

DFM Strauss

A history of attempts to delimit (state) law

Summary

Reflections on the nature of law and on the limits of the state's law-making competence did not escape the distorting effect of individualistic and universalistic views of human society. While the Greek-Medieval era was largely in the grip of the latter, the former dominated early modernity up to the Enlightenment. From the urge to be free and autonomous since the Renaissance, the natural science ideal aimed at a rational reconstruction of the universe which, according to social contract theories, proceeded from its simplest elements, the individuals. The subsequent reflection on the nature of law appeared to be in the grip of the inherent tension between the science ideal (nature) and the personality ideal (freedom). This applies to theories of natural law, to Kant and Hegel, as well as to the historical school, legal positivism and the subsequent developments in the 19th century. However, since the romanticism of the late 18th and early 19th century, both universalistic and individualistic theories continued to exert their influence until the 20th century. Cutting through all these developments, other conceptions also played a role, such as the idea of an eternal and immutable *lex naturalis* and the reaction of historicism and legal positivism which relativized these natural law claims – accompanied by the question of how one should understand constancy and change. A brief systematic alternative is outlined in the concluding remarks of the article.

'n Geskiedenis van pogings om die (staats-)reg af te baken

Nadenke oor die aard van die reg en die grense van die regsvoerende kompetensie van die staat kon nie ontkom aan die verwingende effek van individualistiese en universalistiese sienings van die menslike samelewing nie. Waar die Grieks-Middeleeuse era grootliks in die greep van laasgenoemde was, het eersgenoemde die vroeë moderniteit tot en met die Verligting gedomineer. Sedert die Renaissance het die drang om outonoom en vry te wees die natuurwetenskapsideaal gerig op 'n rasonale rekonstruksie van die heelal wat in die sosiale verdragsteorieë vanuit die seining van eenvoudigste elemente, die individue, vertrek het. Dit het geblyk dat die voortgaande besinning oor die aard van reg in die greep van die inherente spanning tussen die wetenskapsideaal (natuur) en die persoonlikheidsideaal (vryheid) was. Dit geld ten opsigte van die natuurregsteorieë, rakende die sienings van Kant en Hegel, asook die historiese skool, regspositivisme en die daaropvolgende ontwikkelinge van die 19^{de} eeu. Na die romantisme van die laat 18^{de} en vroeg 19^{de} eeu het beide individualistiese en universalistiese teorieë hul invloed tot en met die 20^{ste} eeu bly uitoefen. Kruisnydend deur al hierdie ontwikkelinge was daar ook ander ontwikkelinge wat 'n rol gespeel het, soos die idee van 'n ewige en onveranderlike *lex naturalis* en die reaksie daarop van die historisisme en regspositivisme wat hierdie natuurregsaansprake gerelativeer het – vergeesal deur die vraag hoe konstantie en verandering verstaan moet word. Aan die einde van die artikel word 'n alternatiewe benadering vlugtig in die slotopmerkinge toegelig.

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*Noch suchen die Juristen eine Definition zu ihrem Begriffe vom Recht.*¹

1. Introductory remarks

This article focuses on the history of attempts to *delimit* the scope of (state) law. As a whole and in all its subdivisions, this investigation is guided by the question as to whether or not particular legal trends of thought or the views of individual scholars indeed succeeded in delimiting law effectively. The universal human awareness of what is just and unjust presupposes the *jural aspect* of reality which, in turn, lies at the basis of what may be regarded as legal or illegal human actions in concrete historical circumstances. However, theoretical concerns for the jural do not necessarily guarantee a proper understanding of the limits of (state) law or of the distinct meaning of the jural aspect.

Ancient Greek and Medieval orientations perceived the state as a self-sufficient and all-encompassing community. Such a view is often designated as *holistic* or *universalistic*, because every sphere of life was simply absorbed by this life-embracing political whole. Medieval scholasticism mediated this legacy which later on assumed a new life in the thought of Rousseau, post-Kantian freedom idealism and in the diverse holistic orientations emerging in the 20th century. Alongside this universalistic mode of thought, an equally important individualistic (atomistic) orientation is found. We shall note that, after the Renaissance, this approach generated social contract theories which initially, for example in the thought of Hobbes, assumed a totalitarian form, but later (in the social contract theories of Locke, Rousseau and John Rawls) intended to be theories of the *just state* (*Rechtsstaat*).

Intertwined with this analysis, a number of more general problems surfaced. All of them are evaluated in terms of the central question addressed in this article, namely whether or not they contributed to a limited understanding of state law. Among these problems, one finds the distinction between law and justice, divine law, natural law and positive law, jural principles and their varying applications, the rise of an irrationalistic romanticism during the first decades of the 19th century, the uprooting effect of the relativism of the historical school of Von Savigny and the levelling implications of legal positivism which ultimately identified law with state law. Behind all of these concerns, the motivating power of the basic Greek motive of form and matter, the medieval motive of nature and grace and the modern humanistic motive of nature and freedom exercised their dialectical influence.²

In order to structure the flow of thought in this article, we commence by highlighting the central theme running through the entire article. The

1 Kant 1787:759, footnote.

2 The term "dialectical" points at two poles which both pre-suppose and threaten each other.

argument advanced consistently shows that those attempts failing to demarcate state law effectively, among others, arise from unsuccessful attempts to provide meaningful answers to the problems formulated in the questions below:

- Does the presence of a political order, found in all human societies, necessarily result in assuming a limited form within human society?
- Did the narrowing down of *cosmic order* to *state order* within Greek culture avoid an all-encompassing (totalitarian) view of the *polis*?
- Did Cicero, by accepting an immutable, incorruptible and non-arbitrary universal law, which holds (which is valid) *per se* for all times, and by distinguishing between public law and private law, succeed in arriving at a yardstick that can effectively delimit the sphere of competence of the state?
- In terms of the problem of demarcating state power, how should we understand Augustine's distinction between the *Civitas Dei* and the *Civitas terrena*?
- To what extent does the Thomistic view of the *societas perfecta* continue the Aristotelian legacy and how was it informed by the synthesis motive of nature and grace?
- How did the synthesis of the Aristotelian *lex naturalis* with biblical motives result in an erosion of our understanding of the meaning of law?
- What was the contribution of nominalism during the transition from the medieval era to modernity; how did it introduce the idea of the *arbitrariness of the human will*, and why did it deny supra-individual communities?
- What are the ultimate assumptions of modern theories of the social contract?
- How do these theories bring to expression the directing influence of the underlying modern motive of nature and freedom?
- Why did Hobbes and Bodin not succeed in delimiting the legal competency of the state properly?
- Why was it still impossible for both Locke and Rousseau, in spite of their formal idea of the *just state*, to advance an understanding of the limited jural competence of the state?
- How does Rousseau's view, namely that the dissenting minority must be *forced* to be *free*, reveal his return to a material idea of the power state (Hobbes)?
- How did the freedom-idealism of Hegel continue this legacy in its claim that the body politic is the absolute power on earth (Hegel)?

- What are the similarities and differences between the historical school and legal positivism, and how did Von Jhering arrive at his view that the state is the sole source of all law?
- Why does the positivistic view of the sources of law lead to legal arbitrariness?
- Did the neo-Kantian schools of thought succeed in limiting law?
- What are the implications of the way in which Kelsen identified the state with a functional complex of legal norms?
- Why does Kelsen, in a *formal sense*, still appreciate an *absolutistic dictatorship* as a “*Rechtsstaat*” [just state]?

2. Background considerations

Since the earliest times, human societies have displayed a particular social order. Both the extended family and sibs or clans were undifferentiated forms of co-inhabitation. The same applies to the stronger organized *tribe* which gave prominence to the political organization which was always accompanied by authority relationships, i.e., relationships of super- and subordination. Kammler characterizes undifferentiated societies by the absence of a significant technology and the lack of the realization of political and administrative, economic, juridical, cultic religious and educational functions. These latter relationships were initially fused in the family bond or were only present in a rudimentary form. Both differentiated societies (designated as “complex societies” by Kammler) and undifferentiated societies reflect a social stratification and unilateral relations of super- and subordination. Kammler argues that even the lowest level of technological and economic development displays elements of *social ordering*.³

Initially, the blood ties which connected members of an extended family are still visible in the stronger organization of sibs and clans, although often the assumed common line of descent became fictitious. Moreover, according to Lowie, “primitive society” exhibits a “mottled diversity” as well as a “variety of social units”.⁴ The same could be said in respect of the political organization of tribes. Van Creveld discerns more sophisticated forms of political organization in “some East African Nilotic tribes such as the Anuak, Dinka, Masai, and Nuer” as well as among “the inhabitants of the New Guinea highlands and Micronesia; and most – although not all – pre-Columbian Amerindian tribes in North and South America”.⁵ The

3 Without acknowledging authority and control within the earliest undifferentiated societies, it is not possible to explain how such societies succeeded in protecting themselves against external threats. In spite of the difficulty of identifying the central instance of control, the presence of such a defence organization testifies, according to Kammler (1966:31), in the light of ethnographical material, that the “political element” everywhere presents itself in undifferentiated societies.

4 Lowie 1921:414.

5 Van Creveld 1999:2.

German sociologist Münch characterizes “primitive societies” as examples of *closed communities*.⁶

Insofar as the extended family, sibs and clans, and tribes are undifferentiated societies, their *encompassing grip on social life* does not leave any room for what eventually crystalized as non-political sectors of societal life. In their undifferentiated condition, all the distinct activities present in a differentiated society are bound together by *one undifferentiated form of organization*.⁷

The question regarding the *limits* of (state) law (of the *legal order* within society) ultimately touches upon the acknowledgment of domains of freedom which are not subject to the “law-giver”, to the legislative power within society. Normally, this power is conceived in relation to the *jural dimension* of reality. However, this dimension is interwoven with a rich variety of phenomena, initially positioned within the broader context of a *cosmic ordering*, i.e., the order of the universe.

Subsequently, it was narrowed down to human society and eventually focused on the state (*state law*) and its limits. What played a decisive role in all of this is the difficulty to understand the uniqueness of the jural aspect of reality and its coherence with all the other aspects. Closely related to this, as partially noted above, is the problem of natural law in relation to positive law, the historicistic relativizing of law also found in legal positivism which represent responses to the normativity of life as it comes to expression in legal norms or principles and the varying shapes and forms they assume when applied in changing historical circumstances.

This article therefore focuses on the history of those significant attempts aiming at a delimitation of (state) law. From the rich legacy disclosed by such an investigation, it will be possible to assess whether or not particular conceptions regarding the meaning of the jural dimension of society, indeed in principle, succeeded in delimiting law effectively. What is peculiar in investigating the jural delimitation of law is that one unavoidably stumbles upon classical foundational problems facing all scholarly disciplines. Reflections on state law and its jural delimitation always had to face questions concerning the interrelationships between the jural and the non-jural. We shall observe that this often leads to related basic problems, such as the questions as to what the relationship between constancy and change is, how we have to understand the relationship between law and morality, and ultimately regarding the *limits* of the jural competency of a government. Behind all these problems, another all-pervasive one lurks, given in the question if the scheme of a *whole with its parts* fits our understanding of the multifarious embodiment of the jural laws, ordinances and regulations (normally reflecting the levels of state government, provinces and municipalities). These considerations will turn out to be of vital importance for an insight into the medieval view

6 Münch 1990:448.

7 It is only within a differentiated society that distinct societal collectivities operate on the basis of their own distinct form of organization.

of the state as an all-encompassing, self-sufficient community (*societas perfecta*).

It will turn out that, in the transition to the modern era, problems surfaced which continue to be of importance for our understanding of law and society. In their book, *Defensor pacis (In defence of peace)* (1326), Jean of Jandun and Marsilius of Padua claimed that all forms of authority are derived from the people. The implication, namely that *law is an expression of the (unlimited) will of the majority*, leads to the stance of Rousseau in the 18th century, at a time when modern ideas about democracy started to take shape. Ultimately, therefore, our investigation will constantly border upon the problem of the *Rechtsstaat* (the *just state*) and the *Machtsstaat* (power state).

3. The universality of political order

At a presentation in Munich in 1906, Karl von Amira pointed out that there is a tendency among those who reflect on the nature of law to restrict themselves to what is considered to be *civilized* nations, particularly in their most recent levels of development. In addition, this focus is further restricted to those forms of organization known to us as the *state*.⁸ Yet, the earliest human societies exhibited *rule-determined conduct*, connected to relations of *super-* and *subordination*. Oppenheimer, in following Marx and Engels, attempts to argue that the earliest human societies did not display any element of what later surfaced in the formation of distinct *states*.⁹ However, his view cannot account for the presence of social structures capable of defending such societies against attacks. Kammler points out that, although it may sometimes be difficult to locate the locus of control, such a defensive organization, in the light of the available ethnographical material, shows that the “political element” is universally present within traditional societies.¹⁰

4. Greek conceptions

Within early Greek philosophy, the terms *logos* (concept) and *nomos* (law) were used to designate the meaning of *law*. However, the word *logos* had a scope exceeding the *jural* meaning of the term *law*. But, in the course of time, the term *law* obtained a closer relationship to what became known as *Politeia, Republic*, as portrayed in Plato’s work bearing this name, *Politeia*.

Both in its encompassing and more restricted meanings, the term *law* was open to alternative interpretations. The broadest contrast is found in the opposition between a supposedly *eternal* and *unchanging* order, on the one hand, and a *changeful* and *temporal* ordering, on the other. Within Greek philosophy, the former view is found in the line from Parmenides to

8 Amira 1906:70.

9 Oppenheimer 1907, 1922, 1926. See also Engels 1884.

10 Kammler 1966:31.

Plato and Aristotle, whereas Protagoras and the Sophists represent the alternative view.¹¹

In *Politeia*, Plato considered a proper knowledge of the ideas (the transcendent ontic forms) to be sufficient for obedience within the ideal state, an obedience encompassing all facets of human life. In his later work on “The laws” (*Nomoi*), law was meant to protect the principle of *temperance*, although it continued to encompass, as in the *Politeia*, the whole of society incorporated within the (unlimited) state.

In this respect, Aristotle followed the view of Plato, because Aristotle considered the human being a “political animal” (*zoon politikon*). The rational-ethical essential form of human beings comes to fulfilment within the state, which takes the individual from *desire* to the *good*.¹² Von Hippel points out that ancient Greece proceeded from a metaphysical determination of an ordered condition of the community, in which the individual is only of interest as a *part* and function of the measure of a group (the *whole*).¹³

Both Plato and Aristotle merge *law* and *morality* they conceive of *justice* as a *moral virtue*. Aristotle was the first thinker to distinguish between *natural law* and *positive law*.¹⁴ In its broad moral sense, *justice* (*dikaion politikon*) remains attached to the state and, at once, embraces all virtues such as *courage*, *moderateness*, *friendliness*, and so on. Yet, in a strict sense, *justice* concerns jural norms and their obedience. This points in the right direction; however, owing to the life-encompassing hold of the *Republic*, no structural limits to law are contemplated.

5. Cicero and the Stoics

The Stoa accepts *nomos* as a universal, natural and moral law. Cicero orients himself to an immutable, incorruptible and non-arbitrary universal law which holds (which is valid) *per se*. In his dialogue *De legibus*, Cicero speaks of the highest law which was present from eternal times even

11 Below we shall see that this problem continued even up to the opposition among contemporary theories of natural law and legal positivism. In passing, we note that both Plato and Aristotle employed the whole-parts scheme to society with the state as the encompassing whole. See Plato’s *Politeia* as a whole; Aristotle 1894:149.

12 Human life is realized in a hierarchy which stretches from the nuclear family (the germ-cell of society), via the village community, to the *polis* (city-state) as the highest whole *encompassing* all other communities as mere *parts*. In the *polis*, the *form-perfection* of the individual is given at once.

13 Von Hippel 1955:197: “So ist für das Griechentum die Gemeinschaft ein Ordnungszustand, der sich als solcher metaphysisch bestimmt, während der Einzelne im wesentlichen nur als Teil und Funktion eines Gruppenhaften interessiert”.

14 John Finnis (2004:10) points out that in the philosophy of Thomas Aquinas “the whole law of a political community may be considered philosophically as positive law”.

before written laws or the foundation of a state.¹⁵ Cicero holds that true law (in agreement with nature) is “of universal application, unchanging and everlasting”.¹⁶ This view evinces an element of acknowledging the *constancy* of jural principles, although it is also committed to an overestimation of it. Since the beginning of the 19th century, historicism opted for the opposite extreme by emphasizing the changefulness of law and legal practices.

Jones points out that, in addition to an objective universal order (flowing from divine reason), Cicero takes the *ius naturale* to comprise “those half-legal, half-ethical rules which express the principles of human justice, because they have a bearing upon the relations of men living in society and upon their duties to one another and to the gods”.¹⁷ Yet Cicero’s views do not simply reflect the influence of the Stoa, for it is actually a fusion of the Roman view of state and law and the Stoic understanding of the *ius naturale*.¹⁸ In Cicero’s work on *The laws*, Marcus asserts that “we have been made by nature to receive the knowledge of justice one from another and share it among all people”.¹⁹

Nonetheless, although Cicero distinguishes between public law (*ius publicum*) and private law (*ius privatum*), this does not mean that he obtained a proper understanding of the *limited nature* of the state as a *public legal institution*. In his dialogue *De republica*, Cicero combines the concerns of the public (*res publica*) with the position of the *people* in a state (*constituo populi*), as it is captured in the words: “*estigitur res publica res populi*”²⁰ and, in addition, he distinguishes between a bond of blood and the “*lex civilis*” as legal community.²¹

Moreover, by following the Stoic theory of natural law, he accepts *civil private law* solely as a *limit* to state power. The lack of delineating the communal interests (*communis utilitas*) supposedly constitutive for the *ius publicum* of the state, therefore, does not provide us with a norm to *delimit* the public domain of the state.

6. Augustine and Thomas Aquinas

In his large work, *Civitas Dei (The city of God)*, Augustine distinguishes between divine law and natural law. On the one hand, he accounts for

15 *On the laws*, written during the last years of the Roman Republic. Cicero 1852:I, 6, 19.

16 Cicero *De republica* III, xxii, 33.

17 Jones 1956:99.

18 The stature of the Roman republic after the final victory over the Carthage empire became the model for Cicero’s moderate view of the state.

19 *De legibus* I, 33; Cicero 1999:117.

20 Cicero 1978:I, 25, 39). Although the Latin word *res* literally means “thing”, the phrase *res publica* is best translated as “public affair”. The quoted Latin phrase (*estigitur res publica res populi*) thus says: consequently, the *public affair* is of the *people*.

21 Cicero 1978, I, 32, 49: “cum lex sit civilis societatis vinculum”.

the biblical distinction between the kingdom of God and the kingdom of darkness but, owing to the influence of neo-Platonism, on the other, he adds to it an un-biblical twist. As a mere *copy* of the city of God, the earthly state is negatively portrayed as *Babylon*, while its monarch is designated as *Diabolus*. This exerted a significant influence upon the subsequent struggle between church and state during the Middle Ages, particularly because both the city of God and the earthly state were regarded as all-of-life-encompassing entities. This explains why both the Greek *polis* and the *Holy Roman Empire* were still appreciated in the Aristotelian perspective of an all-encompassing, self-sufficient community (*societas perfecta*).

In the thought of Thomas Aquinas, the lower societal communities have a relative autonomy but, nonetheless, still function as *parts* of a larger *whole*. This continues the Aristotelian view which embraces all branches of society according to the mutual relationship of a *means* to an *end*, of *matter* to *form*. What is new in the conception of Thomas Aquinas is that the state merely serves as the *lower portal* for the church. While the state ought to bring its citizens to their highest *temporal* fulfilment, namely *moral perfection*, the church, as supra-natural institute of grace, aims at *eternal bliss* (*ad finem beatitudinis aeterna*).²² This hierarchical relation between *nature* and *grace* is, therefore, reflected in the distinction between *lex naturalis* (a natural law which, in a *cosmic* sense, also embraces human beings in their rational-moral nature) and a divine law (*lex divina*) belonging to a supra-natural realm.²³ In his work on the governance of the rulers,²⁴ even *cities* and *provinces* are designated as *perfect communities*.²⁵

Thomas Aquinas subscribes to the view that natural law is valid for all times and places. He states that “natural law needs no promulgation” and that the “binding force of law extends even to the future”.²⁶

By and large, Thomas Aquinas continues the Greek understanding of law. In a broad sense, justice embraces the moral virtues but, in a *restricted sense*, it continues to serve as one of the four moral virtues (in addition to *wisdom*, *temperance* and *courage*). Justice “tributes” to a person what legally belongs to that person the background of the modern notion of (*re-*)*tribution*. Thomas Aquinas also continues the Aristotelian distinction between *commutative* and *distributive* justice – with equality respectively viewed in terms of an *arithmetical* and a *geometrical* yardstick. In addition to *commutative* and *distributive* justice, he adds *legal justice* (*iustitia legalis*). This form of justice assigns particular legal duties to a

22 Thomas Aquinas remarks that “if man were ordained to no other end than that which is proportional to his natural ability”, no addition to natural and human law would have been needed. “But since man is ordained to an end of eternal happiness, ... it was necessary that, in addition to natural and human law, man should be directed to this end by a law given by God”. *Summa Theologica*, I, II, 91, 4. See also Pegis 1945:752-753.

23 See also Von Hippel 1955:312-313.

24 *De regimine principum*, I, c, 1.

25 See Hommes 1961:37, note 6.

26 *Summa Theologica*, I-II, XIII, Q. 90, Art. 4, Obj. 1. See also Pegis 1945:746.

person (among which *military service*). Natural law forms the basis of all positive law – when a positive legal stipulation contradicts natural law, it loses its legal validity. Objective natural law (valid for humanity as a whole) can be derived from the teleological ethical basic principle: “Do what is good and avoid what is bad”. Subjective natural law includes those legal competencies that belong to a person by virtue of *objective natural law* (such as the right on life, integrity, acquisition of property, and so on). As encompassing virtue, general justice à la Aristotle has to direct all the other virtues towards the communal good (*bonum commune*).

Ultimately, Thomas Aquinas wanted to synthesize the Aristotelian *lex naturalis* (with its dual teleological order) with certain fundamental biblical motives. The result was that the Aristotelian-Thomistic view denatured the meaning of *law*. It is merely a *means* in service of the *goal* of the *moral perfection* of being human, as the stepping stone towards eternal (supra-natural) *bliss*. Therefore, the good, in a dual sense (regarding *temporal moral perfection* and *eternal bliss*), continues to incorporate all of society completely within the state and the church. This embodied the ecclesiastical unified medieval culture.²⁷

7. Transition to the modern era

This entire edifice of Thomas Aquinas soon had to face new developments and challenges during the 13th and 14th centuries. Dante relativized the power claims of the church and advanced the idea of a *just* world monarch which actually should be God although he still maintained the dualism between nature and grace (philosophy and theology).²⁸ But then it was, as Windelband phrased it, “the very faithful sons of the church who once again widened the split between philosophy and theology and finally made it unbridgeable”.²⁹ This period witnessed the emergence of what became known as the *nominalistic movement* which introduced the idea of the *arbitrariness of the human will* as well as the idea of *popular sovereignty* as *source of law* – this ultimately generated totalitarian theories of the power state (the *unlimited power* of the general will).

Nominalism denies any universality outside the human mind and, therefore, undermined the meaning of both *law* and *morality*, for ultimately it does not leave room for supra-individual (normative) standards of conduct. In his *Sententien*, Ockham advanced the view that universality “is only in the soul and therefore not in the things”.³⁰ On the next page, Von Hippel points out that denying what is universal logically entails that ultimately all *law* is turned into *positive law*. It entails that the “bindingness” of positive law derives from the will of a highest legislation.³¹ This opened the way for

27 See Troeltsch 1925:127ff.

28 See Von Hippel 1955:328ff., 334.

29 Windelband 1935:271.

30 Ockham(I, d. 2, q. 7 G; Von Hippel 1955:354.

31 Von Hippel 1955:354: “Für den *Rechtsbereich* hat die Leugnung der Universalien zur logischen Folge, daß alles Recht zuletzt zum positivem wird, d.h. seine

state positivism, which was further thought through by Marsilius of Padua. The latter clearly distinguished the particularity of the *political sphere* from both *religion* and *morality*. Law is no longer considered to be something *universal and immutable* and as being valid in itself. One serious implication is that the church was thus reduced to a mere *collection (set) of believers*.³² Jean of Jandun and Marsilius of Padua completed their book, *Defensor pacis* ("In defence of peace") in 1326 and presented it in that year to the emperor. According to them, *all forms of authority derive from the people*, which implies that *law is an expression of the will of the majority*. Only the majority can *make a law, change it, withdraw it or interpret it*.³³

In addition, all legal competencies were centred in the state, justifying Von Hippel's conclusion: "But when the worldly power in this way absorbs also the spiritual competencies in the modern sense, it becomes a total state, that is to say, the political sphere becomes the sole power over all areas of life".³⁴ Marsilius thus paved the way for the doctrine of an unbridled *popular sovereignty* and it made room for the subsequent Lutheran view, namely that the (internal) legal order arrangements of the church belong to the state a view that also underlies the entire legacy of assigning a quasi-public legal status to the church.³⁵

The early 14th century, therefore, saw the contest between Boniface VII and Philip the Fair and between John II and the spokesman of Louis of Bavaria, Marsilius of Padua.³⁶ The nominalistic movement was the starting point for modern philosophy as well as modern political and legal thought. During the Renaissance, the dominant role of the Pope and the Roman Catholic Church started to diminish. This process made room for individualistic (atomistic) theories of human *society, the state and law*. The reality of supra-individual communities was now denied.

8. Machiavelli, Bodin and Hobbes

The Renaissance era witnessed an exploration of the unlimited possibilities of human reason. This new spirit was exceptionally impressed by the successes of the rising natural sciences mathematics and physics. Liberated from the restrictions imposed upon society by the Roman Catholic church (with its doctrine of *sin*) and from the Greek idea of *fate*, the modern Renaissance personality came into its own, enthroning the human being as such. In doing so, it at once elevated the newly developing

Verbindlichkeit aus dem *Willen* einer höchsten Gesetzgebung erhält".

32 "Et quod sic Christus intellexerit ecclesiam, id est credentium seu fidelium universitatem" (*Defensor Pacis*, II, e. VI, 13; quoted by Von Hippel 1955:362).

33 Kates 1928:37.

34 Von Hippel 1955:363: "Wie aber so der weltliche Gewalt auch die geistliche Befugnisse zuwachsen, wird sie im modernen Sinne zum totalen Staat, d.h. der politische Bereich erlangt die *Allzuständigkeit über alle Lebensgebiete*".

35 Compare the German and Austrian *Staatskirchenrecht* ("state-church law"). See Campenhausen 1983; Friesenhahn & Scheuner 1974; Link 1973.

36 See Kates 1928:8.

natural sciences to become a means in service of proclaiming the majesty and dignity of human beings who emerged as a *law unto themselves*.

During and after the Renaissance, the assumed unlimited possibilities of recreating reality in a rational way were reinforced by the achievements of the mathematical and physical natural sciences. The latter became a means in service of proclaiming the autonomous freedom of human beings. The Greek dialectical motive of matter and form and the medieval dialectical basic motive of nature and grace were now transformed and absorbed into the new basic motive of modern Humanism, that of *nature* and *freedom*. The nature motive aimed at establishing an all-encompassing natural science capable of explaining whatever there is in causal natural scientific categories. The freedom motive actually gave birth to this science ideal and it manifested itself in the personality ideal, that is, the ideal of an *autonomously free human personality*. Yet, as soon as reality is entirely comprehended in terms of exact (natural causal) laws, then ultimately the human personality itself is also reduced to a *mere phenomenon of nature* – an atom among atoms, a cause among causes and an effect among effects – fully *determined* by the law of causality and, therefore, stripped of all *freedom*!

The driving force of the science ideal soon captured the reflections of Machiavelli (1469-1527), Bodin (1530-1596) and Hobbes (1588-1679). They attempted to understand society completely in terms of the actions of *individual* human beings. The radical ideas of Machiavelli reflected the society in which he lived, stamped by a continuous power struggle and guided by amoral political practices, accompanied by astounding instances of corruption also manifesting themselves in diplomacy. The humanist urge to deny any God-given world order caused Machiavelli to view the state as an artificial creation that can be constructed, changed and adapted to the needs of the day. The authority of state government was captured by Bodin in the concept of *sovereignty*. Yet his understanding of the state still adhered to the traditional (universalistic) perspective which holds that the state is the *encompassing whole of society*. In Book III (Chapter 7) of his work on the state, he explicitly characterizes the relationship between the *family, corporations and colleges* to the state as that between the *whole* (the state) and its *parts*.³⁷

Bodin opposed the views of Machiavelli, by accepting that the government of a state is bound to both *natural law* and *divine law*. The implication was that he accepted the classical principle of natural law, namely *pacta sunt servanda* (contracts ought to be respected and kept). Unfortunately, he believed that the state has an absolute, unlimited and original competence to the formation of law within its territory.

In the thought of Thomas Hobbes, the modern science ideal served as the basis for the rational *reconstruction* society by means of a social contract on the basis of the *atoms* of the state, the *individuals*. When a

37 Bodin 1981:521: "... sowie zwischen diesen und dem Staat verhält es sich ähnlich wie mit dem Unterschied zwischen dem Ganzen und seinen Teilen".

multitude of individuals are united, a *Common-Wealth* or *Civitas* emerges on the assumption that every individual gives up the right of self-governance while authorizing one person who has sovereign power.³⁸ This *Agreement* or *Covenant*, instituted by everyone with every one, authorizes the *representative* of the multitude – “every one, as well as he that *Voted for it*, as he that *Voted against it*” to which Hobbes adds the remark that the multitude “shall *Authorise* all the Actions and Judgements, of that Man, or Assembly of men, in the same manner, as if they were his own”.³⁹

Hobbes holds that

because the major part hath by consenting voices declared a Sovereigne; he that dissented must now consent with the rest; that is be contended to avow all the actions he shall do, or else justly be destroyed by the rest ... or be left in the condition of warre he was in before; wherein he might without injustice be destroyed by any man whatsoever.⁴⁰

Since every person “voluntarily entered into the Congregation” such that “the major part hath by consenting voices declared a Sovereigne” those who “dissented must now consent with the rest” refusing to do this would be unjust.⁴¹

The outcome of the political theory of Hobbes is, therefore, totalitarian and absolutistic no one can ever complain, because the *unlimited power* of the *Sovereigne* derives from those who authorized all his deeds to be their own actions.

9. Locke and Rousseau

The development of modern thought produced many thinkers who aimed at advancing theories of *law* and the “just state” with the intention to guarantee various basic (civil) rights. A key element in these theories is found in the abovementioned *autonomy ideal* which is, as we noted, embodied in the new ideal of *freedom* (the *personality ideal*). Rousseau explicitly defines freedom in the spirit of this idea of *autonomy*: “freedom is obedience to a law which we prescribe to ourselves”.⁴²

John Locke continues the *natural law* tradition and explicitly identifies it with human *reason*: “The state of Nature has a law of Nature to govern it,

38 *Leviathan*, Part II, Chapter 17; see Hobbes 1651:227-228.

39 *Leviathan*, Part II, Chapter 18; see Hobbes 1651:228-229.

40 *Leviathan*, Part II, Chapter 18; see Hobbes 1651:228-229. The theories of a social contract hypothetically assume a *state of nature*. For Hobbes, this state of nature, preceding the civil state, was characterized by a “Warre of every one against every one” (*Leviathan*, Part I; Hobbes 1651:185). The Latin phrase is: *bellum omnium contra omnes*.

41 *Leviathan*, Part II, Chapter 18; see Hobbes 1651:231.

42 Rousseau (1975:247). Remember that the term *autos* means “self” and *nomos* means “law”.

which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions".⁴³ Later he adds the qualification of being *eternal* to the law of nature: "Thus the law of Nature stands as an eternal rule to all men".⁴⁴

His portrayal of "man in the state of Nature" is that such a person is free and is the "absolute lord of his own person and possessions, equal to the greatest and subject to nobody".⁴⁵ This emphasis on individual autonomy the *absolute lord* evidently opposes every form of super- and subordination between human beings. On the same page, Locke is prompted to ask "why will he part with his freedom, this empire, and subject himself to the dominion and control of any other power?" He does that against the background of his follow-up remark that within the state of nature all is coordinated equally as kings: "for all being kings as much as he, every man his equal".

The only reason Locke can provide for leaving the state of nature is that this state is very unsafe and insecure and is "constantly exposed to the invasion of others", threatening "the enjoyment of the property he has in this state".⁴⁶ In the final analysis, it turns out that Locke does not terminate the state of nature when, via the social contract, the civil state is entered (on the basis of a majority decision).⁴⁷ Only two rights are given up, relative to two particular powers "man" has in the state of nature. These powers are "to do whatever he thinks fit for the preservation of himself and others within the permission of the law of Nature" and "the power a man has in the state of Nature ... to punish the crimes committed against that law".⁴⁸ Only so "much as the law of Nature gave him for the preservation of himself and the rest of mankind, this is all he doth, or can give up to the commonwealth, and by it to the legislative power".⁴⁹

The civil state is, therefore, merely a *continuation* of the state of nature, directed at civil freedom, but not accounting for freedom and equality in a *public legal sense*. Locke does make an appeal to the *salus publica*, but he fails to give a *delimited* content to the idea of the *public good*, in spite of his guideline: "*Salus populi suprema lex* is certainly so just and fundamental a rule, that he who sincerely follows it cannot dangerously err".⁵⁰

The problem is that no precise delimitation is given to the *salus populi* or to the *public good*. Locke frequently speaks of *life, liberty and property*. The latter actually embraces *all* the subjective rights of an individual and the end of government is to protect the members of society in their lives,

43 Locke 1690:119 Chapter II, paragraph 6.

44 Locke 1690:185 Chapter XI, paragraph 135.

45 Locke 1690:179 Chapter IX, paragraph 123.

46 Locke 1690:179 Chapter IX, paragraph 123.

47 Locke 1690:165 Chapter VIII, paragraph 97.

48 Locke 1690:179 Chapter IX, paragraph 128.

49 Locke 1690:179 Chapter XI, paragraph 135.

50 Locke 1690:197 Chapter XIII, paragraph 158.

liberty and property. The legislative is appreciated as “supreme power” that can only govern by the *consent of society* and by the “authority received from them”.⁵¹ This notion of “society” does not specify any *limits* to the supreme legislative power: “and therefore all the obedience, which by the most solemn ties anyone can be obliged to pay, ultimately terminates in this supreme power”.⁵² Stating on the next page that this “power in the utmost bounds of it is limited to the public good of the society” merely underscores the problem: the *supreme power* can do anything in the name of the (unlimited) *public good!*

Notwithstanding his view that all human beings are born *free* and *equal*, Locke’s classical liberal idea of the state does not support *universal suffrage*. He is satisfied with the restriction of the right to vote to the privileged classes, as was the case in the British monarchy of his time. The implication is that, for Locke, democracy is merely a *means* in service of the protection of the inalienable human rights of the citizens, without containing a guarantee for *public* legal freedom and equality. Although he intends to restrict the government to do as little as possible, in order to provide the citizens with a maximum of freedom, he did not come up with a criterion demarcating unlimited actions of the government on behalf of the “public good”. Apart from the two rights given up, the civil state merely continues the state of nature and thus at most opts for *civil freedom*. It was Rousseau who appeared to have given the decisive step to the domain of public law, embodied in his aim to secure *public legal freedom*.

In the thought of Rousseau, the theme of popular sovereignty, in its connection to the idea of law as an expression of the general will, occupies a central position in his famous *Contrat social* (1762). Analogous to Locke’s views, Rousseau holds that the *Sovereign* has no force other than the legislative power and that laws are “solely the authentic acts of the general will”.⁵³ At the same time, Rousseau transcends Locke’s understanding of the social contract and what it produced. According to Rousseau, all human rights are surrendered by entering into the social contract, which then provides the basis for all the rights obtained in the civil state: “For the State, in relation to its members, is master of all their goods by the social contract, which, within the State, is the basis of all rights”.⁵⁴

Although both Locke and Rousseau proceed from an atomistic (individualistic) understanding of the state of nature, their ways part when the result of the contract is assessed because, for Rousseau, the contract gives rise to a transpersonal collectivity, the *general will* as *sovereign*. It is made possible in that each participant “gives himself absolutely”. Yet, “[A]t once, in place of the individual personality of each contracting party, this act of association creates a moral and collective body, composed of as many members as the assembly contains voters, and receiving from

51 Locke 1690:182 Chapter IX, paragraph 131.

52 Locke 1690:184 Chapter XI, paragraph 131.

53 Rousseau 1762:74 Book II, Chapter XII.

54 Rousseau 1762:17 Book I, Chapter IX.

this act its unity, its common identity, its life, and its will".⁵⁵ Through the contract, the atomistic individuals are transformed into indivisible parts of the new whole, the general will: "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 an indivisible part of the whole".⁵⁶ In other words, the social contract transforms the individualistic (atomistic) condition of the state of nature into the universalistic (holistic) whole embodied in the *volonté générale* which underlies his view that *law* is "purely the declaration of the general will".⁵⁷ He even identifies the *general will* with *law*, by speaking of "the general will or the law".⁵⁸

The crucial question is: Are there any *limits* to the *law*-making power of the *general will*? The key to answering this question is found in Rousseau's conception regarding the power of the general will: "As nature gives each man absolute power over all his members, the social compact gives the body politic absolute power over all its members also".⁵⁹

Social contract theory is inspired by the modern natural science ideal, aiming at a *rational reconstruction* of society and law in terms of autonomous individuals within the (hypothetically) assumed state of nature. However, motivated by the personality ideal of modern Humanism, Rousseau hoped to safeguard human freedom within the civil state. Yet, in the final analysis, his construction of freedom inevitably terminated in a totalitarian view. If *law* flows from the *general will*, which can only come to expression within the *state*, then the distinction between state law and non-state law is eliminated. The *internal law* of every societal form of life distinct from the state then turns out to be subjected to the general will, for Rousseau's approach does not acknowledge the internal legal relationships of religious groups, marriages, educational institutions and the like. Rousseau's view, therefore, contains no guarantee that the law intrinsic to schools, firms, marriages, families, and churches is protected against infringements from the state. Law remains of one kind only: *state law*.⁶⁰

55 Rousseau 1762:13 Book I, Chapter VI.

56 Rousseau 1762:13 Book I, Chapter VI.

57 Rousseau 1762:79 Book III, Chapter XV. According to Rousseau, most of the time there exists a big difference between the will of everyone (*la volonté de tous*) and the general will (*la volonté générale*). The "latter considers only the common interest, while the former takes private interest into account, and is no more than a sum of particular wills" (Rousseau 1762:23 Book II, Chapter III. See Article 6 of the Declaration on Human Rights of the French revolution: "Law is an expression of the general will").

58 Rousseau 1762:49 Book III, Chapter I.

59 Rousseau 1762:24 Book III, Chapter IV.

60 For example, Rousseau advocates a civil religion (*la religion civile*) with dogmas determined by the sovereign. In this respect, he is just as intolerant as the churches of his time: "While it can compel no one to believe them it can banish from the State whoever does not believe them". See Rousseau 1975:334-335; Rousseau 1762:114 Book IV, Chapter VIII.

While Rousseau strived to liberate himself from the enslaving grip of the dominant natural science ideal of his time by envisioning, through the social contract, the establishment of a new and higher civil state in which public freedom and equality would reign, the personality ideal in the final analysis lost the battle, as is clearly noted in the central line of argumentation running through his *Contrat social*:

- Freedom is obedience to the law which we have prescribed to ourselves.
- Through the social contract, the abstract individuals are transformed into indivisible parts of the collective whole which emerges from the contract as the general will with its own communal unity, life and will.
- The contract serves as the basis of all rights within the civil state and entails that the general will is the true will of each participating individual (which is different from the “will of all”).
- Dissent by any minority, in fact, opposes the general will, which is supposed to be the *own will* of each *indivisible part* of it.
- Those who are not conforming to the general will are actually not obeying their own will and are therefore not free for freedom solely exists when we obey the law which we have prescribed to ourselves.
- Finally, on the basis of the “absolute power [of the *general will*] over all its members”, Rousseau draws the ultimate totalitarian conclusion dissenters should be *forced to be free*: “... ce qui ne signifie autre chose sinon qu'on le forcera à être libre!”⁶¹

The inner structure of Rousseau’s view of (state) law is just as totalitarian as the view portrayed by Hobbes in his *Leviathan* the only difference is that Rousseau substituted the *monarch* of Hobbes with the *general will* but the legal power of both is *unlimited*.

10. Kant and Hegel

Immanuel Kant (1724-1801) restricted the classical humanistic science ideal to the world of sensory experiences (*phenomena* theoretical reason) in order to open up room for the primacy of the personality ideal of autonomous moral freedom (practical reason the human personality as an ethical *end-in-itself*). Kant equates freedom with being “independent from the coercive arbitrariness of another person”.⁶² If my action can co-exist with the freedom of every other person, according to a general law,

61 See the original French text Rousseau 1975:246. Rousseau did not remember that he appreciated *force* negatively, since it cannot create *right*. Therefore, he distinguished it from “legitimate powers”: “... force does not create right, and [that] we are obliged to obey only legitimate powers” (Rousseau 1762:6 Book I, Chapter III).

62 Kant 1797-1798, AB:45.

then, according to Kant, we encounter the *general principle of law*.⁶³ In this general formulation, nothing specific of the jural aspect of reality is present. Much rather the ideal of autonomous freedom here opts for coordinated relations, while rejecting relations of super- and subordination.

Every injustice is an obstacle of freedom, according to general laws. An injustice can only be restored when a force is installed against this injustice. Such a prevention of an impediment to freedom is in agreement with freedom, according to general laws.⁶⁴ But this solution generates a tension with Kant's ideal of autonomous (juridical) freedom, for this assumed autonomy is identical to the *independence* from the arbitrariness of another person. Consequently, this deified freedom is incompatible with every form of *jural coercion*. Moreover, because every impediment of freedom generates an injustice, the recourse taken to *force* entails that what is *just* actually emerges from the *hindrance* of a *hindrance*.⁶⁵ Thus justice is supposed to emerge from the injustice done to an injustice. This looks like two minuses yielding a plus but how can *justice* arise when an injustice is done to an injustice?

In the part treating legal theory (*Rechtslehre*), Kant accepts the general idea of a social contract by referring to a non-jural (*nicht-rechtlichen*) condition from which the step is taken into a civil state which is determined by laws and a sufficient external power.⁶⁶ The atomistic starting-point present in the theories of state and law of social contract theorists is continued in Kant's definition of the state: "A state (*civitas*) is the union of a collection of people under legal laws".⁶⁷ In following Rousseau, he teaches that the legislative power only applies to the *united will of the people*.

The possibility is always present that, by taking a decision against someone else, such a person causes an injustice. But this is not possible when such a person decides over him-/herself (*volenti non fit iniuria*). Consequently, only the consenting and united will of all, insofar as everyone decides over all and all over everyone, that is to say, only the general united will of the people could be *legislative*.⁶⁸ Since Kant continues to assign the legislation to freedom to the *general will*, it becomes impossible for him to avoid the totalitarian and absolutistic consequences entailed in the thought of Rousseau (and Hobbes).

Hegel derived one of his central thought patterns from the natural scientific discovery of electricity *positive, negative, spark*. He employed it in the form of *thesis, antithesis*, and (higher) *synthesis* (the latter incorporates

63 Kant 1797-1798:B:33.

64 Kant 1797-1798:B:35.

65 Kant 1797-1798:B:35: "Folglich: wenn ein gewisser Gebrauch der Freiheit selbst ein Hindernis der Freiheit nach allgemeinen Gesetzen (d.i. unrecht) ist, so ist der Zwang, der diesen entgegengesetzt wird, als *Verhinderung eines Hindernisses der Freiheit* mit der Freiheit nach allgemeinen Gesetzen zusammenstimmend".

66 Kant 1797-1798:B:193-194.

67 Kant 1797-1798:B:194-195.

68 Kant 1797-1798:B:195-196.

and transcends both *thesis* and *antithesis*). Art (*Anschauung*) and religion (*Vorstellung*) were incorporated in philosophy (pure, free concept) as the final synthesis. Law belongs to the *objective spirit*, which reveals itself in (abstract) law, morality and ethics the three main parts of his philosophy of law. Ethical life was the higher synthesis encompassing both law and morality. In speaking of “law as such” and about “law in its universality”, disregarding particular interests, Hegel approximates the functional universality of the jural aspect of reality.⁶⁹ Yet he holds that only *positivized law* (*Gesetz*) is *binding* (has *Verbindlichkeit*).⁷⁰ The lawfulness of positive law is the source of our knowledge of what is right or in accordance with law.

Civil society, according to Hegel, aims at the particular and common interests generated by the needs of individuals embraced by their externally organized association. The external state incorporates within its constitution public life dedicated towards the aim and reality of what is substantially universal through an external ordering regarding their particular and shared interests.⁷¹ The state is perceived as differentiated and properly organized (“*der Staat [ist] als ein gegliedert und wahrhaft organisierter anzusehen*”).⁷² In this instance, Hegel proceeds by applying the philosophical idea that a part should be observed in its relation to the whole, also to the dependence of private legal laws on the specific character of the state.⁷³ This encompassing appreciation of the state acquires its ultimate totalitarian statement in Hegel’s following claim: “The people as state is the spirit in its substantial rationality and immediate reality, therefore the absolute power on earth”.⁷⁴

The thought of Hegel (as well as those of Fichte and Schelling) breathed the spirit of a new appreciation of *history*. The latter highlights the tension between *nature* and *freedom* in the form of distinguishing the two sides of the particular national character of a people (*Volk*) its historical development (*seiner geschichtlichen Entwicklung*) and natural necessity (*Naturnotwendigkeit*).⁷⁵ The primacy assigned to the motive of *freedom* (the *personality ideal*) is clear from his conviction that within the highest truth (truth as such) the opposition of *freedom* and *necessity*, *spirit* and *nature*, *knowledge* and *object*, *law* and *drive*, *opposition* and *contradiction* as such, whatever form it may assume, does no longer have any power.⁷⁶ The idea, the absolute Spirit, which within nature merely is in itself, that is, not yet “in its truth”,⁷⁷ nonetheless has its highest determination in *freedom*: “Freedom is the highest determination of the spirit”!⁷⁸

69 Hegel 1821:179 Part I, paragraph 81.

70 Hegel 1821:353 Part III, paragraph 212.

71 Hegel 1821:301 Part III, paragraph 157.

72 Hegel 1821:396 Part III, paragraph 260.

73 Hegel 1821:396 Part III, paragraph 261.

74 Hegel 1821:486 Part III, paragraph 331.

75 Hegel 1821:65 Introduction, paragraph 3.

76 Hegel 1931:149.

77 Hegel 1931:141.

78 Hegel 1931:148: “Die Freiheit ist die höchste Bestimmung des Geistes”.

11. The Historical school and legal positivism

During the transition from the 18th to the 19th century, the rise of historicism, on the one hand, generated a form of legal positivism which at once also challenged the long-standing legacy of natural law with its trust in eternal and immutable legal standards. In the first volume of the newly established *Journal for Historical Legal Science* (*Zeitschrift für geschichtliche Rechtswissenschaft*), Von Savigny wrote in 1815 that law is a purely *historical phenomenon* and that there is no immutable and eternal legal system of natural law next to or above positive law.⁷⁹ Between 1840 and 1849, he published an eight-volume work *System des heutigen Römischen Rechts*, in the first volume of which Von Savigny traces the ultimate source of law to the “Volk” [nation] with its communal “Volksg Geist”. Positive law lives within the communal consciousness of the dynamic life of the “Volksg Geist”. Law is not brought forth by the arbitrariness of the single members of the nation. Rather, positive law is generated by the living and acting *Volksg Geist* which is, not accidentally but of necessity, the same law for the consciousness of each individual.⁸⁰

In the subsequent development of legal thinking during the 19th century, the scene was dominated by two wings within the Historical school the Romanistic school of thought (Von Jehr ing and Puchta) and the Germanistic school of thought (Otto von Gierke and his followers). Of course, the emergence of historicism within the science of law did not eliminate the natural law tradition. However, another trend of thought also surfaced during the 19th century, namely that of legal positivism. Jeremy Bentham is considered to be an early legal positivist, although John Austin is accredited for being the founder of analytical jurisprudence and legal positivism.

Although Von Jehr ing commenced from the irrationalistic romanticism of the historical school with its organic holism in his first phase (1842-1852), he eventually, reverted to an individualistic understanding of law and society in his third phase (particularly since 1859 in the third volume of his *Geist des römischen Rechts*). Kant identifies the competence to coerce with law.⁸¹ Hegel added the role of the human will to the concept of law.⁸² Von Jehr ing acknowledges these two elements, but points out that it is mistaken to allow the concept of subjective right to be absorbed by the will, because the will does not in itself contain a measure and end. Without

79 Von Savigny 1948:14ff.

80 Von Savigny 1840:31: “Es ist dieses aber keinesweges so zu denken, alsob es die einzelnen Glieder des Volkes wären, durch deren Willkür das Recht hervorgebracht würde; ... Vielmehr ist es der in allen einzelnen gemeinschaftlich lebende und wirkende Volksg Geist, der das positive Recht erzeugt, da also für das Bewußtseyn jedes Einzelnen, nicht zufällig sondern nothwendig, ein und dasselbe Recht is”.

81 Kant 1797-1798:37: “Recht und Befugniss zu zwingen bedeuten also einerlei”.

82 Hegel 1821:179 – paragraph 81

the latter, it will, from a physiological point of view, be nothing but a force of nature, and from an ethical perspective nothing but arbitrariness.⁸³

The fact that neither an individualistic (atomistic) nor a holistic (universalistic) view of society succeeds in providing a foundation for the limited legal power of the state, is obvious from the view defended by Von Jehring. It already appears in his formulation of the accepted view of law: "Law is the sum-total of coercive norms which are valid within a state". This definition contains two key elements: *norm* and *coercion*. Since the state alone is to be regarded as the bearer of the *Zwangmonopol*, i.e., the monopoly of coercive power, Von Jehring holds that only those norms brought about by the state qualify as legal norms. This says nothing more and nothing less than that "the state is the sole source of law".⁸⁴ In this view, there is no room left for an original non-state competence to the form law.

The reaction of legal positivism during the course of the 19th century was directed both against traditional natural law and against certain views of the historical school. The criticism of natural law exercised by the latter is centred in the emphasis upon the outcome of historical development (the "geschichtlich gewordenen") as opposed to human-made law. Beling, therefore, refers to this view as "customary law positivism" (*Gewohnheitsrechts-Postivismus*).⁸⁵ In the orthodox sense of the term, legal positivism, which *solely* accepts positive law as a source of law, holds that all positive law [*Gesetz*] is unqualified law [*Recht*], and finally that only *state* law counts.⁸⁶

It is tempting to observe in legal positivism a reification of *positive law*. However, different trends of thought acknowledge the reality and importance of positive law for an understanding of law. What is typical of legal positivism is that it overemphasizes the *arbitrary* element present in giving *shape* or *form* to law while abstracting from its *material content*. It disentangles the process of law formation from any supra-individual or non-arbitrary jural principles.

83 Von Jehring 1865:165-166: "[W]enn hinter dem Willen nichts anderes steht, das ihm Maß und Ziel setzt, so ist er physiologisch nichts als eine Naturkraft, ethisch nichts als die reine Willkür".

84 Von Jehring, 1877:176: "Nur diejenigen von der Gesellschaft aufgestellten Normen verdienen den Namen des Rechts, welche den Zwang, oder, da, wie wir gesehen haben, der Staat allein das Zwangsmonopol besitzt, welche den Staatszwang hinter sich haben, womit den implicite gesagt ist, daß nur die vom Staate mit dieser Wirkung versehenen Normen Rechtsnormen sind, oder daß der Staat die alleinige Quelle des Rechts ist".

85 In respect of the historical school, Beling (1931:133) states: "indem sie die Würde des 'geschichtlich gewordenen' im Gegensatz zum 'gemachten' Recht betonte, vertrat sie einen *Gewohnheitsrechts-Postivismus*".

86 Beling 1931:134: For positivism it is the case that "*nur* das Gesetz Rechtsquelle ist; daß *alles* Gesetz bedingungslos Recht is, und *schließlich*, daß *nur* das Staatsgesetz in Betracht kommt, so haben wir den *Positivismus* im, wenn ich so sagen darf, *orthodoxesten Sinne vor uns*".

In his work on the *Province of jurisprudence determined* (1832), John Austin (1832:350) continues essential elements present in the thought of Hobbes and Bodin, for he holds that “every positive law ... is set ... by a sovereign individual or body, to a member or members of the independent political society wherein its author is supreme”.

During the first decades of the 20th century, two neo-Kantian schools of thought not only dominated the philosophical landscape of the West for some time, but also had a significant influence on the philosophy of law. The Marburg school was represented by Rudolph Stammler and Hans Kelsen, while Wilhelm Windelband, Heinrich Rickert and Emil Lask belonged to the Baden school.

In his critical positivism, Kelsen continues key elements of the legal positivism of the 19th century, particularly the formal element, which strips law from a normative content. In his work on the philosophical foundations of the theory of natural law and of legal positivism, reprinted without any alterations in 1928, he acknowledges that behind positivism a relativistic world view hides itself which cannot acknowledge absolute norms for human action.⁸⁷

In his discussion of legal positivism and the sources of law, Raz explains that the “moral value” or “moral merit” of law is fully dependent upon the “contingent ... circumstances of the society to which it applies”.⁸⁸ In the thought of Kant, the split between *Sein* (is) and *Sollen* (ought) is an expression of the basic conflict between nature and freedom (science ideal and personality ideal) in the development of modern philosophy since the Renaissance. In the Baden school of neo-Kantian thought, this split assumes the form of the dualism between *fact* and *value*. Legal positivism gave its own shape to this dualism, sometimes portrayed in the opposition of “social fact” and “moral values or ideals”. Compare the way in which Raz characterizes the “social thesis” of legal positivism

Since the social thesis is that what is law is a matter of social fact, and the identification of law involves no moral argument, it follows that conformity to moral values or ideals is in no way a condition for anything being a law or legally binding. Hence, the law’s conformity to moral values and ideals is not necessary.⁸⁹

It is clear that legal positivism thus eliminates the element of *normativity* from law, entailing that the *form* of a law is combined with an arbitrary (social-historical varying) content.

87 See the remark of Dooyeweerd (1967:257, note 1) as well as the *Foreword* of Kelsen’s work on the problem of sovereignty and the theory of international law. In this *Foreword*, written for the first edition of 1920, Kelsen (1928a:VIII) acknowledges legal positivism and explicitly mentions the relativity of a system of positive law.

88 Raz 1979:37.

89 Raz 1979:38.

Add to this that the influence of legal positivism largely relies on a fairly widespread conviction, namely that there are only two fundamental sources of law *positive law* (backed by the state sovereign) and *customary law* (subordinated to the former), it is clear that the eventual outcome of these views will be both state absolutistic and a form of legal arbitrariness. This legacy contributed substantially to the erosion of the modern idea of the “just state” [*Rechtsstaat*], as it is found in the general theory of law advanced by Hans Kelsen. In his doctrine of the sovereignty of law, he dissolves the state into a functional complex of legal norms.⁹⁰ His conception is structured in such a formal way that it is stripped of every idea of *material normativity*. This enables him *formally* to appreciate an absolutistic dictatorship still as a “*Rechtsstaat*” [just state]. In a different work, *Allgemeine Staatslehre* (Berlin, 1925) we can observe how he struggles with the divide between formal normativity and the fusion of “*Rechtsstaat*” and “*Machtstaat*” [just state and power state]:

For a positivistic view, which does not absolutize the law [*das Recht*] in natural law, the state is a King Midas, for whom whatever he touches, turns into law. From a strict positivistic standpoint excluding every form of natural law every state must be a “*Rechtsstaat*” in this formal sense ... must be a coercive ordering. ... This is the concept of a “*Rechtsstaat*” which is identical with the state as well as with law.⁹¹

He also states that, from a particular point of departure, the entire coercive ordering of the state must be qualified as an organization of power. But the opposition between power and right [*Macht und Recht*], which comes to expression in the juxtapositioning of the legal aim and the power aim, is not at all appropriate for subdividing the possible contents of state order, for the sake of providing a material typification of states themselves. For it precisely belongs to the essence of the state that in it *power* becomes *law*.⁹²

Kelsen’s position is further complicated by the underlying dialectic of nature and freedom. He holds that, as a natural (physical) law, the law of causality applies to whatever factually occurs. Instead of exploring what is

90 In his theory of pure law (“*Reine Rechtslehre*”), Kelsen (1960:289) identifies *state* and *law* [*Recht*]. Paragraph 41 states: “Die Identität von Staat und Recht”.

91 Kelsen 1925:44: “Für eine positivistische Betrachtung, die das Recht nicht im Naturrecht verabsolutiert, ist der Staat ein König Midas, dem alles, was er ergreift, zu Recht wird. Und darum muß, vom Standpunkt des Rechtspositivismus ausgesehen, jeder Staat ein Rechtsstaat in dem Sinne sein, das alle Staatsakte Rechtsakte sind, weil und sofern sie eine als Rechtsordnung zu qualifizierende Ordnung realisieren”.

92 Kelsen 1925:43-44: “Ja, von einem gewissen Standpunkt aus muß man die ganze Staatliche Zwangsordnung, ...als Machtorganisation qualifizieren. Der Gegensatz von Macht und Recht, der in der Gegenüberstellung von Rechts- und Macht-Zweck [zum Ausdruck kommt], ...ist gänzlich ungeeignet, eine Einteilung der möglichen Inhalte staatlicher Ordnung und so hin eine materielle Typisierung der Staaten selbst zu liefern. Denn das ist ja gerade das Wesen des Staates, daß in ihm die Macht zum Recht wird”.

caused by our will, he argues for the objective causal determination of the human will.⁹³ Kelsen indeed considers it undeniable that the human will is objectively determined by the law of causality.⁹⁴

Beling distinguishes between a “positivistic natural law” and an “absolute natural law”, but states that the dividing line between these two conceptions of natural law does not coincide, without any further qualification, with that between the “eternity” or “changefulness” of opinions regarding natural law norms.⁹⁵

12. Concluding remarks

The perspective emerging from our historical analysis is that none of the views discussed succeeded in arriving at a proper delimitation of the law-making competence of the state. Various reasons for this failure surfaced in the course of our analysis. A constant struggle with the extremes of an individualistic or universalistic understanding of state law and society played a primary role in this regard and none of them managed to generate on this basis a view capable of appreciating the limited jural competence of state law within a differentiated society.

Since Greek philosophy, reflections on the nature of law had to account for what persists amidst change over time. It was noted that more recently, in 1931, Beling still partially distinguished two trends within legal positivism, classified in terms of what is *eternal* and what is *changeful*. Throughout the history of philosophical contemplation on what law is, the idea of *order* assumed a central place. Various specifications surfaced, such as *natural law* (*lex naturalis/ius naturale*), *divine law* (*lex divina/ius divina*), *lex civilis*, *ius publicum*, and so on. The initial connection with a universal cosmic law (*logos*) eventually obtained a more specific focus, directed at the function of law within human society. A particular view of the relationship between individual and society also constantly accompanied the understanding of law. Initially, the emphasis was on a universalistic (or holistic) view of the state as highest whole of human society (aimed at accomplishing the *moral perfection* of humankind), and later, in medieval scholasticism, on the church as supra-natural institute of grace, taking humankind to eternal bliss.

93 Kelsen 1960:100.

94 Kelsen 1991:24ff. According to him, factual events are subject to the law of causality and they belong to the domain of is “*Sein*”. The sphere of the *ought* (*Sollen*) is characterized by *Geltung* (having effect). The equivalents of this term that he mentions are “*in Kraft*” (“*in force*”). Kelsen holds the view that the science of law does not operate with factual statements rather it employs *Soll aussagen*, statements of ought to be. It falls beyond the scope of this historical overview to show that the way in which Kelsen employs the terms *Geltung* and *in Kraft* is antinomic.

95 Beling 1931:137: “Die Schnittlinie zwischen diesen beiden Naturrechtsauffassungen ... fällt nicht unbedingt zusammen mit dem Gegensatz der Meinungen über ‘ewigkeit’ oder ‘veränderlichkeit’ der Naturrechtsnormen”.

Since the Renaissance, individualistic and universalistic theories succeeded each other and at times even co-existed alongside each other. Yet, in all these approaches, no single individualistic or universalistic theory succeeded in advancing an acceptable view of the limits of state law. In addition, an understanding of the jural nature of law was constantly hampered by the confusion of law and morality, mainly caused by identifying all forms of normativity with *morality*. A more serious error was the identification of *law* with *state law*. Those who defended the latter view never succeeded in avoiding state absolutism and totalitarianism, because such a view cannot account for any legal sphere of competence distinct from that of state law. When law is identified with state law, the *internal law* of non-political societal spheres are eliminated in principle.

The assumptions behind modern theories of the social contract, as it developed since the Renaissance, appeared to be an outcome of the ideal of an *autonomously free personality*, which gave rise to the modern *science ideal*. The latter's aim was a *rational* reconstruction of reality from its simplest elements or atoms, the allegedly autonomous *individuals*. This inspired the idea of a *hypothetical* social contract. However, the various theories of a social contract never succeeded in escaping from the impasse of atomistic and universalistic views of state and society.

Subsequent theoretical reflection continued to struggle with the inherent tension between *nature* and *freedom*. This basic motive of modern philosophy directed the understanding of law during the past few centuries. We drew attention to it in our analysis of the thought of Locke, Rousseau, Kant and Hegel, as well as the subsequent dominant trends of legal thought of the 19th century.

Although it exceeds the confines of one article to articulate an alternative to the main trends in the history of attempts to delimit state law, it would nevertheless be appropriate to give a brief indication of the way in which such an alternative view should be developed.

Every theoretical view of reality (paradigm) has to articulate an understanding of the uniqueness and coherence of the various aspects of reality. When the jural and non-jural aspects are accepted as they are given in our everyday experience, there is no need to reduce what is irreducible. But the multiple *ismic* orientations within all the disciplines constantly aim to elevate one or another aspect to serve as the ultimate *principle* in terms of which the entire universe could be understood. For example, whereas early Greek philosophy developed along *vitalistic* lines (*everything is alive* – Thales), early modern philosophy advanced a *mechanistic* perspective (the world as the chaotic movement of physical particles subject to blind laws of nature). The influential opposition of an individualistic and a universalistic orientation, which practically dominated the entire history of reflection on human society, respectively elevated the *discreteness* of number and the spatial *whole-parts relation* (or analogies

of these two aspects within other aspects) to become ultimate *principles of explanation*.

Human societal relationships undoubtedly also function within the aspects of number and space. Yet their typical differences exceed the limited scope of these two aspects. This at once explains why the differences between the state as a public legal institution and other societal collectivities will be distorted if one subscribes to an *individualistic* or *universalistic* perspective.

What is needed to transcend the one-sidedness of individualistic or universalistic approaches is an acknowledgment of the *typical inner nature* (or, as it is sometimes phrased: “inner laws”) of distinct societal entities. Otto von Gierke paved the way for such an acknowledgment with his work on Johannes Althusius, for in it he recorded how Althusius formulated the first tentative formulations of such an alternative.⁹⁶ Althusius “stream-lined” the whole-parts relation by stating that churches and families are not *parts* of the state, such as provinces and municipalities.⁹⁷ During the 19th century, the Dutch historian and politician, Groen van Prinsterer, articulated the same idea in his formulation of the principle of sphere sovereignty. This was further explored by Kuyper who gave a presentation at the opening of the Free University of Amsterdam, which bore the same title: “Souvereiniteit in eigen kring” (sphere sovereignty).⁹⁸ After Kuyper, Dooyeweerd developed the implications of this principle both for his theory of modal aspects and for the type-laws underlying our experience of concrete natural and social entities and processes. In addition, more recently, various prominent modern thinkers such as Habermas, Rawls and Münch also advocated the idea of the “own inner laws” of societal collectivities. The acknowledgment of distinct, sphere sovereign, societal entities entails important consequences for the theoretical account of the *sources of law*.

The jural aspect, both in its uniqueness (sphere sovereignty), stamped by its core meaning of *retribution*, and in its coherence with all the non-jural aspects of reality, may serve as a starting point for an alternative understanding of the meaning of law. A crucial element of the acknowledgment of the normativity of modal and typical jural relationships is revealed by a proper insight into the relationship between *constancy* and *change*. Confronted with the Heraclitian doctrine that everything changes, Plato developed the classical insight that all knowledge would cease to be, unless the “essential being” of what is known persists. Both Galileo (inertia) and Einstein (the vacuum-velocity of light) further explored the fact that change can only be detected on the basis of constancy.⁹⁹ If principles are not universal and constant, their normativity will be jeopardized.

96 Von Gierke 1968.

97 *Politica Methodice Digesta*, 1603.

98 Kuyper 1880.

99 Del Vecchio explains that, according to its very nature, law (*das Recht*) is subject to the flow of ever-changing events. According to him, it is impossible to build the concept of law on change. Therefore, he refers to another

This insight is helpful in avoiding both a static rationalistic view (traditionally present in conceptions of natural law) and the irrationalism of historicism and legal positivism. These distinctions lie behind the important insight that (modal and typical) jural principles merely serve as universal, constant starting points for human action and norm positivization without, as erroneously claimed by the natural law tradition, being in and of itself valid *per se*. Every principle requires human intervention in order to be *made valid* (i.e., *to be enforced*).

Without a complex analysis of the *modal universality* of the jural aspect and without an articulated insight into the *typical* differences between what should preferably be designated as the domains of *public law*, on the one hand, and *civil and non-civil private law*, on the other, demarcating the legal competence of the state would remain a *fata morgana*.

These brief concluding remarks attempted to show that the main contours of the historical overview presented in this article provided multiple points of departure for a further elaboration of the problems identified. However, such an elaboration requires an independent investigation in its own right.

ingredient of law which is immutable [constant!] and it is this feature that makes possible the conceptual determination of law. Del Vecchio 1951:345: "In der Tat ist das Recht seiner Natur nach bedingt, d.h. einem gewissen Fluße, einem wandelbaren Geschick unterworfen. Hieraus ergibt sich die Unmöglichkeit, auf dieser veränderlichen Wirklichkeit aufzubauen, um den Rechtsbegriff festzulegen. Deshalb sind wir nunmehr den Frage gegenübergestellt: erschöpft sich die Rechtswirklichkeit ganz und gar in diesem Gehalte oder gibt sich an dem Rechte noch einen weiteren Bestandteil, der unwandelbar ist, und der uns auf Grund dieser Eigenschaft seine begriffliche Bestimmung ermöglicht?"

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