Martin Loughlin

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The State: *Conditio sine qua non*

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The legal idea of the state is commonly misunderstood. In this note, the nature of the concept is explained and its significance for modern legal thought presented. Drawing on the distinction between sovereign and sovereignty, it is argued that the state—an idea that links territory, authority and people in an intelligible scheme—is the foundational concept that enable lawyers coherently to engage with the issue of political authority.

Does the concept of the state serve any useful purpose? Many jurists think not, but this belief, I contend, is founded on a misunderstanding of the concept. The skeptical response is most strongly expressed by those immersed in a common law tradition that distrusts abstraction: as Maitland once said, we prefer our persons to be real. Common lawyers recognize that governing institutions exist, that they are equipped with general powers to act, and that practices have evolved to keep these institutions within the bounds of their jurisdictional competences. Nothing more is required to understand the constitution of the state, they suggest, though here the latter term signifies only the territorial boundary within which governing institutions can exercise their powers. Some extend this claim and argue that the state is merely an obfuscating metaphysical abstraction which prevents us from seeing how governing power is actually exercised.[1] The state, they might even say, is a continental European invention devised to justify authoritarian regimes.[2]

While there once may have been merit in such claims, they are no longer convincing. The common law approach to the question of political authority can no

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[1] J. A. G. Griffith, *The Political Constitution*, 42 MOD. L. REV. 1 (1979). Griffith was taking his cue from LÉON DUGUIT, LAW IN THE MODERN STATE (Frida & Harold Laski trans., 1921).

[2] *See* Léon Duguit, *The Law and the State*, 31 HARV. L. REV. 1 (1917).

longer be sustained. The signs were there over a century ago when the growth of government had caused Maitland to explain that we cannot get by without a concept of the state.[3] But over the last 50 years, as the judiciary has been forced by the pressure of political circumstances incrementally to fashion a more formal account of the public law of the British state, the difficulties caused by the lack of a concept of the state has been evident for all prepared to look.[4]

Common lawyers had been able to sidestep this concept by the simple expedient of avoiding some basic questions about governmental authority: what source? in whose hands? under what conditions? subject to what limits? In doing so, they left a great void at the core.[5] An informal accommodation might have worked in Victorian Britain when the existence of legal and political authority went more or less unquestioned, but these conditions no longer prevail. Today, questions previously treated as non-justiciable because they touched on "affairs of State" are now being presented in terms that demand answers, and lawyers, caught up in myths of their own devising, are no longer able to hide behind evasive rules and practices. And, as Maitland again explains, this concept of the state cannot be circumvented by using terms like "polity" or "regime": for our purposes, these are distinctions without a difference. Whatever term is used, the point at issue is whether a concept that represents the general and permanent arrangement of authority of a collective association is needed.

In continental Europe, by contrast, many public lawyers raised on the central importance of the state now argue that the concept has had its day. They claim that the changes now taking place in the activity of governing—from the growing use of public–-private partnerships to the increasing influence of transnational or supranational institutions—have had the effect of rendering the concept anachronistic.

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[3] F. W. Maitland, *The Crown as Corporation*, *in* 3 COLLECTED PAPERS *,* 244 (H. A. L. Fisher ed., 1911),: "We cannot get on without the State, or the Nation, or the Commonwealth, or the Public, and yet that is what we are professing to do." *Id.* at 253.

[4] For illustrations, *see* Martin Loughlin, *The State, the Crown and the Law*, *in* THE NATURE OF THE CROWN: A LEGAL AND POLITICAL ANALYSIS 33 (Maurice Sunkin & Sebastian Payne eds., 1999); JANET MCLEAN, SEARCHING FOR THE STATE IN BRITISH LEGAL THOUGHT (2012).

[5] *See* F. W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND (H. A. L. Fisher ed., 1908): The Crown is "a convenient cover for ignorance," one which "saves us from asking difficult questions." *Id*. at 418. *See further* JOSEPH M. JACOB, THE REPUBLICAN CROWN: LAWYERS AND THE MAKING OF THE STATE IN TWENTIETH CENTURY BRITAIN (1996).

But in this respect, I argue, that claim rests on a restricted conception of the idea of the state, one drawn from a legal positivist philosophy which seeks to recast the state as a special category of legal person.

The argument I want to make about the foundational significance of the juristic concept of the state is a general one that applies to both groups. It requires me to offer a precise explanation of the juristic meaning of the state. But I propose to approach it obliquely, by first examining the concept of sovereignty. The justification is that sovereignty is taken to be a characteristic feature of a state, and it is only by first exposing the errors in the treatment of that concept that I can highlight the significance of the point I want to make about the concept of the state.

1. Sovereignty

There is considerable confusion among those who write on sovereignty,[6] and revealing the source of that confusion exposes the key distinction that lies at the core of my argument. This is between *sovereign* and *sovereignty*, that is, between its concrete and abstract meanings.

Carl Schmitt's book, *Political Theology: Four Chapters on the Doctrine of Sovereignty* vividly illustrates this point. This is a profound work but, notwithstanding its title, it examines only a concrete thing, "the sovereign," and fails to deal with that abstract thing, "sovereignty." This is evident from the outset. Chapter 1 immediately gives us a definition of the sovereign: "Sovereign is he who decides on the exception."[7] And the rest of the chapter examines the characteristics of the sovereign. But perhaps sovereignty will be more explicitly addressed in Chapter 2, "The Problem of Sovereignty as the Problem of Legal Form and Decision"? This chapter must surely offer a definition. Here Schmitt's intent is most explicitly revealed. "Of all juristic concepts," he asserts, "the concept of sovereignty is the one most governed by actual interests."[8] He then explains that the "conceptual development" of

[6] *See* Martin Loughlin, *Why Sovereignty? in* SOVEREIGNTY AND LAW: DOMESTIC, REGIONAL & GLOBAL PERSPECTIVES 34 (Richard Rawlings, Peter Leyland, & Alison Young eds), 2013).

[7] CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., University of Chicago Press, 2005) (1922) (page references are to the 2005 edition).

[8] *Id*. at 16.

sovereignty must be characterized not by a "dialectical heightening inherent in the characteristics of the concept" but "by various political power struggles."[9] Having reduced the abstract concept to the concrete form, he is able finally to offer a definition: "Sovereignty is the highest, legally independent, underived power."[10] There we have it: sovereignty is an expression of the power exercised by the sovereign. The abstract collapses into the concrete.

This gives us a precise meaning of the term, but it is not one that seems at all adequate. The historic source of the term "sovereignty" is certainly found in the figure of the sovereign, but Schmitt too readily glosses over its subsequent dialectical development. I should briefly consider that development.

The term "sovereign" was coined to denote the office of the ruler. It signified the authority of that office, in that (as Schmitt states) a sovereign ruler was not legally obligated to any other power. As Bodin and Hobbes had suggested, the ruler's sovereignty signified the absolute quality of the legal relationship between ruler and subject. But even in the early-modern period it was recognized that the ruler occupied a representative office: whatever deference might be paid to the king's majesty, the ruler did not exercise a personal power. This recognition came about in a circuitous manner, in that first the monarchical image of the sovereign ruler was idealized ("the king can do no wrong") and this then opened the way for an institutionalization of "the king's will." Once the king's will was institutionalized, the sovereign could be conceived as a corporate office. Through internal differentiation, the sovereign powers of government—what Bodin called the "marks of sovereignty"—no longer inhered in the person of the ruler: they came to be exercised variously through the king-in-parliament, the king-in-council, the king's ministers, and the king's courts.

This principle is clearly understood in British practice, where the doctrine that the "king-in-parliament is sovereign" still holds sway. But such institutionalization was also a feature of the so-called absolutist regimes of continental Europe. Whatever uncertainties surround the concept, sovereignty surely expresses the absolute legal authority of the ruling power in its corporate capacity.

That, however, is only the first stage of its dialectical development. These processes of institutionalization, internal differentiation and corporatization of the office of the sovereign permitted—indeed required—a distinction to be drawn

[9] *Id*. at 16–17.
[10] *Id*. at 17.

between the sovereign powers of rule and the concept of sovereignty itself. Specifically, the powers of rule could be divided, but sovereignty—expressing the absolute authority of the ruling power—could not. This point had indeed already been understood at its moment of conception. Schmitt claimed that Bodin was the first to identify the sovereign as an entity able to determine the exception.[11] But he did not mention that Bodin also was the first to appreciate that a distinction must be made between sovereignty and the sovereign powers of government.

This distinction between sovereignty and government becomes especially important once we follow through Schmitt's argument. In Chapter 3 he declares that "all significant concepts of the modern theory of the state are secularized theological concepts."[12] We can appreciate the point, but once it is accepted that sovereign right is not bestowed from above by God but is conferred from below by "the people," then the dynamic changes. It becomes complicated because, despite some of the claims made for popular sovereignty, the fact is that the people exist *qua* people only once the sovereign office of government has been established. Hobbes had seen this, but it was Rousseau who most explicitly highlighted its paradoxical nature.[13] This type of claim cannot be vindicated as a matter of historical fact: it can only be established retrospectively, once a regime has been established. The statement that "the people is sovereign" is therefore one of considerable ambiguity. Any attempt to specify the sovereign of Schmitt's definition - that person or body that possesses "the highest, legally independent, underived power" - must in the modern world remain an uncertain undertaking. But uncertainty over identification of the sovereign does not suggest uncertainty about sovereignty.

This is most clearly explained in the work of the early-modern social contract theorists. Their way out of the paradox Rousseau had highlighted was to change the basis of the argument. They reworked the question of the origin of ultimate authority from a historical inquiry into a thought experiment. The source of authority is conceived not as a historical event but as a virtual act. This act—the political pact (otherwise, the social contract)—is treated as a symbolic expression (a retrospective

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[11] *Id*. at 8–9.
[12] *Id*. at 36.
[13] THOMAS HOBBES, ON THE CITIZEN 137 (Richard Tuck & Michael Silverthorne trans., Cambridge University Press, 1998) (1647); Jean-Jacques Rousseau, *The Social Contract*, *in* THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 39, 71 (Victor Gourevitch ed. Cambridge University Press, 1997) (1762).

reconstruction) of the passage from natural to civil existence. And once the virtual character of this transition is acknowledged, it becomes clear that, other than in a purely representational sense, power is not delegated from the people (the multitude) to their governors. Nevertheless, it is only through this type of virtual exercise that the imaginative world of the political is created. This world of the political is the world of public law, the world in which we imagine ourselves as citizens impressed with rights and responsibilities within the collective association through which we are governed.

Once this point is grasped, it is strained to say that the "people is sovereign": any governmental regime must take some constitutional form and it is unlikely that any constituted body would possess "legally independent, underived power." But although the office of sovereign is an ambiguous one, the concept of sovereignty is not. Sovereignty comes into its own as a representation of the power and authority created through the formation of that political worldview (*Weltanschauung*). Sovereignty is vested neither in the ruler nor in the office of government nor in the people: sovereignty vests in the set of relations created through the establishment of these practices. The trajectory of development of the idea of absolute authority thus moves from sovereign ruler through the corporatization of the office to a sense of sovereignty that is conceptually different from the actual institutional arrangements of government. Sovereignty now presents itself as a representation of the autonomy of the political domain; it is an expression of the absolute authority of that political worldview.

2. The State

I now come to the concept of the state. The German tradition of *Staatslehre* posits three fundamental elements of the state: territory, ruling authority, and people. The first refers to the existence of the state as an independent territory; the second to the institutional apparatus of rule that secures sovereign authority internally and externally; and the third connotes the idea of the state as an aggregation of members of the association—subjects/citizens—within that territory. The first aspect (*Staatsgebiet*) indicates the way that states as independent entities engage with one another in the world and provides the basis for creating a body of public international

law.[14] In this sense, the entire world is divided into an arrangement of bounded territories, or states. The latter two aspects are of greater relevance to the task of specifying the character of public law. They indicate that the state is both a governing arrangement (*Staatsgewalt*) and an associational entity (*Staatsvolk*). From the perspective of *Staatsgewalt*, the state might be conceived as operating in a Hobbesian (or Schmittian) sovereign–subject relationship, but from that of *Staatsvolk* subjects are citizens who comprise the membership of the state and, ultimately, are the source of political power. This German formulation has been widely adopted in European jurisprudence.

My argument is that the way the concept has evolved parallels the distinctions I have drawn between sovereign and sovereignty. In the early nineteenth century, *Staatslehre* had been conceived as a broad field, the objective of which was to generate a general science of the state that drew on, and sought to integrate, political theory, sociology, and law. But in the latter half of that century, and under the influence of legal positivism, the concept of the state was reformulated. The Gerber/Laband school, soon to become dominant, advocated the establishment of a more precise notion of *Staatsrechtswissenschaft* (science of state law) which removed all "extraneous" matters from consideration. These extraneous matters included history, politics, and ideas drawn from private law. In so doing, these jurists were able to devise a new specification: the state, they claimed, is a legal entity possessed of a special type of corporate personality produced by the operation of public law. The state is a legal person.

In this specification, the state is a legal person that possesses a will, and this will is what we mean by law. "The power of the state to will," wrote Gerber, "the ruling power, is the law of the state."[15] Gerber created a legal personality for the state essentially by confining the concept of the state to that of *Staatsgewalt*. By virtue of this maneuver, he equated the state to that of the sovereign. This shift is reinforced by the tendency in German political thought to draw a distinction between state and society: the state, it is assumed, is an institutional apparatus that disciplines and regulates social forces and maintains (political) unity from (social) diversity. In some respects, this is a peculiarity of the German process of state development.

[14] *See* EMER DE VATTEL, THE LAW OF NATIONS (Liberty Fund, 2008) (1797).
[15] CARL FRIEDRICH VON GERBER, GRUNDZÜGE EINES SYSTEMS DES DEUTSCHEN STAATSRECHTS 3 (1865).

Nevertheless, this positivist conception of the state as a legal person has been adopted by many jurists, a practice bolstered by its widespread adoption, in the twentieth century, of the emerging (positivist) political science.

This, I suggest, yields an impoverished account of the juristic concept of the state. The concept of the state cannot simply be reduced to one of its three aspects: to do so undermines the role that it performs as a constitutive foundation of modern public law. If the concept is assumed to express the institutional apparatus of rule, then the state is equated to the office of government. Yet Bodin had clearly recognized that sovereignty must be distinguished from government, and so too—if it is to be able do its job—must the concept of the state be distinguished from the office of government. The state is not simply a synonym for government: it is "an abstract entity above and distinct from both government and governed."[16] As an abstract term encompassing its three aspects—territory, ruling power, and people—the state is the correlative expression of sovereignty.[17]

Like sovereignty, the state stands as a representation of the autonomy of a political worldview: the state expresses the main elements of that worldview (territory, people, and institutional apparatus) and sovereignty symbolizes its absolute authority. The concept of the state therefore performs an ontological function: it is that which must be presupposed in order to give access to modern political reality. It is a juristic concept that enables us not only to make sense of a political world that has been created through a collective act of imagination but also to express this coherently as a law-governed world.

State and sovereignty are juristic concepts. The sovereign character of the state means that it generates its own source of law: the state is "the *fons et origio* of all those laws which condition its own actions and determine the legal relations of those subject to its authority."[18] In his landmark work on the foundations of modern

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[16] J. H. SHENNAN, THE ORIGINS OF THE MODERN EUROPEAN STATE 1450-1725, 114 (1974).

[17] *See* ADHEMAR ESMEIN, ELEMENTS DE DROIT CONSTITUTIONNEL FRANÇAIS ET COMPARE (7th ed., 1921): "The self-foundation of public law consists in giving to sovereignty, apart from and beyond the persons who exercise it at any given moment, an ideal and permanent subject or title, which personifies the entire nation: this entity is the state, which herewith is identical to sovereignty, the latter being its essential attribute." *Id.* at 1.

[18] WESTEL W. WILLOUGHBY, THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW 30 (1924).

political thought, Quentin Skinner claimed that modernity is realized with the emergence of the idea of the state as "an entity which is at once distinct from both rulers and ruled,"[19] and he suggested that the state becomes the "master noun" of modern political argument.[20] The basic argument is sound but the choice of metaphor is not. Referring to the state as the master noun of public law once again reduces the state to the office of rule. If its juridical significance is to be grasped, it must be conceived as the foundational concept from which the grammar, vocabulary, and syntax of "political right" (i.e. public law) is derived. The concept of the state yields the basic scheme of intelligibility through which we are able to conceive the political world as a set of legal relations.

The state, then, is that which is presupposed to enable us to create a world comprising citizens and subjects who are bearers of rights and duties and who exist in a set of relations with a matrix of institutions that shape the world of the political. The state constitutes "a certain way of thinking, reasoning, and calculating"[21] and gives us access to a political world of institutions and practices formed as an autonomous set of politicolegal relations. If we think of institutions in the way that Hauriou and Romano envisaged them, we might say that the state is the "institution of institutions."[22] The contours of this scheme are without doubt the subject of continuous contestation. But the essential point is that this process of argumentation about meaning and significance can take place only *within* this scheme of intelligibility.

3. Conclusion

Contrary to the claims of those who maintain that it serves no useful purpose or is an obfuscating metaphysical abstraction, the state is the foundational concept that

[19] 2 QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT 112 (1978).
[20] Quentin Skinner, *The State*, *in* POLITICAL INNOVATION AND CONCEPTUAL CHANGE 90, 123 (Terence Ball, James Farr, & Russell L. Hanson eds., 1989).
[21] MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977-78, 286 (Michel Senellart ed., Graham Burchell trans., 2007).
[22] Maurice Hauriou, *The Theory of the Institution and the Foundation: A Study in Social Vitalism*, *in* THE FRENCH INSTITUTIONALISTS: MAURICE HAURIOU, GEORGES RENARD, JOSEPH T. DELOS 93 (Albert Broderick ed., 1970); SANTI ROMANO, THE LEGAL ORDER (Mariano Croce trans., Routledge, 2017) (1918).

enables lawyers coherently to engage with questions of political authority. Jurists who claim that we have now moved beyond the state are invariably deceiving themselves. Their arguments make sense only if by the state they mean the institutional apparatus of rule. That, as I have argued, is a distortion: it equates the state to the government and it rests on a set of dubious assumptions drawn from a legal positivist philosophy.

This is not an argument against the plurality of legal orders: we can readily recognize that a multiplicity of institutions is created through normative schemes to which many would attach the label "law." Rather, it is an argument about authority. In the modern world, the law of the state performs the integrative function of maintaining political unity and if that function is undermined by fragmentation and continuing institutional differentiation, then the consequences for both legal and political ordering are serious. Some contend that this in fact expresses the present state of affairs. If so, then my claim about the foundational role of the state at least has the virtue of specifying the source of our present uncertainties. But others argue that this claim about the state is founded on a set of modern factors which no longer pertain and that, just as that scheme of intelligibility was able to draw its imaginative power from the emergence of a modern system of nation states, then so too can we devise a new juridical scheme drawing on contemporary post-modern conditions. This may indeed be the case. The difficulty is that no one has yet managed to sketch an alternative to match the sophistication and sheer imaginative power of the modern state-founded discourse. My argument therefore stands mainly as a warning against those who would promote a new juridical world order based on skewed and simplistic arguments about the modern scheme's limitations.