

The “Psychology” of *Rechtsstaat*: from a Sharp XIX-Century Distinction from Authoritarianism to the Collapse of One into the Other during Weimar Republic

GIOVANNI BISOJNI

University of Salerno, Italy.

E-mail: gbisogni@unisa.it

ABSTRACT

The article is a contribution to a research project. Its basic contention is that *Rechtsstaat* is psychologically more counterintuitive than its competitor (e.g., sovereigntism; populism), and the reason for this would be the higher cognitive load required for conceptually processing the former. To demonstrate that contention, it was necessary to clearly separate a network of terms catching the conceptual essentials of *Rechtsstaat* from a similar network for competitor. This separation turned out to be difficult and the conjecture about this is that the latter does not exhibit radically different values and catchwords, but use the same basic concepts of the former, manipulating their meaning. So, a test for this conjecture is to investigate – that is the article’s aim – a real case of procedurally legal transition from a *Rechtsstaat* regime to autocracy: the dissolution of the Weimar Republic and the rise to power of Nazism. And unfortunately, the test is successful: if *Rechtsstaat*’s legality is not coupled with legitimacy, even a dictatorship can rightly call itself a *Rechtsstaat*.

L’articolo costituisce un contributo a un progetto di ricerca. La sua tesi di fondo è che il *Rechtsstaat* sia psicologicamente più controintuitivo rispetto ai suoi concorrenti (ad esempio, sovranismo e populismo), e che la ragione di ciò risieda nel maggiore carico cognitivo richiesto per la sua elaborazione concettuale. Per dimostrare questa tesi, è stato necessario separare chiaramente una rete di termini che catturano gli elementi concettuali essenziali del *Rechtsstaat* da una rete analoga riferita ai suoi concorrenti. Tale separazione si è rivelata difficile; la congettura avanzata è che questi ultimi non presentino valori e parole chiave radicalmente differenti, ma utilizzino gli stessi concetti fondamentali del *Rechtsstaat*, manipolandone il significato. Un banco di prova per questa congettura è quindi l’analisi – che costituisce l’obiettivo dell’articolo – di un caso reale di transizione procedimentalmente legale da un regime di *Rechtsstaat* all’autocrazia: la dissoluzione della Repubblica di Weimar e l’ascesa al potere del nazismo. Purtroppo, il test risulta confermato: se la legalità del *Rechtsstaat* non è accompagnata dalla legittimità, anche una dittatura può legittimamente definirsi un *Rechtsstaat*.

KEYWORDS

Rechtsstaat, rule of law, Weimar Republic, legal formalism, legality, legitimacy

Rechtsstaat, stato di diritto, Repubblica di Weimar, formalismo giuridico, legalità, legittimità

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The “Psychology” of *Rechtsstaat*: from a Sharp XIX-Century Distinction from Authoritarianism to the Collapse of One into the Other during Weimar Republic

GIOVANNI BISOGNI

1. *Introduction* – 2. *The Rising of Social Psychology and Its Impact on Legal Science* – 3. *Kelsen and Crowd Psychology* – 4. *From Rechtsstaat to Dictatorship: Hermann Heller* – 5. *Beyond Weimar*.

1. *Introduction*

When I was invited to take part to the seminar, I asked how to contribute to the research project. The response was to test a conjecture.

The basic contention of research project is that *Rechtsstaat* is psychologically more counterintuitive than its competitor (e.g., sovereigntism; populism), and the reason for this would be the higher cognitive load required for conceptually processing the former. To demonstrate that contention, it was necessary to clearly separate a network of terms catching the conceptual essentials of *Rechtsstaat* from a similar network for competitor. This separation turned out to be difficult and the conjecture about this is that the latter does not exhibit radically different values and catchwords, but use the same basic concepts of the former, manipulating their meaning. So, a test for this conjecture is to investigate – that is my task – a real case of procedurally legal transition from a *Rechtsstaat* regime to autocracy: the dissolution of the Weimar Republic and the rise to power of Nazism.

I was happy to accept this invitation. Weimar was my first love – my first book was devoted to some prominent legal scholars of that age (BISOGNI 2005) – and, as they say, you never forget your first love.

The invitation made me return to it, but with a different, rather intriguing view, because it prompted me to look at this period from an unusual perspective: the connection between psychology, law, and State.

From a historical point of view, that connection is well-founded. And indeed, the birth of mass society made the continental legal science method – the so-called *juristische Methode* – increasingly out of date and prompted legal scholars to broaden their horizons towards new disciplines that studied mass behaviour, namely crowd psychology (section 1). In section 2, we will analyze how one of the greatest 20th century legal scholars – Hans Kelsen – assesses the contribution of crowd psychology to legal field: through Kelsen, we will see that this contribution is useful but limiting for legal scholar and, above all, does not help understand the rising practice of the (ab) use of *Rechtsstaat* to establish authoritarian regimes. Section 3 will demonstrate that the origin of this practice had more to do with the history of concepts than with social psychology: *Rechtsstaat* notion was losing its normative “worth”, getting more and more formalistic. Hermann Heller, another important author of the Weimar age, describes this shift very effectively: a bourgeoisie, frightened by mass society, no longer believes in the values behind *Rechtsstaat* concept and is satisfied by a procedural compliance with it, even if it channels authoritarian contents. It is this shift to explain why illiberal regimes use the same basic concepts as the notion of *Rechtsstaat*, but interpret them differently: so, there is no coincidence if post-war constitutionalism (section 4) rejected the “simple” notion of *Rechtsstaat* to embrace a “qualified” notion of it (social *Rechtsstaat*; democratic *Rechtsstaat*; constitutional *Rechtsstaat*) – a notion more cognitively demanding but consistent with contemporary society pluralism.

2. *The Rising of Social Psychology and Its Impact on Legal Science*

The psychology-law-State connection is historically justified for two reasons.

The first is the political and constitutional relevance of mass society between XIX and XX centuries. Nobody could ignore it because cities' landscape was changing: industrialization; public transport for workers; working-class urbanization and so on. But of course, it was not just a material phenomenon, but a social one too – corporations, public companies, trade unions, political parties, general strikes – and a political one – claim for labor regulations (on working hours, on child and women's work) and particularly for the extension of electoral suffrage.

It was a fascinating spectacle – see, for example, Futurism and its emphasis on all that was dynamic, fast –, but at the same time a frightening one due to its novelty and because it seemed beyond the scope of rationality, as it was understood until then.

That's the reason why enlarging knowledge to embrace and decipher mass behaviour got a pressing matter, and psychology was on the first line that way. In the late XIX century a new branch of it began to emerge: social psychology, which took the name of “crowd psychology” from the title of the work published in 1895 by the French psychologist, Gustave Le Bon, *Psychologie des Foules* (literally: psychology of crowds) (LE BON 1895) – a huge success at the time.

It is not my intention here to summarize the history of this sub-discipline: it would take us far away. It may suffice to point out that, retrospectively, it was quite naive, clearly deterministic, full of Lombrosian nuances (after all, a contribution to this field of study was offered by Cesare Lombroso himself) and by no means free from political aims – how crowds functioned, what threat they might represent to institutions that until then represented a social and economic élite and were elected by a part of it, and, last but not least, also to know what machinery could be used to govern and manipulate them (MOSCOVICI 1985; VAN GINNEKEN 1992).

At the same time, however, it had a positive impact too. To the extent that empirical dimension was taken into account, albeit primitively, it had a demystifying and unsettling effect on some disciplines that, for structural and historical reasons, had not updated their paradigm with respect to this phenomenon.

This was precisely the case with legal science – and we come to the second reason. The psychology-law-State connection is historically justified also due to the crisis of XIX century legal science – my view here is limited to German legal science, not only because I have been asked to deal with the Weimar age, but also because at that time German legal science was influential in continental Europe. One of its most important tenets was the so-called “*juristische Methode*”, coupled with “*Wertlosigkeit*”: to be such, a jurist had to practice his own method, specifically legal, without any sort of combination with other disciplines, and this self-sufficiency was based – subjectively – on the prohibition of being conditioned by moral, political or economic evaluations and – objectively – on the obligation to separate legal concepts and categories from the contingent moral, political or economic contents that the positive law in force could convey¹.

By the end of the 19th century, such an approach had produced a striking formalism both *de jure condito* and *de jure condendo*.

De jure condito. Take, for instance, the contract. For XIX century economy was essentially a real-estate one, the contract was designed as a strictly individualistic act. But at the end of the century, it ended up being unfit to regulate a new practice: negotiating wages and duties for all the employees of a factory or an industrial group through trade union representatives, and not individually – what we call now “collective labor agreements”, but, in the opinion of one of the “founding fathers” of German labor law, Philipp Lotmar, the law in force was more or less silent about them and accordingly legal science was struggling to square them into new categories (LOTMAR 1900).

De jure condendo. Take, for example, civil liability that no one denied was able to regulate that

¹ See, for private law, WIEACKER 1995, and, for public law, STOLLEIS 1999.

kind of tort represented by accident at work. However, as is well known, civil liability required the plaintiff – i.e., the worker, that usually could not afford lawsuit costs – to prove: 1. the existence of a damage; 2. the unlawfulness of it; 3. causation and 4. the employer’s culpability. Unsurprisingly, one of the first concessions to trade union claims was accident insurance, that was mandatory for a large number of employers – a legal duty to contract: again, something inconceivable for a liberal mindset².

In short, the world was changing and at a speed and extent that legal science could not (but sometimes: did not want to) keep up with. Hence the need to abandon the safe “fortress” of the “*juristische Methode*”: it was necessary to open up to concreteness, to *materiality* of social life, so to say, and through this openness legal science could not but cross the path of crowd psychology.

But it was a path to tread carefully, as we can see through one of the leading figures of Weimar age: Hans Kelsen.

3. Kelsen and Crowd Psychology

In 1922 Kelsen published a long article in the journal *Imago* entitled *Der Begriff des Staates und die Sozialpsychologie. Mit besonderer Berücksichtigung von Freuds Theorie der Masse*. The journal was edited by Freud himself and had a meaningful subtitle: «Zeitschrift für Anwendung der Psychoanalyse auf die Geisteswissenschaften» (KELSEN 1922a) and what Kelsen does is precisely an application of psychology to the science of law and to the doctrine of the state – a critical application, however.

The article, as often happens with Kelsen, is very interesting from both a historical and theoretical point of view: it should be contextualized with respect to both the conditions of psychoanalysis at the time and to Kelsen’s research goals and his conception of law and the state³. It is not necessary here to go into detail, except to the extent that at first glance this article would seem to confirm our conjecture, even without the empirical test requested (the fall of Weimar Republic analysis).

Kelsen surveys social psychology from its founder, Gustave Le Bon, to Freud’s 1921 essay *Massenpsychologie und Ich-Analyse* (FREUD 1921). Kelsen’s opinion about this science is not so enthusiastic, although he greatly appreciates the cognitive contribution made by Freud’s writing.

Strictly speaking, social psychology should not exist, according to Kelsen. The psyche is only individual and there is no “collective” or “social” psyche *in rerum natura*. The psychological study of social relations should always start from an individual perspective, without hypostatizing entities with their own structure and psychological consciousness (KELSEN 1922a, 6 and 7). Thus, for Kelsen, Freud is right: a human being can be said to belong to a mass only if he develops an individual relationship, libidinal in character, through which he identifies himself with the object of the same relationship, losing the sense of his own individuality and acquiring that of belonging to a whole made up of all those who feed the same relationship (KELSEN 1922a, 13).

Kelsen shares the importance Freud gives to the object of mass libido: the *leader*, understood in both a material and an ideal sense. In a mass context, the leader is to the individual as, in the family, the father is to the child: just as «a little boy identifies himself with his father by wishing he were like him and might take his place in everything, when in short he takes his father for his ideal» (KELSEN 1922a, 16), so a mass member identifies himself with the leader, who embodies the ideal to which to conform his own behaviour and from whom he expects just criticism in the event of deviation from the model he indicates and offers. The consequence is that, for Freud, as for Kelsen, psychoanalytically speaking the mass is the re-edition of a very ancient, primitive

² See, for example, the strong opposition by National Liberals against the Accident Insurance Bill presented by Bismarck to *Reichstag* in 1884. On the formation of welfare state in Germany see STOLLEIS 2014.

³ Kelsen himself in the article (KELSEN 1922a, 1) refers to his own work *Der soziologische und der juristische Staatsbegriff* (KELSEN 1922b). On Kelsen and psychology see BUSCH 2016, FEICHTINGER 2016.

phenomenon: the *horde led by a chief* which «still wishes to be governed by unrestricted force; it has an extreme passion for authority; in Le Bon's phrase, it has a thirst for obedience. The primal father is the group-ideal, which governs the ego in the place of the ego-ideal» (KELSEN 1922a, 18).

It is now clear why this article appears to confirm straightforwardly our conjecture. First, from a cognitive point of view, a *Rechtsstaat* regime fails to stand out from an authoritarian state because a horde-dynamic runs under the machinery of both. And we must admit that, since this dynamic works intuitively better in the latter, it possesses a competitive advantage over the former. Second, a conclusion like that would be entirely consistent with Kelsen's legal theory. The socio-psychological relevance of the horde-dynamic would mirror the notion of law as coercive organization and would give a further explanation to another, well-known Kelsenian thesis: the legal-philosophical indistinguishability between a *Rechtsstaat* regime and an authoritarian one. If a state exists, it possesses a legal system, no matter if democratic or autocratic: therefore, Kant's claim to transform a state-subject into a citizen should be deemed essentially unnatural, because *Rechtsstaat* is anti-paternalistic, because it clashes with a psychological pattern according to which, whenever mass relations come into play, there is always in action a chief leading a horde.

This interpretation would be convincing, but it would amount to a misunderstanding of Kelsen's thought.

First, Kelsen's legal theory does not give any relevance to the reasons for obedience. Such reasons lie on the so-called *Sein* level (Is); instead, law (and state, too) are *Sollen* (Ought) entities: so, the existence of law does not necessarily depend on a specific psychological attitude towards it. To put it differently (and briefly), for Kelsen a legal system is valid when it is broadly effective – via the fundamental norm – and a legal system is effective when it is obeyed, but the reasons that sociologically or psychologically prompted obedience, for Kelsen, do not affect the legal nature of the system. A legal system is legal even if people at large do not obey out of fear of punishment, but – for example – due to a widespread, deep-rooted religious conscience.

Of course, this view could be discounted as recessive in current legal theory. If we aim to understand something about law, norms should be understood not as Kelsen claimed – i.e., the normative sense of an act falling in *Sein* domain –, but as reasons for action and, significantly, Hart remarked that rule-acceptance is a practice which, although not to be reduced to a psychological experience of obligation, is factual in nature (HART 1994 [1961], 57).

However, even if contemporary legal theory is right, we could not say that «the key to the science of jurisprudence» – to use John Austin's words – is the horde-dynamic.

Indeed, the idea that law and the state ultimately can only function on the basis of the paternal authority of a leader leaves unanswered a basic question: why law and the state are inexorably bound to this adolescent phase with no chance of emerging from it and getting adulthood. In other words, if *any* state can be reduced to a primitive horde, then Western legal and political thought's efforts to separate, for instance, the government of laws from the government of men, to shape law and state according to values like freedom and dignity of the human being, ends up resembling the well-known myth of Sisyphus: always and unconditionally predestined to fall back into the primitive condition. And, as always Kelsen rightly notes, the horde-dynamic explains the formation of a mass and the behaviour of an individual in it quite convincingly, but it is an explanation that can apply to *any* mass, not just that of the state:

«The wholly legal idea of the state can only be understood in its own specific judicial conformity, but not psychologically, as may the processes of the libidinal ties and associations which are the material of social psychology. The psychic processes by which the formation of leaderless groups is achieved (that is, of groups in which the individuals who are reciprocally identified substitute an abstract idea instead of the idea of the concrete personality of the leader for their ego-ideal) is, however, similar in all cases, whether it involves the idea of a nation, a religion, or a state» (KELSEN 1922a, 23 and 24).

To grasp the relevant distinction between «a nation, a religion, or a state», for Kelsen, we must leave the domain of the unconscious. No doubt some citizens can relate to their own state in libidinal terms, but if we theorize law and the state only from this point of view, we risk plunging into the Hegelian «night in which all cows are black». Law and the state are too complex, too “artificial” to be reduced to the “naturalness” of a psychological perspective, even a social-psychological one, and this perspective is too narrow to understand their specificity and to distinguish them from other social phenomena such as the nation or religion:

«These social phenomena» – Kelsen adds – «appear as *differentiated* institutions only from the point of view of their specific content, only in so far as they are conceived of as ideational systems, as specific thought-trends, as *mental contents*, and not as psychic processes maintaining and realizing these contents» (KELSEN 1922a, 24).

4. From Rechtsstaat to Dictatorship: Hermann Heller

So, following the path of crowd psychology we have not made much progress.

True, in mass society a horde-dynamic is often at work behind obedience to the state. But that dynamic makes no difference between religion, the nation, the state and – we might add – between *Rechtsstaat* and its competitor: from this point of view, the effort to conceptually distinguish the former from the latter turns to be pointless⁴. And after World War I, this distinction was getting more a tremendously *real* issue than a matter of psychology alone: a full-hearted advocate of authoritarianism could rise to power through the procedures of *Rechtsstaat* (elections, legislative process, etc.), transforming it into a legal dictatorship with no *coup d'état* – Italy, for instance, was one of the first countries to go along this path. In other words, our problem – clearly separate a network of terms catching the conceptual essentials of *Rechtsstaat* from a similar network for its competitor – was increasingly concerning the “ideational systems”, the “mental contents” referred to by Kelsen.

We can find the best formulation of this problem in Gustav Radbruch’s handbook of legal philosophy:

«How is it possible for the state to be bound by its own law? How are rights of the individual against the state, how are constitutional and administrative law — and constitutional and administrative legal wrong — how is a government of laws, possible? This problem has traditionally been raised by asking whether law “precedes” the state or the state “precedes” law, that is, whether the state owes its power of command, as to its extent and limits, to the law, or whether contrariwise the validity of the law is determined and conditioned by the will of the state» (RADBRUCH 1950, 201).

Now, a possible way out was suggested by Kelsen himself, who identified – as mentioned above – law and the state. However, according to Radbruch this was not a solution, but rather a dele-

⁴ As we can see in Karl Olivecrona’s thought – member of Scandinavian legal realism –, who made psychology the empirical basis for the study of law and for a critique of the alleged “scientificity” of legal scholars of the time (OLIVECRONA 1941). In Olivecrona, psychology has a structural role, and it aims to explain the functioning of “any” legal system, no matter what contents and values it expresses, no matter it is a *Rechtsstaat* or a dictatorship: «Every instance of the kind of relationship we term “power” is a psychological relation. The lever of power is always a psychological influence of one person on another. This may appear as a frail instrument. In reality, however, its strength is stupendous, given the proper conditions. It is the instrument by which every country is governed in peace and war, the instrument through which order and security is maintained and through which armies are driven to battle against each other» (OLIVECRONA 1941, 219 and 220). Unsurprisingly it is not so detailed (he writes that his «is not intended as a book on psychology», OLIVECRONA 1941, 31): not only there is no reference to horde, but even Freud is never mentioned. For this reason, it is not so useful in verifying or falsifying our conjecture.

tion of the problem: «The doctrine of identity is of purely analytical significance for purposes of definition but is of no legal philosophical substance for purposes of policy» (RADBRUCH 1950, 202). Indeed, Kelsen's thesis could be «incontestably» accepted only «in a purely juridical view» (RADBRUCH 1950, 202): the state could hardly be anything other than its own law only in what Radbruch labels as the “ideal” dimension – that is, the “Ought” domain. But – Radbruch adds – the relationship between law and the state had also “real” relevance – in the “Is” domain – and extending the solution on the “ideal” level to the “real” one ends up being an undifferentiated use of terms such as, for example, “science”, that

«on the one hand means the standard of truth for the activity of gathering knowledge, by which shortcomings in knowledge are measured as unscientific, and on the other hand it means the historical cultural concept which, neutral as to values, embraces scientific truth and scientific error» (RADBRUCH 1950, 203).

Thus, «the doctrine of identity» provided no clear distinction between *Rechtsstaat* and dictatorship, and during the Weimar age – but for our enquiry too – *this* was the problem of *Rechtsstaat*:

«Now the question of the priority of the law or the state refers on the one hand to the normative concept of the law, and on the other hand to the concept of the state in reality. These two concepts are by no means identical but, on the contrary, involve the highest tension, viz., the tension which usually exists between a norm and a reality but which is here still further increased» (RADBRUCH 1950, 204).

So, it was impelling to shed light on the «legal philosophical substance for purposes of policy» of the *Rechtsstaat* concept. It was impelling to understand how it was possible that in the 1930s, after a century of *Rechtsstaat* theory and practice, that “substance” was lost to the point that one of the greatest legal scholars of the 20th century – and, no doubt, a sincere advocate of democracy – ended up downgrading the *Rechtsstaat* concept to an analytical, merely descriptive formula, through which any state, even a dictatorship, is a *Rechtsstaat*.

The answer comes from another “classic” of Weimar age: Hermann Heller.

For some time now Heller is experiencing a sort of revival, mainly due to his political criticism to liberalism⁵. But, beyond this renaissance, I strongly suggest his works because he is the best guide to Weimar legal literature – he provides a comprehensive overview of both Kelsen's and Schmitt's thought, while maintaining a position all his own and, after the Second World War, Schmitt regarded him as «damals der beste Kopf in Deutschland»⁶.

In 1930, Heller wrote an essay entitled *Rechtsstaat oder Diktatur?* (HELLER 1992 [1930]), where we can find the answer.

Heller starts from an opposite consideration to Kelsen's. Historically, the *Rechtsstaat* notion had a clear «legal philosophical substance for purposes of policy», in Radbruch's terms: it was created *precisely against* dictatorship. Only in the early post-war period this notion seems to have lost not only appeal – many were convinced that dictatorship was the most appropriate form of state for post-war mass society –, but even heterogeneity with respect to authoritarian regimes, turning into an empty shell⁷.

⁵ See MENENDEZ 2015: the issue presents a special section revolving around the English translation of Heller's article *Autoritärer Liberalismus*, originally published in 1933.

⁶ Quoted in PASQUINO 1983, 138; on Heller see MÜLLER, STAFF 1984, POMARICI 1989, DYZENHAUS 1997.

⁷ Put in Hartian terms, the problem raised by Heller affected the well-known «internal point of view» (HART 1994 [1961], 88 ff.): the internal point of view of a long political and legal practice based on values such as freedom and equality. No doubt, even if the «minimum content of natural law» (HART 1994 [1961], 193 ff.) is restricted to a small part of society, law is the state, and the state is law from an external point of view. But for Heller, it was necessary to understand why «bis zum Ausgang des Weltkrieges war der Rechtsstaat in Europa eine Selbstverständlichkeit gewesen» and yet in the post-war period, «wenn es auch nicht allzu wichtig zu nehmen ist, daß ein bekannter

Heller very effectively outlines the historical-conceptual steps leading to this result.

Rechtsstaat, in his view, came into being to meet two demands, the first preceding the French Revolution, the second emerging with it.

The first one was economic in character and is called modern capitalism (HELLER 1992 [1930], 445 and 446). After Max Weber's masterful contribution, there is little to say: capitalism needs uniform rules across borders, which means an increasingly general and abstract regulation and less and less tailored to that patchwork that was the corporate society of *ancien régime*. As a result, modern capitalism finds essential a single rules-creating authority in the country – exactly those national monarchies which sought to centralise law-creation from the 16th century onwards and ever more intensively in the following centuries.

The second demand appears in the 1700s and has an “axiological” nature, so to speak (HELLER 1992 [1930], 447 and 448). In short, it is called freedom: freedom to manage one's own moral and material life without interference from other individuals and above all from institutional agencies like the Church; but also, freedom from heteronomy, that is, the idea that each person is sovereign of himself and no one is naturally subject to others because, as Article 1 of the Declaration states, «men are born and remain free and equal in rights». Therefore, any obligation must always be founded on this individual sovereignty, either directly – and that is the contract – or indirectly – and that is the law produced this time no longer by the monarch, but by individual sovereigns put together, i.e., the people.

The result is a notion that – borrowing the same terms used at the beginning of this article – exhibits values and catchwords radically other than authoritarianism's. They are: the popular or *latu sensu* democratic source of law; the supremacy of law over all public powers; the separation of powers (particularly, the independence of judge) because all the powers in one hand represent a serious threat to freedom; the idea, as a consequence of art. 1, that the law «must be the same for all, either that it protects, or that it punishes», i.e. the rule by general norms (and not by particular decree); and last but not least, the content-independence of laws since they are expression of individual sovereignty, and heteronomy would once again appear if there is an authority other than the people entitled to dictate law's content.

It is worth noting that these catchwords were not open to manipulation by possible alternative political models. Due to the success of bourgeois capitalism over pre-modern types of economy and due to the bourgeoisie's grip on institutions through census suffrage, the social environment could hardly change to the point of creating dissonance with respect to the two demands at the foundations of *Rechtsstaat* – and even within them. Instead, that environment was extremely stable, ruled by a numerically small and culturally homogeneous social class – in Heller's words, a «geistig und wirtschaftlich erstarkten Bürgertum» (HELLER 1992 [1930], 448), where “economy” and “freedom” developed in a mutually consistent way. The result is a context – a *materiality* – that made the basic concepts of *Rechtsstaat* rather intuitive, and the cognitive load required to process those catchwords relatively “low”, keeping them away from misinterpretation.

This can be seen very clearly in relation to the last of the properties of the *Rechtsstaat* concept listed above: the content-independence of law. This means that a law is valid if it is enacted by the competent authority – i.e., the popular, *latu sensu* democratic law-giver – regardless of its content. This is a *formal* notion of law, usually referred to as “legality”, but – this is the point to emphasize – it was not a *formalistic* notion, due to what we have called the “materiality” behind *Rechtsstaat* understanding in XIX century. It ensured that legality also expressed “legitimacy”: a law could have any content because its source was the people, i.e., those men born and remaining free and equal in

deutscher Staatsrechtslehrer die Diktatur als die spezifisch moderne Staatsform, den Rechtsstaat aber als veraltetes Verfassungsklišee bezeichnet, so ist die Möglichkeit einer solchen Behauptung dennoch symptomatisch» (HELLER 1992 [1930], 445). Heller added, with reference to Kelsen, that «die leeren Abstraktionen dieses nomokratischen Denkens tragen nicht wenig dazu bei, gerade unter einer nach sittlichen Begründungen suchenden und wirklichkeits-hungrigen Jugend den Diktaturgedanken zu befördern» (HELLER 1992 [1930], 451).

rights, and this made it completely unthinkable to have a law that was openly discriminatory, for example, against Jews, Roma, homosexuals. Heller admits that this “materiality” was shared only by those who possessed «Bildung und Besitz» when «der Besitz noch gebildet und die Bildung noch besitzend war» (HELLER 1992 [1930], 448). But, as Heller adds, «das mußte sich im Zeitalter des entwickelten und organisierten Kapitalismus grundlegend ändern» (HELLER 1992 [1930], 448).

By the end of the 19th century, capitalism had made the working class self-aware and strong enough to make a claim: to be part of those men «born and remaining free and equal in rights» and to be entitled to vote just like «Bildung und Besitz» social class. The result was a deadly paradox for the *Rechtsstaat*:

«Der wirtschaftlich Schwache versucht mittels der Gesetzgebung, den wirtschaftlich Starken zu fesseln, ihn zu größeren sozialen Leistungen zu zwingen oder ihn gar aus dem Eigentum zu verdrängen. So hat der Kapitalismus das demokratische Prinzip zu Konsequenzen geführt, die dessen eigenen Schöpfer, das Bürgertum, in seiner Herrschaft bedrohen» (HELLER 1992 [1930], 448).

A bourgeoisie that in this condition – Heller adds – «beginnt am Rechtsstaatsideal zu verzweifeln und seine eigene geistige Welt zu verleugnen» (HELLER 1992 [1930], 449). It realizes that “inventions” like political legitimacy from below, elections, content-independence of law and so on can be used not only by other social classes, but above all *against* it – to undermine its economic power and to convey a sense of justice other than freedom and inspired by greater material equality. The social environment is no longer the same as in the previous century and, from a psychological point of view, yields dissonance within the bourgeois cognitive world. The first demand at the origins of the *Rechtsstaat* concept – the one previously labelled as “economic” and centered on capitalism – gets more and more inconsistent with the second – the one defined as “axiological” and focused on freedom –: unconditionally complying with the latter means jeopardizing the former; it could be discarded in favor of an autocracy at the service of capitalism, but psychologically this would be too burdensome – by now *Rechtsstaat* is the “form-of-life”, in Wittgenstein terms, of the bourgeoisie and what feeds its social respectability. The consequence is what we might call a defense mechanism, except that it is an intentional strategy based on the rejection of the materiality underlying the *Rechtsstaat*: its forms, its procedures, its “rituals” are left unchanged, but on condition that who rises to power interprets *Rechtsstaat* catchwords to preserve the bourgeoisie’s economic rule, even at the cost of freedom’s sacrifice.

It is from now on that the formal notion of law turns to be formalistic:

«Von nun an ist es bis nach der Revolution von 1918 unbestrittene Lehre, dass z.B. der die Gleichheit vor dem Gesetz garantierende Art. 4 der Preußischen Verfassung von 1850 nicht etwa ein Willkürverbot für den Gesetzgeber bedeute, sondern sich nur an den das fertige Gesetz anwendenden Beamten wende. Damit hatte das Gerechtigkeitsideal für den Gesetzgeber seine Geltung verloren und war herabgesunken zu einer formellen Verwaltungsmaxime, die ohne Rücksicht auf den gerechten oder ungerechten Inhalt des Gesetzes dessen berechenbare Anwendung auf den Einzelfall verlangte. Nun kam es nur noch auf diese Rechenhaftigkeit und bourgeoise Sekurität des Gesetzes an, nicht mehr auf seine Richtigkeit» (HELLER 1992 [1930], 449).

The “materiality” underpinning the formal notion of law has dissolved: legality is no longer followed by legitimacy. The former has become a facade: it suffices to have independent judges subject “only” to the law, and to rule by general norms to be a member of the club of nations with a *Rechtsstaat*. By now law can *really* have any content: even an autocrat is able to declare to adhere to the principle of legality, but only to convey a legitimacy completely other than at the origins⁸.

⁸ Of course, Kelsenian thesis – any state is a *Rechtsstaat* – by no means implies a bias towards autocracy. According to Kelsen, the struggle for the *Rechtsstaat*’s “rechtsphilosophisch-politische Gehalt” (in Radbruch’s terms) should be

That was what happened in Germany in 1933. Nazism, more effectively than Fascism, rose to power through legal means – and Hitler knew very well how essential conformity to legal forms was to strategically stabilize his political success.

The *Reichstag* was not stormed like the Winter Palace. Hitler was legitimately appointed chancellor by President Hindenburg following the crisis of the von Schleicher cabinet, and, I might add, without any march on Berlin.

As known, art. 48, par. 2, RV, authorised the President to enact decree suspending some fundamental liberties (for instance, personal freedom, inviolability of property, secrecy of correspondence, freedom of opinion, freedom of assembly and association), when «im Deutschen Reiche die öffentliche Sicherheit und Ordnung erheblich gestört oder gefährdet wird». And it was the President Hindenburg who, following the *Reichstag* fire, issued such a decree which suspended those liberties “bis auf weiteres”, in order to reaffirm the authority of the state against “kommunistischer staatsgefährdender Gewaltakte”.

The (in)famous *Gesetz zur Behebung der Not von Volk und Reich* of 24 March 1933, today known as *Ermächtigungsgesetz*, was a very regular (from a procedural point of view) constitutional amendment, passed by a 2/3 majority of the *Reichstag*. And even after that the regime was careful not to replace the BGB – the German Civil Code – or to affect the principle of judicial subjection only to law. As Ernst Fraenkel noted in his still relevant interpretation of the functioning of the Nazi state (FRAENKEL 1969), this represented one of the two faces of it: the «Normenstaat», the normative state, the state based on general norms, functional only to the first of the two demands at the origin of *Rechtsstaat* – the economic one, expressed by modern capitalism. The axiological demand of the regime was quite different and ran along a different track, called by Fraenkel «Massnahmenstaat», the prerogative state, the state of pure arbitrariness practiced by the various agencies that competed for political supremacy within the regime.

Of course, *Rechtsstaat oder Diktatur?* was not only expository, but also constructive. Heller suggested to save the *Rechtsstaat* idea from this formalistic decline through a “re-materialisation” of it: by recognising the claim for social justice coming from the “economically weak party” and culminating in a renewed *Rechtsstaat*, the “soziales Rechtsstaat” (HELLER 1992 [1930], 450).

True, but it is another story. It is a story that begins *after* Weimar; but above all, it is the story of *something different*, which we could call the story of “qualified” *Rechtsstaat* (social *Rechtsstaat*; democratic *Rechtsstaat*; constitutional *Rechtsstaat*). As far as “simple”, “unqualified” *Rechtsstaat* is concerned, its history ends here. At best, it is a partisan notion now: it is being labelled as “liberal” – «bürgerlicher Rechtsstaat», a descriptive name for a kind of state coming from the past⁹. At worst, it is a mere slogan, useful to “sell” a deliberately vague and indeterminate materiality to justify highly questionable politics – to the point that from a theoretical and perhaps even historical perspective there is little interest in delving into the post-1933 debates on whether the new regime could be categorized as a *Rechtsstaat*: it would only be an exercise of erudition and, as Michael Stolleis rightly noted (STOLLEIS 2004, 349 ff.), it was essentially an academic power fight¹⁰.

fought on the level of what he calls “legal politics” and not on the level of “science of law” – and Heller himself sees in Kelsen one of the few advocates of «dieser Glaube an eine entleerte Nomokratie, die Utopie des ewigen Friedens durch endgültige Vergesetzlichung aller Individualität» (HELLER 1992 [1930], 451). But Heller warns at the same time that «die leeren Abstraktionen dieses nomokratischen Denkens tragen nicht wenig dazu bei, gerade unter einer nach sittlichen Begründungen suchenden und wirklichkeitshungrigen Jugend den Diktaturgedanken zu befördern» (HELLER 1992 [1930], 451).

⁹ See, for example, SCHMITT 2008, 167 ff.

¹⁰ Something like that happened in Italy too with a debate revolving around the question whether Fascist state was to be classified as an example of a *Rechtsstaat* (see BODDA 1935; ALLORIO 1942).

5. *Beyond Weimar*

Conclusively, I was asked to test a conjecture, and unfortunately the test is successful. If *Rechtsstaat*'s legality is not coupled with legitimacy – and only the bourgeoisie believed in it, as happened in XIX century –, both *Rechtsstaat* and authoritarian state do not exhibit radically different values and catchwords, but share the same basic concepts: even a dictatorship can rightly call itself a *Rechtsstaat*, to establish not even a government of men, but of organised gangs, as Nazi regime was.

Let me add an afterword.

It is no surprise that none of the main post-World War II constitutions adopted the “simple”, “unqualified” *Rechtsstaat* formula. Not the Italian Constitution, nor the French one. Not the German one, which uses the «demokratischer und sozialer Bundesstaat» formula (and speaks of *Rechtsstaat* only in relation to the *Länder* (and, later, to EU)¹¹. In the Spanish Constitution the “Estado de Derecho” formula figures in the Preamble, but art. 1 specifies that Spain is an «Estado democrático y social de Derecho». Nor does the Portuguese Constitution, which identifies the Republic as an «Estado de direito democrático».

It might be interesting to test the conjecture in relation to these formulas, but it would obviously be another research project. Yet, I do not think that the outcomes of this future project would be different than the current ones. As demonstrated before, in Weimar legality ends up divorcing from legitimacy in relation to “simple” *Rechtsstaat*, converting legal concepts into formalistic ones, and something similar seems to be happening to the post-World War II “qualified” *Rechtsstaat*. Indeed, it does not seem that social *Rechtsstaat* can still be counted among the *naturalia rei publicae* if we remind Margaret Thatcher’s slogan «there is no alternative» and the following years of rampant neo-liberalism. Democratic *Rechtsstaat* also seems to be in trouble if illiberal democracies are now a common phenomenon and not the contingent deviation from a trend of absolute regularity – and the rich literature on the topic is good evidence in this respect. And finally constitutional *Rechtsstaat* does not perform better if one of its main theorists – Gustavo Zagrebelsky – in the introduction to the recent reprint of his book, *Il diritto mite*, feels compelled to specify that this formula should be not intended as a normative conception – a desideratum for the future, in search of implementation –, but the description of a state-of-affair – a state-of-affair that unfortunately many describe in another way (ZAGREBELSKY 2024, chs. X and XI).

If this picture is true, we may say that XIX century was the golden age of *Rechtsstaat*, when it required no qualifier, when legality and legitimacy were two sides of the same coin, when a higher cognitive load to process it was unnecessary, and it was much less counterintuitive than today. And we may add that it is hard for the “qualified” notion of *Rechtsstaat* to aspire to the “psychological” success achieved by the “simple” notion of it during XIX century not only because the “qualified” nature of the current notion, so to say, “weakens” the intuitiveness of the original formula, but also because the former lacks the cultural homogeneity that had enabled the success of the latter – after all, as the previous review of comparative law shows, the “qualified” notion of *Rechtsstaat* is manifold, while the “simple” one was at singular.

But the perspective should be reversed. Instead of evaluating current formulas on the yardstick of a (supposedly) successful one, we should admit that history has changed, and we can no longer retain those “psychological” beliefs that only the XIX century context could nurture. The “qualified” notion of *Rechtsstaat* is hard to be psychologically processed precisely as *deliberately*

¹¹ Indeed, it is meaningful that the “simple” *Rechtsstaat* formula, disappeared at national level, reappeared in 1992 in European Union law. And based on what we have said, this re-surface can be interpreted either as a rejection of the “qualified” *Rechtsstaat* formula and thus as a return to the (neo)liberal *Rechtsstaat* or simply as an umbrella formula aimed to get consensus from all member states – a consensus that would have been more difficult to achieve in front of the “qualified” *Rechtsstaat*. In short, a bit like Jacques Maritain said about human rights at the UN: «Yes – they said – we agree about the rights but on condition that no one asks us why» (MARITAIN 1949, 9).

counterintuitive from the outset. It consists of heterogeneous and open-textured basic concepts: as a result, it is based on a mixed and pluralistic – and therefore more fragile – legitimacy, which requires consciousness, commitment, care, especially against possible manipulation.

As Zagrebelsky rightly puts:

«Un diritto e una costituzione pensati per situazioni storiche che non esistono più (come fanno coloro che deplorano le difficoltà del nostro tempo e rimpiangono immaginarie età dell'oro) e forse esisteranno ma non esistono ancora (come fanno coloro che sperano in un futuro migliore del presente): questo, sì, sarebbe un modo per fare ideologia costituzionale guardando indietro oppure in avanti e ignorando lo stato delle cose. Il nostro tempo costituzionale è difficile. Occorre prospettare soluzioni né nostalgiche né utopistiche ai problemi che esistono. Ma, prima di tutto occorrerebbe leggere diversamente la realtà nella quale il diritto si trova ad operare per svolgere la funzione che gli è propria. Questa realtà è riassumibile in una sola parola: pluralismo» (ZAGREBELSKY 2024, XI-XII).

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