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## The State and Legal Otherness

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# The State and Legal Otherness

Donald Bello Hutt

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## 1 Introduction

- 1 In his intriguing book, Paolo Sandro underscores the importance of distinguishing between the creation and application of the law. The rationale for this effort deserves praise. Like him, I believe that core principles and commitments of liberal democracies, the rule of law being a foremost example, are not only best accounted for but also safeguarded to the extent that legal and political institutions, as well as the citizens affected by their operations, exert power over others not whimsically or in a purely creative fashion, but as applying standards other than their say-so. *Legal otherness*, as Sandro aptly names this feature, is indeed a desirable feature.
- 2 I contribute to this special issue with a quibble around the edges of Sandro's argument, the complexity of which I cannot fully honour here, alas. Broader engagements with it should also reflect the amount of time and research exhibited in his claims, discussions, and bibliographical apparatus. Others have done this extensively.<sup>1</sup>
- 3 And so, I will ask a limited question and offer a critical evaluation of Sandro's take on the matter, namely whether the state is necessary for the rule of law to emerge. Sandro thinks it is not. I, by contrast, think it is. Our disagreement can be stated as follows: when rejecting the necessity of the state for the emergence of the rule of law, Sandro misrepresents the contractarian narrative warranting the existence of the state's right to rule over its subjects, and this leads him, unnecessarily for the broader purposes of his book, to conclusions potentially at odds with his concern for *legal otherness* and, by implication, for the rule of law.
- 4 I proceed as follows. I will first briefly recapitulate Sandro's depiction and subsequent questioning of the contractarian narrative of how the state is born out of a state of nature and its initial conditions unto a civil state resulting from a hypothetical covenant. I offer critical remarks about the recapitulation and the arguments on which he rejects that contractarian story. In a nutshell, Sandro is wrong that contractarians expect the state to improve the conditions of its subjects without qualification (section

2). Sandro's rule-of-law committed project does not need to rebuff contractarianism to get off the ground and be sustained. On the contrary, it needs the state. Since Sandro focuses primarily on Hobbes's conception of the state, I will argue that even in Hobbes's absolutist version, the state is bound by the rule of law in ways that a stateless society is not (section 3). The final part offers conclusions (section 4).

## 2 Contractarianism and The State

- 5 Is the State a necessary condition for the rule of law to emerge? For Sandro, it is not. He reaches that conclusion in three steps.
- 6 First, he avows that the law:
- is not tied at all to the nation-state. Rather, the idea of law as the enterprise of subjecting human conduct to the guidance of rules (and rulings) is broad enough to accommodate a number of normative phenomena beyond that of 'state-law'.<sup>2</sup>
- 7 Second, Sandro points out that while his book is focused on the kind of political organisation "that has become widespread specifically after the Second World War",<sup>3</sup> his argument does not presuppose "an understanding of the state as an unqualified good".<sup>4</sup> Anthropology, on the one hand, teaches that there have been stateless societies with legal orders incarnating the principle of *isonomia*. On the other, it is false, as some classical contractarians would have it, that the state is indefectibly geared towards improving the living conditions of its subjects. In fact, "it carries potentially a far greater danger for members of social groups".<sup>5</sup>
- 8 Third, the notion that the state is a necessary condition for the rule of law to emerge, raises a problem of the legitimation and limitation of political authority, which is better addressed, in Sandro's view, by paying attention to a distinction between law as *lex* and law as *ius*. The distinction maps onto two types of law, the second of which — *ius* — constrains the exercise of political authority — *lex* — by providing modern constitutionalism with what Sandro calls *legal otherness*. Sandro's distinction is positivist in that it emerges from the very stuff of legal phenomena, yet irrespective of whether there is a state in place.
- 9 In short, the state is not necessary for the rule of law to emerge and be secured. As it happens, it may even be counterproductive for achieving those goals.
- 10 I agree with the *ius/lex* divide and its normative consequences, but I am less convinced by the path Sandro walks towards grounding it. Like him, I believe that the *ius/lex* distinction should be preserved. However, I doubt that one needs to question the contractarian story of the emergence of the state to reach his conclusions. In my view, the *ius/lex* distinction is also a constitutive feature of the modern state — even in Hobbes's version of that story, which is the one Sandro refers to to build his argument.
- 11 Moreover, I doubt whether anthropology settles the matter about the potentially beneficial or detrimental effects of the state. Whether the state makes its subjects better or worse off *vis-à-vis* their life in the state of nature is a question that can be addressed and answered by sundry concepts such as rights, justice, and so on. Put differently, improving the conditions of subjects can mean several things, including, for example, securing rights, economic prosperity, freedom, equality, etc. And indeed, states can and have mistreated their subjects in many of those respects. But while considering whether it is convenient to have a state in comparison to living in

conditions of natural liberty, it is necessary to examine this question from a rule-of-law standpoint. And it is on that front where the State fares better than other forms of social organisation, especially when human associations reach a certain size. In other words, one should have a state if one cares for the rule of law. The *ius* constraining political authority may be composed of several elements — justice, rights, and so on. Yet, a picture of *ius* inclusive of the rule of law can only emerge once the state is brought about. Stateless societies may be (un)fair, (un)just, (im)moral, and so on, but they are not bound by rule-of-law imperatives; at least not necessarily. Conversely, states may be unfair, immoral, and so on, but they cease to operate as states when they fail to provide the conditions for a minimally predictable life.

- 12 Let me elaborate. Is the state an unqualified good? To start with, this is a rather puzzling way of presenting the problem. I cannot think of any contractarian who would argue in the affirmative. Sandro is right that the state is not something that necessarily fares well or even better than other sorts of political organisation. A quick look at the world suffices to notice this. And so, we should indeed qualify its acceptance. But this is precisely what the authors Sandro has in mind question about the value of the state ask us to do when they seek to convince us to give up on our natural freedom and enter civil society. They want us to consider: “What are we getting into if we sign this contract and relinquish our natural freedom? Can each of us achieve our individual ends by forming a state rather than remaining in the state of nature?” Unlike contractarians, Sandro’s faith in the state is scant, for, he tells us that legal history and anthropology show that early states have indeed been anything but unqualified goods. In fact, we learn quite the opposite. Far from securing rights, justice, and so on, states have carried and carry even greater dangers for their subjects. “Not only”, claims Sandro, “does the creation of the state not automatically imply the amelioration of the living conditions of all its subjects, but also there have existed historical legal orders that prescinded from a state-like structure altogether” — forms of government that the Greeks called *isonomia*.<sup>6</sup>
- 13 There is one standard reply to Sandro’s challenge that I will not expound here, namely that contractarians present the state of nature as an ahistorical and hypothetical thought experiment, a just-so story meant to trigger our reflection about what a stateless society *would* look like. But leaving that aside, we can explore Sandro’s challenge on its own terms. And what we find is that he seems to miss that the qualification he demands is, indeed, present in every contractarian story about how and why states are brought about. What differs in each of these authors’ accounts is the type of good that each of them thinks the state should be primarily concerned with. Each puts a premium on a different good that the state is supposed to secure over other goods. And this is compatible with losses on sundry aspects, to the extent that the prioritised goods are secured.
- 14 To choose a few classical accounts, and bluntly put, Hobbes’s version was primarily focused on predictability, Locke’s on legitimacy and rights, and Rousseau’s on equality. Of course, the attention on each mentioned good does not exclude the possibility that the state may pursue the safeguarding of other values. However, what Sandro seems to miss is that the priority assigned to each principle by each theory, means that in the event of having to choose between competing values, Hobbes will prefer security and predictability, Lock property rights, and Rousseau equality.

- 15 Consider Locke. It is well known that his concern was with securing the rights individuals have irrespective of whether the state recognises them. Individuals are entitled to life, liberty, and property on the basis of their being rational children of God,<sup>7</sup> which makes their existence independent of anyone's recognition, concession, or vote. Now, government is rendered legitimate when it exerts its right to political power while respecting and protecting those individual rights. And it will do so better than individuals living in a condition of natural liberty because the institutional and normative conditions characterising the state of nature make it the case that they will most likely interpret and execute the law of nature favouring their own respective positions, thus planting the seeds of potential conflict. Now, this may not always be the case. The point is that given how the state of nature is set up, there is a latent and constant possibility that such self-interested execution of the law of nature will eventually ensue. So, what the exercise of political power by the Commonwealth does is to institutionalise clear and abstract rules interpreted by an umpire that will settle disputes about the content of the law of nature impartially, thus securing individual rights. Sandro could reply that this is neither a guarantee that the Lockean state will make everyone equal, fair, decent, etc., nor that this has, as a matter of fact, been the case. There is, his objection could go, no guarantee that a host of values other than property rights will or have been secured by states. But to this, Locke could simply grant the objection, as for him rights enjoy lexical priority.
- 16 Similar considerations apply to Rousseau, for whom the main reason why individuals would agree on the terms of the social contract of the kind he proposes is avoiding the possibility that private power arbitrarily frame interactions, rights, and obligations among individuals, who due to their freedom, reason, language, and perfectibility may otherwise willingly accept living under inegalitarian and oppressive regimes.<sup>8</sup> Provided that those regimes are not natural but conventional, the question then becomes which convention will likely avoid the type of inequality that leads to the oppression that Rousseau thinks pervades the society of his time.<sup>9</sup> Hence, Rousseau's main purpose in the *Social Contract* becomes to inquire "whether in the civil order there can be some *legitimate* and sure rule of administration".<sup>10</sup> Legitimacy and equality, then, are the normative criteria standing above other normative considerations. These additional concerns are certainly part of the equation behind Rousseau's project, but they become instrumental for achieving legitimacy, i.e., voluntary and egalitarian legal and political arrangements. Accordingly, rights, interests, justice, and utility are subservient to the higher goal of legitimate and egalitarian government. Should, for example, certain conceptions of justice, foremostly a Lockean conception giving primacy to property rights, be at odds with legitimacy and equality, then those rights should take the back seat. So, confronted with the question of whether states have improved the living conditions of their subjects when, for example, private property has been limited in order to instantiate equality, Rousseau would answer in the affirmative without compromising his argument.
- 17 These two examples help us see that what the state is supposed to do is improve the living conditions of its subjects vis-à-vis their living in conditions of natural liberty varies depending on the conception each author has regarding its main functions.
- 18 What about Hobbes? I have postponed reflecting on his account of the social contract and the role he gives the state in securing the living conditions of its subjects for two reasons. First, because Sandro focuses his rejection on the contractarian story in

Hobbes's narrative, and so it deserves separate examination. And second, because while Hobbes also gives priority to certain values over others, he does so with a difference worthy of more careful attention. To wit, that the value he prioritises functions as a common denominator for every other contractarian story. For all its absolutism, it is fair to say that this value is the rule of law. He champions the state over the state of nature on the grounds that, as terrible, unjust, illegitimate, inegalitarian as the civil state may be, it is at least mandated to bring about the conditions under which the life of subjects may be predictable in ways that the state of nature cannot. And this, I suggest, is the minimum condition for the rule of law to emerge.

19 Hobbes is quite aware that the “Condition of Subjects is very miserable; as being obnoxious to the lust, and other irregular passions of him, or them that have so unlimited a Power in their hand”.<sup>11</sup> Little in his arguments and even less in his rhetoric suggest that life in the civil state is better than the one subjects lead in the state of nature, apart from the fact that it is more predictable. This is, admittedly, a far cry from the notion that “the creation of the state” automatically implies “the amelioration of the living conditions of all its subjects”.<sup>12</sup> But it does make a major difference in terms of the life one should expect to lead in the state of nature. Hobbes's claim is nuanced. The predicament you find yourself in when living in a condition of natural liberty is that you may in fact enjoy what comes with having no master or with being bound by no rule other than the one dictated by your own consciousness. However, absent common enforceable rules determining what belongs to whom, there is very little you can do with such freedom if everyone else enjoys it too. The exercise of this freedom may hypothetically lead to obtaining certain advantages and certain commodities far greater than the ones you will acquire under state rule. Granted. Yet, the issue is that there is no normative framework turning possessions into properties backed by rights that may be enforced should disputes arise and, consequently, no certainty that what you claim as your own will be indeed yours, nor for how long. The consequence is, in Hobbes's parlance, anticipation: “that is, by force, or wiles, to master the persons of all men he can, so long, till he see no other power great enough to endanger him”,<sup>13</sup> in addition to the continuous disposition to doubt and distrust others, which is the true nature of war. You may enjoy things, you may work, and your work may bear fruits. But there is no certainty that you will be able to hold on to those things as yours in the robust sense whereby *yours* means that possessions are backed by property rights.

20 And so, it is fair to say that the state of nature is one of unpredictability and uncertainty. One should remember that the state of nature is a state of war not because there is actual fighting and battling – not because the condition of individuals is *actually* bad, but because the normative framework (rules, norms, incentives, etc.) under which individuals live makes it impossible for them to plan their lives in advance. For:

Warre, consisteth not in Battel onely, or the act of fighting, but in tract of time, wherein the Will to contend by Battel is sufficiently known: and therefore the notion of *Time*, is to be considered in the nature of Warre; as it is in the nature of Weather. For as the nature of Foule wather, lyeth not in a showre or two of rain; but in an inclination thereto of many dayes together: So the nature of War, consisteth not in actuall fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is PEACE.<sup>14</sup>

21 And so, Sandro's contention that history and anthropology show that there are or have been stateless societies that have had legal systems and that "the historical presence of at least a peaceful and prosperous system of organisation of a community (a normative order) that was not based on centralised rule invalidates the Hobbesian thesis that such centralised power was necessary to overcome the 'state of nature'",<sup>15</sup> misses the point that particular instances of observable welfare among individuals living in stateless societies is not the criterion by which the success of the Hobbesian state should be measured. The primary point of the Hobbesian state is that long-term certainty is the condition for living life without the anxiety that comes with knowing that the only thing you know for sure is that life is uncertain. Life is solitary, poor, nasty, brutish, and short because in a state of nature, in a state without a common power keeping everyone in awe:

there is no place for industry, because the fruit thereof is *uncertain*: and *consequently* no culture of the earth; no navigation; nor us of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual *fear*, and *danger* of violent death".<sup>16</sup>

22 The italics are central here. The things *potentially* lacking in the state of nature are a *consequence* of uncertainty. Coming back to Sandro's point, notice that this is compatible, as historical record or anthropology may suggest, with the actual existence of human associations that did enjoy commodities for certain periods of time. Hobbes does not deny this. What he questions is the possibility of enjoying those commodities in the long-term. Conversely, he does not deny that actual states may fare poorly on morality, rights, fairness and so on. The question, rather, is whether stateless societies can establish the conditions under which individuals may plan their lives in advance with some degree of certainty towards the future.

23 So, I agree with Sandro that the state is not an unqualified good. But so do Hobbes, Locke, and Rousseau. The state is an instrument, a minimal condition for the secure creation, acquisition, and enjoyment of the things necessary for a predictable life.

24 There is an additional reason for doubting Sandro's depiction of contractarians as championing the state without qualification that is worth mentioning, even if quickly. To wit, that advocating for the state as condition for certainty, and for certainty as a condition for the emergence and securing of other goods and values, is compatible with accepting that some predictability can be expected in certain stateless human associations.<sup>17</sup> It suffices to say here that it is difficult to accept that such predictability can be expected once those associations grow to certain extents and, in any case, when they reach the size and complexity of modern nations. This means that there is a problem of scale in terms of the number of individuals one can reasonably expect to cooperate spontaneously, i.e., without centralised coordination of the kind the state is meant to provide. Given that Sandro does not put too much weight on this point, I will limit myself here to stating that not only for the kinds of philosophical reasons that contractarians offer but also as a matter of empirical record, we know that whereas cooperation can be expected in the absence of state apparatuses, such cooperation is limited in non-negligible ways. Consider, for example Chen and Deakin, who, by focusing on China, argue that alternatives to the rule of states, including interpersonal trust, closed networks, and authoritarian political control, "can only achieve limited scale and scope effects, and are prone to high deadweight costs arising from corruption

and the capture of the public sphere by private interests”.<sup>18</sup> In short, it may be the case that non-state societies are stable and non-arbitrary. Yet, once those groups reach a certain size and the relationships between their members reaches a certain complexity, it becomes more difficult to expect that cooperation will ensue. When such size and complexity — the size and complexity of contemporary nations — is reached, then centralised, clear, and long-term non-arbitrary rule becomes necessary.

### 3 The State and the Rule of Law

- 25 In what remains of this brief essay, I will give a more proper name to what I have thus far loosely referred to as predictability, certainty, and so forth: the rule of law. I will thus rehearse some connections between the state and the rule of law, connections which I see not merely as contingent, but as necessary. This leads me, towards the end, to agree with Sandro on the importance of the *ius/lex* distinction with one difference, namely, that in my view the divide is a constitutive function of the state. Following up on my reflections above, the claim, which will need more elaboration than I can provide here, is Hobbesian in spirit: the state may fall short of providing subjects with several goods and with incarnating important political and moral values. What it cannot fail to do to be considered a state, is to create the conditions for a predictable life. Whether this suffices to say that the state is committed to the rule of law depends on how demanding our conception of this value may be. Here, I take no side on that discussion, which requires being tackled elsewhere. Yet, this one element, predictability, shared by every rule-of-law scholar as essential to even the most minimalist or thin interpretation of the concept, is a necessary feature of the state. My disagreement with Sandro should then become visible: it is in the very terms of the function the state is supposed to fulfil — to replace the normative structure of an uncertain state of nature with a predictable civil state — that its actions should be evaluated. That minimal and basic rule-of-law function is a normative background — *ius* — against which state action — through *lex* — ought to operate.
- 26 Now, to say that *ius* is related to the rule of law and that the rule of law is a feature of every state, requires more specification, for the rule of law is a contested concept. Commentators often endorse either “thinner” or “thicker” versions of the doctrine, according to whether they see it as comprising more or less substantive subprinciples. Those championing thicker versions see the rule of law as a complex principle informing legal systems that include, for example, respect for human rights, dignity, or justice. Thinner versions are more concerned with avoiding conceptual stretching and thus limit the doctrine to the formal elements that make the law, the law. Those endorsing this view consider that the subprinciples comprising the doctrine include the requirement that laws should be general, clear, prospective, enforceable, public, and predictable.<sup>19</sup>
- 27 Yes, laws should be predictable, just like state action. This is where the connection between the state and the rule of law becomes visible. To make this clear, two things should be noticed. First, that the tenets informing thinner conceptions of the rule of law are also taken as necessary features of the rule of law by scholars endorsing thicker versions. This means that while thicker conceptions are more demanding in terms of the conditions that are taken as sufficient for the rule of law to emerge, they agree with thinner or functionalist conceptions that formal requisites are necessary conditions for

the ideal to obtain. In a nutshell, if you want respect for human rights, dignity, and so on, you also need predictability, stability, etc. Second, that irrespective of the differences between rule-of-law theories, this minimal agreement on the functional requirements of the doctrine signals an additional feature shared by all conceptions, namely, that power over others ought to be exerted non-arbitrarily,<sup>20</sup> and that non-arbitrariness means clarity as to who rules and how, in ways that allow individuals to plan their lives in advance with a certain degree of certainty — that the exercise of public power is made predictable.

- 28 This marks an agreement with Sandro's idea that *ius* should constraint *lex*, for the demand for predictability is precisely that: a demand — a normative background against which the holder of political power ought to exert it for it to count as discharging its function. Coming back to Hobbes, it ought to be stressed that, as I have mentioned above, this is precisely what is expected from the state. The very reason why individuals who “naturally love Liberty”<sup>21</sup> in the state of nature would be willing to give up on their right to all things and create a mortal good that keeps everyone in awe, is that they need certain common constraints for that freedom to be meaningful. The point of the state is its function, and its function is to make life predictable, as miserable as it may be in sundry other respects — to take subjects out of that condition where they are in a constant state of anticipation because the only thing you know is that you do not know how life is going to be tomorrow. This may not be enough for living a decent life, as substantivist rule-of-law scholars are adamant to claim, as history and anthropology may show, and as Sandro suggests. Granted. However, the possibility of life planning is a basic condition of non-arbitrariness, which in turn is a condition for the enjoyment of all these other goods. And it is in this sense that I claim that the state, and the Hobbesian state in particular, is a condition for the rule-of-law.

## 4 Conclusions

- 29 As anticipated above, my disagreement with Sandro is a minor point of contention with an argument the normative orientation of which I share — that the minimal condition for a state to emerge and operate as such is that it should create predictable conditions for the exercise of power. This is a rule-of-law function. From the perspective of their functions, all states — even the Hobbesian state — are bound by at least this rule-of-law purpose. In contrast to Sandro's argument in his intriguing book, the demand for predictability imposed on the state is *ius* constraining *lex*, legal otherness constraining state action.

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## NOTES

1. e.g., Lewis 2023; Jiménez (Forthcoming).
2. Sandro 2022: 10.
3. Sandro 2022: 10.
4. Sandro 2022: 11.
5. Sandro 2022: 11.
6. Sandro 2022: 11.
7. Locke 2012: 271.
8. Rousseau 2014: 91.
9. Rousseau 1997: 41.
10. Rousseau 1997: 41. My emphasis.
11. Hobbes 1991: 128.
12. Sandro 2022: 11.
13. Hobbes 1991: 87-88.
14. Hobbes 1991: 89.
15. Sandro 2022: 34.
16. Hobbes 1991: 89. Emphasis added.
17. Sandro 2022: 26.
18. Chen and Deakin 2015, 123.
19. For a critical overview of these two strands, see, for example, Bello Hutt 2022 and Tasioulas 2020.
20. Bello Hutt 2022: 4.
21. Hobbes 1991: 117.

## ABSTRACTS

Is the state necessary for the rule of law to emerge? Paolo Sandro thinks it is not. I, by contrast, think it is. The reason for my disagreement can be summarised as follows: Sandro misrepresents the contractarian narrative warranting the existence of the state's right to rule over its subjects. This leads him to conclusions potentially at odds with his concern for *legal otherness* and, by implication, for the rule of law. My suggestion is that there is no *legal otherness*, no *ius* constraining *lex*, no rule of law, without the state.

## INDEX

**Keywords:** Legal otherness, *ius/lex*, state, predictability, rule of law

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