferentiated organizational form, the possibility of any of the above-mentioned differentiated qualifying functions is absent. The variety of social forms of life which eventually, in the course of a gradual process or cultural–historical differentiation and disclosure, surface, are bound together in an undifferentiated manner within such an undifferentiated society.

From this angle, we can state that an undifferentiated society does not merely exhibit an economic aspect, because as a whole it acts as something which is recognized on a differentiated cultural level as an economically qualified business (whether it be of a hunting-, agricultural or cattle farmer type). An undifferentiated society also does not merely exhibit a juridical aspect, for it acts as a whole as something similar to what much later is identified as a *state* within a differentiated society. The same applies to the faith aspect—the undifferentiated society acts as a whole in cultic-religious capacity, similar to a differentiated collective faith community. Within the undifferentiated total organizational form, a variety of typical structural branches are therefore found such that each one of them, alternatively, can bring into action the entire undifferentiated society. Within differentiated societies, distinct and independent societal forms of life perform these activities.

From the *Grossfamilie* to the sib and clan

In addition to the *Grossfamilie*, the sib also represents an undifferentiated society. The *sib* (as the Americans designate it) or the *clan* (as British anthropologists prefer to denote it—see Lowie 1921, 105) is more encompassing, while the *tribe* displays a stronger (political) organization. This state of affairs implies that the correlate of an undifferentiated foundation (namely one encompassing form of organization) is given in what may be called an *undifferentiated qualification*, because instead of a qualifying aspect of reality, one of the ‘not yet differentiated’ societal structures, intertwined within the encompassing whole, assumes the leading or guiding role. In the case of the extended family, which binds parents, children, and grandchildren together in a patriarchal unit, the patriarch and the oldest son are positioned in such a way that it reflects a specific kind of historical organization which cannot be explained exclusively on the basis of the blood relationship existing between them.

The extended family does not only evince a family structure, because in its undifferentiated total structure, other social forms of life are also intertwined. In particular, the intertwined political structure is observed in the (political) force with which internal order and peace is maintained. Similarly, the economic enterprise is recognized by the way in which the subsistence economy operates. However, the decisive question is: can we establish which one of the interwoven social forms of life present in such a society actually plays a leading role in its undifferentiated total structure? It appears that within the *Grossfamilie*, the interwoven extended family structure is truly of a central leading nature even though as such it does not inherently possess an enduring structure of super- and subordination (see the extensive analysis of Dooyeweerd 1997-III, 346–376).

The *sib* (clan or *gentes*), which apparently only appears when agriculture and livestock farming partly or completely replace hunting as the basis of economic life, is constituted by a larger group of organized relations (where either only the father's or the mother's line of descent is taken into account). Although membership in the extended family is normally dependent upon blood relationship (natural birth), the *sib* is so large that it is no longer possible to assume direct descent from a communal father—although such descent may function as a fictitious presupposition or mythological conception. Besides activities like the ancestor cult (typical of an eventually differentiated cultic institution), taking revenge (which at a higher level of development is taken by an independent state), and the presence of forms of division of labour, also the family structure is present in the *sib*. In reality, this interwoven family structure takes on the undifferentiated leading role within the *sib*—a leading role which, as noted above, rests on a particular historical form of power organization (just as in the case of the extended family). This feature anticipates the stronger political organization of the tribe.

The stronger political organization of the tribe

Vinogradoff (1993) mainly employs features of the *sib* to define a tribe when he states that when human society 'has assumed the form of a tribe', it is 'an association based mainly on real or supposed kinship' (10). Only within the much stronger organized tribe, the political organization assumes the leading role. But this role does not yet entail an enduring monopolistic organization of the sword power. This is clear from the fact that fights between members do not provoke any tribal punishment because only a relative of someone killed in such a fight could consider revenge (in the context of the *lex talionis*).

It is also necessary to keep in mind that our current acquaintance with the correlation between legal rights and legal remedies was absent in undifferentiated societies where there was not yet an integrated monopoly of power on a limited territory capable of enforcing the resolution of legal conflicts. Regarding the absence of this correlation, Vinogradoff (1993) remarks:

And yet it is with such states of society that we have to deal in early Germanic as well as early Greek and Roman Law. When self-help was the principal mode of enforcing right, when juridical conflicts commonly resolved themselves into feuds, or had to be managed by arbitration, when even legal proceedings were initiated by ceremonial agreements, the practical enforcement of liability naturally took the shape of an appeal, not to public force, but to private execution. (8)

Noteworthy is that although tribal law ensured the presence of particular kinds of a legal order, there was no uniform integration of legal rules, apart from the fact that every tribe had its own law. According to Berman (1983), this situation applied to the

Franks, Alemanns, Frisians, Visigoths, Ostrogoths, Burgundians, Lombards, East Saxons, Vandals, Suevi, and other peoples that were eventually combined in the Frankish Empire, embracing much of what later became Germany, France, and northern Italy; the Angles, West Saxons, Jutes, Celts, Britons, and other peoples of what later became England; the

Danes, Norwegians, and other Norsemen of Scandinavia and later of Normandy, Sicily, and elsewhere; and many others, from Picts and Scots to Magyars and Slavs. (52)

Developments within Roman law

In its restriction to the Roman tribe, the initial folk law (*ius civile*) was *exclusive*. It applied to members of the Roman tribe only. Germanic folk law was also basically tribal law which was based upon blood feud and composition of blood feud, with ordeals, oath-helping, and other procedures (Berman 1983, 51). Owing to the nature of tribal law, the legal status of a person was completely dependent upon membership in the tribe—in the case of Rome, membership of the Roman *populus*. People living outside this circle were lawless (*exlex*) and also designated as barbarians. Yet there also existed laws of the barbarians (*leges barbarorum*). The oldest forms of this kind of law, which was distinct from Roman law (*leges Romanae*), is found in the law of the Salk Franks and the *Lex Salica* which was issued by the Merovingian king Clovis after his conversion to Christianity in 496 AD (Berman 1983, 53).

As Roman folk law, the *ius civile* right from its inception was reminiscent of the undifferentiated, tribal background of Roman life. However, during the expansion of the Roman Empire, non-Romans were soon present on Roman territory. This situation increasingly called for some kind of a legal arrangement in order to make legal provision for these non-Romans within the Roman Empire. This was done in what emerged as the *ius gentium*. Although this new legal development is sometimes seen as the starting-point of what later became known as the *law of nations*, it should actually rather be seen as the starting-point of civil private law and therefore not as the legal source of the law of nations. The subsequent legal development transcended the artificial intermediate position of *Latini* as a class between foreigners and Roman citizens. Mackenzie (1898) remarks: 'Finally, Caracalla bestowed the citizenship on all ... subjects of the Roman empire' (79; see also Quaritsch, H. Staat und Souveränität).

Feudo-vassalism, guilds, and manors

During the middle ages, the societal arrangement of Western Europe, which lasted from the ninth to the fifteenth centuries, was designated as *feudalism*.

Feudalism

During such a vast period of time, significant changes naturally occurred throughout. For example, tenancy developed into tenancy for life and eventually it was extended into a heritable holding. Medley (1925) identifies two properties as defining features of the feudal era:

But the characteristic of the whole period was what has been described as the union of two relationships of lord with man and lord with fassal. Thus feudalism, or feudo-vassalism, as it

has been more correctly called, contained both a social element based upon land-tenure, and a political element expressed by homage and fealty.² (24–25)

These two elements were intertwined in a relatively undifferentiated manner within the feudal system. The latter increasingly accommodated owners of large pieces of land, which they had received as reward for their support to the King in times of threats to the realm. An important supposition of the feudal system was that portions of governmental authority were still spread over cities, guilds, and market communities.

Guilds

During the ninth century, the powerful counts and dukes combined forces with the church and thus generated the genuine bearers of governmental authority during the subsequent medieval era. Although these guilds did integrate religious interests and professional interests, they still merely formed a relatively *undifferentiated* societal unit. Even the influential international traders (merchant guilds) of the twelfth and thirteenth centuries were succeeded by craft guilds with a similar undifferentiated structure. The medieval guilds were undifferentiated with structures similar to those of the extended family and sib, but without any real or fictitious common descent (Berman 1983, 290–292).

Probably as a continuation of the Germanic guilds, the eleventh and twelfth centuries witnessed the rise of the guild system in various towns. They often originated as sworn brotherhoods binding their members by oaths regarding mutual protection and service. Berman (1983) points out that the multifarious forms displayed by various types of guilds are all normally designated by the word *guild*, while in fact this term encompasses entities as diverse as: ‘*ars, universitas, corporatio, misterium, schola, collegum, paraticum, curia, ordo, matricola, fraglia*, and, for the merchant guild *hansa* or *mercandancia*’—yet ‘the ordinances of all the dozens of guilds that might exist within a city had many features in common, and these common features existed throughout the West’ (391).

Our interest in the difference between undifferentiated societies and differentiated societies invites us to observe how, during the Middle ages, non-ecclesiastical society continued to function within *undifferentiated structures*. Troeltsch (1925) notes that this medieval period also knew a large number of *authorities* (*Obrigkeiten*), but points out that they are superseded by the power of the all-embracing, supra-natural, spiritual world empire of the Church. The latter has its own structure of super- and subordination. However, medieval society does ‘not know a state as a unified, sovereign will-organization of the whole, where it is irrelevant who exercises this sovereignty’ (302).³

The Manor

Within Thirteenth-century English law, a typical undifferentiated community is found in the land *Estate*, known as a *Manor*. Although it was not a technical

legal term, it was characterized by the recognition of the right of a lord to hold a court as a unit for the exercise of jurisdiction, although it might have evolved as an economic unit. In the course of the subsequent centuries, the on-going emergence of new estates divided the *vills* into several *manors* without establishing an exclusive jurisdictional territory, for the boundaries of *vill* and manor may partially overlap (Medley 1925, 44). In addition, as Dooyeweerd (2012) points out, the legal competence of a manor included the capacity to issue legal summonses and ordinances which embraced almost all spheres of society:

The owner of large feudal land holdings was endowed with privileges which gave him the legal right to act as lord over every person domiciled on his estate. In the medieval cities the guilds were the undifferentiated units which simultaneously displayed an ecclesiastical, industrial, and at times even a political structure. These guilds were often based on a kind of fraternity which, as an artificial kinship bond, embraced its members with their families in all their activities . . . It is important to note that at a higher level feudal lords exercised governmental authority as if it were private property, which they could indeed acquire and dispose of on the basis of private legal stipulations. All of these undifferentiated legal spheres possessed autonomy; that is, the legal competence and right to act as government within their own sphere without the intervention of a higher authority. (54; see also Berman 1983, 316–332)

Increasing differentiation and integration

In a certain sense, one may see in *integration* a task running parallel with differentiation. Prior to the late eleventh and early twelfth centuries, diverse legal rules and procedures prevailed within the distinct legal orders of the West. Berman points out that these legal orders were ‘largely *undifferentiated* from social custom and from political and religious institutions’. No attempt was made to integrate the prevailing laws and legal institutions into a unified legal order. This situation was understandable if we consider that very little of the law existed in writing and that there was not yet a professional judiciary (no professional class of lawyers and an absence of professional legal literature). No conscious effort was made to systematize law because it

had not yet been ‘disembedded’ from the whole social matrix of which it was a part. There was no independent, integrated, developing body of legal principles and procedures clearly differentiated from other processes of social organization and consciously articulated by a corps of persons specially trained for that task. (Berman 1983, 50)

What is striking in some of the typical undifferentiated societal entities, which lasted up to the French Revolution, is that they embraced different types of communities—just think of the above-mentioned *guilds*—and the same applies to medieval *towns*, which were dependent upon the customs and privileges granted to them by the feudal lords. Their relative autonomy therefore included much more than what eventually was captured by the acknowledgment of different societal spheres with their own *inner laws*. Although he still adheres to the

universalistic (holistic) implications of sociological *system theory* (with its emphasis on systems and subsystems, i.e. *wholes and parts*), some of the formulations articulated by the sociologist Münch, who analysed processes of differentiation, do reveal a sound view of a differentiated society. In line with his system theoretic approach he explains that '[D]ifferentiation means the growing autonomy of subsystems of interaction which have their own rules' (Münch 1990, 443). Yet on the previous page, he correctly refers to the theory of the rationalization of modern society developed by Max Weber, who holds that this resulted into spheres of society 'that are guided to an increasing extent by their own inner laws'. Within the legacy of the anti-revolutionary party in the Netherlands, Groen van Prinsterer already in the nineteenth century captured the same idea by introducing the phrase sphere sovereignty. He influenced Abraham Kuyper who erected the Free University of Amsterdam in 1880 and whose opening address in that year addressed *Sphere Sovereignty*.⁴ His plea was that an academic institution (such as the Free University), owing to its sphere sovereignty, ought to be free from interference both by the Church and the State. He influenced the Dutch legal scholar, Herman Dooyeweerd, who further explored the implications of the principle of sphere sovereignty in a non-reductionist ontology (including his theory of modal aspects) and who in particular made it fruitful in his analysis of the structure of human society.⁵

Rawls (2001) clearly stumbled upon the implications entailed in the principle of sphere sovereignty when he writes: 'Thus, although the principles of justice do not apply directly to the internal life of churches, they do protect the rights and liberties of their members by the constraints to which all churches and associations are subject' (597). Rawls is just one of many prominent contemporary social thinkers who, in spite of exploring a systems-theoretical approach, does reveal an insight into the uniqueness of different societal entities. For example, in spite of the fact that Rawls's (1996) thought is torn apart by atomistic and holistic affinities, he does acknowledge different societal principles holding for distinct kinds of subjects: 'But it is the distinct purposes and roles of the parts of the social structure, and how they fit together, that explains there being different principles for distinct kinds of subjects' (262). On the same page, he alludes to the distinctive autonomy of elements in society, where principles within their own sphere fit their peculiar nature. This way of addressing the issues undoubtedly approximates the idea of sphere sovereignty. Just consider his following words: 'Indeed, it seems natural to suppose that the distinctive character and autonomy of the various elements of society requires that, within some sphere, they act from their own principles designed to fit their peculiar nature'! These formulations support our pledge for a limited positioning of the state within a differentiated society.

Surely one cannot argue in terms of a whole-parts relation (systems and subsystems) *and* at the same time attempt to advocate an acknowledgment of the 'own inner laws' of societal entities, but the mere fact that leading sociological theorists at least partially adhere to an 'own inner laws' perspective shows that they can contribute to a better understanding of the issue under discussion.

Parting ways: church and state

Because the guild system obstructed the realization of a genuine state-organization, it was imperative for the differentiation of society to break down the artificial hold of power of the Roman Catholic Church. This increasingly occurred during the period subsequent to the Renaissance, which witnessed a process of societal differentiation that took shape. This process was decisive for the emergence of the modern state because it generated the *distinct legal interests* which eventually had to be bound together within the public legal order of the state. The first major step in this process of differentiation is therefore given in dissolving the unified ecclesiastical culture of the Roman Catholic Church. This process initiated the differentiation of church and what later on became known as the *state*. Later on, in a similar process of differentiation, the nuclear family and the business enterprise each came into their own during the Industrial Revolution.

At least partially, one can see the disintegration of the unified ecclesiastical culture of the late medieval period as the outcome of the untenable synthesis between ancient Greek views and those of biblical Christianity. According to Berman (1983), this attempted synthesis resulted in splitting life into 'two realms, the eternal and the temporal' where 'the temporal was thereby depreciated in value' (82). During the transition from the medieval era to the modern dispensation, the speculative metaphysics of *universalia* (universals) was questioned by the new nominalistic movement.⁶ Krüger (1996) speaks of the 'significance' of Ockham 'for the separation of a natural and supra-natural world' (33, note 3).⁷

Sovereignty

The idea of *popular sovereignty* surfaced prominently in the writing of Marisilius von Padua and Jean of Jandun of 1324 on *In Defense of Peace (Defensor Pacis)*. This invited reflection on the nature of *sovereignty* which was later on undertaken by Bodin in his discussion of the nature of governmental sovereignty. In 1576, he still designated a state as a *republic* while using the word *etat* for *specific forms* of the state. He introduced the concept of *sovereignty* in service of an understanding of the *authority* (power) of a government.⁸ Unfortunately, he did not succeed in liberating his thought from the traditional universalistic perspective that proclaims the state to be the *encompassing whole of society*. In Book III (Chapter 7) of his work on the state, he portrays the relationship between the family, corporations, and colleges to the state as that between the whole (the state) and its parts.⁹

This encompassing view hampered his understanding of the process of differentiation because he observed in the legal competence of law-making societal entities, distinct from the state, a threat for the sovereignty of the state. Of course exactly the opposite is the case, for without the crystallization of distinct societal spheres with their peculiar (non-political) legal interests, the state would not have the task to integrate a diversity of legal interests into one public legal order. Whereas his idea of *sovereignty*, as characteristic feature of the government of a state, forms part of the significant process of differentiation that took

shape after the middle ages, his un-grounded fear that newly emerging spheres of legal competence would threaten the sovereign law-making competence of the state stood in the way of positively appreciating societal differentiation. Next to the differentiation of church and state the industrial revolution accomplished the differentiation of the nuclear family and the modern business enterprise. It is therefore not surprising that the nineteenth century gave rise to the prominent modern democratic states, such as Germany, the Netherlands, France, and Britain as well as Australia, New Zealand, the USA, and Canada.

Does sovereignty belong to the people or to the monarch?

Unfortunately, modern political theories were mainly interested in the *power* of the state. Their basic problem was: does the highest power within the state belong to the *people* or the *monarch*? This gave rise either to the idea of *popular sovereignty* or to the *sovereignty of the monarch*. Therefore, since Machiavelli, the established distinction drawn was that between a *kingdom* and a *republic*. This practice cannot do justice to the *public legal* character of the state, because it does not leave room for the insight that the concern for the *res publica* as such does not yet say anything about the *form* in which it should be realized. The idea of the *public interest* solely underscores that the state, in the true sense of the word, is a *republic* (a *res publica*). Its sole concern is the ‘res’ of the ‘publica’—the *res publica*. Apart from a *parliamentary democracy* (such as the USA) and a *monarchical democracy* (such as Britain and The Netherlands), the former Russia was justified in designating its totalitarian states as ‘people’s republics’—just recall the acronym USSR, which stood for the *Union of Soviet Socialist Republics*.

Limitations of undifferentiated societies

It follows from our preceding analysis that *undifferentiated societies* are incapable of giving shelter to a state in the *public legal* sense of the term. Within such societies, there is no room for an exclusive legal *competence* or *jurisdiction* over a *limited cultural area*, familiar to us as the *territory* of the state.

Once the public legal character of the state is acknowledged, two issues require attention:

- (1) To give an account of the uniqueness of the state within a differentiated society and
- (2) To illuminate the relationship between the state and the diverse non-state societal entities present on the territory of the state.

The uniqueness of the state within a differentiated society

Undifferentiated societies lack a proper understanding of the state as a distinct legal institution. Such an idea includes the insight that governmental authority

cannot be appreciated as the *private property* of one or another (private) person and that for this reason it also cannot be restricted to a formal recognition of existing legal privileges and customs. Only when these privileges are eliminated, it will be possible for the true *parts* of the state, such as provinces and municipalities, to support the typical *res publica* nature of the state. It must be clear that the whole-parts relation is of critical importance. Applying the whole-parts relation to human society will also lead to an erroneous understanding of sovereignty and different spheres of competence within a differentiated society.

Just recollect Bodin's view of sovereignty: although the sovereignty of the government of a state pre-supposes differentiation, Bodin in fact conceived it as standing in opposition to societal differentiation. He saw sovereign power as 'summa ... legibusque soluta potestas.' The main reason for this shortcoming is found in the affinity of his ideas with the 'classical formula of political absolutism' according to which sovereignty is not only *absolute* but also *indivisible* (Meyer-Tasch 1981, 35). Although Bodin (1981) supports the long-standing principle of natural law, *pacta sunt servanda* (211), his understanding of sovereign power shows an element of the *potestas Dei absoluta* (the despotic arbitrariness of God) advanced by Ockham. Esmain (1993) notes that the adage 'Princeps legibus solutus est' (*the monarch is elevated above the law*) was derived from Ulpian, one of the classical Roman jurists (he lived round about 170–228 AD) (202).

Ancient Greece as well as the medieval era and modernity since the Renaissance, did not know the 'state', for this term only emerged by the end of the eighteenth and the beginning of the nineteenth century. Traditionally, the term *Politeia* (Plato's *Republic*) was used alongside the well-known legacy to speak of a *Kingdom* or, if one wants to conform to inclusive (politically correct) language-use, a *Realm* (*regnum*). Plato held the view that the two highest political estates shared communal ownership but did not partake in private marital life and family life. The lowest estate is stripped of *all rights*. The upshot is a typical totalitarian structure. In a similar fashion, Aristotle (1894, 2001) conceived of the *polis* as the all-embracing political community that aims in a greater degree than any other at the highest good:

Every *polis*¹⁰ is a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good. But, if all communities aim at some good, the *polis* or political community, which is the highest of all, and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good. (1252a 1–7, 1127).

The middle ages continued the conception of Aristotle with a qualification, because according to the view of Thomas Aquinas, the state only leads to temporal perfection, overarched by the supra-natural accomplishment of the church. His view of the function of the church as a supernatural institution of grace continued to exert an influence on the official position assumed by the Roman Catholic Church. In the well-known papal encyclical, *Quadragesimo anno* (15 May 1931) explicitly states: 'Surely the church does not only have the task

to bring the human person merely to a transient and deficient happiness, for it must carry a person to eternal bliss' (Schnatz 1973, 403). Zippelius (1980) illuminates this point with reference to the whole-parts relation: 'Parts are standing in a proper relation to the whole when one and the same principle rule them' (67).¹¹

The implication of this insight is that societal entities distinct from the state cannot participate in the same structural principle as the state. Perhaps the first thinker who realized this was the Calvinistic legal scholar, Johannes Althusius, in his work from 1603: *Politica Methodice Digesta*. He accepted *proper laws* for different societal entities, which imply that churches, families business enterprises and the like cannot be *parts* of the state—only provinces and municipalities qualify for this privilege (Woldring 1998, 129–132).

It is precisely the uncritical application of the whole-parts relation to human society that obstructed a proper understanding both of the state as such and of its place within a differentiated society. This brings us to the second point.

The relationship between the state and the diverse non-state societal entities present on the territory of the state

Unless an account is given of the *limited* sphere of competence of the state, no escape would be possible from a totalitarian view. The first element of this limitation concerns the *inner spheres of operation* of non-political societal entities and the second element is found in acknowledging the necessity of an exclusive *legal domain* of the state, its *territory*. However, there is yet another one-sided pre-conception operative within traditional views of human society which need to be corrected. This assumption is given in the conviction that the individual human person could be embraced fully by one or another societal community or collectivity (Verband).

The last-mentioned view is equivalent to the conviction that *society* is the embracing whole or totality of (inter-)human relationships. When the state is seen as a 'subset of a society', we encounter a mistaken application of the whole-parts relation. The distinction between *set* (whole) and *subset* (part), after all, is synonymous with the whole-parts relation. In his *Review* of the work of Chartier (2012), Brennan, for example, mentions Kavka (1995) who said: 'A government, or a state, by definition, is a subset of a society that claims a monopoly on the right to create rules and to enforce these rules via coercion' (2). Chartier is even convinced that it would be possible to achieve what a state is supposed to do through the erection of cooperation amidst anarchism and that there would then emerge a *legal order* in the absence of the state (Chartier 2012; Brennan 2013). Brennan remarks that Chapter 3 of Chartier's work commences 'by noting that states need to be justified. After all, states create hierarchies of power, and it's not clear what could justify giving some subset of society monopoly rights on coercion'. The whole-parts relation is here equated with an authority structure, a relation of super- and subordination.

No one is fully absorbed by the state or any other societal entity

Following up on what has been said about the *limited* sphere of competence of the state, we have to point out that the human being transcends every possible social link. A human person can assume a variety of social roles without ever being fully absorbed by any one of them. A rudimentary form of this insight is already found in the thought of Hegel. He positions it within the context of what is universal and particular. It belongs to our civilization to comprehend thinking as an awareness of the individual in the form of universality, that I am understood as a person in general, in which all of us are identical. This holds for the human being because it *is* a human being, not owing to the fact that one is a Jew, Catholic, Protestant, German, Italian, and so on.¹²

From the perspective of the modern state, the implication of this insight is that one can look at the citizens of a state from the perspective of any societal entity distinct from the state. For example, a particular group of citizens may be identified as Protestants, Catholics, or Atheists. Changing the point of view may lift out just the married men or women within the territory of a state. Once again a subset of the citizens of a state may belong to one or another cultural (ethnic) community. In none of these instances will the angle of approach pursued in such an exercise coalesce with the *totality* of the citizens of the state, because the public legal character of the state distinguishes itself as cutting through all the non-public ties citizens may have. For this reason, the societal collectivities that are distinct from the state have to integrate their own internal order-arrangements and these are always restricted to a specific sphere of private law. Therefore, these social entities can only form *specific law*, a *ius specificum* which finds its counterpart in the *ius publicum* of the state.

The implication of these distinctions is that the only way to speak of the citizens of a state is precisely to *disregard* all the social ties citizens may have in diverse non-political societal entities. Asking whether or not a person is a citizen of a state is therefore disregarding a person's denominational stance, whether or not a person is married, studies or teaches at a particular university, is a member of a sport club, or has shares in one or another business enterprise.

Yet there is an important catch in speaking of *disregarding* the various non-state ties of citizens, because every one of those connections forms part of a societal entity with its own particular *legal interests*. Therefore, while disregarding these societal ties, the government of a modern constitutional state under the rule of law at the same time has to integrate these legal interests within its unified public legal order, while acknowledging that the internal spheres of operation of these non-political entities are not *generated* or *brought into being* by the state. The state can merely *acknowledge* these legal interests, with their accompanying limited (non-state) spheres of competence. If these spheres of competence would be derived from the state—and not merely acknowledged—then the state in fact would have been the all-encompassing totality of human society—which then would have been totalitarian in the fullest sense of the word.

The underlying perspective here is therefore given in the insight that no single human being could ever be fully absorbed within any societal community or

collectivity, notwithstanding the fact that human beings may assume different social roles in each one of them.

Legal competence and cultural–historical power

By contrast, only when a limited idea of the state prevails, it will be possible to do justice to the other societal communities and collectivities on its territory. Then they could be appreciated in their own right without degrading them to mere *parts* of the state. True parts of the state are provinces and municipalities, because they are all subject to the *legal power* of a government. This legal power is synonymous with the *legal competence* seated in the *office* of government. It underlies the legitimate task of a government to make positive law. But given the compound nature of the expression *legal power*, we should reflect for a moment on the two elements it contains, namely a jural part—the term ‘legal’—and a non-jural part—‘power’. The use of such compound phrases appears to be inevitable within the disciplines of law and political science, because the *jural* meaning of law does not exist in isolation, since its meaning only comes to expression in its coherence with all the non-jural aspects of our experiential horizon. These distinctions and the account of analogical linkages between the various aspects of reality are introduced by Dooyeweerd in his general theory of modal aspects (Dooyeweerd 1997-II).

Consider a few other examples of compound phrases: *legal causality* (highlighting the coherence between the jural mode and the physical aspect); *legal accountability* (revealing a connection between the jural and the logical–analytical mode where the principle of sufficient ground points at accountability); *legal interpretation* (displaying the coherence between the jural and the sign-mode of reality); and so on. Similar to the jural mode, every non-jural aspect therefore has something unique to it as well as a multiplicity of structural elements pointing towards those aspects that are distinct from it.

Let us now return to the expression *legal power*. The term ‘power’ (control) appears to be original within the *cultural–historical* aspect of reality. Our first acquaintance with the cultural–historical aspect is normally related to the formation of cultural objects (artifacts).

Since concrete things, events, and processes function in all aspects of reality,¹³ their multi-aspectual nature cannot be used to argue against the existence of what we may designate as the *cultural–historical aspect* of reality. Formative cultural activities are intrinsically related to the historical mode or aspect. Cultural–historical formation or *formative control* is an outcome of the *free formative imagination* of human beings. Through it, things (artifacts) are brought into existence in dependence upon the formative power of human beings. Yet this formative power is not exclusively directed towards relations between subjects and objects,¹⁴ for in the case of inter-human relationships, there are numerous instances of people exercising power over other people. Such instances concern relations between subjects that are fitted into instances of super- and subordination, intimately connected to the nature of an *office* with its inherent

competence (power) to give a positive shape to norming principles holding for other human subjects—such as those promulgated by the parliament of a constitutional state under the rule of law.

The important point to be observed is that *power* has its original seat within the *cultural–historical* aspect of reality. Therefore, within the jural aspect, *power* only surfaces as a reminder of its original cultural–historical meaning. Another way to formulate this situation is to say that within the jural aspect *power analogically* reflects the original meaning of cultural–historical power. What is known as *legal power* is therefore synonymous with the *jural competence* of the government of a state to form law on its territory. In terms of a theory of *functional modes* or *modal aspects*, this concerns a backward-pointing analogy from the jural aspect to the cultural–historical aspect. This backward-pointing analogy (also designated as a *retroicipation*), must be distinguished from the *typical function of the state* within the cultural–historical aspect (the ‘power of the sword’). And this jurisdiction, in turn, requires the monopoly of the state over the ‘power of the sword’ in order to be able to integrate the diverse legal interests on its territory into a unified public legal order, guided by the idea of the public interest (*res publica*) and in order to restore any infringement of the balance of legal interests through an impartial civil and criminal legal system (Dooyeweerd 1997-III, 433–448).

Yet cultural–historical power differentiates both into subject–subject relations and subject–object relations. The former are found in the power vested in an *office* which gives one human subject power over others.¹⁵

Concluding remarks

From our analysis, it is clear that accounting for the place of the state in a differentiated society benefits from illuminating the differences between undifferentiated societies and differentiated societies. Traditional or undifferentiated societies find their lower limit in the extended family (*Grossfamilie*). Membership in the clan is more extensive, while a stronger political element guides the tribe. Although a political element is always present in such societies, their lack of societal differentiation results in an undifferentiated form of organization. As a consequence, such societies *as a whole* may now act as an economic unit, then as a political unit and afterwards as a fiduciary unit. In the case of differentiated societies, however, these various societal spheres not only are independently organized, but are also guided by a distinct functional aspect of reality: the business enterprise is qualified by the *economic aspect*, the state by *the jural* and a community of faith by the *certitudinal aspect*.

Within Roman law, the development from the initial undifferentiated *ius civile* to what became known as the *ius gentium* should be seen as the starting-point of our current common law or civil private law, aimed at the protection of the personal freedom of individuals participating in the legal intercourse of a differentiated society. Yet, during the subsequent developments of the medieval era, feudo-vassalism is defined by land tenure and homage while portions of

governmental authority were still spread over cities, guilds and market communities. The medieval guild system continued the undifferentiated structures of the middle ages, evincing similarities with the extended family and sib, but without any real or fictitious common descent. The land estate known as a Manor served in English law as the basis of undifferentiated, partially overlapping communities, but lacking an exclusive jurisdictional territory.

The challenge was to integrate the emerging differentiated prevailing laws and legal institutions into a unified legal order in anticipation of what became known as the modern state. The traditional whole-parts relation appeared to be unable to account for the acknowledgment of different societal spheres displaying their *own inner laws*. Groen van Prinsterer, Abraham Kuypers, and Dooyeweerd explored the significance of this insight in terms of what they designated as the principle of sphere sovereignty. More recently Habermas, Münch, and Rawls, although not consistently, at least in certain contexts subscribe to the idea of differentiated societal spheres with their own inner laws.

However, the process of societal differentiation occurring since the late middle ages, for example between church and state and between the nuclear family and the business enterprise, exemplified the reality of distinct societal spheres with their inner laws. The emergence of the modern state prompted Bodin to introduce the feature of sovereignty as a distinctive characteristic of the state. The test for the proper meaning of this characteristic within the context of distinct, sphere-sovereign societal entities, is whether its application to the state can avoid an unlimited view of governmental authority. Analysing this issue required a brief historical digression probing the distortions caused by an over-extension of the whole-parts scheme. Alternatively, it should be acknowledged that no individual is ever fully absorbed within any particular societal sphere. This insight implies the distinction between the *specific law* of societal entities distinct from the state (*ius specificum*) and the public legal sphere guiding state activities, specified by the idea of public law (*ius publicum*). The concluding paragraph focuses on the fundamental distinction between the *jural competence* of the state and its connection with *cultural–historical power*.

The place of the state within a differentiated society is therefore determined by a twofold limitation. In the first place, it is limited by its concern for the *res publica* on the basis of integrating all *legal interests* on its territory within one *public legal order*. In the second place it is demarcated by the inner spheres of competence of all the non-political societal entities on its territory, which are not brought into being by the state but ought to be acknowledged by the state in ‘their own right’. Just as little as these non-state societal entities are *parts* of the state, the state is a societal entity that can be absorbed by any non-political community or collectivity, such as the church-institute, a business enterprise, or the people as an ethnic cultural community.

Ultimately, our preceding analysis aims at avoiding a totalitarian appreciation of the place of the state within a differentiated society.

Acknowledgements

This work is based on the research supported in part by the National Research Foundation of South Africa. Any opinion, finding and conclusion or recommendation expressed in this material is that of the author(s) and the NRF does not accept any liability in this regard.

Notes

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1. This means that what Groen van Prinsereer, Abraham Kuyper, and Herman Dooyeweerd designated as the principle of sphere sovereignty has not been realized in undifferentiated societies. It was Jean Bodin who introduced, as a distinctive feature of political authority, the term *sovereignty* (this aspect will get more attention later on in this article).
2. A fealty is a pledge of allegiance of one person to another.
3. 'Das Mittelalter kennt eine Unzahl von Obrigkeiten und eine oberste, die diese Obrigkeiten bedingende, aber auch von ihnen selbst stark bedingte Gewalt und neben dem das allen übergeordnete geistliche Weltreich der Kirche, das mit seinen belehnten Würdenträgern selbst einen Teil der Obrigkeiten bildet und als Ganzes dann noch obendrein allen insgesamt übergeordnet ist; aber es kennt keinen Staat als einheitliche souveräne Willensorganisation der Gesamtheit, wobei es zunächst gleichgültig ist durch wen diese Souveränität ausgeübt wird.' [The Medieval era knows numberless authorities and an authority which determines these authorities while itself being conditioned by strong forces, and adjacent to them the spiritual world empire of the church super-ordained over all of them, which with its indebted dignitaries constitute themselves a part of the authorities and then on the whole, in addition, is an order embracing all together. But it does not know a state as a unified, sovereign will-organization of the whole, where it is irrelevant who exercises this sovereignty.]
4. In passing, we may note that Kuyper, in spite of his adherence to the idea of sphere sovereignty, at the same time was still influenced by an organic view of human society, revealing ideas advanced in the romantic movement and thought-schemes going back to the thought of Aristotle. This explains why he designated the state as an *Ethical Organism (Zedelijke Organisme)* and why he advocated an organic idea of the right to vote, which he reserved for the (male) head of households, similar to what Rawls holds in his *Theory of Justice* (Rawls 1999, 111).
5. The historical roots of the concept sovereignty are amply highlighted in the work of F.H. Hinsley on sovereignty (1989). See in particular Chapters III and IV (45–157). In the research volume edited by Hanns Kurz, the contributions of Harold Laski, Moritz Stockhammer, Hans Kelsen, and Friedrich, August von der Heydte are related to our current discussion. Prokhovnik (2007) focuses on the contemporary situation regarding the idea of sovereignty.
6. More detail about this movement with its historical significance for the rise of the modern idea of the state is found in the work of Waldecker (1927) and in Von Hippel (1955 in particular Chapter 8: Nominalism and the origination of the idea of the state—337–351). See also Von Hippel (1963), 51 ff. For an exposition of the more general philosophical nuances of nominalism, see Von Hippel (1955, 352–365, 1963, 51 ff., 68) and Strauss 2004: (particularly pages 265–272) and Strauss 2009 (particularly pages 370–379).
7. '[F]ür die Trennung einer natürlichen und übernatürlichen Welt.'
8. We shall return to the nature of 'power' below.
9. '... sowie zwischen diesen und dem Staat verhält es sich ähnlich wie mit dem Unterschied zwischen dem Ganzen und seinen Teilen' (Bodin 1981, 521).
10. 'Ἐπειδὴ πᾶσαν πόλιν κοινωνίαν ... [The translation is in the text.]
11. 'Teile stehen aber dann in einem rechten Verhältnis zum Ganzen, wenn ein und dasselbe Prinzip sie regiert.'
12. 'Es gehört der Bildung, dem *Denken* als Bewußtsein des Einzelnen in Form der Allgemeinheit, daß Ich als *allgemeine* Person aufgefaßt werde, worin *Alle* identisch sind. *Der Mensch gilt so, weil er Mensch ist*, nicht weil er Jude, Katholik, Protestant, Deutscher, Italiener usf. Ist' (Hegel, 1821, 349; § 209).
13. Dooyeweerd distinguishes 15 aspects: number, space, movement, the physical, biotic, sensory, logical–analytical, the cultural–historical, the lingual, social, economic, aesthetic, jural, ethical, and certitudinal.

14. Object-functions are latent, they depend upon the activity of a subject to make them patent. A stone cannot identify and distinguish, but a human being can open up its latent analytical object-function. It cannot name itself, but when it is named by a lingual subject, its object-function within the sign-mode of reality is disclosed. Note that expressions such as *an analytical object* or a *lingual object* are denoting *function concepts*, they concern particular object-functions. The concept of a *legal object* is therefore also a function concept (e.g. the property right on a diamond ring).
15. The latter are manifest in the capacity of the free, formative human fantasy to produce all kinds of tools. Initially humans were considered to be unique in the use of tools. Since animals also use tools, the criterion shifted to the manufacturing of tools, but even in this case, a qualification was needed, because animals also produce tools. What is absent in the case of animals is an inventive formative imagination which provides account for practically useful archaeological criteria in terms of which typically human tools can be distinguished (Narr 1988, 280–281). For example, producing tools should not be suggested by what is given (e.g. in distinction from a stick from which irritating leaves and twigs need merely be removed). A tool should not merely function as extended bodily organs and likewise the mode of production should also not be suggested.

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