The Reconstruction of the Juridico-Political

Affinity and Divergence in Hans Kelsen and Max Weber

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Routledge
Taylor & Francis Group
a GlassHouse Book

First published 2016
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

a GlassHouse book.

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
The reconstruction of the juridico-political : affinity and divergence in Hans Kelsen and Max Weber / Edited by Ian Bryan, Peter Langford and John McGarry.
pages cm
Includes bibliographical references and index.
ISBN 978-0-415-52482-7 (hbk) – ISBN 978-0-203-79878-2 (ebk)
1. Law–Philosophy. 2. Law–Political aspects. 3. Legal positivism. 4. Sociological jurisprudence. 5. Kelsen, Hans, 1881–1973 6. Weber, Max, 1864–1920 I. Bryan, Ian. II. Langford, Peter. III. McGarry, John.
K230.R423 2016
340'.1–dc23
2015024624

ISBN: 978-0-415-52482-7 (hbk)
ISBN: 978-0-203-79878-2 (ebk)

Typeset in Baskerville by
Servis Filmsetting Ltd, Stockport, Cheshire

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Acknowledgements

We would like to thank Colin Perrin, Commissioning Editor at Routledge, for his support regarding this contribution and also Rebekah Jenkins and Laura Muir, former and present Editorial Assistants, for their assistance and patience during the preparation and submission of the manuscript. We would also like to express our gratitude to the contributors to this volume, both for their support for our project and for their incisive and original contributions. We would like to thank Edge Hill University for its financial and administrative support which enabled the conference *Hans Kelsen and Max Weber: Convergences and Divergences in Conceptions of the Juridico-Political* to take place in July 2012. Many of the papers contained in this volume were presented at the conference.

In addition to the aforementioned, Peter would like to acknowledge and thank all his friends for their interest and encouragement; and to thank his father for his support throughout this book project. Ian would like to express his profound gratitude to family and friends for their insightful comments and unfailing kindness. John would like to thank his family, Clare, Joe, Joan and Ken for their support and patience.

Ian, Peter and John
June 2015

Chapter 3

Max Weber's conception of the State: the State as Anstalt and as *validated conception* with special reference to Kelsen's critique of Weber[1]

Hubert Treiber[2]

Für Ulrike

> The sociologist who makes the state the object of his attention must first of all realise: I do not see it in *my* world of social realities, and cannot conceive it as a unity with the concepts available to me [. . .].[3]

Introduction

In seeking to answer the question of what Max Weber understood by the term 'State', it is advisable to treat his 'Basic Sociological Concepts' as a key source.[4] One reason for this is that this text comes from the final period of his working life.[5] Another is that the lecture course that he gave during the summer semester of 1920 under the title '*Allgemeine Staatslehre und Politik (Staatssoxiologie)*' 'draws heavily on the related paragraphs from *Wirtschaft und Gesellschaft*, his major contribution to the *Grundriß der Sozialökonomik*, which Weber had shortly beforehand sent to the press.'[6] Kelsen's critique of Weber can be found in paragraph 27 of his text *Der Soziologische und der Juristische Staatsbegriff. Kritische Untersuchungen des Verhältnisses von Staat und Recht*.[7] The discussion of Max Weber's conception of the State presented here has a particular point, because it is only by precise presentation of Weber's conceptual definitions and elaborations that many of Kelsen's misunderstandings, or misinterpretations, can be dealt with. It will also become apparent that there are not only differences between Kelsen and Weber, but also points at which they converge.

Paragraph 17 of *Economy and Society*, part 1, states, 'A political *institutional organisation enterprise* (*Anstaltsbetrieb*) will be called a *State* to the extent that its administrative staff can successfully exercise a monopoly of legitimate physical force in the execution of its orders.'[8] The most important aspects of Weber's concept of the State can be opened up through this definition; above all it prompts a thorough discussion of the (logical) conceptual architecture developed in the 'Basic Sociological Concepts' which culminates in this passage. It will become evident that Weber makes use of established legal concepts such as *Verband* or *Anstalt*, and in this regard fulfils his announcement in the 1913 essay that sociology 'has to

make use of precise legal expressions' and lend them a different meaning.[9] Thus Weber himself stated that some of his key definitions relate to legal concepts. The question, therefore, becomes the degree to which sociological terminology not only adopted the shells of legal concepts, but in assuming legalistic expressions also took on their related substantive meanings.

At the same time, it will also become evident that 'the isolated individual and his action is the prime unit'[10] of this conceptual architecture, articulating the intent of an interpretative sociology to be 'a science that seeks interpretative understanding of social action, and *hence* causal explanation of the course and effects of such action.'[11] Weber conceives one of sociology's tasks to be the treatment of a collective concept such as 'the State' 'as a complex arising from the specific interaction of men',[12] 'reducible to "action that can be understood", and that means exclusively: the action of participating individual persons [. . .].'[13] This raises the interesting question of how Weber himself approached this difficult task, given Thoma's view, citing Kelsen, that 'the sociologist, by penetrating to the level of individual behaviour and its motives as the sole reality of the social, dissolves the State and to some extent denies its existence.'[14] As will be demonstrated, the concept of validity (*Geltung*), a concept heavily overshadowed by neo-Kantianism, plays a not unimportant role in resolving this problem.

The State as '*Anstalt*' (*der Staat als 'Anstalt' – a structure of social formation along institutional lines ('anstaltsmäßige Vergesellschaftung')*)

'Social relationship' as a fundamental category

As already noted, for Weber, interpretative sociology is 'a science which seeks interpretative understanding of the meaning of typical processes of social action (typical here meaning typically alike), and so providing causal explanation of the course taken and their effects.'[15] 'Of the course taken' refers primarily to the capacity of the actor to define a given situation, something of which an observer of this situation must also be capable.[16] 'And their effects' refers to both intended and unintended consequences of a concrete action, 'requiring above all the analysis of the consequences of the action of many actors and their knitting together into structures that either constrain but also facilitate further action.'[17]

Social action is, in turn, the intended meaning of an actor or actors 'related to the behaviour of others, and conduct so oriented.'[18] The orientation of behaviour which is referred to here depends on the predictability of behaviour, which, in turn, 'to a great extent depends on the possibility of being able to calculate behavioural regularities, hence that in a given situation a specific behaviour is uniformly repeated.'[19] This is made possible by the capacity to typify, and so presupposes a work of abstraction based upon 'the equivalence of behavioural processes in equivalent situations.'[20] Hence 'similarities, regularities and continuities in outlook (*Einstellung*) and action'[21] on the part of the actor can arise, which

is particularly the case with action that is 'determined by interests', or which is 'purposively rational'.[22]

Within the conceptual architecture of the 'Basic Sociological Concepts' the definition of 'social relationship' (§ 3) has a special valency; defined as it is in terms of several actors reciprocally taking account of each other and so mutually orienting themselves. This is, first, because 'the quite central and dominating concept in the Basic Sociological Concepts is not ("mere") "social action" with its processes and effects, but rather "social relationship" (which does of course include "social action" as an attribute)'.[23] And, second, because that 'social construct', 'the State', in order 'to avoid an "essentialist" view', is connected to the existence of a social relationship.[24] In this respect 'social relationship' goes beyond action and social action, since now 'orientations and ultimately actions, plans for action, are co-ordinated',[25] through which structures of action (such as organization (*Verband*), State) can be formed.[26] The co-ordination of action can either just happen (through practice and custom), or be achieved through the 'rules' which are intended to be binding (convention, law). Weber also writes of 'maxims'[27] in this context. This refers, on the one hand, to § 4 of the 'Basic Sociological Concepts' involving practice (*Brauch*), custom (*Sitte*) and action 'conditioned by interests', as well as § 6 dealing with convention and law.[28] Behind these last two regularities in behaviour there is hidden a 'rule' (*Regel*) intended to be binding, whose observation, according to Weber, is conditioned by the validation of a conception of a norm, '[. . .] the reason for this is not the "ideal validity" of a norm, but rather the empirical conception on the part of the actor that the norm "should be valid" for his behaviour.'[29] If the actors orient themselves to a 'conception (*Vorstellung*) of the existence of a legitimate order',[30] the valid order undergoes an 'inner acceptance', increasing its stability.[31] Weber calls the 'substantive meaning of a social relationship'[32] an order (*Ordnung*) if 'maxims' can be formulated to which actors orient themselves. If this actual orientation results because the maxims are perceived to be 'binding or exemplary' (*verbindlich oder vorbildlich*), then this order is *valid*. If this occurs alongside other motives which can be taken into consideration then the chance that actors really will orient themselves to this order is considerably increased. Weber makes these statements more explicit by going on to talk of 'the prestige of commitment (*Verbindlichkeit*) and exemplary character (*Vorbildlichkeit*)' and equates this with 'legitimacy'; and so the border between the validity of an order and the validity of a legitimate order is not especially clear cut.[33] By present day standards, the validity of a legitimate order means no more than an orientation to a legal order that has been legally established but is certainly open to modification, the legality of this legal order being accepted.[34] This 'belief in legality' is also supported by general cultural values, from:

> generally accepted belief(s) that the conditions of everyday life [. . .] are for the greater part rational in nature, i.e., that rational knowledge, creation and control are accessible human artefacts [and also from the] assurance [. . .]

> that they function rationally in the sense of conforming to known rules, and not irrationally like the powers that the savage seeks to influence with his magic; that one can in principle at least 'count on' them, 'calculate' their behaviour, and that one can orient one's action to unambiguous expectations formed thereby.[35]

The actual behavioural regularities emerging there from (such as custom and practice), like the valid order (convention, law) but also valid legitimate orders[36] – all of these are, for Weber, actual conditions of social action or social relations,[37] given that he recognized the 'parallel validity of differing and mutually contradictory orders' within any possible social composite (*Gesellschaftsintegrat*).[38] These conditions are taught to a child during socialization, for example;[39] nonetheless, they determine action 'at quite different levels of consciousness.'[40] Weber is indeed convinced that 'the chance of legal coercion [. . .] has a very minor' impact upon conformity to norms.[41] On the one hand, the 'rules of co-ordination' ('orders') presented are internalized, suppressing their coercive character, while, on the other hand, external coercion remains very real for many; as when the actor is confronted with the requirements of 'role norms' and discovers in this way that demands are being made of him that apply to others in similar positions (so that there is a clear moment of de-individualization).

However, before we pursue Weber's conceptual architecture relating to *Verband*, *Anstalt* and *Staat* any further, we need to consider in greater detail his concept of validation (*Geltungsbegriff*).

On Weber's concept of validation[42]

If one puts together the various statements on validation that we can find in the 'Basic Sociological Categories',[43] the Essay on Categories,[44] the Critique of Stammler[45] and also the fragment 'The Economy and Social Orders',[46] then it becomes plain that Weber is not entirely consistent. As a rule, he does not simply establish the fact of observed behavioural regularities, but, instead, places emphasis upon the way that in the *heads* of the actors (involved in a social relation) there exists an empirically ascertainable *idea* (*Vorstellung*) of the binding nature of an established (legal) order,[47] whereby the chance of an *actual orientation* to this order arises. If this is, in fact, the case then there is also an increased chance that this order will be respected. Insofar as the substantive meaning of social relations can be expressed in 'maxims',[48] then Weber talks in terms of 'orders' (*Ordnungen*), as has already been noted. If the actors in question perceive this order as 'binding or exemplary', then this order is *valid*. If, on the other hand, the existing idea of such a binding and exemplary order in the heads of the actors is supplemented by the additional value of prestige – and the relevant text in § 5 of the 'Basic Sociological Categories' can certainly be read this way – then this additive[49] lends the order the quality of a (valid) legitimate order. What is nonetheless decisive for Weber is that the fact of 'validation' is decided by 'the fact of an "orientation" of an actor to an order and not through its "observance"'.[50] As will be shown below, this distinction underpins a very consequential difference with respect to Kelsen.

The use of the term 'exemplary' (*vorbildlich*) seems to come from Rickert, who understood this to be an evaluative concept (*Wertbegriff*), 'the concept of something good to which a value was attached.'[51] The path upon which Weber set out, making the 'idea of a norm' into the 'actual determining basis of real [regular] human action',[52] brings to mind similar thoughts in Windelband first sketched in 1882, according to Fritz Loos,[53] in his text on 'norms and natural laws' which can be found in his *Präludien*.[54] The outlines of similar thoughts can be detected in Windelband's *Habilitationsschrift, On the Certainty of Knowledge*[55] (1873), in the context of the normative theory of truth that he sketches there. There, Windelband states that 'the logical law [. . .] like the ethical law, is a maxim, where in the latter one acts correctly, in the former case, where one should think correctly, without the involvement of any compulsion of the sort normal for natural laws, where one has to really act correctly, or really think correctly.'[56] In his essay 'Norms and Natural Laws' Windelband elaborates upon this, 'that logical and ethical norms can become determinants of ideational connections and decision-making in the purposively-active, voluntaristically thinking and consciously striving individual.'[57] Further, Windelband also speaks in the context of the 'consciousness of an obligation', or of the 'idea of an obligation' which has a lasting impact upon the logical and ethical norms that function as 'determinants', increasing the degree to which they are observed:

> For the idea of such a norm brings with it a feeling that the real process, whether of thinking or wanting (*Wollen*), should be formed in its image. Quite obviously there is associated with the emergent consciousness of a norm a form of psychological compulsion that it be observed. [. . .] Whoever recognises a norm as such is convinced that he, like everyone else, should act in conformity with it. Since the norm involves a sense of the obvious (*Evidenz*), once anyone has clearly and vitally made this norm conscious it necessarily becomes applicable (*geltend*) to them; and so every logical and ethical rule [in individual consciousness] becomes a determinant of thinking or striving.[58]

This reminds one of Hellpach's 'feeling of commitment',[59] but also of Weber's procedure in lending the concept of validity a sense of value orientation.[60]

The influence of Windelband on the conception of Weber's use of 'validity' is apparent when we examine more closely the associated meanings with which Weber endowed his concept. Windelband lent the concept a meaning which runs back to his teacher Hermann Lotze. His concept of validity rested upon an unusual interpretation of the Platonic idea, which interpretation was subsequently adopted by prominent representatives of the south-western school of neo-Kantianism (Windelband and Rickert). We need then to consider Lotze, because, for Weber, the idea of the binding nature of an order for an actor is, on the one hand, a definitive reason that the order *should* be valid, while, on the other hand,

it opens up the possibility of empirical validation, that is, a connection to reality. The following statement of Lotze can be paralleled in Weber:

> *Ideas*, to the extent we have and hold them, lend *reality* to the meaning of an event, they occur within us [. . .]; however its substantive content, insofar as we can consider it separately from the envisaged activity directed to this content, no longer happens, is not at all as things are, but remains *valid*.[61]

This is also a reason that for Weber *only* 'the fact of an action "being oriented" to an order' decides on its validity.[62]

We cannot here pursue a detailed genealogy of the concept of validity in the work of the most important representatives of German neo-Kantianism.[63] Instead, we will limit our discussion to Windelband, and in particular, how he dealt with the concept within the framework of his doctrine of judgment (*Urteilslehre*).[64] Windelband begins by distinguishing a ruling (*Urteil*) from the act of judgment (*Beurteilung*), not least because he seeks to make the process of passing judgment the object of philosophy, rendering it an evaluative science (*Wertwissenschaft*). While rulings relate to particular objects, the judgment aims at evaluations (*wertende Stellungnahmen*), in which not only cognitive aspects play a role.[65] Judgments are also ideational in character (*vorstellungsmäßigen Charakter*), since they dissect ideas or make connections between ideas. Windelband calls the general norm that guides the connection of ideas in a judgment a 'rule' (*Regel*) in the context of a wilful interpretation of Kant.[66] He regards those ideas to be 'true' that can be connected with each other with the aid of such a generally valid rule. According to Windelband, this is related to his discussion of general validity – in the domains of logic, ethics and aesthetics – and in no way involves an 'actual recognition', but rather an 'ought to be recognised'.[67] In this respect Sommerhäuser is quite right, 'What is valid is what ought to be recognised; it is not always realised as such, but always a stipulation. What is valid turns out to be what ought to be.'[68] Even when Weber uses another concept of rule[69] he still gives great emphasis in the concept of validity to this 'oughtness'.[70] If one considers that 'given maxims' are treated as 'binding or exemplary',[71] hence introducing a value rational component ('feeling obliged'), then this once again originates with Windelband and his doctrine of judgment. Windelband assumes that 'in the "ruling" there is, alongside the idea, also a form of value definition (*Wertbestimmung*) as a material moment.'[72] This is true both of negative and positive rulings (*affirmative Urteile*). Whoever subjectively considers a 'rule' to be 'binding or exemplary' is not only making an affirmative judgment, but rather attaches to this an evaluation (*wertende Stellungnahme*). Weber's concept of validity constantly involves an idea of commitment (*Verbindlichkeitsvorstellung*), whose 'oughtness' is reinforced by the value orientedness of the actor, and this is clearly expressed in affirmative judgment.

Particular 'social relations': *Verband*, *Anstalt*, *Staat*

Verband[73]

For Weber, an organization (*Verband*) is a 'social relationship which is externally closed or limited' in which 'the observance of its order is guaranteed by the behaviour of particular persons charged specifically with its implementation: by the behaviour of a managing head and, quite probably, of an administrative staff.'[74] Consequently, an organization has members, it may also have one or perhaps several orders (*Ordnungen*);[75] the observance of, or compliance with, some of those orders (not all) is in the hands of an administrative staff. This, in turn, entails that there could exist orders which are not controlled by an administrative staff. The existence of such an administrative staff is a characteristic which is easy to ascertain, and, when present, the existence of an organization is established. The presence of an organization therefore depends 'on the existence of the chance that the action of certain persons occurs and is directed to the execution of the organisation's orders [. . .]. In the absence of a staff or an individual performing action in the manner defined there is in our terminology just a "social relationship" and no "organisation" (*Verband*).'[76]

Weber distinguishes in this way an organization (*Verband*) from an association (*Verein*) and an *Anstalt*, both of which are characterized by rational statutory orders, but where membership of an association is a voluntary matter, while that of an *Anstalt* is compulsory. Since Weber characterizes the State as an enterprise formed as an *Anstalt*,[77] we need to address ourselves to this concept. This is also because the sociological concept of an *Anstalt*,[78] marked out by the imposition of a statutory order, is also the endpoint of a development that Weber summarized in his *Sociology of Law* in one sentence, 'From the charismatic revelation of new commandments there leads, via the imperium, the most direct route to the development of law formed through fixed and imposed statute.'[79] Since this developmental line is in § 2 of the *Sociology of Law*, also identified as a process of legal rationalization, the definition of the State presented in § 17 of the 'Basic Sociological Concepts' is directly related to Weber's theme of rationalization. The concept of an *Anstalt* is also subject to the methodological pronouncement[80] that precise legal concepts should be employed in the process of constructing sociological concepts, concepts which are, however, then given a different meaning.[81] Since Weber, even if with a degree of distortion, treats the development of the English State from a sociological perspective in terms of the *Anstalt* model, then we can treat this as initial support for the claim that 'Weber was convinced that he had found in the form of the *Anstalt* the decisive criterion of State formation.'[82]

The origin of the sociological conception of Anstalt

The model for Weber's sociological concept of *Anstalt* is the legal concept that he briefly introduces in § 2 of the *Sociology of Law*,[83] and about which he says

that 'from the purely legal point of view, it was modern theory that first made this complete.'[84] He alludes here to the theory of the State as an *Anstalt*, whose development during the second half of the nineteenth century ran more or less chronologically in parallel with that of the conception of the State as a legal person from Gerber to Laband. Along the way, there was a great deal of argument, and the *Anstalt* conception of the State was more or less completed by Otto Mayer in debate with Laband. Of course, there is more agreement than disagreement between Mayer and Laband. This applies, for instance, to the view that the State's existence precedes that of the law, as well as to the position (disputed by Kelsen) that follows from this, that the State limits itself, not least given the view that is of especial interest here, that the State represents 'with regard to its citizens an entirely autonomous apparatus.'[85]

There are clear affinities between Otto Mayer's characterization of an *Anstalt* – which it might be noted appeared in a *Festschrift* for Paul Laband – and Max Weber's sociological concept of an *Anstalt*, 'The term *Anstalt* really means no more than an enterprise that is intended to persist.'[86] The following passage from Mayer highlights just how close this was to Weber's sociological concept of the *Anstalt*:

> So that he might rule the land the Duke made suitable arrangements, putting material and personnel in systematic (*planmäßig*) order. That is an *Anstalt*. The people, the population, is the object of the work that they perform; quite possibly privileged members of this mass who made up the citizenry were able to suggest some small alterations to the running of this *Anstalt*; but that does not change anything. [. . .] And so the state is of course one great *Anstalt*! State power means the guidance of this *Anstalt*. For that you need both people and territory, for without these the great historical purpose of the *Anstalt* is inconceivable.[87]

These terms 'persistence', 'enterprise', 'territory' and also 'conduct of the *Anstalt* according to heteronymous acts of authority' – an aspect that has an 'ecclesiastical origin', as we shall soon see – enter either directly or indirectly into Weber's sociological concept of the *Anstalt*.[88]

Not only was Weber aware of the contemporary debate over the legal conception of an *Anstalt*, he also noted that materially this 'was of ecclesiastical origin', developed out of Canon Law.[89] The relevant source here is Otto von Gierke's *Genossenschaftsrecht*, especially volumes two and three of this multi-volume monument. Of especial importance is Gierke's 'Comprehensive Theory of Canon Law' (Landau), a critical conception requiring particular evidential support since it played a central part in his argument that there is 'continuity from the Germanic conception of law right up to the present.' This theory was used in support of the idea that:

> canonistic corporate doctrine had an intrinsically different foundation to that of the Germanic conception of the corporation (*Körperschaft*), or *Genossenschaft*, for apart from anything else the foundation of the former concept derived from Christian universalism and not from the spirit of the Germanic peoples (*germanischer Volksgeist*).[90]

The 'Comprehensive Theory of Canon Law' thus acquires a particular importance because Gierke's conception of a Germanic *Genossenschaft* could only be filled out in opposition to his theory of the Canonistic *Anstalt*. Moreover, this theoretical element is embedded within an all-encompassing developmental-historical perspective which starts out from the basic assumption that '*Herrschaft* and *Genossenschaft* originally represented mutually supportive and specifically Germanic legal structures.'[91] This underlying assumption formed the starting point of a developmental process that ran from the Germanic tribes to the foundation of the German Empire in 1871, in which the two dichotomous principles found an accommodation in the reconciliation of the monarchical claim to rule and the civil insistence on independent self-administration. According to Gierke, this development unfolded in the tensions existing between the *Genossenschaft(sverband)* and the *Herrschaft(sverband)*, between *Körperschaft* and *Anstalt*, or in other words between (older) Germanic Law and Romano-Canonical Law. Canon Law here played a particularly decisive role:

> Canonistic doctrine transformed the concept of corporation into a concept of *Anstalt*, such that the legal personality of all the subjects defined by Canon Law, from the universal Church to the benefice of a cleric, was no longer founded on volition, but instead upon a heteronymous act of authority, in the case of the *ecclesia universalis*, on divine benefaction (*göttliche Stiftung*).[92]

Gierke considered the Canonical concept of the *Anstalt* to be 'the model for the concept of temporal authority' (*Obrigkeitsbegriff*) so that, according to Landau, Gierke 'here partially anticipated Max Weber'.[93] Naturally, Landau does at the same time make clear that 'the medieval Canon Law sources lend little support'[94] to Gierke's view that 'the legal person in Canon Law was transpersonal', which his concept of *Anstalt* sought to capture in legal terms.

Anstalt *and* Staat

The sociological definition of an *Anstalt* that can be found in § 15 of the 'Basic Sociological Categories' – 'an *Anstalt* is an organisation (*Verband*) whose statutes can within a given domain be (relatively) successfully imposed upon all whose action has specified particular characteristics' – has features taken from the legal concept of an *Anstalt*. This is especially clear in the way that the *Anstalt*, as a form of sociation constituted through action, is characterized by rational statutory (legal) orders imposed upon those subordinated to the direction of the *Anstalt* (compulsory participants);[95] that is, they are subject to a heteronymous act of authority.[96] The use of the term 'imposition'[97] implies the compulsion also involved in rulership, but it is only in the definition of an *Anstalt* in the 1913 'Essay on Categories' that this idea

of force and compulsion is stated explicitly by reference to an 'apparatus of compulsion'.[98] There, the use of *Oktroyierung* means that a particular group of persons (executive directors, administrative staff) proclaim a rational statutory order to which 'institutional inmates' (*Anstaltsgenossen*) orient themselves (through consent or '*Einverständnis*'). In practice, *Oktroyierung* presupposes power,[99] just as 'any compulsory power' is subject to the influence of the prevailing form of rule (*Herrschaft*),[100] which besides other motives of compliance also makes use of physical and psychic compulsion. It can above all count upon compliance (obedience) if those who do the obeying 'also subjectively regard the relationship of rule as "obligatory" for them' – what is called in the terminology of the 1913 'Essay on Categories' 'legitimacy-compliance' (*Legitimitäts-Einverständnis*).[101] In this respect, an *Anstalt* possessing powers of compulsion is also an 'organisation of rule' (*Herrschaftsverband*).[102] The characteristic of a (purposively) rational statutory order (or orders) also represents the termination of a process of development underlying Weber's rationalization principle. The conceptual distinctions that we encounter in the 1913 Essay (communal, compliant and societal action, or the action of organization and *Anstalt*),[103] like the conceptual architecture of the 'Basic Sociological Categories', represent a framework of logical relationships. But Weber also wished to make the point that the sociological basic concepts he used not only related to each other logically, but also according to a developmental history 'expressive of the degree to which its inherent social potential for rationalisation had been realised.'[104]

The administrative staff is also expressly referred to in the definition of the State with which this essay began. In a modern State, this is synonymous with the 'modern' (rational) bureaucracy, which Weber presents in the form of an ideal construct[105] in his 'structural-typological terminology' (Zingerle). It should be noted that this thought construct (*gedankliche Gebilde*) serves particular cognitive ends, and, hence, assumes the function of a cognitive instrument. Weber seeks in this manner to respond to a question thrown up in the 'Preface' (*Vorbemerkung*): why it is only in the Occident that cultural phenomena (such as rational bureaucracy, rational State, modern capitalism and so forth) first appeared, proceeding then, following the then plausible assumption, to advance ultimately to 'world domination'.[106] In the material part of the *Sociology of Religion* and of *Rulership*, Weber also makes use of this structural-typological terminology, which is bound up with a particular problem to which Zingerle has drawn attention, as has also Hermes:

> [. . .] On the one hand, in his methodological writings [as also in the 'Basic Sociological Concepts'] Weber elaborates his principles in terms of a theory of action, for this purpose reducing institutional moments to action-oriented analysis [. . .]; on the other hand, he nonetheless employs in his substantive studies structural-typological terminology which cannot be directly 'retranslated' in action-theoretical terms.[107]

We still lack a structural-typological 'retranslation' of the ideal-typical construct of the modern bureaucracy, but it would be possible to develop one if the joint

action of those in bureaucracies, ordered hierarchically and subject to a division of labour, were broken down into role norms.[108]

It is plain that it is in the conception of an *Anstalt* that the *initial* outlines emerge of what Weber would mean by *Staat* and *Staatlichkeit* (so long as one does not omit Weber's rider: 'The *Anstalt* can in particular be a territorial organisation (*Gebietsverband*)'):[109]

> The concept of *Anstalt* developed in Continental Canon and common Roman Law clearly contains [major] components, which for an understanding of the rational State as a legal organisation requires a sociological theory of organisations oriented to the phenomena of rationalisation. (Compulsory membership, rational statutory orders, bureaucratic institutional organs with statutorily-regulated competences.)[110]

By explicitly identifying the requirement for an administrative staff in § 17, Weber refers to the definitions of an organization (*Verband*) and of the State.[111] This emphasizes that the members of the administrative staff are distinguished from the organizational leadership (the governors) by a particular inner disposition, and in so doing makes a link to basic assumptions of the sociology of rule (*Herrschaftssoziologie*).[112] This becomes quite plain if Weber's treatment of the *Sociology of Rule* is treated as a response to Hume's question (Popitz): why are the many governed by the few? According to Weber, the rule of the few over the many is based upon their superior organizational ability (which is expressed by the creation and use of an administrative staff) as well as in the ability to arouse and sustain a belief in the 'justness' (legitimacy) of their rule.

But if the sociological concept of *Anstalt* and its various features claims that it provides substantive meaning to a legal conceptual source now freed of its temporal context, we should recall that the proximity of the legal concept of *Anstalt*, originating in the nineteenth century to the Prussian-German constitutional monarchy is quite obvious. We can go back to Otto Mayer's characterization of the '*Anstalt "Staat"*' above:

> The monarch is 'the leader of this great *Anstalt*' and popular representation can only 'suggest some small alterations' in the conduct of the enterprise, without this having any lasting or fundamental impact upon the system. But it is precisely this *Anstalt* apparatus dominated by a monarch which in Laband's system equates the legal personality of the State with the monarchical possessor of State power. The manner in which, in Wilhelminian Germany, the State was identified with the bureaucracy is rendered particularly concrete in Mayer's description of the State as an *Anstalt*.[113]

As we have shown, in respect of 'imposition' and 'direction from above', Weber's sociological concept adopts important features of the legal concept of an *Anstalt*, recapitulating the everyday 'reality' of Prussian constitutional monarchy; and so

Weber's sociological concept of *Anstalt* has a striking proximity to a present 'reality',[114] so that the State appears to become incorporated in the monarchical and bureaucratic apparatus (the '*Anstalt* "state"').

An *Anstalt* equipped with compulsory powers is still a 'ruling organisation' (*Herrschaftsverband*),[115] characterized by the fact that its commands are complied with, not least because those who obey desire the same end as those who command.[116] Here, there is a striking similarity with the 'doctrine that begins with Gerber' that treats the State as a legal person, equipped with 'the power and will of the ruler, the state power to which its citizens are subordinate.'[117] According to Schönberger, 'the idea that command and compliance constituted the real central characteristic of public law (*Staatsrecht*)' could only then develop 'because the state was considered to be a bureaucratic apparatus separate from and external to its citizens',[118] something which did correspond with the actual state of affairs, but which on the other hand was certainly also an idea favoured by the legal concept of the *Anstalt* (in Otto Mayer). Hence, we cannot simply dismiss Hermes' assumption that the:

> centralised character of organisation and rule as constituted in politico-legal theory had a considerable influence on the structure of meaning in the parallel terminology of sociology. And precisely because Weber also imported from jurisprudence, along with the legal concept, the criteria of relevance for the constitutions of sociological objects.[119]

Here, only Laband will be called as a 'crown witness' for the way in which politico-legal theory presumed the centrality of rule, and also because of his importance to Weber; to this end we can draw upon some especially striking passages from his *Staatsrecht des Deutschen Reiches* (1876):

> Since von Gerber in his *Grundzügen* made the leading principle of *Staatsrecht* the idea that the peculiar substantive will of the state personality be considered to be 'ruling', and the power to rule over the state be called state power (*Staatsgewalt*), there have been any number of politico-legal texts which talked of rulership and the rights of the state to rule, it was not thought necessary to examine more closely what state rule meant.[120]

Laband himself proceeds to set about dealing with this alleged deficiency, 'Rule is the right to command free persons (and associations of the same) to perform actions, to desist from actions, to make services (*Leistungen*), and to compel their compliance therewith.'[121] Then stating, a few pages later, that 'to rulership there also belongs the authority to compel adherence to commands through the application of physical force.'[122] And if Laband, taking account of the multiplicity and constantly changing aims (tasks) that State power considered, and considers, itself called upon to perform, then believes it an impossibility to assemble all of these in one legal concept,[123] and so notes the one 'unchangeable and established' fact,

that 'the state has the right to command free persons with coercive power',[124] this could have served as a model for Weber. In support of this we can cite Weber's dictum that, 'it is not possible to define a political organisation – not even the "state" – by listing the aims of its organisational action', together with the conclusion which was derived from this, that the consequence was that here only the means specific to the State – force – could be considered.[125] Accordingly, for Weber, a 'political *Anstaltsbetrieb*' will be called a State 'if, and to the extent that, its administrative staff can lay claim to a monopoly of legitimate physical force in the execution of its orders.'[126] Hence the 'monopoly of legitimate physical force' is the demarcation criterion between State and *Anstalt*, in other words, between a political organization (*politischer Verband*) and the State.[127]

With this criterion of demarcation, Weber once more emphasizes that the modern State involves the means to 'found the rule of man by man upon force',[128] it is a ruling organization (*Herrschaftsverband*) which those who are subordinated to its rule, to the extent that they accept the use of force, regard as legitimate.[129] Hermes has noted that Weber traced the monopoly of force and the capacity to enact statutes back to military charisma.[130] If both the monopoly of force and the capacity to enact statutes are available, the political organization becomes a State, capable of securing its orders through the use of legitimate force. This lends emphasis, on the one hand, to the way in which force creates order, but, on the other hand, any order which comes about and is guaranteed by force also has need of a limitation to the use of force.[131] The problem that arises here, the limitation of institutionalized force, was something of which Weber was also conscious, noting that '[. . .] there is "legitimate" force [. . .] only to the extent that the state order permits or prescribes it.'[132] To this extent, for Weber, the modern State is always a State based on the rule of law (*Rechtsstaat*).[133]

Weber's sociological 'concept of law' presumes that a (statutory) order is guaranteed externally by force, assisted by a staff capable of coercion.[134] According to Weber, rule (*Herrschaft*) consists of the 'factual existence of a power of command' plus actual compliance with such commands.[135] Since rule generally seeks legitimacy,[136] and rule based exclusively upon force (coercion) is very considerably less stable than rule that is inwardly accepted by those ruled, rule and law are categorically connected through legitimacy.[137] If the concept of rulership is not exhausted by the idea that a command be followed, but also requires that the ruled 'make the substance of the command, for its own sake, a maxim for their action',[138] accept it therefore as a 'valid norm', then this signals the general inner acceptance of the relationship of rule ('low-level legitimacy'). The use of this concept of maxim indicates, in addition, that the concepts with which we are here dealing (law, rule) are adapted to an empirical and sociological perspective, as is the concept of the 'idea of a norm' (*Normvorstellung*) and the sociological conception of validation in the 'Essay on Stammler',[139] and, also, in the textual fragment 'The Economy and its Orders'.[140] As Kelsen states,[141] for Weber, 'organisation' (*Verband*) and 'law' do not map seamlessly on to each other, they are, instead, 'mediated by the concept of rule'.[142] As has already been demonstrated, commands which make evident the

exercise of rule can also be understood as 'maxims' in the sense of rules of action (*Handlungsregeln*) that are both binding and subjective,[143] rules that are, for Weber, 'factual determinants of real human action'[144] and so to this extent prove themselves to be 'valid norms'. These are legal norms if the chance of their validation is 'guaranteed' by the expectation that a sanctioning instance will intervene,[145] something upon which one can count if members are guided by the idea that the 'obligation' imposed upon them to act (secondary normativity)[146] is to be treated as binding. Hermes sums this up as follows, 'A political organisation (*politischer Verband*) is not only the empirical domain of validation of commands which are "taken" to be normative [i.e. rule/*Herrschaft*], but simultaneously the empirical domain in which compulsorily guaranteed norms [i.e. law] have effect.'[147] If one accepts this view, then it is possible to agree with Weber that 'an "organisation" (*Verband*) is the "bearer" (*Träger*) of, the support and medium for, the law.'[148] This should be understood as meaning that the rulership (*Herrschaft*) and law are not exclusively bound up with the modern State, but appeared long before as a historically demonstrable phenomenon – for instance in the form of 'numerous "legal communities" whose autonomies cross-cut with each other, among which political organisation – to the extent that it could at all be treated as such a unity – was only one such body.'[149] The concepts that Weber develops are intended to capture this particularity, including the fact that not all ordered organizations are legal in nature. The following two sections will examine the degree to which there are, even here, differences with Kelsen in respect of epistemological premises.

The State as validating idea (*der Staat als Geltungsvorstellung*)

So far, we have talked about the conceptual architecture of the 'Basic Sociological Concepts', finishing with the definition of the State in § 17. Weber thinks that there are very specific difficulties with the categories that he there introduces:

> It is a peculiarity not only of language, but also of our thinking, that the categories which deal with action present it as an enduring being, as a 'personified' form that is tangible or leads its own life. This is true, and especially true, for sociology. Concepts such as 'the state' [. . .] and others amount for sociology, quite generally, to categories for particular modes of mutual human action, and so it becomes the task of sociology to reduce such modes to 'intelligible' action, and that means without exception: to the action of the individual persons involved.[150]

Two lengthy passages – one in the 'Essay on Objectivity',[151] the other in the elaborations to the 'Basic Sociological Concepts'[152] – seem, at first glance, to provide an insight into what Weber understood by State in terms of this reduction of collective forms to the specific mutual action of persons. However, once we examine the passage from the 'Essay on Objectivity' more closely it becomes plain that this cannot here be of any assistance: Weber briefly discusses the enormous

difficulties involved in constructing the State as an ideal type which takes account of the sometimes clear, sometimes diffuse syntheses of the ideas which contemporaries associate with the State, given the massively complex interconnection of diverse actions together with factual and legally ordered relationships, all of which are held together by 'belief in valid norms and relations of rule, or in norms and relations that are supposed to be valid.'[153] Weber also draws attention to the inherently 'hybrid' property of ideal types, 'They seek to be, or implicitly are, regular ideal types not only in the *logical* sense but also in a *practical* sense – they are exemplary types.'[154] And so we can only resort to the passage from *Economy and Society*, which can therefore be quoted at length:

> The interpretation of action has to acknowledge a fundamental and important fact: that the conceptions associated with a collective construct – whether drawn from everyday thought or derived from some specialized discipline, such as the law – have a meaning in the minds (heads) of real people (not just judges and officials, but also the wider 'public') as something which in part exists, and in part should exist, to which their action is *oriented*, and as such have a quite powerful, often dominating influence, for the manner in which the action of real people is performed. Above all, as conceptions of something that should become valid (*gelten soll*), or not. (A modern 'state' consists to a not inconsiderable extent of this form – as a complex of the specific interaction of people – because specific men and women orient their action in regard to their *conception* that the state exists in this form, or *should* exist in this form; that in other words, legally-oriented regulations of this kind *have validity* [. . .].)[155]

Weber turns here to what he had written about the sociological perspective in the 'Essay on Stammler' and the 'Essay on Categories':[156] if particular ideas or conceptions form in the heads of people ('as something which in part exists, and in part should exist'), there is the chance that they will orient themselves to these ideas, and so these ideas are to this extent 'valid'; there is the chance that they will act in accordance with these ideas (their chance of realization); and so, in sum, their action is causally determined in this way. The task of the sociological perspective is to establish not only whether there really are such ideas of validation in respect of the State, but also how widespread such ideas are.[157] Of course, there are problems with the investigation of ideas of validation. As regards the 'empirical validation' of legal norms whose guarantee is always external, this external perspective (observation) relates initially only to more or less regularly performed action to which one cannot without further qualification impute 'obligatoriness',[158] since the normative aspect of this as a conception of validity is something that the actor has hidden in his head. The outer view has to be complemented by the corresponding view from within, the meaning associated with the action displayed. According to Weber, this occurs by causal imputation (*kausale Zurechnung*), which is based upon experience and judgments of objective possibility. This calls for 'interpretative understanding', as is shown by the concept

of validation itself, since it is, of course, aimed at the chance of orientation to an actually given norm or conception of obligation. In this regard, the concept of validation is jointly determined by a 'quite particular element internal to action' (*Handlungsinnenelement*), such that action 'in respect of this (causal) feature can only be inferred, not observed.'[159] This 'inference' or 'interpretation' is a construction in thought related to probable actions which excludes 'unreal causal contexts and connections' 'in order to penetrate to the real.'[160] Weber says of this, 'We practise a "dogmatics" of "meaning".'[161] To this extent, we can agree with Möller when he points out that Kelsen:

> did not accept epistemologically that the facts with which sociology deals are themselves constructions. Kelsen's distinction between causality as a category oriented to facts and imputation as a legal concept was not,[162] unlike Weber, carried on to the point at which the world of objects as conceived by the social sciences could be interpreted as one of constructs of social processes creative of meaning.[163]

When Weber states explicitly that 'legally-oriented regulations of this kind *have validity*', this demonstrates very particularly both proximity to, and disagreement with, Kelsen. Proximity, since both have the legal order in mind and both recognize the dualism of is and ought.[164] Disagreement, to the extent that, for Weber, this legal order (or the 'maxims' that can be imputed to it) is an idea present in the heads of real people as normatively valid and hence their action is possibly also influenced by it; while, for Kelsen, the State is identical to the legal order.[165] For Dreier:

> the identity of state and law follows quite necessarily from the epistemological premises: while it is a strict 'methodological demand' of the legalistic perspective that it presents everything in terms of the law, the state cannot appear to jurisprudence as a spatial and temporal phenomenon, as a causal structure; it is only a normativity, more: it is simply a normative order, to be understood as the 'perfect form of positive law'.[166]

The consequence of this is that Kelsen's theory of the State treats all State forms as the same thing, since, for him, 'every state is a state based upon the rule of law (*Rechtsstaat*).'[167] While, at first glance, this is a possibly alienating, if nonetheless consistent, perspective,[168] it is directed against the hypostatization of the State in terms of an organism, a view that Kelsen shared with Weber,[169] and also against Jellinek's two-sided theory[170] and the associated doctrine of the self-restraint of the State (the legal taming of Leviathan imposed by Leviathan itself).[171] Kelsen argues that Jellinek violates the 'requisites of normative argument' because his doctrine of self-restraint combines both a systematic and a historical approach and draws 'a legal conclusion from a historical observation.'[172] Weber proceeds differently, however, since he gives historical observation particular attention from two connected aspects. The first is that 'the struggle between (political or hierocratic) lords and those ranks with particular powers (nobles, priests, cities etc.) for the appropriation or expropriation of powers (*Herrengwalten*)' is quite evident. The second adopts a historico-developmental approach marked by a quite specific conception of history, characterized by a 'consciousness of contingency' that 'is expressed methodologically in ideal-typical concepts and developmental constructions, and which can conceptualize historical processes only as hypothetical causal progressions (objective possibilities) by applying rules derived from long experience to specific sections of reality.'[173] The development that this reveals serves as proof of the probability of the improbable: the formation and development of the modern State,[174] in which historical development, whose temporary 'endpoint' is the *Anstaltsstaat* with its imposed statutory order,[175] is at the same time marked out in § 2 of the *Sociology of Law* as a process of legal rationalization, directly connecting Weber's conceptualization of the State in terms of *Anstalt* to his axiom of rationalization.

If one takes a relatively early text of Kelsen – his essay 'Zur Soziologie des Rechts' which was published in 1912 in the *Archiv für Sozialwissenschaft und Sozialpolitik* – the distinction dealt with above is not apparent:

> A sociology of law will not be developed by investigating some particular social human behaviour in abstraction from all norms, but by taking the legal norms themselves as existential facts (*Seinstatsachen*), that is, by investigating the causes and effects of complex conceptions inhabiting the consciousness of men (*Vorstellungskomplexe*). From this standpoint – in my view, the only possible one for legal sociology – only that human behaviour which relates to the legal order, their law-governed life and their legal reality, will be investigated; that is, behaviour motivated by consciousness of legal norms. A psychological investigation of this kind – its scientific method and practical conduct is yet to be determined – would very probably reveal that only a very small part of those human actions that relate to the law can be causally traced back to the legal order as a motive, and that very many actions that externally seem to be related to the law find their motivation exclusively in the consciousness of morality and custom.[176]

In later publications, Kelsen does make criticisms of Weber, that he 'did not consider the cause of *sollensgemäß* being [. . .], or [. . .] action conforming to law [. . .], to be what ought to be, or [. . .] the law, or the norm in its quite specific sense (*Eigensinn*)', but instead 'thinking, feeling, wanting, the existential fact of the psychical experience of the norm.'[177] Kelsen thought that Weber had wandered into 'a psycho-physical parallel world that represented not law, but mere facts of existence (*Seinstatsachen*): human ideas, evaluations, the setting of aims, actions.'[178] Weber did not dispute this, but said quite plainly, 'When what is normatively valid becomes the object of empirical investigation it loses, as an object, the character of a norm: it is treated as something that "exists", not as something that is

"valid"'.[179] Generally, Weber's application of the sociological perspective to the law could draw upon the success with which he had employed it in his *Protestant Ethic*.[180] There, the concept of validity is related to the existence of 'binding' ideas of religious belief in the heads of Puritans, the chance thereby arising that Puritans do in fact orient themselves to these beliefs, these beliefs thus having had historical effects.[181] If one wishes to ascertain the 'power of such ideas to guide conduct' we need to explore their meaningful foundation, which involves the construction of a '"dogmatics" for "meaning"' ('"*Dogmatik" des "Sinns*"'),[182] hence work of analysis and interpretation (as is the usual practice for lawyers). Weber would have, here, readily admitted that interpretative sociology necessarily becomes involved 'with other cognitive systems (systems of thought) which from the standpoint of sociology are quite various',[183] and he had in fact acted on this, examining the 'normative core of Calvinist theology, including their doctrine of predestination and of personal proof', as also 'the need for practical pastoral care' and the consequent 'reinterpretation' of radical belief in predestination with its implications for the guidance of conduct.[184] This does not, however, mean that as a sociologist of religion his interpretative activity was exclusively limited to the Calvinistic theological system of meaning, or that he completely entered into the system of meaning possessed by a faithful Calvinist. Whoever, as a sociologist of religion, practices a '"dogmatics" for "meaning"' does not necessarily have to succumb to the influence of the Calvinists, but can nonetheless posit theological value judgments.[185]

There is, of course, a fundamental difference in the way in which Weber and Kelsen use their respective concepts of validity.[186] In Kelsen, the concept of validity belonged to the realm of what should be (*Sollen*) and indicates the normative character of a legal norm, although it does in its effects have a 'twin sister' in the realm of being (*Sein*) – although under particular conditions. Since, for Kelsen, the basis for a norm's validity can be ultimately only another, higher norm, there comes into play ('an assumption treated in part as a hypothesis, in part as a fiction')[187] a founding norm (*Grundnorm*), a consequence of the strict observation of dualism of *Sein* and *Sollen*. Of course, not any and every normative order can lay claim to legal validity, but only those that evince a specific quotient of applicability and adherence, 'As he states, their norms are not valid *because* of this, they are valid only *if* this has effect: "Effectivity is the condition of validity, but is not the same thing as validity" (Kelsen)'.[188] As we know, Weber associated the empirical concept of validity *solely* with 'orientation', and not adherence (*Befolgen*). Hence, he is able to deal with cases of the open infringement or evasion of an order in terms of a gradualistic concept of validity, 'Even where this averagely understood meaning [of an order] is "evaded" or "infringed" it is likely that this validity will still to some extent remain *effective* as a binding norm.'[189] Weber here deploys a gradualist concept of validity:[190] that is, within a particular social composite (*Gesellschaftsintegrat*) an order is regarded by an overwhelming part of its members as binding or obligatory. The empirical, if also gradual, validity of the order exerts predictable pressure upon a deviant, so that he '*must* conceal his violation of the order.'[191] While Kelsen has in view the normal case which presumes adherence ('effectivity is the condition of validity [. . .]'), in the light of Weber's concept of validity this only follows if in a 'marginal case' there is a conscious avoidance or infringement of an order with a predictable effect. Hence the 'gradual validity' of a (legal) order is the condition of a predictable effect upon a deviant who behaves in a purely 'purposively-rational manner' when concealing his action 'through orientation to the "validity" of criminal law.'[192]

In Stegmüller's book, *Hauptströmungen der Gegenwartsphilosophie*, there is a little-noticed passage[193] in which he cautiously draws a parallel between Gilbert Ryle[194] and Max Weber, where a 'correct' reading of Ryle's concept of disposition[195] contributes to a better understanding of the matters discussed here. Stegmüller argues that Ryle seeks to 'do away with an obsolete idea in the philosophy of consciousness: the myth of the "ghost in the machine"', whereas Weber wishes to 'destroy the myth of the superghost in the supermachine.' He continues:

> The supermachine is called 'the state' and the superghost has names such as 'people' and 'nation'. Weber traces all of these entities, including their characteristic features such as validating legal norms, valid economic system, customs and usages to the dispositional behaviour of individual persons. The expression 'chance', which he lights upon with great linguistic instinct, [. . .] expresses two things: firstly, that this is a matter of dispositional features; and secondly, that these features are such as to permit only probabilistic predictions, hence predictions about putative behaviour.[196]

In contrast to the contemporary position, Ryle does not see any particular properties in dispositions,[197] even if the use of concepts of disposition for explanatory purposes in ordinary language leads one to ascribe or deny particular capacities or properties to a particular 'bearer' (a person or a thing). Instead, Ryle treats dispositional statements as 'inference-tickets' (*Schlussfahrkarten*) which permit us to draw conclusions when faced with particular 'circumstances'.[198] Ryle provides vivid examples of this: the (dispositional) statement 'this lump of sugar is soluble' leads to the conclusion 'that it would dissolve, if submerged anywhere, at any time and in any parcel of water'; or the statement, 'this sleeper knows French' permits the conclusion to be drawn 'that if he is ever addressed in French [. . .] he responds pertinently in French.'[199] For Ryle:

> Dispositional statements about particular things and persons are [. . .] like law statements in the fact that we use them in a partly similar way. They apply to, or they are satisfied by, the actions, reactions and states of the object; they are inference-tickets, which license us to predict, retrodict, explain and modify these actions, reactions and states.[200]

Jansen thus considers Ryle's treatment of dispositional statements to be 'condensed ways of speaking about hypothetical events in particular types of situation'

which allow the conclusion to be drawn that 'if a situation belongs to such a type of situation a corresponding event will occur.'[201]

If one reads the following example from Stegmüller in the light of this understanding of dispositional statements, then light is shed upon Weber's unusual 'conception of the state', a conception which found dramatic confirmation in the bloodless 1989 revolution in the German Democratic Republic (GDR):

> That in state X a particular form of 'perfect dictatorship' will still be there tomorrow, whereas in state Y there will tomorrow be a 'well functioning' democracy of a particular kind – this only means that the members of two groups of persons will tomorrow retain their disposition generally to accept particular forms of conduct. A coup of the most bloodless kind would occur if, for instance, members of X all behaved tomorrow as if they were members of Y.[202]

If we consider matters more closely there is another significant affinity between Ryle and Weber. If Ryle sees in dispositional claims inference-tickets which '[license] its possessors to move from asserting factual statements to asserting other factual statements', or 'to provide explanations of given facts',[203] then this has a certain connection with Weber's objective judgments of possibility. These rest, of course, on a 'general consideration of the individual case' (v. Kries)[204] in which nomological knowledge in the form of rules based upon experience are introduced – it is no coincidence that Ryle compares dispositional statements with statements of law. This is, therefore, a matter of judgments regarding the probability of the course of events, in which there is a resort to existing experiential knowledge. Weber uses an 'inference-ticket' himself when he states:

> That a 'friendship' or a 'state' exists, or did exist, means exclusively and only that: we (the observers) judge that there is or has been a probability that on the basis of certain kinds of known subjective attitude of certain individuals there will result in the *average sense* a certain specific type of action.[205]

Or more emphatically:

> For sociology the state is no more than the chance that particular kinds of specific actions occur, as the action of particular individual people. No more than that [. . .]. What is 'subjective' here: is that the action is oriented to definite conceptions (*Vorstellungen*). And 'objective': that we – the observer – make a judgment of whether the chance exists that an action oriented to these ideas will follow. If this chance no longer exists, so then the 'state' no longer exists.[206]

Final remarks

If one compares the following quotation from Kelsen with those just made from Weber, there does, at first glance, seem to be a striking agreement between them:

> In Gorky's drama 'The Lower Depths' the pilgrim replies to the actor's question of whether there was a God by saying: if you believe in Him then there is a God. That applies literally to the state, to the real existence of the state – the thinking, feeling and wanting of a particular content, of a particular ideology: if one believes in it, i.e., if the conception of the order described by 'state' becomes a motivation of action, then the state 'exists' as a reality, the state becomes reality.[207]

And as Kelsen writes elsewhere, 'if this ideology loses its motivating force, then state "power" no longer exists [. . .]'.[208]

Closer examination, however, leads nonetheless straight into the problematic of validity and effectivity, of normativity and facticity and once again renders evident the quite fundamental difference between the sociological and the juridical conception of the State, between Weber and Kelsen. It becomes apparent that the devil is already in the detail, the conceptual uncertainties that we can there observe are no more than indicators of the problematics we have just mentioned. We can gain access to these through the question: how can the condition of effectivity, as well as the correspondence of normativity and facticity, be harmonized with the basic principle of Kelsen's legal doctrine, the dualism of is and ought?

First, we should recall that, for Kelsen:

> the origin of being in conformity with the ought (*des sollensgemäßen Seins*) [. . .] is not that which ought to be (*das Sollen*) [. . .] but thinking, feeling and wanting, the existential facts of the psychical experience of the norm. [. . .]. To this psychical experience, especially to that of 'wanting' this norm, is related the conception of *realisation*, more, the transfer from the mere inwardness of wanting into the externality of action, of moral or lawful action. In action conforming to the norm *wanting* is '*realised*', for it is just this wanting which is the motivation, the origin of the action as an *effect*.[209]

For Weyma Lübbe, there are a number of things wrong with this, 'psychic experience' is certainly no 'experience of the norm' but rather an 'experience of a want or a wish', while it is not a particular norm that is wished for, but a particular action. Corresponding to the distinction made by Kelsen, the State belongs, as an 'ideal order', as a normative order (or as a 'system of compulsory norms'),[210] to the level of the ought (*Sollensebene*), whereas the 'real psychic acts of will by men' belong to the level of being (*Seinsebene*).[211] As a normative order, the State is, for Kelsen, 'cognitive substance' (*geistiger Inhalt*), but this lives on 'ultimately only in psychical acts, but this fact has no consequence for theoretical knowledge. For

such knowledge the substance remains something that is thought.'[212] Kelsen illustrates this by referring to the Pythagorean principle according to which one could say that it could not exist 'if there was no-one to think it.' Besides that, however, Kelsen argued that this principle was not valid by virtue of the thinking, but by virtue of some ultimate axioms.[213] He considered that the legal order conceived as a State, as 'a uniquely normative category (*Sollenskategorie*)',[214] likewise forcibly raised the question of the basis of its validity, that of the origin and basic norm (or founding hypothesis) which secured the unity and particular nature of a legal system.[215]

Even if Kelsen does not admit that 'any kind of reality apparent to pre-scientific understanding can influence the constitution of a science',[216] he is certainly aware that ordinary, commonplace and everyday theories (*Alltagstheorien*), as well as conventional political theory (*Staatslehre*), identify the State with 'power' or 'force':

> It is not coercion as the substance of the norm – as it seems from the point of view of a lawyer concerned with the validity of legal statutes – but rather the actual psychic coercion inhering in the effectiveness of particular conceptions of norm (*Normvorstellungen*), a motivational rule that determines the actual behaviour of men and women, hence a real power that one thinks of when one characterises the state as a coercive *Anstalt*.[217]

This perspective 'allows cognitive substance to be replaced by the psychic process attributed to it', in which 'the misleading equivocation of our language, failing to distinguish sufficiently precisely between thinking and the thought, wanting and what is wanted' plays a part.[218] Kelsen here seeks support in the conceptual distinction between State order and State ideology. Insofar as people fail to recognize that decrees and commands emanate not from a State power, but from a valid legal order, they are victims of an ideology which, as an 'ideal order',[219] is experienced by them as a motive, and which, as such, becomes effective. One can agree with Lübbe's pithy solution to this, 'The "state order" (*Staatsordnung*) is *valid*, "state ideology" is *experienced* as a motive, and the putative "power of the state" is the effective "work of ideology"'.[220]

The (conceptual) distinction between the validity of the state order and the effective work of State ideology is owed to the unbridgeable gap between *Sollen* and *Sein*.[221] Nonetheless, Kelsen posits 'a certain relationship between the validity and the effective work of state ideology', although following this with a characteristic remark in brackets, 'insofar as this word [State ideology] can be used for the two different objects.'[222] It is not only this conceptual uncertainty (inexactness) that indicates the problem of the 'correspondence of normativity and facticity' implicit in legal validity.[223] Kelsen had also seen this problem, and he maintained that 'pure' legal science must have to be certain that, 'despite the basic difference between *effect* and *validity*, only an order that was as a rule *effective* should be treated as *valid*.'[224] This is of importance in that a 'pure' legal science is also concerned to have an impact upon 'a political community whose law it recognised' by using this

law to guide or stabilize the community.[225] On the part of those who applied the law, and those to whom the law applied, this also presupposes a degree of acceptance, or willingness to conform,[226] which in Kelsen leads to a gradualist concept of effectivity.[227] The dilemma highlighted here has two aspects. The first is that the pure theory of law 'is helpless when faced with the phenomenon of revolution, or more exactly, when faced with the problem of repairing the gaps torn by revolution in the chain of legal statutes and applications leading back to the basic norm (*Grundnorm*).'[228] And if we push this to its logical conclusion, then the pure theory of law also cannot overlook the 'facticity of existing law', and must moreover presuppose 'a minimum of social stability',[229] so that the question of whether Kelsen's theory of the State 'represents an ideology legitimating the status quo' seems in no respect improper.[230] Second, the dilemma noted above is expressed by the fact that the legal perspective 'cannot explain, without exceeding its methodological boundaries, why a legally constructed legal order has empirical validity, and corresponds to what in fact exists.'[231]

Given his basic dualism of *Sein* and *Sollen*, Kelsen cannot see that 'the *Sein* perspective can register "that which has value", if only in a purely subjective sense.'[232] Weber had already foreseen this and taken note. For Weber, the legal order is an order of men and women acting in a meaningful way,[233] men and women who help to validate this order so long as they *orient* themselves to the *idea* that it is obligatory. This is not a matter 'of the "proper" motivation corresponding to a legal norm, but to a factually effective motivation.'[234] It is thus a matter of the effectiveness of a legal order, which Weber treats as 'a complex of maxims in the heads of particular empirical people [. . .], which maxims causally influence their concrete action and so indirectly that of others',[235] so that the substance of a legal order is incorporated in an entirely concrete manner. In this instance of empirical validation, Weber treats the correspondence of normativity and facticity in a much more elegant fashion without having to surrender the dualism of *Sein* and *Sollen*. He does see the existence of a threat to the State if 'the human action from which the state is constituted'[236] through orientation to the legal order is 'no longer sufficiently motivated' by the legal order.[237] But Stegmüller's apt example of the GDR shows that the evident probability of a State collapsing, that 'particular forms of meaningfully oriented social action'[238] simply no longer 'take place', can happen without direct orientation to the legal order (something that Weber's conceptual apparatus allows us to understand).[239] The example of the peaceful revolution in the GDR lends substance to Schluchter's conception of the 'marginal case', 'that a "state" that from the sociological point of view no longer exists be nonetheless legally recognised.'[240] Hence we need add nothing to Schluchter's conclusion that 'Kelsen's legal theory of the state needs to be extended sociologically.'[241]

Notes

1 The usually accepted translation of *Anstalt* as 'institution' is misleading. The model that Weber had in mind for his sociological concept of *Anstalt* was the legal concept as

it stood towards the end of the nineteenth century. This legal concept was characterized by a number of features, some of which Weber adopted. For details of this, see the third section. Given this particular problem, I have opted to leave the term *Anstalt* untranslated.

2 Stefan Breuer (Hamburg), Christoph Schönberger (Konstanz) and Gerhard Wagner (Frankfurt) read the first draft of this chapter and made helpful comments on it; while I was able to discuss some aspects of the present chapter with Horst Dreier (Würzburg) during a long forest walk. I would like to express my gratitude to all four. I would like to express my thanks to Keith Tribe for his translation.

3 R. Thoma, 'Der Begriff der modernen Demokratie in seinem Verhältnis zum Staatsbegriff. Prolegomena zu einer Analyse des demokratischen Staates der Gegenwart', in H. Dreier (ed), *Rechtsstaat-Demokratie-Grundrechte. Ausgewählte Abhandlungen aus fünf Jahrzehnten*, Tübingen: Mohr Siebeck, 2008, pp. 76–119, p. 109; first published in 1923. Here, Thoma, whose essay originally appeared in the Max Weber memorial volume, sums up a central axiom of Kelsen.

4 Since current English translations of Weber's 'methodological' writings and *Economy and Society* are in many respects problematic, while the publishing strategy of the *Gesamtausgabe* is to supersede the idea that there is a finished text known as *Economy and Society*, reference to these writings are to the standard German versions, to the *Gesamtausgabe* where available. Note that 'Basic Sociological Concepts' is Chapter 1 of *Economy and Society*, specific reference to this below being made as WuG since Part One of *Economy and Society* has yet to appear in the *Gesamtausgabe*. Abbreviations: ES = *Economy and Society: An Outline of Interpretive Sociology*, 2 vols, G. Roth, and C. Wittich (eds), Berkeley, Los Angeles, London: University of California Press, 1978; GSG = Georg Simmel Gesamtausgabe; HKW = Hans Kelsen Werke; MWG = Max Weber Gesamtausgabe; WL = Max Weber, *Gesammelte Aufsätze zur Wissenschaftslehre*, J. Winckelmann (ed), 7th edn, Tübingen: J.C.B. Mohr (Paul Siebeck), 1988; WuG: *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie*, 2 vols, J. Winckelmann (ed), 5th edn, Tübingen: J.C.B. Mohr (Paul Siebeck), 1976.

5 The extent to which Weber developed his 'Basic Sociological Categories' 'by reworking his 1913 Essay on Categories' has been vigorously debated by W. Schluchter and S. Hermes in particular. Disagreeing with Schluchter, Hermes argues, on the basis of textual and historical study of the two main texts, 'that the changes of the latter are for the most part terminological, rather than substantive' (cf. S. Hermes, *Soziales Handeln und Struktur der Herrschaft. Max Webers verstehende historische Soziologie am Beispiel des Patrimonialismus*, Berlin: Duncker und Humblot, 2003, p. 48). Hermes does, in fact, maintain that there were 'substantive shifts and additions'. S. Breuer, in his introduction to *Herrschaft in der Soziologie Max Webers*, Wiesbaden: Harrassowitz, 2011, demonstrates that there are a number of major changes between the 1913 Essay and the first chapter of *Economy and Society*. In later publications, Hermes claims that the conceptual definitions in the essay on categories, first published in the journal *Logos* in the course of 1913, are something of a 'late invention'. Further contributions related to this issue are: W. Schluchter, 'Vorbemerkung: Der Kategorienaufsatz als Schlüssel', in his *Individualismus, Verantwortungsethik und Vielfalt*, Weilerswist: Velbrück Wissenschaft, 2000, Appendix, pp. 179–89, containing further contributions to this discussion; W. Schluchter, 'Zur Entstehung von Max Webers Hauptbeitrag zum Handbuch der politischen Oekonomie, später: Grundriss der Sozialökonomik', in his *Handlung, Ordnung und Kultur. Studien zu einem Forschungsprogramm im Anschluss an Max Weber*, Tübingen: Mohr Siebeck, 2005, pp. 229–38; Max Weber, *Wirtschaft und Gesellschaft. Entstehungsgeschichte und Dokumente*, introduced and edited by W. Schluchter, Tübingen: J.C.B. Mohr (Paul Siebeck), 2009 (MWG I/24); S. Hermes, 'Das Recht einer "Soziologischen Rechtslehre". Zum Rechtsbegriff in Max Webers Soziologie des Rechts', *Rechtstheorie* (2004), 35, 195–231, esp. 200ff.; S. Hermes, 'Vom Aufbau der sozialen Welt. Zur Genese, Genealogie und Kategorienlehre von Max Webers Soziologie des Rechts', *Rechtstheorie* (2007), 38, 419–49.

6 G. Hübinger, 'Einleitung', in G. Hübinger with A. Terweg (eds), *Allgemeine Staatslehre und Politik (Staatssoziologie). Unvollendet. Mit- und Nachschriften 1920*, Tübingen: J.C.B. Mohr (Paul Siebeck), 2009, pp. 1–41 (2) (MWG III/7). Cf. G. Hübinger 'Die "Staatssoziologie" Max Webers', in F.-J. Peine and H. A. Wolff (eds), *Nachdenken über Eigentum. FS für Alexander v. Brünneck*, Baden-Baden: Nomos, 2011, pp. 443–52.

7 H. Kelsen, *Der Soziologische und der Juristische Staatsbegriff. Kritische Untersuchungen des Verhältnisses von Staat und Recht*, 2nd edn, Tübingen: J.C.B. Mohr (Paul Siebeck), 1928.

8 ES, 54; WuG, 29.

9 WL, 440. Cf. W. Gephart, 'Juristische Ursprünge in der Begriffswelt Max Webers', *Rechtshistorisches Journal* (1990), 9, 343–62.

10 WL, 439.

11 ES, 4; WuG, § 1; cf. W. Schluchter, 'Handlungs- und Strukturtheorie nach Max Weber', *Berliner Journal für Soziologie* (2000), 10, 125–36, p. 130.

12 WuG, 7.

13 WL, 439. Weber wrote to Hermann Kantorowicz on 29 December 1913 about the 1913 Essay, '"Interpretative sociology" – unintelligible? To *you*? "For if they do these things in a green tree" [St. Luke 23.31] – how poorly I must have formulated this! // It is an effort to *get rid of everything* "organicist", Stammlerish, supraempirical, "valid" (= *normatively* valid), and instead conceive the "sociology of the state" as a sociology of purely empirical typified *human action* – this is in my opinion the sole way forward – while the individual *categories* themselves are a matter of convenience', M. Weber, *Briefe 1913–1914*, M. R. Lepsius and W. J. Mommsen, with B. Rudhard, and M. Schön (eds), Tübingen: J.C.B. Mohr (Paul Siebeck), 2003, p. 442f. (MWG II/8).

14 Thoma, 'Der Begriff der modernen Demokratie in seinem Verhältnis zum Staatsbegriff', op. cit., p. 109.

15 This is a translation of G. Wagner's suggested more easily grasped rephrasing of the passage from WuG, § 1, (ES, 4), quoted above.

16 One reference here can stand for several others: Schluchter, 'Handlungs- und Strukturtheorie nach Max Weber', op. cit., 130. See also R. Greshoff, '"Soziales Handeln" und "Ordnung" als operative und strukturelle Komponenten sozialer Beziehungen', in K. Lichtblau (ed), *Max Webers 'Grundbegriffe'. Kategorien der kultur- und sozialwissenschaftlichen Forschung*, Wiesbaden: VS-Verlag, 2006, pp. 257–91, p. 258ff.

17 Schluchter, ibid., 130.

18 ES, 4; WuG, § 1.

19 H. Popitz, *Die normative Konstruktion von Gesellschaft*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1980, p. 4.

20 Ibid., p. 5. See also H. Popitz, *Der Begriff der sozialen Rolle als Element der soziologischen Theorie*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1967, p. 32ff. Still worth reading on typification: G. Simmel, 'Exkurs über das Problem: Wie ist Gesellschaft möglich?', in his *Soziologie. Untersuchungen über die Formen der Vergesellschaftung*, O. Rammstedt (ed), Frankfurt am Main: Suhrkamp, 1992, pp. 42–61, p. 47ff., GSG vol. 11.

21 ES, 30, no. 3; WuG, 15, no. 3.

22 Ibid.

23 Greshoff, '"Soziales Handeln" und "Ordnung" als operative und strukturelle Komponenten sozialer Beziehungen', op. cit., p. 261.

24 ES, 27, § 3, no. 2; WuG, 13, § 3, no. 2.

25 W. Schluchter, 'Replik', in A. Bienfait, and G. Wagner (eds), *Verantwortliches Handeln in gesellschaftlichen Ordnungen. Beiträge zu Wolfgang Schluchters 'Religion und Lebensführung'*, Frankfurt am Main: Suhrkamp, 1998, pp. 320–65, p. 335.

26 Schluchter, 'Handlungs- und Strukturtheorie nach Max Weber', op. cit., p. 131. Of course, Weber does not use the term 'structures of action'.
27 Strictly speaking, 'maxims' are 'not equivalent to "norms"' (Kelsen, *Der Soziologische und der Juristische Staatsbegriff*, op. cit., p. 161), but are 'conception(s) (*Vorstellungen*) of the "norm" which operate as the real impulse for the actor' (WL, 329), something which is lent emphasis by the use of the expression 'norm-maxim' (WL, 334), W. Lübbe talks of 'rules of action' (*Handlungsregeln*) in *Legitimität kraft Legalität. Sinnverstehen und Institutionenanalyse bei Max Weber und seinen Kritikern*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1991, p. 44.
28 ES, 34; WuG, 18: convention and law are behavioural requirements that are intended to be binding, i.e. deviation from them results in the application of a sanction. In the case of a convention anyone can do this, while if the law is involved this has to be done by a coercive staff created for the purpose.
29 WL 330f. For this reason we find in respect of custom, 'Custom would not in this sense be something "validating": no one can "require" its observance, that one conform to it' (ES, 29, no. 2; WuG, 15, no. 2).
30 ES, 31; WuG, § 5.
31 There are inconsistencies in §§ 5–7 (ES, 31–38) in the presentation of what is in itself a consistent conception.
32 See on this 'substantive meaning', ES, 28, nos 5, 6; WuG, 14, nos 5, 6.
33 ES, 31, nos 1, 2; WuG, 16, nos 1, 2. This is because in § 5 there is an express reference to the 'existence of a *legitimate* order'. Cf. Lübbe, *Legitimität kraft Legalität*, op. cit., p. 43ff.
34 ES, 36ff.; WuG, § 7. Also M. Weber, *Wirtschaft und Gesellschaft. Die Wirtschaft und die gesellschaftlichen Ordnungen und Mächte. Nachlaß. Teilband I: Gemeinschaften*, W. J. Mommsen, with M. Meyer (eds), Tübingen: J.C.B. Mohr (Paul Siebeck), 2001, p. 207f. (MWG I/22-1; ES, 903f.).
35 WL, 473f.
36 That is, the order is as such treated (considered) to be binding by the actors.
37 ES, 311ff.; WuG, 181.
38 ES, 32, no. 3; WuG, 16, § 5, no. 3; WL, 445.
39 WL, 330.
40 WL, 330, 339. See also WL, 473, 'The empirical "validity" of a "rational" order centres upon the acceptance of an adaptation to the accustomed [practice], it is absorbed, taught, constantly repeated [custom]. Considered with regard to its subjective structure, behaviour can even take the form of a more or less regular mass action without connection to any meaning.'
41 ES, 324f.; WuG, 190.
42 Cf. H. Treiber, 'Im "Schatten" des Neukantianismus: Norm und Geltung bei Max Weber', in J. Brand and D. Strempel (eds), *Soziologie des Rechts. Festschrift für Erhard Blankenburg zum 60. Geburtstag*, Baden-Baden: Nomos, 1998, pp. 245–54 (esp. pp. 246–49).
43 ES, 31ff.; WuG, 16f.
44 WL, 323, 329, 330f., 334.
45 WL, 445f., 456–57, 459f., 468.
46 ES, 311ff., 326; WuG, 181f., 191.
47 Weber calls 'an empirical legal order' 'the "empirical existence" of the law as a maxim-generating "knowledge" shared by actual men and women' (WL, 350). Accordingly, for Weber a legal order consists of 'a complex of maxims in the heads of particular empirical people [. . .], which maxims causally influence their concrete action and so indirectly that of others' (WL, 348).
48 ES, 28; WuG, 14, no. 6.

49 M. Weber, *Wirtschaft und Gesellschaft. Die Wirtschaft und die gesellschaftlichen Ordnungen und Mächte. Nachlaß. Teilband 4: Herrschaft*, E. Hanke with T. Kroll (eds), Tübingen: J.C.B. Mohr (Paul Siebeck), 2005, p. 138 (MWG I/22-4).
50 ES, 312f.; WuG, 182. Cf. N. Bobbio, 'Max Weber und Hans Kelsen', in M. Rehbinder and K.-P. Tieck (eds), *Max Weber als Rechtssoziologe*, Berlin: Duncker & Humblot, 1987, pp. 109–26, p. 118.
51 *Die Grenzen naturwissenschaftlicher Begriffsbildung. Eine logische Einleitung in die historischen Wissenschaften*, 3rd and 4th edns, Tübingen: J.C.B. Mohr (Paul Siebeck), 1921, p. 247f., (original publication 1896).
52 ES, 312; WuG, 181; WL, 331., 348, 374f., 440.
53 F. Loos, *Zur Wert- und Rechtslehre Max Webers*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1970, p. 98f.
54 W. Windelband, *Präludien. Aufsätze und Reden zur Philosophie und ihrer Geschichte*, 7th and 8th edns, Tübingen: J.C.B. Mohr (Paul Siebeck), 1921, vol. 2, pp. 59–98, esp. pp. 64f., 84–86 (although this is in relation to logical and aesthetic rules (norms)).
55 W. Windelband, *Ueber die Gewissheit der Erkenntniss. Eine psychologisch-erkenntisstheoretische Studie*, Berlin: Henschel, 1873. Reprinted Saarbrücken: VDM Verlag Müller, 2006.
56 Ibid., p. 64.
57 Windelband, *Präludien*, op. cit., vol. 2, pp. 85f., 95.
58 Ibid., vol. 2, p. 85f.
59 ES, 322; WuG, 189; also WuG, 188f.
60 ES, 31; WuG, 16, § 5, no. 1; WL, 442, 446.
61 H. Lotze, *Logik. Drei Bücher vom Denken, vom Untersuchen und vom Erkennen*, G. Misch (ed), 2nd edn, Leipzig: Meiner, 1928, p. 512 (original publication 1874); emphasis added.
62 ES, 312f.; WuG, 182.
63 See H. Sommerhäuser, *Emil Lask in der Auseinandersetzung mit Heinrich Rickert*, Berlin: Ernst-Reuter-Gesellschaft, 1965; H. Schnädelbach, *Philosophie in Deutschland 1831–1933*, Frankfurt am Main: Suhrkamp, 1983, pp. 19–66.
64 W. Windelband, 'Was ist Philosophie? (Über Begriff und Geschichte der Philosophie)', in his *Präludien*, op. cit., vol. 1, pp. 1–54, p. 29ff.
65 Schnädelbach, *Philosophie in Deutschland 1831–1933*, op. cit., p. 220.
66 Windelband, *Präludien*, op. cit., vol. 1, p. 134ff.
67 W. Windelband, 'Kritische oder genetische Methode?', in his *Präludien*, op. cit., vol. 2, pp. 99–135, p. 122.
68 Sommerhäuser, *Emil Lask in der Auseinandersetzung mit Heinrich Rickert*, op. cit., p. 34.
69 WL, 322ff.
70 WL, 330f.
71 ES; 31; WuG, 16, § 5, nos. 1, 2; WL, 446.
72 W. Windelband, 'Beiträge zur Lehre vom negativen Urteil', in *Strassburger Abhandlungen zur Philosophie: Eduard Zeller zu seinem siebenzigsten Geburtstag*, Freiburg, Tübingen: Mohr, 1884, pp. 165–95, p. 176.
73 For the sake of clarity in the resulting definitions, *Verband* is here translated simply as 'organization'.
74 ES, 48; WuG, §12.
75 ES, 324f.; WuG, 190.
76 ES, 49; WuG, 26, no. 2.
77 ES, 54; WuG, § 17; S. Hermes, 'Der Staat als "Anstalt". Max Webers soziologische Begriffsbildung im Kontext der Rechts- und Staatswissenschaften', in K. Lichtblau (ed), *Max Webers 'Grundbegriffe'. Kategorien der kultur- und sozialwissenschaftlichen Forschung*, Wiesbaden: VS Verlag, 2006, pp. 184–216.
78 ES, 52; WuG, § 15.
79 ES, 765; WuG, 449; now as M. Weber, *Wirtschaft und Gesellschaft. Die Wirtschaft und*

die gesellschaftlichen Ordnungen und Mächte. Nachlaß, Teilband 3: Recht, W. Gephart and S. Hermes (eds), Tübingen: J.C.B. Mohr (Paul Siebeck), 2010, p. 454 (MWG I/22-3); see in particular Hermes, *Soziales Handeln und Struktur der Herrschaft*, op. cit., pp. 110, 149f. On the concept of statute, see Hermes, ibid., p. 110f., note 370.

80 WL, 440; Gephart, 'Juristische Ursprünge in der Begriffswelt Max Webers', op. cit.

81 The 'proximity' of the sociological perspective to legal concepts also arises because 'this perspective proceeds from the fact that "factual" powers of command tend to believe that they significantly supplement a normative "order" created "by legal means", and so of necessity operate with a legal conceptual apparatus' (ES, 948; WuG, 545; MWG I/22-4, 138).

82 S. Hermes, 'Staatsbildung durch Rechtsbildung – Überlegungen zu Max Webers soziologischer Verbandstheorie', in A. Anter and S. Breuer (eds), *Max Webers Staatssoziologie. Positionen und Perspektiven*, Baden-Baden: Nomos, 2007, pp. 81–101, p. 87.

83 ES, 707f.; WuG, 425; MWG I/22-3, 383f., 195.

84 ES, 714; WuG, 429; MWG I/22-3, 397.

85 C. Schönberger, *Das Parlament im Anstaltsstaat. Zur Theorie parlamentarischer Repräsentation in der Staatsrechtslehre des Kaiserreichs (1871–1918)*, Frankfurt am Main: Vittorio Klostermann, 1997, p. 314. On the 'theory of the state' developed from Gerber to Laband see here pp. 21–120; on Otto Mayer's conception of an *Anstalt*, see pp. 311–18. See also H. Speer, *Herrschaft und Legitimität. Zeitgebundene Aspekte in Max Webers Herrschaftssoziologie*, Berlin: Duncker & Humblot, 1978, p. 37ff.

86 O. Mayer, 'Die juristische Person und ihre Verwertbarkeit im Öffentlichen Recht', in *Staatsrechtliche Abhandlungen. Festgabe für Paul Laband zum fünfzigsten Jahrestage der Doktor-Promotion*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1908, vol. 1, pp. 1–94, p. 40.

87 Mayer, ibid., p. 55; see also Hermes, 'Der Staat als "Anstalt"', op. cit., pp. 197ff., 206ff., and Schönberger, *Das Parlament im Anstaltsstaat*, op. cit., p. 315.

88 ES, 52, 54; WuG, § 15, § 17.

89 ES, 714; WuG, 429; MWG I/22-3, 397.

90 P. Landau, 'Otto Gierke und das kanonische Recht', in J. Rückert and D. Willoweit (eds), *Die Deutsche Rechtsgeschichte in der NS-Zeit, ihre Vorgeschichte und ihre Nachwirkungen*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1995, pp. 77–94, p. 82.

91 Ibid., p. 80.

92 Ibid., p. 85. See also Schönberger, *Das Parlament im Anstaltsstaat*, op. cit., p. 343, 'The characteristic feature of the *Anstalt* is that it does not involve the legal subjectivity (*Rechtssubjektivität*) of a self-organising totality of members as in a corporation (*Körperschaft*), but instead involves the binding together of persons through a will that comes "from above and without". [. . .] The model for this is the Canonical concept of the *Anstalt*. The Church and all its subordinate elements thus primarily takes the form not of a community of believers, but of the expression of a transcendental divine will that shapes it from on high'.

93 Landau, 'Otto Gierke und das kanonische Recht', op. cit., p. 87.

94 Ibid., pp. 91, 92ff.

95 Compulsory participants also because it is the occupation of a particular territory (birthplace, presence etc.) that determines the subordination to action taken by the *Anstalt*, unlike the situation for members of an association or a corporation (ES, 50f., WuG, 27, § 13; ES, 52, WuG, 28, § 15, no. 2; WL, 466).

96 In this regard the concept of the State, or of an *Anstalt*, is as presented in the 'Basic Sociological Concepts' 'blind to party'; even if sufficient scope is given to the sociology of political parties in *Politics as a Vocation*. See H. Tyrell, 'Physische Gewalt, gewaltsamer Konflikt und "der Staat" – Überlegungen zu neuerer Literatur', *Berliner Journal für Soziologie* (1999), 9, 269–288 (283f.).

97 Oktroyierung, – ES, 51, WuG, 27, § 13, no. 1, 'An imposed order in the sense used here is *any* order not established on the basis of a free personal agreement by all participants.' Majority decision, therefore, also involves something which is imposed.

98 WL, 466.

99 WL, 469.

100 WL, 470.

101 WL, 470.

102 ES, 52; WuG, 29.

103 Terms in brackets: *Gemeinschafts-, Einverständnis- und Gesellschaftshandeln bzw. Verbands- und Anstaltshandeln.*

104 K. Lichtblau, '"Vergemeinschaftung" and "Vergesellschaftung" in Max Weber: A reconstruction of his linguistic usage', *History of European Ideas* (2011), 37, 454–65, p. 460.

105 ES, 217ff., WuG, 124ff.; ES, 956ff., WuG, 551ff., MWG I/22-4, 157ff.

106 M. Weber, *Gesammelte Aufsätze zur Religionssoziologie*, 6th edn, Tübingen: J.C.B. Mohr (Paul Siebeck), 1972, p. 1.

107 A. Zingerle, 'Max Webers Analyse des chinesischen Präbendalismus. Zu einigen Problemen der Verständigung zwischen Soziologie und Sinologie', in W. Schluchter (ed), *Max Webers Studie über Konfuzianismus und Taoismus. Interpretation und Kritik*, Frankfurt am Main: Suhrkamp, 1983, pp. 174–201, p. 195. See also Hermes, *Soziales Handeln und Struktur der Herrschaft*, op. cit., p. 233ff.

108 Popitz, *Der Begriff der sozialen Rolle als Element der soziologischen Theorie*, op. cit., pp. 7, 8ff.

109 ES, 28; WuG, 28, § 15, No. 2, final sentence. In § 17 of the 'Basic Sociological Concepts' ('political organisation') Weber introduces the characteristic of a territory, which of course excludes those political forms that favour the personality principle. See Hermes, *Soziales Handeln und Struktur der Herrschaft*, op. cit., p. 90. 'Territory' is with respect to the 'state' a supplementary category which can be added to the concept of the *Anstalt*, but not necessarily (cf. the Church), while it is *conditio sine qua non* for the concept of the State. Hence my qualification that it is the '*initial* outlines' of what Weber means by a *Staat* and *Staatlichkeit* that emerge from the conception of an *Anstalt*.

110 Hermes, 'Vom Aufbau der sozialen Welt', op. cit., p. 95; here 'major' has been substituted for 'all' (see also the preceding footnote). For considering the definition of the State in § 17 of the 'Basic Sociological Concepts', to which we are about to turn, we would need to add 'persistence' or 'continuity' to the features of an *Anstaltsbetrieb*, since they too are borrowed from the legal concept of an *Anstalt*.

111 ES, 55; WuG 29, no. 2.

112 ES, 953; MWG I/22-4, 147.

113 Schönberger, *Das Parlament im Anstaltsstaat*, op. cit., p. 315.

114 Certainly Weber overlooked the consensual elements to which G. Lehmbruch has drawn attention in respect of the German Reich: G. Lehmbruch, *Parteienwettbewerb im Bundesstaat: Regelsysteme und Spannungslagen im politischen System der Bundesrepublik Deutschland*, 3rd revised and expanded edn, Wiesbaden: Westdeutscher Verlag, 2000.

115 ES, 54; WuG, 29.

116 ES, 946; WuG, 545; MWG I/22-4, 163f.

117 Schönberger, *Das Parlament im Anstaltsstaat*, op. cit., p. 52; see also Hermes, 'Der Staat als "Anstalt"', op. cit., p. 208ff.

118 Schönberger, ibid., p. 53.

119 Hermes, 'Der Staat als "Anstalt"', op. cit., p. 212. This critique does not, however, coincide with Kelsen's argument, according to which 'Weber's sociology of the state reveals itself to be a legal doctrine' (Kelsen, *Der Soziologische und der Juristische Staatsbegriff*, op. cit., pp. 156ff., 169). See on this, Lübbe, *Legitimität kraft Legalität*, op. cit., pp. 29ff., 31 and her note 2, 'Kelsen's formulation comes from his ontological dualism, which compels him to hypostasise action "in itself" or "the facticity of action" in terms of a

natural scientific terminology which treats them as "muscular contractions", rather than as events that have a "sense" which belongs to the world of "validity"'.

120 P. Laband, *Das Staatsrecht des Deutschen Reiches*, 5th revised edn in four volumes, Tübingen: J.C.B. Mohr (Paul Siebeck), 1911, vol. 1, p. 66.
121 Ibid., vol. 1, p. 68.
122 Ibid., p. 71.
123 Ibid.
124 Ibid., p. 72.
125 ES, 55; WuG, 30, no. 2.
126 § 17 'Basic Sociological Concepts'. For a sceptical view concerning the possibility of implementing this monopoly on a global basis, see T. v. Trotha, 'Ordnungsformen der Gewalt oder Aussichten auf das Ende des staatlichen Gewaltmonopols', in B. Nedelmann (ed), *Politische Institutionen im Wandel*, Sonderheft 35 of the *Kölner Zeitschrift für Soziologie und Sozialpsychologie*, Opladen: Westdeutscher Verlag, 1995, pp. 129–66.
127 C. Colliot-Thélène, 'Das Monopol der legitimen Gewalt', in Anter and Breuer (eds), op. cit., pp. 39–55.
128 M. Weber, *Wissenschaft als Beruf (1917/1919) – Politik als Beruf (1919)*, W. J. Mommsen and W. Schluchter, with B. Morgenbrod (eds), Tübingen: J.C.B. Mohr (Paul Siebeck), 1992, pp. 159f., 166f. (MWG I/17).
129 MWG I/17, 160.
130 Hermes, *Soziales Handeln und Struktur der Herrschaft*, op. cit., p. 148ff.; ES, 1134f., 1141ff., WuG, 670f., 676f.; ES, 771f., WuG, 453; MWG I/22-4, 470ff., 514f.
131 H. Popitz, *Phänomene der Macht*, 2nd edn, Tübingen: J.C.B. Mohr (Paul Siebeck), 1992, p. 61ff. 'Every potential order is subject to this vicious circle in dealing with force: social order is a necessary condition for the restraint of force – while force is a necessary condition for the maintenance of social order', p. 62.
132 ES, 56; WuG, 30, no. 3.
133 ES, 908; WuG, 519; MWG I/22-1, 214, 'In this way the political community monopolises the legitimate use of force for its coercive apparatus and gradually transforms it into an institution for the protection of rights.'
134 ES, 34; WuG, 17.
135 ES, 948; WuG, 545; MWG I/22-4, 138f.
136 ES, 953; WuG, 549f., MWG I/22-4, 147f.
137 Hermes, *Soziales Handeln und Struktur der Herrschaft*, op. cit., p. 147. See on this, Weber, 'For the exercise and threat of such coercion there is therefore in a fully developed political community a system of casuistic order to which a specific "legitimacy" tends to be ascribed: this is the "legal order", whose normal and sole source is today the political community, since it has in actuality usually usurped the monopoly of providing the observance of this order with a physical compulsion' (ES, 904; WuG, 516; MWG I/22-1, 208).
138 ES, 946; WuG, 544.; MWG I/22-4, 135.
139 WL, 331ff.
140 ES, 311ff.; WuG, 181ff.; MWG I/22-3, 191ff. See also Hermes, *Soziales Handeln und Struktur der Herrschaft*, op. cit., p. 142.
141 Kelsen, *Der Soziologische und der Juristische Staatsbegriff*, op. cit., pp. 164f., 167.
142 On this and the following, see Hermes, 'Das Recht einer "Soziologischen Rechtslehre"', op. cit., p. 229.
143 WL, 446, 470.
144 ES, 312; WuG, 181; MWG I/22-3, 193; WL, 331.
145 ES, 312; WuG, 182; MWG I/22-3, 195.
146 T. Geiger, *Vorstudien zu einer Soziologie des Rechts*, Neuwied, Berlin: Luchterhand, 1964, p. 218f.

147 Hermes, 'Das Recht einer "Soziologischen Rechtslehre"', op. cit., p. 229. Even if Hermes' suggestion is convincing, see statement in note 73, Weber's definition of *Verband* (group, association) is essentially simpler and more elegant. Weber speaks of a *Verband* when the distinguishing feature of a 'leader' is present. If, in addition to the principal characteristic of the 'leader', the further feature of an 'administrative staff' is sometimes present, as an additional characteristic, this merely means that the order (*Ordnung*) of the *Verband*, is a legal order (*Rechtsordnung*).
148 ES, 324; WuG, 190; MWG I/22-3, 221.
149 ES, 697; WuG, 418; MWG I/22-4, 364f. See in addition, Hermes, *Soziales Handeln und Struktur der Herrschaft*, op. cit., p. 144.
150 WL, 439; a similar formulation can be found in ES, 13f.; WuG, 6f.
151 WL, 200f. See also Hübinger, MWG III/7, 8f.
152 ES, 14; WuG, 7.
153 WL, 200.
154 WL, 199.
155 ES, 14; WuG, 7, no. 9.
156 WL, 329f.; WL, 440.
157 WL, 440.
158 W. Lübbe 'Der Normgeltungsbegriff als probabilistischer Begriff. Zur Logik des soziologischen Normbegriffs', *Zeitschrift für philosophische Forschung* (1990), 44, 583–601, p. 589.
159 Lübbe, *Legitimität kraft Legalität*, op. cit., p. 46.
160 WL, 287.
161 WL, 333f., 443f.; see, further, M. Weber, 'Diskussionsrede zu dem Vortrag von H. Kantorowicz, "Rechtswissenschaft und Soziologie"', in his *Gesammelte Aufsätze zur Soziologie und Sozialpolitik*, 2nd edn, Tübingen: J.C.B. Mohr (Paul Siebeck), 1988, pp. 476–83, p. 481ff.
162 In German: *Kausalität als faktenorientierte Kategorie vs. Zurechnung als Rechtsbegriff.*
163 C. Möllers, *Staat als Argument*, München: Beck, 2000, p. 43. See especially Loos, *Zur Wert- und Rechtslehre Max Webers*, op. cit., p. 100, note 55, who reminds us that '"law" and "state" as objects of empirical sociology [. . .] are always real actors in a real subjectively intended sense', something that Kelsen overlooked (*Der Soziologische und der Juristische Staatsbegriff*, op. cit., p. 156ff.). 'The ideal-typical "substantive meaning" of a legal order served only as a cognitive instrument; hence the task was not the construction of an ideal meaning (which is what Kelsen supposed, 1928, 159, 162) but the investigation of actual conceptions of meaning. [. . .] Legal sociology could not therefore be reduced to jurisprudence, a position to which Kelsen is impelled by a tendency to an ultimately naturalistic concept of empirical science (see Kelsen 1928, 8ff., 120) for which "meaning" is a foreign body (see Kelsen 1928, 58, 169).' Among other things, Kelsen overlooks the important reference in Weber's essay on Roscher and Knies (WL, 69) in which he writes, comparing the behaviour of Frederick II in 1756 to an avalanche, that '"interpretability" here adds to "calculability", compared to natural processes that are not open to "interpretation".' On this problematic, see also Lübbe, *Legitimität kraft Legalität*, op. cit., p. 26ff. The concept of imputation (*Zurechnung*) is, however, much more complex than it appears in the passage from Möller cited above, and not only because of the different meanings implied by its use in different phases of Kelsen's writing, see the contributions on this by J. Renzikowski, 'Der Begriff der "Zurechnung" in der Reinen Rechtslehre Hans Kelsens', in R. Alexy, L. H. Meyer, S. L. Paulson and G. Sprenger (eds), *Neukantianismus und Rechtsphilosophie*, Baden-Baden: Nomos, 2002, pp. 253–82, and C. Heidemann, 'Der Begriff der Zurechnung bei Hans Kelsen', in S. L. Paulson and M. Stolleis (eds), *Hans Kelsen. Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts*, Tübingen: Mohr Siebeck, 2005, pp. 17–34.

164 On Kelsen see, for example, his arguments in the first chapter of his *Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre vom Rechtssatze*, Tübingen: J.C.B. Mohr, 1911, HKW 2, Erster Halbband, pp. 80–116, esp. p. 86; and H. Kelsen, 'Über Grenzen zwischen juristischer und soziologischer Methode. Vortrag gehalten in der Soziologischen Gesellschaft zu Wien' (1911), in HKW, 3, 22–55, esp. 27f., each of them makes explicit reference to G. Simmels, *Einleitung in die Moralwissenschaft. Eine Kritik der ethischen Grundbegriffe* (1892), K. Ch. Köhnke (ed), Frankfurt am Main: Suhrkamp, 1989, vol. 1, Ch. 1, 'Das Sollen', pp. 15–91, esp. p. 18ff. (GSG, 3). H. Kelsen, 'Die Rechtswissenschaft als Norm- oder Kulturwissenschaft. Eine methodenkritische Untersuchung', *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich* (1916), 40, 95–153, 95ff. See also HKW, 3, 551–605, 553ff. On Weber, see the Stammler essay in WL, 291ff.

165 H. Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*, Baden-Baden: Nomos, 1986, p. 208ff.; Möllers, *Staat als Argument*, op. cit., p. 40ff. cf. H. Kelsen, 'Autobiographie' (1947), *Geschichte der Germanistik. Mitteilungen*, Ch. König, and M. Lepper (eds), Göttingen: Wallstein, 2006, Doppelheft 29/30, pp. 70–81, p. 75, 'The critical question in respect of the nature of the state seemed to be this: that which constituted unity within the diversity of the individuals making up this community. And for this question I could find no answer that might have a scientific basis other than this: that a specific legal order constitutes this unity; and that all efforts to found this unity meta-juristically, that is, sociologically, are to be considered failures. The argument, that the state by nature is a – relatively centralised – legal order, that therefore the dualism of state and law is a fiction that is based upon an animistic hypostatisation of personification, with the aid of which one seeks to represent the legal unity of the state – this has become an important element of my legal teaching. It may well be that I came to this view not least because the state to which I am closest and which from personal experience I knew best, the Austrian state, was quite plainly only a legal unity. Held up against the Austrian state, a state which is composed of so many groups who differ by race, language, religion and history, all theories which seek to base the unity of the state on some kind of socio-psychological or of socio-biological connection between the people who legally belong to this state are quite obviously fictional.' See on this also HKW 1, 29–91, as well as the section 'Habsburgischer Hintergrund und "Liberalismus" von Kelsens staatsrechtlichem Entwurf', in C. Schönberger, 'Hans Kelsens "Hauptprobleme der Staatsrechtslehre". Der Übergang vom Staat als Substanz zum Staat als Funktion (Einleitung)', in M. Jestaedt (ed), *H. Kelsen, Werke. Band 2: Veröffentlichte Schriften* 1911, Erster Halbband, Tübingen: Mohr Siebeck, 2008, pp. 23–35, p. 30ff. (HKW 2).

166 Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*, op. cit., p. 209.

167 Ibid., p. 211. Kelsen, *Der Soziologische und der Juristische Staatsbegriff*, op. cit., p. 90, 'In the state of primitivism the legal order originally transfers its material coercive force to those to be protected by the law but whose interests had suffered injury. The injured person functions here as the "organ" of coercive order (blood feud).'

168 See also H. Dreier, 'Hans Kelsens Wissenschaftsprogramm', in H. Schulze-Fielitz (ed), *Staatsrechtslehre als Wissenschaft, Die Verwaltung*, Beiheft 7, Berlin: Duncker & Humblot, 2007, pp. 81–114, 94.

169 ES, 13f.; WuG, 6f.

170 G. Jellinek, *Allgemeine Staatslehre*, reprint of the 3rd edn of 1913, Berlin: Julius Springer, 1922 (original publication 1900), esp. Ch. 2. For an example of the representative literature, see S. Breuer, *Georg Jellinek und Max Weber. Von der sozialen zur soziologischen Staatslehre*, Baden-Baden: Nomos, 1999; C. Schönberger 'Ein Liberaler zwischen Staatswille und Volkswille: Georg Jellinek und die Krise des staatsrechtlichen Positivismus um die Jahrhundertwende', in S. L. Paulson and M. Schulte (eds),

Georg Jellinek – Beiträge zu Leben und Werk, Tübingen: Mohr Siebeck, 2000, pp. 3–32. In his *System der subjektiven Rechte*, Freiburg: J.C.B. Mohr, 1892/1905, p. 14f., Jellinek had already associated himself with the then customary distinction between the human and the natural sciences and, considering the dual nature of the State, clarified the nature of the two modes of cognition by contrasting on the one hand a physiological and a psychological approach representing natural scientific, theoretical knowledge, to an aesthetic approach on the other. Both approaches dealt with one and the same object, which was a symphony, whose 'reality' was in the first case 'fluctuations on air pressure' and the 'sensations of sound that they created', in the second enjoyment and aesthetic feelings. He also made it clear that the two modes of knowledge could neither be substitutes for each other, nor did they stand in contradiction. If the example of the symphony is a reference to H. v. Helmholtz (*Die Lehre von den Tonempfindungen als physiologische Grundlage für die Theorie der Musik*, 3rd edn, Brunswick: Vieweg & Sohn, 1870, p. 369ff.), the conclusion that he draws also involves a reference to the first 'neo-Kantian', F. A. Lange (*Geschichte des Materialismus und Kritik seiner Bedeutung in der Gegenwart*. Zweites Buch, *Geschichte des Materialismus seit Kant*, 3rd edn, Iserlohn: J. Baedeker, 1877, p. 538ff.), who he cited in his *Habilitationsschrift* (*Die sozialethische Bedeutung von Recht, Unrecht und Strafe*, reprint of the 1878 Vienna edn, Hildesheim: Georg Olms, 1967, p. 9). On Helmholtz and Lange, see K. Ch. Köhnke, *Entstehung und Aufstieg des Neukantianismus. Die deutsche Universitätsphilosophie zwischen Idealismus und Positivismus*, Frankfurt am Main: Suhrkamp, 1986, pp. 151ff., 233ff. The works by Jellinek there cited are notably epistemological, showing that he was well acquainted with the basic views of the Southwest German neo-Kantians, in addition to which he was a close friend of Windelband during his time in Leipzig. On Lange and the dualism of the 'two worlds', the 'world that is' and the 'world of values', see B. Jacobsen, *Max Weber und Friedrich Albert Lange. Rezeption und Innovation*, Wiesbaden: Deutscher Universitäts Verlag, 1999, pp. 9ff., 104ff. Jens Kersten, *Georg Jellinek und die klassische Staatslehre*, Tübingen: Mohr Siebeck, 2003, p. 147ff., rightly draws attention to the fact that 'Jellinek does not take as his starting point the cognitive interest of the subject, which posits an object to be known'. On Jellinek's doctrine of types in contrast to Weber's ideal-type, ibid., p. 102ff.

171 Kelsen, *Der Soziologische und der Juristische Staatsbegriff*, op. cit., p. 132ff.; Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*, op. cit., p. 212f.; Möllers, *Staat als Argument*, op. cit., p. 38f. According to Kelsen (ibid., p. 133), the theory of self-restraint (*Selbstverpflichtungstheorie*) sought to 'make the unintelligible intelligible – how the power opposed to law would be made law, how a state which was assumed to be beyond law, metalegal, alien to law, even the foe of law, could be transformed into law.'

172 Möllers, ibid., p. 39.

173 Hermes, *Soziales Handeln und Struktur der Herrschaft*, op. cit., p. 135.

174 Ibid., p. 138.

175 ES, 765; WuG, 449; MWG I/22-3, 454, 'From the charismatic revelation of new commandments there leads, via the imperium, the most direct route to the development of law formed through fixed and imposed statute.'

176 H. Kelsen, 'Zur Soziologie des Rechtes. Eine kritische Betrachtung', in S. L. Paulson (ed), *Hans Kelsen und die Rechtssoziologie. Auseinandersetzungen mit Hermann U. Kantorowicz, Eugen Ehrlich und Max Weber*, Aalen: Scientia Verlag, 1992, pp. 601–14, p. 613f.; original publication in *Archiv für Sozialwissenschaft und Sozialpolitik* (1912), 34, 601–14; see also HKW, 3, 77–92. On this last aspect, see WL, 473; from this reference it can be inferred that Weber shared Kelsen's perspective.

177 Kelsen, *Der Soziologische und der Juristische Staatsbegriff*, op. cit., p. 80.

178 Hermes, 'Das Recht einer "Soziologischen Rechtslehre"', op. cit., 215.

179 WL, 531.

180 H. Treiber, 'Vom Nutzen und Nachteil juristischer Dogmatik', *Rechtshistorisches Journal* (1997), 16, 411–52 (esp. 416ff).
181 M. R. Lepsius, 'Eigenart und Potenzial des Weber-Paradigmas', in G. Albert, A. Bienfait, S. Sigmund and C. Wendt (eds), *Das Weber-Paradigma. Studien zur Weiterentwicklung von Max Webers Forschungsprogramm*, Tübingen: Mohr Siebeck, 2003, pp. 32–41, esp. p. 35ff.
182 WL, 333f.
183 Kelsen, *Der Soziologische und der Juristische Staatsbegriff*, op. cit., p. 157.
184 Lepsius, 'Eigenart und Potenzial des Weber-Paradigmas', op. cit., p. 35f. Lübbe has however reminded us that this is not a matter of 'deducing "immanent meaning" from "cognitive systems", but rather of the given meaningful bases of action ("systems of meaning for action").' See Lübbe, *Legitimität kraft Legalität*, op. cit., p. 28f.
185 Weber succumbed to this danger, see Treiber, 'Vom Nutzen und Nachteil juristischer Dogmatik', op. cit., 424f. See also F. W. Graf, 'Die "kompetentesten" Gesprächspartner? Implizite theologische Werturteile in Max Webers "Protestantischer Ethik"', in V. Krech, and H. Tyrell (eds), *Religionssoziologie um 1900*, Würzburg: Ergon, 1995, pp. 209–48.
186 Weber, 'Diskussionsrede zu dem Vortrag von H. Kantorowicz "Rechtswissenschaft und Soziologie"', op. cit., p. 478: 'The "validity" of a legal statute in the sociological sense is a matter of empirical probability involving facts, while validity in the legal sense is a logical imperative, and those are two quite different things [. . .].'
187 H. Dreier, 'Hans Kelsen (1881–1973), "Jurist des Jahrhunderts"?', in H. Heinrichs, H. Franzki, K. Schmalz and M. Stolleis (eds), *Deutsche Juristen Jüdischer Herkunft*, München: Beck, 1993, pp. 705–32, p. 719.
188 Dreier, ibid., p. 724; See also Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*, op. cit., pp. 121–29.
189 ES, 32; WuG 16, no. 3.
190 Just as Geiger (*Vorstudien zu einer Soziologie des Rechts*, op. cit., p. 71f.) employed a gradualistic concept of obligation, Weber draws upon a gradualist concept of validity (see also ES, 32; WuG, 17). Kelsen (*Der Soziologische und der Juristische Staatsbegriff*, op. cit., p. 93) likewise has a gradualist concept of effectiveness.
191 ES, 32; WuG, 16, no. 3.
192 ES, 32; WuG, 16, no. 3.
193 W. Stegmüller, *Hauptströmungen der Gegenwartsphilosophie. Eine kritische Einführung*, 8th edn, Stuttgart: Kröner, 1987, vol. 2, p. 83f. I have Gerhard Wagner (Frankfurt) to thank for drawing Stegmüller's book to my attention.
194 G. Ryle, *The Concept of Mind*, London, New York: Routledge, 2009.
195 'Correct' reading in Ryle's sense.
196 Stegmüller, *Hauptströmungen der Gegenwartsphilosophie*, op. cit., p. 83f.
197 Ryle, *The Concept of Mind*, op. cit., p. 100ff. See also L. Jansen, 'Dispositionen und ihre Realität', in Ch. Halbig and Ch. Suhm (eds), *Was ist wirklich? Neuere Beiträge zu Realismusdebatten in der Philosophie*, Frankfurt am Main: ontos verlag, 2004, pp. 117–37, p. 121f.
198 Ryle, ibid., p. 105.
199 Ibid., p. 107.
200 Ibid., p. 108.
201 Jansen, 'Dispositionen und ihre Realität', op. cit., p. 121.
202 Stegmüller, *Hauptströmungen der Gegenwartsphilosophie*, op. cit., p. 84. A 'state' may in this way cease to 'exist' sociologically, although the administrative staff (in the form of a modern bureaucracy) can indeed continue to 'exist' as a result of 'a practised ability to adapt oneself' on the part of both officials and the ruled within the existing administrative order, but also as a result of the 'objective indispensability of the once-existent apparatus, in connection with its peculiarly, "impersonal" character' (ES, 988; WuG, 570; MWG I/22-4, 209).
203 Ryle, *The Concept of Mind*, op. cit., p. 105.
204 On this problematic, see H. Treiber, 'Wie wirkt Recht? Methodische Aspekte bei der Erforschung von Wirkungszusammenhängen', in G. Wagner (ed) *Kraft Gesetz. Beiträge zur rechtssoziologischen Effektivitätsforschung*, Wiesbaden: VS Verlag, 2010, pp. 119-44, esp. pp. 133–42.
205 ES, 28; WuG 14, § 3, no. 4.
206 Letter from Max Weber of 9 March 1920 to R. Liefmann, cited in W. J. Mommsen, 'Diskussion über "Max Weber und die Machtpolitik"', in O. Stammer (ed), *Max Weber und die Soziologie heute. Verhandlungen des 15. Deutschen Soziologentages*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1965, pp. 130–38, p. 137, note 12, now available in NWG ii/10–2, pp. 946f.
207 Kelsen, *Der Soziologische und der Juristische Staatsbegriff*, op. cit., p. 90, note 1.
208 Ibid., p. 89. See on this also, Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*, op. cit., p. 210: the State for Kelsen 'volatises into a thought object which, like religion, evaporates if one loses one's belief in it.' See also Dreier, 'Hans Kelsens Wissenschaftsprogramm', op. cit., p. 94.
209 Kelsen, ibid., p. 80.
210 Ibid., p. 91.
211 On this and the following, see W. Schluchter, *Entscheidung für den Rechtsstaat. Hermann Heller und die staatstheoretische Diskussion in der Weimarer Republik*, Köln, Berlin: Kiepenheuer & Witsch, 1968, and the essay included there, 'Der Staat als Recht in der "Reinen Rechtslehre" von Hans Kelsen', pp. 26–52, p. 34. See Kelsen, ibid., p. 75f.
212 Schluchter, ibid., p. 34. It would certainly be very misguided if one sought to imply that, for Kelsen, the substance of a given legal order was not influenced by political and/or social disputes. See Dreier, 'Hans Kelsens Wissenschaftsprogramm', op. cit., p. 83.
213 Kelsen, *Der Soziologische und der Juristische Staatsbegriff*, op. cit., p. 93.
214 Dreier, 'Hans Kelsen (1881–1973), "Jurist des Jahrhunderts"?', op. cit., p. 719.
215 Kelsen, *Der Soziologische und der Juristische Staatsbegriff*, op. cit., p. 93ff. For a recent philosophical account of the basic norm (*Grundnorm*), see S. L. Paulson, 'Zwei radikale Objektivierungsprogramme in der Rechtslehre Hans Kelsens', in Paulson and Stolleis (eds), op. cit., pp. 191–220. Loos (*Zur Wert- und Rechtslehre Max Webers*, op. cit., p. 110) sees in the 'recognition of the hypothetical *validation* of law for the purpose of analysis with the aid of an interpretative schema which is either logically compelling or conventional (hence for its part only hypothetically valid)', as does Weber in *Science as a Vocation* (MWG I/17, 95), a parallel to Kelsen's basic norm (*Grundnorm*), or founding hypothesis. On the function of the basic norm, see the parable that M. T. Fögen borrows from Luhmann concerning the 'Handing back of the twelfth camel' in *Das Lied vom Gesetz*, München: Carl Friedrich von Siemens Stiftung, 2007, p. 104. On Luhmann, see his 'Die Rückgabe des zwölften Kamels. Zum Sinn einer soziologischen Analyse des Rechts' (1985), in G. Teubner (ed), *Die Rückgabe des zwölften Kamels. Niklas Luhmann in der Diskussion über Gerechtigkeit*, Stuttgart: Lucius & Lucius, 2000, pp. 3–60 (*Zeitschrift für Rechtssoziologie* (2000), 21, 1, 3–60).
216 Schluchter, *Entscheidung für den Rechtsstaat*, op. cit., p. 27.
217 H. Kelsen, *Allgemeine Staatslehre*, Berlin: Julius Springer, 1925, p. 17; Kelsen, *Der Soziologische und der Juristische Staatsbegriff*, op. cit., p. 91.
218 Kelsen, ibid., p. 92.
219 Ibid., p. 92.
220 Lübbe, *Legitimität kraft Legalität*, op. cit., p. 54, on the distinction made by Kelsen (*Der Soziologische und der Juristische Staatsbegriff*, op. cit., p. 91ff.).

221 A few pages earlier Kelsen (ibid., p. 78) explains that 'every connection to "realisation" is excluded from "*Sollen*"', so that 'the normative perspective is treated as something entirely different from the teleological or technical perspective, i.e. any perspective directed to the relation of means and ends.' But there is a possible cognitive connection (*Gedankenbrücke*) established here between *Sollen* and *Sein* when he writes that 'what one states as that which ought to transpire is regarded as in some way not yet complete.' Such a completion, he states, would be as follows, '*Das Sollen* of the law realises itself in the *Sein*, in the actual, as something belonging to the world of natural reality, in the causally determined behaviour of men and women, in behaviour which conforms to law, is legally appropriate, proper in the legal sense' (Kelsen, ibid.).
222 Kelsen, ibid., p. 93.
223 Schluchter, *Entscheidung für den Rechtsstaat*, op. cit., p. 42.
224 H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre*, reprint of the 2nd edn of 1928, Aalen: Scientia, 1960, p. 96; also Schluchter, ibid., p. 42f. See also Kelsen, *Der Soziologische und der Juristische Staatsbegriff*, op. cit., p. 93.
225 Schluchter, ibid., p. 43.
226 Ibid., p. 43; Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*, op. cit., p. 127.
227 Kelsen, *Der Soziologische und der Juristische Staatsbegriff*, op. cit., p. 93.
228 Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*, op. cit., p. 127; Kelsen, ibid., p. 96ff.; Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*, op. cit., p. 96.
229 Dreier, ibid., 128f.; Schluchter, *Entscheidung für den Rechtsstaat*, op. cit., p. 43.
230 Schluchter, ibid., p. 43.
231 Ibid., p. 49; Lübbe, *Legitimität kraft Legalität*, op. cit., p. 53ff., regarding Kelsen's concept of legal validity. In respect of the impossibility of 'exceeding methodological boundaries', the following italicized formulations are telling, 'In this determination normativity and facticity link up in a quite particular manner parallel to validity and effect. What should here become evident is the fact that the ideal system of state and legal order, as specifically normative lawfulness, is, *in some fashion* a fragment of real life, a part of the causal regularity of ongoing human behaviour; and that *there has to be a degree of agreement* between the substance of the "legal" system (or the "state" system) and that of the relevant part of the "natural" system' (Kelsen, *Der Soziologische und der Juristische Staatsbegriff*, op. cit., p. 96). This agreement can on the one hand 'not exceed a certain maximum', while on the other it cannot fall below 'a certain minimum' (ibid.).
232 Schluchter, *Entscheidung für den Rechtsstaat*, op. cit., p. 48. Kelsen could have gained initial access to this insight from reading Simmel's *Soziologie* (op. cit., pp. 42–61), since he does cite this work repeatedly. Or more precisely, by reading Simmel's digression, 'Wie ist Gesellschaft möglich?', which Popitz (*Der Begriff der sozialen Rolle als Element der soziologischen Theorie*, op. cit., p. 32ff.) reformulated as the epistemological question, 'What cognitive processes are to be presupposed, as conditions of possibility, for men to see, understand, feel themselves to be part of society, as parts of a social whole?' This question draws upon Kant, as did Kelsen too. On the pros and cons of Kelsen's use of Kant, see Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*, op. cit., pp. 56–90; also, more recently, Paulson and Stolleis (eds), *Hans Kelsen*, op. cit., pp. 191–220.
233 See the discussion of this in Lübbe, *Legitimität kraft Legalität*, op. cit., p. 29ff.
234 Schluchter, *Entscheidung für den Rechtsstaat*, op. cit., p. 50.
235 WL, 348.
236 ES, 14; WuG, 7.

237 Schluchter, *Entscheidung für den Rechtsstaat*, op. cit., p. 49.
238 ES, 27; WuG, 13, no. 2.
239 See the definition of the concept of order (ES, 31; WuG, 16 § 5, no. 2), but also the distinction of (observed) behavioural regularities in the non-obligatory (custom and practice) as well as the obligatory (convention and law): ES, 29f., WuG, 14f., § 4; ES, 33f., WuG, 17, § 6; ES, 319ff., WuG, 187ff. (MWG I/22-3, 210ff.).
240 Schluchter, *Entscheidung für den Rechtsstaat*, op. cit., p. 49.
241 Ibid.