

Political Theology

All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development—in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver—but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle in theology. Only by being aware of this analogy can we appreciate the manner in which the philosophical ideas of the state developed in the last centuries.

The idea of the modern constitutional state triumphed together with deism, a theology and metaphysics that banished the miracle from the world. This theology and metaphysics rejected not only the transgression of the laws of nature through an exception brought about by direct intervention, as is found in the idea of a miracle, but also the sovereign's direct intervention in a valid

legal order. The rationalism of the Enlightenment rejected the exception in every form. Conservative authors of the counter-revolution who were theists could thus attempt to support the personal sovereignty of the monarch ideologically, with the aid of analogies from a theistic theology.

I have for a long time referred to the significance of such fundamentally systematic and methodical analogies.¹ A detailed presentation of the meaning of the concept of the miracle in this context will have to be left to another time. What is relevant here is only the extent to which this connection is appropriate for a sociology of juristic concepts. The most interesting political application of such analogies is found in the Catholic philosophers of the counterrevolution, in Bonald, de Maistre, and Donoso Cortés. What we immediately recognize in them is a conceptually clear and systematic analogy, and not merely that kind of playing with ideas, whether mystical, natural-philosophical, or even romantic, which, as with everything else, so also with state and society, yields colorful symbols and pictures.

The clearest philosophical expression of that analogy is found in Leibniz.² Emphasizing the systematic relationship between jurisprudence and theology, he rejected a comparison of jurisprudence with medicine and mathematics: "We have deservedly transferred the model of our division from theology to jurisprudence because the similarity of these two disciplines is astonishing." Both have a double principle, reason (hence there is

1. *Der Wert des Staates* (Tübingen, 1914); *Politische Romantik* (Munich and Leipzig, 1919); *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (Munich and Leipzig, 1921). [A second edition of *Politische Romantik* appeared in 1925; on the various editions of *Die Diktatur*, see the introduction, note 15.—tr.]

2. *Nova Methodus*, paras. 4, 5.

a natural theology and a natural jurisprudence) and scripture, which means a book with positive revelations and directives.

Adolf Menzel noted in an essay³ that today sociology has assumed functions that were exercised in the seventeenth and eighteenth centuries by natural law, namely, to utter demands for justice and to enunciate philosophical-historical constructions or ideals. He seems to believe that sociology is inferior to jurisprudence, which is supposed to have become positive. He attempts to show that all heretofore sociological systems end up by making "political tendencies appear scientific." But whoever takes the trouble of examining the public law literature of positive jurisprudence for its basic concepts and arguments will see that the state intervenes everywhere. At times it does so as a *deus ex machina*, to decide according to positive statute a controversy that the independent act of juristic perception failed to bring to a generally plausible solution; at other times it does so as the graceful and merciful lord who proves by pardons and amnesties his supremacy over his own laws. There always exists the same inexplicable identity: lawgiver, executive power, police, pardoner, welfare institution. Thus to an observer who takes the trouble to look at the total picture of contemporary jurisprudence, there appears a huge cloak-and-dagger drama, in which the state acts in many disguises but always as the same invisible person. The "omnipotence" of the modern lawgiver, of which one reads in every textbook on public law, is not only linguistically derived from theology.

Many reminiscences of theology also appear in the details of the argumentation, most of course with polemical intent. In a positivistic age it is easy to reproach an intellectual opponent

3. *Naturrecht und Soziologie* (Vienna and Leipzig, 1912).

with the charge of indulging in theology or metaphysics. If the reproach were intended as more than mere insult, at least the following question could suggest itself: What is the source of this inclination for such theological and metaphysical derailments? One would have had to investigate whether they may be explained historically, perhaps as an aftereffect of monarchical public law, which identified the theistic God with the king, or whether they are underpinned by systematic or methodical necessities. I readily admit that because of an inability to master intellectually contradictory arguments or objections, some jurists introduce the state in their works by a mental short circuit, just as certain metaphysicians misuse the name of God. But this does not yet resolve the substantive problem.

Until now one was generally satisfied with casual intimations only. In his publication on the law in the formal and material sense, Albert Hänel⁴ raised the old objection that it is "metaphysics" to demand, for the sake of the uniformity and reliability of the state's will (both of which he thus does not deny), the concentration of all functions of the state in one organ. Hugo Preuss⁵ too attempted to defend his association concept of the state by relegating his opponents to theology and metaphysics. The concept of sovereignty in the theory of the state by Laband and Jellinek and the theory of the "sole supremacy of the state" make the state an abstract person so to speak, a *unicum sui generis*, with a monopoly of power "mystically produced." To Preuss this was a legal disguise of the theory of the divine right of kings, a repetition of the teachings of Maurenbrecher with the modification that the religious fiction is replaced by the juristic fiction. Thus

4. *Das Gesetz im Formellen und Materiellen Sinne* (Leipzig, 1888), p. 150. [2d printing (Darmstadt, 1968)—tr.]

5. *Festgabe für Laband*, vol. 2 (1908), p. 236. [I was unable to verify this citation—tr.]

Preuss, a representative of the organic theory of the state, reproached his opponent for theologizing. In his critical studies of the concept of the juristic person, Bernatzik⁶ maintained, on the other hand, that it is precisely the organic doctrine of the state that is theology. Bernatzik attempted to destroy the organic ideas of Stein, Schulze, Gierke, and Preuss with the sneering remark that if the organs of the collective legal person should once again be persons, then every administrative authority, every court, and so on, would be a juristic person and the state in its entirety would also once again be such a sole juristic person. "The attempt to comprehend the dogma of the Trinity would, by comparison, be an easy matter." He also dismissed Stobbes's opinion that the entire collective personality is a legal person with the sentence that he does not understand "twists like this one that are reminiscent of the dogma of the Trinity." Yet he himself said, "It already resides in the concept of legal competence that its source, the state's legal order, must posit itself as the subject of all law, consequently as a juristic person." This process of positing itself was apparently so simple and plausible to Bernatzik that he mentioned a deviating opinion as representing "only a curiosity." Nevertheless, he did not ask himself why there is a greater logical necessity for the source of legal competence, namely, the legal order, that is, the state's legal order, to posit itself as a product than there is for Stahl's dictum that only a person can be the basis for another person.

Kelsen has the merit of having stressed since 1920 the methodical relationship of theology and jurisprudence. In his last

6. "Kritische Studien über den Begriff der juristischen Person und über die juristische Persönlichkeit der Behörden insbesondere," *Archiv des öffentlichen Rechts* 5 (1890): 210, 225, 244.

work on the sociological and the juristic concepts of the state⁷ he introduced many analogies. Although diffuse, these analogies make it possible for those with a deeper understanding of the history of ideas to discern the inner heterogeneity between his neo-Kantian epistemological point of departure and his ideological and democratic results. At the foundation of his identification of state and legal order rests a metaphysics that identifies the lawfulness of nature and normative lawfulness. This pattern of thinking is characteristic of the natural sciences. It is based on the rejection of all "arbitrariness," and attempts to banish from the realm of the human mind every exception. In the history of the parallel of theology and jurisprudence, such a conviction finds its place most appropriately probably in J. S. Mill. In the interest of objectivity and because of his fear of arbitrariness, he too emphasized the validity without exception of every kind of law. But he probably did not assume, as did Kelsen, that the free deed of legal perception could shape just any mass of positive laws into the cosmos of its system, because this would nullify the objectivity already achieved. For a metaphysics that suddenly falls into the pathos of objectivity, it should make no difference whether an unconditional positivism directly adheres to the law that presents itself, or whether it bothers to first establish a system.

Kelsen, as soon as he goes one step beyond his methodological criticism, operates with a concept of causation that is entirely natural-scientific. This is most clearly demonstrated by his belief that Hume's and Kant's critique of the concept of substance can be transferred to the theory of the state.⁸ But he fails thereby

7. [Tr.] *Der Soziologische und der juristische Staatsbegriff* (Tübingen, 1922).

8. *Ibid.*, p. 208.

to see that the concept of substance in Scholastic thought is entirely different from that in mathematical and natural-scientific thinking. The distinction between the substance and the practice of law, which is of fundamental significance in the history of the concept of sovereignty,⁹ cannot be grasped with concepts rooted in the natural sciences and yet is an essential element of legal argumentation. When Kelsen gives the reasons for opting for democracy, he openly reveals the mathematical and natural-scientific character of his thinking:¹⁰ Democracy is the expression of a political relativism and a scientific orientation that are liberated from miracles and dogmas and based on human understanding and critical doubt.

For the sociology of the concept of sovereignty it is altogether vital to be clear about the sociology of legal concepts as such. The aforementioned systematic analogy between theological and juristic concepts is stressed here precisely because a sociology of legal concepts presupposes a consistent and radical ideology.¹¹ Yet it would be erroneous to believe that therein resides a spiritualist philosophy of history as opposed to a materialist one.

The political theology of the Restoration offers an exemplary illustration of the sentence Max Weber articulated in his critique of Rudolf Stammler's philosophy of right, namely, that it is possible to confront irrefutably a radical materialist philosophy of history with a similarly radical spiritualist philosophy of history. The authors of the counterrevolution explained political change as a result of change in outlook and traced the French Revolution to the philosophy of the Enlightenment. It was nothing more than

9. *Die Diktatur*, pp. 44, 105, 194.

10. "Vom Wesen und Wert der Demokratie," *Archiv für Sozialwissenschaft und Sozialpolitik* 47 (1920-21): 84.

11. [Tr.] Schmitt uses the word *radical* here in the sense of "thought out to the end."

a clear antithesis when radical revolutionaries conversely attributed a change in thought to a change in the political and social conditions. That religious, philosophical, artistic, and literary changes are closely linked with political and social conditions was already a widespread dogma in western Europe, especially in France, in the 1820s.

In the Marxist philosophy of history this interdependence is radicalized to an economic dependence; it is given a systematic basis by seeking a point of ascription also for political and social changes and by finding it in the economic sphere. This materialist explanation makes a separate consideration of ideology impossible, because everywhere it sees only "reflexes," "reflections," and "disguises" of economic relations. Consequently, it looks with suspicion at psychological explanations and interpretations, at least in their vulgar form. Precisely because of its massive rationalism, this philosophy can easily turn into an irrationalist conception of history, since it conceives all thought as being a function and an emanation of vital processes. The anarchic-syndicalist socialism of Georges Sorel thus linked in this fashion Henri Bergson's philosophy of life with Marx's economic conception of history.

Both the spiritualist explanation of material processes and the materialist explanation of spiritual phenomena seek causal relations. At first they construct a contrast between two spheres, and then they dissolve this contrast into nothing by reducing one to the other. This method must necessarily culminate in a caricature. Just as Engels saw the Calvinist dogma of predestination as a reflection of capitalist competition in terms of its senselessness and incalculability, it would be just as easy to reduce the modern theory of relativity and its success to currency relations in today's

world market, and thus to find the economic basis of that theory. Some would call such a procedure the sociology of a concept or a theory. This, however, is of no concern to us.

It is otherwise with the sociological method, which, with a view to certain ideas and intellectual constructions, seeks the typical group of persons who arrive at certain ideological results from the peculiarity of their sociological situations. In this sense one can speak of a sociology of juristic concepts, in the case of Max Weber, who traced the differentiation of the various legal fields to the development of trained jurists, civil servants who administer justice, or legal dignitaries.¹² The sociological "peculiarity of the group of persons who professionally concern themselves with forming law" necessitates definite methods and views of juristic thinking. But this is still not a sociology of a legal concept.

To trace a conceptual result back to a sociological carrier is psychology; it involves the determination of a certain kind of motivation of human action. This is a sociological problem, but not a problem of the sociology of a concept. If this method is applied to intellectual accomplishments, it leads to explanations in terms of the milieu, or even to the ingenious "psychology" that is known as the sociology of specific types, that is, of the bureaucrat, the attorney, or the professor who is employed by the state. The Hegelian system, for example, if investigated by applying this method, would have to be characterized as the philosophy of the professional lecturer, who by his economic and social situation is enabled to become, with contemplative superiority, aware of absolute consciousness, which means to practice his profession as a lecturer of philosophy; or it would be

12. *Rechtssoziologie*, II, 1.

possible to view Kelsen's jurisprudence as the ideology of the lawyer-bureaucrat practicing in changing political circumstances, who, under the most diverse forms of authority and with a relativistic superiority over the momentary political authority, seeks to order systematically the positive decrees and regulations that are handed down to him. In its consequent manner this type of sociology is best assigned to belles-lettres; it provides a socio-psychological "portrait" produced by a method that cannot be distinguished from the brilliant literary criticism of a Sainte-Beuve, for example.

Altogether different is the sociology of concepts, which is advanced here and alone has the possibility of achieving a scientific result for a concept such as sovereignty. This sociology of concepts transcends juridical conceptualization oriented to immediate practical interest. It aims to discover the basic, radically systematic structure and to compare this conceptual structure with the conceptually represented social structure of a certain epoch. There is no question here of whether the idealities produced by radical conceptualization are a reflex of sociological reality, or whether social reality is conceived of as the result of a particular kind of thinking and therefore also of acting. Rather this sociology of concepts is concerned with establishing proof of two spiritual but at the same time substantial identities. It is thus not a sociology of the concept of sovereignty when, for example, the monarchy of the seventeenth century is characterized as the real that is "mirrored" in the Cartesian concept of God. But it is a sociology of the concept of sovereignty when the historical-political status of the monarchy of that epoch is shown to correspond to the general state of consciousness that was characteristic of western Europeans at that time, and when the juristic construction of the

historical-political reality can find a concept whose structure is in accord with the structure of metaphysical concepts. Monarchy thus becomes as self-evident in the consciousness of that period as democracy does in a later epoch.

The presupposition of this kind of sociology of juristic concepts is thus a radical conceptualization, a consistent thinking that is pushed into metaphysics and theology. The metaphysical image that a definite epoch forges of the world has the same structure as what the world immediately understands to be appropriate as a form of its political organization. The determination of such an identity is the sociology of the concept of sovereignty. It proves that in fact, as Edward Caird said in his book on Auguste Comte, metaphysics is the most intensive and the clearest expression of an epoch.

"Imitate the immutable decrees of the divinity." This was the ideal of the legal life of the state that was immediately evident to the rationalism of the eighteenth century. This utterance is found in Rousseau's essay *Political Economy*. The politicization of theological concepts, especially with respect to the concept of sovereignty, is so striking that it has not escaped any true expert on his writings. Said Emile Boutmy, "Rousseau applies to the sovereign the idea that the philosophes hold of God: He may do anything that he wills but he may not will evil."¹³ In the theory of the state of the seventeenth century, the monarch is identified with God and has in the state a position exactly analogous to that attributed to God in the Cartesian system of the world. According to Atger, "The prince develops all the inherent

13. "La déclaration des droits de l'homme et du citoyen et M. Jellinek," *Annales des sciences politiques* 4 (1902): 418.

characteristics of the state by a sort of continual creation. The prince is the Cartesian god transposed to the political world."¹⁴

There is psychologically (and, from the point of view of a phenomenologist, phenomenologically as well) a complete identity. A continuous thread runs through the metaphysical, political, and sociological conceptions that postulate the sovereign as a personal unit and primeval creator. The fine tale of the *Discours de la méthode* provides an extraordinarily instructive example. It is a document of the new rationalist spirit. In the depth of doubt, it finds consolation by using reason unswervingly: "J'étais assuré d'user en tout de ma raison." But what is it that becomes clear in the first place to the mind suddenly forced to reason? That the works created by several masters are not as perfect as those created by one. "One sole architect" must construct a house and a town; the best constitutions are those that are the work of a sole wise legislator, they are "devised by only one"; and finally, a sole God governs the world. As Descartes once wrote to Mersenne, "It is God who established these laws in nature just as a king establishes laws in his kingdom."

The seventeenth and eighteenth centuries were dominated by this idea of the sole sovereign, which is one of the reasons why, in addition to the decisionist cast of his thinking, Hobbes remained personalistic and postulated an ultimate concrete deciding instance, and why he also heightened his state, the Leviathan, into an immense person and thus point-blank straight into mythology. This he did despite his nominalism and natural-scientific approach and his reduction of the individual to the atom. For him this was no anthropomorphism—from which he was truly free—but a methodical and systematic postulate of his juristic thinking. But

14. *Essai sur l'histoire des doctrines du contrat social* (1906), p. 136.

the image of the architect and master builder of the world reflects a confusion that is characteristic of the concept of causality. The world architect is simultaneously the creator and the legislator, which means the legitimizing authority. Throughout the Enlightenment period until the French Revolution, such an architect of world and state was called the legislator.

Since then the consistency of exclusively scientific thinking has also permeated political ideas, repressing the essentially juristic-ethical thinking that had predominated in the age of the Enlightenment. The general validity of a legal prescription has become identified with the lawfulness of nature, which applies without exception. The sovereign, who in the deistic view of the world, even if conceived as residing outside the world, had remained the engineer of the great machine, has been radically pushed aside. The machine now runs by itself. The metaphysical proposition that God enunciates only general and not particular declarations of will governed the metaphysics of Leibniz and Nicolas Malebranche. The general will of Rousseau became identical with the will of the sovereign; but simultaneously the concept of the general also contained a quantitative determination with regard to its subject, which means that the people became the sovereign. The decisionistic and personalistic element in the concept of sovereignty was thus lost. The will of the people is always good: "The people are always virtuous." Said Emmanuel Sieyès, "In whatever manner a nation expresses its wishes, it is enough that it wishes; all forms are good but its will is always the supreme law."

But the necessity by which the people always will what is right is not identical with the rightness that emanated from the commands of the personal sovereign. In the struggle of opposing

interests and coalitions, absolute monarchy made the decision and thereby created the unity of the state. The unity that a people represents does not possess this decisionist character; it is an organic unity, and with national consciousness the ideas of the state originated as an organic whole. The theistic as well as the deistic concepts of God become thus unintelligible for political metaphysics.

It is true, nevertheless, that for some time the aftereffects of the idea of God remained recognizable. In America this manifested itself in the reasonable and pragmatic belief that the voice of the people is the voice of God—a belief that is at the foundation of Jefferson's victory of 1801. Tocqueville in his account of American democracy observed that in democratic thought the people hover above the entire political life of the state, just as God does above the world, as the cause and the end of all things, as the point from which everything emanates and to which everything returns. Today, on the contrary, such a well-known legal and political philosopher of the state as Kelsen can conceive of democracy as the expression of a relativistic and impersonal scientism. This notion is in accord with the development of political theology and metaphysics in the nineteenth century.

To the conception of God in the seventeenth and eighteenth centuries belongs the idea of his transcendence vis-à-vis the world, just as to that period's philosophy of state belongs the notion of the transcendence of the sovereign vis-à-vis the state. Everything in the nineteenth century was increasingly governed by conceptions of immanence. All the identities that recur in the political ideas and in the state doctrines of the nineteenth century rest on such conceptions of immanence: the democratic thesis of the identity of the ruler and the ruled, the organic theory of the

state with the identity of the state and sovereignty, the constitutional theory of Krabbe with the identity of sovereignty and the legal order, and finally Kelsen's theory of the identity of the state and the legal order.

After the writers of the Restoration developed a political theology, the radicals who opposed all existing order directed, with heightened awareness, their ideological efforts against the belief in God altogether, fighting that belief as if it were the most fundamental expression of the belief in any authority and unity. The battle against God was taken up by Proudhon under the clear influence of Auguste Comte. Bakunin continued it with Scythian fury. The battle against traditional religiosity can be traced naturally to many different political and sociological motives: the conservative posture of ecclesiastical Christianity, the alliance of throne and altar, the number of prominent authors who were "déclassé," the appearance of an art and literature in the nineteenth century whose genial representatives, at least in the decisive periods of their lives, had been spat out by the bourgeois order—all this is still largely unrecognized and unappreciated in its sociological detail.

The main line of development will undoubtedly unfold as follows: Conceptions of transcendence will no longer be credible to most educated people, who will settle for either a more or less clear immanence-pantheism or a positivist indifference toward any metaphysics. Insofar as it retains the concept of God, the immanence philosophy, which found its greatest systematic architect in Hegel, draws God into the world and permits law and the state to emanate from the immanence of the objective. But among the most extreme radicals, a consequent atheism began to prevail. The German left-Hegelians were most conscious of

this tendency. They were no less vehement than Proudhon in proclaiming that mankind had to be substituted for God. Marx and Engels never failed to recognize that this ideal of an unfolding self-conscious mankind must end in anarchic freedom. Precisely because of his youthful intuition, the utterance of the young Engels in the years 1842–1844 is of the greatest significance: "The essence of the state, as that of religion, is mankind's fear of itself."¹⁵

If viewed from this perspective of the history of ideas, the development of the nineteenth-century theory of the state displays two characteristic moments: the elimination of all theistic and transcendental conceptions and the formation of a new concept of legitimacy. The traditional principle of legitimacy obviously lost all validity. Neither the version of the Restoration based on private law and patrimony nor the one founded on a sentimental and reverent attachment was able to resist this development. Since 1848 the theory of public law has become "positive," and behind this word is usually hidden its dilemma; or the theory has propounded in different paraphrases the idea that all power resides in the *pouvoir constituant* of the people, which means that the democratic notion of legitimacy has replaced the monarchical. It was therefore an occurrence of utmost significance that Donoso Cortés, one of the foremost representatives of decisionist thinking and a Catholic philosopher of the state, one who was intensely conscious of the metaphysical kernel of all politics, concluded in reference to the revolution of 1848, that the epoch of royalism was at an end. Royalism is no longer because there are no kings. Therefore legitimacy no longer exists in the traditional sense.

15. Friedrich Engels, *Schriften aus der Frühzeit*, ed. G. Mayer (Berlin, 1920), p. 281.

For him there was thus only one solution: dictatorship. It is the solution that Hobbes also reached by the same kind of decisionist thinking, though mixed with mathematical relativism. *Autoritas, non veritas facit legem.*

A detailed presentation of this kind of decisionism and a thorough appreciation of Donoso Cortés are not yet available. Here it can only be pointed out that the theological mode of thought of the Spaniard was in complete accord with the thought of the Middle Ages, whose construction was juristic. All his perceptions, all his arguments, down to the last atom, were juristic; his lack of understanding of the mathematical natural-scientific thinking of the nineteenth century mirrored the outlook of natural-scientific thinking toward decisionism and the specific logic of the juristic thinking that culminates in a personal decision.

On the Counterrevolutionary Philosophy of the State (de Maistre, Bonald, Donoso Cortés)

German romantics possess an odd trait: everlasting conversation. Novalis and Adam Müller feel at home with it; to them it constitutes the true realization of their spirits. Catholic political philosophers such as de Maistre, Bonald, and Donoso Cortés—who are called romantics in Germany because they were conservative or reactionary and idealized the conditions of the Middle Ages—would have considered everlasting conversation a product of a gruesomely comic fantasy, for what characterized their counterrevolutionary political philosophy was the recognition that their times needed a decision. And with an energy that rose to an extreme between the two revolutions of 1789 and 1848, they thrust the notion of the decision to the center of their thinking. Wherever Catholic philosophy of the nineteenth century was engaged, it expressed the idea in one form or another that there was now a great alternative that no longer allowed of synthesis. No medium exists, said Cardinal Newman, between catholicity and atheism. Everyone formulated a big either/or, the rigor of