The State's Existence between Facts and Norms

A Reflection on Some Problems
to the Analysis of the State

Daniel Gaus

RECONSTITUTING DEMOCRACY IN EUROPE

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Daniel Gaus is Senior Researcher at ARENA – Centre for European Studies, University of Oslo. E-mail: daniel.gaus@arena.uio.no.

Abstract

The state's mode of existence is still a problem to political science analysis. How can we decide if a political order (for example the EU) is a state or not? This paper discusses the ontological quality of the state and what follows from that to its analysis. It is suggested to view the state in terms of an everyday theory operating in historical societies. As a consequence, three perspectives are logically related in the analysis of the state: a normative, a sociological and a genealogical perspective. The paper illustrates how a full account of the state is dependent on a systematic cooperation between the disciplines of political theory, sociology and the history of ideas.

Keywords

Introduction

The question if democracy is dependent on the context of a state-like order or not is widely discussed. It is, among other things, of utmost interest to the debate about the future of the European Union (EU). If democracy is tied to the state, can, and should, the EU develop into a state in order to become democratic (Eriksen 2009)? Or are there dark sides to state orders that suggest refraining from a European democracy and viewing the EU's legitimacy based on alternative values instead (Weiler 1999, 2003)? Thus, despite all the challenges of globalisation and transnationalisation to the contemporary nation-state, the concept of the state remains a salient issue in political thinking. There is, however, a basic problem to the concept of the state: It seems that we still have difficulties in understanding what is referred to when we talk about 'the state'. In everyday language, the meaning of the word 'state' is mostly unproblematic. But in social scientific practice the situation is different. It becomes problematic as soon as the role of stateness is addressed, for example, in its relation to the principle of democracy. Let me illustrate this by using the discussion about the future shape of the EU as an example.

Searching for possible ways to ensure democracy in the European context, Eriksen and Fossum (2009) deduce three models from the broader discourse about EU's legitimacy. The models are distinguished on the basis of an assumption about the relation between democracy and the state.[1] The first option is to 'still rely on state-based democratic theory' (Eriksen and Fossum 2009: 9). Then ensuring democracy involves *reconstituting the European order* in one of two ways: European integration could be cut down into a more intergovernmental order that secures democracy at the member state level (model 1); or integration could be strengthened to reach a European democratic federal state (model 2). The alternative is to view democracy as independent from the state. Then there is a third possibility. In this case it is not the European order that has to change, but instead, it would be 'rather necessary to *reconfigure a new theory of democracy* that is either suitable to the particular transnational character of the EU or to an increasingly cosmopolitanised world' (ibid.; italics added). The task, Eriksen and Fossum continue, is to find out 'which of these models is the most robust in relation to the fundamental requirements of a democratic order [...and] which of these is most feasible' (Eriksen and Fossum 2009: 10). Whereas the first task pertains to a normative assessment of the three alternatives, it is the second task that is of interest here. As Eriksen and Fossum note, it implies an empirical analysis consisting of a 'systematic mapping effort to establish the extent of EU proximity to the model and whether the EU is developing in this general direction' (ibid.). We can now see more clearly what is problematic about the analytical concept 'state': If the task is to describe the proximity of the EU to the proposed models, then that implies a decision about whether the EU has developed into a state or not. This, in turn, presupposes that we already have the means to recognise the EU as a state (or non-state) and that we know where to look in order to decide that question. However, it is exactly this point political science is still struggling with.

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[1] For a detailed description of those models, see Eriksen and Fossum (2007).

The concept of the state has led to a remarkable dichotomy of views in the analysis of politics. Some point to the state's seemingly undeniable role and impact in politics, others find that the concept of the state is not necessary to the analysis of politics at all. My aim in this paper is not to give an overview over these accounts. Rather, I start from the assumption that this ambiguity indicates an unsolved puzzle at the most basic conceptual level, namely the question of what kind of object we deal with in the social scientific analysis of the state. One might say that my concern is to describe the ontological nature of the state and what follows for its analysis. However, to speak about ontology easily invokes an assumption that stands in contrast to my argument. Doubtlessly, the state does not have a material existence. That said, however, the opposite view, which conceives the state as unreal, a *chimera*, is equally implausible. States do exist, with real impact on real social action – be it in international or domestic politics. How, then, do they exist? How do we know that we see a state when we look at one? It is necessary to pay more attention to that basic question before we can thoroughly evaluate if the EU has or can come close to a state or not.

In this paper I suggest that the common analytical perspectives of the state might be too narrow. The state is sometimes described as either consisting of a specific organisation of political institutions or a normative principle or a network of social relations. By focusing on just one of those aspects I think we fail to understand a state's mode of existence. The view I want to suggest instead is the following: The analytical concept of the state refers to an orienting *impact* of a particular valid *normative order* on *the social action of individuals*. To put it differently, the ontological nature of the state might be described as a specific 'everyday theory' that is operating in historical societies. My aim is to demonstrate how this view might enrich social science analysis of the state.

In the first section I discuss the state's ontological nature as a recurrent problem in the literature. In doing so, I make no claims to a thorough review of the literature on the state. I rather roughly sketch some main lines of the debate in order to illustrate in what sense the view of the state as an everyday theory might be useful. The second section, then, turns to some consequences regarding how to analyse the state. Through a discussion of Hans Kelsen's, Max Weber's and Quentin Skinner's accounts I illustrate how a juridical, a sociological and a genealogical approach are logical related in the analysis of the state. My conclusion is that the analysis of objects like 'the state' requires a systematic cooperation of normative political or juridical theory, sociology and the history of ideas.

The ontological nature of the state as 'everyday theory'

The following argument starts from the assumption nicely expressed by Quentin Skinner:

> As I have observed, we continue to organise our public life around the idea of the sovereign state. But it seems to me that we do not always understand the theory we have inherited, and that arguably we have never managed fully to make sense of the proposition that the person of the state is the seat of sovereignty.

> (Skinner 1999: 1)

This view entails two major aspects that I would like to draw attention to: Firstly, the ontological nature of the object 'state' can most adequately be described as a theory; and secondly, this has consequences for how to analyse it – consequences that imply a need for border-transcending social science research. In this section I reflect on the kind of substance the object of analysis 'state' consists of. I do so by briefly discussing some arguments about the state in political science discourse.

The ontological nature of the state as problem in political science

One major conflict in this regard pertains to the basic question if the concept of the state should be used in political science analysis or not. From the 1950s on, it seems that the concept of political system has more or less replaced the use of the concept of the state in political science analysis. David Easton, a major proponent of systems analysis, provides two reasons for why this is preferable. First, the state has always been 'only a nebulous conceptual tool' (Easton 1981: 317), whereas the systems view has helped 'to move into more rigorous empirical research' (ibid.: 321). Second, if political life is conceptualised in terms of a systems analogy then there is no added analytical value to the further use of the state concept. The concept of political system covers all aspects of political life the state concept refers to, and more. This view is based on the premise that the state consists of a certain constellation of political institutions and actors. According to Easton, a revival of the state concept in political science analysis means unnecessary conceptual obstruction with no prospect of any explanatory benefit. If the state was

> to succeed in displacing the political system as a key orienting idea in analysis and research, this would threaten us with a return, not to a tried and true conceptual tradition of political research, but to a conceptual morass from which we thought we had but recently escaped.
>
> (Easton 1981: 322)

Three decades later the state has not displaced the systems view on politics. On the contrary, it has reclaimed some attention despite Easton's withering assessment. Most prominently, Theda Skocpol (1985) countered the proposal to drop the state concept. Her main objection is that approaches neglecting the state concept cannot account for the fact that states are autonomous actors in politics. This view is based on the premise that a state is not the sum of independently existing elements of the political system, but has an existence of its own. 'State autonomy' consists of two qualities, which 'are not simply reflective of the demands or interests of social groups, classes, or society' (Skocpol 1985: 9): First, 'the capacities of states as actors trying to realize policy goals'; and second, the 'impact of states on the content and workings of politics' (ibid.: 8). The strong impact that the call for 'bringing the state back in' has had indicates that there is more to the state than a certain set of political institutions. In some sense, the suggestion that states are autonomous agents capable of intentional action is persuasive. Notably, it is Easton who distinguishes states' domestic from their international role by admitting that 'the state has led a double life. It has never disappeared as a concept for identifying the unified actors in the international arena. Its use there has created little difficulty.' (Easton 1981: 304) However, by today the latter is no longer true. The assumption of states as unitary actors has been contested also in the context of international politics. But before I turn to that it is important to note the following. The conflicting views illustrated by example of Easton and

Skocpol suggest a specific source of the difficulties in studying the state. Namely, the question if the state has an ontological quality that makes it an independently existing object analysis. It was a reflection on this issue that finally led to an epistemological turn and lifted the state debate onto a reflective level.

The epistemological turn criticises the naturalness of viewing states as actors. By speaking of states without further specification, the state is portrayed as an actor we all know, a bodily person with a will of its own that possibly turns against society. According to epistemological critique, the foremost task for the study of the state is to 'demystify, which in this context means attending to the senses in which the state does not exist rather than to those in which it does.' (Abrams 1988: 58) Consequently, any account of the state has to bear in mind that the state has no life of its own. Philip Abrams (1988) argues that the state neither refers to some kind of hidden entity, nor to a mere system of political institutions. Instead, it should be viewed as a twofold structuration within political practice:

> The state is not the reality which stands behind the mask of political practice. It is itself the mask which prevents our seeing political practice as it is. There *is* a state-system: a palpable nexus of practice and institutional structure centered in government and more or less extensive, unified and dominant in any given society. There *is*, too, a state-idea, projected, purveyed and variously believed in different societies at different times. We are only making difficulties for ourselves in supposing that we have also to study the state – an entity, agent, function or relation over and above the state-system and the state-idea.
> (Abrams 1988: 58; emphasis original.)

Thus, in the conflict of views about the nature of the state, Abrams' position in one sense marks the middle ground. On the one hand, he sees a specific institutional order as an essential part of the state. On the other, he assumes that the state has a somewhat independent existence – as a state-idea. By adding an ideational quality, Abrams carries the concept of the state beyond the vocabulary of a systems view of politics without reifying it. However, whereas he extends the scope of state-analysis by a new kind of object – the state as an idea – it remains unclear what societal function the state-idea has and what its relationship to the state-system is. I will briefly elaborate on those aspects to finally suggest describing the ontological nature of the state as an everyday theory.

The moral function of the idea of the state

The function of the state as an idea is a topic normative political theory is concerned with. It is mostly with regard to the state's role in the global order that authors spell out the normative function of the idea of the state. Rainer Schmalz-Bruns (2009) ascribes three different meanings to the concept of the state. According to him, the state as an idea has to be distinguished from the state as a specific organisation of political community as well as from the state as a legal personality in international relations. The idea of the state does not refer to the image of a pre-legal, ethnic political community. Instead, it is a 'theoretical fiction' (Schmalz-Bruns 2009: 89) that refers to a certain moral conviction. The 'normative grammar' of the state-idea reflects the very idea of a morally just organisation of common problem-solving among equal individuals. According to Schmalz-Bruns, the idea of the state refers to the following:

Whenever a group of people seeks to establish continuous public will-formation and decision-making in a morally just way, an organisation of hierarchical self-intervention is the logical consequence.[2] In this perspective, the idea of the state serves a specific moral function: It is a 'context of justice' (ibid.: 76) to a legitimate political order.

In a similar vein, Martti Koskenniemi (1994) ascribes a reflective function to the idea of the state, which he sees as constitutive for a political community. He argues that the state-idea is not a utopia that would compete with other, non-state ideals of how to organise political community. Instead, it refers to the common (and fictional) societal ground that is the basis for a societal battle of competing worldviews in the first place:

> There must be a space [...] for the ascertainment of the truth or the acceptability of the proposed forms of life of the various critiques. This is where the state reenters the scene, this time as pure form – as the location (I might say, as the language) through which we can examine the consequences and acceptability of the various jargons of authenticity, compare them, and set them in a specific relationship so as to enable political action.
>
> (Koskenniemi 1994: 28)

Koskenniemi understands the state as a theoretical fiction that first establishes a common (ideational) viewpoint, which allows society-members to look 'down' at the same political battle from different angles. In this sense, the idea of the state is a logical precondition for every political community. The state's substance is of ideational quality and its existence is normative. Thus, the state is always socially constructed, artificial. It provides a logical 'position of retreat' where we can reflect upon and reconcile different ethical views – even if 'that reconciliation is, of course, always only ad hoc – subject to criticism by those it marginalizes and to change as struggle continues.' (Koskenniemi 1994: 29). For Koskenniemi, then, the idea of the state is the modern expression of what is called *polis* in Greek philosophy:

> It has not existed to provide us with well-being; it has instead defined to us – differently, during different periods and in different places – what well-being means. It has not existed to realize just principles; it has encapsulated justice in itself.
>
> (Koskenniemi 1994: 29)

On the one hand, these accounts attribute a certain societal function to the state-idea, conceiving it as a theoretical fiction that has an impact in social reality. On the other hand, in speaking of the state as socially constructed, pure form and fiction, they seem to counter the strong intuition that states are more than that – namely, real and powerful political actors. Then one question remains: How does the view of the state as theoretical fiction relate to the view of states as agents capable of intentional action?

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[2] 'Staatlichkeit erscheint als abstrakter und spezifizierungsbedürftiger organisationsrechtlicher Reflex der Idee legitimer (demokratischer) Willensbildung selber' (Schmalz-Bruns 2009: 89-90).

The (in)dependent existence of states as agents

Do we talk about the same object when we, on the one hand, view the state as a real actor in politics and, on the other, as a theoretical fiction? Alexander Wendt (2004) assumes that it is a deeply rooted, physicalist assumption that makes the two views appear irreconcilable. This physicalist premise holds that a person capable of intentional action is in the end always bound to a material basis, a body. Consequently, either states are assumed to have a (if hidden) material body or realist International Relations-theory, which is based on the assumption of states as real persons capable of intentional action, has to be given up. Wendt argues that this is a false dichotomy. In order to undermine the physicalist premise on which it is based, he turns to recent developments in philosophy. His hypothesis is that states are in fact real persons capable of action – we just have to understand the nature of their personality the right way. According to this, the personality of the state differs from that of individual subjects in that it has no material basis (body and brain), but only an ideational basis. Thus, states are not organisms with a consciousness – a quality usually ascribed to human beings. However, Wendt argues, much like an individual, a state is an 'intentional system' of its own. It represents a form of collective intentionality – group intentions – independent from the intentions of its individual members, albeit only in certain and not all respects:

> [G]roup intentions [...] are dependent on the structured interaction of individuals. In the same physicalist way that the mind is thought to be dependent on neurons in the brain, there can be no group intentions without individuals to carry them on their backs, which means they are always subject to renegotiation.
>
> (Wendt 2004: 298)

In this view, the substance of the object 'state' – group intentions – has an ontological status lying in between the realm of physical objects and the realm of subjectively held ideas. On the one hand, the state has no independent mind which allows it to develop a state-will contrary to its constituent society. At the same time, however, the intentions of a state (group intentions) can conflict with the individual intentions of its members. The specific object-quality of a state is difficult to comprehend because, from the viewpoint of classical physicalism, it seems to have a paradoxical structure: Albeit the state (group intention) is ontologically dependent on its constituting individuals, it exists independent of them in other regards at the same time. For example, states (their constituent groups) 'can intend things that none of their members intend'; 'a group intention, such as the US invasion of Iraq, may be relatively insensitive to which of its members hold it'; 'the identity of group intentions, such as state persons, can persist over time despite a 100 per cent turnover in their membership'; and finally, 'groups can do things individuals cannot, making some group intentions "indivisible"'. (Wendt 2004: 299)

The ontological nature of the state as 'everyday theory'

Based on the different features ascribed to the state, how might the ontological quality of the state best be analytically described? What kind of object is it? As argued above, the state is a peculiar kind of object in between physical objects, on the one hand, and subjectively held views, on the other. The terms we have encountered so far all have some degree of plausibility, but they also have shortcomings. It is potentially

misleading to describe the state as a person, as this term is loaded with physicalist connotations, falsely implying a material object. To describe the state as a theoretical fiction evokes the impression that the state would have no empirical existence, as if it were disconnected from politics. To describe it as an idea, in turn, hides the complexity of its internal structure, its 'normative grammar' (Schmalz-Bruns 2009: 91). In my view, the different features discussed above could be integrated by describing the ontological nature of the state as a particular everyday theory (Alltagstheorie) that operates in historical societies. This makes it easier to comprehend the empirical quality of the object 'state' as neither material, nor subjective-psychological, but of a third kind. The nature of a theory seems to parallel that of a state in many ways: It is socially constructed, open to change and renegotiation, but at the same time not at free disposal to individuals. A theory is easily understood as a non-physical object that has an empirical impact. It orients large groups of people in a similar way and, thus, has a structuring effect on social action. It is the result of individuals coping with their environment and trying to make sense of the world they encounter, but at the same time it has an objective existence as part of this reality. The latter also explains why it makes sense to speak of an *everyday* theory *operating* in societies. Contrary to a scientific theory, an everyday theory is not dependent on being explicated to unfold its orienting impact. It might (and probably mostly does) remain tacit. Yet it (unwittingly) structures people's interpretations of their social environment and orients them in a way that – in the case of the state – integrates their individual actions into the actions of a collective. If we assume the object of analysis 'state' to be an everyday theory operative in historical societies, this has consequences for how to analyse it in social science. One implication is that the analysis of the state requires a systematic cooperation of political theory, sociology and the history of ideas – or so I will argue in the next section.

Three dimensions in the analysis of the state: Normative, sociological, genealogical

In the previous section I have discussed the state's ontological nature as a recurrent problem in political science and suggested to view the state as an object of the kind 'everyday theory' operating in a historical society. Analytically speaking, 'the state' refers to a hypothesis about an orienting *impact* of a particular valid *normative order* on *social actions of individuals*. Accordingly, three analytical perspectives – the normative, the sociological and the genealogical – are logically related in the analysis of the state. In the following I want to illustrate that by a discussion of three (classic) approaches to the analysis of the state – Hans Kelsen, Max Weber and Quentin Skinner. My aim is to show that their accounts are, in a certain regard, intertwined and mutually dependent. To comprehend that, however, we have to view their accounts in a particular perspective. It is not their descriptions of the state as such but the methodological premises and claims concerning the object 'state' which are of interest for our concern.

Kelsens' view of the state as a normative order

Hans Kelsen's (1922) aim is to establish the state as a purely normative concept. He views the state as a particular normative order that exists in ontological difference to natural facts. To understand Kelsen's perspective on the state, it is important to

consider the social scientific context in which he wrote. This explains why above all he was concerned with the difference in the state's mode of existence to 'empirical' reality (a). Only after he established the 'sphere of ought' as an independent part of social reality, he turns to the description of the state as a normative order that is defined by a specific content (b). And this description, in turn, is based on a premise that reveals Kelsen's account to be logically related to a sociological one (c).

Different modes of existence: The sphere of 'is' and the sphere of 'ought'

Regarding its ontological status, Kelsen says that the state has no 'empirical' reality and, accordingly, is no sociological concept (for the following, see Kelsen 1922: 4-74). It is, however, important to note that this explicitly refers to a contemporary (1922) understanding about the meaning of 'empirical' and, accordingly, sociology; namely, that sociology mirrors natural science and that the empirical realm of social reality consists of natural objects standing in causal relationship. Accordingly, Kelsen argues, sociology applies the cause-and-effect principle in assuming psychological mechanisms to explain social action – individual behaviour is caused by individual wants, feelings or thoughts. By the same token, Kelsen continues, social entities (including the state) are assumed to exist as conformities of individuals' wills or thoughts that add up to new 'higher' entities. However, Kelsen objects that this view, which ties a state's existence to the subjective minds of individuals, contradicts another common assumption: Namely, that the state has a supraindividual ('*überindividuell*') existence, is persistent over time and embodies a 'higher will' based on which it exerts power against the wills of its subjects.

Kelsen finds that the psychologically oriented sociology of his time adopted an overly restrictive view on social reality. Its orientation toward the cause-and-effect principle restricts its view to the *process* dimension of psychology and allows only for the general explanation *that* individual wills and thoughts cause individual behaviour. What is neglected is the *content* dimension of those psychological processes. However, Kelsen argues, only the content dimension brings into view that individual psychological processes are not only based on subjective desires, feelings and interests. They also refer to entities of the kind 'objective intellectual content' ('*objektiv geistiger Inhalt*', Kelsen 1922: 43) – or, in other words, to social entities. And, Kelsen argues, all these social entities together make up a different layer of social reality, namely, the realm of norms – the 'sphere of ought'.

For Kelsen, elements of the sphere of 'ought' are part of reality in the same way as natural objects are. Yet, he notes, for didactical reasons it is necessary to speak of a sphere of 'ought' ('*Sollen*') as distinct from a sphere of 'is' ('*Sein*'), because in commonly '*Sein*' is associated with natural objects forming causal relationships. By describing the state as part of the sphere of ought, Kelsen stresses the fact that state's mode of existence is different to that of natural objects – and, accordingly, that the law-like relationship it establishes (the rule of law) is different to the laws of nature:

> The rule of law and the law of nature differ not so much by the elements they connect as by the manner of their connection. The law of nature establishes that if A is, B is (or will be). The rule of law says: If A is, B ought to be. The rule of law is a norm (in the descriptive sense of the term). The meaning of the connection established by the law of nature between two elements is the "is",

whereas the meaning of the connection between two elements established by the rule of law is the "ought". The principle according to which natural science describes its object is causality; the principle according to which the science of law describes its object is normativity.

(Kelsen 2008: 46)

To sum up, Kelsen begins his description of the state with a remark on its ontological quality as a normative order. The crucial point in this regard is that normative orders exist as social entities, which are not to be confused neither with subjective wills nor with material objects, but are of a third kind. In their specific mode of existence norms (and normative orders) are part of social reality independent of their 'realisation' in compliant individual behaviour. To 'realise' a norm means that its content becomes the motivating will for an individual to act accordingly. Thus, strictly speaking, the 'thing' that causes compliant behaviour is not the norm itself, but the psychological experience[3] of the norm, 'transferring' its content into an individual will. This sounds pedantic, but there is an important consequence: You can only have a chance to experience the psychologically motivating effect of a norm, if it is already established in the first place. In this sense, the validity of a norm is independent from being represented in the individual, subjective will and, consequently, the description of a normative order is independent from – and not to be mistaken as – a description of actual behaviour.

The content of the normative order 'state'

So far we have focused on the ontological status of the state as a normative order. What is the characteristic *content* of that normative order 'state'? For Kelsen, the state refers to a very basic normative order that constitutes a particular type of norms distinct from, for example, the norms of morality or logics. The state is identical to the concept of the unity of positive law and as such it constitutes juridical norms. The characteristic feature of juridical norms is that the content of their 'ought' (finally) always also entails physical coercion. To put it differently, all juridical norms are part of a system of norms that defines the conditions for when there *ought* to be a use of physical coercion among humans. And, Kelsen argues, the state is just another name for the unity of this particular system of norms. In this sense, coercion is a characteristic feature of the concept of the state, but, Kelsen stresses, the state entails coercion only as defining feature of the content of the 'ought' that it establishes. Because the state is an abstract normative order its definition says nothing about the *actual* organisation or use of means of physical coercion in a society. It is

> not the fact of coercion that is characteristic of the concept, but physical coercion is the *content* of the normative order [*Inhalt der Sollordnung*]. The state appears as the unity of a system of norms that regulate the conditions for the use of a particular coercion among humans.

(Kelsen 1922: 82, my translation)[4]

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[3] In Kelsen's words: 'das Denken, Fühlen, Wollen, die Seinstatsache des psychischen Erlebens der Norm' (1922: 80).

[4] German orginal: Es ist 'nicht die Faktizität des Zwanges […], die als Begriffsmerkmal akzeptiert wird, vielmehr erscheint hier der Zwang – und zwar der sogenannte physische, äußere Zwang – als *Inhalt der Sollordnung*, als *Norm-Inhalt*. Der Staat erscheint als die Einheit eines Systems von Normen, die regeln, unter welchen Bedingungen ein bestimmter Zwang von Mensch zu Mensch geübt werden solle.'

To say the state is the 'unity' of the system of norms regulating the legitimate use of coercion, is just another way of saying that it represents the 'highest' order of coercion. 'Highest' refers to the fact the order 'state' is not deduced from, but embodies the basic normative principle for defining what and when physical coercion is justified in a society – this is the meaning of the sovereignty of the state. Thus, as with coercion, sovereignty is explained as an essential part of the *content* of the state-concept. As such, it does not imply any kind of 'highest', 'original' political power or rule of some over others. For Kelsen, sovereignty has a purely logical status. It is another name for the fact that a basic principle defines the highest authority for the generation of every other concrete juridical norm – sovereignty means that a '*Ursprungsnorm/Grundnorm*' exists:

> A norm the validity of which cannot be derived from a superior norm we call "basic" norm. [...] That a norm belongs to a certain system of norms, to a certain normative order, can be tested only by ascertaining that it derives its validity from the basic norm constituting the order. [...] The whole function of this basic norm is to confer law-creating power on the act of a first legislator and on all other acts based on the first act.
>
> (Kelsen 2008: 111 and 116)

By the same token, Kelsen argues, territoriality (*Staatsgebiet*) and people (*Staatsvolk*) belong to the definition of the state. But again it is important to note in what sense they are part of the concept. The state-concept does not determine anything about how territoriality and people are actually organised in a historical society. Rather, they function solely as principles that unambiguously define the area of validity (*Geltungsbereich*) and as such they are preconditions for every normative order 'state'.

The state's existence as 'objective intellectual content'

We have now gathered all essential features of the normative-juridical concept of the state as Kelsen describes it. In his view, the state exists as an 'objective intellectual content' ('*objektiv geistiger Inhalt*'; Kelsen 1922: 43). That expression mirrors the paradoxical structure, which Wendt ascribes to the object-quality of the state (see above). It is an *intellectual* entity because the state is an imagined unity, an ideational synthesis, perceived by individuals looking at the social world.[5] But at the same time it has an *objective* existence that is somehow independent from actual individual behaviour which possibly runs against the 'ought' prescribed by the state. In Kelsen's juridical-normative perspective, the concept of the state is described as an imagined unity of a legal order or, put figuratively, as the 'purely artificial person of the state' (Skinner 1999). However, such a juridical perspective on the state remains incomplete in one important sense: It accounts for the *objective* meaning of the concept, the content of the state as a normative order. But if the normative order 'state' is assumed to have an actual objective existence – and does not refer to something purely fictional, a normative utopia – then the juridical-normative view rests on a sociological premise. It presumes a social function to the state, its performative effect as a normative order, so to speak. The very rationale of a normative order (and thus, of the state) is to *effectively* orient human behaviour. And Kelsen's argument indeed

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[5] In Kelsen's words: eine 'ideelle Synthese im Geiste des die soziale Welt Erkennenden' (Kelsen 1922: 45).

assumes the state to do that to some extent. He presupposes that the concept of the state is actually effective in orienting an appreciable amount of individual actions:

> Legal norms [...] are considered to be valid only if they belong to an order which is by and large efficacious. Therefore, the content of the basic norm is determined by the facts through which an order is created and applied, to which the behaviour of the individuals regulated by this order, by and large, conforms. The basic norm of any positive legal order confers legal authority only upon facts by which an order is created and applied which is on the whole effective.

> (Kelsen 2008: 120)

This is the ambivalence of the state concept: On the one hand, a state exists as a normative order independent from being reflected in wills of individual actors. On the other hand, it would not exist as a social entity at all, if it were not (or had not been) a normative order that is actually believed to exist by an appreciable amount of individuals. To account for this latter aspect, however, the normative-juridical has to be complemented by a sociological perspective on the state.

Max Weber's view of the state as a sociological ideal-type

As with Kelsen, it is important to understand the methodological context of Max Weber's account of the modern state. Weber's description of the state is meant as an ideal-type for analytical purposes – a counterfactual model sociological understanding and explanation of social action depends upon. To better appreciate that, I will first show that Weber shares Kelsen's assumptions about the ontological quality of the state (a). Then, to comprehend the function of an ideal-type it is helpful to review Weber's understanding of sociology as an interpretive science (b). Finally, the synopsis of Weber's and Kelsen's views reveals in what sense the completion of an account of the state is dependent on a third, a genealogical perspective (c)

The state as normative order orienting social action

Like Kelsen, Weber views the state as a particular normative order that individuals direct their social action toward. He stresses that not only scientific experts, but also ordinary people, refer to the concept 'state' to make sense of social reality in their everyday practice:

> These concepts of collective entities which are found both in common sense and in juristic and other technical forms of thought ['Fachdenken'], have a meaning in the minds of individual persons, partly as of something actually existing, partly as something with normative authority ['Geltensollendes']. This is true not only of judges and officials, but of ordinary private individuals as well. Actors thus […] orient their action to them, and in this role such ideas have a powerful, often a decisive, causal influence on the course of action of real individuals. This is above all true where the ideas involve normative prescription or prohibition. Thus, for instance, one of the most important aspects of the existence of a modern state, precisely as a complex of social interaction of individual persons, consists in the fact that the action of various

individuals is oriented to the belief that it exists or should exist, thus that its acts and laws are valid in the legal sense.

(Weber 1978: 14)

However, as Weber argues, it would be naive to expect empirical social action to simply mirror a 'clearly imagined' idea of a state-order. On the contrary, every analysis will presumably to some degree reveal contradictions and mixtures in actor orientations:

when we inquire as to what corresponds to the idea of the "state" in empirical reality, we find an infinity of diffuse and discrete human actions, both active and passive, factually and legally regulated relationships, partly unique and partly recurrent in character, all bound together by an idea, namely, the belief in the actual or normative validity of rules and of the authority-relationships of some human beings towards others. This belief is in part consciously, in part dimly felt, and in part passively accepted by persons who, should they think about the "idea" in a really clearly defined manner, would not first need a "general theory of the state" which aims to articulate the idea.

(Weber 1949: 99)

According to this view, the normative order 'state' unfolds an orienting impact on social action sometimes in a more explicit, but mostly in a tacit way (and in some cases not at all). In this regard, Weber is in accord with Kelsen's view of the ontological quality of the object state.

Weber's perspective on 'the state' as ideal-type in interpretive sociology

Unlike Kelsen, however, Weber applies a sociological perspective. His aim is not to describe the content of the normative order state, but to understand and explain empirical social action. To understand the function of the state-concept in the latter regard, it is helpful to remind some aspects of Weber's basic sociological terms. In a sense, his interpretive sociology is the (logical, not chronological) continuation of Kelsen's critique of psychologically oriented sociology.

Weber understands sociology as an empirical science that seeks to explain (patterns of) individual actions that are oriented towards the behaviour of others (that is, social action). Like Kelsen, he stresses that a sociological explanation does not refer to a psychological process (*that* individual will causes action), but to the content dimension of this process. For Weber, social action is always motivated by a subjective meaning an actor attaches to it. Accordingly, sociological analysis proceeds as a rational reconstruction of social practice. That is, it has to proceed interpretively to reconstruct how empirical action (typically) is meaningfully related to other social actions and relations. For Weber, a sociological explanation is a hypothetical description of the subjective meaning that actors attach to their actions in a particular situational context. For that purpose, sociology seeks to establish, as a methodological device, general concepts, which 'compared with actual historical reality, […] are relatively lacking in fullness of concrete content' (Weber 1978: 20) – that is, ideal-typical concepts.

With his description of the state Weber seeks to establish such a sociological ideal-type concept. It is based on two assumptions. The first assumption is about the empirical impact of the normative order state. Weber argues that the subjective meaning people attach to social action can generally be divided into three basic categories. Regularities in social action are either due to the actor's orientation towards customs, the actor's interest or the actor's orientation towards a valid order ('*Vorstellung einer legitimen Ordnung*'). Normally, Weber assumes, actions are driven by a mixture of all three (plus non-accountable irrational factors like, for example, emotions). However, he goes on, orientation towards valid normative orders accounts for the most stable patterns of social action. And among such normative orders, in turn, the state is probably most effectively orienting empirical political practice.

The second assumption states that for matters of 'methodological convenience' (ibid.: 6) abstract ideal-typical concepts are a necessary to sociological explanation. Ideal-typical concepts are the result of thought experiments. They describe a hypothetical course or system of meaningfully related actions given that the actors were behaving purely rational. Note that 'rational' here means all possible kinds of subjective meaning attached to an action (oriented toward customs, interest or valid orders). Ideal-types are abstract in that they (unrealistically) assume two things: First, that actors *consciously* attach subjective meaning to their action although in fact 'in the great majority of cases actual action goes on in a state of inarticulate half-consciousness or actual unconsciousness of its subjective meaning' (ibid.: 21); and second, that action is based on *one* specific type of subjective meaning only. That is to say, it is assumed to be rational in just one sense, although in fact all action is driven by a mixture of motives. By being abstract in this double sense, ideal-types function as a comparative device against which empirical practice can be matched. They allow for defining to what degree real empirical action is rational in the respective sense or irrational – and the latter means, influenced by any other possible factors:

> The construction of a purely rational course of action in such cases serves the sociologist as a type (ideal type) which has the merit of dear understandability and lack of ambiguity. By comparison with this it is possible to understand the ways in which actual action is influenced by irrational factors of all sorts, such as affects and errors, in that they account for the deviation from the line of conduct which would be expected on the hypothesis that the action were purely rational.
>
> (Weber 1978: 6)

This way, ideal-types function as a common vocabulary of interpretive sociology and allow for transparency and comparability in the explanation of empirical practice as being close or distant to the respective ideal-typical action.

The complementary relation between a normative, sociological and genealogical perspective

It is now possible to better understand the status of Weber's perspective on the state. Weber's definition of the state is a sociological ideal-type. That is to say, it is a thought experimental projection of a system of social relations which are purely rationally oriented toward the normative order 'state'. One might say that Weber takes Kelsen's description of the state as a normative order for granted and asks: What patterns in

empirical social action would be expected if it were purely rationally oriented toward what Kelsen describes as the normative order 'state'? It is such a projected ideal-typical pattern of social action that Weber's famous (and shortened) definition refers to:

> A compulsary political organization with continuous operations (*politischer Anstaltsbetrieb*) will be called a "state" insofar as its administrative staff successfully upholds the claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order.
>
> (Weber 1978: 54)

Thus, Weber's and Kelsen's accounts of the state refer the same object of analysis, but from different perspectives. Both (implicitly) presume the analytical concept of the state as a heuristic means, a synthesising name for a specific relationship in social reality. Namely, that the analytical concept 'state' stands for a hypothesis about an *impact* of a particular valid *normative order* in rationally orienting *individual social actions*. Kelsen adopts a normative-juridical view and stresses the dimension of the normative order. He describes the characteristics of the content of the normative order in this relationship. From this perspective, he argues that the 'state' refers to a specific kind of 'ought' established by a specific system of norms.

Weber adopts a different, sociological view and focuses on the dimension of individual social actions in this relationship. He views the normative order 'state' instrumentally and asks to what degree it might be helpful to the explanation ('meaningfully comprehension') of empirical social action. In that regard, he uses the normative-juridical concept of the state as the basis of a thought experiment that leads him to a sociological ideal-type 'state': What were the features of a complex of individual social actions if all the actors believed that a normative order 'state' exists or should exist?

If we acknowledge this difference in perspective, we better understand Weber's conclusion that *sociologically* speaking social entities, like the state, are literally nothing else than a number of meaningfully related (possible) individual actions:

> in both legal terminology and in everyday speech the term "state" is used both for the legal concept of the state and for the phenomena of social action to which its legal rules are relevant. For sociological purposes, however, the phenomenon "the state" does not consist necessarily or even primarily of the elements which are relevant to legal analysis; and for sociological purposes there is no such thing as a collective personality which "acts." When reference is made in a sociological context to a state […] or to similar collectivities, what is meant is, on the contrary, only a certain kind of development of actual or possible social actions of individual persons. Both because of its precision and because it is established in general usage the juristic concept is taken over, but is used in an entirely different meaning.
>
> (Weber 1978: 14)

We have now reached the point where the need for a third perspective in the study of the state becomes apparent. Normative orders are not natural objects, but social constructs. Their generation, reproduction and transformation are a by-product of

people's everyday interpretations in coping with their social environment. Consequently, the degree to which empirical political practice in historical societies matches an ideal-type conceptualisation like Weber's sociological concept of the state most likely varies. That does not reduce the analytical value of the latter. But it does suggest that the analysis of the state should be extended by a genealogical perspective. That third perspective deals with the historical changes concerning the *impact* of the normative order on which the sociological ideal-type of the modern state is based. To put that differently, it traces the historical development of the normative order 'state' (as decribed by Kelsen) into a valid order. How did it develop into an everyday theory operating in political practice of modern societies? What are the social conditions that led to its prominent role in modern political thinking?

Quentin Skinner's genealogical view of the state

In my view, Quentin Skinner's approach to the history of ideas gives a genealogical account of the state in this sense. He draws attention to a linguistic and conceptual transformation of the term 'state' in political thinking from late medieval to modern societies. His aim is to describe the historical socio-cognitive formation that has led to the typical modern view of the state, according to which the state has a 'double impersonal character':

> We distinguish the state's authority from that of the rulers or magistrates entrusted with the exercise of its powers for the time being. But we also distinguish its authority from that of the whole society or community over which its powers are exercised.

> (Skinner 1989: 112)

Note that my primary concern is not Skinner's view on how the state concept has historically developed in substance. Rather, I would like to draw attention to the methodological assumptions underlying Skinner's genealogical analysis of the state. In my view, his approach is sensitive to the specific ontological nature of the state as outlined above – that is as an (mostly tacitly) operating everyday theory that shapes the views and orients actions of a society's members. One might say that he employs a Weberian ideal-type of the modern state in order to systematically identify deviations in the cognitive order of historical societies – and from that he extrapolates a historical formation of the modern view of the state.

Skinner's method is to interpret historical political writings 'in context'.[6] Roughly speaking, for Skinner historical texts are empirical data that inform about different layers of social reality. To be sensitive to that, a combination of three considerations should guide their analysis. The first pertains to the use of the term 'state' in the inner context of the historical text. How is the term 'state' used in the text? What aspects of political life is it referring to? Secondly, the use in the text has to be compared to the way the term 'state' is used in the political language of the contemporary societal context. Is the use of the term 'state' common also to other contemporary political writings or in what respect does it differ? Finally, the historical text as such has to be considered in a broader socio-historical context. What is the motivation of the author to write this text at this point in time and does that help to understand the (possibly

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[6] In the following I draw on Skinner (2002).

changed) use of the term 'state'? In this latter regard the text as such is viewed as a speech-act that is directed at a contemporary audience with the aim to establish a certain perception.

I will now give a very rough sketch of Skinner's description of a socio-cognitive transformation with regard to the state. Let me stress that the following does no justice to his well-elaborated argument on the state. My only intention, however, is to illustrate his method as an example for how an elusive object 'valid normative order' could be traced historically. According to Skinner, as early as the 14th century the terms 'status', 'estat', 'stato' or 'state' were already frequently used in political contexts.[7] They referred to a qualification of the ruler as a person – the state of the king as the ruler's 'state of majesty' or condition of high estate. By late 14th century, a second meaning had been established. Here, 'state' referred to the condition of the realm or commonwealth: The 'good state' of the commonwealth was partly linked to the state of the king (northern Europe), but the good state of the community was at the same time also seen as separated from the state of the ruler and dependent on his rule being in line with certain norms. The latter view pertains to the context of the Italian city states (but not exclusively), where the well-being of the republic was related to the magistrate acting in pursuit of justice.

Skinner argues that it is the historical emergence of Italian city states as new form of political order that led to a reflection of the concept of political authority. For the first time, he argues, it is possible to observe a political discourse that 'concerned the type of regime best suited to ensuring that an independent *civitas* or *respublica* is able to maintain its *optimus status* or best state.' (Skinner 1989: 97) For Skinner, the context of this discourse shows a political constellation that is typical also for later modern discussions about the state. It brought forth two rival traditions giving two different answers the question of how to achieve the best state of the commonwealth. On the one hand, early treaties claim that an elective system of government is a precondition for the best state. On the other hand, this notion was later superseded by a contrasting one that sees the institution of the rule by a wise prince to be decisive. Skinner argues that the expansion of the latter view is comprehensible in light of the fact that the Italian city-states were usurped by 'hereditary *signori'* (ibid.). This takeover of power explains why a new genre emerged in the contemporary political discourse – the mirror-for-princes treaties. Those treaties were motivated by one primary aim: 'how to advice the new signori of Italy, often in highly unsettled circumstances, on how to hold their status principis or stato del principe, their political state or standing as effectively governing rulers of their existing territories.' (ibid.)

It is in the context of these mirror-for-princes treaties that Skinner identifies a major cognitive transformation toward a modern understanding of 'state'. The rationale of the advice books was to discuss the preconditions for the ruler to keep their state (meaning: their political standing). But in doing so, Skinner argues, the advice books show a use of the terms 'status' and 'stato' that indicates a steady transformation of their meaning. They more and more referred not only to the personal quality of the ruler, but also to various other aspects of political power: How to maintain the character of the existing *systems of government*, how to maintain the *territories* given

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[7] In the following I draw on Skinner (1989).

into the ruler's charge, and how to 'keep up *one's hold* over the existing power structure and institutions of government' (Skinner 1989: 101).

For our concern, it is important to realise the epistemological assumptions involved in Skinner's method of studying the cognitive formation of the state order. His three-dimensional perspective on political writings 'in context' makes his analysis sensitive for a tensed dynamic between the two levels of political reality which are reflected in the advice books. The advice books (as any other historical text) are empirical data about their contemporary politico-historical context (history of events) on the one hand and, on the other, they inform about the contemporary socio-cognitive formation. Seen as speech-acts in a particular politico-historical context, the mirror-for-princes treaties are obviously expressions of their author's motivation to advice the rulers how to *preserve* their state in the sense of *personal standing*. However, even though they probably have done so, the use of the terms 'status' and 'stato' in the advice books portrays a change relative to its use in the political language of the (historically previous) societal context. In this regard, the advice-books at the same time inform about a transformation on the socio-cognitive level – namely, the establishment of a view of political order that means a *logical depersonalisation* of the state. The logical separation of the rule from the person of the ruler means a differentiation of the valid normative order and, thus, a cognitive shift that opens up the chance to address both aspects separately in the future. Something that was 'unthinkable' before has become thinkable and an acceptable normative basis to further act upon. Thus, paradoxically the same advice books can be interpreted as having fulfilled a particular purpose in the politico-historical context (to advice the ruler how to keep up his rule) and as catalysts of a slow and steady undermining of the very cognitive basis of hereditary rule in general.

In a similar way, Skinner goes on to reconstruct the development of republican thinking and the conservative reaction to it (Hobbes) as interplay between these two layers of reality which have to be kept separately in analytical terms. However, I stop the review of Skinner's reconstruction of the historical formation of the modern state-concept at this point. My concern has been to demonstrate in what sense an approach to the history of ideas is of systematic relevance to the analysis of the state. The analysis of historical writings 'in context' is sensitive to the relation between two different layers of political reality. By interpreting the dynamics between these two layers it concludes on developments in the socio-cognitive formation. In this sense, it adds a genealogical perspective to the analysis of the state.

This discussion of Kelsen, Weber and Skinner has demonstrated in what sense all three approaches to the concept of the state are logically related. They are all (more or less explicitly) based on the view that the analytical concept of the state is a name for a specific relation in social reality, which can be viewed from three perspectives. Analytically speaking, the state refers to a hypothesis about an orienting *impact* of a particular *normative order* on *the social action of individuals.* Thus, the complementary relationship between these accounts is not accidental. It follows from the ontological nature of the empirical object under consideration – the 'state' – that its normative-juridical analysis is based on presuppositions of a sociological and genealogical kind and *vice versa*.

Conclusion

In this article I have discussed the state's mode of existence and what follows for the social scientific analysis of the state. The problem is that political analysis is mostly driven by a diffuse view on the ontological nature of the object 'state'. At the same time, however, pressing practical concerns require us to get a clearer view on the phenomenon 'state'. For example, the steady European integration confronts us (Europeans) with the choice of whether to further integrate into a state or not – or do we already live in a European state-like order without even recognising it?

The first section holds the view that common analytical conceptualisations of the state are too narrow. I have argued that the object 'state' is a social entity which neither belongs to the realm of physical objects nor to that of subjective perceptions. Instead, I have suggested considering the ontological nature of the state in terms of an everyday theory that operates in historical societies. The second section elaborated on the implications of such a view to the social scientific analysis of the state. What follows is that the study of the state is a multi-perspectival task in which a normative-juridical, a sociological and a genealogical approach are logically related. The discussion of Kelsen, Weber and Skinner has not only demonstrated how each of their accounts is compatible with the view of the state as an everyday theory. Furthermore, their different perspectives on the state have turned out to be logically related and complementary. In this sense, my conclusion is that if we acknowledge the peculiar ontological nature of the object 'state' then a full social scientific account of the state is dependent on a systematic cooperation of the disciplines of political theory, sociology and the history of ideas on the matter.

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RECON seeks to clarify whether democracy is possible under conditions of complexity, pluralism and multilevel governance. Three models for reconstituting democracy in Europe are delineated and assessed: (i) reframing the EU as a functional regime and reconstituting democracy at the national level; (ii) establishing the EU as a multi-national federal state; or (iii) developing a post-national Union with an explicit cosmopolitan imprint.

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Project website: www.reconproject.eu

RECON Online Working Paper Series

The Working Paper Series publishes work from all the researchers involved in the RECON project, but it is also open to submissions from other researchers working within the fields covered by RECON. The topics of the series correspond to the research focus of RECON's work packages. RECON Online Working Papers are widely circulated and included in online social science databases. Contact: admin@reconproject.eu.