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# Assessing the historical-philosophical background of the German *Staatslehre* in the light of the type law of the state

*Danie Strauss*  
*School of Philosophy*  
*Potchefstroom Campus*  
*North-West University*  
*dfms@cknet.co.za*

## Abstract

*In this article the contribution of the German Staatslehre towards an understanding of the type law of the state will be assessed in terms of various systematic distinctions and by taking into account significant historical connections. From its inception the German Staatslehre concerned itself with the state and its power. Since 1894 the discipline called Allgemeine Staatslehre comprised a systematic and a historical part. The phrase Allgemeine Staatslehre replaced its attachment to constitutional law (Staatsrecht) and natural law. After a brief reflection on the question if the Greek-Medieval era knew the state, the assessment of Jellinek is mentioned, namely that the discipline Allgemeine Staatslehre is dominated by two opposing world views, the one individualistic-atomistic and the other one collectivistic-universalistic. This calls for an account of the relationship between universality and what is individual against the background of the distinction between modal laws and type-laws. The distinction between what is just and unjust as well as that between right and might (Recht und Macht) opens the way to paying attention to additional features of the state as well, such as the relationship between state sovereignty and legal sovereignty. Characterizing the state in terms of one undifferentiated function evinces a lack of understanding for the multi-faceted nature of the state. This presupposes a non-reductionist*

*Christian ontology safeguarding theoretical thinking from one-sided distortions (absolutizations), such as atomistic and holistic views. Jellinek even refers to individualism and universalism as two opposing world views. As an alternative the relationship between universality and what is individual is employed on the way to distinguishing between modal laws and type laws. The connection between individualism and nominalism is highlighted and followed up by contemplating the dualism of is and ought. The views of Jellinek and Smend are treated in some more detail. Smend mutually separates state and law while at the same time attempting to hold on to their inseparable connectedness. Atomistic and organicistic theories of the state also reveal an inner conflict within political theory. The notion of the validity of values (Werten) illegitimately crosses the abyss between Sein and Sollen. The continued influence of nominalism eliminated universality outside the human mind and reduced factual reality to pure individuality. Jellinek struggled to reconcile his sociological and juridical state concept and in the final analysis did not succeed in avoiding the Leviathan of the total state. Ultimately this issue raises questions concerning the limits or boundaries of the competence (jural power) of the state and it prompted political scholars to face what they designated as the crisis of Allgemeine Staatslehre (Smend and Von Hippel). The legacy of an Allgemeine Staatslehre paved the way for the next generation to develop a more comprehensive and coherent understanding of the nature (and structural principle) of the state. Finally a brief indication is given of key elements required in our understanding of the type law of the state.*

During the 19<sup>th</sup> century and the first half of the 20<sup>th</sup> century the term *Staatslehre* was established as the equivalent of *political science* or *political theory*. Yet, scholars working within the domains of political theory and the science of law attach different meanings to this term, depending upon their respective views on the nature of the state and the nature of law. The German legacy gave birth to the idea of the *Rechtsstaat* (just state) which is unknown in England where the idea of the “rule of law” developed under different circumstances (see Dicey, 1927:179 ff. and Blaau, 1990:89 ff.).

The idea of a *Rechtsstaat* presupposes an insight into the *structural principle* of the state, which will also be designated as the *type law* of the state in this article. This study intends to investigate the historical-philosophical

underpinnings of those ideas which wrestle with the *structural principle* of the state even though there are diverging stances within the German *Staatslehre* legacy. The *Allgemeine Staatslehre* of Georg Jellinek provided the platform for opposing schools of thought, such as the Berlin school and the Vienna school. The former school includes scholars from Berlin (Rudolf Smend and Hermann Heller), as well as from Bonn (Carl Schmitt, Gerhard Leibholz and Leo Wittmayer), keeping in mind that they represent varying points of view. Jellinek was a legal positivist (he studied at the University of Vienna), reminding us of another well-known legal scholar from Vienna, Hans Kelsen, who is a representative of the neo-Kantian Marburg school and also known for his legal positivism.

We commence with an overview of the relevant literature and some historical considerations (subdivisions 1-6), followed by a theoretical reflection on the systematic issues at stake (subdivisions. 7-11), which will take us to a further application of systematic (structural) issues (subdivisions 12-16).

## 1. The focus of *Staatslehre*

Long before the modern state emerged, political elements permeated human societies. The most obvious ones are displayed in relationships of super- and subordination. However, the mere presence of authority structures within human society does not ensure the existence of a genuine state. Relationships of super- and subordination are primarily a manifestation of various kinds of *power* and among them state-power is considered to be a core element of the state. In itself this characterization, inter alia, points at the need to explain the relationship between the *state*, *power* and *law* (in the *jural* sense of the term). When the idea of the state is explored it should be kept in mind that particularly within the German academia a discipline called *Staatslehre* (*Theory of the State*) dominated the scene. It is directed at the “essence or structure” of the state (“das Wesen oder die Struktur des Staates”) (Vollrath, 1998:53). M. Zilnizki distinguishes between a transhistoric universal application of the state concept and a historic understanding where the concept of the state differentiates into a *structural-historical part* and a *word and concept-historical variant* (“*strukturgeschichtliche und eine wort- und begriffsgeschichtliche Variante*”) (Zilnizki 1998:1).

A structural-historical perspective does not depend on the emergence of the meaning or the concept of a state, but rather on the development and combination of forms of government (*Herrschaftsformen*) which belong to an order designated as a “state”. Understood in this way it does not matter that

the literature at the time does not mention the word *state*. Zilnizki considers expressions such as “civitas” (S. Pufendorf, G. W. Leibniz), “societas civilis” (H. Conring), “res publica” (V. Gentilis, J. Lipsius), “république” (J. Bodin, J.-J. Rousseau), “commonwealth” (Th. Hobbes), and “body politic” (J. Locke). He also remarks that viewing the state as a *transhistorical* phenomenon employs a universal category peculiar to Germany. During the transition from the 18<sup>th</sup> to the 19<sup>th</sup> century the concept *state*, which traditionally included the addition of peculiar meanings, now turned into an *encompassing general concept*.

## 2. The emergence of distinct designations of the state

Distinct political concepts of order eventually became terms used in German for the state, such as “polis,” “politeia” and “res publica”. This applies to Plato’s “Politeia” as well as Cicero’s “De re publica” and for Bodin’s “Six livres de la république” (Zilnizki, 1998:2).<sup>1</sup> Such an encompassing term opened the way to speak of the state of ancient Greece, the Medieval state or the Modern state. In German the word “state” thus acquired the function of an encompassing concept for distinct forms of societal organization or political ordering. This development enabled prominent scholars from the previous century to publish works with the title, *Allgemeine Staatslehre* (*General Theory of the State*). The standard work of Georg Jellinek has this title – the 5<sup>th</sup> print of its third edition appeared in 1928. Another well-known legal scholar from Germany, Hans Kelsen, published the first edition of his *Allgemeine Staatslehre* in 1925. Herman Heller simply used one word: *Staatslehre* (1934). Of course it should not be forgotten that Fichte published his *Die Staatslehre* already in 1813.

During the late 19<sup>th</sup> and early 20<sup>th</sup> centuries the development of *Staatslehre* did not escape from the Kantian and neo-Kantian schools of thought. Immanuel Kant wrestled with the problem of causality and freedom. He assigned causality to the modern science ideal (restricted to the “appearances”) and freedom to the personality ideal (the “Ding an sich” – the freedom of the human soul). Kant elevated human understanding to the level of the apriori formal law-giver of nature, where the categories of thought serve as ordering principles.

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1 This process of incorporating words within the German language is designated in German as “*Eindeutschung*”.

According to Hermann Cohen, the founder of the neo-Kantian Marburg school (oriented to the primacy of the science ideal), the first three categories of Kant's table of categories, namely *unity*, *multiplicity* and *totality*, specified under "quantity", should serve our understanding of society in such a way that the unity and multiplicity of societal relationships must be subsumed under the mathematical totality (all-ness) of the state (in the *Table of Categories quantity* embraces "Einheit, Vielheit, Allheit" – Kant, 1787:106). This inevitably leads to a totalitarian and absolutistic understanding of the state,<sup>2</sup> because within the mathematical "Allheit" no room is left for the original spheres of competence of non-state societal entities. Hans Kelsen, who also belongs to this Marburg school, explores this approach further in his attempt to derive all law from his hypothetical *Grundnorm* as the underlying mathematical-logical unity.

### 3. *Staatsrecht* and *Staatslehre*

Against the background of conceptions of natural law the expression "Allgemeines Staatsrecht" [*General Constitutional Law*] already emerged during the late 18<sup>th</sup> century. In the fourth edition of his 1787 work on "Institutiones juris publici Germanici" (published in Göttingen), Pütter views the discipline called *Allgemeine Staatslehre* as partly belonging to *philosophy* and partly to *natural law*. According to Von Hippel the expression "Allgemeine Staatslehre" was first employed by W.J. Behr in 1804 in his work: "System der Allgemeinen Staatslehre" [*System of a General Theory of the State* – mentioned by Von Hippel, 1963:8]. A century later, in 1899, Hermann Rehm interpreted this expression in a *naturalistic* way and at the same time defends the view that the term *Staatsrecht* should be replaced by the expression *Allgemeine Staatslehre* (see Von Hippel, 1963:7-8). The factual power of the state reveals something of the empirical side of the state while the discipline *Allgemeine Staatslehre* focuses on "the concept and the essence of the state" (see Von Hippel, 1963:9). The first edition of Jellinek's *Allgemeine Staatslehre* appeared in 1900.

Jellinek identifies three elements of the state: (i) the territory of the state (*das Staatsgebiet*); (ii) the nation of a state (*das Staatsvolk*); and (iii) state

2 When there are no political freedoms in a state (such as co-determination or co-responsibility), it is designated as *absolutistic*, and when civil and societal freedoms are absent, we encounter a *totalitarian* situation. What is designated in German as a *Machtstaat* is actually both totalitarian and absolutistic. The legal scholar Johan Van der Vyver defines the terms absolutism and totalitarianism in the same way (see Van der Vyver 1982:461).

power (*Staatsgewalt*) (Jellinek, 1928:394, 406, 427). Yet he distinguishes only two main points of view (zwei Gesichtspunkten) under which the state could be observed, respectively the state as societal structure and the state as a juridical institution. Accordingly *Staatslehre* divides into a social theory of the state (*soziale Staatslehre*) and the theory of constitutional law (*die Staatsrechtslehre*) (Jellinek, 1928:11).

#### 4. ***Allgemeine Staatslehre*: Did the Greek-Medieval era know the state?**

After Von Hippel's *Allgemeine Staatslehre* appeared 1963, Krüger used the same title, *Allgemeine Staatslehre* and published a book with the same title in 1966 (1028 pages).<sup>3</sup> Krüger points out that the history of the term "state" has not been sufficiently investigated. He mentions that although the term "Staat" is derived from the Latin word "status", it does not mean that the Romans employed the term "status" in the current sense of the term "Staat". They rather referred to their communal bond as the "populous romanus" or as the "res publica". One does find combinations such as "status republicae", "status imperii" or "status regni", but the upshot is that the term "status" was not used in the sense of a "state" during the middle ages (Krüger, 1966:9-11). He holds that neither Antiquity nor the Medieval era has known the state in the modern sense of the term (Krüger, 1966:9).

#### 5. ***From Staatswissenschaft and Staatstheorie to Staatslehre*: two opposing world views**

Sometimes the word "Staatslehre" replaces the term "Staatswissenschaft" (*Science of the State*) or "Staatstheorie" (*Theory of the State*). Yet the discipline of a *Allgemeine Staatslehre* did not leave constitutional law behind. When the field of constitutional law (*Staatsrecht*) is also incorporated, the total science of the state should be indicated, "*die gesamte Staatswissenschaft*". However, according to Jellinek, the discipline *Allgemeine Staatslehre* is dominated by two opposing *world views*, namely an *individualistic-atomistic* one and a *collectivistic-universalistic* world view (Jellinek, 1966:174). This claim covers both the Greek-Medieval legacy and the post-Renaissance developments.

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3 The slow shift towards the current practice to refer to "Staatslehre" as "political science" is reflected in the title of a work of Zippelius in 1980: *Allgemeine Staatslehre* (Politikwissenschaft).

Since the Renaissance the atomistic world view dominated the scene, for example in the classical mechanistic world view where the universe is nothing but *particles in motion*. This inspired individualistic theories of human society and hypothetical explanations of the emergence of the modern state within *social contract theories*. The opposite view portrays the state as a spiritual-moral organism (see Krüger, 1966:147 ff.).<sup>4</sup> Zippelius discusses the question whether the state is an organism [*Der Staat als Organismus*]. The organic view appreciates the state as a living totality [“lebendiges Ganzheit”]. It is already found in the thought of Fichte who emphasized, in his 1796 work, *Grundlage des Naturrechts*, that in an organic body every part sustains the whole, and by doing this sustained itself – this also applies to how the citizen relates to the state (see Zippelius, 1980:31).<sup>5</sup>

Whereas the former “world view” restricts itself to the quantitative meaning of the *one and the many*, the latter chooses for the idea of an *organic whole and its parts* as mode of explanation for state (and society). Historically these two views respectively relate to the individualistic rationalism of the Enlightenment on the one hand and the universalistic irrationalism of post-Kantian freedom idealism on the other. A Christian, non-reductionist ontology will aim at avoiding the reification (absolutization) of any aspect of reality.

## 6. *Being-a-state and individual states*

Intimately connected to reflection on the nature of the state – the search after its typical structure – is the question of the nature of *principles*. This question flows directly from the concern to gain an understanding of the *structural principle of the state*. Such a structural principle must have a *universal scope* since it encompasses whatever is known as a genuine state. Heller employs the expressions “Strukturbegriff” (*structure concept*) and “Gestaltbegriff” (*form concept*) as synonyms. Every Gestalt is general

4 Although Rousseau proceeds from an individualistic starting-point in his *Contrat Social* (1762), concluding the contract immediately produces a moral collective body transforming the former independent individuals into indivisible parts of a new whole. “Immediately the association produces, in the place of the particular person of every participant, a moral and collective body, composed out of just as many members as the voices of the gathering, which derives from this act its unity, communal self, life and will.” And just before this we read: “Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as a indivisible part of the whole” (Rousseau, 1975:244). A discrete multiplicity is turned into a whole with its parts – the switch from individualism to universalism.

5 Fichte writes: “In dem organischen Körper erhält jeder Teil immerfort das Ganze, und wird, indem er es erhält, dadurch selbst erhalten.”

and particular. Through its form-laws it serves as the yardstick for other forms, and through its individuality it is demarcated from other forms. One can therefore say that the modern European state has particular form-laws that are hall-marks of the (individually different) German, French and Italian states (Heller, 1934:63).

This issue relates to a basic distinction of a non-reductionist ontology, namely that between the law side and factual side of reality. The structural principle (*type law*) holding for individual states has a *universal scope* and in its *orderliness* (or even disorderliness) every individual state in an equally universal way displays its *subjectedness* to this structural principle by being orderly or relatively disorderly. Every state is therefore subject to the universal law for *being-a-state*. Knowledge of such a universal law does not automatically provide us with the unique forms particular states can assume. Landmann captures this situation in a striking way where he writes: “Imagine aristocracy according to all its predicates, and not even once will it be possible to come up with the faintest idea of Sparta” (Landmann, 1973:81).<sup>6</sup>

## 7. Modal laws and structural principles (type laws)

Is there a difference between (modal) *laws* and (structural) *principles*? The physical laws for material entities, such as the laws of energy-constancy, non-decreasing entropy and gravity, hold without any specification. That is to say, they hold for all possible classes of entities. Such laws represent instances of *unspecified universality* and are found within the various aspects of reality, the ways or modes in which concrete entities exist. When these modes of being are lifted out and distinguished from others, we encounter *modal abstraction* through which modal laws could be discerned – such as arithmetical laws, spatial laws, kinematic laws or physical laws. A *typological* classification, by contrast, is directed at different *kinds* of entities which presuppose kind-laws or type laws. Since the modal aspects also serve as gateways (points of entry) to an understanding of multi-aspectual entities, modal abstraction at once accounts for the theoretical analysis of type laws as well.

For example, a type law has its own *specified universality*. The law for “being-a-state” entails that there is still an element of universality at stake, for it applies to *all* states. Yet since not everything in the universe is a state it implies

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6 “Denke dir die Aristokratie nach allen ihren Prädikaten, niemals könntest du Sparta ahnen.”



that the universality of this type law is restricted (limited), that is to say, it is *specified* to apply to states only. Every societal entity within a differentiated society has a typical function within the various aspects of reality. However, these typical functions do not eliminate the modal universality of the aspects of reality, for they are merely specified. Interestingly, the well-known German sociologist, Max Weber, is of the opinion that from a sociological perspective the modern state could be viewed as a large business enterprise, for essentially there is no difference between business enterprises and the state (Weber, 1918:15). Insofar as both a business enterprise and a state function within the economic aspect of reality they share the norming obligation to avoid excesses by observing a frugal mode of behaviour. This remark merely refers to the modal universality of the economic aspect. But as soon as the typicality of state and firm is considered, the typical differences between a firm and the state are evident. While a business enterprise cannot impose taxes on its clients, the state can tax its citizens.

In this example a distinction is drawn between what is *economic* and *un-economic*, thus merely pointing out that the modal universality of the economic aspect entails that both a state and a business enterprise can waste their money by acting un-economically and that both have to observe the guidance of norming economic considerations of frugality.

But it is only possible to phrase these perspectives when the economic aspect is understood in its modal universality, i.e. when the respective *typical structures* of the business and the state are disregarded. Modal laws hold universally without any specification – universities, businesses, states, families and sport clubs all have to observe the general meaning of economic norms in order to act in non-excessive ways.

When Breuer discusses “theories about everything” he closely approximates what we have called *modal universality*. He relates universality to what holds for the “entire material ‘world’” such that “no part of the material world is excluded from its domain of validity” (Breuer, 1997:2). The physicist Von Weizsäcker captures the idea of modal universality aptly where he explains that the laws of quantum physics hold for all possible “objects”: “Quantum theory, formulated sufficiently abstract, is a universal theory for all *Gegenstandsklassen* [classes of objects]” (Von Weizsäcker, 1993:128).

Whereas modal laws hold for all possible classes of (natural and societal) entities, type laws and typical principles solely hold for a limited class of entities, namely those belonging to that type. Note that the term “laws” may apply to norming laws (principles) or to non-norming laws (natural laws).

## 8. What is just and unjust: enabling the existence of the state

An investigation of the structural principle of the state therefore may include a helpful distinction, namely between *modal jural norms* (specified or unspecified) and *type laws* (always manifest in the *typical functions* which a particular kind of entity displays within all aspects or reality). Heller categorically states: “Without separating what is just from what is unjust [*Recht und Unrecht*] no justification of the state is possible” (Heller, 1934:218). Implicit in this remark is the distinction between the jural aspect and the way in which the state functions within it. Heller here discusses the state function and jural function [“*Staatsfunktion und Rechtsfunktion*”] (Heller 1934:216 ff.). Yet he does not realize that the jural is but one of the many functions of the state.

## 9. *Recht and Macht*

Throughout the history of reflection on the nature of the state (even when designated by other terms), the presence of authority structures within human society generated the idea of one or another form of *power*. Since Bodin introduced the term *sovereignty* it was not only intimately connected to the idea of power but also to the recognition of a delimited cultural area, known as the *territory* of the state. By and large Theodor Litt is correct in noticing that the history of political theories toggled between the absolute *power* claim of the state and the idea that it should only protect what is *right* – which underscores the importance of the simultaneous presence of *might* and *right* (*Macht und Recht* – see Litt, 1948:23). However, the question is how one should relate these various “components” of the state? Is there a difference between *state-power* and *jural power*, or between *state sovereignty* and *legal sovereignty*? To these one can add questions regarding government and citizens, state organs, the territory of a state, the legal order of a state, constitutional rights, personal freedom, and so on. Does one have to prioritize to any one of these “factors”?

Power within the state is easily identified with the military strength at its disposal. The earlier development of modern political theories contemplated two extremes of *popular sovereignty* and the *sovereignty of the monarch*. Early in the 20<sup>th</sup> century an alternative, the theory of state-sovereignty, surfaced – compare the views of Gerber, Laband, Jellinek and Otto Von Gierke. When the state is identified with its *power*, the demands of *right* are

excluded, thus turning the state into a pure power institution. Von Gierke, for example, considers *might* and *right* as two independent and specifically distinct sides of communal life (see Von Gierke, 1915:105). The jural is thus turned into something completely *external* to the state. This raises a question regarding the jural competence involved in the formation of law. Is it possible for an institution that is characterized by the non-judicial feature of cultural-historical power to play a role within the domain of law formation?

In his *Staatslehre* Heller holds that considering a social order within a certain domain is still insufficient, at least if it does not include the aim to strive for a *just order*. "The sanction of the state is only possible when the state function is related to the jural function."<sup>7</sup> This formulation is slightly awkward insofar as it suggests that the state only has one undifferentiated "function", instead of acknowledging its *multiple* functions within all aspects of reality. In this context it may be helpful to refer to the integration theory of Smend since Mols discussed the question regarding "*Allgemeine Staatslehre oder politische Theorie?*" by using Smend's integration theory as an example (see Mols, 1969). The first systematic work in which Smend explains his integration theory was published in 1928 (*Verfassung und Verfassungsrecht*). In the *Evangelisches Staatslexikon* (1966) Smend explains the word and concept of integration: "The word originally means the restoration, but then as such the regeneration or origination of a unity or totality from single elements, such that the recovered unity is more than the sum of the united parts."<sup>8</sup>

Badura explains that according to Smend the

constitution is the legal ordering of the state, more precisely, of the life in which the state displays its vital reality, namely its processes of integration. The meaning of these processes is constantly found in the restructuring of the living totality of the state, and the constitution is the legislative norming of particular sides of this process (Badura, 1977:319).

Kelsen points out that Smend seriously intends to transform the traditional opposition of state and law into that between *integration and law* (Kelsen, 1930:62). Smend adds another step to this idea, by considering state and law (*Staat und Recht*) as indivisibly connected but nonetheless self-contained provinces of spiritual life, serving each other in the realization of particular

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7 "Nur durch beziehung der Staatsfunktion auf the Rechtsfunktion ist die Sanktion des Staates möglich" (Heller, 1934:217).

8 "Das Wort meint ursprünglich die Wiederherstellung, dann aber überhaupt die Herstellung oder Entstehung einer Einheit oder Ganzheit aus einzelnen Elementen, so dass die gewonnene Einheit mehr als die Summe der vereinigten Teile ist" (Smend, 1956:482).

value-ideas.<sup>9</sup> On the same page Kelsen immediately highlights the fact that the concepts “enclosed within itself” (*in sich geschlossen*) and inseparably connected (*zwar untrennbar verbunden*) are contradictory. The *connection* eliminates after all the *mutual separation*.

Van Ooyen remarks that Smend, in accepting “a supra-individual state substance”, which contradicts his own intentions, demonstrates that he did not liberate himself from the organic political theory of Von Gierke. Kelsen rejects these universalistic stances for according to him both the organic political theory and the integration theory fixate an understanding of the state as a collective body which solidifies existing power relationships (Van Ooyen, 2014).<sup>10</sup>

It is noteworthy that none of the above-mentioned authors realized that the term *integration* reflects the meaning of the *biotical* mode of experience. Every living entity is subject to the biotic time-order of birth, growth, maturation, ageing and dying. Growth manifests a process of differentiation and integration, for if a growing entity does not *integrate* its differentiating life processes the living entity will *disintegrate* and die. Therefore the original aspectual (modal) meaning of the term integration is found within the biotic aspect of organic life. In aspects other than the biotic one merely encounters *analogies* of this original biotic meaning of differentiation and integration. Consequently the transition from undifferentiated to differentiated societies *analogously* reflect the original biotical meaning of growth. In spite of this similarity, there are also important differences between life in a biotic sense and social life. To mention just one: biotic life is subject to biotic laws, whereas social life is guided by norming principles, presupposing an accountable free human will. When it is not realized that within the element of similarity the difference evinces itself, human society is appreciated as *an organism*, resulting in a reductionist view. This *organicistic* reduction is similar to the arithmeticistic reduction present in all *individualistic* or *atomistic* orientations – just recall the earlier mentioned way in which Jellinek opposed the two world views, namely an *individualistic-atomistic* one and a *collectivistic-universalistic* world view. An individualistic approach over-estimates the numerical meaning of the one and the many and ultimately advocates a

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9 According to Smend state and law are two “zwar untrennbar verbundene, aber doch je in sich geschlossene, der Verwirklichung je einer besonderen Wertidee dienende Provinzen des geistigen Lebens” (quoted by Kelsen, 1930:62).

10 “Wie die organische Staatslehre ist für Kelsen damit die Integrationslehre Ausdruck autoritär fixierten, obrigkeitstaatlichen Denkens, deren politischer Zweck es dabei sei, über die Vorstellung vom Staat als tatsächlichem, souveränem Kollektivgebilde die bestehenden Machtverhältnisse zu zementieren.”

reductionist view in which everything in the universe is reduced to a multiplicity or to analogies of the one and the many within the non-numerical aspects of reality.

## 10. Individualism and nominalism

Moreover, individualist thinkers often pursue a naturalistic epistemic ideal with nominalistic and natural law underpinnings. Karl Bergbohm employs physicalist terms, such as *atoms* and *molecules*, for his search after the concept of law in a metaphoric sense applies a naturalistic concept of science, directed to “those atoms that have to be present in every jurial molecule [*Rechtsmolekül*]” (Bergbohm, 1892:82). During this time the Baden school of neo-Kantianism expanded the Kantian distinction between *Sein* and *Sollen* (*is* and *ought*) by introducing the notion of *values* (*Werten*) within the realm of “Sollen” (*ought*). Initially Rickert assigned a supra-temporal, ideal being to these values, but historicism soon relativized this view by transforming them into varying personal choices of the individual. But operating with distinct “values” that apply like modal norms does not elucidate the type law of each of societal entities. For example, Eduard Spranger, a student of Dilthey, distinguishes the following values: the theoretical (truth); the economic (what is useful); the aesthetic (form and harmony); the social (love); the political (power); and the religious (unity) (see Spranger, 1914:5, 109-130). Rickert, in turn, holds that what belongs to the realm of values is *valid* (*Geltung*). This view shows that the validity of values disqualify them to be compared with pre-positive principles, for the latter are not valid yet. In fact, acknowledging modal laws and type laws presupposes the reality of *ontic normativity*. Ontic normativity (pre-positive principles), in turn, entails the distinction between pre-positive principles and the way in which a *positive form* is given to such pre-positive principles in unique historical circumstances.

## 11. The dualism of *Sein* and *Sollen*

Pre-positive principles are universal, constant points of departure for human action, but they are not in and of themselves *valid* or *in force*. In order to be *enforced* or *made valid*, pre-positive principles are in need of a competent organ, on the intervention of an accountable human subject. In his *Allgemeine Staatslehre* Hans Kelsen distinguishes between natural reality, which is *causally* determined (the domain of the *Sein*) and the state, as a spiritual entity (belonging to the domain of the *Sollen*). They are two

mutually independent systems characterized by Kelsen as constituting a dualism (Kelsen, 1925:14-15). Within the domain of the *Sollen* Kelsen denies the difference between private law and public law. Ultimately he resolves the concept of the state into a norm-complex of jural functions. This view conforms to the orientation of those who *separate* natural causality and normative accountability, a conception that is fairly widespread among the neo-Kantian scholars of the Baden and the Marburg schools of thought about one hundred years ago.

Instead of asking whether our actions are caused by our will Kelsen holds that the human will is causally determined, that is to say, that the human will is *objectively determined* by the *law of causality* (Kelsen, 1960:98-99).<sup>11</sup> On the basis of this (Kantian) dualism between *Sein (is)* and *Sollen (ought)*, Kelsen does not realize that the characteristic feature of normativity introduced by him actually contradicts his restriction of the domain of *Sein* to (physical) causality. The feature he introduces is “being valid” (*Geltung*), which is synonymous to what is *in force (in Kraft)*. This also applies to the *Grundnorm* (basic norm), which is not identical to the sum of all positive norms of a legal order, but the *presupposed, positing ground of their validity* (“ihren Geltungsgrund darstellende, vorausgesetzte, nicht gesetzte Norm” – Kelsen, 1960:201). The statement that a specific jural norm is *in force* is equivalent to saying that it is *valid*.<sup>12</sup> Consequently, the primary dualism between (physical) causality (*Sein*) and normative accountability (*Sollen*) is relativized by introducing within the *Sollen* domain the physical expressions *Geltung* and being *in Kraft*. The irony is therefore that the aim of keeping the domain of *ought* separate from the *Sein* is jeopardized by this employment of *physical* analogies. I pointed out that the term *Geltung* is the equivalent of the physical terms *Kraft* (German) and *force* (English).

## 12. Continuing the legacy of nominalism

The legacy of *Staatslehre* embraces diverging trends of thought regarding the nature of the state. The general spirit of the late 19<sup>th</sup> and early 20<sup>th</sup> century, its *Zeitgeist*, was strongly influenced by the post-Renaissance nominalism. Nominalism denies any universality outside the human mind

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11 “Mitunter leugnet man zwar nicht, daß der Wille des Menschen, wie alles Geschehen, tatsächlich kausal bestimmt ist, ...” (Kelsen, 1960:98). “Da die objective Bestimmtheit des Willens nach dem Gesetze der Kausalität nicht geleugnet werden kann, ...” (Kelsen, 1960:99).

12 “daß die Aussage: eine bestimmte Rechtsnorm ist ‘in Kraft’ (‘in force’) dasselbe bedeutet wie: eine bestimmte Rechtsnorm steht in Geltung, ...” (Kelsen, 1960:82).

and therefore eliminates any *order for* or *orderliness of* entities. Jellinek, for example, positions *law (das Recht)* within our human representations, such that providing a closer determination of what *law* is amounts to establishing which part of human consciousness should be designated as law (Jellinek, 1966:332).

This intellectual tradition strips the concrete societal reality of the state also of its universal side. Heller holds that owing to its universality the concept of law cannot capture natural reality or cultural reality in its *individuality*. A single leaf of a linden tree just like a specific human being or state, is strictly individual. Since concepts aim at universal features all individuality is “irrational”. Regardless how many *Gattungsbegriffen (kind or type concepts)* through multiple concentric circles may approximate what is individual, they will never be able to arrive at genuine knowledge of the historical, socially individualized reality.<sup>13</sup>

### 13. The universal state concept, the historical state concept and the concrete state concept

Von Hippel embarks on a slightly different path by distinguishing between *idealistic* and *naturalistic* trends within the discipline of *Allgemeine Staatslehre* – the former concerns the *ought* and the latter what factually *is*. But the discipline itself is positioned between *natural law* and *naturalism* (Von Hippel, 1963:5-9). His own exposition attempts to mediate between the universal state concept, the historical state concept and the concrete state concept (Von Hippel, 1963:10-13).

### 14. The sociological and juridical state concept of Jellinek

Von Hippel opposes the approach of Jellinek in his *Allgemeine Staatslehre* because he is still a victim of the *positivist* concept of science. Nonetheless

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13 “Mit Gesetzesbegriffen wird überhaupt keine, weder eine Kultur – noch eine Naturwirklichkeit erfasst. Denn ausnahmslos ist alle Wirklichkeit Individualität, das einzelne Lindenblatt um nichts weniger als der einzelne Mensch. Alle Individualität ist irrational und kann durch noch so viele konzentrische Kreise von Gattungsbegriffen erfasst werden. Weil uns aber in den Kulturwissenschaften vornehmlich die historisch-sozial individualisierte Wirklichkeit interessiert, deshalb können Gesetze und allgemeine Gattungsbegriffe der Kultur zwar wesentliche Voraussetzungen für eine Wirklichkeitserkenntnis bieten, eine Wirklichkeitserkenntnis durch sie bleibt aber prinzipiell ausgeschlossen” (Heller, 1934:60-61).

they share the rejection of an individualistic or atomistic approach. Jellinek writes: “Whatever the original forms of human communal existence might have been, it is not possible to find a pre-historical or historical co-existence which is completely atomistic.”<sup>14</sup> Yet, according to Von Hippel the positivistic state concept of Jellinek is dualistic. It falls apart in a sociological state concept and a juridical state concept. The former characterizes the state as the united communal bond of settled humans equipped with original governing power.<sup>15</sup> In spite of the scope of his encompassing work (*Allgemeine Staatslehre*) Jellinek dedicates merely a couple of pages to his definition of the state in a juridical sense. He speaks of the state as “Rechtssubjekt” (jural subject) and combines this designation with the idea of a “body” of people (*Körperschaft*). As a legal concept the state is then defined as a settled people equipped with an original power to rule, or simply as a territorial body equipped with original governing power.<sup>16</sup>

It is striking that the “power to rule” or “to govern” is central both to the sociological and the juridical definitions of the state. The connection with law – such as stating that the state is a legal subject – is merely introduced as an addendum.

## 15. Escaping from the *total state*?

Therefore, when it comes to the demarcation of state-power, Jellinek does not hesitate to employ well-known terms derived from Hobbes.

The state becomes the big Leviathan, absorbing all public power within itself. ... It is shown in that it claims the right to dispose, through its law, over all governing powers on its territory. The modern state grants every individual and every societal collectivity a legally delimited domain of freedom vis-à-vis this state-power, an independent right to rule, although by virtue of its essence the state cannot acknowledge any intransgressible border opposing it.<sup>17</sup>

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14 “Wie immer die Urformendes menschlichen Gemeindeseins beschaffen gewesen sein mögen, jedenfalls ist ein völlig atomistisches Nebeneinander-bestehen der Menschen vorgeschichtlich und geschichtlich nicht nachzuweisen” (Jellinek, 1966:365).

15 “Der Staat ist die mit ursprünglicher Herrschermacht ausgerüstete Verbandseinheit seißhafter Menschen” (Jellinek, 1966:180-181).

16 “Als Rechtsbegriff ist der Staat demnach die mit ursprünglicher Herrschermacht ausgerüstete Körperschaft eines seißhafter Volkes oder ... die mit ursprünglicher Herrschermacht ausgerüstete Gebietskörperschaft” (Jellinek, 1966:183).

17 “Der Staat wird der große Leviathan, der alle öffentliche Macht in sich erschlingt. ... Das zeigt sich darin, daß er sich das Recht zumischt, über alle Herrschaftsgewalt auf seinen Gebiete durch sein Gesetz zu disponieren. Der moderne Staat erkennt zwar



This implication flows from the fact that Jellinek identifies ruling force with state power:

Ruling is the criterion which distinguishes state power from all other powers. Therefore when ruling power is found in collectives integrated within the state or an individual, it is derived from state power, even when these instances of ruling power turned into the internal law of these collectives, not original, but derived power.<sup>18</sup>

Von Hippel is fully justified when he recognizes in the thought of Jellinek the idea of the “total state” since the state is the “sole owner of freedom” (“Der Staat als alleiniger Inhaber der Freiheit”) (Von Hippel, 1963:116). In relation to the Leviathan a person is a complete subject and called to fulfil many duties, among which the most basic one is the total call to duty flowing from being subjected to the sovereignty of the state, which does not have any legal boundaries (Von Hippel, 1963:117).

Since ancient Greece this view continues key elements of attempts to delimit the jural competency of the state and state-law (see Strauss, 2012). It also explains why various German scholars reflected on what appears to be the crisis of political theory (*Allgemeine Staatslehre*). When Rudolf Smend published his work “Verfassung und Verfassungsrecht” [*Constitution and Constitutional Law* (1928)] he immediately addresses the foundation of political theory with the heading: *Die Krisis der Staatslehre* [*The Crisis of Political Theory*]. With Jellinek in mind he refers to the first theoretical assumption of the largest and most successful school of political theory and constitutional law within the German lingual domain (“staats-theoretischen und staatsrechtlichen Schule des deutschen Sprachgebiets”), namely that the state cannot be viewed as a *part* of reality [“das der Staat nicht als ein Stück der Wirklichkeit betrachtet werden darf”]. According to him this situation indicates a crisis, not only for *Staatslehre*, but also for *Staatsrecht* (Smend, 1928:121). The diagnosis of a crisis is also connected to the above-mentioned problem of delimiting the (jural) competence of the state.

Where Van Ooyen discusses Kelsen’s critique of Smend’s idea of the “state as integration,” he explains that the majority vote, as parliamentary

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jedem Individuum und jedem Verbands ein gesetzlich begrenztes Gebiet der Freiheit von seiner Gewalt zu, ein selbständiges Herrscherrecht jedoch, das ihm als unübersteigliche Schranke gegenübersteht, vermag er zufolge seines Wesens nicht anzuerkennen” (Jellinek, 1966:431).

18 “Wo daher Herrschergewalt bei einem dem Staate eingegliederten Verbands oder einem Individuum zu finden ist, da stammt sie aus der Staatsgewalt, ist, selbst wenn sie zum eigenen Rechte des Verbandes geworden ist, nicht ursprüngliche, sondern abgeleitete Gewalt” (Jellinek, 1966:430).

procedure through which a decision is reached, is devaluated by Smend who views it as something merely *formal*. Thus the majority principle is ultimately separated from the concept of democracy. Kelsen compares this argumentation of Smend with that of Bolsjevist Marxism on the basis of their shared appreciation of parliamentarianism and a dictatorship:<sup>19</sup>

... to what an extent Smend intends democracy when he refers to parliamentarianism, shows how close he approximates the political theory of Bolsjevism. Democracy is namely also according to Smend reconcilable with a dictatorship (Van Ooyen, 2014:34).<sup>20</sup>

Von Hippel even wrote a book on the crisis contained in the idea of the state, which incorporates the problem of the limits of state-power: *Die Krise des Staatsgedankens und die Grenzen der Staatsgewalt* ("The Crisis of the Idea of the State and the Limits of State-power") (1950).

Acknowledging state-power is fine as long as it is not viewed as the *exclusive* characteristic of the state, for once this is done, law becomes something external (and different) from the state, generating the problem of "integrating" it with the state. Kelsen highlights the *vicious circle* entailed in Smend's argumentation. Smend commences from the conviction that state is not law because the state is integration. Also, law is not integration. Yet: law is integration, from which it follows that law is state. Moreover, since integration is not a value (*Wert*) it cannot be opposed to the jural value (*Rechtswert*). Nonetheless Smend simultaneously holds that "also the judiciary should integrate". On the one hand he therefore says that the judiciary should integrate and a few pages later he states that the judiciary does not serve the integration value (*Integrationswert*) and then continues by saying that the judiciary ought to integrate (see Kelsen, 1930:67)! What makes it even more problematic is that Smend holds that the judiciary has to integrate the *legal community* which in principle belongs to a sphere that differs from the state community, although in a practical sense it may at once serve state integration. According to Kelsen the upshot of all of this is that the state community does integrate, through which, though only in a practical sense

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19 "Hierbei würde das – für seinen Begriff einer pluralistischen Demokratie wesentliche – Entscheidungsverfahren des (parlamentarischen) Mehrheitsbeschlusses durch Smend als bloß formalistisch abklassifiziert, das Mehrheitsprinzip schließlich überhaupt vom Begriff der Demokratie abgelöst. Kelsen setzt daher die in konservativen Traditionen stehende Smendsche Argumentation in Vergleich zum Marxismus bolschewistischer Prägung – und zwar hinsichtlich ihrer gemeinsamen Einstellung zu Parlamentarismus und Diktatur."

20 "... wie sehr SMEND die Demokratie meint, wenn er auf den Parlamentarismus schlägt, das zeigt, wie nahe er an die politische Theorie des Bolschewismus herankommt. Demokratie ist nämlich auch nach SMEND mit der Diktatur vereinbar."

and not in principle, the state community turns into the legal community or vice versa.<sup>21</sup>

Dooyeweerd is equally critical when he traces the roots of the integration theory:

And so it turns out in the end that the entire integration concept rests on the ancient view of the state as an organized community of power. And we soon see the adherents of the Berlin School slipping onto absolutistic paths, leaving no room for sphere-sovereignty in non-state organized communities. The method of the humanities, too, backed by the humanist view of reality, renders impossible a genuine analysis of the individual meaning-structure of organized communities. On this point the integration theorists all agree: the sovereignty of the state is absolute as against all other organized communities" (Dooyeweerd, 2010:57-58).

The numerous works written within the tradition of an *Allgemeine Staatslehre* constantly wrestled with an account of key features of the modern state: power, law, juridical organs, constitutional law, territory, the relation of super- and sub-ordination, the state as system, the legal order of the state, the state as representation, state and civil society, the place of political parties, the state as an organized community (*Verband*), the body politic, public opinion, societal norms and many more.

In subdivision 7 the nature of modal universality was briefly explained. It implies that the various aspects of reality, in an ontic sense, lie at the foundation of the diverse concrete (natural and societal) entities. Therefore the jural function belongs to reality and cannot be restricted to any entity merely functioning in it in a typical way. It is therefore meaningless to hold that either the state precedes law or that law precedes the state. Modal laws and type laws are co-conditioning the existence of whatever is present within the universe.

The (universal) conditions for being this or that type of thing or entity has to be distinguished from the (universal) way in which particular entities evince their conformity with these conditions (laws). In being an atom or being a state, this or that atom or state shows that it meets the conditions (type law) for what it is. Sometimes the word "structure" is used both for the "law for" an entity and for the "actual (historically-situated) composition of" an entity. The structure (composition) of the latter reveals what is correlated with (and therefore distinct from) the *order for* entities. A *structure for* has

21 "Das heißt also: die Staatsgemeinschaft integrieren; wodurch the Staatsgemeinschaft – zwar nicht 'im Prinzip', aber 'praktisch' – zur Rechtsgemeinschaft wird, oder umgekehrt" (Kelsen, 1930:67).

the meaning of a *law for*, while a *structure of* represents the universal way in which individual entities reveal their conformity with the given law for their existence (also known as their law-conformity).

The type law for the state therefore incorporates both modal universality and typicality. Marck treats this issue in a work which continues the systematic contribution found in Cassirer's work from 1910 on the distinction between *function concept* and *substance concept*. The underlying issue therefore concerns first of all the distinction between functional aspects or reality (with their unspecified modal universality) and the diverse concrete (natural and societal) entities. The two above-mentioned dominating world views within the field of *Allgemeine Staatslehre* according to Jellinek, namely an *individualistic-atomistic* world view and a *collectivistic-universalistic* world view did not succeed in providing a sound account of the structural principle of the state.

The universalistic view is also still alive in modern system theory, particularly in the thought of Parsons and Luhmann. If the state is understood in non-jural terms, i.e., as an institute characterized by its *power*, then it cannot operate within the domain of the *formation* of law. Parsons juxtaposes the state (political organization) and the legal system and then has to "integrate" the former with the latter: "Because of the problems involved in the use and control of force, the political organization must always be integrated with the legal system" (Parsons, 1961:47).

Luhmann's understanding of the legal system is intimately related to his views on law as the *structure* of society (see Luhmann, 1985:103 ff.). He advocates the idea of "the institutionalization of the scheme of societal system differentiation" and emphasizes that "law must be seen as a structure that defines the boundaries and selection types of the societal system" (Luhmann, 1985:105). He holds the view that the insights pertaining to self-referential systems ought to be applicable to the legal system as one of the differentiated functional systems distinguishable in the evolution of a society. However, his system theoretical orientation results in a view of the *Ausdifferenzierung* (differentiating out) of the legal system, lacking insight into the original non-state spheres of law.

According to Parsons political control of power and the legal system must be integrated: "Because the problems involved in the use and control of force, the political organization must always be integrated with the legal system" (Parsons, 1961:47). Without an intrinsic connection between power and law the state lacks an original competence to form law.

## 16. The way ahead

The domain of theorizing left open to scholars within the field of political science therefore still needs innovative developments. One may think of explorations in the thought of thinkers such as John Rawls, Jurgen Habermas and Herman Dooyeweerd. They generated a more comprehensive and coherent understanding of the nature (and structural principle) of the state.

The coherence between modal aspects and multi-aspectual entities calls for acknowledging the cultural-historical and the jural aspects of reality. They are intrinsic to the structural principle or type law of the state. *Might* and *right* cannot be separated for they serve as the two characteristic functions of the structural principle of the state, of its type law. Habermas correctly emphasises this intrinsic coherence between law (*Recht*) and the democratic-constitutional origination, acquisition and application of political power.<sup>22</sup> Later, he mentions the mutually constitutive coherence between “Recht und politischer Macht” (“law and political power” (Habermas, 1998:208)).

The classification of social forms of life with the aid of compound basic concepts, such as specified in the distinction between *societal collectivities* (*Verbände*), communities and coordinational relationships, does not contain any criteria enabling the discernment of *typical* differences between them. A state and business firm both display the distinctive features of societal collectivities, namely the presence of a durable relation of super- and subordination and a solidary unitary character. However, these two features do not provide us with criteria to distinguish between societal collectivities as such. The only theoretical access we have to the typical differences exhibited by these forms of life is the point of entry provided by the meaning of distinct sphere-sovereign modal aspects. The decisive element in applying the idea of sphere-sovereign modal aspects to distinguish between different kinds (types) of societal collectivities, is to realize that the foundational function and the qualifying function of such social forms of life are mutually dependent and co-determinative. This becomes evident as soon as one realizes that most societal relationships have their foundational function within the cultural-historical aspect, since most are based upon some or other type of power formation. Without taking the qualifying function of these social forms of life into account, it will not be possible to differentiate the types of power formation exemplified by them. Of course this view assumes the (ontic) modal universality of all aspects, including the jural.

22 “... der interne Zusammenhang zwischen dem Recht und der demokratisch-rechtstaatlichen Organization der Entstehung, des Erwerbs und der Verwendung politischen Macht ...” (Habermas, 1998:70)

Whereas many thinkers within the tradition of *Staatslehre* struggled to account for the relationship between the *state* and *law* (the jural function of reality), the just mentioned distinctions transcend this shortcoming. The artificial synthesis of “state” and “law” turns out to be unnecessary when it is realized that the modal universality of the jural aspect, due to its ontic givenness, co-conditions the very existence of any state, making any “synthesis attempt” redundant. The type law for being a state merely specifies the modal universality of the jural aspect, while this aspect in turn serves as the guiding and qualifying function of the state.

The underlying distinction concerns the dimension of natural and societal entities and the universal modal aspects within which they function of a typical way. Interestingly ancient Greek and Medieval philosophy were by and large oriented to a *substance* perspective, whereas modern philosophy and in particular the modern natural sciences (since the Renaissance) increasingly switched to a *functionalistic* mode of thought (see the above-mentioned book discussing this problem (Cassirer, 1910). The upshot of this legacy is that either modal aspects (functions) were *reified* (“substantialized”) or entities were *functionalized* (see Strauss, 2013).

Jellinek restricts the concept of substance to human beings, because according to him the ultimate objective elements of the state is given in the sum of particular actions in which social relationships comes to expression. The state “is therefore in no sense a substance, but exclusively a function. The substance laying at the foundation of this function is and remains the human being.”<sup>23</sup>

Smend holds that insofar as the political theory of Kelsen directs itself against the mechanical spatializing presuppositions of the formal school in modern sociology (Simmel, Vierkandt, Von Wiese) and against every “substantializing organology” [*substanziatisierender Organology*], that it should be supported (Smend, 1928:131).

The problem of *substance* and *function* at once reintroduces the life and world view controversy setting apart individualistic and universalistic views of society as well as the opposition of natural-scientific and “geisteswissenschaftliche” orientations, reflecting the ultimate driving force behind the intellectual developments during the past five hundred years, the motive of nature and freedom (science ideal and personality ideal) alluded to in subdivision 2 discussing the emergence of distinct designations of the state.

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23 “Er [the state] ist somit nach keiner Richtung hin Substanz, sondern ausschließlich Funktion. Die dieser Funktion zugrunde liegende Substanz sind und bleiben die Menschen” (Jellinek, 1966:174).

In principle a biblically informed non-reductionist ontology may guide us here towards a meaningful and integral understanding of the state as well as its place within human society. It may also open the way towards an alternative view in which the shortcomings and one-sidedness present in some of the dominant traditions within the German legacy of *Staatslehre* could be overcome.

A significant step in this direction is given by Jonathan Chaplin (2011) in a work discussing the conditions for being a state, while focusing on the distinction between “typical laws” and modal aspects as developed in this article, exploring further key distinctions found in the views of Dooyeweerd (see also Strauss, 2014). It will therefore be fitting to analyse this orientation elaborated by Chaplin in a different article.

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