Still a Cold Monster?

On the Dual Nature of the State[1]

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1. The Question of the State

The question of the state is central for legal and political theory, since the state is the form that modern political communities and their legal order have assumed. It is also the central question for philosophical and pollical anarchism. This is so because the state is an entity that claims to have an overwhelming right to our obedience, a right that is mostly shaped as absolute. Its commands should be obeyed without exception, and with not too much delay. Thus, a state is the form of social organisation that most conflicts with anarchist values and ideas.

A state, as a structured and institutionalised organisation, is in tension with a form of life that projects itself as constantly changing and changeable. This is a basic tenet of anarchism, which is projected along at least two different lines of elaboration. In the first, a political community is the outcome of the mutual recognition of individuals and of agreement about a common scheme of cooperation. Subjective autonomy here is the bedrock of political order, so this is permanently exposed to autonomous arrangements of individuals to cope with evolving circumstances and revision of their needs and views. A different elaboration of this autonomy motive conceives institutions as only legitimate if not detached from their instituting moment, from their original, societal source. This is the seat of autonomy and can never be pre-empted by the established institution. In this way, what is institutional is constantly exposed to the emergence of the ”novel”, a new project and concept of a good life, the vicissitude of social imagination, that is collective autonomy.

Contrary to this second model, the state seems to embody a quite rigid form of institutionalisation that does not allow for adjustment and modifications according to the needs and will of individuals. It is based, it would seem, on domination, violence and hierarchy, such that freedom is permanently denied to its citizens. It claims a value in itself that is superior to the dignity and autonomy of the individual. Individuals’ basic goods, life, property, honour, respect, liberty, might all be sacrificed on the altar of the state. It is a ‘person’ in itself that is more than the association of its members and even of its officials or rulers. It can demand everything from its ‘subjects’, including their own death, be it in war or on a scaffold. As Nietzsche once characterised it, it is a ‘cold monster’.

[1] I base this on ideas and materials from chapter three of S. Newman & M. La Torre, *The Anarchist Before the Law*: *Law Without Authority*, Edinburgh University Press, Edinburgh 2024.

However, the question of the state – of its legitimacy and form – is not just a concern for anarchism, but might be plausibly considered as nearly the whole business of political and legal philosophy. Our entire life is developed and experienced within the confines of the state. We are born and are immediately registered as members, nationals of a state. Our minute affairs and vicissitudes are determined by state rules and instructions. We live within state borders, we are brought up to sing a national anthem, or salute a national flag. We are under state supervision and control from birth to death. If we infringe the state's rules and instructions, we are sent to state jails or we have to pay state fines. A substantial part of our income is taken every year by the state in the form of taxes, which is spent in ways over which we have little or no control.

Many Europeans were possibly not aware that they lived under a state until 1914. But suddenly, in August of that fatal year, they were conscripted, sent first to barracks, given a uniform and a weapon, carried by trains to the front, and forced to kill others indiscriminately, without a clear understanding of the reasons. The militarised state – first and foremost a European form of political rule – was fundamentally based on four key institutions: the army, the post, the railway, and the police. In several European states, military training began in the school, a place where children and teenagers were confined and subjected to strict discipline and indoctrination. The schoolmaster anticipated the figure of the sergeant.

This story is well narrated by Erich Remarque's pacifist novel *All Quiet on the Western Front* (1929),[2] or by Józef Wittlin, in his *Salt of the Earth* (1935).[3] The latter novel is especially suggestive in understanding how the state in the twentieth century was experienced by ordinary people. A Polish peasant is mobilised, stripped of his social attachments, forcefully put into a train wagon, and sent to military training in Austrian army barracks. Here he is confronted by a new world, where his individuality counts for nothing. He is one naked body among many, dressed in a uniform, but this does not really cover his nakedness: his social world, his relationships, all that gives him an identity and dignity, has been reduced to nothing.[4] This nothingness is already visible during the medical examination, when his body is inspected to ascertain whether he is fit to serve as a soldier and fight. Recruits appear naked before the army doctors – they are simple, sheer bodies, filled with shame, and their prevailing experience is one of destitution.

National identity was a product of the exigency of states. A state was a gigantic enterprise for constructing a homogeneous national identity out of plural communities and local affiliations. Until late in the twentieth century, for instance, Italian peasants could not generally understand each other, since they did not share a common national language. They spoke their respective dialects: Sicilian

[2] English translation by E.W. Wheen, 1928, Available at https://www.gutenberg.org/ebooks/75011

[3] First English translation from the original Polish: J. Wittlin, *Salt of the Earth. A Novel*, Methuen & Co., London 1939.

[4] This might confirm what Giorgio Agamben says about "naked life" being an intended product of the modern state (cf. G. Agamben, *Homo sacer. Il potere sovrano e la nuda vita*, II ed., Einaudi, Torino 2005, p. 9). In a somewhat similar vein, David Graeber relates the formation of States to the destruction of the "context", the communal relations, that are constitutive of subjective individuality (cf. D. Graeber, *Debts*, Melville House, Brooklyn, New York 2011, *passim*).

peasants could barely grasp what a working-class girl from Piedmont had to say. We cannot but agree with Michael Oakeshott's observations:

> Each of the states which emerged in early modern Europe was composed of a variety of ancient communities with undying memories of other allegiances, of independence, or of mutual hostility, or made up of fragments of such communities severed by a frontier from their fellows, without a common language, law, or coinage, divided from one another ethnically, in custom, and often in religious beliefs.[5]

Those plural and diverse communities shared only the same experience of being subject to an overwhelming force that intended to shape their lives in a uniform way. The state thus forcibly simplified the internal structures of political orders, while at the same time bringing about a new dimension of plurality, and indeed paradoxically producing "anarchy," within the international domain. In Europe, the birthplace of the modern state, "to the degree that state formation progressed, the universal Christian world order made room—as noted by Dieter Grimm, a former German federal constitutional judge—for particularistic states existing side by side."[6] The state, that is, marks the decline and fall of the idea of an Empire that, based on Christianity, was able to rule the entire Christian world. A state should sadly give up the universal ambition of global rule and only establish itself within the space of well entrenched, and specific borders. The state thus implicitly accepts the validity of other states, something an Empire would never possibly acknowledge. This is particularly relevant to the political configuration of Europe, where once the form "state" was introduced, it would be confronted with a plurality of equal, sovereign formations.

2. The Nature of the State

What is the state? What is its nature? How could we define it? There are at least two traditional definitions. There is one focusing on the exercise of violence within a distinct territory; the state would essentially be qualified by a monopoly of violence. This is the definition we find in one the most famous papers by Max Weber, the great German sociologist, *Politik als Beruf* (1922), where we read that the State is "that human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory."[7] This does not mean that violence is the ordinary means for the state to act and exist; however, adds Weber, it is what gives the state its specificity, what ultimately defines it in the last instance; it is what defines its nature.[8] Max Weber's idea is further developed by Carl Schmitt, according to whom a state is rather the monopoly of decision,

[5] M. Oakeshott, *On Human Conduct*, Clarendon, Oxford 1975, pp. 186-187.

[6] D. Grimm, *Sovereignty. The Origin and Future of a Political and Legal Concept*, Columbia University Press, New York 2015, p. 5.

[7] M. Weber, *Gesammelte Politische Schriften*, ed. by J. Winckelmann, Mohr, Tubingen 1980, p. 506. Italics in the text.

[8] "Gewaltsamkeit ist natürlich nicht etwas das normale oder einzige Mittel des Staates: -- davon ist keine Rede --, wohl das ihm spezifische" (*ibid*.).

meaning by this an exception to the 'normality' of the rule of law.[9] This monopoly of decision refers to the sovereign's capacity to violate the law, a capacity that would potentially imply an exceptional use of force. The state, then, is that institution that is allowed to infringe, by force, its own law.

How should we understand this notion of a monopoly of force? We could think of it as a device to minimise violence. Indeed, there is a line of interpretation that sees the state as the engine of a process of civilisation within societies, whereby people have to learn to relate the one to the other without violence. Feuds and vendettas are no longer tolerated, as the state assumes the sole authority to decide disputes through legal means.[10] The state rules out the private use of force; the violence or potential violence of the sovereign thus enforces a peaceful social order.

On the other hand, the monopoly of violence might be interpreted in a different way. What the State in this second approach can undertake is a superior use of violence such as to alter the use of violence elsewhere in the society. In its first version a monopoly of violence means a general prohibition of the use of force for citizens, and somehow for state agencies, too. In this second version, the monopoly is not an attempt to reduce the use of force in the society, but to make it possibly so radical that attempts at individual use of force would immediately be reciprocated with a disproportionate application of violence. There is no pacificatory ideal involved here. In a sense, the state, by asserting its own supremacy and sovereignty, means it is able to be the most violent possible actor within the society. In order to do that, means should be used that are the strongest and the most effective for deploying force. Force is concentrated not so much to deactivate it, but rather to make possible an extreme use of it. This logic is then duplicated in the arena of international relations, where a search for equilibrium of powers among states is constantly disrupted by each state striving to have military supremacy over its rivals. According to this picture, states do not seem to be instrumental in civilising social and political relations; on the contrary, it may seem that they render the social world increasingly dependent on, and exposed to, extreme violence—indeed, after the development of weapons of mass destruction, to total annihilation.

But the question remains: What is a state? Legal philosophy and legal theory have usually given two main answers to this question, once again testifying to the dual nature of the state, and the ambiguity of its grip on our society and imagination. The key to the understanding of the state here is seen in its connection to law. What is law for the state, or vice versa: what is the state for the law? Here, two opposing visions are confronted. First, we have an approach according to which the state is an extra-legal entity, a body able to act collectively, which is hierarchically structured with a commander-in-chief at its highest rank. A state,

[9] See C. Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, Duncker und Humblot, Leipzig 1922.

[10] This is, for instance, Goethe's view: "Der Character der Roheit ist es, nur nach eigenen Gesetzen leben, in fremde Kreise willkürlich übergreifen zu wollen. Darum haben wir den Staats-Verein geschlossen, solcher Roheit und Willkür abzuhelfen, und alles Recht und alle positive Gesetze sind wiederum nur ein ewiger Versuch, die Selbsthilfe der Individuen gegeneinander abzuwehren." (*Letter to Weimar Chancellor Friedrich von Müller*, 18th April 1818).

according to this account, is either a sovereign power that can impose obedience on others, a 'political superior' in John Austin's words, or else a kind of community, a historical society that is an expression of a specific national, cultural, or temporal context, an embodiment of an 'objective mind'. This is the account of Hegel and German Historicism. In both cases, the state is prior to the law; it is the 'source' of law, and the efficacy of law is indeed limited in shaping the essentials of the state. The state operates legally by an act of self-limitation—this is an influential idea by George Jellinek, one of the founding fathers of European continental public law. This conception has relevant implications in the way we should then understand constitutionalism and the nature of a constitutional state. In this essentialist approach, the State is not the product of a constitution: the latter can only give some form to it; it offers formalisms of various kinds to its operation, but such formalisms, however, can be dismissed when necessary. There is a continuity of the state that constitutions cannot alter – such is also the public view of international law. The basic nature of what a state is remains the same whichever constitution is then adopted. Fundamental rights do not have a constitutive validity, but serve rather as a kind of regulative rule. Fundamental rights here can never be rooted in original natural freedoms of citizens or in their basic moral dignity. This is explicitly thematised, for instance, by Georg Jellinek, who understands public rights as being founded upon an individual's position of absolute subjection to authority, *status passivus.*[11] Fundamental rights are then negative rights, entitlements against state intervention. They operate vertically between authority and autonomy. In this view, however, a constitution could hardly claim *Drittwirkung*, "efficacy towards third parties;" it could not claim validity in impinging upon private relationships and transactions. Private law is of the same essence as the state; that is, endowed with a stronger ontological dignity than constitutionalism. Law here is instrumental to the state, not the other way around.

However, there is an alternative doctrine. This is explicitly vindicated by Immanuel Kant: the state is a collective entity that is structured through legal rules ("Ein Staat […] ist die Vereinigung einer Menge von Menschen unter Rechtsgesetzen"[12]): "A state is (…) an association of a mas of people through rules of law." Kant's view is then radicalised by Hans Kelsen: a state, he claims, cannot be understood, nor can it act, without referring to rules. And within the state, rules are equivalent to legal rules. There is no possibility of conceiving of a state from any other perspective, once we assume the internal point of view of its agents. This is the legal point of view. The consequence of such an approach is that every state is seen as a *Rechtsstaat*, a rule of law: "Er muss zu der Erkenntnis führen, daß *jeder Staat Rechtsstaat ist,*"[13] which should lead to the conclusion that every state is a legal state, that every rule is a rule of law. The authority of the law and the authority of the state are one and the same thing. This thesis, however, does not have *prima facie* strong legal philosophical or political implications. Kelsen is not justifying or recommending a dictatorship as the rule of law: a state here

[11] See G. Jellinek, *System der subjektiven öffentlichen Rechte*, Mohr, Tübingen 1905.

[12] I. Kant, *Metaphysik der Sitten*, ed. by H. Ebeling, Reclam, Stuttgart 1990, p. 169.

[13] H. Kelsen, *Der soziologische und juristische Staatsbegriff*, II ed., Mohr, Tubingen 1929, p. 191. Underlined in the text.

seems to be considered as a kind of a mask, behind which one might perceive the disquieting presence of the Gorgon of naked power. The ontology of the state is based on force, not really on law. This is somehow a sort of device to make sense of the juristic operations that are, however, instrumental to state functions. This is why there is a possible interpretation of Kelsen's doctrine as a sort of political realism.[14] Nonetheless, the substantive emptiness, the radical formalism, of this approach contrasts with any attempt to offer an essentialist or naturalist picture of the State. This explains why Kelsen's picture of the state was so strongly opposed by nationalists and communitarians, both of the right and the left.

On the other hand, the Austrian scholar's approach allows for the idea that sovereignty is simply another name for a valid legal order, and that law can be perfectly impersonated through supranational institutions. In the end, Kelsen's message is that law is independent of the state as a specific sociological formation, or alternatively that a state is just another name for any valid legal order. Here the duality of the state—on the one hand, a historical community, a special sort of society, and on the other a formal, hierarchical structure defined by rules and procedures—is solved, as noted by Gustav Radbruch, the German legal philosopher, by simply denying that this is a problem. There is no solution to the dilemma of the dual nature of the state, only a denial of the problem, which is seen as arising from an unclear or mistaken epistemological strategy. The only cognitive point of view concerning a state is the internal, legal perspective. Beyond this, or without this, there is confusion and inappropriate essentialism or even mysticism, as happens, for instance, whenever the state is interpreted with reference to an impersonal soul or a collective destiny, and is filtered through a demanding philosophy of history or a too thick social ontology.

But is Kelsen's thesis sufficient for understanding what a state really is? We have reason to doubt it. The Austrian scholar does not ignore the coercive side of the state practice, and, indeed, according to him, a legal order is a coercive system, and legal norms are ultimately about sanction and coercion. But the nature of the law cannot be reduced to coercion, nor can it explain the state and its operations and validity. Otherwise, a bandits' order, a rule by desperados or gangsters or mafia, would be indistinguishable from law. Or we could envisage Auschwitz as an institution of law. Incidentally, according to Kelsen, validity, *Geltung*, is the specific form of the existence of both law and the state. The state is more than just a monopoly of violence; there is a drive to order and structured processing of conducts. The state is thus a *legal* monopoly of violence, where the legal attribute is what gives the state its specific nature and ontological justification.

However, is this reference to legality a sufficient guarantee to constrain the violence of state sovereignty? This is debatable. In the end here, the factual prevails; this is somehow explicit in Kelsen's admission that the basic ground rule of the legal order is the principle of efficacy, one that is recurrent in public international law. Such admission tells us to consider as a state—that is, a legitimate legal subject of international law, one that deserves recognition by the international community—all those powers that are under fully effective control

[14] See, for instance, the recent book by Robert Schuett, *Hans Kelsen's Political Realism*, Edinburgh University Press, Edinburgh 2021.

within a specific territory. In this way, we are driven back to Georg Jellinek's idea of the 'normative force of the factual', *normative Kraft des Faktischen,*[15] so that the fact of authority is a sufficient condition for the claim to produce law. This idea, we might remember, is quite close to Pascal's recommendation that, since we cannot make justice powerful, we should aim to make the powerful just: "Ne pouvant fortifier la justice, on a justifié la force."[16] Violence that is effective and monopolised by a powerful subject can legitimately raise a claim to legality. Is this consistent with the notion of the state as a civilising actor in society? Is the state a gentle civiliser of nations, once it is shaped according to the facticity of an irresistible power?

This is not the view of the great legal historian Hermann Kantorowicz. According to the German scholar, to presuppose the state as prior to law would not necessarily allow us to give legal character, for instance, to the rules of international law or customary law. Constitutional law would also be impaired by such priority given to the state as the primordial source of law. As Kantorowicz says:

> We must not, as many do, consider the law a creation of the state – a theory which would be incompatible with the existence of customary law, of canon law, and of international law. On the contrary, the state presupposes the law – international or national law – and this idea is borne out by the history of jurisprudence, which shows that no concept of the state has ever been formed that did not imply some legal elements."[17]

This also seems to be the view developed by Gustav Radbruch, a good friend and a colleague of Kantorowicz at the University of Kiel.

3. A Self-Limited Power?

Radbruch was a legal positivist, and a strong legalist. He used Georg Jellinek's doctrine of the self-limitation of the state as starting point: law is the outcome of a self-limiting act, but the efficacy of the law is conditional on its application of being universally undertaken. Self-limitation by law means that the law is applicable to the state itself. Of course, from this perspective, there is a state before the law. But the state's claim to make law – and this is a necessary evolutionary move for the state to develop its grip on society – is only possible on condition that the law is generally applicable; that is, applied to the state itself. The law does not provide an exception for the state. A state without a law is illegal and thus illegitimate, but this opens the possibility of a full deployment of the dual nature of the state, in so far as the law's sense is envisaged in its pretension to justice. A legal state, a *Rechtsstaat*, is, according to Radbruch, a state that lays claim to justice. However, the question is intricate, and the legal positivism

[15] See G. Jellinek, *Allgemeine Staatslehre*, III ed., Wissenschaftliche Buchgesellschaft, Darmstadt 1960, p. 337. Jellinek's thesis however is presented as a psychological finding, rather than as a normative argument (see ibid., pp. 339 ff.).

[16] Pascal, *Pensées*, ed. by M. Le Guern, Gallimard, Paris 1977, p. 94.

[17] H. Kantorowicz, 'The Concept of the State', *Economica*, No. 35, February 1932, pp. 5-6.

maintained as a general doctrine of law makes things less clear and promising. Radbruch maintains the idea of a sovereign power that imposes its rules, possibly by coercion, and its justification is essentially its capability of being a supreme authority, understood in factual terms as violence and the monopoly of force.

Legal positivism – the doctrine according to which the law's validity is not necessarily connected with justice, or morality – is a theory especially designed to justify the rise of the modern state. As a matter of fact, in the philosophy of law, legal positivism has been identified in three distinct forms. We have first a doctrine that claims the state to be the only source of the law. This is sometimes also called the "source thesis;" the law is to be known just by looking at what an authority, actually a state, says the law is. This thesis, that of legal positivism as a doctrine of the state as the only producer of law, is made plausible through the adoption of two more basic versions of positivism. The first is the so-called "methodological positivism:" it is possible—according to this version—to know what valid law is in a descriptive, purely cognitive mood. This is a kind of epistemological rehearsing of the "source theory": "there is somewhere a source of law. I approach it, I see it, I record it, and this all I need to know what law is. I do not need to assume a normative attitude. I can be—I should be—neutral. I should only repeat the law."

An Italian positivist legal philosopher used to say that legal rules are a reiteration of the sovereign's prescriptions.[18] A lawyer should only learn them, possibly by heart, indeed to "sing" them ("cantar", as is required, for instance, in Spain to pass the exam for judges), and repeat such rules time and again. But why should the law be experienced in this way? In a society, there is a permanent conflict over what the rules of society should be. Such conflict cannot be resolved from the point of view of a substantive morality. This is so, especially, because the right and the wrong are relative and cannot be cognitively approached; there is no right answer in an absolute moral sense. What is "right," then, cannot but be the outcome of a decisionist action, undertaken by a figure that has the authority, the force, that can use the necessary violence, to impose the one solution that ends the controversy. And we need this authority if we want to live in peace and coordinate our conduct effectively.

A somehow oblique version of this normative positivism is offered by the "service conception" of authority,[19] whereby authority is justified in so far as it is of service to individuals' preferences and plans of life. Here, the argument is presented as a logical or an ontological one. Since the law is something that claims authority, it does presuppose such authority; that is, a coercive power capable of imposing its prescriptions. This is the nature of law. It is a kind of ontological proof of the authoritarian nature of law. It reminds us of the medieval ontological proof of the existence of God: since God is claimed to hold all properties, He should also have the property of existence. "Existence" is considered an adjectival quality, like "goodness". Now, in the same way as we assume that God is good, we should then also acknowledge that He owns "existence," once we start from the basic idea that God possesses all possible positive qualities. The authoritarian nature of

[18] See U. Scarpelli, 'Le "proposizioni giuridich"' come precetti reiterati', in *Rivista internazionale di filosofia del diritto*, Vol. 44., 1967, pp. 465-482.
[19] See J. Raz, *The Morality of Freedom*, Oxford University Press, Oxford 1986.

law is deduced in a similar way. Behind such ontological proof of authority as the nature of law, there is a theory of the reason we have for action. In this case, the argument runs more or less as follows: authority, issuing pre-emptive, second-order reasons for action, is able to give first-order reasons for action, individual preferences, and basic interests, greater satisfaction or more effective realisation. First-order reasons are more capable of realisation if they are assisted by second-order reasons.[20]

But—and this is the gist of the argument— such assistance is equivalent to replacement. Assisting individual preferences means, for authority, replacing them through the authority's prescriptions. Second-order reasons replace first-order reasons, and it is good that this is so. To do that, however, there should be an authority issuing those second order reasons; that is, an intervention that pre-empts first-order reasons, individual substantive desires and preferences, and make them irrelevant in citizens' practical reasoning. This, in a sense, is what also constitutes the state as such—its primordial *Coup d'État*; that is, the State's "official" reasons supplanting citizens' "private" reasons.[21] Authority—which is, moreover, the basic justification for such an operation—makes people better off, and this is only possible if, in following authority's rules, people forget the relevance and even the content of their first-order reasons; that is, their interests, needs and preferences. When presented with rules as second-order reasons—that is, as authority commands—we are asked to remember the underlying good these reasons, such commands, are supposed to assist and better realise.

That a contemporary natural lawyer shares an analogous view of authority is evidence of the deep influence enjoyed by positivism over the whole of legal culture. Indeed, such a view seems more radical than the thesis defending natural law as being based on sheer force. According to the natural law thinker, legal validity at the end of the day is built upon the "perhaps too stark principle" (the natural lawyer's words[22]) of effective force. Once again, normativity is related here to the supreme capacity of a fact, *normative Kraft des Faktischen*. The state is a rule that is opaque to people's desires and motives. This core thesis of positivism is also reflected and re-elaborated from different intellectual perspectives. Such is the case, for instance, of system theory, which thematises legal norms as expectations that are not open to disappointment.[23] A state legal rule would therefore be valid, even if it were not repeatedly followed. The rule not being assisted and applied with reference to people's wishes, and its being actually

[20] See J. Raz, *The Authority of Law*, Oxford University Press, Oxford 1979.

[21] Cf. P. Bourdieu, *Sur l'État. Cours au Collège de France 1989-1992*, "Raisons d'agir/Seuil", Paris 2012, p. 123. "Le coup d'État d'où est né l'État […] témoigne d'un coup de force symbolique extraordinaire qui consiste à faire accepter universellement, dans les limites d'un certain ressort territorial qui se construit à travers la construction de ce point de vue dominant, l'idée que tous les points de vues ne se valent pas et qu'il y a un point de vue qui est la mesure de tous les points de vues, qui est dominant et légitime".

[22] J. Finnis, *Natural Law and Natural Rights*, Clarendon, Oxford 1980, p. 250.

[23] See N. Luhmann, *Rechtssoziologie*, II ed., Westdeutscher Verlag, Opladen 1983, p. 43: "Normen sind demnach *kontrafaktisch stabilisierte Verhaltenserwrtungen*. Ihr Sinn impliziert Unbedingtheit der Geltung insofern, als die Geltung als unabhängig von der faktischen Erfüllung oder Nichterfüllung der Norm erlebt und auch so institutionalisiert wird" (italics in the text).

opposed to people's desires, breach the conditions for such a rule to be given the dignity of law.

Not surprisingly, Gustav Radbruch, being a legal positivist, defends something of a similar tenor. His first move is the recognition that legal positivism bases itself on a natural law assumption: "Wenn in einer Gemeinschaft ein Höchster Gewalthaber vorhanden ist, soll, was er anordnet, befolgt werden,"[24] ("If in a state there is a supreme holder of force, whatever this prescribes ought to be followed.") But why? The answer here is given through an appeal to the highest value of legal security. It is only by obeying the supreme holder of violence and force that we can reach certainty about a common rule for society to follow. However, the same legal security principles oblige the state, the supreme force holder, to abide by that same law it has issued. "Der selbe Gedanke der Rechtsicherheit, der den Staat zur Gesetzgebung beruft, verlangt auch seine Bindung an die Gesetze:"[25] the same intuition that connects legal certainty and State legislation, leads to the idea of the rule of law binding the state. Should the supreme legislator not be bound to its own commands and rules, its power would cease to be legitimate and it would not be able to claim obedience. The use of force and law is inextricably considered connected to the claim to be legitimate and binding on citizens. But law here is not just a general rule; law is more than just a rule or statute or command, and a rule can only be a law if it can claim to be just: "Denn Recht ist nur, was den Sinn hat, Gerechtigkeit zu sein:"[26] "Law is only that whose meaning is justice." Justice, on the other hand, implies equality and a strong connection to the common good, to the *res publica*. A state is legitimate, and indeed a proper public institution, only if it can be considered a guarantor of the public good.

4. The State as Caring for the Common Good: An Alternative View

Legal positivism tends to obscure the dual nature of law and the state. From this perspective, authority is the core of the law and the state, and behind authority lurks the experience of the monopoly of violence, meant as the greatest possible deployable force. However, Gustav Radbruch—as we have seen—proposes a richer concept of law and legality, connected as this is to justice. He makes positivist reductionism less plausible, and opens up an alternative theory. This alternative, surprisingly enough, has been openly thematised by the anarchist thinker, Pierre-Joseph Proudhon.

We are used to believing that anarchism is a doctrine that radically opposes the state. Indeed, for most anarchist thinkers, the state is irremediably considered as a form of violence and domination. This is also so in the work of contemporary anarchists, such as David Graeber. In his work on the history of debt, Graeber refers to the state not as a specific political form related to modernity, but rather as a notion to explain and name all forms of centralised power and authority in human history.[27] This approach is later confirmed in his general political

[24] G. Radbruch, *Rechtsphilosphie*, ed by R. R. Dreier ad S.L. Paulson, Heidelberg 1999, p. 172.
[25] Ibid., p. 173.
[26] Ibid.
[27] See D. Graeber, *Debts*, Melville House, Brooklyn, New York 2011.

anthropology of human societies, *The Dawn of Everything.*[28] In this perspective, there were states in Ancient Mesopotamia and Egypt, as well as in the Inca and Aztec societies in pre-Columbian America. The Roman city is here held to be a State, and so on. The qualifying character of a state is assumed to be its use of violence and the reduction of people, in principle, to slaves—to subjects that are fully disposable by power holders. This is also the anarchist Kropotkin's view, whose book on *The State* centres around the hypothesis of this political form as an outcome of sheer violence and oppression.[29]

Kropotkin's view is that the roots of the state are to be found in war, and in the surrender and humiliation of the vanquished and conquered. Max Stirner declared that whoever has the power, he will also have the right: "Wer die Gewalt hat, der hat das Recht:"[30] "Law is thus an accessory, a tool, of the state for enforcing its power." Karl Marx, though dismissive of 'Saint Max', would agree: "Einfache Herrschaft von Säbel"—"the simple rule of the sword," the German communist says, "is the state's oldest way."[31]

More recently, Michel Foucault, the French post-structuralist philosopher, has presented us a picture that is not too different from the stark view held by Kropotkin or Stirner. In most of his work, the state is a force of domination, violence and codified warfare; law is stained with the blood of the oppressed. From such a perspective, no alternative vision of the state would seem to be possible: nor might a state with dual nature be even conceivable. This is still Nietzsche's 'cold monster': "Staat heisst das kälteste aller kalten Ungeheuer."[32] Nietzsche also later adds that the state is a sort of 'hypocritical dog', *Heuchelhunde*[33]; that is, while its speech is given through the shouting of orders and the smoke of firing, it would have us believe that those words it speaks imperatively would express the nature of things. It offers us a philosophy whose real essence is violence. In short, the state is an ideological machine that disciplines not only our conducts, but also and above all our thought and imagination. It claims to be 'the most important animal on this earth', and more often than not it bravely succeeds in convincing us that it is so.

However, there is an anarchist thinker who has a more nuanced and sophisticated understanding of the state. Pierre-Joseph Proudhon considers the state from two alternative perspectives. We can see the state simply in terms of the monopoly of violence, where any claim to justice is nearly null, or if it exists, it plays the role of mere ideological fiction. Here, force and violence are the definitional properties of a state. However, there is another sense of the state which is both less formal and less sheerly empirical, and that is a state as the dimension of public affairs, of common good, "res publica":

[28] Graeber, D., Wengrow, D., *The Dawn of Everything,* Penguin, UK, 2021

[29] See P. A. Kropotkin, *The State. Its Historic Role*, Freedom Press, London 1943.

[30] M. Stirner, *Der Einzige und sein Eigentum*, ed. by A. Meyer, Reclam, Stuttgart 1981, p. 110.

[31] K. Marx, *Der achzehnte Brumaire des Louis Bonaparte*, ed. by H. Brunkhorst, Suhrkamp, Frankfurt am Main 2007, p. 13.

[32] F. Nietzsche, *Also sprach Zarathustra*, in Id., *Sämtliche Werke*, Vol. 4, ed. by G. Colli and M. Montanari, Walter de Gruyter, Berlin 1980, p. 61.

[33] Ibid., p. 170.

> Il existe en toute société, par cela seul qu'il y a société, une chose positive, réelle, qu'il est permis de nommer *l'État*. Elle consiste, cette chose : 1. Dans une certaine force essentielle au groupe, et que nous appellerons force de collectivité ; 2. dans la solidarité que cette force crée entre les membres du corps social ; dans les propriétés et d'autres avantages communs qui la représentent et qui en résultent.[34]

The common good is another name for the justice of political life, of the public morality of collective institutions. In this sense, a State is a sphere where individuals are no longer considered isolated subjects, stripped of their social context, of their intersubjective attachments, of the reciprocity of commitments that makes their identity. In this area, the public is equivalent to reciprocity and solidarity. The State's *locus* is public morality, or the common good; in Hegel's jargon: "Der Staat an und für sich ist das sittliche Ganze."[35]

Michael Oakeshott seems to follow Proudhon's suggestion when he proposes two possible delineations of the idea of State: one that he calls *societas*, and another labelled *universitas*. The main character of *Universitas* is its purposiveness, its instrumental strategic determination, whenever associates are driven by a uniform external target. *Societas* is rather a mode of internal discursive recognition and conversation. Oakeshott then adds that modern states are a conjunction of both models: they are mixed up, but such mixing is never fully achieved; the two basic ideas cannot fully converge in a coherent, frictionless scheme.[36]

We could nonetheless hope that one model, and the more civilised one, that of the state as public sphere and discourse, might eventually prevail. The state is reshaped in terms of an institution of social solidarity and civil conversation, if—as Proudhon claims—by state we should mean the public sphere and the institutionalised common good through citizens' participation: "si par l'État on entend la chose publique, la force collective, à la production et au benefice de la quelle participent tous les citoyens."[37] Here, justice moreover assumes a strong redistributive turn by at the same time referring it to the citizen's sovereignty. As Proudhon says: "The peculiar feature of the concept of justice—as John Rawls says—is that it treats each person as an equal sovereign."[38] In this second view of the state, as an institution of public discourse and solidarity, there are no commands and subjection as original positions, and they do not have a definitional character; what is essential in such a case is engaging with commitments and agreements. Authority is here prompted by citizenship and participation. First-order reasons take the upper hand over the second-order state precepts. Law is

[34] P.-J. Proudhon, *De la Justice dans la Révolution et dans l'Église*, Vol. 2, Fayard, Paris 1988, p. 769 .

[35] G. W. F. Hegel, *Grundlinien der Philosophie des Rechts*, Suhrkamp, Frankfurt am Main 1986, p. 403.

[36] M. Oakeshott, *On Human Conduct*.

[37] P.-J. Proudhon, *De la Justice dans la Révolution et dans l'Église*, Vol. 2, p. 772. Cf. J. L. Villacañas Berlanga, "Föderalismus als Gegenbewgung", in *Zukunft des Staates—Staat der Zukunft*, ed. by H. U. Gumbrecht and R. Scheu, Reclam, Stuttgart 2021, pp. 24 ff.

[38] J. Rawls, 'Constitutional Liberty and the Concept of justice', in *Rights*, ed. by D. Lyons, Wadsworth, Belmont, Cal. 1979, p. 45.

given back to considerations of justice, and this to the collective solidarity of people that acknowledge each other's basic needs, rights, and virtues.

Now, what is the conception of the state that is most conducive to democracy and to social justice? It is obvious that we are in need of a richer notion of the state that might keep open and operative the question of its possible dual nature and the meeting of requirements that such duality mobilises. The Covid-19 pandemic has shown us how much the common good is a question of care, and how effective care can only be provided by a public institution. We might thus refer to the State as *the public institution of care*. We would then expect a concept of law, accompanying this civilised form of the state, that does not forcefully and starkly pre-empt citizens' first-order reasons, and will be permanently accountable to them.[39]

In this way, eventually, we get a state that anarchists could claim as their own. This is the dimension of the common good, a public sphere that is instrumental for individuals to make effective their personal projects of good life and where they act in concert to experience the pleasure of participation in a common scheme and project. The good life would remain the business of each person. There is no other way to have a good life if not from the internal perspective of the person whose good life is in question. No one except him or her can know what is really good for a person beyond a certain threshold that guarantees that conditions are offered for developing one's own plan of life. A good life is a life in which one has the capacity and the means to project and conduct oneself. Pursuing a good life also means that one is ethically responsible for it. A public sphere cannot pre-empt this basic reference to the individual plans of life. However, it should protect and make it possible in a dignified way. In this sense a state could be reshaped as such a guarantee and eventually be considered as an institution that anarchism could reasonably and legitimately claim without denying its normative core. This is maintained by the refusal of hierarchy, inequality and domination. An anarchist state would thus be a public sphere comprising persons endowed with equal dignity, each given the capacity to pursue their project of life, without submitting to any other rule than the one commonly and freely agreed.

5. Sovereignty Civilised

A general criticism and rejection of the state, indeed, seems to be the core of the anarchist theory of politics.[40] This—as we have tried to argue—might be doubted. However, Proudhon's political philosophy attempts a more nuanced analysis of the state whereby its monopoly of violence and its obsession with coercion are disconnected from its more basic public functions and its role for the maintenance of a public sphere and a collective good.

In his lectures on the birth of biopolitics and neoliberal governance at the end of the 1970s, Michel Foucault astutely outlined how unsatisfactory was a general criticism of the state. This, he intelligently remarked, was based on several

[39] For a philosophical proposal pointing in such direction, see the recent book by Robert Alexy, *Law's Ideal Dimension*, Oxford University Press, Oxford 2021.

[40] D. Loick, *Anarchismus zur Einfuehrung*, Junius Verlag, Hamburg 2017, p. 119.

argumentative fallacies. One of these was arguing by generalising an assumed historical state capacity for evil and expanding it to the whole scope of state action: since there was Auschwitz, and a state was responsible for Auschwitz, whatever a state performs keeps as its inner logic the potential for Auschwitz. However, a national health system is also a state performance, but it cannot be equated with a practice of domination or with one of sheer coercion: this would only be possible if one had to approach states with a poor analytical methodology. Institutions are complex collective entities which obey distinct functional motives. In order to understand them, we should be able to differentiate distinct institutional functions and modes of action. A general, unnuanced criticism of the state would not give us the best key for such an understanding. It would also oversimplify the anti-authoritarian sense and good reason of the traditional anarchist rejection of the state. Now, Proudhon's more nuanced care approach is indeed what could, on the one hand, maintain the anarchist criticism against dominion and self-defining institutions, and at the same time satisfy the need not to scarify the collective good and the public functions that are instrumental to the flourishing of the public good to a preconceived, and not thoroughly reflexively self-examined ideological position.

But here, a more fundamental question is implied. Anarchism traditionally does not seem capable of avoiding a paradigm of politics rooted in the notion of sovereignty. What anarchism does is to radically universalise such a paradigm, both in its intensity and in its extension. The sovereign is not only one person or a few people, but all. Sovereignty is here linked to equal concern, a universal notion of individual dignity. Dignity requires autonomy, and thus sovereignty, or at least a fragment of it. On the other hand, sovereignty is here permanently exercised: there is no end to its use and movement. Rules are given by all and then by all they can be changed—in fact, they ought to be changed, if institutions are not to be fully crystallised in a socially unreflective and coercive form. Rejection of coercion means a permanent activation of sovereignty, but this has a cost, and this, among others, is a recurrent claim of individual merits and rights, a growing focus on the self, to the detriment of the respect and attention due to others. This attitude can only be controlled from a different existential perspective. Self-reflexivity would here only increase the self-centred world of an egocentric self, obsessed in the end with his own will to power. To counteract this likely outcome of a radicalised individualism, we need to give others a voice, and the chance to stop the self-righteous activation of autonomy. This is exactly what care intends to do. Sovereignty in this way is, so to speak, tamed and reshaped in a more humble way by attention to the needs and the words of the other person. The voluntarist romanticism inherent in the self-empowering individual and collective self (people driven in this way imagine themselves to be a pre-political homogeneous entity) is corrected by a different form of romantic culture; one that is rooted in respect for the small, poor and humble. It is not strength here that is the defining virtue, but just its opposite, vulnerability.