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AUFSÄTZE

The state-regime-nexus: law and legal order

Theresa Paola Stawski

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Abstract The aim of this paper is to illuminate the interdependent relation and connectivity between state and regime known as the state-regime-nexus. To conceptualize the reciprocal institutional relation between state and regime and to deepen the understanding of the state-regime-nexus, I focus on law and legal order as one mutual linkage between state and regime in both democratic and autocratic regimes. To do so, this conceptual paper addresses two points that are part of the same topic: the relation between state, regime and law and different variants of legal order in democratic and autocratic regimes. This creates a theoretical basis to gain more conceptual and analytical clarity in the complex realm of the state-regime-nexus.

Keywords State · Regime · Nexus · Law · Legal order

Zusammenfassung Der vorliegende Beitrag widmet sich der komplexen Wechselwirkung von Staat und Regime, auch bekannt als Staat-Regime-Nexus. Um ein tieferes konzeptionelles und analytisches Verständnis dieser interdependenten Beziehung zu erlangen wird das Rechtsmonopol des Staates in Kombination mit Recht und Rechtsordnung als verbindendes Element von Staat und Regime in demokratischen und autokratischen Regimen analysiert. Hierzu werden konzeptionelle und theoretische Annahmen verbunden, um ein tieferes Verständnis zwischen Staat und Regime zu erlangen. Der Fokus liegt dabei auf dem Rechtmonopol und den korrespondierenden Rechtsordnungen in Demokratien und Autokratien.

Schlüsselwörter Staat · Regime · Nexus · Recht · Rechtsordnung

Theresa Paola Stawski (✉)
Institute of Political Science and Sociology, Comparative Politics and System Analysis, Julius-Maximilians-University Würzburg, 97074 Würzburg, Bayern, Germany
E-Mail: Theresa.stawski@uni-wuerzburg.de

1 Introduction

The state is the basis of all political regimes, it is the single most important instrument that provides the means for exertion of authority for any political regime, both democratic and autocratic. Although state and regime are analytically distinct and located on different conceptual levels, they still form a unit; state and regime are, in fact, conceptually distinct but causally and inextricably intertwined (Andersen et al. 2014, p. 1204). The goal of this paper is to shine a light on the symbiotic connection between regime and state by exploring the role of the monopoly of law and different forms of legal order.[1] This follows the broader underlying assumption that democracies and autocracies cannot be understood exclusively on the level of the political regime, additionally they must be analysed in combination and relation to the state, its constituent institutional manifestation and usage (Møller and Skaaning 2011).

Based upon the notion that, on the most basic level, the state and its legal order are more or less identical (Kelsen 1925), the monopoly of law[2] is a central institutional means of power for both state and regime. Law and politics are intrinsically related: law is a particular form of political practice (Henderson 1991), it governs and determines allocations of power among people and institutions, and power is the subject of politics. Authority as institutionalized power finds it formal equivalence and form in the state, and "law is defining for authority" (Fruhstorfer 2017, p. 771). The proximity of law and the state rests on the state's coercive monopolization of law, physical violence and administration. The question of whether the legal order belongs to the institutional dimension of the state or regime can therefore be answered with "both". The regime enacts and determines the content of the law, the state ensures and enables laws to be enacted by the regime are carried out across its territory, irrespective of the nature of the regime or the legal content.

But how can law and legal order be conceptually integrated into the state-regime-nexus? And what logical structure of law is characteristic of democratic and autocratic regimes?

To answer these questions, this conceptual paper addresses two points that belong to the same topic: the connectivity between state and regime, the supremacy of state law and different variants of legal order. I amplify the interdependent relation between regime and state by exploring the connectivity between both objects of analysis labelled as the "state-regime-nexus". For this, I focus on the monopoly of law and the state's legal order as one mutual point of reference for both state and regime. First, the importance of the interdependence of state and regime is explained. I then proceed with the position of the monopoly of law and the legal order of a state as one point of intersection between state and regime. Based on this, I clarify the

[1] While the issue of the rule of law and democracy is an established field of research, there is also a growing number of theoretical and empirical research projects that focus on the role of law in autocratic regimes (e.g. Henderson 1991; Moustafa 2008; Lauth 2017; Solomon 2007; Scheppele 2018; Lührmann and Lindberg 2019; Fruhstorfer 2017).

[2] This focus on formal law does not mean that state law is the only law. Indeed, normative or legal pluralism with more than one legal order that decentralizes the state of its institutional supremacy can contribute to social order (e.g. Kraushaar and Lambach 2009; Boege et al. 2008; Kötter et al. 2015).

differences between democratic and autocratic legal orders by applying the positivist "rule by law" as the root concept, i.e. "the level in a conceptual hierarchy that is the initial point of reference" (Collier and Levitsky 2009, p. 271) for state law.[3] The necessity of this conceptual distinction becomes obvious by moving down the kind hierarchy to classical subtypes of state law and concepts of legal orders, increasing differentiation by including a formal definition of the rule of law, reaching the end of the spectrum of state law with thick and substantive conceptions of the materialistic rule of law in democratic regimes.

Some cautionary notes: While the endeavour to detect causality in the realm of the state-regime-nexus is certainly worthwhile, I do not or only briefly brush upon this subject, since causality includes questions of time and sequence, cause and effect. This, in my opinion, obstructs the overall basic understanding of the state-regime-nexus as a synchronous reciprocal or equiprimordial form of institutional connection between regime and state. Questions of causality are more relevant in the context of institutional change, e.g. studies of regime transformation.

2 State, regime and nexus

The state is an essentially contested concept and the multiple definitions and conceptualizations of state, stateness and fragility reflect the differing methodological assumptions (Lambach et al. 2015, p. 1303). Two approaches of political thought on the state can be differentiated (Eriksen 2011): an institutional Weberian approach that is focused on the instruments of the state and emphasizes the state's legitimate monopoly of physical violence and bureaucracy, and an approach based on Locke which views the state as a service provider, including public goods like security, justice or public health and thereby defines a state based on its output (Lambach et al. 2015, p. 1303).

Following the Weberian approach, I define a *state* as an institutionalized social order of hierarchical authority that is in control of the monopoly of law, monopoly of physical violence and monopoly of administration throughout a given territory and its inhabitants. For this, the state monopolizes the means of law, violence and bureaucracy and claims legitimacy "to assert and defend its sovereignty within a given territory" (Lambach et al. 2013, p. 7).

Stateness as the degree to which a state exists (Nettl 1968) consists of empirical (de Facto) and juridical (de Jure) stateness. The juridical (external) dimension of the state entails its recognition as a sovereign and independent state (Jackson and Rosberg 1982). Empirical stateness means that a state is able to enforce the laws enacted by the regime across its territory and refers to the internal dimension of the state (Andersen et al. 2014, p. 1208), it entails the state's quantitative and qualitative dispersion and penetration of the state territory and state population. Stateness and fragility—as deficiencies in one or more dimensions of stateness—are

[3] The concept reflects a procedural and institutional minimal definition of law and legal order that contains the smallest possible number of attributes that produce a standard for state law. Furthermore, the construction of a positivist and minimalistic root concept does not conflate aspects of regime and stateness.

conceptualized as a continuous phenomenon, encompassing the spectrum between functioning, fragile and collapsed states.

In contrast, the concept of the *political regime* is centred on the question of "who has access to political power and how those who are in power deal with those who are not" (Fishman 1990).

It is the formal and informal organisation of the centre of political power, and of its relations with the broader society (Fishman 1990). These formal and informal rules result in differing regime types that follow their own "distinctive and coherent operating logic" (Bogaards 2009, p. 7) that constitute orders of relational organisation between "rulers and ruled".

A regime is thus the manifestation of the specific form or shape of political leadership and the unique expression and exercise of political power that determines who gets what and how access to state-power is regulated (Lauth 2004, p. 56). As a set of institutions, the regime incarnates the norms, principles and procedures of a political organisation, which defines the modes of authority (Lauth et al. 2014, p. 157). To display differences between varying regime types, the continuous conceptualization of regimes stretches between democratic and autocratic regimes as the respective endpoints. The attributes democratic and autocratic thereby indicate the internal organisational and power structures of a state, with the relationship between those in power and the people/addressees of authority being the main criteria of differentiation (Merkel 2010).

2.1 State-regime-nexus

The regime and the state are bound and shaped through the synthesis of both, forming the interdependent and reciprocal *state-regime-nexus*. This nexus can be epitomised as a nested institutional order with its components being embedded in each other and permeating each other. The state is the basic institutional structure of any type of "modern" political authority. Thus, the state is the manifestation of monopolization of institutionalized power, i.e. the single legitimate and supreme authority that enables organisation and application of control and command. As a political instrument of authority, the state is, initially, neutral to any given regime type. But a state without a regime is an acephalic or polycentric entity without a central organisational or leading authority. As the permanent manifestation of the political organisation of authority, the regime represents the state authority that uses and exercises this power through the state, being influenced and influencing its appliance. A regime constitutes an institutional form of government of the state, it is the specific organisation of power throughout the state and depends on the state as its institutional frame of reference.

The regime is an integral part of the state, and the state is a definitional part of the regime. For a regime to function, the state must possess stateness to enforce its laws and legal order against resistance through the monopoly of physical violence and implement its decisions and programs through its bureaucracy. Thus, there is no regime without a state while the state is a constitutive aspect of any regime. Hence, the reflexive relation between state and regime is evident, a regime relies on the state to exercise power and define the boundaries of its legal right to rule. The

state facilitates the exercise of authority through the monopolization of power and the means necessary to uphold its monopolies. And while the regime uses the state to implement its goals, it simultaneously determines and shapes the state in form and content (Andersen et al. 2014, p. 1203/1204). This intersection between state and regime reflects the connectivity that the *employment* of the state depends on the character of the regime.

To prevent conceptual contradiction or equation, the constitutive components and subcomponents of the state-regime-nexus as an equiprimordial institutional complex have to be distinctively defined and their reciprocal relation has to be structured. I follow Goertz's (2006) method for construction of multidimensional concepts and define the state as the underlying institutional basis or first conceptual layer that consists of the monopoly of law, monopoly of violence and monopoly of administration as the state's immanent components. The second layer of the state, the regime, expands the basic-level concept that acts as an intermediate dimension or meta-component that structures the government of the state. The secondary-level dimensions of the regime thereby substantiate the concept of the state and further constitute what the phenomenon, the state-regime-nexus, is. The regime requires the state and simultaneously shapes the application of state authority. Through this secondary layer, the multidimensional character of the concept, the state-regime-nexus, becomes apparent. In this line of conceptualization, regime types like autocracy and democracy form types of state-rule. While the state is in itself an institutional pattern, the regime as a meta-component also forms an institutional pattern (extension of authority, structure of authority, exercise of authority and access to authority (Merkel 2010, p. 22f.)) with divergent attributes that result in distinguishable regime types, i.e. democracy, autocracy and their respective diminished subtypes and hybrid regimes. Diminished subtypes of the state are first and foremost fragile states, and they can only contain a defective regime, forming "causally intertwined" diminished subtypes.

3 Root concept: state law and classical subtypes

The complex relationship between state, regime and law forms between their respective collections of institutions which interact on multiple levels (Fukuyama 2014, p. 1337). The state's claim to authority throughout its territory over the inhabitants rests on its legal internal and external autonomy or sovereignty. Sovereignty thus means autonomy of competence or "competence-competence" (Zippelius 1999) of the state. Through this, sovereignty is an attribute of law, since it is an attribute of the state (Kelsen 1981, cited in Voigt 2018, p. 614). Hence, the monopoly of law and the state's legal order embed the broader notion that the validity of law is anchored in the supremacy and legitimacy[4] of the state. The state holds its legiti-

[4] I follow Gerschewski's (2018, p. 655) proposition that "legitimacy is an ascribed attribute and a property of an object", in this case, the state, "while legitimation refers to the process of gaining legitimacy". The legitimacy of the state is normatively grounded in its legal internal and external autonomy/sovereignty. I understand legitimacy of the state in accordance with Weber's first component of legitimacy, consisting of the obedience towards an order given by the state as the highest authority (Lambach et al. 2013, p. 7).

mate position not necessarily through legitimation of authority but through its self-reinforcing institutionalisation as the singular sovereign entity that holds the sole legitimate hierarchical superior position of authority.[5]

The main characteristic feature of the state's sovereignty is the monopoly of law, it is the highest normative control mechanism and authority of competence that embodies the organisation of political power (Zippelius 1999). A state's claim to the monopoly of law includes the corollary that no one else is entitled to make binding decisions for the citizens, unless they have been explicitly delegated this authority by the state (Lambach et al. 2015, p. 1306). State law is characterized by a formality in its creation, promulgation and application in all its singular instantiations and the distinctive feature of law is its connection to the state as its origin (von der Pfordten 2014, p. 21). Consequently, the monopoly of law is exclusive and only recognises law promulgated, enforced and practiced by the state and excludes any other legal sources (Bucher 2000, p. 402). State law differs from social norms through its specific means, namely the necessary use of coercion to guarantee obedience and its hierarchy of validity based on its formal authorization by the state (von der Pfordten 2014, p. 18).[6] Law thus creates stability by justifying authority and an obligation to obey the rules (Gerschewski 2018, p. 652) through the formal creation of law and the "generic obligation to obey the law" (Finnis 2011, p. 345) that "arises in respect of each law as law and not on the basis its content" (Aiyar 2000, p. 466). As Raz (1979, p. 226) put it:

> Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put. It is the virtue of efficiency; the virtue of the instrument as an instrument. For the law this virtue is the rule of law. Thus the rule of law is an inherent virtue of the law, but not a moral virtue as such.

In its broadest and most minimalistic sense, rule of law by a state "means literally what it says: the rule of the law. [...] people should obey the law and be ruled by it"

[5] This legitimate position of the state does not mean that the state's legitimacy is not contested. Historical and current conflicts that question the state's legitimate claim to power oftentimes involve and revolve around the state power, state territory or state population with a tendency to insurgency and/or a demand for secession of parts of the state territory.

[6] The premise of the law, regardless of its procedural or substantive dimension, is that the rules are sanctioned by the state—in order for law to be efficient, in addition to the formal existence of the law the state has to be able to enforce the law throughout its territory (Møller and Skaaning 2012, p. 142). The legal order of a state is an order of coercion, to implement mandatory decisions, the state has to be able to enforce them (Vollmeyer 2011). The monopoly of violence of the state is intrinsically connected to the monopoly of law: "To make its binding decisions stick, a state has to be able to implement them even in the face of resistance" (Lambach et al. 2015, p. 1306). This does not imply that there is no state violence, on the contrary. The state's order of violence can be one of repression or excessive force—it is, however, exclusive and institutionalizes the state as the single legitimate source of violence, coercion and force. The monopoly of administration as the third dimension of the state is connected to both the monopoly of law and monopoly of violence. Administration is a medium of implementing the authorized law. To implement policies, the state needs a bureaucratic organisational structure throughout the territory as well as financial resources. Furthermore, the bureaucracy is in command of the administration of goods and services (water supply, hospitals etc.) to provide basic services to its population.

(Raz 1979, p. 212). Objective validity of law and legal order are independent from moral standards, as Kelsen pointed out:

> Every by and large effective coercive order can be interpreted as an objectively valid normative order. The validity of a positive legal order cannot be denied because of the content of its norms (Kelsen 1934, cited in Suntrup 2020, p. 5).

Positivist legalism as the *root concept* of state law reflects this minimalist and institutional definition of law and legal order. The smallest possible commonality that produces a standard for law is *its origin*: *the state*. The law's reference point is the state—legal norms created and enforced by state institutions—through which it provides normative standards with regard to composition, enforcement, and content of legal norms (Kötter and Schuppert 2014). Rule by law as the "thinnest formal version" of state law "is the notion that law is the means by which the state conducts its affairs" (Tamanaha 2004, p. 92). As a minimalistic root-concept, rule by law contains the premise that the exercise of power is carried out via positive law (Møller and Skaaning 2012, p. 139), formalised norms by the state that are sustained through and anchored in the supremacy of the state and its institutional components, the monopoly of law and judiciary, monopoly of violence and monopoly of administration.

To distinguish between different logical structures of legal order I apply Møller and Skaanings (2012) adapted[7] proposal that includes three interacting dimensions: the source and shape of the rules (core/configuration), the sanctions of the rules (control), and the substance of the rules (content/consent). Here, core, configuration and control entail the thinnest conception of state law. The last dimension—substance (content/consent)—contains thicker aspects and adds to the root concept (Møller and Skaaning 2012, p. 143). In its most minimalistic sense, the logical structure of state law rests on the premise that rules do not have to be just or fair (content), the source of the rules, the state's monopoly of law (core), formal legality of the law (configuration) and the supremacy of law create the obligation to obey (control), not the consent of the people.

By moving down the hierarchy to increase differentiation, classical subtypes of state law that include more defining attributes and fit a narrower range of cases become visible (Collier and Levitsky 2009, p. 274).[8] The continuous conceptual understanding of the rule of law as a classical subtype of state law encompasses concepts with fewer requirements, formal legality, to more demanding requirements with regards to consent and content. Between these thin and thick versions of the rule

[7] Unlike Møller and Skaaning's proposal, which was developed to conceptualise democratic rule of law, I understand the dimension *shape of the rules* and the dimension *source of the rules* as being somewhat identical, yet useful to capture the *core and configuration (*not consent) of the rules in the overall conceptualisation of state law. The inclusion of the shape in the meaning of consent is arguably not vital to the root concept, since, as Møller and Skaaning (2012, p. 144) note, the attribute of consent stands in a trade-off with all other attributes and only applies to democratic rule of law.

[8] The classical hierarchy implies that the rule of law is a specific subtype of state law based on the root concept of rule by law, and each thicker type subsumes all thinner types (components of the root concept). Further down the conceptual hierarchy, the concepts have more defining attributes—i.e., greater intension—and encompass fewer instances—i.e., more limited extension (Collier and Gerring 2009, p. 5).

of law, each concept further down the hierarchy incorporates the central aspects of the preceding concepts, "making them progressively cumulative" (Tamanaha 2004, p. 91).

A *formal* definition of *rule of law* entails a set of minimal characteristics: The minimal requirement of rule of law stresses formal or instrumental aspects of rule of law and includes at least formal legality, which can be understood as the obligation to the law and judicial review (Peerenboom 2004, p. 2). It highlights the importance of laws, procedural guarantees and formal consistency and generality (Sehring and Lauth 2009).[9] In this formal understanding, law must be prospective, made public, be general (laws should not require the impossible and not contradict each other), be clear, be stable and certain, and be applied to everyone according to its terms; simultaneously, laws have to be enforceable by institutions and procedures that are consistent and sufficiently efficient (Tamanaha 2007; Rijpkema 2013).[10] The thin variant of the rule of law includes formal legality, consequently, the thin definition of the rule of law is necessary but not sufficient to equal a fair and just legal order (Tamanaha 2007, p. 18). If the law enforces an authoritarian order, it serves to enhance legally enforced and licenced oppression.[11] Oppressive rules can therefore be enacted as state law and demand obedience by the population. Law and legal order provide predictability but do not guarantee liberty, since the scope of action permitted under the law can be narrow and oppressive while complying with the rule of law in the thin or formal definition (Tamanaha 2007, p. 8).[12]

Moving further down the hierarchy, the "thick" conceptional standard that is even more demanding in its requirements of state law finds its equivalent in the concept of the *substantive rule of law*. This thick concept of the legal state ("Rechtsstaat") considers the rule of law to be essential for substantive outcomes and goes beyond procedural norms without separating formal and substantive elements yet emphasizing their interdependence (Kötter and Schuppert 2014, p. 72). The substantive component of the rule of law includes fundamental human rights (content) that act as prevention and protection against the state itself. Under the materialistic rule of

[9] Raz (1979, p. 214 ff.) lists eight principles of the formal rule of law to ensure that the law is capable of providing effective guidance: law has to be prospective, open and clear; laws should be relatively stable; the making of laws should be guided by open, stable, clear and general rules; the independence of the judiciary has to be guaranteed; principles of natural justice must be observed; Courts should have review powers over the implementation of the other principles; Courts should be easily accessible and the discretion of the crime-preventing agencies should not be allowed to pervert the law.

[10] The aspect of equality before the law is somewhat contested: while formal legality does include equality of application since the laws are general and made public, it does not embed the vast notion of equality before the law, which states that laws must not discriminate against generally defined groups (Møller and Skaaning 2012, p. 139).

[11] Formal rule of law does also not only entail the process of obeying commands or rules, but can also involve oppression and punishment. Liberal values are opposed, instead conformity and obedience to rules are insisted upon and coercion and punishment are frequent tools to ensure obedience (Henderson 1991, p. 382).

[12] The minimal requirements of the procedural or formal rule of law are in fact compatible with a vast diversity of institutions and practices (Peerenboom 2004, p. 11). The formal rule of law is solely concerned with procedures and the process of identifying authoritative commands or directions and then following them as obedience to rule based authority. Because the thin conception of the rule of law does not impose requirements with regards to the content of the law, it does not implement limits on the scope of the law.

law principle, the state develops into an enforcer and defender of dignity and liberty of individuals and guarantees that all sources of public power are subject to binding legal checks (consent) (Scheppele 2018, p. 558). It furthermore contains aspects with political substance to ensure the normative preconditions for the realization of the rule of law and individual human rights (Kötter 2010, p. 5). The difference between the formal (thin) and substantive (thick) definition of the rule of law can be summarized according to Tamanaha (2004, p. 92) as: "formal theories focus on the proper sources and form of legality, while substantive theories also include requirements about the content of the law (usually that it must comport with justice or moral principle)".

These core assumptions of state law lead to the second topic of analysis: distinguishing between different variants of legal orders in connection to the respective regime types, given that law is neither exclusive to democratic regimes, nor is it absent in autocratic regimes. In democratic and autocratic regimes, law is a major tool of political authority, since it is the primary institutional component of the state itself and as such a vital instrument of any regime to implement its authoritatively binding rules, to legitimate itself and accomplish its objectives. Law is a central device to establish relationships of power and to stabilize and increase the power of democratic and autocratic regimes (Lorenz 2008, p. 7),[13] since both regime types benefit from the normative force of the formal legal order in conjunction with the state (Scheppele 2018, p. 563).[14] Both democratic and autocratic regimes share some characteristics of legal procedure, captured in the thin concept of formal legality or the normative state. Both regime types have additional substantive features of legal order—yet with different content and degrees of consent.

3.1 Autocracy and legal order

The assumption that autocracies lack formal rationality entirely and rely solely on arbitrary rule is misleading (Suntrup 2020, p. 6). On the contrary, autocratic regimes are officially often committed to the ideal of legality (Lührmann and Lindberg 2019) and their use of prerogative power is more subtle today than in previous autocratic regimes (Suntrup 2020, p. 25). Autocracies are based on rational legal orders that bind the population and—to a certain degree—the elites by stable long-lasting rules that form a written or unwritten constitution.[15] But in sharp contrast to democratic regimes, state authority is arranged in a strict monistic structure, separation of power

[13] "Instead of operating in the world of liberalism, then, autocratic legalists operate in the world of legalism" (Scheppele 2018, p. 562), "legalistic autocrats" deploy the law to achieve their aims, so that "[...] the law exists not to limit the state but to serve its power" (Carothers 1998, p. 97). In fact, most repressive regimes like Nazi Germany or Stalinist Russia chose to use law and courts (Solomon 2007, p. 129), reframing the formal law and using rule by law to establish an omnipotent state.

[14] Although autocratic legalism undermines the principles of the rule of law, it still generates political legitimacy by following the positivist formal process of law-making (Scheppele 2018, p. 563).

[15] Autocracies also have a constitutional trait, they are not lawless or without a constitution (Bernholz 2017, p. 51), because no society and no state can exist without law and legal instruments, as they provide predictability.

is de facto absent, even if a formal separation of power exists, it lacks any real checks and balances.

The autocratic logic of authority-usage is reflected in the dual structure of the legal order, which Fraenkel (1941) called the "Dual State". Alongside the sovereign "prerogative state", which is unconstrained by constitutional or formal rule of law, the "normative state" provides legal certainty in domains such as economy, administration and taxation (Suntrup 2020, p. 1).[16] This bifurcation of the application of the law and legal order leads to a co-existence of the formal rule of law as part of the normative state, and a part that is characterized as "rule by law" with a prevalence of an illiberal and arbitrary prerogative state (Suntrup 2020, p. 9), albeit as a highly dynamic construct without clear borders.[17] Still, the dual "state" does not imply the duplication of the state, rather it describes a single state that rests on two strands of legal order: a "normative state" that more or less abides by legal rules and ordinary procedures to stabilise normative expectations (formal rule of law) and a prerogative state that foresees no legal regulation of official state entities (rule by law).

The *normative state* operates according to sanctioned principles of rationality and impartial legal norms and abides—more or less—to the formal rule of law to safeguard the legal order of the state. The normative state complies with the formal rule of law, providing reliable rules and unchanging principles to justify order and authority, discipline and control the population and elites as well as enhance the power of the elite. Consequently, the formal rule does not bring forth liberal values or democracy, since authoritarian regimes can, to a certain degree, abide to the formal rule of law (Tamanaha 2007; Lauth 2017). And legal means and legality can serve as mechanisms to justify and authorize repression or legitimize social programs and transformations like the nationalization or privatization of property. But the more sensitive the jurisdiction is because of its relevance to the political sphere of the state, the more likely the courts will face pressure to deliver results in alignment with the guidelines of the executive (Solomon 2007, p. 125).

The *prerogative state* exercises power arbitrarily and violently without legal constraints or legal guarantees (Fraenkel 1941; Sakwa 2013), it rather acts as a separate legal order of its own, while the formal legal order remains intact. This sphere of autocratic legalism has three key elements: the use, abuse, and non-use of the law in service of the regime (Corrales 2015, p. 38). The prerogative part of the state is regulated by all-encompassing legal measures in which the regime exercises its power following arbitrary prerogatives. The autocratic rule manifests itself through the absolute and therefore unlimited power of a person or assembly, resulting in an institutionalized order of authority where the rule of one person or group of people is unconstrained by the law (McGuire and Olson 1996, p. 93). Furthermore, state and regime are not subject to the law since their realm belongs to the political sphere of

[16] This mixture between formal rule of law and positivist rule by law is indeed quite fitting for the autocratic authority since formal legality and rule by law have more in common than formal legality and the historical rule of law tradition (Tamanaha 2004, p. 96).

[17] Fraenkel noted, as time passes it is likely that the prerogative state encroaches on and expands into the normative state, ultimately resulting in a totalitarian regime. This complete intrusion then constitutes "one of the defining characteristics of pure totalitarianism" (Fishman 1990).

the prerogative state. The omnipotence of a state without legal boundaries results in an arbitrariness of state authority that can be exercised through legality (e.g. states of emergency) or without any recourse to formal legal procedural paths. The prerogative state operates based on the concept of autocratic legalism that only knows one formal requirement: state laws must meet a positivist standard that relates to the state's monopoly of law for enactment as a technical or procedural matter, regardless of the content (Scheppele 2018, p. 562). No secondary rules exist to guarantee substantial or formal demands of the law or the legislative process and law enforcement, similarly there is not an independent judiciary, which results in the destruction of any checks and balances (Fraenkel 1941; Sakwa 2013). Furthermore, the arbitrary use of power includes retroactive changes to the law to suit the purposes of elites.

Still, both strands of legal order depend on the state as the basis and instrument of the autocratic regime. When stateness is limited, both the normative and prerogative state will not be fully-fledged, since there are legal orders but a lack of stateness to implement and enact them sufficiently; furthermore, if the prerogative state is dominated by arbitrariness in a way which the law is fully annihilated or inconsequential, the concept of the dual state does not apply (Suntrup 2020, p. 16).[18]

The logical structure of legal order in autocracies presents itself to be of an *asymmetrical relation* between the dimensions of core/configuration, control and consent/content. The dominant dimensions in autocratic regimes are core/configuration and control, while the dimension consent/content is subordinate. In autocratic regimes, the legal order is comprised of formal legality as the normative sphere and rule by law as the prerogative sphere. Both refer to the dimension of the source of the rules (core and configuration), the state. The sanction of the rules (control) in its most narrow sense means that the state is able to enforce the law throughout its territory, not that the state or regime (government/state agents) are themselves subject to sanctioning. The last dimension—substance of the rules (content/consent)—which originally differentiates between negative (liberal) and positive (social) rights, does not or only narrowly applies to autocratic regimes, since laws are not defined by invariable or fixed specific content, nor are they dependent on the consent of the people.

3.2 Democracy and legal order

A democracy is based on the sovereignty of the people, limited only if the majority disesteems the democratic principles. Democracy combines the elementary ideas of separation of power, political participation and control of political power through the barriers of the rule of law. In democratic regimes, the rule of law is the highest constitutional principle that shapes both the state structures and exercise of public authority through the legal order (Kötter and Schuppert 2014, p. 75). The rule of law is more than a formal, procedural requirement, it is a normative requirement against which every act, be it private or of the state and its agency, is evaluated.

[18] In such instances, informality replaces or takes over the prerogative (and sometimes even normative) part of the state, eventually deforming the state into a hybrid that consists of a formal and informal sphere, or an entirely informal state.

The substantive rule of law captures the legal foundation of democratic regimes: the state is bound by the rule of law under the premise of inalienable rights. This includes that public promulgation of the law, equal enforcement, and independent adjudication form the normative principles and requirements of governance, which result in an interlocked relation between rule of law as a principle of law and as a principle of governance (Rijpkema 2013, p. 794).[19]

The function of the substantive rule of law principle is to impose legal restraints on the regime by requiring compliance with existing law and by imposing legal limits on legislative power through an institutionalized separation of state authority, constitutional rules of legislation, administration and justice. As the state monopolizes and uses power, the substantive rule of law constrains the exercise of power, resolving the inherent tension between the state and regime through a delicate balance: the state has to be powerful enough to implement and execute its rules and decisions and yet constrain itself in the way that it uses that power (Fukuyama 2014, p. 1328). To be legally binding, authorization is required for every act of state organizations and institutions, which have to be precisely determined in content, purpose and extent and follow universal principles of rationality (von der Pfordten 2014, p. 27).

In democracies, rights are embedded in the constitution as its substantive core that are superior to all other norms. They can neither be abolished (even by constitutional amendments) nor impugned by the majority; fundamental rights can be enlarged, but not restricted or supressed. Fundamental rights are substantive norms that regulate the production of other norms, subordinating every norm's validity to their coherence to the fundamental rights, meaning that ordinary or constitutional law that is incompatible to these norms is unlawful.

Rule of law also includes a separation of power as a means of internal control that is expressed in an institutional differentiation between executive, legislative and judiciary state power. Executive actions are strictly bound by the law. Government official have to act in accordance and consistent with the law, they are required to consult and conform to the law before and during actions and legal rules provide requirements and standards to hold government officials accountable during and after their actions, which provides the basis for vertical and horizontal account-

[19] Between the accepted distinctions of a thinner versus a thicker conceptualization of the rule of law, contemporary versions of democracy differ with regards to the scope of the rule of law in relation to its content. While formal and substantive concepts of the rule of law coexist conceptually and are generally seen as gradual characteristics of democratic development, the content of the law depends on the question of the supremacy of the law (liberal, negative rights) versus the supremacy of equality (social, positive rights) as a somewhat classical trade-off in theories of democracy itself. Consequently, the thick conception of the rule of law is part of a general and broader social and political discourse that encompasses a variety of issues beyond those relating to the core of the legal system and rule of law (Peerenboom 2004, p. 6). Democratic Regime may differ in regard to these sometimes contradictory goals. If a state puts greater emphasis on stability rather than individual freedom or equality, this may result in an unbalanced democracy with a limited civil society (Peerenboom 2004, p. 3).

ability (Tamanaha 2007, p. 14).[20] Furthermore, the rule of law principle provides clear secondary rules for the legislative process and includes qualitative demands of law-making as well as law enforcement (core/consent) (Kötter and Schuppert 2014, p. 84). Hence, democracy and rule of law rest on the "recognition of the rights of individuals, including their right to be governed under self-limiting and checked authority, authority that has as its normative touchstone legitimation through democratic means" (Scheppele 2018, p. 558/559), i.e. the tension between democracy and constitutionalism is solved by implementing the requirement of a self-sustaining democracy.

The rule of law in a state of fundamental rights includes various subprinciples that tame politics and provide protection against arbitrariness by ranking individual human freedom and equality above the state and the laws and thus commit law to a liberal and just constitutional order based on human dignity. Authority is strictly limited and constrained by the sphere of the fundamental rights and neither public nor private decision-making can dispose of these fundamental norms. In addition, the rule of law imposes restrictions on the law by institutionalizing limitations on the legislative process that are superior to ordinary law-making, to minimize "the danger created by the law itself" (Raz 1979, p. 224). The law is also subordinate to the law itself, not only with respect to juridical acts, but to the production of law by way of the law, including the exercise of authority and the resolution of societal conflicts. The principle of the legal state embodies the principle and legal basis that nobody is above the law and everybody is subject to the law (von der Pfordten 2014, p. 24).

To conclude, democratic regimes also combine two separate yet connected strands of legal order, the formal branch that is concerned with formal legality and proceedings and the substantive branch that embeds indefeasible rights that are not subject to the political discourse of a society. The dynamic *symmetrical relation* between the dimensions of core/configuration, control and content/consent is an integral and definitional attribute of democratic regimes. The etatistic foundation of the rule of law requires all legal norms to refer to the state, core/configuration and control relate to the state as the basis for political authority, while consent of the people and formal as well as substantive content of the law find their equivalence in the democratic rule of law. The complementarity of the dimensions keeps the regime in a balance that guarantees and enables the democratic process.

As an "essential pillar upon which high-quality democracy rests" (O'Donnell 2004, p. 32), rule of law is considered to be both a necessary condition for democracy and an integral part of democracy itself (Sehring and Lauth 2009, p. 179). Rule

[20] To guarantee this requirement, an institutionalized, independent judiciary is crucial to the substantive rule of law: in democratic regimes, an independent judiciary is an important instrument of the state to hold government officials accountable to the law (vertical), and to resolve disputes between citizens according to the law (horizontal).

of law and liberal democracy[21] are necessarily intertwined, "one cannot exist without the other" (Carothers 2008, p. 4). As a principle of law, the rule of law functions as a description of the law, as a principle of governance it functions as its normative guideline. Through these mechanism the rule of law is more than a generic characteristic of the legal order, but in fact "the legally based rule of a state that houses a democratic regime" (O'Donnell 2010, p. 96).

4 Conclusion

The aim of this article was to deepen the overall understanding of the connectivity between state and regime through law, as well as to differentiate between variants of legal order in democratic and autocratic regimes. For this, I defined the state-regime-nexus as a nested institutional pattern: For a regime to govern, the state must possess the complementary degrees of stateness, and the regime simultaneously shapes the application and extent of state authority in form and content. Thus, state and regime are equiprimordial concepts that are interdigitated. Without a state, neither the exercise of authority nor its political institutionalisation through laws as a central steering device of organization of authority are enforceable. State, law and regime are intrinsically connected and intertwined.

The relation between state, regime and law can be a starting point to deepen our understanding of the state-regime-nexus. Both democratic and autocratic regimes are law-based forms of government of a state. To detangle the relationship and interdependence, the continuous concept of law proves useful to explore the connection between state and regime that discloses insight into the dynamics of the state-regime-nexus.

The continuous conception of state law broadens the horizon of analysis since it does not suffer from an inherent conceptual democratic bias and can therefore "travel" beyond the field of democracy. The usage of subtypes based on a positivist root concept of state-law understood as rule by law and a continuous conception of rule of law that ranges from a formal to a substantive conception of the rule of law opens up lines of inquiry into the state-regime nexus and allows for a more fine-grained distinctions of law and legal order in democracies and autocracies.

I used a three-dimensional logical structure of legal orders—core/configuration, control and content—to distinguish between law in democracies and autocracies. The legal order of autocracies is based on an asymmetrical dynamical balance with an emphasis on the first two dimensions, a democratic regimes rests on the dynamic balance of all three dimensions. Both democratic and autocratic regimes share some characteristic of legal order, both regime types combine a dualistic legal order that consists of a normative state that abides by the formal rule of law and the prerogative

[21] In a narrower sense, electoral democracies that emphasize the process of political contestation and electoralism can co-exist with a defective or vestigial legal state. But the basic understanding of democracy through the electoral process then leads to a "fallacy of electoralism" as Rose and Shin (2001, p. 349) pointed out: "In short, the fallacy is committed when one assumes that elections are a sufficient measure of democracy and ignores other essential attributes", especially the rule of law.

state resp. the state of rights where authority is carried out via positivistic rule by law or bound and shaped by the thick conception of the materialistic rule of law. While the autocratic strand of the predatory state knows no boundaries and is arbitrary, repressive and rampant in nature, its democratic "counterpart", the state of rights, embeds moral standards based on the concept of indefeasible human rights that bind the state, its agency and the citizens.

Still, all three variations of law and legal order depend on the state, its monopoly of law, physical violence and administration and the institutional manifestation of these three monopolies. Therefore, this article argues for the integration of state- and regime research. The synthesis provides a fruitful perspective, even for cases where the differentiation between state and regime proves challenging, while exploration of the state-regime-nexus proves analytically useful (Fishman 1990). In sum, the integration of these intrinsically connected fields of research promises to be beneficial for both.

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References

Aiyar, S. 2000. The problem of law's authority: John Finnis and Joseph Raz on legal obligation. *Law and Philosophy* 19(4):465–489. https://doi.org/10.2307/3505079.

Andersen, David, Jørgen Møller, and Svend-Erik Skaaning. 2014. The state-democracy nexus: conceptual distinctions, theoretical perspectives, and comparative approaches. *Democratization* 21(7):1203–1220. https://doi.org/10.1080/13510347.2014.960206.

Bernholz, Peter. 2017. *Totalitarianism, terrorism and supreme values*. Berlin: Springer.

Boege, Volker, Anne Brown, Kevin Clements, and Anna Nolan. 2008. *On hybrid political orders and emerging states. State formation in the context of "fragility"*. Berlin: Berghof Research Center for Constructive Conflict Management.

Bogaards, Matthijs. 2009. How to classify hybrid regimes? Defective democracy and electoral authoritarianism. *Democratization* 16(2):399–423. https://doi.org/10.1080/13510340902777800.

Bucher, Eugen. 2000. Rechtsüberlieferung und heutiges Recht. *Zeitschrift für Europäisches Privatrecht* 28(75):394–543.

Carothers, Thomas. 1998. The rule of law revival. *Foreign Affairs* 77:95–106.

Carothers, Thomas. 2008. Rule of law temptations. https://carnegieendowment.org/files/Rule_of_Law_Temptations.pdf. Accessed 10 Nov 2021.

Collier, David, and John Gerring. 2009. Introduction. In *Concepts and method in social science: the tradition of Giovanni Sartori*, ed. David Collier, John Gerring, 1–10. London: Routledge.

Collier, David, and Steven Levitsky. 2009. Conceptual hierarchies in comparative research: the case of democracy. In *Concepts and method in the social science: the tradition of Giovanni Sartori*, ed. David Collier, John Gerring, 269–288. London: Routledge.
Corrales, Javier. 2015. The authoritarian resurgence: autocratic legalism in Venezuela. *Journal of Democracy* 26(2):37–51.
Eriksen, Stein. 2011. State failure in theory and practice: the idea of the state and the contradictions of state formation. *Review of International Studies* 37:229–247. https://doi.org/10.1017/S0260210510000409.
Finnis, John. 2011. *Natural law and natural rights*, 2nd edn., Oxford: Oxford University Press. First published in 1980.
Fishman, Robert. 1990. Rethinking state and regime. Southern Europe's transition to democracy. *World Politics* 42(3):422–440.
Fraenkel, Ernst. 1941. *The dual state: a contribution to the theory of dictatorship*. New York, London, Toronto: Oxford University Press.
Fruhstorfer, Anna. 2017. Paradoxes of constitutional politics in the post-soviet space. *Illinois Law Review* 2:101–129.
Fukuyama, Francis. 2014. States and democracy. *Democratization* 21(7):1326–1340. https://doi.org/10.1080/13510347.2014.960208.
Gerschewski, Johannes. 2018. Legitimacy in autocracies: oxymoron or essential feature? *Perspectives on Politics* 16(3):652–665. https://doi.org/10.1017/S1537592717002183.
Goertz, Gary. 2006. *Social science concepts: a user's guide*. Princeton: Princeton University Press.
Henderson, Lynne. 1991. Authoritarianism and the rule of law. *Indiana Law Journal* 66(2):379–356.
Jackson, Robert, and Carl Rosberg. 1982. Why africa's weak states persist. The empirical and the juridical in statehood. *World Politics* 35(1):1–24. https://doi.org/10.2307/2010277.
Kelsen, Hans. 1925. *Allgemeine Staatslehre*. Berlin: Springer.
Kötter, Matthias. 2010. Rechtsstaat and Rechtsstaatlichkeit in Germany. In *Understandings of the rule of law in various legal orders of the world* Rule of law working paper series, Vol. Nr. 1, ed. Matthias Kötter, Gunnar Folke Schuppert, 1–7. Berlin: FU Berlin.
Kötter, Matthias, and Gunnar Folke Schuppert. 2014. Rule of Law: Leitbild und Maßstab auch jenseits des staatlichen Rechts. *Verfassung und Recht in Übersee* 47(4):369–391. https://doi.org/10.5771/0506-7286-2014-4-369.
Kötter, Matthias, Tilman Röder, Gunnar Folke Schuppert, and Rüdiger Wolfrum (eds.). 2015. *Non-state justice institutions and the law. Governance and limited statehood*. London: Palgrave Macmillan. https://doi.org/10.1057/9781137403285_1.
Kraushaar, Maren, and Daniel Lambach. 2009. *Hybrid political orders: the added value of a new concept*. Online occasional paper, Vol. No. 14. Brisbane: Australian Centre for Peace and Conflict Studies.
Lambach, Daniel, Eva Johais, and Markus Bayer. 2013. *An Anchor for a dazzling debate: conceptualizing state collapse*. 8th Pan-European Conference on International Relations, Warsaw, 8.–21. September 2013.
Lambach, Daniel, Eva Johais, and Markus Bayer. 2015. Conceptualizing state collapse. An institutionalist approach. *Third World Quarterly* 36(7):1299–1315. https://doi.org/10.1080/01436597.2015.1038338.
Lauth, Hans-Joachim. 2004. *Demokratie und Demokratiemessung. Eine konzeptionelle Grundlegung für den interkulturellen Vergleich*. Wiesbaden: VS.
Lauth, Hans-Joachim. 2017. Legitimation autoritärer Regime durch Recht. *Zeitschrift für Vergleichende Politikwissenschaft* 11(2):247–273. https://doi.org/10.1007/s12286-017-0333-1.
Lauth, Hans-Joachim, Gert Pickel, and Susanne Pickel. 2014. *Vergleich politischer Systeme. Eine Einführung*. Paderborn: Schöningh.
Lorenz, Astrid. 2008. *Verfassungsänderungen in etablierten Demokratien. Motivlagen und Aushandlungsmuster*. Wiesbaden: VS.
Lührmann, Anna, and Staffan Lindberg. 2019. A third wave of autocratization is here. What is new about it? *Democratization* 26(7):1095–1113.
McGuire, Martin C., and Mancur Olson. 1996. The economics of autocracy and majority rule: the invisible hand and the use of force. *Journal of Economic Literature* 34(1):72–96. http://www.jstor.org/stable/2729410.
Merkel, Wolfgang. 2010. *Systemtransformation. Eine Einführung in die Theorie und Empirie der Transformationsforschung*. Wiesbaden: VS.
Møller, Jørgen, and Svend-Erik Skaaning. 2011. Stateness first? *Democratization* 18(1):1–24. https://doi.org/10.1080/13510347.2011.532607.

Møller, Jørgen, and Svend-Erik Skaaning. 2012. Systematizing thin and thick conceptions of the rule of law. *Justice System Journal* 33(2):136–153.
Moustafa, Tamir. 2008. *The political origins of "rule-by-law" regimes*. Yale University Workshop on the Rule of Law, 28–29 March 2008.
Nettl, John. 1968. The state as a conceptual variable. *World Politics* 20(4):559–592.
O'Donnell, Guillermo. 2004. The quality of democracy: why the rule of law matters. *Journal of Democracy* 15(4):32–46. https://doi.org/10.1353/jod.2004.0076.
O'Donnell, Guillermo. 2010. *Democracy, agency, and the state: theory with comparative intent*. Oxford, New York: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199587612.001.0001.
Peerenboom, Randall. 2004. *Varieties of rule of law: an introduction and provisional conclusion*. https://doi.org/10.2139/ssrn.445821.
von der Pfordten, Dietmar. 2014. On the foundations of the rule of law and the principle of the legal state/Rechtsstaat. In *The legal doctrines of the rule of law and the legal state (Rechtsstaat)* Ius Gentium: comparative perspectives on law and justice, Vol. 38, ed. James Silkenat, James Hickey, and Peter Barenboim, 15–28. Cham: Springer. https://doi.org/10.1007/978-3-319-05585-5_2.
Raz, Joseph. 1979. *The authority of law. Essays on law and morality*. Oxford: Oxford University Press.
Rijpkema, Peter. 2013. The rule of law beyond thick and thin. *Law and Philosophy* 32:793–816. https://doi.org/10.1007/s10982-012-9170-1.
Rose, Richard, and Doh Chull Shin. 2001. Democratization backwards: the problem of third-wave democracies. *British Journal of Political Science* 31(2):331–354.
Sakwa, Richard. 2013. The soviet collapse: contradictions and neo-modernisation. *Journal of Eurasian Studies* 4(1):65–77. https://doi.org/10.1016/j.euras.2012.07.003.
Scheppele, Kim Lane. 2018. Autocratic legalism. *University of Chicago Law Review* 85(2):545–583.
Sehring, Jenniver, and Hans-Joachim Lauth. 2009. Putting deficient Rechtsstaat on the research agenda: reflections on diminished subtypes. *Comparative Sociology* 8(2):165–201. https://doi.org/10.1163/156913309X421637.
Solomon, Peter. 2007. Courts and judges in authoritarian regimes. *World Politics* 60(1):122–145. https://doi.org/10.1353/wp.0.0004.
Suntrup, Jan Christoph. 2020. Between prerogative power and legality—reading Ernst Fraenkel's The Dual State as an analytical tool for present authoritarian rule. *Jurisprudence* 11(3):335–359. https://doi.org/10.1080/20403313.2020.1734337.
Tamanaha, Brian. 2004. *On the rule of law: history, politics, theory*. New York: Cambridge University Press.
Tamanaha, Brian. 2007. A concise guide to the rule of law. https://ssrn.com/abstract=1012051. Accessed 23 May 2021.
Voigt, Rüdiger. 2018. Souveränität. In *Handbuch Staat*, ed. Rüdiger Voigt, 609–620. Wiesbaden: Springer VS. https://doi.org/10.1007/978-3-658-20744-1_55.
Vollmeyer, Jan. 2011. *Der Staat als Rechtsordnung. Hans Kelsens Identitätsthese und ihre Bedeutung für den europäischen Konstitutionalisierungsprozess*. Baden-Baden: Nomos.
Zippelius, Reinhold. 1999. *Allgemeine Staatslehre. Politikwissenschaft*. München: C.H. Beck.