Article

Beware the "Normative Void": Revisiting Max Weber's Conception of State Legitimacy

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Abstract: Max Weber's definition of the state is steadily considered as a theoretical key-tool for analyzing and assessing statehood and state legitimacy. At the same time, as it is well known and debated in the literature, Weber radically abstains from normative reasoning in regard to state, law, and politics. In the present paper, I aim to revisit Weber's normative deficit, arguing that it renders the explanatory power of his state and state legitimacy theory either useful but trivial, either structurally unimportant. The above is explained by reference to modern-day public issues and debates (such as "privatization of security forces" and "failed states"). I advocate precisely for a theory of substantive legitimacy, drawn upon the classical political-philosophy framework, from which Weber departs.

Keywords: Weber, state monopoly on use of violence, political legitimacy, social contract

T he monopoly of legitimate violence, also referred to as state monopoly on violence, relates to the idea that the state alone retains the right to use—or authorize the use—of physical force within a given political community. The idea and its actual wording are intimately linked to the works and the elaborations of the German social theorist Max Weber (1864–1920). In fact, Weber's definition of the state as a "compulsory political association that successfully upholds claim to the monopoly of the legitimate use of physical force" is arguably the most widespread *state definition* in social and political science.[1]

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[1] Andreas Anter, "The Modern State and Its Monopoly on Violence," in *The Oxford Handbook of Max Weber*, ed. by Edith Hanke, Lawrence Scaff and Sam Whimster (Oxford: Oxford University Press, 2020), 227.

The whole concept is generally envisaged as covering the essential historical and conceptual aspects of the *modern state*.[2] That is, the institution that arose out of the long-term process of the emergence of Modern Times (as distinct from Antiquity and the Middle Ages) and gradually became the basic organizing form of the political tier of social life. Weber portrays extensively in his work the actual historical process by which the modern-type—basically *occidental*—state was given birth, through expropriating all means of political domination (including the use of physical force) from local lords, religious institutions, associations of medieval guilds, private households, etc. and by shaping out the *legitimacy of its own rule*.[3]

The Weberian notion in question might, then, seem as the adequate framework that is able to animate and unlock quite a many vital questions, supposedly concerning not only historical or empirically "definitional" issues about the state, but furthermore a somewhat proper understanding of its (political) legitimacy. Given all due emphasis, after all, to the adjective Weber himself employs, i.e., legitimate (*legitimate* violence), one might be tempted to raise on the occasion the crucial philosophical question—*the keystone question* of philosophy of law, as righteously claimed[4]—which relates to the legitimizing grounds/substantial reasons for living under a *coercive* legal and political system. However, as I will analyze below, Weber stresses the problem of legitimacy without any such normative aspirations or framework. Weber's "normative void"[5] is something that has been addressed several times and criticized in the literature.[6] At the same time, for certain, the Weberian approach is steadily considered as a theoretical tool for, so called, empirical investigations of statehood and political rule (e.g., analyzing state formation processes or assessing "state failure").[7] In the present paper, I aim

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[2] For a detailed and thoughtful elaboration on the historical development of the early modern state in the European field and context, see Thomas Ertman, *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe* (Cambridge: Cambridge University Press, 1997).

[3] See Max Weber, *Economy and Society: An Outline of Interpretive Sociology,* ed. by Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978), in particular 941ff; and, among others, Allen Kieran, *Max Weber: A Critical Introduction* (London: Pluto Press, 2004), 97ff, 111ff.

[4] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 108ff.

[5] Pedro Magalhães, "A Contingent Affinity: Max Weber, Carl Schmitt, and the Challenge of Modern Politics," in *Journal of the History of Ideas*, 77 (2016), 284.

[6] See the classic formulations of this criticism in Leo Strauss, *Natural Right and History,* (Chicago: University of Chicago Press, 1965), 43ff; Wolfgang J. Mommsen, *Max Weber and German Politics,* trans. by Michael Steinberg (Chicago: University of Chicago Press, 1984), 448ff; Jürgen Habermas, *Legitimation Crisis,* trans. by Thomas McCarthy, Cambridge: Polity Press, 1988), 97ff; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by William Rehg (Cambridge: The MIT Press, 1996), 67ff.

[7] See among others Robert Grafstein, "The Failure of Weber's Conception of Legitimacy: Its Causes and Implications," in *The Journal of Politics,* 43 (1981), 456; Stefano Guzzini, "Max

to show that the normative deficit of Weber's theory of legitimacy takes a toll on such empirical investigations as well (a field, purported to be the outmost relevant field of application for a Weberian-type analysis). I begin by a comprehensive and in-context presentation of Weber's state definition, focusing next on what the Weberian legitimacy actually means. I then try to tie what appears to be a "thin"—and rather circular—theory of legitimacy with the overall ("value-free") methodology of Weber. The deficits of the Weberian account are explained accordingly by reference to modern-day public issues and debates, such as on privatization of security forces and the problem of, so called, "failed states." I end up advocating precisely for a theory of substantive legitimacy, drawn upon the classical-philosophy normative framework (from which Weber fundamentally departs).

Framing—and Deciphering—the Weberian Concepts

Weber's state analysis is a part of his broader theoretical project regarding a *sociology of domination* (Herrschaft).[8] As Weber broadly remarks, every historical era provides instances of political domination and rule (of men over men); struggles for acquiring and preserving it, as well as institutions that shape its form and somehow delineate its exercise. However, there are some specific traits that correspond to what we can aptly call *state*. The state refers to a historically specific type of political rule ─ based on the concentration of resources of domination and the establishment of an actual monopoly on legitimate (i.e., *accepted as legitimate,* as we shall see below) use of physical force on behalf of the ruling staff.

The actual definition elements are to be found in the following passages from "Politics as Vocation" (1919) and *Economy and Society* (published posthumously):

> we must say that the state is the form of human community that (successfully) lays claim to the *monopoly of legitimate physical violence* within a particular territory … other organizations or individuals can assert the right

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Weber's Power," in *Max Weber and International Relations,* ed. by Richard Ned Lebow (Cambridge: Cambridge University Press, 2017), 98.

[8] As Weber himself acknowledges, he is influenced at this point by the elaboration of the famous jurist—and personal friend of him—Georg Jellinek, who kept on identifying the "social relations of men" as the "ultimate objective element" of the state; in particular, social relations revolving around *powers of rulership* (Herrschergewalt), see comments by Guenther Roth in Guenther Roth, "Introduction," in Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. by Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978), LXXXIX.

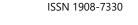> to use physical violence insofar as the *state* permits to do so.[9]

> compulsory political organization with continuous operations [*politischer Anstaltsbetrieb*] will be called a 'state' insofar as its administrative staff successfully upholds the claim to the monopoly of the legitimate use of physical force in the enforcement of its order.[10]

Already from the start, it stands out as obvious that the monopoly of legitimate violence is not just all there is, in the Weberian definition of a state. Other elements appear inextricably necessary as well: The territory is present as a crucial component of the definition since it defines the space within which the state claims its monopoly on force. Second, a certain state staff is needed, in order to perform exactly all that the state domination entails (in terms of law-giving, administration, order enforcement, etc.). Weber highlights, in addition, the element of continuity; for the state structure is in need to demonstrate stability and its operating needs to be presented as continuous.

Finally, the adverbial phrase "successfully," included in the passage, seems to cover both a) the quantitative element of the physical superiority and b) the qualitative element of the background legitimacy of one state's rule. What is constitutive, first of all, of the monopoly in question is that it refers to a use of force physically superior to other force manifestations, irresistible and capable of outweighing any counter-acting force or probable resistance. That is exactly why we are dealing with a different case if a certain counter-force finally succeeds to set aside the state force (see in the case of a successful revolution or secession from the territory): It then establishes ─ or aims at establishing ─ its own monopoly and rule.[11]

Second (and principally), the above superior rule does not only present itself as *lawful* and *legitimate*, but it is also broadly acclaimed *as such*. What sets the tone in this approach is how, by which reasons and on which terms a certain sovereign rule obtains and consolidates people's belief in

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[9] Max Weber, "Politics as a Vocation," in *The Vocation Lectures,* ed. by David Owen and Tracy B. Strong, trans. by Rodney Livingstone (Indianapolis: Hackett Publishing Company, 2004), 33 [emphasis and German term in text].

[10] Weber, *Economy and Society,* 34 [emphasis in text].

[11] See at this point Weber's own emphasis on the aspect of "success" ("successfully laying claim to the monopoly of violence"). Ralf Poscher highlights the importance of this aspect in a similar direction. See Ralf Poscher, "The Ultimate Force of the Law: On the Essence and Precariousness of the Monopoly on Legitimate Force," in *Ratio Juris,* 29 (2016), 316.

legitimacy.[12] The famous social thinker is not, as quite frequently described, a fetishist of—or an apologist for—violence. When said of a "successful claim on violence," what does mainly matter for Weber is that people have given their consent to it;[13] and this is the actual context which sets out the famous Weberian tripartite taxonomy of types of political authority, or else types of legitimate domination, as well as types of grounds for legitimacy (*Legitimität*).[14]
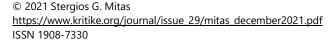
There exist three "ideal types" (in the Weberian-methodological sense of the term "ideal type," that is a constructed ideal, a model for the scrutiny and systematic understanding of social reality[15]) of legitimate political domination: a) the traditional, b) the charismatic, and c) the legal/rational domination; while their respective grounds of legitimacy can be identified as a) tradition, b) charisma, c) legality (*Legalität*).

The traditional type of domination is based on the every-day, undebated belief in the authority, if not the sanctity, of the traditional, since time immemorial (as said), power arrangement and system of rules: the evident example here is the monarch "by divine right." The charismatic type of domination, in turn, is animated by the devotion to the heroism, capacities and qualities, considered extraordinary, of the person(s) in rule, e.g., the case of the "unbeatable military leader" or the "popular, with exceptional charisma politician." The third type, finally, the so-called legal—otherwise rational—type, is entwined with the belief in the legality of the order; i.e., that the people who gain and wield power do so because of, and in conformity with, pre-established rules.

Now, the third one, the so-called *legal* type is a "civil-servant-type" of exercise of power, in Weber's own analysis. This type is acclaimed as *the only* "rational," since the political subject in this case puts faith, not in the person or the authority per se, but in the rule, i.e., the impersonal, pre-established rules that shape and govern, inter alia, the exercise of political power. Thus, as regards the latter, political power occurs as nothing more and nothing less than a set of ordered services.[16]

Throughout extensive passages and in that connection exactly, Weber aims to demonstrate how the European Modern-Era states were actually shaped, namely, as an outcome of centuries of rationalization *in*

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[12] Karl Dusza, "Max Weber's Conception of the State," in *International Journal of Politics, Culture and Society*, 3 (1989), 75.

[13] *Ibid.*, 89–90.

[14] Weber, *Economy and Society*, 215ff.

[15] For the so called *ideal-types* see *ibid.*, 19–22, and the relevant passages from his famous methodological essay "'Objectivity' in Social Science and Social Policy," in Max Weber, *Methodology of Social Sciences,* trans. and ed. by Edward Shills and Henry Finch (London: Routledge, 2011), 90ff.

[16] Weber, *Economy and Society,* 217–218.

progress, i.e., secularization, codification of law, bureaucratization of the public sphere, etc., and in the above respect, gradual transformation of the traditional and the charismatic grounds of legitimacy.[17] Sure enough, instances and traces of the two first types can be equally found in the modern state as well (we are dealing, as already highlighted, with pure ideal types, not empirical depictions or some mode of historical categorization). It is safe nonetheless to submit that the type that properly befits modern legal-political systems is the third one, the legitimacy through legality type.
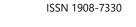
We can assert therefore—going back to the subject of legitimate violence—that in the modern state the monopoly in question is no longer claimed—and effected—via invocation of tradition, or by virtue of one's exemplary personal authority; but due to formal legality and necessarily within the scope of a certain rule-ascribed, impersonal competence. In this respect, state officers may exercise physical force against citizens (e.g., detain persons, seize goods, put down street protests) and implement, after all, various forms of legal and administrative coercion (see for instance the enforcement of a judgement or an administrative act). In any case, the modern state is accountable to the law; it shall not resort to any unlawful use of state violence; and it might answer for just such an occasion. In what follows we aim to demonstrate why we ought not to overestimate however, mainly from a normative point of view, the Weberian account.

Casting Political Philosophy Aside: A Thin and Circular Theory of Legitimacy

When the German thinker refers to grounds for legitimacy, he does not submit a thesis about any normative criteria that delimit state action, or somehow justify its use of force. What he tries to address and analytically frame—let us indicate once again—is that the institution called state retains the capacity to enforce you to do this or that; while it is broadly considered legitimated to do so.

Indeed, with regard to the issue of legitimacy, Weber radically shifts the point of analysis in relation to the standard political philosophy's stance on the subject.[18] To him, legitimacy no longer pertains to normative evaluation of a specific juridico-political arrangement; it does not, indeed, refer to the legal arrangement or the political regime itself.[19] Weber's legitimacy actually refers, in a strikingly circular way, to the belief in the

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[17] *Ibid.*, 941–1204.

[18] Donald J. Hermann, "Max Weber and the Concept of Legitimacy in Contemporary Jurisprudence," in *DePaul Law Review,* 33 (1983), 1–2, 12.

[19] See among others Grafstein, "The Failure of Weber's Conception of Legitimacy," 456, and Brian S. Turner, *Max Weber: From History to Modernity* (London: Routledge, 1993), 191–193.

existence of a legitimate order: A legal-political regime is legitimate if it is largely regarded as legitimate. Furthermore, Weber directly relates (belief in) legitimacy with norm-compliance by citizens—a point at which we will come back to later.[20] For Weber, in the modern-state paradigm the above occurs as long as public authority is exercised in conformity with preestablished procedures. But we are still dealing, in the case, with a "rule by law" and not a "rule of law" account.

We should not expect from Weber's legitimacy via legality thesis more than it actually says (hoping for instance to derive from it resources for theorizing the rule of law, the democratic rule, or some other guiding principle to which the modern state, in terms of its structuring and action, is subject). Weber basically takes the view that it is inherent in the exercise of modern state power to act in conformity with rules, gaining through this, more or less, people's endorsement. All things considered, the above sets up an interpretive scheme about a historically defined state structure and rule. It lays not a background ideal, against which the functioning of the state or the quality of the legal institutions can—and ought to—be weighed. Put another way, Weber's writings do not give rise to, strictly speaking, fundamental obligations of the state, and *still less* to fundamental rights of citizens.

Sure enough, the legitimacy via legality thesis implies a minimum of restraints to state rule: As already discussed, the powerholder may exercise power pursuant only to his/her mandate and within the limits of it.[21] The above comes in line with a number of modern-day principles and fundamental legal norms, such as the principle of legality of administrative acts and the separation of powers.[22] However, in the final analysis, Weber does not provide bounding reasons for the state actors not to breach—or circumvent—legality; at least other than the assumption, extrinsic to all normative reasoning, that in such a way they may jeopardize their "legitimacy." Hence, the effectivity of their rule.

All these, of course, fall within the scope of his broader methodological project. As has been widely commented and debated on in the literature, Weber radically abstains from all normative reasoning in regard to state, law and politics;[23] suggesting from the outset, the need for "ethical neutrality" in social sciences.[24] We could argue, actually, that Weber's "value-free" (*Wertfrei*) methodology traces back to two specific traits of his

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[20] E.g., Weber, *Economy and Society*, 36–37.

[21] *Ibid.*, 652.

[22] Dusza, "Max Weber's Conception of the State," 95.

[23] See Strauss, *Natural Right and History*; Mommsen, *Max Weber and German Politics*; Habermas, *Legitimation Crisis*; Habermas, *Between Facts and Norms*.

[24] See especially the essays "The Meaning of 'Ethical Neutrality' in Sociology and Economics" and "'Objectivity' in Social Science and Social Policy," in Weber, *Methodology of Social Sciences*, 1–112.
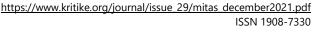
intellectual formation and profile; namely, a) his own adjustment of the fact-value distinction elaborated by the Neo-Kantians of Heidelberg[25] and b) certain Nietzschean influences that are, by and large, recognizable in his thought (e.g., in the "extra-moral" and historical, context-based treatment of morals that Weber preaches and pursues).[26]

In such a framework, Weber attempts to analyze belief in legitimacy purely in factual grounds, distancing himself from rational validity claims.[27] Nevertheless, even if we take crude belief in legitimacy (as distinct from a legitimacy belief, *justified* and grounded in normative reasoning) as a firm and a fertile research objective, the whole agenda raises difficulties: Since it is clear that belief remains basically inaccessible to an empirical research, Weber seems to look upon general *compliance* with the regime as an *indicium for belief in legitimacy*.[28] Still, it would be an invalid inference to deduce from compliance the sought-after belief in legitimacy, since we are lacking the crucial logical nexus: we do not know if the compliance stems actually from belief in legitimacy. Thus, Weber not only fails to distinguish between substantive political legitimacy and de facto legitimacy (equating actually the latter with stable political power[29]); he seems, equally, unable to carry out the very project that he pursues, namely the "empirical" investigation of political legitimacy.

Weberian Conception Applied, or Still in Need of a "Thicker" Legitimacy

Quite a number of current debates and references are animated by, or relate to, Weber's state monopoly and state legitimacy theory. In the

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[25] On the meaning and implications of the facts/values distinction in Weber's thought, see Stephan Fuchs, "Observing Facts and Values: A Brief Theory and History," in *Canadian Review of Sociology/Revue canadienne de sociologie,* 54 (2017), 462–464. For a more nuanced exposition of the relations between Weber and the Neo-Kantians see M. A. Brand, "Causality, Objectivity and Freedom: Weber, Kant and the Neo-Kantians," in *The Australian and New Zealand Journal of Sociology,* 15 (1979).

[26] Turner characterizes Weber's relation to Nietzsche as "constitutive." See analysis given in Turner, *Max Weber,* 185–187. As regards the Nietzschean influences of Weber on various aspects, see also Georg Stauth, "Nietzsche, Weber, and the Affirmative Sociology of Culture," in *European Journal of Sociology,* 33 (1992); and Ralph Schroeder, "Nietzsche and Weber: Two 'Prophets' of the Modern World," in *Max Weber, Rationality and Modernity,* ed. by Sam Whimster and Scott Lash (London: Routledge, 1987), 207ff.

[27] See par excellence Habermas, *Legitimation Crisis,* 97ff.

[28] Weber himself acknowledges indirectly that *belief* is at the end an unreliable criterion, see for example the following passage, "Action […] *may* be guided by the belief in the existence of a legitimate order. The *probability* that action will actually be so governed by will be called the 'validity' (Geltung) of the order in question" [emphasis added], Weber, *Economy and Society,* 31.

[29] Grafstein, "The Failure of Weber's Conception of Legitimacy: Its Causes and Implications," 456–457.

present section I aim to show that the Weberian scheme at the end proves to be either useful but trivial or structurally unimportant.

Overtime and in all state-formed societies, the state alone and its apparatus are not the sole actors that exercise violence. As the actual and only source of legality, the state evidently retains the right to lawfully authorize the exercise of violence.[30] Second, it is necessary to point out that the state's monopoly is obviously not refuted by the single fact of wide-spread cases of illegitimate violence within a society, from the least severe cases (e.g., slight bodily harms) to the most severe and large-scale ones (e.g., terrorism, organized crime, etc.). It is the law itself, after all, that foretells prospective instances of violence on behalf of a general and indeterminate number of probable actors; acts or omissions, prescribed exactly as criminal or civil offenses, meant to meet sanctions.[31]

In the present-day literature, some scientists and commentators tend to resort to Weber to discuss whether cases such as the privatization of security forces[32] or the "right of the citizens to keep and bear arms"[33] are compatible with his, quite well-known, "state monopoly on violence." The answer to such a query is rather self-standing, in terms of a *stricto sensu* Weberian account: As far as the state law (*itself*) provides for, and regulates, such phenomena, and given that the state apparatus retains *superior resources* of force, the monopoly in question is not at all debated.

It might be, for certain, plausible to argue that such provisions and phenomena raise fundamental rights issues; for instance, that they enable arbitrary use of violence on behalf of private persons and entities endanger the very entitlement to equal respect and concern of all citizens under the law. But claiming that, we get already outside of the Weberian scope—touching, say, upon the *substantial legitimacy* of the state and not the sole *effectivity of its rule*.

There is furthermore a great deal of discussion that weigh the relevance of Weber's lines, on the field of international politico-legal analysis; for instance, examining or assessing state frailties and qualities, etc.[34] A state

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[30] See, inter alia, examples of legitimate self-defense, permissible school or family discipline; even the case of private security companies, regulated by law).

[31] Poscher, "The Ultimate Force of the Law."

[32] See for instance Herbert Wulf, "Challenging the Weberian Concept of the State: The Future of the Monopoly of Violence," in *The Australian Centre for Peace and Conflict Studies – Occasional Papers Series*, 9 (2007); Elke Krahmann, "Private Security Companies and the State Monopoly on Violence: A Case of Norm Change?," in *Peace Research Institute Frankfurt Reports*, 88 (2009).

[33] On a US-based level of discussion, see Joshua Horwitz and Casty Anderson, *Guns, Democracy, and the Insurrectionist Idea* (Ann Arbor: University of Michigan Press, 2009), 179–184.

[34] See for instance Daron Acemoglu, James A. Robinson and Rafael J. Santos, "The Monopoly of Violence: Evidence from Colombia," in *Journal of the European Economic Association*, 11 (2013); Philipp Lottholz and Nicolas Lemay-Hébert, "Re-reading Weber, Re-conceptualizing

is qualified as "failed," predominantly, when it is no longer able, or simply fails, to carry out the "basic state functions" that are more or less extrapolated by the Weberian definition (enactment and enforcement of law, effective administration, protection of public order and national security, etc.).[35] If the analysis proceeds however one step further, maintaining—as it is usually the case—that such a state "fails to safeguard minimal civil conditions,"[36] or that it lacks the "ability to manage domestic and international challenges"[37], a strictly Weber-type analysis cannot sustain the argument. Because this would require an argumentation concerning no longer the so-called basic functions of a state, or the empirical signs of its alleged legitimacy; it presupposes a line of reasoning concerning the "fundamentals of a state" from the standpoint of *the reasons that render it, normatively, necessary* (and after all endowed with the coercive faculties in question).[38]

What happily gains ground in the above debates, is that reflections on legitimate rule can no longer be carried out *exclusively* by reference to physical domination through force or the mere fact of administration of basic state functions; that is, without touching upon "thicker" and much more nuanced accounts of legitimacy (that refer, for instance, to the democratic accountability of the state, the respect for human rights, etc.).[39] As explained above, however, we have to go beyond so-called "value-free" conceptions of legitimacy for that: We need to set out a philosophical framework of discussion that, unlike and beyond Weber, seeks *substantial standards and values for political legitimacy*. In what follows, I try to roughly outline such a framework, drawing upon the classical political-philosophy thinking of Modernity (from which Weber, as said, radically departs).

State-building: From Neo-Weberian to Post-Weberian Approaches to State, Legitimacy and State-building," in *Cambridge Review of International Affairs,* 29 (2016); Jason Miklian, "Monopolies of Violence in Developing Democracies: Emerging Evidence from India," (2016), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2854224>.

[35] See Turkan Firinci-Orman, "An Analysis of the Notion of a 'Failed State'," in *International Journal of Social Science Studies,* 4 (2016), 80–81; and Jean-Germain Groz, "Failed States in Theoretical, Historical, and Policy Perspectives," in *Control of Violence: Historical and International Perspectives on Violence in Modern Societie,* ed. by Wilhelm Heitmeyer, Haupt Heinz-Gerhard, Stefan Malthaner, and Andrea Kirschner (New York: Springer, 2011), 537ff.

[36] Firinci-Orman, "An Analysis of the Notion of a 'Failed State'," 81.

[37] Groz, "Failed States," 549.

[38] *Necessary* on one side, and at the same time compatible *with the fundamental status - value of freedom of the persons* that lay subject to its rule, see Alain Renaut, Jean-Cassien Bilier, Patrick Savidan and Ludivine Thiaw-Po-Une, *La philosophie* (Paris: Odile Jacob, 2005), 392ff.

[39] E.g., Miklian, "Monopolies of Violence," 1.

Addendum: Political Philosophy Re-enters

The very idea that the emergence of a state is equal to a radical shift of power relations, *in favor of the political ruler*, can be traced back to the philosophical thinking of Modernity that has dealt with the so called "social contract," that is, the hypothetical pact that lies beneath *and justifies* the abandoning of "natural freedom" of each, in favor of their association as political community (under coercive institutions and norms).

According to Spinoza, among others, the "social compact" entails handing down one's resources of force, including the power to physically defend herself to the sovereign authority.[40] Of course, the philosophical analysis that relates par excellence to the debate is the Hobbesian argument about the almighty state sovereign, famously (or *notoriously*) bearing the name *Leviathan*. Hobbes borrows the name from Bible passages regarding a mythical creature that is ferocious indeed and *without equal in terms of might*. In line exactly with the latter, the philosopher claims that the reference stands as *illustrative* for the superiority the sovereign political rulers exhibits (within a political society).[41]

Hobbes's argumentation is basically built upon two premises: 1) The opposite of the political state of coexistence, the so called in the philosophical literature *status naturalis*, is truly bleak and unsustainable, a state in which "a man is a wolf to another man." 2) If, supposedly, every single individual retains the right to make decisions by her own, regarding her interests, everyone then winds up being *both* interesting party *and* judge: Thus, it seems that the only possibility of ensuring our civil cohabitation is by proclaiming the state as *guarantor of the common rules*; as *impartial arbiter* above all probable bilateral disputes; ultimately, as the subject *that excels in might* among all other subjects/group of subjects.

According to the Hobbesian text:

> [the only way] is, to confer all their power and strength upon one man, or upon one assembly of men … and therein to submit their wills, everyone to his will, and their judgments, to his judgment …. For by this authority, given him by every particular man in the commonwealth, he hath the use of so much power and

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[40] Barcuh Spinoza, *Theological-Political Treatise,* ed. by Jonathan Israel, trans. by Michael Silverthorne and Jonathan Israel (Cambridge: Cambridge University Press, 2007), 189ff.

[41] Thomas Hobbes, *Leviathan,* ed. by J.C.A. Gaskin (Oxford: Oxford University Press, 1986), 82ff, 85ff.
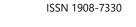
strength conferred on him, that by terror thereof, he is enabled to conform the wills of them all ….[42]

It cannot however be *validly* concluded that, when men enter political society, they are meant to be expropriating their faculties as freedom-holders for the benefit of the superpower called *state*. The *pactum unionis* needs not (necessarily) be, as the Hobbesian text precludes, a *pactum subjectionis*.[43] All that the two premises above entail is that the political sovereign reserves exclusively the right to implement coercion; not necessarily that every sort of coercion that the sovereign brings forth is to be considered *legitimate* (just because it comes from the sovereign). But to properly tackle with the political *pactum* as a matter of *gaining, instead of sacrificing,* freedom, and ultimately speak about legitimate constraints upon the state power itself, we need to get outside the Hobbesian framework.

There exists a wholly different conception about the political community and the legitimate *claims to authority* and *coercion* within it. This conception is to be found in the works of Rousseau and Kant. It points, following Rousseau's monumental words, to a "form of association that may defend and protect with the whole force of the community the person and property of every associate, and by means of which each, joining together with all, may nevertheless obey only himself, and remain as free as before."[44] As Kant highlights from the outset: the veritable justifying foundation of the legal and political association of men actually lies in providing for, preserving and furthering conditions of the maximum possible coexistence of freedom.[45] Notwithstanding their respectively distinct scope and argumentation, both philosophers share the premise that the rightful political condition has actually to do with maintaining "mutual recognition" among all (Rousseau) and equal "innate right to freedom" of each (Kant).[46]

Since the radical problem with the (hypothesis of a *prepolitical*) state of nature is that every person may seek to undo each other, and bearing always in mind that, if the enforcement of (what I take to be) my rights were to depend solely on my physical strength, then the limits on freedom are destined not to be reciprocal: freedom, then, is not about to be equal. It would seem therefore as an abuse of language to speak about freedom in the state of

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[42] *Ibid.*, 114.

[43] *Ibid.*, 115ff, 139ff.

[44] Jean-Jacques Rousseau, *The Social Contract and The First and Second Discourses,* ed. and trans. by Susan Dunn (New Haven: Yale University Press, 2002), 163.

[45] Immanuel Kant, *The Metaphysics of Morals,* trans. by Mary Gregor (Cambridge: Cambridge University Press, 1991), 56.

[46] See Arthur Ripstein, "Authority and Coercion," in *Philosophy and Public Affairs,* 32 (2004), 6ff; Arthur Ripstein, "Universal and General Wills: Hegel and Rousseau," in *Political Theory,* 22 (1994), 447–450.

nature (and even less about rights); where there is nothing else but exercises of unilateral, brute force.

Instead, what a (just) political society brings forth is equitable inter-relation: in terms of reciprocal respect of the *personhood* and *equal freedom of all*. Having one's freedom subject to the arbitrary will of others amounts to (unjust) private enforcement that ought to be hindered by the use of (justified) public coercion, as a "hindering of a hindrance to freedom."[47] On the same grounds, a *justifiable* state coercion has first of all to actually represent the "general will" of a free people (i.e., it has to stem from the collective body of self-legislating citizens). Second and by all means, it needs to be grounded in reasons of respecting/promoting aspects, or conditions, of equal freedom (i.e., what constitutional lawyers actually call fundamental *rights* and *principles*). Such a Rousseauian/Kantian-inspired analysis, roughly sketched of course, can serve as the adequate basis for distinguishing *substantially* legitimate to nonlegitimate uses of public coercion.

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[47] Kant, *Metaphysics of Morals*, 57.

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