A SEARCH FOR AN INTEGRAL VIEW OF LAW, THE STATE & HUMAN RIGHTS: COMPARING HANS KELSEN'S POSITIVISM, CARL SCHMITT'S REALISM & OTFRIED HÖFFE'S RATIONALISM

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ABSTRACT

A SEARCH FOR AN INTEGRAL VIEW OF LAW, THE STATE & HUMAN RIGHTS: COMPARING HANS KELSEN'S POSITIVISM, CARL SCHMITT'S REALISM & OTFRIED HÖFFE'S RATIONALISM

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The primary objective of this work is to develop *the (rationalist) thesis of integrity* or *the integral view* in the realm of legal-political thought. This view consists in the elaboration of the essential-conceptual interdependency of law, the political authority (i.e. the state) and the universal moral standpoint of justice (i.e. the standpoint encapsulated by the idea of human rights in our age) in a way avoiding the shortfalls of legal-moralism illustrated by the natural-law-theories. The rationalist thesis of integrity suggests that the elements within the complex nexus of the law, the state, and justice can neither be divorced from nor be assimilated into each other. This evidently refutes *the (positivist) thesis of separation* which breaks off the cord between law and the state, on the one hand, and the moral standpoint of justice, on the other hand. However, the thesis of integrity equally opposes *the theses of assimilation* whereby either law and political authority are assimilated into morality ("the moralist-naivety") or law and justice are assimilated into brute political force ("the realist-cynicism"). In brief, the integral view gives each element its due in the nexus of law, the state and the universal moral idea of justice (i.e. human rights). In this work, this view is strived to be deduced from a comparative critical-examination of three legal-political theories, each of which is taken as representing a particular approach beyond legal-moralism. These are Hans Kelsen's Pure-Theory-of-Law representing the positivist approach, Carl Schmitt's

Concrete-Order-Thinking representing the realist approach, and Otfried Höffe's Ethical-Philosophy-of-Law-and-the-State representing the rationalist approach.

Keywords: Law, the State, Justice as Human Rights, Legal-Rationalism, the Thesis of Integrity.

ÖZ

HUKUK, DEVLET VE İNSAN HAKLARINA İLİŞKİN BÜTÜNLÜKÇÜ BİR İZLEK ARAYIŞI: KELSEN'İN POZİTİVİZMİNİN, CARL SCHMİTT'İN GERÇEKÇİLİĞİNİN VE HÖFFE'NİN AKILCILIĞININ KARŞILAŞTIRILMASI

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Bu tezin esas amacı, hukuksal ve siyasal düşünce alanına dair *akılcı bütünlük tezini* ya da *bütünlük görüşünü* geliştirmektir. Söz konusu görüş, hukuk, siyasal otorite (yani devlet) ve evrensel ahlaki bir konum olarak adalet (yani çağımızda insan hakları fikri çerçevesinde tanımlanan konum) arasındaki asli-kavramsal ilişkiyi, doğal hukuk kuramları tarafından örneklendirilen hukuksal-ahlakçılığa düşmeden ortaya koymaya çalışır. Akılcı bütünlük tezi, hukuk, devlet ve adalet bağlantısı içerisindeki öğelerin ne birbirinden ayrılabileceklerini ne de birbirlerine massedilebileceklerini telkin eder. Bu, hukuk ve devletin ahlaki bir konum olarak adalet ile olan bağını çözen *pozitivist ayrılma tezinin* açıkça reddedilmesi anlamına gelir. Diğer yandan, bütünlük tezi, ya hukuku ve devleti ahlaka indirgeyen ("sofu-ahlakçılık") ya da hukuk ve adaleti kaba güce indirgeyen ("sinik-gerçekçilik") *massetme tezlerine* de aynı keskinlikle karşı çıkar. Kısacası, bütünlükçü görüş hukuk, devlet ve evrensel ahlaki bir ilke olarak adalet (yani insan hakları) arasındaki bağlantıyı her bir öğeye ona hak ettiği rolü vererek kurar. Bu çalışmada, söz konusu görüş, her birisi hukuksal-ahlakçılığın ötesine geçen birer yaklaşımı temsil eden üç hukuksal-siyasal kuramın karşılaştırmalı olarak eleştirel-incelemesi temelinden ortaya konmaya çalışılacaktır. Bu kuramlar, pozitivizmi temsil eden Hans Kelsen'nin Saf Hukuk Kuramı, Carl Schmitt'in gerçekçiliği temsil eden Somut-Düzen-Düşüncesi ve Otfried Höffe'nin akılcılığı temsil eden etik-temelli kuramıdır.

Anahtar Kelimeler: Hukuk, Devlet, İnsan Hakları olarak Adalet, Hukuksal-Akılcılık, Bütünlük Tezi.

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CHAPTER ONE
INTRODUCTION

In the penultimate chapter of Franz Kafka's most famous novel, *The Trial*, the priest of the cathedral narrates a very interesting parable about law[1]. The priest tells to Josef K., who tries hard to make sense of the legal-process he experiences throughout the novel, that there is a gate-keeper standing in front of the gate opening to law. A man from the provinces comes across this gate and asks for entrance. The gate-keeper responds "maybe latter, but not now". Habitually complying with what the gate-keeper says, the man from the provinces decides to wait until the permission for his entrance comes. However, the permission does not come for years, during which the man grows old. At the moment of his death, the man asks "I only wonder why no one else has come to the gate". The gate-keeper says "there is no need to wonder for that, because the gate is a private one for you". The man then wonders why he could not enter through his own private gate. As the priest interprets, the parable suggests an astonishing response to this question. The reason why man has not entered through his own gate lies not in that the gate-keeper has not permitted him, but just in that it has never come to his mind to enter through the gate without waiting for the permission. In narrating this parable to Josef K., I think, the priest does not help him to make sense of the legal-process he experiences. Rather, the priest makes Josef K. understand the only thing he can understand with regard to his legal-process: that it is really an absurd process that cannot be made sense of. In this way, I think, Kafka's text gives the insight that Josef K.'s experience of law turns out to be an absurd process, because his relation with law depends through and through upon the mediation of the political-legal authority (or, more precisely, of what he assumes to be the representatives of such authority). For, in the view of Josef K., law has a substance thoroughly derived

[1] I am aware of the fact that this well-known parable from Kafka is widely debated, especially in the context of a critical understanding of the workings of law. The recent literature surrounding the article has been set off by Derrida's reading presented in his "Before the Law" in 1982. I do not intent to develop a different interpretation or new insights concerning the foregoing parable. I will make use of it as a point of departure for designating a specific mindset concerning law and the state. For such a mindset, there can be no unmediated access to law. Law is merely what is made of it by legal-political authorities, rather than an objective source of norms. This is indeed to suggest that there is no category of "the judicial" beyond the category of "the juristical".

from the political-legal authority. His whole encounter concerns whether law should be known in advance or not; he never questions whether or not law can be traced back to somewhere beyond the political-legal authority.

If we look at one of Sophocles' famous tragedies, we will see that Antigone, the heroine after whom Sophocles named his tragedy, had a mood which is completely different from Josef K.'s perception of the relation between human subject, law and political-legal power. In Sophocles' tragedy, the king Creon commanded, out of wrath, that there would be no funeral for Polyneices the dead traitor. Yet, Antigone, the sister of Polyneices, opposed this command. For, she was convinced that a respectable burial for any person is a right by the natural law. This means that, for Antigone, a lady from the ancient Greece, law or, at least, a certain part of law was independent from political-legal power. Moreover, Antigone assumed that she had a direct access to the substance of this law, that is, an access not in need of mediation by political-legal authority. She thought that she knew by herself law well, and challenged the king on the very basis of law. Hence, it was not the political-authority that mediated between law and the ruled ones, but it was law that mediated between the rulers and the ruled. From her standpoint, law had such an independent status, because it referred to an extra-legal domain: to the domain of ethics providing the objective standards for human practice in all its aspects.

The remarkable difference between the attitudes of Josef K. and Antigone with respect to law can thus be encapsulated as follows: while the latter conceives law as an idea in symbiosis with ethics, which meant for her a set of objective (more precisely, inter-subjectively agreed upon) principles and values ordering our practices; the former does not conceive a necessary relation between law and certain "objective" normative-criteria. This way of putting the difference between Josef K. and Antigone explains the reason for the former's predicament, i.e. why he experiences law as an absurdity and perceives political-legal authority as a gang of bandits. This is because Josef K. is unable to evoke "objective" (i.e. all-binding) standards instructing the actions of both authorities and subjects of law. In the absence of such standards, he is caught within a zone of indeterminacy whereby he can not make sense of what he experiences. If Antigone was far from such a predicament (that is, if she could maintain that what she faces with is cruelty, i.e. a serious violation of law, rather than law itself), this is because she maintained the insight into the symbiosis between law and morality. We encapsulate this symbiosis

by the idea of justice, which is a moral idea considered to be a constitutive element of the idea of law and the state[2].

In juxtaposing Josef K. and Antigone, I don't mean to point out a contrast between the ancients and the moderns. Although both characters reflect the mindsets of their own ages and societies at certain points, they both are representatives of standpoints which are not bound to their own times and societies. For instance, the figure of Josef K. has an intellectual resemblance to the Sophists of the Ancient Greece; while Antigone's conception has kinships with the Thomist philosophy or with the rationalist political-legal philosophers of early modern ages, who have defended the necessity of supra-legal norms. What I want to highlight is, however, that there are basically two fundamental paths of thinking on law and the state. One path strives to account for the idea of law and the state in a symbiosis with the objective (i.e. all-binding) moral standard called justice (e.g. human rights). The other path tries to account for the idea of law and the state in a way questioning or disregarding the references to morality as a set of "objective" standards.

In this work, I strive to show the conceptual interdependency of law, the state and the universal moral standpoint of justice. As will be elucidated throughout my work, the moral standpoint of justice corresponds to the very principles and rules which are called human rights in our age. Hence, my purpose might perhaps be more precisely described as the elaboration of the conceptual-essential nexus between law, the state and *justice as human rights*. I will thus call the basic argument of my work as *the thesis of integrity* or *the integral view*. It is evident that this thesis opposes *the thesis of separation* which breaks off the cord between law and the state, on the one hand, and the moral standpoint of justice, on the other hand. Yet, it is important to note that the thesis of integrity also opposes, with equal strength, *the theses of assimilation* whereby either law and political authority are assimilated into morality (which is the extreme I call the moralist-naivety) or law and justice are assimilated into brute political force (which is the extreme I call the realist-cynicism). Hence, the thesis of integrity I will defend in this work aims at

[2] By using the phrase "the idea of law and the state", I emphasize the interdependency between law and the state. This is indeed a phrase I have borrowed from Otfried Höffe, whose modern-rationalist approach to law and the state will be examined in detail in Fourth Chapter. As we will see in the following chapters, the phrase "the idea of law and the state" does indeed imply one of the basic contentions I will try to defend in this chapter: that law and the state are not identical to each other but nevertheless two concepts necessarily presupposing each other.

giving each element its due in the nexus of law, the state and the universal moral idea of justice (i.e. human rights). In developing my thesis, I will critically engage with the works of the representatives of the alternative strands in the modern legal-political thought. I expect that, in consequence of such critical engagements, I will be able to articulate the most proper theoretical-philosophical standpoint which account for the nexus of human rights, law and the state in a viable fashion, i.e. in a fashion which would do justice to the complexity of this nexus.

The route and the method I will follow in my work will be substantiated in the following part of this section. Just before doing this, I should yet explain why the articulation of an integral view on law, the state and human rights should be put at the very top of the agenda of the contemporary legal-political theory. Let me start with a general observation with regard to our own age: that the controversy between two fundamental paths (i.e. the one illustrated by Antigone and the one illustrated Josef K.) are far from a resolution. Indeed, no previous age has been so cacophonic and full of contradictions *vis-à-vis* the visions of law and the state they harbored. Recall that, on the one hand, our modern age is, in a certain sense, the age of universal human rights. Despite the fact that modern period of human history encompasses such atrocious mass-human-rights-violations that were even unimaginable for the earlier periods of human history, the idea of human rights seems unchallengeable at the level of theory. That is, in the context of a system of international law founded upon various human-rights-documents, every one and every state should, at least, pay lip service to human rights, if one wants to be respected as a legitimate actor or institution. Underlying this obligation to pay tribute to human rights are both the proposition that human rights constitute objective (i.e. all-binding) standards of justice, and the subsequent proposition that only by reference to these standards can the concepts of law and state acquire their full meaning. In fact, as is evidenced by the American Declaration of Independence and the French Declaration of the Rights of Man and Citizen, both of which have been foundational for the establishment of the terrain of modern politics and public sphere, it is sometimes gone so far to contend that any actual entity which does not recognize and show respect for human rights does not deserve the title of an order of law and a state.

In the evidence of what I underline in the previous paragraph, one may presuppose that, at least at the level of theory, the moderns have an integral view of

law, the state (i.e. the political authority) and morality on the basis of the idea of universal human rights. However, this would be merely the half of the truth. For, normative relativism, not less than human rights, seems to be an essential pillar in modern discourses on law and politics. Once normative relativism, i.e. the view that there are no objective standards cross-cutting different zones of time and space, is embraced, there is no sense in the kind of theories establishing a necessary relation between law and the state, on the one hand, and a certain normative set of "objective" standards, on the other. Rather, within the theoretical confines of normative-relativism, law and the state are nothing but historical-positive constructions. Rather than being guided by a trans-historical and trans-social normative objectivity, such constructions may, at most, interact with (i.e. partially determine and partially determined by) a historically-socially specific normativity. Hence, for the relativistic conception of law and the state as historical-positive constructions, the central element is not the concept of justice as an objective (i.e. all-binding) standard, but the concept of sovereignty as the will creating its *own* (*particularistic*) standards and values. This explains how most atrocious tyrannies like the Nazi-yoke or the French yoke over Algerians could claim to be legal and political rule within the modern era. That is, normative-relativism and the conception of sovereignty it evokes have made possible to pass over in silence the tragic mass-human-rights-violations.

There are various strategies of thinking suggested for coping with the modern cacophony and contradictions concerning the relations between law, and the state and human rights. On the one hand, there are positivist and realist strategies of thought. The positivists rejoice, in the spirit of scientism, the separation of the theory of law and the state from moral philosophy. In this way, they assume, we can reach an objective-scientific account of law and the state –an account from which emotional evaluations, ideological biases, and etc are combed out. The realist, too, endorses the farewell to *the* moral philosophy as such. However, they contend, every legal-political order partially comprises specific morals of its own, i.e. its particularistic standards for what are right and what are legitimate. In the following parts of my thesis, positivist and realist strategies, which are the dominant approaches of our age, will be considered in detail.

The strategies of thinking that stand against positivism and realism can be located under the general label of legal-moralism. In most simple terms, legal-

moralism is the mode of thinking which considers law as correlative with morality. Hence, legal-moralism designates a really comprehensive mode which is expressed by various schools of legal and political philosophy. A good deal of such schools is designated as natural law theories. In the western world, the natural law tradition has been assumed to emerge with Plato, Aristotle and the Stoics in the Ancient Greek, and then continued with Aquinas' synthesis of Christian theology and the rationalist philosophy in the medieval era. Not surprisingly, the contemporary champions of the natural-law-idea, e.g. Heinrich Rommen, Jacques Maritain and A. P. d'Entrèves, are usually the intellectuals coming from a catholic background. Another version of legal-moralism is found in what is usually called as natural-rights-theories. The historians of thought usually date back such theories to Hugo Grotius and make it continue through early-modern philosophers like Hobbes, Locke, and Rousseau, up to Kant[3]. It has always been a serious point of discussion –particularly by the adherents of the natural-law-idea– that the natural-rights-theorists should be perhaps seen as forerunners or the founding-fathers of legal-positivist and even legal-realist strands of thought, rather than representatives of a specific version of legal-moralism[4]. Although I neither have to nor can engage into that debate at the moment, I want to note that there is a tradition known as natural-rights-liberalism which defends a vision of law and the state based on the respect for the moral idea of human rights. In fact, as the reader will notice, legal-rationalism which will be elaborated and defended in this thesis is built mainly upon the insights of the philosophers who are cited among natural-rights theorists. Despite this common ground of insights, legal-rationalism should be considered as a more improved version of legal-moralism in comparison to natural-rights-theories as well as to natural-law-theories. This is because it re-establishes the nexus between law, political power, and the moral idea of justice in an intellectual universe heavily influenced by positivist and realist mindsets.

It is important to hold in mind that there are different versions of legal-moralism, because certain versions of legal-moralism do not stand as a viable alternative. Straight out (or heedless) versions have serious drawbacks, particularly under the conditions of the modern age. By the term straight out legal-moralism, I mean those

[3] See, for instance, Rommen's *The Natural Law* and Tuck's *Natural Rights Theories.*
[4] For a forceful articulation of such contention, see Leo Strauss' classical work titled *Natural Right and History*. Strauss suggested that natural-rights theories necessarily lead to amoral-positivism and historical-relativism and culminate into a value-nihilism at the end.

versions which equalize legal value with moral value, i.e. which try to ground legal norms on the basis of "the moral good". However, because "the moral good" rests upon a comprehensive-metaphysical (religious or philosophical) edifice, to ground law on the basis of "the moral good" necessitates a unity in the comprehensive-metaphysical beliefs. As is an undeniable matter of fact, which constitutes the point of departure of contemporary political philosophers, like Rawls and Habermas, pluralism of comprehensive-moral-world-views marks the contemporary societies. Again, as is an undeniable matter of fact, such pluralism triggers normative relativism, which challenges the objectivity of any "moral good". When "the moral good" becomes fully private or subjective, it is not only unrealistic but also dangerous to expect that legal norms which should be by definition objective-public norms are to be founded upon "the moral good". For, moral norm may survive its meaningfulness even under the presumption that morality is purely a private-subjective matter concerning individual-conscience. Yet, this is not the case for legal norms, which comprises the threat of social-public coercion over individuals. That is, unlike the moral norm, the legal norm would amount to nothing but brutal force if it were not regarded as socially-objective (i.e. as normatively binding for all members of the society). Hence, straight out legal-moralism, i.e. the view that assimilates legal value to moral value, risks the very meaning of law as an objective-public form. Then, it is not surprising that legal-moralism, i.e. the natural-law paradigm, was much more popular and effective in pre-modern societies where there were both substantial unity of the comprehensive-metaphysical beliefs of the members, and hence presumption of the objective-social character of morals.

Another serious defect of straight out (or heedless) legal-moralism concerns its political implications: the question known as political paternalism. Political paternalism, which is a form of elitism for the sake of the ruled, is a recurrent disease showing up in legal-moralist paradigms since Plato. Its basic tenet is the assertion that the political authority should rule over its subjects as a father rules over his children –that is, it should rule like a benevolent educator and master. Political paternalism arises out of the assimilation of law and legality into morality. For, the function of morals is to make human beings virtuous; and, a straight out identification between law and morality leads to the severe mistake that law has the same function, i.e. that law should directly force individuals to be virtuous members of the society. It should be underlined that we do not talk here about the

much moderate suggestions, like that law or legal order provides a necessary condition for a virtuous life, or that there is something morally relevant in the very concept of law. To make clear what we speak of, let me recall one of its hard core illustrations in human history: Sparta, the ancient city whereby law forced the "virtuous alternative" in every aspect of individual life upon the members. In Sparta, how members should eat, sleep, mate, and etc. were inserted into the compass of determination by social laws. Indeed, this city should have been the principal source of inspiration for the most well known defender of straight out legal-moralism, i.e. Plato, who is also known with his insistence on the aristocratic state ruled by the philosophers as the best of political regimes. Anyway, the point is this: the assimilation of law into morality, which may also be called the over-moralization of law, brings about an undue authoritarianism and political inequalities with which we, the moderns, may not come into terms. For, as will be discussed in the following parts of my work, the modern mindset is grounded upon the presupposition of the principle of subjective freedom which evokes a fundamental equality of human beings in their moral capacity and political rights[5].

What I argue in the preceding paragraph also indicates that the usually held but naïve presumption, "the more moralized law is, the less coercive it is", is not true. Rather, the severity of coercion or power over the individual may aggravate to the extent that law is assimilated to morals. The naïve presumption disguising this insight stems from the fact that a quasi-Manichean intellectual tendency, according to which the moral good (as if it was the element representing the spiritual world of lightness) and power (as if it was the element representing the material world of darkness) are two pure-antagonistic elements that can in no way be infused into (i.e. synthesized with) each other, is prevalent in the modern intellectual milieu. What I want to emphasize is that such tendency has a potential to be very treacherous in terms of its political implications. To put it bluntly, it entails, though sometimes latently, political fanaticism. For, a quasi-Manichean mindset, which conceives the universe as the battleground for "the pure good" and "the pure evil", can judge a

[5] I strongly recommend Luc Ferry and Alain Renaut's works elaborating the distinctiveness of the modern mindset in recognizing human beings as the authors of any standard of objectivity (e.g. truth, moral rightness, political right, and aesthetic beauty) in all aspects of their life-world. Particularly, I want to cite Ferry's *Rights: The New Quarrel between the Ancients and the Moderns*, *Homo Aestheticus: The Invention of Taste in the Democratic Age*, and Renaut's *The Era of the Individual: A Contribution to the History of Subjectivity*, as well as Ferry and Renaut's short article titled "How to Think About Rights?" which is, indeed, a resume of their general thesis on distinctive features of the modern mindset and its basic moral-political implications.

political rule only in one of these extreme modes: either demonizing it as the absolute tyranny (the mode of the anarchist) or apotheosizing the existing political order as the heaven within the world, i.e., the regime without yoke but only the rule of the right (the mode of the strict-conservative[6]). Here, I will not prolong such discussion on the legal-moralist's naivety in conceiving law and power as two antagonistic purities. To state, at the very beginning, my own position which will be elaborated in the latter parts of my thesis, I defend the legal-rationalist thesis that highlights power as an integral element of law, besides the element of rightness. In passing, nevertheless, I want to remark that, in the 20th and 21st century, radical theorists like Benjamin, Derrida and Agamben –who, in my view, strive for a philosophical substantiation to the Kafkaesque judgment of law and the state as nothing but an absurdity– theoretically exploited the legal-moralist's naivety so as to present a general critique of law and the state. That is, they underlined the element of power (force) within law in a one-sided manner, identified force inherent in law with violence, and then they suggest to transgress (or to dispose of) "the violence-producing law and the state"[7]. I think that legal-moralist view is really vulnerable in the face of these authors' critiques. Yet, whether or not their critiques hold also for the legal-rationalist vision I will hold forth is another question. I expect that, once the rationalist view of law and the state will have been explicated in detail in the following parts of this work, the reader will agree with me on the point that the latter question deserves a definite "No!".

In regard of straight out legal-moralism, there is yet one more defect I want to underscore. Again, this stems from the strict assimilation of law and morals. Besides the over-moralization of law, such assimilation also incurs the risk of the deterioration of morality. For, morality stands as a meaningful practice only on the condition that individuals are considered as the authors of their actions, i.e. as persons *freely choosing* the moral path or its reverse. To sanction morals by law

[6] For instance, I would be not surprised to learn that the *Ulema*, the religious-ruling elite in Iran, have such an apotheosizing view *vis-à-vis* the Iranian state, not simply because Iran is the birthplace of Manichaeism, but also because Platonic legal-moralism, interpreted from the perspective of Islam by the philosophers like Al-Farabi (Alpharabius), seems to be still very effective in Iran. In this vein, it would be very interesting to investigate to what extent Al-Farabi's *El-Medinetu'l Fazıla* (which literally means "the virtuous city") have been a source of inspiration for the construction of Iran's current regime.

[7] See Benjamin's "Critique of Violence", Derrida's "Force of Law: The "Mystical Foundation of Authority" and Agamben's *Homo Sacer: Sovereign Power and Bare Life* and *The State of Exception*.

means converting morality to a practice externally (socially) forced upon man and woman. This means the collapse of the distinction between the moral point of view (the deontological point of view which instructs to act in accord with duty for the sake of duty itself), on the one hand, and pragmatics and prudence (which are consequentialistic standpoints of evaluation), on the other hand. In this way, we would lose, indeed, the genuine moral point of view. This is why Kant, who defended ardently the supremacy of the moral point of view in relation to all theoretical and practical considerations of human reasoning, has also ardently opposed the view that suggests making law a servant of morality[8].

I think that above sketch of the drawbacks of straight out legal-moralism suffices to prove that such a vision is incapable of providing a convincing theoretical framework for the nexus of law, the state and the moral standpoint of justice. This incapability aggravates in the cases of modern or contemporary political-social societies which are marked by a plurality of worldviews co-existing within them. Therefore, it is not surprising that straight out legal-moralism seems at the verge of withering away in our age. In the face of the undeniable fact that the substantial unity of the comprehensive-metaphysical (religious and/or philosophical) beliefs held by the members of a given society has been lost in modern times, even those who do otherwise find such moralism normatively desirable cannot dare to present it as a viable political-legal paradigm for modern-contemporary political societies. To give an example, let me cite Alasdair Macintyre who may be taken as an admirer of the legal-moralist (i.e. the Christian natural-law) paradigm of the past. He argues that "what matters at this stage is the construction of local forms of community within which civility and the intellectual and moral life can be sustained through the new dark ages which are already upon us" (Macintyre, 2003: 263). In a romantic mode, Macintyre concedes hereby that there is no way to instaurate moralism of the past at the macro level of modern societies. Hence, even for this ardent defender of the moralism of the past, a straight out moralist should now content with non-legal forms of social regulations instantiated by small communities.

[8] *The Metaphysics of Morals* stands as the systematic exposition of Kant's political-legal philosophy. Beside this essential text, certain themes concerning law, the state, and politics are discussed also in articles like "Perpetual Peace", and "Theory and Practice". Such articles are edited in *Kant: Political Writings (Cambridge Texts in the History of Political Thought)*.

Having dismissed straight out legal-moralism as a viable approach to law, the state, and the moral standpoint of justice, I will examine, in this work, three alternative approaches, more precisely three theoretical endeavors each illustrating one of the three major modes of thinking in contemporary legal-political theory. These theories are Hans Kelsen's pure theory of law instantiating legal-positivism, Carl Schmitt's concrete-order thinking instantiating legal-realism, and Otfried Höffe's critical philosophy of law instantiating a modern-Kantian version of legal-rationalism. These theories are, respectively, to be exposed to the basic question: to what extent can they provide a coherent account of our legal-political experiences (i.e. the domain of experience founded upon the concepts of law, the state and the moral standpoint of justice)? I want to emphasize that I will take each of these theories, in the hermeneutic sense, as a horizon of understanding. I will thus try to penetrate into these horizons as much as possible, and then interrogate and judge them basically from a standpoint immanent/internal to these perspectives. Particularly with regard to two essential points, however, I preserve my right to bring forth extra-textual considerations and criticisms. First, I will hold that a tenable approach to law and the state should be one that genuinely-reflectively *understands* the legal and political experience as such. To reflectively understand a form of human practice consists in expounding the constitutive-general propositions and the fundamental motivation underlying the actions of the actor of such practice. I do hereby not mean simply that a tenable approach should adapt the perspective of the participant rather than that of the observer. I rather mean an approach that can *make sense of* the domain of law and the state. I will hence dismiss any "objectivist" explanation which displays this domain as loaded with illusions or delusions. For, as will be elaborated in this thesis, such "objectivist" forms of explanation might have some virtue as sociologies of law; but they are not creditable as theory of law and the state proper (i.e. philosophy of law and the state as such) which is a branch of practical philosophy. As a second but not less important point of reservation, no matter whether an approach affords a particular significance for human rights or not, I will confront the approach in question with the idea of universal human rights in any case. Here it is important to underline that the foregoing idea is the *moral* idea encapsulating the modern conception of *justice*. Hence, even in the case that an approach gives no central significance or even no significance at all for the relation between the moral standpoint of justice and law, I

will move this relation into the centre of my discussion and probe what kind of assumptions concerning morality and ethics (i.e. the moral theory/philosophy) lie behind such dismissal.

Thus, the major question I ask in this thesis can be formulated as follows: **how should we conceive the relation between law, the state (i.e. the political authority) and the moral standpoint of justice encapsulated in the idea of human rights?** I should now sketch the way through which I will proceed to find an answer to this question in my thesis. This sketch will, at the same time, provide my reasons why I choose to develop my answer on the basis of a critical examination of aforementioned theoretical endeavors.

In Second Chapter, I will examine Kelsen's pure theory of law as a version of legal-positivism. Because legal-positivism has been the approach that marks the literature on law since the 19th century (i.e. since the retreat of legal-moralist paradigms of natural law and natural rights) it is very natural to set out by examining the legal-positivist perspective. As will be elaborated in a very detailed fashion in this thesis, legal-positivism is the approach which –in opposition to the legal-moralist traditions of natural law and natural rights– suggests a strict separation between jurisprudence (i.e. the theory of law) and ethics (i.e. the theory of morality). In line with the scientism and the distaste for metaphysics characterizing the positivist mood of thinking, its influential representatives come usually from the Anglo-Saxon (i.e. analytical) tradition of thought. Among these theoreticians, the most prominent ones may be cited as Jeremy Bentham, John Austin, and H.L.A. Hart and his pupil Joseph Raz. However, this list of the prominent theoreticians of legal-positivist creed would remain deficient, unless an important figure coming from the continental tradition of thought, namely Hans Kelsen, is added to it. In elaborating the legal-positivist perspective on law, rights and the state, I have chosen to examine particularly Kelsen among a good many authors championing legal-positivism. For this, I have two basic reasons. First, Kelsen elaborates the most philosophical defense of legal-positivism, and hence provides the most comprehensive and integrated presentation of positivist outlook as a vision of legal, moral and political practices. Second, in line with the first reason I just stated, Kelsen's pure theory is the most meticulous and outspoken version of positivism in working out its implications.

As will be elaborated in the forthcoming chapter, Kelsenite legal-positivism positions itself against two antagonistic extremes: legal-moralism, on the one hand, and legal-realism on the other. On the one hand, it disavows the possibility of a universal-moral standpoint defining and justifying the essentials of law. In this respect, its basic objective is to account for law in a way that casts out any metaphysics. On the other hand, Kelsenite legal-positivism emphasizes the *normative* quality of law and hence opposes the realists' reduction of law into socio-historical facts. My examination will show that Kelsenite positivism fails precisely in both of these front lines. First, it is, in fact, based upon certain metaphysical positions. To state explicitly, Kelsen's dismissal of the moral idea of justice from the scope of the pure theory of law is founded upon moral emotionalism and radical moral relativism, which are, indeed, no less "metaphysical" than moral cognitivism and moral universalism. Second, Kelsenite positivism could never securely establish the quality of law as a *normative* practice (i.e. a practice that is more than a function of socio-historical power relations), precisely because it disavowed the possibility of a universal-moral standpoint defining and justifying the essentials of law.

As will be elaborated in Third Chapter whereby Carl Schmitt's political and legal theory is analyzed in detail, the very interrogation of the *normative* quality of law as a practice *qualitatively* distinguishable from all other forms of power is the mark of legal-realism. Originally, legal-realism was championed by the American school of jurisprudence (as it was inspired by the Justice Oliver Wendell Holmes and then continued by authors like Karl Llewellyn and Jerome Frank) and the Scandinavian school of jurisprudence (as it was founded by Axel Hägerström and then continued by authors like Alf Ross and Karl Olivecrona) in the earlier decades of the 20th century[9]. Due to the fact that, like legal-positivism, legal-realism is based on the dismissal of a universal-moral standpoint defining and justifying the essentials of law, it is sometimes mistaken for legal-positivism. In the face of such confusions, it should be foremost stressed that legal-realism is an approach which has established itself in a confrontation with legal-positivism at certain essential points. Let me try to sketch the realist confrontation briefly. Legal-realism emphasizes the indeterminacy as an inherent characteristic of law. In the view of the realists,

[9] For articles providing introduction to these two legal-realist schools, see Leiter's "American Legal Realism" and MacCormack's "Scandinavian Realism".

classical positivist approach is crucially defective in taking *norm* as the essential element of law while what really matters is the element of *decision* on the concrete case. A legal norm is, by definition, a *general* rule; and there is an abyss between the general rule and the concrete case to which it may be applied. Only a decision which is always particularistic can bridge this abyss between "the norm" and "the real". As we will see, this is not simply a mere philosophical-theoretical proposition suggesting a nominalist rather than a rationalist standpoint, but a proposition of cardinal importance in terms of its consequences *vis-à-vis* the nature of the categories of "the legal", "the political", and "the moral" and the relation between these categories. Here I will limit myself to note that such an emphasis on the priority and/or superiority of decision over norm leads to blurring of the distinctions between "the legal", "the political" and "the moral" –the very distinctions to the maintenance of which legal-positivism has been hypersensitive. For the legal-realist, law is something in which moral and political convictions of those who decide upon it fuse. Indeed, in regard of the legal-moralist or the legal-rationalist proposition that there is a universal-moral standpoint defining and justifying the essentials of law, the legal-realist attacks basically the *universalistic* presumption while the legal-positivist attacks the mingling of law, morality and politics. In plain words, legal-realism suggests a conception of law as an instrument for some extra-legal (e.g. social, moral, cultural, political, etc) ends and/or values, rather than a *normative* system possessing a degree of autarchy (i.e. possessing certain intrinsic ends/values and its own ways of working-out) in relation to the social context within which it is embedded. That is, legal-realism suggests that the idea of law as a *closed* normative system (a system working out in a mode of more or less independency from moral-political considerations of its operators) is nothing more than the *formalistic* fiction or myth underlying legal-positivism. It may be added that this realist enterprise to demystify law is being today championed by the school of the critical legal studies (CLS) founded by authors like Duncan Kennedy and Roberto Unger. Reading legal-realistic premises on law in the light of the social-political critique of modern societies provided by the Frankfurt School and post-structuralism, the CLS aims to develop a radical left-wing standpoint on legal practice[10].

[10]For a brief introduction to the CLS and its close relation to the American legal-realism, see Mark Tushnet's "Critical Legal Theory".

As for my choice of examining Carl Schmitt's theory as the exemplar of legal-realist approach, I should concede that it does not stand as natural or unsurprising as my choice of examination of Kelsenite theory as the exemplar of legal-positivism. For, although Schmitt was actually a scholar of public/constitutional law, he has been widely received as a political theorist. Indeed, he is one of the most discussed figures of political theory in the 20th century, while he is rarely cited in the context of legal philosophy or legal theory[11]. It might be suggested that this partly stems from the fact that Schmitt's works focusing specially on law, e.g. *Constitutional Theory*, are more voluminous and hard to access in comparison with his pamphlet-like works focusing on political theory –a fact which is evidenced by the time-interval between the translations of the former category of works into English and that of the later category of works. Yet, I think, the essential reason for the eclipse of Schmitt in the domain of legal theory is rather different. He was a figure who has been somehow affiliated with the Nazis, and who was sometimes called as the crown jurist of the third Reich. Hence, the legal philosophers/theorists of the post world war era should have found it appropriate to leave such a man with bad assets out of consideration. That is, they should have thought that there can be nothing to be learned about law from a man who could be somehow affiliated with the Nazi regime. However, I certainly do not think that there is nothing to be learned about law and the state from Carl Schmitt as a political-legal theorist. As we will see in this work, Schmitt is probably peerless in providing a philosophical reconstruction and defense for following legal-realist credos: the essential indeterminacy of the general rules *vis-à-vis* particular cases, the importance of the category of decision and of the role of men and/or women authorized to decide for the maintenance of the legal-political process (i.e. the suggestion that "the judicial" is indeed "the juristical"), and the inevitable interference/entanglement of moral,

[11] In his article "Controversies over Carl Schmitt: A Review of Recent Literature", Peter Caldwell accomplishes a substantial job in reviving the enormous literature on Carl Schmitt. This article, which is a very good way of entry into the debates on Carl Schmitt, evidences the fact that Schmitt's theory of law has been either ignored or, at best, given a secondary importance in relation to his political theory. Only such exceptional authors as David Dyzenhaus, William Scheuerman, Erst-Wolfgang Böckenförde and Peter Caldwell himself give due importance to Schmitt's theory of law as well. However, even these authors do, to a great extent, seem to read Schmitt's theory of law as an eccentric (or *sui generis*) one, rather than a particular edifice within one of the pivotal schools of legal theory, namely legal-realism. Hence, although I have learned much from what these authors wrote on Schmitt's theory of law, my interpretation essentially differs from all of them in reading this theory as an edifice illustrating the legal-realist school of thought.

political, cultural, and economic considerations into the domain of law[12]. That is, Schmitt is not simply one legal-theorist formulating and defending the credos of legal-realism mentioned above; he is a theorist/philosopher of a more general level whereby the whole human-social universe is considered upon on the basis of the tenets of realism. In line with this, Schmitt's theory stands as one of the philosophically strongest defenses of realist approach. Furthermore, if Schmitt's practical affiliation with the Nazis does not simply stem from pragmatic motivations but has a doctrinal basis, this makes his theory as the exemplar of legal-realism all the more important because certain probabilities within the practical horizon of realist approach are hereby revealed. At least, this will show us that the very legal-realist premises, from which the CLS infers radical left-wing practical consequences, might also lead to authoritarian and even fascistic consequences in the hands of an author embracing different moral-political motivations.

In my examination of Schmitt's political-legal theory, it will be unearthed that his realist mode of thinking basically comprises of an invocation to re-bridge the domains torn apart from each other by legal-positivism. That is, Schmitt's legal-realism indeed tries to repair the torn apart connections between law and political reality, and law and social-moral values. In re-establishing the former connection,

[12] I should immediately restrict my suggestion to conceive Schmitt as a philosophical protagonist of legal-realism to the case of American legal-realist school. For, as Brian Leiter stated, this school which is comprised mainly of lawyers and social scientists is devoid of a substantial philosophical reconstruction and defense (Leiter, 2006:50). On the other hand, the Scandinavian legal-realist school is saliently founded upon a certain anti-metaphysical standpoint on semantics and epistemology –a standpoint which is illustrated by the logical positivism of the Vienna circle. This standpoint required refusing such notions as the will or the command of the state which conventional theories considered as underlying legal rules (MacCormack, 1970:34). For the Scandinavian legal-realists, a law should be conceived simply as a *directive* –i.e. a prescription which is dependent neither upon a value underlying this rule, nor upon a will (an intention) ascribable to the author of the prescription. In their view, what really matters for the legal theory is merely *the fact* that there is a directive. The questions whether this directive is right or wrong, and whether its application in the case at hand will lead to desired or undesired consequences are in no way the legitimate concerns for the legal theorist. Such a research program is definitely incompatible with the philosophical framework within which Schmitt develops his realist conception of law, because this framework is definitely based on the notions of the will and the command of the sovereign. Indeed, from the perspective of the Scandinavian legal-realist, Schmitt's theory would probably seem no more than a subjectivist metaphysics from which legal theory proper should be cleansed of. However, it should be emphasized that beside this opposition (i.e. beside the opposition between an inhumane indifference for values and wills underlying laws on the part of the Scandinavian realists, and a Nietzschean self-assertion of values and wills by the political power on the part of Schmitt), both the Scandinavian realists and Schmitt agree on the realist conception of law as a precept (not a general norm) by the authorized men and/or women. This constitutes, at least, an initial warrant for searching a philosophical account of legal-realism in somewhere else than the prosaic (or arid) one offered by the Scandinavian scholars.

he emphasizes the concept of sovereignty as law-constitutive power and the ever-present role of political authority in maintaining the legal order. In re-establishing the latter connection, he emphasizes the central importance of the concept of legitimacy as a supra-legal standard in opposition to the legal-positivist identification of legitimacy with legality. Despite its strive for all these repairing, however, Schmitt's legal-realism follows legal-positivism at the point of tearing apart law and the question of *Right* (i.e. *Truth* as it applies to the spheres of human practice) with the capitalized "R". Interestingly, legal-realism agrees with legal-positivism at the point of embracing moral relativism. As a result of moral relativism, legal-realist "achievement" consists less in connecting law, morality and politics to each other than in attributing to the established political-social authorities a role to regenerate all that is to be counted as legal and moral value. In such a situation where every value is determined by the will of the commander and where there can be no *unsurpassable* standard (e.g. human rights) independent from the will of the commander, the question "how the rule of a sovereign is to be distinguished from the yoke of the head of a gang" cannot be answered adequately. In this way, Schmitt's legal-realism with its claim to repair the torn apart connections leads us to a *cul-de-sac* (i.e. a dead end) which is not more encouraging than what legal-positivism suggests.

In Fourth Chapter, I will present and discuss Höffe's ethical theory of law and the state as an exemplar of the approach I call modern legal-rationalism. At first, I should underline that there is not a school of legal thought established and recognized under the title of legal-rationalism, in the sense that there are legal-moralist, legal-positivist and legal-realist schools. By the label modern legal-rationalism, I refer to a specific mode of thinking distinct from each of these three schools. In opposition to legal-positivism and legal-realism, on the one hand, legal-rationalism is a non-relativist ethical approach conceiving law as founded upon certain *universal-moral* principles. In opposition to straight out legal-moralism, on the other hand, legal-rationalism is based on the insight that the moral principles founding law, i.e. the moral principles of the Right, should not be confused with the moral principles of the Good. To give an initial sense for what will be elaborated in Fourth Chapter: the domain of the Right concerns the moral and prudential principles of human collective existence (i.e. the principles of justice), while the more general domain of the Good concerns all that a human being should value in

her life. Except the sub-class designated as the category of "morally right", the category of "morally good" presupposes the non-existence of an external enforcement over moral subject for its realization. In the case of the sub-category of "morally right", it is due and, indeed, a must to publicly enforce them *via* law. In line with this, legal-rationalists such as Höffe maintain that law is a category within the compass of practical reason while they also distinguish law from morality understood in its comprehensive sense as the creed of what is good and valuable in human life.

Although some germs of modern legal-rationalism may be found in various authors of the natural rights tradition (e.g. Hobbes and Rousseau), its first self-conscious and systematic exposition is achieved by Kant's political-legal philosophy, as it was presented in his *Metaphysics of Morals*. It is then no surprise that I find a contemporary representative of this approach in such an author as Otfried Höffe on whom Kant's impact is obvious[13]. My examination of Höffe's rationalist political-legal philosophy will explicate that his approach can be best conceived as a strove for accounting for the symbiosis between the concepts of justice (as the moral standpoint encapsulated by human rights), law and the state (i.e. the political authority). Likewise, the verification of three hypotheses constitutes the backbone of his legal-rationalist program of philosophical search: (1) that there are objective (universal) standards for collective human life, which we call political justice; (2) that these standards (which turn out, in closer inspection, nothing else than human rights) constitute the essence of the reciprocal coercion which we call law; (3) that the state arises as a necessary moment of these reciprocally coercive relations, which is to say that it is political justice that defines, legitimates and also limits the state power. As will be elaborated Fourth Chapter, Höffe works out this search in a way employing synthetically the insights of modern natural right theory, of Kant's practical philosophy and of the rational choice theory.

In concluding my examination of Höffe's rationalist theory of law and the state, I will argue that it has a remarkable success in explicating the complexity of

[13] At this point, I should also cite Arthur Ripstein as another contemporary figure whose theory of law and the state fits well with what I call modern legal-rationalism. In my examination of Höffe's theory, I will, at certain points, refer to Ripstein's articles as works well-explicating legal-rationalist insights on law. In fact, if Ripstein's book, *Force and Freedom: Kant's Legal and Political Philosophy*, which was published in October 2009, were available to me earlier, I could have considered studying Höffe and Ripstein simultaneously in Fourth Chapter.

intersections between law, the state and justice (as human rights). In Fifth Chapter, I will recapitulate the achievements of modern legal-rationalism in frank comparison to the alternative approaches of legal positivism, legal-realism and legal-moralism. However, I will maintain that there emerges an obvious lacuna in such versions of legal-rationalism as Höffe's to the extent that they expel the cases designated by *the reason of the state* (*raison d'état*) out of the theoretical-philosophical account. Emphasizing certain negative consequences of the strategy to expel out such cases, I will suggest that it is both desirable and also possible to enhance modern legal-rationalism so as to account for the cases of *the reason of the state* as well. More precisely, I will work up an admissible conception of *the reason of the state* –a conception which is tied up with the rationalist understanding of *the reason for the state* (*its raison d'être*)–, in order to provide an upgraded legal-rationalist account whereby the nexus of "the legal", "the political" and "the moral standpoint of justice" is established in a more delicate fashion. In other words, in the concluding sections of my work, I will propose that a legal-rationalism with a realistic proviso will be best serving for our quest to account for the interdependent set of relations between human rights, modern law and the state. This proviso consists in the acknowledgement that the state –insofar as it is the institution responsible for the maintenance of the legal-normative order which is to realize justice in the mutual affairs of members of society– has a dimension which cannot be subsumed under the category of "the legal", but can only be judged morally and prudentially in the very terms of remaining loyal to the cause of justice (i.e. human rights) and following the prudent tract for the achievement of this cause. Indeed, the proviso I bring forth is not simply compatible with, but furthermore prescribed by *the thesis of integrity* underlying the legal-rationalist schema of thought, because this thesis suggests that the elements within the nexus of the legal, the political authority (i.e. the state) and the moral standpoint of justice (i.e. human rights) cannot be assimilated into each other as well as they cannot be divorced from each other.

CHAPTER TWO

KELSENITE LEGAL-POSITIVISM: AN UNSTEADY POSITION SHUTTLING BETWEEN LEGAL-MORALISM AND LEGAL-REALISM

In this chapter, I will examine Kelsen's Pure Theory of Law which stands probably as the most systematical, comprehensive and philosophically-informed endeavor within the tradition of legal-positivism. One may even argue that Kelsenite theory is the most influential legal theory of the 20th century, particularly in the continental Europe. In line with the objective of my thesis, I will particularly focus on the way Kelsen accounts for the concepts of law, state and rights, and the manner he articulates these concepts to each other. I think that precisely because it is the most systematical, comprehensive and philosophically-informed version, Kelsenite theory has the virtue of making explicit the full implications of legal-positivist strand *vis-à-vis* these concepts and their articulation to each other. In other words, with a doctrinaires' honesty, Kelsen's theory reveals the explosive suggestions of positivistic approach, which might remain hidden in other versions of legal-positivism.

Throughout my examination, I will draw substantially upon his two major works whereby he most systematically elaborates his theory: *The Pure Theory of Law* and *General Theory of Law and State*. I will also refer to various others works in cases where it will contribute for a more exact understanding of Kelsen's standpoint on certain points. Among these other works, *Introduction to the Problems of Legal Theory* and some of his essays he himself edited in *What is Justice?: Justice, Law and Politics in the Mirror of Science* will be particularly relevant to my investigation.

At first, I will outline the Neo-Kantian philosophical-theoretical ground upon which Kelsen builds his conception of law. I will then engage in a substantial analysis of the Pure Theory of Law. I will pay particular attention to how he accounts for the concepts of right and duty. A further step will be the examination of Kelsen's conception of the state, which arises directly as an emanation of his legal theory. As we will see, his conception of the state comprises criticisms of many insights of traditional theories of the state, i.e. both of liberal-moralist and of

realist doctrines. This conception culminates in quite new and pretentious views concerning both the status of basic rights in legal orders and the nature of sovereignty. I will then consider Kelsen's arguments on the democratic form of legal orders. Thereby, my intention is to show that Kelsenite vision becomes paralyzed at the very moment it comes to the shore of politics. In concluding my examination, I will suggest that Kelsenite legal-positivism fails to provide a satisfactory articulation of law, state and basic rights. I will claim that this is due to his radical relativism on the question of values –a radical relativism which forces him to deny practical reasoning *in toto*. Moreover, I will argue that the very Kantian-transcendentalist method Kelsen follows is incompatible with such a radical relativism. It rather points out a substantial legal-rationalism, though not to a legal-moralism of the kind we find in Natural-Law Doctrines. Because Kelsen has the conviction that practical reason is a completely fake idea, his instance on the normativity of law designates, at the last instance, an unsteady position that shuttles between legal-moralism and legal-realism. I will discuss much about Kelsen's foregoing conviction in Chapter Four where I consider Höffe's Kantian-rationalist approach. Before this, however, Chapter Three will present an examination of Carl Schmitt's realist approach, which suggests that all normativist positions on state and law, i.e. any version of legal-moralism and legal-rationalism as well as Kelsenite positivism, are indefensible.

II.1. Philosophical Framework of Kelsenite Theory of Law: A Neo-Kantian Search for Going beyond the Duality of Natural-Law Dogmatism and Empirico-Skepticism

Among many legal and political philosophers, it is a point of convergence that Hans Kelsen is one of the most, even maybe the most, important legal theorist of the 20th century. Kelsen is rightfully considered as a loyal representative of legal-positivism. However, his work is so intensely based on certain philosophical (mainly Neo-Kantian) insights that one has to pay particular attention to its philosophical basis, so as to achieve an accurate understanding of the distinguishing characteristics of Kelsenite theory in the face of alternative theories, even of other legal-positivist theories. Therefore, I think, it will be most convenient to begin with outlining his philosophical perspective at first. Such an outline will help us in our

hermeneutical endeavor to understand properly the substance of his theory and the conceptions of law, state and basic rights developed within this theory.

In the introductory parts of almost all his works, Kelsen never gets tired of underlining that the pure theory of law he develops is a theory of "law as it is", not a theory of "law as it ought to be". By this statement, he evidently takes as his target the tradition of Natural-Law theories. In his view, these theories have failed, at least, at two basic points which are essential for any adequate theory of any social phenomenon. First, because of the metaphysical character of their mode of thought, the Natural-Law theories could not give an adequate account of the very phenomenon that is the object of their inquiry. That is, they have failed to explain actual systems of human law *as they are experienced by ordinary actors*. Second, they have confused a cognitive interest to the object of thought with an emotional interest and, thus, turned out to be ideologies. I will return to the second point in the latter parts of my examination; it is essential now to focus at the first point.

In view of Kelsen, Plato is not only the founder of the Natural-Law tradition. Also, his theory of Images (or Forms) is paradigmatic for Natural-Law theories (Kelsen, 2006:421). This theory is a result of Plato's desire to penetrate into the essence of things, that is, to comprehend what lies as fundamental behind things. Plato postulates a sphere beyond experience, i.e. a "world of ideas" beyond the "world of experience", which consists of the perfected forms (or "absolutes") of the worldly entities. This world of forms Plato invents is foundational for the experienced world both in the existential (ontological) and ethical sense. The world of experience emanates from, and imitates, the world of forms. The natural entities are nothing but somehow distorted images of the original forms. To the extent that they approximate their original forms, they not only conform to the natural order of things, but also gather way in their perfection. Thus, for Plato, true knowledge of a thing requires an insight into the form of this thing. Any inquiry into the "is" of a thing is also an inquiry into the "ought" of it, because the perfected form stands also as *telos*, ultimate cause and purpose of the entity. It should be emphasized that this is true much more in the case of inquiry into the laws of states than in any other inquiry; for, Plato associates law with the form of Justice and the categories of good/bad or just/unjust. The more a state's positive law approaches this perfect form of law called Natural-Law, the more it deserves the title of law; hence, the more diverges from it, the less. This Natural-Law is a non-positive (not-posited)

law having absolute validity. Kelsen thinks that, despite revisions, this essentially Platonic metaphysics has continued to serve as the basis of all subsequent Natural-Law theories.[14] For him, such Platonic mode of thinking designating Natural-Law tradition is a version of metaphysical absolutism. What is fundamentally wrong with the metaphysical absolutism is this: it attributes objective reality to what in fact stems from a subjective basis –in this case, from subjective evaluations concerning the right (the good) and the wrong (the bad)– and replaces the existing object with this imagined thing considered as the genuine object, i.e. hypostatizes/reifies the imagined thing. More precisely, Natural-Law philosophers posit certain absolute values as the basis of a true form of law and, then, claim objective validity for them by arguing that they are immanent in the order underlying the experienced world.[15]

By the 19th century, the shortfalls of Natural-Law Doctrine have given rise to a fully different mode of jurisprudence. This new mode which Kelsen calls "sociological jurisprudence" denunciates the conception of jurisprudence as an ethical science and pursues a program for explaining legal phenomena exclusively

[14] It will be convenient here to note that Aristotle's critique of Platonic theory of Images cannot be pointed out against Kelsen's foregoing arguments. Insofar as Aristotle does not renounce the Platonic theory of forms but only reconstructs the relation between forms and particular beings in nature, he should be considered as developing, not renouncing, the essentially Platonic doctrine of Natural-Law. Moreover, one should add that, from the standpoint of the Natural-Law Doctrine, Aristotelian revision is a real improvement in that it better explains the way the Natural-Law can be realized in the political regimes of this world. But, what remains highly disputable in Kelsen's generalization is that he always seems to be blind to the crucially important distinctions between Natural-Law doctrines and Natural-Rights theories. This forces Kelsen to extend his congruous critique of Natural-Law metaphysics to modern philosophers like Grotius and Hobbes who are, despite their own points of weakness, far from continuing the foregoing mode of metaphysics (See, for instance, Kelsen, 1949). Kelsen is unable to see (or reluctant to acknowledge) this rupture between Natural-Law and Natural-Rights. Despite its polemical characteristics, Leo Strauss's *Natural Right and History* is perhaps still one of the most impressive works on the comparative philosophical history of the traditions of Natural-Law and Natural-Rights (Strauss, 1965). There, Strauss contends that the modern idea of natural rights is intrinsically at odds with and even contradictory to the ancient idea of natural law.

[15] Here, I do not mean that this particular point of criticism exhausts Kelsen's account of Natural-Law Doctrine. I do only think that this is the fundamental one; for, such a criticism explicitly asserts that Natural-Law Doctrine does not have the virtue of truth. Otherwise, Kelsen raises various criticisms against Natural-Law Doctrines in his various works. For instance, in "Natural-Law Doctrine Before the Tribunal of Science", he attacks it, at least, at four different points: 1-the idea that there are objective values immanent in nature is scientifically indefensible; 2-the truth of the doctrine would make positive laws superfluous (since a law of nature would, by definition, be evident to all and naturally binding for all, and thus would need no articulation as a positive law); 3-the function of the doctrine in the real world is indeed the justification of positive law (since all Natural-Law doctrines culminate, at the end, into the idea that the respect for positive laws is essential); 4-there is no one Natural-Law Doctrine, but many advocating contrary principles. The first objection is, indeed, a moderate expression of Kelsen's fundamental criticism of Natural-Law-Doctrine. The subsequent objections, I think, are collateral ones which take granted the truth of the first point of criticism.

on the basis of the natural-scientific category of causality in the manner of sociology of the time[16] (Kelsen, 2006:391). This new approach –indeed it was not so new, since it goes back to the Sophists of Plato's time– regards, at the last instance, "positive law as a mere complex of empirical facts and the legal order as but an aggregate of factual power relations" (Kelsen, 2006:436). It aims at describing the legal phenomena in propositions stating not "how men 'ought to' behave under certain circumstances", but "how they actually do behave", just as physics describes how natural objects behave (Kelsen, 1957:269). This does not only mean reducing legal phenomena completely to the world of facts, but also identifying it with the very sphere of power relations to which it aims at bringing about a regulation. Hence, this mode of thinking implies an "individualistic anarchism" which sees any claim to objective-normative validity of the politico-legal order as a mere fiction or ideology. In a way reminiscent of Thrasymachus, sociological jurisprudence make law indistinguishable from power or force and identifies it with the interests of the stronger.

Kelsen is dissatisfied by both Natural-Law Doctrine and sociological legal theory, and engages in a Neo-Kantian strategy –i.e. in something like the application of Kant's transcendental method into the sphere of law– in order to get out of the impasses of the foregoing theories. As is well known, Kant's First Critique attempts a resolution of the debate between rationalism and empiricism. In this attempt, Kant first formulates the basic question of theoretical reason as "how is the knowledge of empirical world we experience possible?". He, then, demonstrates systematically that such knowledge is possible by virtue of the logical categories of human reason, which do not stem from the outer world as its imprint upon us, but constitute the essential condition of our cognition of any occurrence within this world as an experience. That is, we have the knowledge of the world only because human mind *actively processes* the seamless data of the outer world into experience through transcendental –i.e. not experimentally derived– categories and concepts of our minds. Then, Kant reaches to the following conclusions: on the one hand, skeptical empiricism was self-undermining in that, without categories and concepts of reason, any experience and cognition of empirical world was impossible. On the other hand, traditional rationalism is dogmatic since it reified

[16] Kelsen points out American Legal-realism as a typical representative for sociological legal theory (Kelsen, 1957:269 ff.)

the concepts and ideas of reason in the outer world, confusing "thing itself" with the "concept", i.e. the thing as it is conceived by thought.

Similarly, Kelsen founds his Pure Theory of Law on a dual criticism of Natural-Law Doctrine and sociological jurisprudence[17]. On the one hand, he argues that the former is a "metaphysical absolutism" fetishizing law on the basis of "absolute values" alleged to be underlying the existing reality by the doctrinaires. However, the law we know, i.e. positive law, is an order or a system constructed, not discovered as already existing, by human beings, in a way analogical to the fact that scientific thought or philosophy is a construction of human mind[18]. It is true that, in its attempt to understand (*verstehen*) the legal phenomena, human reason operates to find, and then uses as its basis, certain "transcendental logical principles", which does not stem from experience, but constitute the conditions of our experience called legal phenomena. Yet, such transcendental principles have nothing to do with "absolutes" of dogmatic rationalism. First, they are formal principles *constructed by human mind* so as to reveal the basic structure of the legal phenomena as a conceivable order that we experience. Second, these principles are (or they aim at being) the universal principles of cognition, not unconditional values. Thus, they can have nothing to do with determining the substantive content of positive legal order, in opposition to alleged universal principles which Natural-Law Doctrines articulate. Indeed, the "transcendental logical principles" of the Pure Theory of Law are not only fully compatible but are also based on the following insight: it is the human will that establishes legal order; and the values or interests on which any particular legal order is based are relative values or interests.

On the other hand, Kelsen thinks that sociological jurisprudence inherits the impasses of skeptical empiricism. It becomes absurd when it reduces law to factuality, in the same manner that skeptical empiricism becomes absurd when it asserts the arbitrariness of categories and concepts of human reason. For Kelsen, it

[17] At this point, Stanley Paulson's work, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law", which also appeared in somewhat different form in Kelsen's *Introduction to the Problems of Legal Theory*, is very illuminating. Paulson argues that Kelsen sees in legal theory an antinomy between Natural-Law Doctrine and empirico-positivism. The former reduces law to morality ("the morality thesis") while the latter reduce it to the factual world ("the reductive thesis"). In face of these, Kelsen tries to develop a theory of law which can defend the autonomy of law both against morality ("the separability of law and morality thesis") and against the factual world ("the normativity thesis", or "the separability of law and fact thesis").

[18] Of course, there is a difference between these two in that actual legal systems are constructions of will while science and philosophy are, or claim to be, of rational cognition. Thus, analogy will be more correct if we take jurisprudence (i.e. legal theory) instead of legal system itself.

is truly the case that there is no absolute reality that exists independent of human cognition. But, this does not lead us up to "solipsism" or "pluralism" whereby any claim to objectivity beyond the ego's point of view (i.e. any point of reference above the plurality of individual perspectives) is dismissed. In the view of Kelsen, the acknowledgment that categories and concepts through which we cognize the factual world as a realm of meaningful experience originate from our own minds does not require the perspectivalist-relativism according to which the fount of our conceptual schemes is nothing but our arbitrary whims. Rather, as we saw just above, there are universal-formal principles of cognition which constitute the backbone of any valid conceptual schema, i.e. the criteria distinguishing the products of rational-scientific interest for cognition from the offspring of arbitrary whims[19]. Correlatively, for Kelsen, it is truly the case that there is no absolute value –at least, accessible to human reason– on which to found the systems of law. Instead, any positive law is always founded upon someone's will reflecting relative values and interests. But, this does not lead one up to the denial of the specific "normativity" of law. It may not be (and, indeed, is not) based on absolute ethical values, but it is certainly an order of "ought". It is thus categorically separated from the realm of "is". Failing to account for the specific "normativity" of law will amount to failing to make sense of the fundamental notions of "objectivity", "validity", and thus of our experience of law as a meaningful whole. In Kelsen's view, sociological jurisprudence is essentially plagued with this serious failure.

Hence, the aim of Kelsen's Pure Theory of Law is to present explicitly the basic conceptual apparatus, through which we recognize a historically given material as law. To be an object of cognition, law or our legal experience should be considered

[19] Here, it will be revealing for the reader to quote the following passage: "The hypothesis of philosophical absolutism that there is an absolute existence independent of human knowledge leads to the assumption that the function of knowledge is merely to reflect, like a mirror, the objects existing in themselves; whereas relativistic epistemology, in its most consistent presentation by Kant, interprets the process of cognition as the creation of its object. This view implies that the human subject of knowledge is –epistemologically– the creator of his world, a world which is constituted in and by his knowledge. This, of course, does not mean that the process of cognition has an arbitrary character. The constitution of the object of cognition does not mean that the subject creates object as God creates the world. There is a correlation between the subject and the object of cognition. There are laws determining this process. In complying with these norms, rational cognition of reality –in contradiction to the expression of subjective emotions, the basis of value judgments– is objective. But these norms originate in the human mind, the subject of cognition being the autonomous lawgiver. Hence, the freedom of the knowing subject –not the metaphysical freedom of will but freedom of cognition in the sense of self-determination– is fundamental prerequisite of the relativistic theory of knowledge" (Kelsen, 1955:17).

as a meaningful –i.e. consistent–whole. For such a presentation, the legal theorist should overstep the boundaries of a naïve empirico-positivism. That is, he should be in search of the basic presuppositions, i.e. transcendental logical principles of law, providing our legal experience with meaning and consistency. This is an application to legal sphere the well-known Kantian search for the categories which are not data of experience but the conditions of such experience (Kelsen, 2006:437). Thus, Kelsen argues, his legal theory is a "critical positivism" modeled after Kant's critical philosophy (Kelsen, 2006:438).

In the light of foregoing arguments, what Kelsen means by the *purity* of his theory becomes conceivable. First, he means that the theory he presents is free from methodological syncretism. That is, he searches for the inner logical structure of legal experience or legal phenomena as a meaningful and consistent whole. This does not mean to deny that our legal experience is connected to other spheres of experience like politics, ethics or our natural existence. Indeed, the interactions between law and other spheres of experience exist. Moreover, these interactions may be the object of scientific investigation. However, such an investigation cannot be identified with jurisprudence proper. The former is indeed feasible only as theoretical activity that is parasitic upon jurisprudence proper, because it presupposes the very insights of the legal theory as such. That is, it presupposes the very concept of law which can be accounted for only by the pure legal theory[20]. A vicious consequence to which almost all versions of syncretism have failed is to misunderstand legal relations on the basis of natural-scientific principle of cause and effect, and thus deny the normativity of law. Second, the word purity means *formality* in the Kantian sense. Kelsen's theory provides us with formal categories *universal* to all systems of law. These categories are abstract and devoid of content. This is why Kelsen draws a strict line between jurisprudence and legal policy, and argues that only will, not intellect, can give the content of law. The pure theorist of law finds the content of law as already present in the factual world; she cannot deduce it from the transcendental-logical principles[21]. A third meaning of purity is

[20] In line with this, Kelsen argues at various places that the works done under the label of sociological jurisprudence is valuable if they are considered not the works of jurisprudence as such, but of sociology of law or psychology of law. See, for instance, Kelsen, 1957:267-271 and Kelsen, 2006:175-178.

[21] Here, it may be noted that Kelsen's legal formalism is quite different from, and indeed opposed to the kind of legal formalism that tries to deduce the content of particular legal norms from more general abstract norms. For a well articulated presentation of the latter, see Ernest Weinrib, 2003.

what Kelsen himself calls "political indifference" (Kelsen, 2006:438). I think it is more convenient to call this aspect as value-impartiality. This meaning of purity is closely connected to Kelsen's relativist standpoint on the questions of values, and quite effective in determining Kelsen's arguments on the question of justice and law. I will deal with Kelsen's relativism in the following sections of this chapter. Now, let me elaborate his account of the formal structure of the sphere of human experience which is called law.

II.2. The Formal Structure of Law

II.2.1. Law as a Normative Order Founded upon a Basic Norm

Having outlined the general philosophical framework within which Kelsen deploys his theory, I may now engage to a substantial analysis of his legal theory. First of all, for Kelsen, law is "a normative order of human behavior", that is, "a system of norms regulating human behavior" (Kelsen, 2005:4). To make sense of this definition, one should first recall that law, in general, or a legal rule, in particular, is always something that refers to factual world. That is, when we speak of a legal phenomenon we have in mind "a happening" in the physical world. For instance, when we speak of "murder" we refer to someone's killing some other one, i.e. to an external happening at a certain time and in a certain place. The essential point here is that our qualification of a happening as a murder is something that supervenes that very happening. To be considered as a murder, the specific *meaning* of murder should be *attributed* to an external occurrence by us. A clear evidence of this may be pointed out in the fact that we do not always signify as murder "someone's killing some other one". We do sometimes call similar occurrences as "execution by an officer", "act of self-defense" or simply "killing" without attributing a guilt to the actor.

This means that the legal meaning of an occurrence or fact is something analytically distinguishable from this fact. While the latter is an existence in the physical world, i.e. an "is", and determined by the laws of causality prevailing in

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For Kelsen, what Weinrib calls as legal formalism would mean nothing more than a new version of Natural-Law Doctrine based on the indefensible view concerning the possibility of deducing the concrete-particular from the abstract-universal. At this point, see Kelsen, 2002:82-83.

this world, the former is an "interpretation" pertaining to the order of legal norms. Being independent from the cause-effect sequence of the physical world, this interpretation connects a certain occurrence with another one as its consequence. This connection made on the basis of meanings attributed to occurrences gives us the basic form of the legal norm. For instance, if someone kills some other one (except such and such situations), it will be deemed as a murder and punished by life imprisonment. Or, to give an example out of the penal law, if a man with a robe and speaking from dais says some words to another man, this will be called a judicial decision. This judicial decision will be, then, executed by the force of the state authority. Thus, Kelsen argues, "by a 'norm' we mean that something *ought* to be or *ought* to happen, especially that a human being ought to behave in a specific way" (Kelsen, 2005, 4). To mark the difference of this normative connection of two occurrences from the cause-effect sequence of the physical world, Kelsen introduces the category of "imputation" which has the analogous function, in the normative sphere of law, to the function of the category of causality in the physical world[22].

The "ought" contained by norms have three different forms: *commands*, *permissions*, and *authorizations*[23]. All these forms involve someone's *acts of will* directed to another one. It is typical to the general form of norm that there should be someone who *wills* in the form of commanding, permitting or authorizing, on the one part, and someone to whom this will is directed as an *ought*, on the other part. A problem arises here: the norm as an "ought" essentially depends upon an act of will, which is an "is". "Ought" may be the *subjective* meaning of any act of will which is directed at the behavior of other person. Yet, to be called a norm, this

[22] In his article titled "Causality and Imputation", Kelsen argues that "the grammatical form of the principle of causality as well as that of imputation is a hypothetical judgment (proposition) connecting something as a condition with something as a consequence. But the meaning of connection in the two cases is different. The principle of causality states: If there is A, there is (or will be) B. The principle of imputation states: If there is A, there ought to be B" (Kelsen, 1957:331). Then, he underlines two major differences between causality and imputation. First, "the relation between the condition, which in the law of nature is presented as cause, and the consequence, which is here presented as effect, is independent of a human or superhuman act; whereas the relation between condition and consequence which a moral, religious, or legal law asserts is established by acts of human or superhuman beings" (Kelsen, 1957:332). Second, "the chain of causes and effects is, by definition, infinite…[;while] the line of imputation has not…an infinite number of links, but only two links. If we say that a definite consequence is imputed to a definite condition, for instance, a reward or merit, or a punishment to a delict, the condition…is the end point of imputation" (Kelsen, 1957:332).

[23] Authorization means "conferring upon someone else a certain power, especially the power to enact norms" (Kelsen, 2005:5).

"ought" should also be established as an *objective* meaning in the view of the subject at whom it is directed as well as in the view of the willing subject. Otherwise, we would not be able to differentiate a situation in which a gangster commands (i.e. wills) to turn over to him money from the one whereby an income-tax official commands the same physical action. Since it cannot be derived from an "is", the objectivity of the "ought" contained in a norm can only be derived from another norm. This means that an "ought" is a norm only when it is an "ought" authorized by a higher "ought", i.e. a higher norm. In Kelsen's own words, "the ought which is the subjective meaning of an act of will is also the objective meaning of this act, if this act has been invested with this meaning, if it has been authorized by a norm, which therefore has the character of a 'higher' norm" (Kelsen, 2005:8). Indeed, this amounts to say that a norm can exist only within a system of norms, i.e. a normative order. For, the higher norm itself should be authorized by a still higher norm. This will ascend up to a *basic norm* (*Grundnorm*)[24], which provides the norms of the whole order with the objective meaning of being an "ought" in the manner of a norm.

According to Kelsen, the basic norm as the "transcendental-logical presupposition"[25] of the legal order is a presupposed (i.e. a non-positive: not-posited) norm. That is, the basic norm is not a norm created by an actual will, but something presupposed by the founder of a legal order in the very first act of her positing the first norm, and then in any subsequent act of positing laws. Only the cognition directed at law as a meaningful normative order, i.e. only legal theory, uncovers this presupposed norm (Kelsen, 2005:23). Kelsen sometimes refers to the basic norm as a "hypothesis" on the basis of which we can conceive a given material as a normative unity called law[26]. He formulates the basic norm as a fully content-less (i.e. formal) norm applicable to any legal order: "Coercive acts [are] sought to be performed under the conditions and in the manner which the

[24] There is probably no other concept in Kelsen's theory that has been the object of such much fierce debates as the concept of the basic norm has been. This is not surprising, since this concept is the core-kernel of Kelsenite theory. To have an idea on the debates over the basic norm, see Julius Stone's "Mystery and Mystique in the Basic Norm".

[25] J. Stone highlights that Kelsen sometimes refers to the basic norm (*Grundnorm*) by the terms the *Ursprungsnorm* (the origin-norm) or the *Verfassung im rechtslogischen Sinne* (the constitution in the legal-logical sense) (J. Stone, 1963:26).

[26] For Kelsen, the unity of law consists in "a hierarchical structure of super- and subordinate norms" (Kelsen, 2005:201).This is why Kelsen's theory is sometimes called *Stufenbau* theory of law in the literature. *Stufenbau* designates here something like an edifice with various strata of lower and higher.

historically first constitution, and the norms created according to it, prescribe. In short: One ought to behave as the constitution prescribes" (Kelsen, 2005:201). For the sake of clarity, this may further be simplified into: "behave as the legal authority –the monarch, the popular assembly, the parliament, etc– commands" (Stone, 1963:26).

All positive norms stem from the basic norm, not in the manner that they are deduced from it[27], but in the manner that they are founded upon the authorization the basic norm provides. This is how the basic norm provides legal norms with "validity", i.e. the objective meaning of being a norm. For Kelsen, validity means "the specific existence of a norm" (Kelsen, 2005:9). Precisely as "imputation" is analogue of "causality" in the normative sphere, "validity" is analogue of "existence". Thus, a non-valid norm would be a contradiction in terms, in the view of Kelsen. Now, we know that validity, i.e. the specific existence of a norm, is not the same as the existence of a command, i.e. of a will of act, but depends upon the authorization by a higher norm. Indeed, this is why we regard a norm still valid, i.e. existing, even if the act of will, which brings forth this norm, does no longer exists[28].

Yet, the question of validity is not still resolved, since validity is somehow connected with effectiveness. Kelsen argues that we can speak of validity of a legal norm only if the behaviors of persons to which it is directed do conform with it at least to some degree. A legal norm cannot be said to be valid, i.e. exist, if nobody obeys it. However, Kelsen maintains, this does not mean to reduce validity to efficiency in the manner we observe in the case of legal-realist approach. Rather, it means to say that a minimum level of effectiveness[29] is a *necessary*, though not

[27] Since the basic norm is content-less, it is logically impossible to deduce from it positive laws directly.

[28] For instance, we don't regard a norm automatically eliminated when the legislator died or changed his will. Here lies the essence of Kelsen's convincing refutation of Austin's command theory of law. See, Kelsen, 2006:30-38. There, Kelsen argues that "when we say that a certain human conduct is 'stipulated', 'provided for', or 'prescribed' by a rule of law, we are employing an abstraction which eliminates the psychological act of will which is expressed by a command. If the rule of law is a command, it is, so to speak, a de-psychologized command, a command which does not imply a 'will' in a psychological sense of the term…A 'norm' is a rule expressing the fact that somebody ought to act in a certain way, without implying that anybody really 'wants' the person to act that way" (Kelsen, 2006:35). This criticism of the command theory of law is so powerful that even H. L. A. Hart, the most prominent figure in the contemporary Anglo-Saxon legal theory, replaces the concept of command with the concept of rule, so as to define law (see Hart, 1997:18-25).

[29] Here, it will be also convenient to note that, for Kelsen, a legal norm also necessarily presupposes that it is possible to behave contrary to it, i.e. that efficiency of legal norm should always be limited somehow. For, "a norm that were to prescribe that something ought to be done of which everyone

sufficient, condition of validity. Only when combined with the quality of being authorized by a higher form, the minimum level of effectiveness provides a norm with validity. Yet, there still remains the question whether the validity of the legal order itself, not of legal norms, depends solely on effectiveness. We will come back to this question, i.e. to the question of legitimacy. Now, we need to focus on the coercive aspect of law first.

II.2.2. Law as a Coercive Order

Up to now, we have basically focused on law as a normative order. By the question of effectiveness, a further dimension of the nature of law comes into scene: law as a coercive order. For Kelsen, law is "the social technique which consists in bringing about the desired social conduct of men through the threat of a measure of coercion which is to be applied in case of contrary conduct" (Kelsen, 2006:19). To explicate this definition, we may compare the essential-structure of law with morality and religion as other forms of social order. First, law is unique in that it explicitly presents itself as a means, not as an end. Unlike morality and religion, it does not need to ground itself upon ultimate values. Though it may reflect certain relative values and interests, law is formally nothing but a social order regulating the behaviors of individuals. Yet, morality and religion always aspire to be something more than mere social orders, i.e. to be orders realizing absolute values. Second, legal sanctions are fully immanent sanctions in contradiction to the transcendental nature of religious and moral sanctions. We know that morality and, especially, religion present their norms as originating from "a superhuman authority", and refer to sanctions that will be executed outside society and even outside this world. On the other hand, the positive law recognizes that its norms originate within this world and society, and that these norms are to be executed *via* sanctions by certain members of society. Third, sanctions are of primary importance in law, while they are not in morality and religion. By focusing foremost on prescriptions of desired behavior, both morality and religion are interested in sanctions (i.e. proscriptions of "deviant" behavior) only in a secondary

knows beforehand that it must happen necessarily according to the laws of nature always and everywhere would be as senseless as a norm which were to prescribe that something ought to be done of which one knows beforehand that it is impossible according to the laws of nature" (Kelsen, 2005:11).

or tangentially wise. On the other hand, the special technique of law consists in imputing sanction, i.e. "threat of coercion", in the case of the conduct contrary the one desired by the legal order. That is, where there is no sanction there cannot be a legal norm, while this is not the case for moral and religious norms.

A legal sanction consists in "a deprivation of possessions –life, health, freedom, or property" (Kelsen, 2006:18). Since such deprivations are executed against the will of deprived individuals, they have the character of coercion, i.e. of employing force. In Kelsen's view, there appears to be a paradox here. For, "that which is to be accomplished by the threat of forcible deprivation of life, health, freedom, or property is precisely that men in their mutual conduct shall refrain from forcibly depriving one another of life, health, freedom, or property. Force is employed to prevent the employment of force in society[30]" (Kelsen, 2006:21).

Kelsen then argues that this paradox is only apparent because law is not the antithesis of force. It is a regulation or organization of force[31]. It "makes the use of force a monopoly of the community" through "authorizing the employment of force only by certain individuals and only under certain circumstances" (Kelsen, 2006:21). Kelsen then goes on to say that although law is "an ordering for the promotion of peace" and functions to "pacify the community", it is a state of "relative peace", not "absolute peace"[32] (Kelsen, 2006:21). An absolute peace would be the absolute absence of force, i.e. a state of anarchy. On the other hand, law is only "a condition of monopoly of force": it is "an order according to which the use of force is generally forbidden but exceptionally, under certain circumstances and for certain individuals, permitted as a sanction" (Kelsen, 2006:22).

[30] It should be noted that here Kelsen comes very close to Kant's definition of law as "a hindrance of a hindrance to freedom" (See, Kant:1996, 25).Yet, there is not even an *apparent* paradox for Kant, since he thinks "a hindrance of a hindrance to freedom" means, by a logical deduction, freedom itself. That is to say, in the view of Kant, the coercion inherent in law does not stand against freedom, precisely by the virtue that the order of law promotes the general freedom of all.

[31] For a similar view of law, see Edgar Bodenheimer's lucid article "Power and Law: A Study of the Concept of Law". Against the positivists who reduce law to an exercise of power, Bodenheimer defends that law is "essentially a *limitation upon* power. It forces upon the holders of power the observance of certain forms of conduct" (Bodenheimer, 1940:133). Thus, "law, in its pure and ideal form, is that limitation upon power in which the possibility of an abuse of power is reduced to a minimum" (Bodenheimer, 1940:133).

[32] Does not, one wonder, the fact that "law is an order promoting for peace" contradict Kelsen's argument there is no general value inherent in the form of law as a normative social order? Indeed, this proposition may be thought as the basis of a fundamental moral kernel inherent to the form of law. I will turn back to this point latter in this chapter.

Indeed, for Kelsen, coercion is so essential to the form of law that he sometimes formulates the basic norm on its basis as "coercion of man against man ought to be exercised in the manner and under the conditions determined by the historically first constitution" (Kelsen, 2005:50). All legal norms may then be seen as specifications of the basic form. That is, they, all, are conceivable as statements that "under certain conditions, determined by the legal order, a certain coercive act, likewise determined by that order, ought to be performed"[33] (Kelsen, 2005:108). Coercive acts are divided into two major types. First, there are sanctions which are "reactions against an action or refrainment determined by the legal order, such as imprisonment for theft"[34] (Kelsen, 2005:108). Second, there are coercive acts which are not sanctions. In such cases, coercive act is executed without the existence of an action or refrainment by the individual against whom it is directed. As an example, Kelsen points out "the forced internment of individuals afflicted with an illness constituting a public anger or individuals considered dangerous because of their race, political views, or religious convictions; and forcible destruction or deprivation of property in the public interest" (Kelsen, 2005:108).

Another fundamental legal concept which is closely related to that of sanction is delict. Sanction is in fact the consequence of the behavior called delict. Kelsen defines the latter as "the behavior which is considered detrimental to society and which, according to the intentions of the legal order, has to be avoided" (Kelsen, 2006:51). He then emphasizes that there is yet only one objective yardstick for determining whether or not a behavior is delict (i.e. a behavior detrimental to society). This yardstick is the very fact that a certain legal order attributes this character to a certain behavior. Thus, contrary to what Aristotle argued first, and all the following Natural-Law tradition has adapted after him, there can be no *mala in se* (i.e., evil in itself), but only *mala prohibita* (prohibited evil) from the standpoint

[33] One can argue that since such a statement seems to take the norms of criminal law as the prime model for all legal norms, Kelsen is very disputable at this point. This is indeed the strongest criticism Hart makes against Kelsen in his *The Concept of Law*. Hart indicates that Kelsen's attempt to reduce heteronomous types of legal rules into a same form is a consequence of his monistic style of theorizing (Hart, 1997:36-37). Though this monistic style is very common in the continental tradition of legal theory, which is highly influenced by the German Idealist Philosophy, it acquires a peak point in Kelsenite theory.

[34] Kelsen distinguishes, in turn, two types of sanctions as "criminal sanction" and "civil execution". The former is the original form of sanctions, meaning punishment in the narrow sense. The coercive act of the legal authority aims, in these cases, at retribution or deterrence through inflicting an evil against life, health, freedom, or property of individual who wronged against legal order. On the other hand, a civil execution is "a forcible deprivation of property with the purpose of providing reparation, i.e. compensation for illegally caused damage" (Kelsen, 2006, 50).

of legal theory. For, the notion of "evil in itself" is meaningless without the indefensible Natural-Law theory of values which presupposes the existence of values inherit in things. As Kelsen points out, the Roman-legal principle that *nulla poena sine lege, nullum crimen sine lege* (i.e. no sanction without a legal norm, no crime without a legal norm) reflects the clarity of Roman type of jurisprudence, which stems from their decisive secession from metaphysical tradition of Natural-Law doctrines. Thus, it is not a delict, understood as somehow synonymous to moral-religious category of sin, that gives rise to a legal norm; but it is precisely a legal norm that creates a delict.

II.3. The Concepts of Legal Duty and Legal Right

Now, we are in a position to consider the concepts of legal duty (obligation) and legal right. In what we have seen up to now, the consequence is implied that the legal duty is, in fact, nothing but a counterpart to the concept of legal norm. If the form of any law lies in the kind of statements that "under certain conditions, determined by the legal order, a certain coercive act, likewise determined by that order, ought to be performed", the legal duty is simply the legal norm viewed from the perspective of the individual to whose behavior the sanction is attached in a legal norm, or whom is directly subjected to the coercive act inscribed in a legal norm. For, "the statement: 'An individual is legally obligated to behave in a certain way' is identical with the statement: 'A legal norm commands a certain behavior of an individual'" (Kelsen, 2005:115).

Kelsen thinks that the traditional legal theory has been, for no surprise, blind to the identity between legal norm and legal duty. One reason for this blindness is the fact that traditional theory has considered only general norms under the rubric of legal norms while legal duties come into scene usually in the case of individual legal norms. More fundamentally, however, the blindness of the traditional theory arises out of its failure in understanding correctly both the form of law and the dualistic nature of legal duty usually inherent in this form. We are all familiar with the fact that, in the actual world, the legal norms are usually articulated in the statements to the effect that a certain individual ought to observe certain conduct. However, if what Kelsen formulates as the form of legal norm is correct, such statements give rise to flawed form of legal norms. A flawless form of legal norm

would include also a statement to the effect that "another individual ought to execute a sanction in the case the first norm is violated" (Kelsen, 2006:60-61). To give an example to a flawless form of a legal norm: 1) Nobody should kill; 2) If someone kills she will be punished with life imprisonment[35]. Here, it becomes clear that there are two distinct obligations contained in this norm. First, individuals are obligated to avoid killing; second, a certain legal organ is obligated to execute sanction in the case an individual acts contrary. Yet, it should be underlined that this flawless form of law pertains only to the national legal systems of civilized world. "In primitive legal orders and in international law, there is no legal duty for the organ to execute the legal sanction" (Kelsen, 2006:60). One can argue that in such systems, legal norms contain a general obligation for individuals and an authorization (not an obligation) for the execution of a sanction by someone.

We know that the concept of legal duty is usually considered as the opposite of the concept of legal right, which is assigned to a superior status in the systems of law. In view of Kelsen, here lies another fundamental mistake of traditional legal theory. For, the legal right is neither separable from the legal duty nor different from law itself. Instead, any legal right of one presupposes the legal duty of some other; and the right is "law in a subjective sense of the word in contradiction to 'law' in an objective sense, that is, a legal order or system of norms" (Kelsen, 2005:125). As we are to see in a detailed way in the following, the just-quoted sentence harbors a unique conception of rights whereby the concept of right is depleted of any moral (i.e. supra-legal) connotation and rendered into merely a specific technique of law. By the way, it will also be proper to note that, although Kelsen's following elaboration on the concept of legal-right might seem a sort of prosaic argumentation with no essential point of interest except for a legal-technician, his elaboration is important for our inquiry because his arguments in question epitomize his general theoretical program and its fundamental outcome: a concept of law rendered into merely a set of certain techniques for social-political ordering.

To make his point, Kelsen refers to the dual meaning of the word of law in German and French languages. *Recht* and *droit* mean both law and right. In order to

[35] Indeed, Kelsen goes so far to argue that the first part of the norm superfluous, since the second part of the norm already contains the first part. Its sole value is to make easy the representation of the legal norm, especially for common man.

distinguish these two meanings, the legal discourses in these languages introduce even a further distinction between *subjektives Recht* (*Recht im subjektiven Sinne*) and *objectives Recht* (*Recht im objektiven Sinne*). The propositions articulated by the former kind of norms may have various meanings. Two basic meanings Kelsen points out may be called permissions and imperatives. The first are the norms to the effect that "the individual is legally not forbidden, i.e. negatively permitted**,** to act or refrain from a certain action" (Kelsen, 2005:126). The second are the norms to the effect that "a certain individual is legally obligated –or, indeed, that all individuals are legally obligated– to behave in a certain way toward another individual (that is, toward the entitled individual, or the subject of the right)" (Kelsen, 2005:126). The imperative-rights are, in turn, divided into two: rights to a positive performance by other individual/s and rights to refrainment by other individual/s (i.e. rights of tolerance).

In the case of what I call imperative-rights, it is already evident that such a right of an individual is indeed the obligation of the other individual/s. Thus, the legal right of this kind is evidently "merely a reflection of the obligation" (Kelsen, 2005:127). Yet, what needs to be underlined is that even the permissive-rights are of this character too. For, "I am not legally free to do what I wish to do if the others are not legally obligated to let me do what I wish to. My legal freedom is always another's legal subjection; my legal right is always another's legal duty" (Kelsen, 2006:76). We may instantiate this through the example of the right to religious conviction, which is regarded as the archetype of permissive rights. In the view of Kelsen, my right to religious conviction makes a sense only if there are others who are obligated to let me to follow my own personal convictions. In the absence of such an obligation on the part of others, it is absurd to speak of a legal right. As Kelsen highlights, this, indeed, demonstrates that a distinction between permissive-law and imperative-law is indeed a mistake: "Law is imperative for the one, and thereby permissive for the other" (Kelsen, 2006:77).

The reader may, at this point, raise the following objection: even though one agrees with Kelsen's arguments, this only means that there is an essential connection between a right of the one and the duty of the other. But, this does not explain why the concept of right as such is a reflection of the concept of duty and not *vice versa*. I think we can find reasons for the latter in Kelsen's following arguments. First, there is always a corresponding legal duty in any case we speak of

a legal right, while there can be found legal obligations without corresponding rights. For instance, legal norm prescribing a certain behavior towards inanimate objects, like national flag or some other emblem, does not include a legal right on the part of another person[36]. However, the more important reason to see the legal right as the reflex concept of legal duty is that the duty-bearer, not the right-bearer, is the active part in any relation that is considered to be taking place between a right-holder and a duty-bearer. For, it is always the act of duty-bearer which is at issue; and, the right-holder is relevant only as the passive object of this act. Thus, Kelsen argues, the legal right is an auxiliary and even superfluous concept from the standpoint of legal theory, even though it may sometimes facilitate the definition of a legal situation (Kelsen, 2005:128). At this point, let me just note that such an argument strives for dealing a death-blow to the familiar and historically effective conception of rights and their critical role *vis-à-vis* established legal-political orders. That is, Kelsen strives hereby for reducing a concept with a potentially counter-systemic impact into a pro-systemic (i.e. a completely unproblematic) element of his cybernetic conception of legal-order.

Likewise, Kelsen contends that the traditional legal theory foreclosed the identity between the legal right and the legal obligation and ascribed a priority to the former, because it was based on a confusion of scientific cognition with an ideological premise inherent in the idea of natural law. We know that the natural existence of individual and her rights prior to the establishment of social order plays a major role in this doctrine. For, the function of the social-legal order is explained as guaranteeing the natural rights by stipulating obligations corresponding to these rights. Kelsen complains that even after the denunciation of the Natural-Law Doctrine, such a mode of thinking has still dominated the traditional legal theory, which was followed by the School of Historical Jurisprudence. Kelsen points out to Heinrich Dernburg's arguments which represent the typical standpoint of this school. Dernburg argues that:

> For the principal aim of society is to protect individuals in the enjoyment of those absolute values, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly

[36] Kelsen is aware of the possibility of attributing a right to community in such cases. But, he seems not to take the arguments for community-rights seriously.

> and social communities. Hence, it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies… (quoted from Kelsen, 2006:79).

In a way carrying his mode of thought into a radical point, Dernburg further argues with regard to the relation between rights and law as follows:

> Historically, subjective rights existed long before a self-conscious national legal order (a state) has developed. They were based on the personality of the individual and in the recognition which they were able to achieve and to enforce for the person and his property. Only by abstraction was the concept of a legal order gradually derived from the existing subjective rights. The view, therefore, that subjective rights are merely derived from an objective law is unhistorical and erroneous" (quoted from, Kelsen, 2005:129)[37].

In view of Kelsen, such an argumentation is completely contradictory. For, it is only by being guaranteed by the legal order that a legal right acquires its status. That is, "it is made into a legal right first by the guarantee from the legal order" (Kelsen, 2006:80). Thus, the legal norm is prior to or, at least, synchronic with the legal right. He considers this contradiction inherent in the traditional theory as a necessary burden of its purpose of influencing (even directing) the formation of the positive law, rather than pursuing a purely scientific analysis of it. With the claim that legal orders do not create but only recognize and guarantee certain rights, the traditional theory turns out to be a political ideology, aiming at legitimatizing the institutions of individual rights, particularly that of private property.

Such an ideological tendency of the traditional theory is most evident in the logically untenable distinction between *jus ad rem* (i.e. right to a thing) and *jus in personam* (i.e. a right against a person). The property right is taken as the archetype of the former and defined as "the exclusive dominion of a person over a thing"

[37] From my point of view, Dernburg's foregoing arguments comprise a crucial confusion between two arguments: 1) the argument for the logical/conceptual superiority (i.e. the constitutive role) of subjective rights over legal orders; and 2) the argument for the historical priority of subjective rights over legal orders. I think that, *pace* Dernburg, it is essentially important to distinguish these two arguments. For, the historical argument is an easily refutable one, while the logical/conceptual argument is an utmost sober one characterizing the school of thought which I call modern legal-rationalism. In Fourth Chapter, we will have opportunity to consider upon the logical-conceptual argument. At this juncture, let me merely state that Kelsen's following refutation of Dernburg can be taken as a sound one only if it is understood as a refutation of the argument for the *historical* priority of subjective rights over legal orders. Otherwise, Kelsen does not provide a persuasive refutation of the *conceptual* superiority of subjective rights over legal orders.

(Kelsen, 2005:130). In this way, the property right is excluded from the sphere of personal relations and, thus, acquired a status above the category of *jus in personam* which concerns this sphere[38]. Yet, "a right to a thing" does indeed involve a relation between individuals and is, thus, a right against other/s as much as what are usually referred as "rights against a person". For, the exclusive dominion of one over a certain thing means nothing but the legally stipulated exclusion of others from the disposition of a thing. Thus, it is primarily a relation between individuals and only secondarily a relation between an individual and a thing[39]. If the traditional legal theory does not (or cannot) acknowledge this, it is only because that it has stubbornly aimed at being not a pure scientific description of positive law, but a political ideology aiming to influence the formation of law. *Vis-à-vis* such an ideological objective, Kelsen says nothing to the effect that it is either good or bad, but insists that it is not scientific in any case.

Up to this point, we have seen that, in opposition to the conventional jurisprudence, Kelsen proposes that the legal right is not an essential, but auxiliary concept for describing legal relations. That means we can adequately understand most of legal relations without any reference to this concept. Then, the question he raises it that: Is there any case in which the legal right is something more than a reflex of other individual's obligation? This is, indeed, to ask: Is there a specific kind of legal relations whereby the concept of right plays an essential, not auxiliary role? To answer this question, Kelsen first refers to two theories which attempt to conceive the legal right as something more than the reflex of legal obligation. These are: 1) Interest-theory of rights, and 2) Will (or Power)-theory of rights. The former conceives a legal right as "a legally protected interest". In the view of Kelsen, this theory is utterly untenable. For, even if it is the case that the legislator usually assumes that people have certain interests under certain conditions, and that she

[38] Likewise, in his *Doctrine of Right*, the first part of *The Metaphysics of Morals*, Kant recognizes a prior status to the category of *jus ad rem* and property rights in particular over other categories of law. Thereby, it seems that Kant's imagination of the individual takes up to consider man in his asocial existence having contact only with nature, and takes account of the presence of other human beings (i.e. the fact of co-existence with other individuals in a single world) only at a second phase. See, Kant, 1996:37-86.

[39] In line with these, Kelsen argues, only reasonable distinction between rights may be that between *absolute reflex rights* and *relative reflex rights*. The former, of which property rights constitute the archetype, are those which are the reflexes of every other individual's duty toward one. Likewise, the latter are the reflexes of some particular individual's obligation toward one. For instance, the debtor's obligation toward the creditor to pay back a certain amount of money constitutes a relative reflex right on the part of the creditor. See, Kelsen, 2005:131.

intends to protect such interests by positing legal rights, a legal right may exist even in those cases where no actual interest exists. For instance, imagine that I have a property right over a particular land. This right of mine includes my right to destroy the land. If I actually destroy it, it would mean I act on the basis of my right, but evidently in contradiction to my interests. Thus, Kelsen thinks, "the right must consist, not in the presumed interest, but in the legal protection" (Kelsen, 2006:81). On the other hand, the Will-theory of rights suggests that "a legal right is a will recognized by law, or a power granted by law" (Kelsen, 2006:81). For Kelsen, this theory is much closer to solution than the former one. Yet, this definition should be qualified so as to achieve an adequate sense of right as a specific legal concept. In the legally-technical sense, a right is "the legal power bestowed upon [an individual] by the legal order to bring about, by a law suit, the execution of a sanction as a reaction against the nonfulfillment of the obligation [by another person]" (Kelsen, 2005, 134). To instantiate: we know that the right of property simply defined is a reflex of the obligation of all others, which is the obligation not to disturb the enjoyment of property by its owner. However, this is simply a reflex right, not an instance of right as a special legal technique. We arrive at a right in the latter sense only when we annex to the foregoing reflex right a special legal power (an authorization by legal order) conferred to the owner. This special legal power consists in the competence to assert in a court that the obligation not to prevent her from her disposition of her property has been violated in a case. In line with this, Kelsen formulates "the legal right in the technical sense" as follows:

> A right is, thus, a legal norm in its relation to the individual who, in order that the sanction shall be executed, must express a will to that effect. The subject of a right is the individual whose manifestation of will directed to the sanction, i.e. whose suit is a condition of the sanction. If we denote the individual on whom the legal order confers the possibility of bringing a suit, a potential plaintiff, then it is always a potential plaintiff who is the subject of a right (Kelsen, 2006:83).

In the case of norms which are right-norms in the technical sense, Kelsen means, the concept of right is the essential (not the auxiliary or reflex) component, by the virtue that the right-holder, not the duty-holder, constitutes the active party in the relations regulated by such norms. Then, he also argues that there is no need to

invoke extra-ordinary categories as interests or will, so as to explicate the legal relations where rights play an essential role:

> The legal order usually confers that possibility on the individual in whom the legislator presumes a certain interest in the sanction. But if the legal order confers that possibility upon an individual, this individual has a right even if, in a concrete case, he should lack such an interest and thus also a "will" that the sanction be executed. A right is no more the interest or the will of the individual to whom it belongs than a duty is the fear of the sanction or the compulsion in the mind of the obligated individual. The legal right is, like the legal duty, the legal norm in its relation to an individual designated by the norm (Kelsen, 2006:83).

To recapture in concise terms, what Kelsen calls the legal right in the technical sense is some specific legal relation that is more than a relation between a legal obligation of one and its counterpart, i.e. reflex-right, on the part of the other. This indicates, in fact, that the essence of a genuine legal right lies in "granting individuals the capacity of participating in the formation of the will of the state" (Kelsen, 2006:139). For, as we will see in the subsequent part, the will of the state is nothing but the legal norms including both general and particular norms; and, individuals do in fact participate into the process of norm-creation, i.e. of the will-formation of the state, when they initiate a legal process in accordance with their legal rights in the strict sense. This also shows that the conventional distinction between private rights and political rights may be misleading. For, political rights, which, in our societies, consist basically in "the right to vote" and "the right of the elected to be members of parliament and to join in the discussions there"[40], are usually defined as "participation of those subjected to the law in the creation of the law" (Kelsen, 2006:139). However, this is also precisely what an individual does when she initiates a legal process in accordance with her "private" right. The difference between private and political rights may be, thus, found in that while the former consist in participating into the process of individual-norm-creation, the latter consist in participating into the process of general-norm-creation. Yet, it may be argued that Kelsen indicates a further distinction between a "political right" and

[40] Kelsen also argues that if, as is the case in democratic countries, not only the legislative but also governmental administrative, and even judicial organs are called to their positions by election, there are political rights other than voting for and in parliament: "Insofar as the functions of these organs is the creation of law, the respective rights to vote represent, like the parliamentary right to vote, the legal power to participate (indirectly) in the creation of those legal norms which the organs are authorized to create" (Kelsen, 2005:139).

a “private right”: In some cases, a “political right” may not grant the individual the legal power to initiate the legal process of the enforcement of the fulfillment of an official duty corresponding political right. For instance, I may have the right to vote but this right may have such a nature that I may have no legal opportunity to react against to the behavior of a poling clerk who does not count my vote (i.e. against the non-fulfillment of the official obligation corresponding my political right). To reveal this possible distinction between “political rights” and “private rights” is, I think, very important in showing that “political rights” will not have their full force if we do not think them on the model of “private rights” in the technical sense, i.e. as legal powers to react against their non-fulfillment by others.

In the light of his purely-legalistic conception of rights, Kelsen then deals with the question of fundamental rights or liberties. The category of fundamental rights and liberties is usually counted as a subdivision of political rights and consists in such guarantees as “equality before law”, “freedom or inviolability of property”, “freedom or inviolability of person”, “freedom of speech”, “freedom of conscience”, “freedom of assembly”, and etc. In fact, Kelsen suggests, such are neither reflex rights nor legal rights in the technical sense, but “prohibitions” for the legal authorities. Such prohibitions consist in providing for the possibility that when statues or statutory orders with a material content violating the aforementioned kind of rules are enacted, they “may be repealed as ‘unconstitutional’ in a special procedure established for this purpose” (Kelsen, 2005:140-141). In line with this, it will be better to understand the fundamental rights as not legal obligations upon the law-creating organs but as provisions to determine negatively the content of the legal norms.

If we leave aside the “mystifying” discourse on the inviolability of fundamental rights, Kelsen thinks, the specific nature of these rights lies in this: they bring about an effective guarantee for the foregoing rights and liberties only to the extent that “guaranteeing constitution may not be changed by ordinary legislation but only by a special procedure, which differs from the ordinary by requiring special conditions rendering the enactment of a statute more difficult, such as a qualified majority of the members of the legislative body or more than a single resolution” (Kelsen, 2005:142). If such a restriction for ordinary legislation is not the case, there is no sense in positing in the constitution a statute like “freedom of speech is inviolable”.

For, the legislative body may replace this statute by a new one which brings about restrictions for the freedom of expressions under certain conditions.

Even if the so-called fundamental rights are provided with the abovementioned guarantees against ordinary legislation, they cannot be grasped under the category of the legal right in the strict sense. It is the case, on the one hand, that they are not reflex rights, because a prohibition restricting legislation does not, at least directly, constitute an obligation on its part[41]. On the other hand, however, they are not legal rights in the technical sense either, because they do not necessarily grant individuals (whose rights are at issue) the power to bring about by law suits the enforcement of the fulfillment of obligations. A fundamental right can acquire the quality of being a legal right in the real sense only if the legal order confers upon the affected individual the legal power to initiate a legal process leading to the annulment of the "unconstitutional" statute.

The following passage whereby Kelsen summarizes the conclusions of his analysis of the concept of legal right is very lucid and, thus, worth to be quoted in whole:

> The [legal] right of an individual is either a mere reflex right –the reflex of a legal obligation existing toward this individual; or a private right in the technical sense –the legal power bestowed upon an individual to bring about by lawsuit the enforcement of the fulfillment of an obligation existing toward him (i.e. the legal power to participate in the creation of the individual norm by which the sanction is ordered that is attached to the nonfulfillment of the obligation); or a political right –the legal power granted an individual (1) to participate directly, as a member of the legislative popular assembly in the creation of general legal norms known as statutes, or (2) as subject of a parliamentary or administrative voting right to participate indirectly in the creation of legal norms for whose creation the elected organ is authorized, or (3) to participate in the creation of the norm by which the validity of an unconstitutional statute that violates the guaranteed equality or freedom is repealed generally (i.e. for all possible cases) or individually (i.e. only for a concrete case). Finally, a positive permission given by a governmental

[41] Kelsen argues that "for technical reasons alone it is hardly possible to obligate a legislative body to refrain from enacting unconstitutional statutes, and this, in fact, is never done. But it is possible to, and actually happens, that the head of the state and the members of the cabinet are made responsible for the constitutionality of the statutes they have approved, promulgated, or countersigned. This means, that, in case the statute is unconstitutional, a special court may inflict upon them specific punishments such as loss of office or of political rights. Then these organs are legally prohibited from performing such acts, that is, from participating in the passage of unconstitutional statutes" (Kelsen, 2005:144).

> authority may also constitute a right in the technical sense of the term[42]. (Kelsen, 2005:145).

This analysis of the concept of the legal right by Kelsen brings forth the consequence that, in contradiction to the conception of right held by the traditional theories of law, the legal right is neither something different than "objective law" nor, thus, something prior to the legal duty. Far more than being a concept with critical (or potentially counter-systemic) impacts to the legal-political order, the legal-right turns out to be a completely pro-systemic (i.e. unproblematic) element of Kelsen's cybernetic conception of legal-order. In his own words, the concept of legal right designates nothing but "a particular function within the law-creating process" (Kelsen, 2006:89). More precisely, it is only a special case of that function of the legal order called "authorization". In regard of such a complete reduction of the concept of rights into merely a specific technique of law, one should underline that Kelsen presents much more a *deconstruction* of the idea of rights than an account of this idea. For, his legal-technical analysis suggests not simply that the rights have their sense only within the order of law. Much more radically, he defies their significance as standards, i.e. principles, of a legal order. He sees a mystification in the proposition that a right is absolute or inviolable. However, any legal practice in which one claims for a fundamental or basic right is based on this proposition. Hence, a theory of rights which dismisses this proposition is precisely analogue to a theory of science which dismisses the idea of truth, or a theory of arts which dismisses the idea of beauty, or a theology which dismisses the God: it may be a critique, but not an account of the human practice at issue. The problem in Kelsen's theory of rights is that it presents itself as an account of rights, not as a critique of rights. Moreover, in opposition to what a self-conscious critique would suggest, Kelsen seems to expect that the legal practices of rights can be preserved without the proposition of the absolute and inviolable character of the rights. This is precisely like expecting that the people would still continue to pray even though

[42] As the reader of this thesis will probably notice, I have dropped this last category in my own analysis of Kelsen theory above. This is because I can see no essential reason why "positive permissions" should be taken as a unique category, as Kelsen takes them to be. For, if a "positive permission" is that the legal order concedes to an individual the right to carry on a certain activity and also the legal power to start legal proceedings in a case of violation of her right to carry on this activity, there is only this minor difference between "positive permissions" and other legal rights in the technical sense: the former seems to concern only the relations between individuals and the organs of legal order, while other legal rights may be at issue also in the relations among individuals.

they dismiss the conviction that the God exist[43]. I think that this problem in Kelsen's theory of rights is indeed a particular instance of the general problem inherent in his positivist mode of thinking: He tries to account for law as a completely *immanent* (and *cybernetic*) structure of human practice, while the very human practice in this domain is embedded with transcendental categories like justice, righteousness and legitimacy. I will later discuss more elaborately this serious problem of the Kelsenite theory. Now, however, I should focus upon the way he elaborates the concepts of authority, legal order and the state.

II.4. Kelsenite Theory of the State

II.4.1. The State as the Legal Order

The concept of authorization should be taken as the point of entry into Kelsen's theory of the state. As a concept of utmost importance in Kelsenite theory, authorization, in the most general sense, denotes any human behavior which the legal order makes a condition of a coercive act as its consequence, or designates as a coercive act by the legal order. To simplify, authorization means "a capacity conferred upon an individual by the legal order" (Kelsen, 2005:146). And, a capacity is conferred upon an individual not only when she is recognized as capable of conducting legal sanctions or of influencing judicial procedure by a law-suit or an appeal, but also when she is recognized as being capable of committing a delict. On the basis of his general definition of the concept of authorization (i.e. authorization as "conferring a legal capacity to act"), Kelsen deals with the distinction which the traditional legal theory made between simply "the capacity to act" and "competence" or "jurisdiction". The traditional theory conceives the latter mode as "exercising a legal power" and/or "norm-creating", and attributes it to the acts of organs of the community like courts and administrative authorities. Against this traditional view, Kelsen first argues that it is not justified since an act by a private individual, like conducting a legal transaction, is an "exercise of legal power" and "an individual-norm creation" too. Yet, this traditional view is based on a sound intuition, even though it cannot justify this intuition. The intuition in

[43] For his calling my attention to this analogy in order to reveal the consequence of Kelsen's theory of rights, I am particularly indebt to my advisor, Cem Deveci.

question is that there is a functional difference between a case when an organ acts on the basis of its legal power and a case when a private individual acts on the basis of her legal power. For making sense of this functional difference, we should first examine Kelsen's conception of "organ".

Kelsen defines the concept of organ as "an individual who performs a function which can be attributed to the community" (Kelsen, 2005:150). Kelsen emphasizes that there is a fiction here: a human being does, in fact, exercises a function, which is attributed to the community. The meaning of such an attribution can only be the fact that the act at issue is referred to the order constituting the community. However, such a definition of the concept of organ should be further developed, at more than one single point, if it is to be illuminating. For, as the reader would probably extract from what Kelsen has argued up to now, any action, including individual actions such as conducting a legal transaction, should be referred to the legal order; and, the individual acting thereby should be considered as an organ of the community. If the concept of organ is to have any meaning distinguishable from the more general concept of legal subject, it should denote a function different from the one performed by any individual subject of the legal order when her act is simply referable to that order. Thus, only those actions exercised by individuals who are qualified in a certain way can be attributed to the legal community; and, we call only these individuals as organs. Such qualifications are usually made in relation to the acts having the function of law-creation and law-application[44]. The qualification of some individuals as organs of the community indicates to the functional division of labor within the society; and the societies of such character may be designated as "organized communities" (Kelsen, 2005:153). The reason for such a qualification, which provides an individual with a capacity to represent the community in her actions, may only be the fact that this individual is *called to* function in the name of the community by the legal order: "One speaks of 'organs' creating general legal norms and 'organs' applying the law only if certain individuals have been called to the function of legislation and if certain individuals have been called to the function of applying the law as judges" (Kelsen, 2005:155).

[44] Also, law-observing acts are attributed to the community, and thus seen as performance by organs, when they are performed by those who are called officials (Kelsen, 2005:157). The tautological nature of this statement shows that it is difficult to recognize an organ by virtue of the content of the function it performs. For, it is, indeed, difficult to make sharp distinctions between law-creating, law-applying and law-observing. Thus, Kelsenite theory suggests, most of the legal norms may have features that oscillate between these categories.

The calling for an individual to a function may be either direct or indirect: direct when, for instance, the historically first constitution prescribes that "Ahmet should be the head of the state"; indirect when, for instance, the constitution prescribes that "the legislative organ should be constituted through election, drawing lots or nomination by the head of the state".

A second difficulty with regard to the concept of organ is related to the tendency to attribute to a legal community only the kind of behaviors which are *authorized, in the positive sense*, by the legal order. If the act of an organ is simply defined as an act referable to the legal order, this definition includes the behaviors called delict. For, a delict is as referable as any other action to the legal order. However, we do usually not attribute a delict to a community. Indeed, we do call a delict as *Unrecht* (illegal or unlawful), i.e. as a negation of law, not its specification[45]. Instead, we usually attribute to the organs only those actions which are ordered or permitted positively. This implies that we assume that an individual's behavior is attributable to the community only when her behavior is positively authorized. If her behavior does not have this nature, we should think, for the sake of consistency, that she is acting not as an organ of community, but as an individual committing delict. As we will consider later, such an assumption has very important repercussions in considering the relation between law and the state, because it suggests that the state can never commit an unlawful act. Rather, the state is considered as if having a magic wand that turns everything it touches upon in to law[46].

Another difficulty concerning the concept of organ is related to the general tendency for "personification" of legal relations, which is inherent in the traditional legal theory. And, it can never be overemphasized that Kelsen views the most basic virtue of his theory of law in its casting away this characteristic of the traditional theory in any case[47]. With regard to the concept of organ, he maintains that what is

[45] One should notice here why Kelsen almost always prefers the term "delict" in place of the confusing term "illegal". For, he thinks that, in any legal order, an action can be illegal (against law) only metaphorically. For, what is called as illegal, i.e. a delict, is indeed the condition of the sanction prescribed by law itself.

[46] As we will see in the next chapter, this is a point which Carl Schmitt satirizes in regard of positivist theories of law.

[47] For this point, William Ebenstein's excellent article, "The Pure Theory of Law: Demythologizing Legal Thought", is also particularly revealing. The author locates Kelsen within the general Neo-Kantian trend of the period: "The Neo-Kantians, particularly Cassirer, pointed the way to resolve the age-old dualism between substance and function, since substantivist thinking –in the physical as well as in the social and normative sciences– is often the last line of defense of residual

essential for an organ of community is its *function* as an organ. That is, it is crucially misleading when one first posits a substance called an organ and then a function for this substance as its attribute. For, the function is *constitutive for*, not an attribution of, the concept of organ:

> The concept of organ expresses the idea of a subject or "holder" (German: *Träger*) of the function; i.e. the personal element of the behavior that represents function; this function, like any human behavior, consists of a personal and material element. The concept of the organ as the subject or holder of a function different from this holder is a concept of substance and as such to be used with an awareness that, from the point of view of scientific cognition, substance is to be reduced to function. In the concept of the organ as the holder of the function, the personal element is detached from the material element, although the two are inseparably connected. Only with this reservation can the concept of the organ be used as an auxiliary concept which facilitates the presentation of the facts to which the concept of "organ" refers. (Kelsen, 2005:151).

As the reader would probably recall, the problem we face at this point is precisely the same with the one we face in the case of the concepts of *subjectives Recht* and subjective rights. For, it is the same ideological trick to hypostatize a subject prior to, and independent of the legal order, out of which confusions arise. For Kelsen, all these confusions can, however, be easily avoided, if one always holds in mind that, from a scientific (i.e. purely cognitive) standpoint, only the relations between legal norms, or relations between facts determined by legal norms are essential. Individuals as the subjects or objects of such relations can have only an auxiliary importance from the standpoint of legal cognition.

Now, we are in a position to understand what Kelsen means by his conception of the state as "a legal order". For him, the state is essentially a juristic entity overarching all juristic persons and relations within a legal order. Indeed, it is identical to the legal order itself from the standpoint of legal theory. If such an argument seems astonishing, it is only because we are accustomed to the traditional accounts which separate law and the state as two distinct realms. For them, the state

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metaphysical speculation. Cassirer emphasized the general tendency in modern science to dissolve traditional concepts of science –such as *matter, energy, force*, and the atom– into nonsubstantive concepts of *relations, functions, and events*. Similarly, Kelsen showed…that traditional concepts like state, person, and other substantive terms are nothing but *reifications* or *personifications* of functions and relationships…" (Ebenstein, 1971:622) [Italics are mine].

is basically a supra-juristic power underlying social reality. This power, then, transforms itself from a bare fact of power to a legal institution, i.e. to a community governed by law. Thus, the state is conceived of as a kind of man or a superhuman creating the legal order.

Against such imaginative duplications of the state and the legal order, Kelsen has two basic arguments. First, when it is held by a judicial theory aiming at explaining the state as a judicial entity, the contradiction is already evident in such a duplication bringing about a conception of state as a supra-legal entity. Second, even if one would accept that there is a supra-legal social reality related to the phenomenon we call "the state" or "the legal order", the priority would pertain to the second, not to the first one. That is, in a complete analogy to the fact that a sociological account of law presupposes the pure judicial account of law, a sociological account of the state would presuppose the pure judicial account of the state. To show this, Kelsen refers to the conception of *state as a system of domination* as the most successful sociological theory of the state[48], but, then, argues that even this sociological account is far from being adequate. For, if the common-sense holds to a distinction between a gang of bandits and the state as legal order, it should be the case that the simple fact that some individuals are in a position to enforce certain patterns of behavior upon others is not a sufficient condition to call a system of domination as the state. In Kelsen's own words, "the domination that characterizes the State claims to be legitimate and must be actually regarded as such by rulers and ruled" (Kelsen, 2006: 187). Hence, to make sense of the notion of legitimacy is essential to any adequate theory of the state. To reiterate, the state is not the "power behind law", but the legal-normative regulation of power within a society. The state as such is identical to the normative coercive order we call the legal order.

[48] Other sociological accounts of the state which Kelsen briefly considers and finds crucially defective are: 1) the state as "a social unity constituted by social interaction" (This theory is defective since the interaction between the members of different states may be more intense. If it is argued that interactions between the members of the state have a specific character, this character can be explained only on the basis of legal bonds binding the members; and, thus, this argument presupposes a judicial account of the state.) 2) the state as "a social unity constituted by common will or interest" (This theory is defective for the alleged common interest or will can be nothing more than a myth or noble lie. 3) the state as "organism" (This theory is defective because such an organism is nothing more than a hypostation of an animistic type for the ideological sake of guaranteeing individuals' obedience to the legal order) (Kelsen, 2006:183-186).

In Kelsen's view, the fact that it is a *coercive* order designates that the state is also essentially a political organization, since politics designates "coercion exercised by man against man" (Kelsen, 2005:186). Yet, not any legal order can be called a state. To be a state, a legal order must have the character of an organization in the strict sense of the word: "it must establish organs who, in the manner of division of labor, create and apply the norms that constitute the legal order; it must display a certain degree of centralization. The state is a relatively centralized legal order" (Kelsen, 2005:186). Thus, Kelsen argues, neither the primitive social orders nor the international order of our age can be called the state, though both may be conceived of as legal orders. For, neither of these kinds of order has a central legislative organ creating general legal norms. In both of them, norms are created in a decentralized manner *via* custom and exercised in a decentralized and arbitrary manner *via* self-help.

Combining these insights with the traditional insight concerning three essential elements of the state as "the people, the territory, and the efficacy of the state power", Kelsen reaches to the following definition of the state: "the state whose essential elements are population, territory, and power is defined as a relatively centralized legal order, limited in its spatial and temporal sphere of validity, sovereign or subordinated only to international law, and by and large effective" (Kelsen, 2005:290). If one tries to locate the state or the legal order within the general framework of human interactions as such, one can argue that the phenomenon of the state shows itself in any human action presenting itself and understood by others as creation and execution of legal norms. Kelsen calls this the *formal* concept of the state, i.e. the conception of the state understood in relation to its function. As is well known, the traditional theory presents the functions of the state as strictly separated three categories of legislation, administration, and jurisdiction. In Kelsen's view, any particular action under these three categories may be conceivable either as law creation or as law application; and, it is more appropriate to define the function of the state in accordance with the latter terms, which reflect the legal characteristics of the actions at issue more correctly[49].

[49] For, even a judge performs the function of creating a particular individual norm (i.e. that of legislating in some sense) as well as the function of applying a general norm, in any particular case he decides upon.

Yet, there is also a second and narrower meaning of the concept of the state. For, a human action may be imputed to the state not only because the action presents itself as creation or execution of the legal order, but also for the reason that it is performed by an individual who has been qualified as a state organ and, thus, granted to the capacity to act in the name of the state. Kelsen calls this the *material* concept of the state, designating "the bureaucratic machinery of officials, headed by the government" (Kelsen, 2005:293). In opposition to the formal concept of the state, the material concept does not designate the total legal order but only a certain part of it. The latter is indeed a secondary concept presupposing the former: without the conception of a wider community consisting of individual-members all subjected to a legal order of norms, the machinery of the state would have no meaning. It should, however, be emphasized that, though being a secondary concept, the material concept may be very functional in explaining certain cases. For instance, it helps to make sense of the general trend of early 20th century called "nationalization" or "socialization". These indicate that the state activities do not limit themselves to bringing about a certain state of affairs by issuing laws subjugating individuals and applying these laws in the concrete cases, but also aim at directly bringing about the intended state of affairs by its organs, i.e. by bureaucrats, as in cases whereby the state operates railroads, builds schools and hospitals, provides education, offers medical care. When the state engages in such economic, cultural, and humanitarian activities, it acts in the same manner as an individual acting out of realizing a purpose; and, this may be designated more precisely by the term "officialization", rather than "nationalization" and "socialization". This is because hereby the state administration increasingly becomes the direct realization of the state's purposes (Kelsen, 2005:298). This is genuinely a very different mode of activity from the classical functioning of the state, aiming at only realizing the general legal-normative framework within which human beings are to pursue their own chosen purposes. As Kelsen recalls, the recognition of this difference led many theorists to assert that we experience a shift from a "jurisdictional state" (*Gerichtsstaat*: the state whose internal function is limited to legislation, jurisdiction, and execution of the sanctions) to a "jurisdictional and administrative state" (*Gerichts-und Verwaltungsstaat*: the state which is also very active in the manner of direct state administration). However, it should not be thought that this mode of state activity lacks the character of legal

function. As Kelsen underlines, such mode of activity still remains within the boundaries of "law-obeying function". For, it is the legal order which obligates the organs of the state with performances for the realization of certain purposes, and the state officials perform their obligation, i.e. act in a law-obeying manner, when they engage in such activities[50].

Kelsen thinks that his theory of the state as a legal order brings about a resolution to the much debated but up to now controversial issue of the duties and rights of the state. Particularly, the issue of the duties of the states has become controversial because it was very difficult to understand the auto-obligations of the states when one relied on a duality of the state (as the creating subject) and law (as an entity created by the state). However, the auto-obligation, or self-obligation becomes fully explainable from the standpoint of a theory that acknowledges the essential unity between the state and the legal order. For, such a theory provides the insight that it is not the state which submits itself to law, it is law –more precisely, the legal regulation of the behavior of men– which designates the state as an essentially judicial entity. That is to say, the state exists only through the legal relations that obligate and/or grant rights to legal persons. What is the essential object of cognition is (or should be) law as a system of legal relations, not its personification called the state. Indeed, if the state is a legal order, it should be understood as a system or structure, not a separate person. If it is to be metaphorically said that the state has a will, this will of the state should be conceived of as a completely diffused will expressing itself in and through every single legal norm[51]. In line with these, one should notice that the term *Rechtsstaat*, when taken literally as a state

[50] In asserting that the "jurisdictional and administrative states" remain within the boundaries of the rule by law, one should underline, Kelsen essentially diverges from the liberal theories of the Rule of Law (i.e. of *Rechtsstaat*). For, a "jurisdictional or an administrative state" is not compatible with the vision of state and law which liberalism proposes. In his *On Human Understanding* where he identifies the Rule of Law with *civitas*, Michael Oakeshott well elaborates this. He elucidates *civitas* as a civic engagement of human beings solely on the ground of recognized rules. In opposition to *universitas*, thus, it is not a managerial engagement in relation to a common purpose, which may be a moral, or a religious, or an economic or a political one. In a *civitas*, i.e. a civic order of the "rule of law", no common purpose is prescribed upon individuals; rather they are left free to choose whatever substantial purpose they will follow, only with the restriction that their actions should not contradict with the commonly recognized rules of interaction, which are called laws. See, Oakeshott's *On Human Conduct*. For an excellent presentation of Oakeshott's views on civil condition and the rule of law, see Terry Nardin, 2001: 183-224.

[51] Here, the reader probably glimpses what kind of theory of sovereignty Kelsen has relied on. From the standpoint of Schmittian theory, this is indeed counted not as a theory of sovereignty, but a pantheistic vision dissolving the notion of sovereignty. For, as we will see in the next chapter, Schmitt thinks that the sovereignty designates a singular power that is transcendent to the normativity of the established order.

governed by law, is nothing more than a pleonasm, i.e. a redundant idiom[52]. For, a state not governed by law is a contradiction in terms, given that the state means the legal order itself.

If we now consider the specific nature of the duties and rights of the state, one should, first of all, underline that there is no legal obligation of the state in most of the cases when the traditional approach talks about the duties of the state. For instance, it is usually said that it is a basic duty of the state to punish the evildoer. However, there is only an authorization, not a duty, on the part of the state, unless the legal order attaches a sanction to the case that a certain state order fails to inflict a punishment to the evildoer. If legal order prescribes no such a sanction, we can talk only about a general moral-political obligation of the state to act in a manner to fulfill what it is authorized to. This is also the case in the alleged obligations of the states corresponding to the so-called fundamental rights and civil liberties of the subjects of the state. For, this corresponding duty is indeed the prohibition that the state should not violate, by statutes, the equality or liberty that is the content of these rights. However, such a prohibition does not directly create a legal obligation of the legislative order in the technical sense, but only the possibility to annul the statute by a special procedure. We could speak of such an obligation in the technical sense only if a sanction against the legislators were prescribed by the legal order, i.e. by the constitution in this case. Hence, from the Kelsenite standpoint, basic rights can never be ascribed to an absolute and prior status. Rather, at best, they can be constitutionally protected principles, on the condition that a constitutional norm prescribes a sanction executed against the state organs in the cases both when the state authorities do not intervene into a factual violation of basic rights and when the legislative authority itself brings about a violation of basic rights through legislating a statute which is inimical to them.

One can even argue that, in the cases when a sanction to the non-infliction of the punishment is attached, it is more correct to speak of the obligation of an organ of the state rather than of the state in general. Making this nuance is very important, because it makes "possible to attribute to the state an obligation and the behavior that it represents, without also attributing to the state the violation of the obligation"

[52] As Kelsen notes, there is also a specific sense of the concept of *Rechtsstaat* which is more than a pleonasm (Kelsen, 2005:313). We will return to this specific sense of the concept in the following sections.

(Kelsen, 2005:304). This possibility, in turn, leads some to argue that "the state can do no wrong"[53]. Those, who propose this formula, can argue as follows: an obligation of the state may be violated by the actions of an organ of the state; yet, an individual is an organ of the state only insofar as her action is creation, application or observance of law. When she commits a delict, it means that her action is neither of this but a violation of law, and she ceases to be an organ of the state in committing this violation of law. Thus, the state does not and cannot commit wrong, except in cases concerning the international law. Because the international law cannot be identified with the exclusive will of any state, it is possible for a state to commit wrong in that sphere.

The foregoing arguments demonstrate that, from the standpoint of pure theory of law, the obligations of the state are conceivable not as the restrictions on state power, but as the very specific existence of the state as a system of legal relations. Beside the "obligations" of the state, of course, the rights of the state constitute the other –indeed, more essential– dimension of the specific existence of the state as a system of legal relations. For, I think, the legal order, in the sense of *objectives Recht*, is almost identical to the general right of the state to create and apply legal norms, from the perspective of Kelsenite theory. This is evident when he argues that it is the state itself that creates, defines and limits the sphere of private law as a sphere where the individual interests acquire protection[54]. That is, the state does not *recognize* some primordial interests as interests that should be protected; rather, it *creates* these protected interests. Rights of individuals arise only out of the fact of protection of them by a legal order; and, thus, they are the expressions of the authorization of the state by the legal order, or the self-authorization of the legal order, as much as any other legal norm. In line with these, the so-called "rights against the state" can only have the legal-technical meaning that a private person whose legally protected interest is violated can be a party in the legal process leading to a sanction against that state organ which was immediately responsible for the fulfillment of the obligation (Kelsen, 2006:201). Relevantly, the rights of the state, in the very technical meaning of the term, would mean that the judicial

[53] One may note that Kelsen's position with regard to the formula that "the state can do no wrong" oscillates. In *General Theory of Law and State*, he seems to defend the foregoing formula through and through; however, in *Pure Theory of Law*, he suggests more moderately that this is only a possible way of thinking.

[54] For Kelsen's arguments against the traditional view on the separation between public and private law, see Kelsen, 2006:201-207.

process leading to a sanction against an individual who has violated or not fulfilled her obligation is put into motion by a state-official. For, as our examination up to now reveals, Kelsen's general identification of the state as legal order means that every relation and every concept relating to the phenomenon of the state should be explained in a manner which dismisses any reference to extra-legal "mystifications". That is, there should be no reference to extra-legal substance, transcendent principles and transcendent personalities, but only to an order of norms as a completely *immanent* system. If there is some reality left out of this normative system, Kelsen suggests, it will be not an object of inquiry for the proper theory of law and the state.

II.4.2. The "Dynamic" Nature of the Legal Order, Basic Rights and Sovereignty

We should now examine the specific nature of the normative order called the state. This nature may be captured by the formulation of the state as a *dynamic normative order of hierarchically posited norms*. We have already seen what it means to be a normative order: it means to be a system of norms in which validity (i.e. the specific existence) of a norm derives not from a fact (i.e. an "is"), but from another norm (i.e. an "ought"). We should now grasp what it means to be a dynamic and hierarchical order. As is examined above, any legal order has a basic norm (i.e. *die Grundnorm*) as its transcendental-logical presupposition. In most general terms, the basic norm is always a presupposition that the norms posited by legal authority should be obeyed, whatever or whoever this legal authority is. The basic norm is, thus, a final norm which provides for the unity of the whole legal system and the ultimate criterion for the validity of any positive legal norm. It performs this function as the highest norm whose validity cannot be derived from another norm and, thus, cannot be questioned.

Yet, the way the basic norm provides the validity for positive legal norms should be understood correctly. The basic norm can perform its function only in a dynamic way. This, in turn, gives the legal order the character of a dynamic normative system, not a static normative system. A static normative system is the one in which the validity of norms depends on their content. For, such systems depend upon the presupposition that particular norms are subsumable to general norms.

That is, the content of particular norms can be deduced or determined, in some way, by general norms. Ethical systems are usually considered to be founded upon such a presupposition and, thus, represent models of static normative order. To instantiate: the relatively more particular ethical norms like "do not lie" or "do fulfill your promise" are usually subsumed under more general principles like the one prescribing truthfulness. This principle of truthfulness may be, in turn, subsumed under a more general one like Kantian categorical imperative to "treat others as always also ends in themselves" or the Christian motto of "loving your neighbor".

However, Kelsen argues, the idea of a static normative order having a universal validity derived from Reason is nothing more than illusion, even in the case of ethics. For, one can hold that a norm is "directly evident" or "immanent in" or "derives from" reason, only if one also holds to the idea of practical reason. Yet, such an idea is untenable, since "the function of reason is knowing and not willing, whereas the creation of norms is an act of will" (Kelsen, 2005:196). Likewise, even in such an allegedly universalistic ethical system as Christian ethics, the basic norm is not "love your neighbors" but "obey the commands of the God"; and the former is considered to be valid not because of its content, but because of the fact that it is established as the command of the God. Thus, the basic norm Kelsen speaks of as the ultimate principle of dynamic normative orders "contains nothing but the determination of a norm-creating fact, the authorization of a norm-creating authority or (which amounts to the same) a rule that stipulates how the general and individual norms of the order based on the basic norm ought to be created" (Kelsen, 2005:196). That is to say, the basic norm provides the reason for the validity, not of the content of the norms constituting the system. These norms acquire their contents, i.e. come to the existence as norms, only "by the acts by which the authority authorized by the basic norm, and the authorities in turn authorized by this authority, create the positive norms of this system" (Kelsen, 2005:197). One should also underline that, in opposition to Kant's universal principle of law, the basic norm is not a norm which reason discovers as universally valid or immediately self-evident. For, reason prescribes nothing to the effect that the commands of a kingly authority but not of a republican assembly should be obeyed or *vice versa*. The only foundation of the basic norm of a legal system can be found in this: it is the essential presupposition in the acts of will creating positive norms and also in the norm-following acts of the subjects of law.

The foregoing arguments underlined that one basic function of the basic norm is to provide individual norms of a normative system with the systemic validity. In the sphere of law, the basic norm performs its function through being the presupposed starting point of the procedure of positive law creation. I think that it is, at this point, proper to liken law to the image of the God in a pantheistical conception of universe. Precisely like the latter, law is the creator, the created and indeed the very process of creation in this procedure: a phenomenon that regulates its own creation. The end point of this process is a hierarchical structure of super- and subordinate norms. That is, law as a normative system is not that of coordinated norms of equal level but a hierarchy of different levels of norms. At the highest level of positive law stands the *constitution in the material sense,* which consists of the positive norm or norms regulating the creation of general legal norms. The constitution in this sense may be created either by custom or by a legislative act by authorized individuals. In the latter case, there is a document called the written constitution, in opposition to the unwritten constitution created by custom.

The constitution in the material sense should thus be distinguished from the *constitution in the formal sense*, which is a document, a written piece, containing not only norms regulating the creation of general norms (i.e. the legislation) but also norms concerning other politically important subjects[55] (Kelsen, 2005:222). The reason for including norms other than the constitutional norms in the material sense is that a constitutional norm cannot be abolished or amended as ordinary statutes. That is, the annulment of a constitutional norm is made conditional to more rigorous procedures and regulations. Therefore, the authorities may choose to include a norm, which has of a particular importance in their view, into the formal constitution, so as to sustain a relative security or stability for this norm in the future. Here Kelsen reveals certain important points concerning the nature of existing legal orders, which we should underline.

First, as I already said, the technique of the constitution in the formal sense, which has acquired prominence in the modern world, aims at the stability of the essential norms of the legal system. The extent to which a change in the constitution is made more difficult than enactment or amendment of an ordinary

[55] In *The General Theory of Law and State*, Kelsen also calls the constitution in the material sense as the "legal concept of the constitution" and the constitution in the formal sense as the "political concept of the constitution" (Kelsen, 2006:258).

law determines the rigidity or flexibility of a given legal order. Sometimes, the founders of a state may so resolutely decide upon the desirability of rigidity in certain cases that they dismiss the competence for a constitutional change of the ordinary legislation. This was, for instance, the case for the French Constitution of 1875, the article 8 of which declares: "the Republican form of Government shall not be made the subject of a proposed revision" (Kelsen, 2006:259). Similarly, according to the article 4 of the Turkish Constitution of 1982, "the first three articles of the constitution concerning the republican form of Turkish state cannot be made the subject of revision or of a proposal of revision". In such rigid statements, we see that the constitution acquires a closed form that it prohibits, not simply makes harder, its own revision by the ordinary legislation. In accordance with the extent that constitutions include such provision, we may categorize them either as "rigid, stationary or inelastic constitutions" or "flexible, movable or elastic constitutions" (Kelsen, 2006:259). Having said this, Kelsen also underlines that such a distinction between constitutions can only be relative, i.e. a matter of degree not quality, since a system of positive law cannot attain the status of absolute rigidity for evident reasons.

That the constitutions in the formal sense usually include norms other than those concerning the creation of norms also points out to the fact that actual legal orders tend to be dynamic orders combining static elements. For, the constitutions can determine not only the organs which are to create legal norms or the procedures through which legal norms are to be created but also the very content of legal norms in this way. That is, the constitutions can determine the content of future statutes by prescribing and/or excluding statutes with certain contents. In the cases whereby the constitutions prescribe future statutes with certain content, this cannot have a genuine legal significance. Rather, such a prescription can merely have the significance of a promise, because it is technically almost impossible to connect a sanction to the non-performance of creation of the statute by the legislative authority. On the other hand, the exclusion of future statutes with certain contents constitutes a genuine obligation in the technical sense on the part of the legislation. For, it is possible, in this case, to put the individuals participating in the creation of such statutes under personal responsibility or to provide the possibility for contesting and abolishing such statutes. I think that one may point out the catalogue of basic rights as particularly important examples of such prescribed or excluded

norms –especially of the latter– within modern legal systems. In line with the legal principle that a higher norm is valid when a lower norm contradicts with it, these rights of individuals acquire a sort of security within the legal system.

The foregoing point gives the impression that Kelsenite theory can recognize the inviolable status of basic rights *within* the modern legal systems. Yet, this is not the case. The guarantee basic rights may acquire when they are legislated as constitutional norms should not be confused with the inviolable status of certain natural/fundamental rights asserted by Natural-Law Doctrines. Above all, basic rights as Kelsen speaks of them are clearly not supra-legal rights, but legal rights of a prominent status. They are valid as norms only because the legal order *does* contain them, not because legal orders *should recognize* them in order to be a legitimate order. Quite in line with this, it is wrong to conceive of basic rights as "rights against legal order", that is, as certain guarantees against the state power on the part of individual subjects. Rather, basic rights as constitutional norms are the very part of the operation of the state power, not its limitation. The protection individual subjects acquire under a basic right posited as a constitutional norm is not a protection against the state as legal order, but only against some organs of state authority, including legislation, administration and bureaucratic machinery. Moreover, this protection does not mean that a state action in contradiction with "what a basic right entitles individuals to" is impossible from the normative-legal standpoint. It only means that an individual can give start to a procedure whereby an action by a state organ may be invalidated as illegal or unconstitutional at the end. In this way, even a legislative act can be annulled on the basis that the content of a statute it legislated contradicts with a basic right posited in the *constitution in the formal sense*.

Kelsen's conception of basic rights is thus closely connected to his view on constitutional courts. As one of the founding fathers of the idea of the constitutional court, he underlines that the check for the un/constitutionality of legal norms can be performed adequately only if an organ different from ordinary legislative organ is authorized with this function. He thinks that such an organ as a constitutional court which is relatively independent from politics is most appropriate for this function[56].

[56] As Dyzenhaus presents it, Kelsen argues against Carl Schmitt, in his "Wer soll der Hüter der Verfassung sein?", that not the president but the constitutional court should be seen as the protector of the constitution (Dyzenhaus, 1999:108-123). In his *Constitutional Theory*, which I will analyze in

One should note that having brought this proposal, Kelsen is also very veracious with regard to the consequence of establishing independent courts for the check of the constitutionality of legislative norms: it will mean creating an organ having the power of a negative, but superior legislation (Kelsen, 2005:156). For, the last word for the validity of a legislative norm in question will be always said by the constitutional court, not by the parliament[57].

In the hierarchical normative order called the state, the level of general norms created by legislation and/or custom occupies the secondary level which comes after the first level of constitutional norms. That a general norm is created either by legislation or by custom has no significance for their normative status. The only thing that should be held in mind in this regard is that the legal orders including general norms created by custom have a basic norm which institutes not only the

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detail in the next chapter, Schmitt responds to the idea of the constitutional court as the guardian of the constitution. There, he argues that "it is a murky fiction to separate legal questions from political questions and to assume that a public law matter permits itself to be rendered nonpolitical, which, in fact, means deprived of the character of a state" (Schmitt, 2008:164). Hence, for Schmitt, what is needed in the conditions of genuine constitutional crises is an organ that can *decide with integrity*; and "in place of a court of law with its appearance of judicial formality, a political organ [such as a president or a senate] decides with more integrity" (Schmitt, 2008:64). Moreover, Schmitt adds, in the case where a court of law is burdened by the role of protecting the constitution, "there is the danger that instead of a juridification of politics, a politicization of the judiciary emerges, which undermines the prestige of the judiciary" (Schmitt, 2008:64). It should be highlighted that Schmitt's prediction that Kelsenite idea of the constitutional court as the guardian of the constitution will bring about a politicization of the judiciary is implicitly approved even in Kelsen's own theory. For, as we will see just below, Kelsen himself concedes that the constitutional court functions, in fact, as an organ of superior-legislation in opposition to ordinary legislations, i.e. parliaments in the modern states. What is debatable in Schmitt is, however, that such a politicization of judiciary does not negate that there may be also a juridification of politics going on simultaneously under the authority of the constitutional court.

[57] In this regard, a decision of Turkish Constitutional Court taken in 2008 may be pointed out as a confirmation of Kelsen's foregoing arguments. By its decision registered as *Anayasa Mahkemesinin E: 2008/16, K: 2008/116 Sayılı Kararı (5735 Sayılı Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Değişiklik Yapılmasına Dair Kanun ile İlgili)* and published in *22 Ekim 2008 Tarihli ve 27032 Sayılı Resmî Gazete*, the Constitutional Court annulled a constitutional amendment by the Turkish parliament on the basis that the amendment in question conflicted with the essence of the established constitutional regime. Against this decision, members of the majority group in the Parliament and the circles supporting them raised the objection that there is an *ultra vires* on the part of the constitutional court, because the Article 148 of the Turkish Constitution, which regulates the function of the constitutional court, obviously decrees that the authority of the court in supervising constitutional amendments is restricted to supervision on the basis of "their formal or procedural congruity" and cannot be extended to supervision on the basis of "their substantial congruity". Those who defended the decision of the court replied as follows: As expressed in the Article 4, there are inviolable principles of the constitutional regime, and annulling any amendment contradicting with these principles should be considered as supervision on the basis of "formal or procedural congruity". This means to argue that it is up to the constitutional court (and not to anyone else) to decide whether or not a decision taken by the court is constitutionally appropriate. Hence, the decision of the constitutional court and the process and debates following the decision in question confirm Kelsen's claim that the creation of a constitutional court is indeed the creation of a superior legislative body.

conscious creation of a constitution, but also the fact of a qualified custom as law-creating fact (Kelsen, 2005:226). General norms are usually divided into two in accordance with the authority creating them. They are called "statutes" when they are created by legislation, i.e. popularly elected parliament in modern legal orders, even though their elaboration through norms enacted by administrative organs may be permitted. However, it is sometimes the case that governments, i.e. administrative authority, are authorized to issue general norms, in certain cases and circumstances. Such are called "ordinances". The levels that follow the level of general norms are the level of the "creation of individual norms by the courts" and, then, the level of the "execution of the sanction" (Kelsen, 2005:237). All these levels, taken together, indicate to an increasing process of "individualization" and "concretization" within which law regulates itself, i.e. keeps renewing itself (Kelsen, 2005:237).

It is particularly important that Kelsen sees an operation of creation in the court's activity where the traditional theory has seen only an operation of application. Kelsen thinks that, except two borderline cases –i.e. the presupposition of the basic norm (at the top) and the execution of the coercive act as sanction (at the bottom)–, any legal norm is both the application of a higher norm and the creation of a norm. Each norm of a legal order must be an application of a higher norm. That is, each norm should be determined by a higher norm, if the legal order is to sustain itself as a unity. The scope of the determination of a lower norm by a higher norm varies. There is the case of minimum determination when a higher norm only determines the organ that is to create the lower norm. In the maximum case, a higher norm may determine also the procedure through which the lower norm is to be created, and even somehow the content of the lower norm. However, the determination of the content of the lower norm can never be complete: if such complete determination were possible, we would speak of a single norm. In line with this, Kelsen argues that the function performed by courts should be called the creation of individual norms rather than the application of norms. For, any judicial judgment consists of decision and this decision has a constitutive, not merely declarative, role for the legal norm to be applied:

> A judicial decision does not have merely declaratory character as is sometimes assumed. The court does not merely "find" (in German: *das Recht finden*) the law whose creation had been previously entirely completed; the

> court's function is not only juris*dictio*, the pronouncement of law in this declaratory sense. The finding of law is present only when the general norm to be applied in the concrete case is to be ascertained; and even this ascertainment has a constitutive, not merely a declaratory, character. The court…must decide whether the norm to be applied is constitutional, that is, created in a legislative procedure determined by the constitution or by custom delegated by the constitution. This fact, to be ascertained by the court, is as much a condition for the sanction…as the fact, to be ascertained by the court, that a delict is committed. (Kelsen, 2005:238).

This quotation contains very controversial views for a theory of the state. Yet, I should first discuss the theory of judicial interpretation underlying these arguments before focusing upon their implications for a theory of the state. Kelsen thinks that, even when a higher norm includes a determination with regard to the content of a lower norm, there is always need for discretion, i.e. an act of will. In any case, the higher norm is only a frame for interpretation by the legal authority, who is to create the lower norm or to apply the norm. This frame points out to several possibilities. Among these several possibilities, the authority decides upon one as the valid –not the "correct"– one. There are several points of view regarding to the criteria according to which the legal authority should decide. Two major criteria are: 1) to focus upon the wording of the norm, or 2) to focus upon the intention of the legislator. Kelsen argues that, from the standpoint of legal theory, one method is as good as the other. What really matters is the act of will, i.e. decision, by which the judge creates the norm. To find such a view of judicial process in Kelsen's pure theory of law is striking. For, it shows that Kelsen is far from the mechanistic conception of judicial function, which is generally attributed to legal-formalism. Indeed, he is much closer to nominalist modes of thinking which we find in legal-realist thinkers[58].

[58] In his article "Legal Formalism and the Pure Theory of Law", Kelsen explicitly argues that he has never thought that legal judgment can and should be based on the "plain meaning" of the general norm. Rather, he claims that his pure theory of law has grounded on the major premises of the "School of Free Law", i.e. the assertion that the so-called law application is indeed true law creation (Kelsen, 2002:82). At the price of some reiteration, the following quotation from this article will be helpful: "By seeing statutes merely as a frame that must be filled in by law-producing action of the judiciary and administration, by seeing decisions and administrative action as merely the continuation of a process of law-production in which legislation represents only a preliminary state, the Pure Theory of Law, based on the conclusions of the School of Free Law, emphasizes that generally it is a majority of individual norms, of decisions or administrative actions, that is possible on the basis or within the frame of a statute; that the opinion that, in a particular case, only one

Yet, to the extent that Kelsen maintains the idea that a higher norm still continues to be a frame for the lower norm, he never ascribes an absolute role for the moment of decision in the manner we would see in an outright nominalist perspective, i.e. a perspective which characterizes the realist theories of law and the state. In this regard, his argument concerning the Platonic ideal city ruled by the judges is revealing:

> In Plato's ideal state, in which judges may decide all cases entirely at their discretion, unhampered by any general norms issued by a legislator, every decision is, nevertheless, an application of the general norm that determines under what conditions an individual is authorized to act as a judge. Only on the basis of this norm he can be considered as a judge of the ideal state; only then can his decision, as having been reached within the ideal state, be attributed to this state (Kelsen, 2005:235).

Thus, it is basically adherence to a higher norm that provides a decision with the virtue of validity. Here Kelsen brings forth a scientifically meaningful concept of legitimacy. This is "the principle that a norm may be created only by the competent organ" (Kelsen, 2005:276). Even though such a conception of legitimacy is disputable from a legal-moralist standpoint in that it reduces the concept of legitimacy to that of legal validity, it is still different from a fully-fletched nominalist standpoint which is considered to reduce legitimacy to the effectiveness of power[59]. Closely connected to this conception of legitimacy is also Kelsen's concept of sovereignty as the ultimate power pertaining to the legal order *in toto*. According to this normative conception, sovereignty is diffused into the whole legal order and shows itself in every authorized legal act. That is, it is essentially a de-personalized power encompassing the whole legal structure and making it a unity.

In line with all these, Kelsen argues, in a pretentious way, that the term *Rechtsstaat* is nothing more than a pleonasm if it is taken literally. Every state is, indeed, a state governed by law because the state is conceivable only as legal order. It is not the case that a state existing prior to law creates law and then submits itself

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decision…is the "correct" one is an illusion created in the theory in order to provoke a sense of legal certainty" (Kelsen, 2002:82).

[59] On the other hand, Carl Schmitt, an outright nominalist thinker, ridicules such a positivist understanding of legitimacy in that it confuses legitimacy with legality. In the next chapter, both Schmitt's realist-nominalist standpoint on the question of legitimacy and his criticisms of Kelsen's positivist perspective will be discussed in detail.

to law. Rather, law is the very mode of the operation and existence of the web of relationships we call the state. If the concept of *Rechtsstaat* is found meaningful by many authors and is so prevalently used, it is only because the term has acquired a non-literal meaning. *Rechtsstaat*, in its non-literal sense, designates a certain type of state which conforms with the postulates of democracy and legal security. That is, it is a state where jurisdiction and administration are bound by general legal norms which are created by a parliament elected by the people, the members of government are made responsible for their acts, the courts are independent in performing their function, and certain civil liberties of citizens, like freedom of speech and freedom of conscience, are guaranteed (Kelsen, 2005:313). If one pretends to present this type of the state as the "true" or "genuine" state, this will be only a Natural-Law fallacy. An autocratic state where the legal norms are made highly flexible is no less a legal order than the foregoing type of state.

Another fallacy, which Kelsen's insights into the nature of the state as a hierarchically ordered system of law reveal, is the liberal idea of the separation of powers. As is well known, this idea depends upon the assumption that there are three basic functions of the state which are categorically distinct from each other: legislative power, executive power, and judicial power. On the presupposition of these categorically distinct powers, liberal proponents of the idea of separation of powers claim that these three powers should be allocated to different authorities as three coordinate powers so as to sustain the maximum legal security and individual liberty in the state. Yet, as we have seen up to now, what is called executive and judicial functions are indeed components in the general process of law creation (i.e. the process which is, conventionally but mistakenly, identified exclusively with legislation) as well as in the process of law-application. For, they consist in the creation of individual norms on the basis of general norms and in the final execution of individual norms. The legislative, executive and judicial powers are only different stages in the general process of law-creation and law-application. Therefore, there are not three, but two basic functions of the state: law-creation and law-application. Furthermore, these functions are neither capable of being categorically separated nor can be considered as coordinated but only as sub- and supra-ordinated (Kelsen, 2005:269). All these mean that there can be no separation of powers, but a distribution of powers through which different organs are

authorized for different stages of law-creation and law-application process called the state.

Closely connected with this fallacy is the classical classification of the types of states (political regimes) by political-legal theory. The traditional classification, going back to Aristotle, distinguishes the types of the state as monarchy, aristocracy and democracy on the basis of the criterion of the sovereign power creating law. Yet, looked at closely, such a criterion leads to confusions because of the traditional tendency to identify law with the general norms of the constitutional level. In the light of Kelsen's argument, we know now that law-creation is a process that does not end at the constitutional level. Rather, it goes down to the judicial level in the form of individual norm creation. However, Kelsen thinks, the problem with the traditional classification does not exhaust with the ambiguity of its criterion. The traditional dichotomy is also insufficient. For, if we accept that the type of state is to be determined by the way according to which the legal order, i.e. the constitution for the traditional view, is created, we can imagine two basic ways: law-creation in accordance with the principle of autonomy (i.e. freedom in the sense of self-determination) or law-creation in a heteronymous way. In the first case, individual participates into the creation of the legal order to which she is to be subjected. Ideally, she is free in that what she "ought to do" is to coincide with what she "wills", because her will is to be represented in law-creation process. Thus, Kelsen thinks, it is much more convenient to distinguish two basic types of the state as democracy (or republic) and autocracy (Kelsen, 2006:284). Yet, he adds, both democracy and autocracy represent only ideal-types in Weberian sense; and, the actual states always represent a mixture of the elements from both these types. The fact that these can only be ideal types is particularly understandable in the light of the insight that law-creation is a continuous process that does not exhaust at the level of constitution. Let us now look into Kelsen's arguments on the democratic form of the state whereby the process of law-creation is guided by the principle of autonomy.

II.5. Kelsen on the Shores of Politics: Democratic Form of the State

Kelsen's arguments on the democratic form of state may, at first instance, seem to be concerning the legal-technical dimensions of democratic states. Yet, as we will

see, they are indeed the culmination point of the whole philosophical perspective he has articulated. For, these arguments are grinded by Kelsen's positions not only on jurisprudence, but also ethics and politics. Hence, I think, the arguments in question may be considered as symptomatic of the weakness of Kelsen's philosophical perspective concerning ethics and politics.

Having detected the idea of freedom as the grounding principle of democratic form of the state, Kelsen first states that this idea should run a metamorphosis in order to acquire a political significance. In its original or common-sense meaning, freedom denotes a purely negative significance: it means the absence of any bond, any obligating authority. Such a freedom can be an attribute of an asocial or fully anarchical existence called the state of nature by political philosophers, but not an attribute of a political coexistence. In Kelsen's view, the first stage in the metamorphosis of the idea of freedom (i.e. in the way to a politically relevant ideal of freedom) was achieved by Rousseau. As is well known, he formulated freedom in a positive and political manner: "a subject is politically free insofar as his individual will is in harmony with the 'collective' (or 'general') will expressed in the social order" (Kelsen, 2006:285). Kelsen argues that political freedom in this sense can be guaranteed for an individual living in a social order only insofar as she participates in the creation of the social order which regulates her behavior.

Freedom in its Rousseauan sense, then, requires that "the social order should be created by the unanimous decision of all of its subjects and that it should remain in force only so long as it enjoys the approval of all" (Kelsen, 2006:285). That is, the general will should be identical to the actual will of the subjects. This means that there should be no contradiction between the social order and the actual will of any subject. Kelsen contends that one can imagine a distinction between such an ideal state having the permanent consent of all its subjects and a state of anarchy where a social order is absent. However, these two would be indistinguishable in reality, because we need a normative order regulating our behavior precisely for the reason that our co-existence is conflict-laden. Thus, if conflicts among us are excluded *a priori*, there would be no need for a normative coercive order: "only if such a conflict is possible, if the order remains valid even in relation to an individual who by his behavior 'violates' the order, can the individual be considered to be 'subject' to the order. A genuine social order is incompatible with the highest degree of self-determination" (Kelsen, 2006:286).

Thus, the metamorphosis from the negative conception of freedom to Rousseauan ideal of autonomy is not enough. A second transformation to the effect of somehow restricting the Rousseauan ideal is necessary. Kelsen thinks that the principle of majority arises out of this second metamorphosis as the only attainable political ideal of freedom. Before examining his arguments concerning this principle, his views against the alternative offered by various writers should be considered. This is the alternative based on the idea of the "common interest" of the people. Kelsen first underlines that even explicitly authoritarian states, like the Soviet Russia, can present themselves as true forms of democracy on the basis of this idea (Kelsen, 1955:5-6). In its most basic form, the argument is that, for democracy, it is much more important to have a "government for the people", i.e. a government realizing the common interest, than "a government by the people". Even if one dismisses the fact that the most essential element defining democracy is participation in the government, this argument is still crucially defective. For, in the view of Kelsen, the question as to what is common interest or common good is necessarily a value judgment; and, like any other value judgment, it is subjective. Even more, the people in modern societies consist in an aggregate of individuals coming from different economic, social and cultural backgrounds and, thus, have different, even divisive, interests and values. The idea of the common interest or common good of the people operates only to veil the domination of one group over others in these societies. No matter whether the dominating group pursues its material interests or not; even in cases it rules really in accordance with values which it regards as supreme, there will be no additional justification for its rule since there is no objective criterion for values.

The attainable form of political freedom can, on the other hand, be realized by the principle of majority (Kelsen, 2006:286). More precisely, this principle, which prescribes that the number of those approving a binding norm should be more than those disapproving it, provides the way for the greatest possible approximation to the ideal of self-determination. At a first instance, Kelsen carries out the identification of attainable political freedom with the principle of majority to a high point that he seems to argue that prescribing the approval of a qualified majority for changes in social order seems to be in contradiction with political freedom and democracy. Yet, he then expresses that such would be a superficial view of the principle (Kelsen, 2006:287). The fact that democrats adhere to the principle of

majority does not stem from their idea that what the majority of people decides upon represents absolute truth, but rather the idea that such truths do not exist, and we should follow the opinion (*doxa*) held by the majority, not opinions held by less people, in the absence of such absolute truths. Indeed, the absence of absolute truths, in view of Kelsen, brings about the idea of equality. For, in this case, everybody has the same claim to freedom. That is, it is irrelevant whether the one or the other is to be free. In this sense, the principle of majority, and thus the democratic order of the state, depends upon a synthesis of freedom and equality.

The foregoing elaboration indicates that the metamorphosis of freedom does not come to an end with the principle of majority. For, this principle, understood exactly, implies the right of minority. As the title for the form (not for the content) of a social order[60], democracy should sustain a procedure in which the minority is not excluded, but retains the power to influence the will of majority. Therefore, a permanent process of discussion, based on the will to understand and self-criticism, is essential, in opposition to the autocratic principle of rule, the dictate reflecting the will to power.

Likewise, it is not contradictory to political freedom when democratic forms of legal orders "prevent, to a certain extent, the contents of the social order determined by the majority from coming into absolute opposition to the interests of the minority" (Kelsen, 2006:287). This is the case when democratic constitutions guarantee the basic rights, like freedom of conscience, and speech and press, against the ordinary legislative power and administration. This brings forth another principle supplemented to that of majority: the principle of constitutionality or the Rule of Law principle. This principle operates to the effect that particularly "the administrative and judicial functions of the state should be determined so far as possible by pre-established general norms of law, so that as little as possible discretionary power is left to the administrative and judicial organs" (Kelsen, 1955:77). This means, for Kelsen, "freedom is thus guaranteed because arbitrary government is avoided" (Kelsen, 1955:77). This is an interesting argument because the very principle of the rule of law requires the bureaucratization, i.e. non-democratic organization, of the administration and judiciary. And, Kelsen argues,

[60] It should be noted that, for Kelsen, democracy is purely a matter of form, that is, has nothing to do with the substance. In this vein, Kelsen might be counted among the protagonists of procedural conceptions of democracy.

such bureaucratization is in the interest of political freedom and democracy. Second point Kelsen makes with regard to this principle is that: though it constitutes a guarantee of individuals against the acts of administration and judiciary, it does not bring about a secure restriction to the acts of the legislation. This is because the legislative power is the power of enacting the very general norms, to which the authorities are expected to show respect, in accordance with the principle of the rule of law. Considered in its legal-technical effect, the principle of constitutionality (i.e. of the rule of law) can indeed not guarantee the freedom of individual, but only "the possibility of the individual to foresee, to a certain extent, the activity of the law-applying, that is, the administrative and judicial, organs, and hence to adapt his behavior to these activities" (Kelsen, 1955:77).

At the end of his examination of the metamorphosis of the idea of freedom from negative freedom, through Rousseauan popular sovereignty, to the principle of majority implying the right of minority and the rule of law principle, Kelsen reaches to an interesting conclusion. Hereby, what we have come across with is: a social order in which legal security, the rationalization of the activities of government, publicity, compromise and relative peace are achieved, but not freedom. More strikingly, though Kelsen seems convincing in every stages of it, this analysis of political freedom which he presents as the elaboration of the basic structure of democratic legal orders culminates into a point which is contradictory to the point where he started. He begins with underlining the antagonism between democracy and liberalism and finish off with the identification of each other. At the beginning, he claims democracy is based on the idea of the sovereignty of people while liberalism denotes the restriction and distribution of power, even of popular power (Kelsen, 1955:3). At the end, he comes to the view that liberalism is essential to democracy under modern conditions (Kelsen, 2006:288). I think that such oscillations designate more than contradictions on the part of a thinker who owns his reputation to his systemic consistency. They rather explicate that Kelsen's theory gets paralyzed at the very moment it comes to the shore of politics. It gets paralyzed to the point that it is not only incapable of informing our activities in the practical realm, but also incapable of presenting its object-matter in a consistent manner. If only the first incapability were the case, there would be no legitimate objection to Kelsenite theory since Kelsen explicitly renounces the idea of practical reason and a theory instructing our practice. However, to the extent that Kelsenite

theory cannot present its object of cognition, i.e. the democratic legal order in this case, in a consistent manner, it should be exposed to criticism. I think that such a criticism should challenge Kelsen's radical value-relativism which forces him to see both ethics and politics as spheres of irrationality and, thus, makes him incapable of accounting for the affiliations and tensions between law and the other spheres of human activity in question.

II.6. The "Constitutionalist Vision" in Kelsenite Theory

Concerning Kelsen's theory, there is a widespread argument that, in its attempt to conceive the relations within legal order in a de-personalized manner, it takes its inspirations from the Constitutionalist-movement which goes back to the Enlightenment Movement of the 18th century[61]. Enchanted by the developments in natural and physical sciences, the Enlightenment thinkers applied the mechanistic vision of universe these sciences brought forth to the social and political life. That is, the social-political history was read as a deepening process of depersonalization and mechanization which will culminate in a completely depersonalized constitutional state (Eulau, 1942:5-6). This process is also interpreted as an ethico-political progress in that the impersonal constitutional state will bring about the end of the rule of individual caprices in human societies. It will replace the rule of men over men with the rule of law: an impersonal power will take the place of a personal authority. It is argued that Kelsen's adherence to this constitutionalist vision is particularly evident in his radically diffused conception of sovereignty as an attribute of the whole legal order, i.e. as "a concept which has been deprived of all relevancy to a concrete, material person or a group of persons" (Eulau:1942, 11).

By pointing out to an essential connection between "Enlightenment Constitutionalism" and Kelsen's theory, some authors like Carl Schmitt criticizes the latter on the basis that a constitutionalist worldview cannot adequately grasp the nature of politics, law, morality and the relations between them. We will consider Schmitt's critique of the political and legal vision of Enlightenment rationalism, in Third Chapter. What I want to raise here is a different form of criticism against

[61]For instance, see Julius Cohen, 1978 and Heinz H. F. Eulau, 1942. Both of these authors suggest that an ethico-political motivation, on behalf of the Enlightenment values such as impartiality, predictability and scientific objectivity, lies under Kelsenite theory.

Kelsen: that he cannot establish a consistent constitutionalist account of law, politics and morality because of the radical normative-relativism underlying his theory.

Indeed, to argue for a connection between Kelsen and "Enlightenment Constitutionalism" already involves a criticism of the former. In arguing that there is an ethical-political motivation underlying Kelsen's theory, one thereby challenges the self-image of this theory. For, this self-image lies essentially in the assertion that the pure theory of law is a purely cognitive construction completely combed out from any moral and political concern. One should initially underline that Kelsen is vulnerable to such a criticism only because he himself argues that the rational cognition of law cannot yield to certain fundamental principles or values grounding our legal practice. I think that Kelsen's claim that rational cognition of law yields to renunciation of an essential connection between law and any substantial principle or value is essentially open to interrogation. Just before this, however, it will be better to consider why many authors insist on the essential connection between "Enlightenment Constitutionalism" and Kelsen's theory of law.

At the very beginning of this chapter, I have pointed out that Kelsenite legal theory is an instance of the general Neo-Kantian current of his time, which tries to make sense of universe without the need for the concept of substance, but only on the basis of systemic relations. Then, we saw that, in applying this current of thought to the legal sphere of our experience, Kelsen has come to the view that the state is not a substantial subject out of which the relations called legality arises, but a figure of speech used for the systemic totality of these relations. We have also seen that this is true not only for the state but also the individual person existing as the substantial subject prior to, and as the creator of, legal relations. Kelsen thinks that, just as objectivity in natural sciences is attainable to the extent that the self is eliminated from the process of cognition, the rational cognition would be attained in jurisprudence to the extent that one focuses upon the systemic relations, not on meta-legal subjects creating these relations.

In line with these, Kelsen establishes an analogy between the theological dualism of the God (the creator) and the world (the created) and the dualism of the state (as the creator) and legal relations (as the created). Just as theology tried to make sense of universe on the basis of an idea of God, who is paradoxically both transcendent and yet somehow immanent to the world, the dualistic theory of law tried to make

sense of law on the basis of a state which has an existence transcending to law but submits itself to it. Kelsen then continues that just as the true path for rational cognition of the nature has been opened up with pantheism which identifies God with the world, i.e. with the order of nature, so only the identification of State and Law, i.e. the conception of State as Legal order, can yield to the true science of law (Kelsen, 2005:318). Such identification will, in turn, bring about the constitutionalist idea that the sovereignty is not the attribute of a transcendent law-giver, but designates the systemic operation of the normative order called law as a whole. That is, the force of a norm, not that of an individual, will be taken as supreme, i.e. as sovereign, in any case. As we know, the result will be a de-personalized sovereignty diffused to all organs of the legal order and binding for all, even for public authorities themselves, i.e. a state where power is distributed to various organs of the state constituting a check for the activities of each.

In this way, law or the state as legal order is conceptualized in such a way that it constitutes a means for the domestication or rationalization of politics[62]. As is indicated above, Kelsen thinks that what is political is always an irrational (i.e. non-cognitive) phenomenon in that it is nothing more than expression of an interest within the sphere of the conflict of interests called the political sphere. Since Kelsen, the radical moral relativist, thinks that there is neither a common good nor an objective standard of righteousness, any interest is marked by an essential antagonism in relation to some other one's interest. Hence, in Kelsen, political relation is necessarily an antagonistic (i.e. conflict-laden) relation. Political conflicts can take any form, including most crude forms of violence, when they are left unchecked. Law or the state as legal order, however, forces upon "the political" to express itself under the rational form of legality. It thus brings about the domestication to political struggles. More precisely, the obligation to express the political contention in the form of law forces upon the political parties the necessity to attain compromise through discussion with other parties Here, it is important to emphasize that, for Kelsen, the rationalization comes to forth only in the form of compromise because not only politics but also morality is a sphere of the non-cognitive or the irrational, and thus there is no place for "the rational" in the manner

[62] At this point, I am indebt to the work of David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*. See, Dyzenhaus, 1999:149-160.

of a general ethical-political standard. In this regard, the following paragraph from Kelsen's *Introduction to the Problems of Legal Theory* is quite revealing:

> Seen from the standpoint of rational cognition, there are only interests and thus conflicts of interests, which are resolved by way of an ordering of interests that either satisfies the one at the expense of the other, or establishes a balance, a compromise between opposing interests. That only one ordering of interests has absolute value (which really means 'is just') cannot be accounted for by way of rational cognition. If there were justice in the sense in which one usually appeals to it when one wants to assert certain interests over others, then the positive law would be completely superfluous, its existence entirely incomprehensible[63] (Kelsen, 1992:17).

It is now clear how Kelsen's pantheist-inspired legal theory is connected to a constitutionalist vision. I think that there would be nothing wrong with this connection if Kelsen could have been consistent in his scientific methodology. That is, unlike Kelsen himself, I think that an objective account of the human legal experience on the basis of a Kantian-transcendental method leads to a vision of legal order compatible with the principles of Enlightenment-constitutionalism, and not with many other ethical-political perspectives. However, the problem is that Kelsen could not pursue his method consistently for the reasons we will see.

II.7. A Problematic Combination of Kantian-Transcendental Inquiry and Radical Moral-Relativism

As we have seen, the application of transcendental method to the sphere of law consists in an attempt to find foundational propositions constituting our legal experience. Essential to such a method is to forgive, or, at least, suspend any ontological or epistemological claim that would reduce the examined experience to an "illusionary" one. For instance, as Kant has demonstrated, one could not apply the transcendental method to morality if she took granted that the principle of causality applies necessarily to human behavior as well as any other phenomena in nature. For, our very moral experience is founded upon the proposition that we are

[63] At this juncture, I want to underline that Kelsen's value-relativism may be compatible with the liberal tenet of Enlightenment, but not with the republican (Rousseauan) tenet adhering to a positive conception of freedom expressed in law. The latter suggests that the form of law does not represent a compromise among conflicting interests, but the expression of an ethical-political truth called general interest or general will. In this manner, "the rational" is identified with the common good, while compromise is considered to embody always a contingent and arbitrary content.

free to choose between moral and immoral acts in any case. Now, let us reconsider Kelsen's arguments concerning the concept of justice. As any one should do so, Kelsen accepts that human legal experience is associated with this concept. That is, any legal order presents itself as the realization of justice to some extent. Or, if we are to use Kelsen's Kantian terminology, in going back to the transcendental propositions of law, one comes across with the idea of justice. Relevantly, legal orders usually have the claim for being expressions of general interest. However, Kelsen suggests, we should dismiss any reference to these notions in legal theory, because these are notions without a determinable content. The existing plurality of the conceptions of justice and common interest evidences this. He goes so far as to argue that any claim for justice or common interest is indeed nothing but a cover for one's will to power in power struggles between divisive interests (Kelsen, 2006:438). Kelsen's emotivist-relativist position in moral theory underlines these arguments; and, we will now focus upon Kelsen's meta-ethical position and its incompatibility with his philosophical framework inspired by Kant's "transcendental method". Herewith, we should insistently raise the following question against his sterilization of legal theory from "confusing" notions of justice and common interest: what is the difference between his sterilization of legality from notion of justice and the legal-realist's radical sterilization of law from any form of normativity altogether, which he opposes? This question is pertinent because both of these approaches bring forth, at the end, the conviction that ordinary legal experience is stuck with illusions[64].

Kelsen aims at discarding the idea of justice from legal theory because he thinks that the question of justice is the question of absolute value, which can be decided upon only *via* volition, not *via* cognition. He argues that "an absolute value can be assumed only on the basis of religious faith in the absolute and transcendent

[64] At this point, one may even argue that, contrary to what Kelsen suggests, some versions of legal-realism can, at least, escape the conclusion that law is an illusionary phenomenon. It is true that legal-realism as such defies the normativity of law in the sense that Kelsen understands it, i.e. normativity as self-regulation of norms within a closed system of norms. Moreover, it radically challenges the rationalist proposition that there can be found certain principles or values grounding law. However, for the legal-realist, it is quite possible to assert ethical principles and values within the order of law. Hence, legal-realism may account for the phenomenon of law as self-assertation of a human community's way of life and maintenance of this way of law by the force of power. The essential point, in this realist account of law, is that the power executed by law stands upon the credentials of legitimacy in a particular society, and it thus differs from arbitrary execution of power in human interactions. Likewise, as we will see in the next chapter, Carl Schmitt develops such a realist perspective that claims to distinguish "law as the legitimate exercise of power" from "arbitrary instances of execution of power".

authority of a deity" (Kelsen, 2005:63). He then points out the extraordinary heterogeneity of what men consider as good and evil, just or unjust: Heraclites proposes the war as the absolute value, while Christ proposes love and consolation. Yet, what Kelsen seems to confuse at this point is that the question concerning whether law presupposes a value underlying it is not identical to the question concerning which value an individual should take as supreme in her life. Even in the case that one is skeptical concerning the second question, she can still think that law reflects a specific value at its basis. More precisely, an inquiry into the transcendental propositions of law can reveal such a value.

To argue metaphorically, the legal theorist can not force upon us a decision as to which of the Gods should guide our life. It is up to us to follow instructions of *Ares*, the god of warfare, or of *Themis*, the goddess of justice. Yet, she can and should instruct us on the point that law is the language *Themis* speaks of, and that the goddess's values are embedded in this language. Indeed, Kelsen occasionally comes across with the values of *Themis* in his investigations into the nature of law. For instance, once he found that "law is an organization of force…, authorizing the employment of force only by certain individuals and only under certain circumstances", he recognizes that "law pacifies the community" by "making the use of force a monopoly of the community" (Kelsen, 2006:21). As he himself is well aware, this indicates that the value of peace lies under law: "Peace is a condition in which there is no use of force. In this sense of the word, law provides for only relative peace, not absolute peace, in that it deprives individuals of the right to employ force but reserves it for the community" (Kelsen, 2006:22). Thus, he can make sense of the fact why people identify justice with peace (Kelsen, 2006:14). Moreover, the value of justice, in the manner he grasps it, is not so ambiguous to have no clear meaning and no implications concerning the procedure and even contents of legal norms: a legal order, "in the long run, is possible only if each individual respects certain interests –life, health, freedom, and property of everyone else, that is to say, if each refrains from forcibly interfering in these spheres of interests of the others" (Kelsen, 2006:22). It is important to notice that there is more than simply a prudential suggestion for sustaining legal order here. It is because Kelsen goes far to argue in the following way:

> As long as there exists no monopoly of the community in forcible interference in the sphere of interests of the

> individual, that is to say, as long as the social order does not stipulate that forcible interference in the sphere of interests of the individual may be resorted to only under very definite conditions (namely, as a reaction against illegal interference in the sphere of interests of the individuals, and then only by stipulated individuals), *so long is there no sphere of interests of the individuals protected by the social order*. In other words, *there is no state of law which, in the sense developed here, is essentially a state of peace* [italics are mine] (Kelsen, 2006:22-23).

In this condense passage, Kelsen points out that law as a special technique –i.e. law as the operation of social power in a way restricted both for certain cases (i.e. in the cases when there occurs an illegal inference to the sphere of interests of an individual) and to certain individuals (i.e. to the legal authorities)– functions for the end of establishing and maintaining a sphere of individual liberty. However, once one argues that *there is no state of law when there is no sphere of interests of individuals protected by the social order*, it is but a short step to recognize that not only the value of peace but also that of individual freedom is essential to any consistent order of law. Yet, Kelsen never takes this step because of the radical moral-relativism he champions. Rather, he obstinately claims that there is no universal end inherent to law as such.

It is necessary to underline that, as far as I know, Kelsen never elaborates his position on ethics. He simply takes for granted the meta-ethical non-cognitivism. For him, the only stimulant for human will and behavior comes from emotions; and, ethical values come to the scene as justificatory schemas within which behaviors are interpreted by their actors. For instance, he thinks that there are so divisive conceptions of justice because everybody connects this notion with her own emotions or desires. One may note that such a non-cognitivist (and even anti-cognitivist) approach had been very prevalent in the post-Nietzschean intellectual world of Europe. One well known representative is Max Weber who has influenced Kelsen in many respects. Yet, not in many authors, including Weber, this non-cognitivism is combined with a radical skepticism leading to cynicism. That is, unlike the authors like Weber, Kelsen indeed dismisses the concept of value once he assigned for values a non-cognitive basis in belief. That is, he brings down any value to a particularistic-divisive interest underlying it. This is why the same author, who argues that there is no state of law when there is no sphere of interests

of individuals protected by the social order, also argues that the value of individuality and the notion of basic individual rights (which is brought forth by the same value) are indeed not a universal attribute of law, but only an extension of the capitalist order of law. For, this value and this notion are in fact conceptual mechanisms serving for capitalist interests, in view of Kelsen.

Kelsen's radical moral-relativism shows itself also in the fact that the Kantian distinction between morality as Right/Justice and morality as comprehensive ethics has been eradicated in his theory. When he discusses justice, he takes for granted the Platonic sense of it, i.e. the supreme ethical value on the basis of which human life should be guided. It is true that philosophers usually got lost in such a comprehensive conception of justice as the good life. It is also arguable that there is an ultimate un-decidability as to which value should be the anchoring point of a life proceeding on perfection. It is the case and indeed fully legitimate that the people diverge in their ideal of perfection and the way proceeding on this ideal. That is, ethics, in the comprehensive sense of *Sittlichkeit*, is relative. Yet, there is a specific sphere of morality which does not concern the ultimate value or values that should guide human life, but which asks a quite different question: how is to realize a just human co-existence, given that people diverge on their ethical values and may come into conflict in their interests? This is the sphere where rational cognition (i.e. practical reason), not our emotions, can guide us. The idea of law is essentially bound to this sphere, since it is a human artifact which arises as a response (or, at least, as a part of our response) to the foregoing question.

It is particularly interesting that a thinker who is so versed in Kant as Kelsen never notices this distinction between morality as Right/justice and morality as comprehensive ethics. Rather, Kelsen argues that Kant, in whom he saw a resolute destroyer of Platonic theory of images, and thus of philosophical absolutism and a defender of philosophical relativism, got stuck in metaphysics when he comes to morality and law: "the role which the 'thing-in-itself' plays in his system reveals a good deal of metaphysical transcendence. For this reason, we do not find in him a frank and uncompromising confession of relativism, which is the inescapable consequence of any real elimination of metaphysics" (Kelsen, 2006:444). In a way quite natural for his emotivism, Kelsen attributes the defect to his master's disposition: "in character, he was probably no real fighter but rather disposed to compromise conflicts…a complete emancipation from metaphysics was probably

impossible for a personality still as deeply rooted in Christianity as Kant's" (Kelsen, 2006:444). I want to argue that Kant would have objected to this. He would have argued that he pointed out a category of basic rights as essential to positive law not because he had a Christian disposition, but because an inquiry into the transcendental propositions of law reveals that positive law is and should be based on the proposition of our innate right of freedom and any consistent legal order presupposes the universal principle of law as "any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law" (Kant: 1996,24).

To conclude, I think that Kelsen's foregoing confusion and his sympathy for radical relativism of values are closely connected to his very disputable reading of Kant's critique of metaphysical knowledge. It is true that Kant's critique involves the renunciation of absolutes understood in Platonic sense as having existence of their own outside human cognition. Kelsen is, however, very controversial in arguing that the recognition that the reality exists within human cognition or that the reality is relative to the knowing subject should lead to a philosophical relativism (Kelsen, 1955:17). For, there are still certain principles of reason, i.e. categories, which are essential for any rational construction of reality. Likewise, the recognition that there is no immanent reality of any value in nature does not necessarily lead to a value-relativism. For, one can detect certain principles as constituting the cognitive basis of certain forms of human practice, and then attribute an "objective" (i.e. non-arbitrary) character to such principles within these forms of practice. This is what Kant does when he finds out the principle of universalizability (i.e. the categorical imperative reflecting the value of equal dignity of every member of humanity) as constitutive and regulative for morality, or when he finds out the universal principle of law as constitutive and regulative for law[65]. The recognition of such constituting-regulating principles does in no way contradict with the fact that there exists a sphere of relativity left to ethical or legal decision by human beings themselves. Rather, such principles have mostly an indirect relevance for the content of particular ethical and legal decisions in that

[65] Similarly, Habermas follows a quite Kantian mode of thought when he argues that a discursive principle lies under our activities in public sphere oriented to solve practical problems in a communicative manner. For his formulation of this principle, see Habermas, 1991:66.

they delineate the scope which the content of norms should not transgress. That is, when a particular norm transgresses the constituting-regulating principle of the normative order to which it pertains, it will be a contradictory norm.

It is true that, in view of Kant, the fact that a particular legal norm contradicts with the universal principle of law does not automatically invalidate the norm and abate the legal subject's obligation to obey it[66]. However, such a legal norm can be still considered as an imperfect or defective norm; and, it is not our emotions, but rational cognition that finds imperfection or defectiveness in this norm. This form of rational cognition was elaborated by Kant under the title of *Rechtslehre* (i.e., the Doctrine of Right) as a sphere of practical reason where the principles of law are derived from a formal morality which stands also above ethics, *Tugendlehre* (i.e., the Doctrine of Virtue) as Kant called it.

In examining law *via* transcendental method, human reason can detect universal principles having moral relevance, because we are thereby face to face with a human artifact. A human artifact is a response to the problems encountered within the outer world by human beings. It is thus always molded by an intention to realize an end. And, as is the case in law or in morality, when we are face to face with a human artifact standing as a *collective* project, its function cannot be conceived of without reference to a *collective* intention to realize an end. Any attempt to explain such phenomena without reference to such collective intentions and collective ends culminates into a kind of reification or naturalization which is much more acute than the one Kelsen sees in Natural-Law Doctrines. Kelsen may be right on insisting that Natural-Law Doctrines, which are always based on a theological substratum, have usually been misused to justify specific systems of positive law. However, pursuing a pantheistic critique of the "theistic" duality of "good in itself" and "evil in itself" in the realm of law is much more risky. If applied to the realm of practical philosophy, pantheism can easily serve as a general justificatory schema for *every* universe while theism comprises only a justification of *this particular* universe. To abrogate the question of justification from the standpoint of individual, i.e. the question of the distinction between good and evil occurrences in the

[66] For, as I understand Kant, the most fundamental right derived from the universal principle of right is, for him, the right to live in a legal order; and, if an alleged fundamental right to disobey any norm when it is conceived of as contradicting to the universal principle of law is recognized, the existence of a legal order is jeopardized.

universe, is indeed an invitation to be at conciliation with everything that occurs[67]. Recall, Kelsen's argument that the term *Rechtsstaat* is either a pleonasm (since every state should be considered as a government by law) or an ideological term reflecting our partial desires or wishes. Only when one dissociates law from human intentions giving rise to it can she argue in this way. Otherwise, she could argue that a *Rechtsstaat* is such and such a state[68] because this form of state satisfies the human intentions giving rise to human artifact we call state or legal order better than other possible forms or constellations.

To recapitulate, an unprejudiced transcendental inquiry into law (i.e. an inquiry into the basic propositions immanent in our legal experiences and thus legal practices) should unveil that legal experience is founded upon the moral concept of justice. That is, it should lead to the recognition of an essential connection between law and the moral domain of right. In turn, this recognition should entail the acknowledgement of legal-rationalism which we find in Kant's writings on law, i.e. an approach suggesting certain general principles and values (e.g. human rights) as inherent to the form of law. Hence, Kelsen's application of transcendental inquiry is essentially biased by his radical moral-relativism in postulating a strict separation of law and morality.

By remaining to be true to the tenets of what he takes to be legal-positivism, Kelsen strives to give an account of law without referring to the "irrational" and "emotive" notion called justice. I think that such a positivist vision implies, in fact, that the legal experience of humankind is caught with illusion. In this aspect, there is a similarity between Kelsenite positivism and the realist theories of law (which Kelsen calls sociological-legal theories). However, Kelsen, who is reluctant to embrace the realist path, also strives to set forth that law as an autonomous sphere is more than the continuation of power struggles under a veiled form. That is to say, his legal-positivism takes neither the side of legal-rationalism nor the side of a legal-realism, but suspends the decision. The result is that his vision gets paralyzed in considering the relations between politics, law and basic rights[69]. Once he

[67] In this regard, I think that Leibniz's theistic vision suggesting that we live in the best of possible worlds is not less justificatory for what exists (or what happens) than Spinoza's pantheistic moral theory suggesting that what occurs should not be judged from the standpoint of individual desires and wishes, but within the framework of the systematic structure of universe.

[68] See, for what Kelsen considers as the ideological definition of *Rechtsstaat*, see pp.64-65 above.

[69] Perhaps, this objection I arise against Kelsenite legal-positivism should be generalized to all versions of legal-positivism. That is, it should be argued that legal-positivism as such is a position

dismissed the possibility of anchoring the normativity of law to a substantial principle or value which practical reason may offer, he is obliged to affirm everything that arises out of established legal procedures. It is very telling that Kelsen defines legitimacy as "the principle that a norm may be created only by the competent organ" (Kelsen, 2005:276). It is utmost evident that this may be a proper definition of legality, but never of legitimacy. For, any notion of legitimacy necessarily refers to something extra-legal but also foundational for all legality. In this vein, one may point out that Kelsenite theory fails even by its own standards, since it was Kelsen himself who admitted that the notion of legitimacy is essential to any adequate theory of the state[70].

Probably, Kelsen's reluctance to follow the way through a legal-rationalism and elaborate a fully fletched constitutionalist vision stems from the widespread criticisms raised against such an "Enlightenment standpoint" in his time. In an intellectual climate which is heavily loaded by such criticisms, Kelsen tries to establish a theoretical perspective which would ward off "the moralist metaphysics of the Enlightenment" without letting law down into the status of merely a function of socio-historical power. Yet, one may argue that he fails both in the battle with legal-moralism and in the battle with legal-realism. First, Kelsenite legal-positivism is grounded upon moral emotivism and radical moral relativism, which are not less *metaphysical* than the ethical rationalism of the Enlightenment. This is because emotivism relies on a certain sort of metaphysics of moral conduct by associating it with solely emotions. Second, once Kelsenite legal-positivism disavows the possibility of a universal-moral standpoint defining and justifying the essentials of law, the quality of law as a *normative* practice (i.e. a practice that is more than a function of socio-historical power, or a practice that can be *qualitatively* differentiated from the exercise of brute force) is never securely established. That is to say, the stage is made ready for the showing up of legal-realism. In the

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which must always shift either towards a legal-moralism or towards a legal-realism. Indeed, the fact that even H.L.A. Hart, the most prominent legal-positivist thinker of the Anglo-Saxon world, comes in the end to argue that there is a minimal moral content inherent in the form of law –a content derived both from our common "aim of survival in close proximity to our fellows and from the general (de-individualized) form of legal rules"– may be interpreted as an instance of shifting towards legal-moralism (See, Hart:1977, 36-37). Nevertheless, it should be maintained that the contention that *any* legal-positivist theory is an unsteady position shuttling between legal-moralism and legal-realism would be an overgeneralization from the narrower scope of our examination of Kelsenite positivism in this chapter.

[70] See, p.50 above.

forthcoming chapter, I will focus upon an impressive defense of the realist perspective on law, the state and human rights by Carl Schmitt. As for a conclusive judgment on "the Enlightenment standpoint", the reader should wait for the latter chapters where Otfried Höffe's modern legal-rationalism will be presented and then compared with the other two approaches.

CHAPTER THREE
CARL SCHMITT'S REALISM: BRINGING BACK THE POLITICAL INTO THE CORE OF LAW AND THE BASIC RIGHTS

In this chapter, we will examine Carl Schmitt's political-legal theory which he calls "the concrete-order-thinking". As we will see, this theory presents a realist approach to the relationships among politics, law and the state, whose most fundamental credential lies in taking the domains of law and politics as indissolubly intermingled. By the virtue of this, at least in the view of Schmitt, such realism stands in opposition to certain alternative modes of thinking the state and law, namely rationalism and positivism. Indeed, as will also be elaborated, Schmittian realism develops out of his criticisms of these alternative forms of thought on various grounds, but most basically on the ground that these alternatives fail to give a satisfactory account of the component of "the political" inherent in any order of law. Hence, my examination below will be a presentation of his influential critique of rationalism and positivism as well as an elaborated account of his realism. Also, in line with the general objective of this thesis, the particular focus will be given to the meaning and scope that Schmitt's realism may recognize for the idea of the basic rights.

Almost all the particular works in Schmitt's huge oeuvre are indeed relevant to my objective in this chapter; and I will try to employ, in my investigation, insights from all works of Schmitt that have been available. Yet, some of his works, namely *The Concept of Political*, *Political Theology: Four Chapters On the Concept of Sovereignty*, "Appropriation/ Distribution/Production", "Nomos–Nahme–Name", *On the Three Conception of the Juristic Thought*, *The Constitutional Theory* and *Legality and Legitimacy* are directly relevant to my problematic; and I will build up my account of Schmittian legal/political theory heavily on these texts.

Since "the political" is the primary category for the human beings' earthly co-existence in the view of Schmitt, I will present Schmitt's political theory in the first section. There, the friend-enemy distinction, the *jus belli* as the defining feature of a political entity, and Schmitt's argument for the unsurpassable nature of "the political" will be considered in detail. Then, I will argue that Schmitt's political

theory brings forth "the state of exception" and the concept of sovereignty as the pinnacle of "the political" and as the point of entry into the public (constitutional) law. In the second section, I will present the general framework upon which Schmitt's general idea of law rests. As we will see in detail, Schmitt defends a realist position which he calls "concrete-order-thinking". This mode of thinking opposes normativist, decisionist and positivist schools of law on various grounds. The third section will be devoted to Schmitt's constitutional theory. There, I will first elaborate the concept of the constitution that Schmitt develops on the ground of his realist framework. This elaboration will explicate a conception of constitution which has both a political component and a normative (*Rechtsstaat*) component. Then, I will consider the possibility of demarcating the significance of basic rights within the confines of Schmitt's realist legal/political theory. At this point, I think, the examination will reach a very striking result: in opposition to what is generally assumed, Schmitt's realist theory, taken as a whole, does not necessitate a rejection of the idea of the basic rights. It rather challenges the theories which are conventionally associated with this idea. I will however maintain that Schmitt's realist embracing of the idea of the basic rights revises this idea in such a way that it turns to be completely divorced from the idea of human rights. Moreover, I will argue that Schmitt's ground for the basic rights as well as for any other "essentials" of a constitution is contingent and slippery. That is, there are no law-determining constants but only legally-determined precedents in Schmitt. This also indicates that the distinction between a legal order and an arbitrary system of power remains contingent and slippery. In concluding, I will hence argue that although Schmitt's realist perspective has certain virtues stemming from its re-establishing the lost connection between "the political" and "the normative", the admission of such a merely contingent and slippery ground for the basic rights (indeed, more generally, for any normative criteria of legitimacy) is a too high price to pay. In line with this, I will raise, in the end, the question: whether it is possible to account for the political (or the power-relevant) component of law and escape legal-moralism while also sustaining the conceptual linkage between the state, law and human rights. With the intention of elucidating an affirmative answer to this question, I will invite the reader for considering Otfried Höffe's modern rationalist theory of law and the state in Fourth chapter.

III.1. The Political: The Primary Category in Carl Schmitt's Theory

III.1.1. The Friend-and-Enemy Distinction

Indeed, many philosophical figures before and after Schmitt have devoted ages-spanning endeavors to understand the phenomena called politics. However, there is hardly any other thinker who has raised the question concerning the nature of "the political" to such an autonomous and primary status as Schmitt did. For Schmitt, "the political" constitutes the most essential aspect defining human life; and all other spheres of life, like ethics, aesthetics and even religion, have only secondary importance in this respect. Schmitt's estimation of "the political" is not even comparable to Aristotle's idea of human being as *zoon politikon*. For, Aristotle estimated the political life only to the extent that it provides for the possibility of a truly ethical life. Thus, for him, political life has, both in the ontological and in the axiological senses, its foundation in another sphere: ethics. It is quite reverse in the case of Schmitt: "the political" has a constitutive role in the formation of other spheres of social life such as law and ethics. This is why the point of entry to Schmitt as a legal theorist is necessarily his theory of "the political".

Schmitt elaborates his conception of "the political" in his most well-known essay, *The Concept of the Political*. He begins by pointing out a connection between the state and "the political". This connection is held on the assumption that the state is the "ultimate authority" possessing the "monopoly on politics" in a society. Yet, this leaves us caught in an "unsatisfactory circle", since the state itself can be grasped by reference to "the political" as well as the latter refers to the former (Schmitt, 1996: 20). Insofar as the state is usually defined as "the political status of an organized people in an enclosed territorial unit" (Schmitt, 1996:19), an insight into the nature of "the political" is required at first.

In view of Schmitt, every domain of human thought and action seems to be constituted by an ultimate criterion expressed by a binary opposition. For instance, the domain of "the moral" is based on the distinction between good and evil; that of "the aesthetical" between beautiful and ugly; and that of "the economic" between profitable and unprofitable. The specific distinction pertaining to "the political" is the one between friend and enemy. That is, "the political" is a matter of drawing a distinction between enemies and friends, and acting on the basis of this distinction.

The term enemy Schmitt uses in this distinction needs several clarifications. First, the enemy is the kind of *public* adversary which the Roman designated with the term *hostis* and distinguished from the kind of *private* enemy designated by the term *inimicus*[71]. This is indeed a distinction which, for Schmitt, goes back to Plato. The ancient philosopher distinguished the public enemy from the private enemy so as to argue that a war between Hellenes is not possible. To the extent that a people cannot wage war against itself, Hellenes can wage war only with outsiders, i.e. with Barbarians, not within themselves. It is true that there can raise conflicts among Hellenes, but they are merely discords which can be designated by various terms as insurrection, upheaval, rebellion or civil war. In the same manner, the Romans saw in the public enemy a person with whom they are at war, while a private enemy was understood as the person with whom one has private quarrels and whom one hates (Schmitt, 1996:29). Thus, Schmitt argues, the public enemy, i.e. the enemy in the political sense, takes place "only when, at least potentially, one fighting collectivity of people confronts a similar collectivity" (Schmitt, 1996:28). By virtue of such a confrontation, the co-existence of an aggregate of individuals raises its intensity to the level of a genuine union, and such a union acquires a public character.

A further clarification with regard to the concept of enemy follows from the fact that, in contradiction to an inimical fellow, she is a stranger, i.e. someone totally different or alien. It is already mentioned above that an element of hate is almost an indissoluble element in private enmities. This element of hate usually leads to ascribe to the private enemy the negative characteristics from other domains: the enemy as an evil and/or ugly fellow. To the extent that public enemy is a stranger, however, such denigrations remain conceptually irrelevant for the concept of public enemy as such. That is, even though there is evidently a socio-psychological tendency in us to denigrate our public enemy in moral and/or aesthetical senses, "the political enemy need not be morally evil or aesthetically ugly; he need not appear as an economic competitor, and it may even be advantageous to engage with him in business transactions" (Schmitt, 1996:27). Both the autonomy and constitutive role of politics over other domains of society become evident at this point. It is enough for her to be our public enemy that she is an outsider and thus a form of existence different from ours, and that we assume that she intends to negate

[71] On this distinction between *hostis* and *inimicus*, see Schwab:1987 and Kennedy:1998.

our form of existence. This means that it is not necessary to see her as a damned one or as one possessed by the devil that should be given no quarter in the earth. Indeed, as Schmitt indicates in his several other works, it was the achievement of modern ages that the distinction between enemy and friend was rescued from the heavily contamination by moral and religious categories, which was the case in the medieval era[72]. Particularly in his *The Theory of Partisan*, Schmitt laments that the guerilla movements of the 20th century calls back the notion of "absolute enemy" who should necessarily be annihilated, in place of the modern notion of "real enemy" who is extremely fought with but ascertained her proper status and place in the existence. In line with these, some authors like Schwab and Ulmen draw upon the distinction in English language between enemy and foe, the latter meaning an adversary who should be not only fought with but annihilated, and implied that Schmitt's theory has a civilized aspect, since it opposes to assimilate the political enemy to the foe[73].

That "the political" concerns the relations with the public enemy as an alien to "us" provides for the insight regarding further characteristics of phenomena called "the political". At first, it explains why all political discourse is inevitably polemical. Because the public enemy is, by definition, the one who is alien to our mode of existence (i.e. to our socially constructed world involving language, ethics, religion, aesthetics, and etc.), all political concepts, images and terms are employed not to converse with the enemy, but as tools of us to combat them[74]. No matter how it may seem abstract, universalistic and inclusive at a first instance, any genuinely political concept is indeed bound to a concrete situation and necessarily points out someone who should be excluded, combated or negated. For instance, the seemingly all-inclusive and context-independent political ideal of the French Revolution, the Republic, has its genuine political significance in a political context in which popular classes (more precisely, their political representatives) in France negates, first, the French Aristocracy and, then, the non-French peoples. Schmitt's

[72] For instance, see Schmitt, 2004, and Schmitt, 2003.
[73] For arguments to this effect, see G.L. Ulmen, 1987 and George Schwab, 1987.
[74] As will be seen in the following parts of this chapter, here lies the core of Schmitt's crucial strike against liberal and all progressive conceptions of politics. I will, at this point, only remind the reader of that the whole tradition of the Enlightenment, from Condorcet to Habermas, relied on the possibility of a sincere search for righteousness among political adversaries in a public sphere. If it is true that the concepts employed in politics are never suitable for a cooperative search for righteousness but merely convey strategies for negating adversaries, there is really nothing to gain in reading any Enlightenment thinker on politics.

own favorite example is the concept of humanity which, whenever appears in a political context, has always been used (more precisely, misused) to deny the enemy's quality of being human from the time of the European Conquistadors of the 16th century to our time[75].

This conception of "the political" as "the polemical" struggle among enemies highlights, in turn, a form of relation that can be reduced neither to a competition nor to a dispute. As Schmitt emphasizes, it is a form of relation which involves "the most intense and extreme antagonism" (Schmitt, 1996:26). Any political relation necessarily involves "the ever present possibility of combat" (Schmitt, 1996:32). Schmitt also stresses that the term combat should not be taken in a symbolic sense here. Rather, "the political" involves the possibility of combat in its real-existential sense, i.e. in the literal sense of "the existential negation of the enemy" (Schmitt, 1996:33). However, it is important to emphasize, at this point, that Schmitt's argument does not come to equate politics with war. Rather, he underlines that "war is neither the aim nor the purpose nor even the very content of politics. But as an ever present possibility it is the leading presupposition which determines in a characteristic way human action and thinking and thereby creates a specifically political behavior" (Schmitt, 1996:34). Indeed, he maintains, the breaking out of a war as a result of a political conflict is a rare and extreme case. But, it is still decisive as to the nature of "the political". Insofar as the exceptional case reveals the true meaning of the ordinary process[76], war exposes the core of politics in the view of Schmitt. This core lies in that "the political" is the antagonistic relation

[75] It may be even argued that, in the view of Schmitt, there is no other concept as polemical as the concept of humanity, since this concept invokes the extremity of the notion of "absolute enemy". This is so because if a party in a political struggle represents the "humanity", the other party is logically devalued to the sphere of inhumanity and, thus, becomes something that has to be annihilated, not simply to be combated with. In a manner quite characteristic for him, Schmitt satirizes that "Pufendorf quotes approvingly Bacon's comment that specific peoples are 'proscribed by nature itself', e.g., the Indians, because they eat human flesh. And in fact the Indians of North America were then exterminated. As civilization progresses and morality rises, even less harmless things than devouring human flesh could perhaps qualify as deserving to be outlawed in such a manner. Maybe one day it will be enough if a people were unable to pay its debts" (Schmitt, 1996:54-55).

[76] As I will argue below, this proposition stems from Schmitt's theistic mode of thinking. Under the guidance of the motto that *the ordinary is always founded upon a miracle*, a theistic account of the world suggests that it is a vein attempt to seek a completely rationalist explanation of earthly occurrences. For, such occurrences have their ultimate source in an inscrutable divine will which does not only found but also, in cases, occasionally interrupts the mundane processes. Hence, Schmitt thinks that the essentially important moments whereby "the mundane" is founded or dissolved defy rationality. Rather, he views them as the moments whereby the category of will inserts or re-inserts itself in human history in a way which seems arbitrary or contingent from the standpoint of reason.

among enemies and friends, which has no referee other than comparative power-positions of the adversaries. And, it pertains to the nature of this power struggle that it culminates into the physically killing of human beings, i.e. into war, if the struggle has not been decided upon otherwise. For, it is the possibility of a real combat that provides the meaning of the distinction of friend and enemy for individuals. Therefore, a world in which the possibility of war is eliminated will be a world in which there is no friend-enemy distinction, and thus no politics. For Schmitt, "such a world might contain many very interesting antitheses and contrasts, competitions and intrigues of every kind, but there would not be a meaningful antithesis whereby men could be required to sacrifice life, authorized to shed blood, and kill other human beings" (Schmitt, 1996:35).

One may ask what would be the substance or the content of such an extreme form of antithesis or contrast that Schmitt calls "the political". His answer is that there is no predetermined substance for political antagonism and any conflict among two human groupings can turn out to be the substantial point of distinguishing friends from enemies, hence of "the political". For, "the political" is not a matter of substance, but of intensity of an association of human beings. When a human grouping is intensified to a level whereby members of this group orient themselves toward the extreme possibility of waging a war against another grouping, there exists the association called the political entity. The motivation or energy which has led to the formation of this political entity may, at first, stem from various domains such as religion, morality, economics, and etc.. The crucial thing is that any previously religious or moral or economic antithesis turns out to be a political antagonism at the very point whereby it becomes "sufficiently strong to group human beings effectively according to friend and enemy" (Schmitt, 1996:37). Thus, the Christian community of Europeans was something much more than a religious community during the "Holy Crusades" by the virtue that they were so intensively associated to wage a war against an enemy, i.e. the Saracens. Similarly, the proletariat waging a universal war against the bourgeoisie would be a collectivity conveying much more than something purely economic; it would rather be a political entity.

Thus, "the political" pertains to the decisive entity grouping (and dividing) human beings in accordance with the distinction of friend and enemy. Yet, this intensity of political grouping should not be understood in the absolutist sense that

all aspects of a person's life are absorbed within her bond to the decisive political entity. Indeed, the fact that a political entity reaching such an absolute form would be a very rare phenomenon explains the existence of domestic politics under the conditions of the modern states. As is well known, there are groupings within many modern states which are established on the basis of economic or religious or any other form of interests and identities. These groupings, which are called parties, engage in struggles for influencing the state in line with the interests they pursue or the principles they represent. In view of Schmitt, the parties are normally and should be only sub-groupings; and their activities, i.e. party-politics, can be called "the political" only in a secondary or derivative sense. In normal situations, they are merely societal-associational groupings bound to the state, which is the decisive entity with the power to forge a unity on the basis of friend-enemy distinction. Thus, the state stands transcendent, superior, and qualitatively distinct with respect to these societal-associations. This qualitative distinction of the state is denoted by the notion of the sovereignty.

However, all these do not mean that an internal antithesis within a state cannot intensify to such a point that it weakens or spoils the unity of a state. Rather, this is possible; and if domestic conflicts within a state have come to this point, it means that a political struggle, i.e. a friend-enemy grouping with the possibility of combat, takes place *within* a state, not among states. This type of combat is called "civil war" (Schmitt, 1996:32). If one of these groupings is strong enough to forge the friend-enemy distinction anew, then the political entity is resurrected on the basis of a new substance in line with the economic, cultural or religious or some other viewpoint of the victorious group. Yet, "if a class or some other group within a state is sufficiently strong to hinder the waging of wars against other states but incapable of assuming or lacking the will to assume the state's power and thereby decide on the friend-and-enemy distinction and, if necessary, make war, then the political entity is destroyed" (Schmitt, 1996:38). For, the political entity either exists as the sovereign, authoritative entity over all other societal-associations or does not exist at all. There is no midpoint[77].

[77] Thus, in the view of Schmitt, Anglo-Saxon Pluralism, which misconceives the state as one association and identity among other societal associations and identities, is far from providing a satisfactory account of the state. See, Schmitt, 1996:44-45.

III.1.2. The Defining Feature of the Political Entity: The *Jus Belli*

Up to now, we have already seen that the essential feature of the state as the political entity depends upon the *jus belli*, i.e. the power and right of war: "the real possibility of deciding in a concrete situation upon the enemy and the ability to fight him with the power emanating from the entity" (Schmitt, 1996:45). This is indeed Schmitt's definition of the concept of sovereignty in purely political-existential terms[78]. In the most extreme case, the *jus belli* denotes two crucial rights-powers: "to demand from its own members the readiness to die and unhesitatingly to kill enemies" (Schmitt, 1996:46). This extreme right is indeed imposed upon the state by its own end: "assuring total peace within the state and its territory" (Schmitt, 1996:46). He defines total peace as a condition of tranquility (quietude), security, and order whereby the *normal* situation as the pre-requirement of the validity of legal norms is established. The crucial point in this definition of the end or function of the state is that it is conceived not simply as the *preserver* or *promoter* of a peace the substance of which has already been ordained by a supreme authority like the God. Rather, the state is the *creator* of the earthly peace. In his treatise on Hobbes, he approvingly notes that Hobbes conceived of the state not as the *Defensor Pacis*, but as the *Creator Pacis* (Schmitt, 1996b: 32-33). That is to say, the state is the *legibus solutus* (i.e. the being that is above law) in the secularized form, i.e. the God of Calvinism as the omnipotence unbound by law, justice or conscience (Schmitt, 1996b: 32).

Since the political entity is the creator, as well as the ultimate guardian, of the substantial peace, it belongs to the concept of the state that it has the right and power to declare who is external and/or internal enemy. An external enemy is the one who is assumed to be existentially threatening the form of life of the community united under a political entity, and thus the one who must be combated with by all means. An internal enemy is the one who is assumed to be spoiling the *normal* condition created by the political entity. By a declaration of internal enemy, the state points out to a threat of "*civil war*, i.e., the dissolution of the state as an organized political entity, internally peaceful, territorially enclosed, and

[78] In a following section, we will particularly focus on Schmitt's more juridical formulation of the concept of sovereignty in his *Political Theology*.

impenetrable to aliens" (Schmitt, 1996:47). Thus, the declaration of someone as a public enemy (*hostis*) in any case is indeed a decision in the form of a verdict on life and death. Insofar as it brings about the physical destruction of human beings, such a verdict cannot be justified simply on the basis of ideals or norms: "there exists no rational purpose, no norm, no matter how beautiful, no legitimacy nor legality which could justify men in killing each other" (Schmitt, 1996:49). In repelling and fighting a real enemy, there can only be an existential-political justification, i.e. a *ratione necessitatis* (a reason of necessity): that there comes an existential threat to one's own way of life from a public enemy. This right and duty is imposed upon the political entity as a necessity of the earthly human existence: it is a must to claim exclusively the *jus belli* and act out of it, if the *normal* order of peace within the state's own territory is to be protected. *Jus belli* is, then, the supra-normative foundation of any normative order. Any attempt either to disregard or to normatively justify this essential factuality of human political existence would be in vain. For, the former would mean blindness to the truth of earthly existence, while the latter would lead to the vicious assertion that what is necessary is just. Only the principle of self-preservation, which is an existential not normative principle, may be seen as relevant at this point. From the standpoint of the relations between the political entity and its subjects, this principle indicates the external relation between protection and obedience: "if protection ceases, the state too ceases, and every obligation to obey ceases" (Schmitt, 1996b:72). As Schmitt understands it, this cardinal point in Hobbesian construction of the state is far from bringing out a normative regulation of the state power. Quite reverse, it underlines that the unconditional duty and right of the state lies exclusively in protecting its order of peace. This duty and right as such designates the end which the state should succeed in if it is to not cease to exist.

That the *jus belli* is the defining feature of the political entity presupposes the ever presence of an enemy confronting the political entity. As long as a political entity exists, there is always more than one political entity. "The Political" always takes place within a *pluriverse*, and negates the *universe*. A political entity which would be universal in the sense of embracing all humanity would be an absurdity. For, such a universal entity would negate the distinction between the outer and inner space, whereas, as we seen above, "the political" raises essentially on a

distinction between enemy (i.e. the outsider) and friend (i.e. the insider). At this point, Schmitt touches upon the "all-embracing" humanitarian discourses of his time. In his view, such discourses are either ideological cover veiling imperialist objectives. Or, they are utopian demands for the total depoliticalization of our earthly existence. In the former case, we have already mentioned above that appropriating universalistic terms such as humanity, civilization and progress on one's own behalf leads to a vicious form of politics through which another grouping of human beings are not simply combated with, but tried to be exterminated. In the latter case, it is believed to be possible to solve the questions of our earthly co-existence on a neutral or objective domain distinct from the domain of "the political". From the 17th century to the time of Schmitt, the western part of humanity sought for such a domain subsequently in metaphysics, ethics, economics, and technology[79]. Yet, it has been a vain attempt to transfer political questions into an allegedly neutral sphere and then hope to solve them there. For Schmitt, one may choose, as liberals usually do, to close her eyes to the reality of politics; but this will certainly not exterminate politics from the earth. Sooner or later, the truth will take its revenge and one will face "the political" in someone else's frightening power to draw a distinction between friend and enemy and to act out of the *jus belli*. In line with this, Schmitt argues, in regard of the utmost popular idea of a League of Nations of the post-world war one period, that such a league can, at most, only be a new political entity in the form of an alliance of some nation states. Quite similar to federative political structures, it will thus be a political entity with the *jus belli* confronting other nations. It will never satisfy the optimistic expectations that a world-embracing organization of human beings will be established, whereby the irrationality of politics, i.e. the domination of men over men, is repressed on behalf a system in which everything functions automatically, i.e. things spontaneously administer themselves. But, why is this so? Why is Schmitt so insistent on that "state and politics cannot be exterminated"? (Schmitt, 1996:78). The answer to this question, I think, will be essentially important for our inquiry in this chapter, since it will reveal the core upon which Schmitt's every particular argument, including his arguments on law and legality, is founded.

[79] See, Schmitt's "The Age of Neutralizations and Depoliticizations (1929)" where he gives an historical account of the European man's vain strive for a neutral sphere.

Hence, let us deal, now, with the question why Schmitt saw in the political an unsurpassable element of human earthly existence.

III.1.3. Politics as an Unsurpassable Phenomenon

In the 7th section of *The Concept of the Political*, Schmitt seems to provide, at first instance, a simple answer to the question why politics is a constant feature of our co-existence: the problematic human nature. By citing the names of Machiavelli, Hobbes, Fichte, Hegel, Bossuet, de Maistre, Donoso Cortés, Julius Stahl, and H. Taine, he argues that all genuine political theorists have recognized the problematic character of human nature: differences among them withstanding, they all presuppose "man to be evil, i.e., by no means an unproblematic but a dangerous and dynamic being" (Schmitt, 1996:61). For, in a good world among good people, only peace, security, and harmony would spontaneously prevail; and thus there would be no place for "the political" the essence of which consists in enmity. This is why liberalism and its radicalized version, anarchism, cannot offer a genuine theory of politics. By founding their overall accounts on an anthropological optimism, they can, at best, offer a critique of politics and state, but not a positive theory of politics.

However, the argument for the problematic character of human nature cannot by itself establish that "the political" is an unsurpassable phenomenon of human earthly existence. This becomes clear when Schmitt argues that "because the sphere of the political is in the final analysis determined by the real possibility of enmity, political conceptions and ideas cannot very well start with an anthropological optimism" (Schmitt, 1996:64). We come across with a sort of circularity here: while the problematic human nature was introduced, at first, as the reason for the ever-presence of "the political", now Schmitt takes it as a presupposition of "the political" itself. Hence, the argument for the problematic human nature is a superficial one. Thus, we should look for a more substantial answer in his works to the question concerning the ever-presence of "the political" in the sense Schmitt understood the term. I think that such an answer may be found in his interesting interpretation of Hobbesian political theory.

As is known, Hobbes' famous construction of the modern state begins with a fiction of the State of Nature where everybody pursues her own self-preservation solely in her own way, and holds her own ideas and criteria pertaining to the questions of truth, justice and the good. This is, at least latently, a condition of the war of all against all. All the virtue of the Hobbesian Leviathan stems from the fact that he brings about an end to this war, i.e. to this condition of radical relativism, by making his will an objective standard for all. The Leviathan is the *will* who replaces the *polemical* situation with a domain of objectivity whereby tranquility, security and predictability is attained. Thus, as Schmitt insistently remarks, the Leviathan designates, first of all, a person for Hobbes (Schmitt, 1996b:20). But, the same term also means the artifice, i.e. the domain of objectivity, which the foregoing person creates (Schmitt, 1996b:34). For Schmitt, there is no problem in calling both the person, i.e. the sovereign, and his artifice, i.e. the state, by the same title. Yet, in his view, the problem in Hobbes arises at the point where he implies that the sovereign may be, at the end, absorbed within the artifice. This is so because Hobbes speaks as if the Leviathan could shut the polemical situation up once and for all[80]. For Schmitt, this would mean the foreclosure of "the political" within the boundaries of the state forever. In reality, such a foreclosure is impossible, and the Hobbesian state of nature is the political situation as such, which is always an immediate possibility in our lives.

[80] Schmitt's following remark on Hobbes should be most relevant here: "He said about himself that now and then he made 'overtures', but that he revealed his thoughts only in part and that he acted as people do who open a window only for a moment and close it quickly for fear of a storm" (Schmitt, 1996b:26). Here, Schmitt indicates that, in opposition to the ancient and medieval rationalists (Plato, Aristotle, Aquinas, etc), Hobbes well understood that the realm of secure co-existence (i.e. the domain of objectivity) is not natural but artificial. That is, it is founded upon a powerful will that is able to impose itself upon others, not upon reason. Having understood this, however, Hobbes has tried his best to underplay the fact that the domain of objectivity established by the powerful will is always a relative (not ultimate) achievement, i.e. an achievement which is always under the threat of dissolution by the chaotic forces. Because of this underplaying, Schmitt thinks, Hobbes could not adequately account for the necessity that the powerful will does not simply play its role only at the moment of the foundation of objective normativity but acts as the force interrupting the mundane processes, in the cases of necessity, even after the moment of foundation. As I am about to explain in the main text, Schmitt's criticism against Hobbes has a remarkably theistic taste. While granting that Hobbes's account was genius in explicating that only a powerful will can overcome our chaotic existence, Schmitt also indicates that Hobbes felt into same trap with the rationalist/deist accounts: the desire for an automatically or spontaneously operating domain of objective normativity, from which the threat of dissolution, and with it the need of the God as our permanent guardian against the forces of evil (i.e. against chaos), is excluded. It is because of this unrealistic (rationalistic) desire that Hobbes leads to the wrong suggestion that the sovereign can be absorbed within his artifice –a suggestion which would be exploited by liberals after Hobbes. This is why Schmitt thinks that Hobbes opens the window to the truth (i.e. to the insight into the nature of the political) but also shuts it (since he cannot overcome his anxiety to face the ever presence of the storm, i.e. the crucial disorder whereby the forces of order and the forces of chaos fight permanently).

I want to argue that underlying Schmitt's argument for the impossibility of a foreclosure of "the political" is *a theistic existentialism combined with a nominalist critique of abstract rationalism*. In the view of Schmitt, abstract rationalism is founded on the idea that every particular thing or event in the universe can be subsumed under a general concept. This subsumption of the particulars under the universals discloses the *immanent* order of the universe as a *mechanism*. A mechanical order is by definition the one which self-regulates itself and does not need any intervention of a transcendent power once it has been established. When the rationalist thinks of the problem of human co-existence, he thinks on the basis of this model of universe as a self-regulating mechanism, sometimes by reference to free market, sometimes to the division of labor, or sometimes to community itself. Thus, he assumes that human co-existence can be captured *a priori* under the abstract laws which would then regulate the particular cases immanently. As the constitutionalist state model of Enlightenment-Rationalism perfectly illustrates, immanent (cybernetic) regulation under abstract laws means that the established order would proceed in the prescribed manner without any interruption. That is, society would be like a perfect clock: once it is designed and made by its designer, it will work eternally without any further effort (i.e. intervention) by its designer. Now, Schmitt thinks that such rationalist visions are no more than fantasies for two reasons. The first is the nominalist objection: what the rationalists hold as the objective concepts under which the particular things and events can be subsumed mechanistically are indeed nothing more than arbitrary nominations of a group of things or events under a common name or label. Indeed, a cursory glance over human history shows immediately that the general concepts, most of all the most essential ones like those of justice and peace, are not the solution of, but the very part of the problem of the contentious character of the human co-existence on the earth. Indeed, For Schmitt, a nomination for an event acquires its objectivity only by the virtue of the power articulating it, not by virtue of its intellectual truthfulness[81]. I will further elaborate the consequences of Schmitt's nominalism when we consider his theory of law. At this point, let me only note that this is a position he already shares with Hobbes.

[81] Likewise, according to the *Genesis*, Adam nominates the things around himself not by the virtue of an intellectual standard which he somehow holds, but solely by the virtue of the power of nomination, which the God has granted to him.

What differentiates Schmitt from Hobbes is his second reason for defying the rationalist visions: *an ontological existentialism*[82] which comes to the fore most evidently in his *Political Theology: Four Chapters on the Concept of Sovereignty*. In its first article, Schmitt defines his theoretical endeavor as "a philosophy of concrete life" (Schmitt, 2005:15). This means an attempt to account for the political life in all its vivacity and fluidity. To be able to do this, he insists, one should focus on the *exceptional situation* rather then the *normal situation.* For, it is "the exceptional" that reveals both the truth of the ultimately unsurpassable power of real life and the essence of "the normal". This existential privileging of "the exceptional" is clear in the following passage:

> The exception can be more important to it [i.e. to a philosophy of concrete political life], *not because of a romantic irony for the paradox,* but because the seriousness of an insight goes deeper than the clear generalizations inferred from what ordinarily repeats itself. The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception. *In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition* (Schmitt, 2005:15)[83].

The last sentence in the above quotation proves that, for Schmitt, life is a *pulsating fluidity* that overcomes any bridle sooner or later. Yet, one should not assume that Schmitt rejoices this *pulsating fluidity*. Quite reverse, he brings this fore only in order to convince us how a serious attempt it is to try to bridle the flux of the concrete life. On the need and desirability of giving a *regiment* to the chaotic disorder of the "state of nature", there is no difference between Hobbes and Schmitt. The difference is that Schmitt, the existentialist, takes this chaotic disorder

[82] I am indebted to the works of Cem Deveci (2002) and Richard Wolin (1990 and 1992) in calling my attention to Schmitt's existentialism. Yet, for the reasons I will present immediately below in the main text, I don't agree with them when they connect Schmitt's existentialism with a *vitalism* in the sense of an attitude rejoicing the ruptures in the flux of the concrete life. Moreover, as we will see later, such a *vitalistic* reading of Schmitt can make some sense for his theory of "the political", but certainly not for his theory of public law as it was elaborated in his major works like *On the Three Types of the Juristic Thought*, *Legality and Legitimacy*, and *The Constitutional Theory*. Thus, reading Schmitt as a *vitalist* would require duplicating him as a political theorist, on the one hand, and as a legal theorist on the other. As I try to show in this chapter, I think that, no matter whether one is agreed to his political/legal theory, Schmitt's theory may be read as a consistent whole. If it is true that a reading of Schmitt's theory as a consistent whole is available, the burden of proof lies on the part of those who think that the Schmitt as a political theorist should be distinguished from the Schmitt as a legal theorist.

[83] Italics are mine

as the truth of our earthly existence, which cannot be regimented once for all, but, at most, only bridled temporarily. He insists that the Leviathan should be ever-present as a *person* as well as an artifice, if the order is to be maintained in the face of this pulsating fluidity. That is, he emphasizes the life as a pulsating fluidity only so as to defy the deistic visions of order in which the need for a personal-constituting-power is excluded. His point is not to defy "the normal", but to show that "the normal" is possible only in the ever-presence of a personal-authority who can take exceptional actions in the face of the intrusions of chaotic life into the order of "the normal". Indeed, from his own standpoint, it is the anarchists, Schmitt's prime political antagonists, who are true *vitalists* in their joyful appreciation of the chaotic power (or, the spontaneous flux) of the concrete life in the universe against the orderly power of the God and the political authority:

> Bakunin was the first to give the struggle against theology the complete consistency of an absolute naturalism…Bakunin's intellectual significance rests on his conception of life, which on the basis of its natural rightness produces the correct forms by itself from itself. For him, therefore, there was nothing negative and evil except the theological doctrine of God and sin [i.e. an idea of a transcendent standard imposed upon the immanency of the concrete life], which stamps man as a villain in order to provide a pretext for domination and the hunger for power. All moral valuations lead to theology and to an authority that artificially imposes an alien or extrinsic "ought" on the natural and intrinsic truth and beauty of human life[84] (Schmitt, 2005: 64).

In strict opposition to Bakunin's joyful appreciation of the concrete life and the logic of immanency, Schmitt's realism is a form of authoritarianism that underlines the need for guarding against precisely what the anarchists appreciate. While the anarchists see a beautiful, true harmony in the immanent (i.e. spontaneous, unchecked) flux of the concrete life, Schmitt sees there a chaotic indeterminacy, and thus a calling (*Beruf*) for a determination by an authoritative (i.e. powerful) will. To elaborate the nature of this calling, I should now examine the probably most interesting issues of Schmitt's theory, namely the state of exception and his conception of sovereignty.

[84] In reading this passage, one gets the impression that the contemporary anarchist thinker, Giorgio Agamben comes close to a vitalistic-existentialism. See, Agamben, 1998 and Agamben, 2005.

III.1.4. The State of Exception and the Concept of Sovereignty

I already argued above that, for Schmitt, "the exceptional" reveals the true essence of "the normal". "The exceptional" refers to a borderline condition in which there exists (or, more precisely, is assumed to be existing) an oscillation between the *nomos* as the politico-legal order and the disorder of the real life. Thus, the state of exception is both the pinnacle of Schmitt's political theory and the point of entry into his theory of constitutional law.

In Schmitt's own terms, the state of exception "can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a performed law" (Schmitt, 2005:6). That a peril cannot be circumscribed by the positive law stems from the very fact that it comes to being as an intrusion of indeterminate forces of real-life. Thus, it is a situation which defies any provision concerning both its details and what should take place in such a case. Yet, though the state of exception defies the codification by legal norms, it still remains as a category within the framework of "the juristic"[85] insofar as it means something else than a chaos.

The insight into the state of exception as a juristic concept is gained when one takes into consideration that a subject with the ultimate power takes action against the chaos and on behalf of the order in such situations. This subject, which is the necessary presupposition of any politico-legal order, is called the sovereign. And, one can account neither for the state of exception as a juristic concept nor for the state-order as a whole without the concept of sovereignty.

In the very first sentence of the first article of *Political Theology*, Schmitt formulates the sovereignty as the person "who decides on the exception" (Schmitt, 2005:5). Such a decision involves an unlimited power in the juristic sense. For, a decision on the exception comprises not only a decision regarding "what to do in an extreme emergency", but also a decision regarding "what the exceptional case is" and "whether or not it exists in a particular case"[86]. As such, the sovereign is a

[85] It would be proper to note, at the very beginning, that the term "the judicial" is replaced by (i.e. assimilated into) the term "the juristical" in Schmitt's theory. For, the latter term discloses the importance of the category of decision and the role of the people authorized to decide for the maintenance of the legal-political process. In my view, this is a point evidencing the kinship between Schmitt's theory and other legal-realist approaches.

[86] As Tracy B. Strong notes in his "Foreword" to Schmitt's *Political Theology*, the German original of Schmitt's formulation captures this fullness of the sovereign power much more clearly: "*Soverän*

complex, even paradoxical figure that both "stands outside the normally valid system [and] nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety" (Schmitt, 2005:7).

To substantiate his point, Schmitt refers to Jean Bodin, who introduced and first formulated the modern conception of sovereignty. Bodin's most quoted definition is: "sovereignty is the absolute and perpetual power of a republic" (Schmitt, 2005:8). This definition emphasizes the fullness and the indivisibility of the power held by the sovereign[87]. Schmitt has, of course, no objection to this definition. Yet, for him, the more decisive point in Bodin is his emphasis that the sovereign is completely unbound under conditions of urgent necessity. In such conditions of conflict, he decides upon what constitutes order, public safety, public interest, and common good (*le salut public*) without regard to positive law and, at least in practice, even to the natural law[88]. In line with this, Schmitt argues that the true mark of sovereignty, in Bodin, is "the authority to suspend valid law" (Schmitt, 2005:9). All other powers, including the power to declare war and peace, are indeed derived from this fundamental power.

To capture in one sentence: Sovereignty resides in determining what constitutes public order and security, and in determining when these are disturbed, by a decision that is free from all normative ties and thus absolute in the true sense. Thus, sovereign decision has necessarily an existentialistic character: a decision *ex*

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ist, wer über den Ausnahmezustand entscheidet" (Strong:2005, x-xi). For *über* provides both the senses of "decision in a state of exception" and "decision of a state of exception". Also, *entscheiden über etwas* can mean in German "to settle on something" (Strong: 2005, xi).

[87] Agamben refers this completeness attributed to sovereignty as "a *pleromatic* state in which the distinction among the different powers (legislative, execution, etc.) has not yet been produced" (Agamben, 2005:6). The term *pleroma* is a Gnostic word designating the spritual world where there is a primordial fullness of the Divine Being and the eons emanating therefrom.

[88] Despite its length, the following passage from Schmitt's *Constitutional Theory* is due to quotation: "Sovereign is whoever has the highest power, not as civil servant or commissioner, but rather continuously and on their own authority, that is, by virtue of their own existence. He is bound by divine and natural law. However, that is not at issue at all in the question of sovereignty. At issue, rather, is only whether the legitimate *status quo* should be insurmountable hindrance for his political decisions, whether anyone can compel him to be responsible, and who decides in the case of conflict. When the time, place, and individual circumstances demand it, the sovereign can change and violate statutes. His sovereignty emerges especially clear in such actions. In his chapter on sovereignty (Ch. 8, Bk.1), Bodin speaks continuously about ideas such as annulling, squashing, rupturing, dispensing, and eliminating existing statutes and rights. Hobbes and Pufendorf present this essential perspective with systematic clarity during the 17th century. The question that always arises is *quis iudicabit* (i.e. who shall decide?). The sovereign decides about that which advances the public good and the common use. In what does the state interest consist when it demands rupturing or setting-aside of the existing law? All of these are questions that cannot be settled normatively. They receive their tangible content through a concrete decision by the sovereign organ." (Schmitt, 2008:101).

nihilo, i.e. a decision out of nothingness. The only rule that can be relevant in such situation, i.e. in suspension of all law, is the rule of self-preservation of the political entity (Schmitt, 2005:12). This is a very interesting situation in which "the state remains, whereas law recedes" (Schmitt, 2005:12). The *norm-al* situation created by the state is suspended in the very decision of the state, which is taken so as to resurrect the *norm-al*, i.e. the legal order subsequently.

At this point, it's well worth to dwell upon a condensed paragraph from *Political Theology* whereby Schmitt extracts the implications for the nature of law and legal order from his conceptions of the state of exception and of sovereignty. By targeting at authors like Kelsen, he begins there with an outright rejection of the exclusion of the state of exception from the sphere of juristical thought on the basis of the distinction between a legal theory proper and a sociology of law: "It would be a distortion of the schematic disjunction between sociology and jurisprudence if one were to say that the exception has no juristic significance and is therefore 'sociology'"[89] (Schmitt, 2005:13). He continues that although "the exception is that which cannot be subsumed, [and which] defies general codification, it simultaneously reveals a specifically juristic element –the decision in absolute purity" (Schmitt, 2005:13). Indeed, Schmitt emphasizes, the cases of exceptions, or sovereign decisions, have fundamental-founding significance for law:

> The exception appears in its absolute form when a situation in which legal prescriptions can be valid must first be brought about. Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations. The norm requires a homogenous medium. This effective normal situation is not a mere "superficial presupposition" that a jurist can ignore; that situation belongs precisely to its immanent validity. There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists (Schmitt, 2005:13).

I think that within this paragraph, Schmitt already inserts three fundamental propositions concerning the nature of law and legal order, which he is to elaborate in his works particularly focusing on legal theory. First, as he explicitly argues immediately after this paragraph, "all law is 'situational law'" (Schmitt, 2005:13).

[89] For Kelsen's distinction between a pure theory of law, i.e. a legal theory proper, and a sociology of law, see pp.23–26 above.

They are valid only insofar as the situation of "the normal" holds according to the view of the sovereign[90]. Second, the moment of the exception or of sovereign decision marks that the authority producing law has a supra-normative status: its source lies neither in law nor in any other norm. In regard of this point, he latter introduces the Hobbesian maxim: *autoritas, non veritas facit legem*, that is, the authority (i.e. the power), not the truth (i.e. the substantive rightness of a norm) makes law[91] (Schmitt, 2005:33). No norm can establish itself and no legal order can arise out of a grounding norm by itself. There is always a person and his will standing at the pinnacle of the legal order. In his *Legality and Legitimacy*, Schmitt remarks that "no norm, neither a higher nor a lower one, interprets and applies, protects or guards itself; nothing that is normatively valid enforces itself; and if one does not intend to trade in metaphors and allegories, there is also no hierarchy of norms, but rather only a hierarchy of concrete persons and organs" (Schmitt, 2007: 54). That is, there is no category of "the judicial" beyond the category of "the juristical". Third, every legal order comprises two distinct, even contrasting, components within itself: juristic norm and decision. That is to say again, every legal order has as its necessary condition a founding-and-guarding authority that is transcendent to the norms of the order[92].

In the following two sections, we will see how the foregoing propositions play constitutive role in Schmitt's construction of a legal-realistic vision of law. I will first try to explicate the essential points of this legal-realistic vision of law, which he himself calls as the "concrete-order thinking". Then, we will be in a position to examine his substantial analysis of the modern constitutional law.

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[90] Indeed, in the second section of the *Political Theology*, Schmitt radicalizes this situational character of law by arguing that any translation of a law into a case involves a constitutive, not declaratory, decision (Schmitt, 2005:31). As he adds, this indeed means that because it is always in question whether or not the normal situation holds for a norm, any legal decision "emanates from nothingness" (Schmitt, 2005:32).

[91] In Chapter Four of this thesis where I will examine Höffe's rationalist approach, we will see that the foregoing Hobbesian motto may be read in a very different way than the one Schmitt suggests.

[92] In the third section of the *Political Theology*, titled "Political Theology", Schmitt provides the historical tendency of the modern-western political and legal thought which culminated, by the 19th century, into the elimination of all theistic and transcendental conceptions and the dominance of the conceptions of immanence. For him, first in the 18th century, deism has come to the fore, which preserved a vision to the transcendent as an engineer who creates a machine, but then sets himself aside, since machine then runs by itself (Schmitt, 2005:48). In the 19th century, even this set-aside transcendent power is repressed radically by an immanence-pantheism which is based on a normative-relativistic and impersonal scientism (Schmitt, 2005:49). Not surprisingly, Schmitt cites Kelsen as the perfect representative of the immanence-pantheism.

III.2. Schmitt's Juristic-Project: A Realistic Foundation for Law

III.2.1. *Nomos* as the Order of Ordering: The Might Constituting the Right

In a very later period of his intellectual career (in the post-world war two period), Carl Schmitt has introduced the concept of *Nomos* in order to account for the developments in international law and international politics[93]. Challenging the modern translation of this ancient term simply as law, he elaborates a very specific conception of *Nomos*. I think that this specific conception of *Nomos* has been the underlying foundation for almost every argument Schmitt has developed since the beginning of his career. I can even argue that Schmitt indeed translates his ideas on the origin and the nature of the politico-legal order into the ancient concept of *Nomos* rather than providing an accurate account of how the ancient Greeks (including pre-Socratics) understood the concept.

In discussing the meaning of the ancient concept, Schmitt first points out that the word *nomos* was the noun form of the Greek verb *nemein* (Schmitt, 2003:326). Thus, it signified an action or process whose content is indicated by this verb. The verb *nemein*, in turn, had a complex meaning combining three forms of actions or processes, which we are used to differentiate. It meant first "to appropriate" (to grab/to grasp) or "to take"; second, "to divide" or "to distribute"; third, "to pasturage" or "to use" or "to produce". In the view of Schmitt, it is essential for an initial insight to the meaning of *Nomos* to take notice that all these verbs are concerned with the activities on land or space. Thus, *nomos* as an action or process indicated, first of all, the appropriation of the land, more precisely of a piece of land. This was "a first measure", i.e. "a first order", upon which all other measures are subsequent. It is a "constitutive act of spatial ordering" in the sense that men "fence", "enclosure" or "build a wall around" a particular land and nominate[94] it as

[93] See, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. In explicating Schmitt's conception of *Nomos*, I will draw upon only its fourth chapter and two articles titled "Appropriation/Distribution/Production: An Attempt to Determine from *Nomos* the Basic Question of Every Social and Economic Order" and "*Nomos –Nahme–* Name", which were published as appendix in the same book.

[94] By pointing out the proximity between the German word *Nahme* (the noun form of *nehmen*, which means 'to take' or 'to appropriate') with *Name* (name in English too), Schmitt argues that there is a unity or, at least, a deep relation between these two activities. (Schmitt, 2003:348). Here, Schmitt's suggestion that the act of constituting order is closely relevant or even identical to the act of naming the things evidences the strict nominalism underlying his arguments.

their own, and then "dwell" there (Schmitt, 2003:74-75). This sentence already establishes the link between "to appropriate" and subsequent meanings of the word *nomos*. For, the terms like fencing or enclosure indicates an initial division or distribution; and the verb "dwell" is almost synonymous with the verb "pasturage", particularly for a non-industrial society like the ancient Greeks.

On the basis of such an etymological inquiry into the roots of a Greek word, Schmitt reaches to a definition of *Nomos* as "the first measure of all subsequent measures, the first land-appropriation understood as the first partition and classification of space, [and thus] the primeval division and distribution" (Schmitt, 2003:67). This means nothing other than a "fundamental law as a concrete order and orientation" (Schmitt, 2003:69). This was clearly not a law in the moderns' popular sense of an "ought", since it designated a concrete action as the foundation of a concrete order. Also, *Nomos* as the law founding a *Politeia* was fully different from "all the sundry acts, statutes, orders, measures, and degrees entailed in the management and control of a commonwealth" (Schmitt, 2003:69). Indeed, the latter fell under the categories of either *thesmos* (positive law or legislation) or *rhema* (command). As the words of Heraclitus and Pindar testified, "all [these] subsequent regulations of a written or unwritten kind derive their power from the inner measure of an original, constitutive act of spatial ordering, [which is called *Nomos*]" (Schmitt, 2003:78). *Nomos* as such was "a constitutive historical event –an act of *legitimacy*, whereby the legality of a mere law is made meaningful" (Schmitt, 2003:73). It was a power not mediated by laws but revealing itself in the form of complete immediacy by the act of an ordering for a legal order. This power thus expressed a measure, i.e. a standard, which establishes a political, social and religious order with a definitive form.

In line with all these, Schmitt suggests, there is "no basic norm, but a basic appropriation [in the form of the immediacy of a power]" at the beginning of any legal order (Schmitt, 2003:345). Yet, this insight, which a true understanding of the concept of *Nomos* provides, has been lost for long[95]. This naiveté concerning

[95] Schmitt argues that, after pre-Socratics, only Aristotle remembered this true meaning of *Nomos*: Aristotle called Solon, but not Draco, the *Nomothet*, since only the former founded a *Politeia* and made a primeval division and distribution, not simply revisions on the existing order (Schmitt, 2003:68). Among the moderns, he seems to give some credit only to Kant: "Even Kant's legal theory takes as a principle of legal philosophy and of natural law that the first substantive acquisition must be land. This land, the foundation of all productivity, at some time must have been appropriated by the legal predecessors of present owners. Thus, in the beginning, there is the

Nomos reached its peak among the moderns. To the same degree that modern political ideologies and social theories believe in the possibility of a human co-existence without antagonisms, they either forget *Nomos* as appropriation by force or dismiss it as atavistic, reactionary or inhuman, and thus reduce law to "legal norms"[96]. In the below paragraph, Schmitt sums up what he considered as the ancient insight encapsulated within the word *nomos* but lost in the modern-phrase "legal-order":

> In no way is the *nomos* limited to the stable and lasting order established by land-appropriation. On the contrary, it demonstrates its constitutive power in the strongest way possible in the processes that establish order in the original division, the *division primaeva*, as noted legal thinkers call it. However, after the land-appropriation and land-division have been completed, when the problems of founding anew and of transition have been surpassed, and some degree of calculability and security have been achieved, the word *nomos* acquires another meaning. The epoch of constituting quickly is forgotten or, more often, becomes semi-conscious matter. The *situation établie* of those constituted dominates all customs, as well as all thought and speech. Normativism and positivism then become the most plausible and self-evident matters in the world, especially where there is no longer any horizon other than *status quo* (Schmitt, 2003:341).

The above quoted paragraph whereby Schmitt somehow romantically recalls back the "ancient conception of *nomos*" in the face of the dominant approaches of modern legal theory indicates the basic objective underlying his juristic-project: a general theory of law which can account for the reality of the Might laying at the constituting core of the Right (*Recht*). Now, it is time to consider his general theory of law, or his framework for the juristic thought, which he develops as a critique of normativism and decisionism.

'distributive law of mine and thine in terms of land for everyone' (Kant), i.e. *nomos* in the sense of *Nahme*. Concretely speaking, this is land-appropriation. Only in this connection can there be any distribution and, beyond that, any subsequent cultivation" (Schmitt, 2003:328).

[96] For Schmitt's argument that liberalism and socialism come together at the point of veiling the necessity of a primeval appropriation for all subsequent distribution and production (or cultivation), see Schmitt, 2003:331. There, Schmitt argues that, by reversing the true order of things, both of these ideologies mistakenly suggest the possibility of solving the question of distribution and appropriation by production.

III.2.2. Concrete-Order Thinking: A Framework for the Juristic Thought beyond Normativism and Decisionism

As he expounds it in his *On the Three Types of the Juristic Thought*, Schmitt develops his general approach to law through a critique of two schools of jurisprudence: normativism and decisionism[97]. A realist standpoint, which he himself calls "concrete-order-thinking", is both grounding and culminating point of his criticisms. Yet, as we will see, Schmitt's adherence to the "concrete-order-thinking" is not without qualification either. Particularly, he distinguishes his understanding from Hegelian theories of law, which also defend expressly a standpoint of "concrete-order-thinking".

At the very beginning of his book, Schmitt distinguishes three meanings of *Recht*[98] (Law): a rule, a decision, and a concrete-order or a formation (Schmitt, 2004:43). He then argues that any theory of law operates necessarily with these three meanings of law. Yet, every particular theory of law recognizes a primary status for one of these meanings and thus locates in a secondary, i.e. derivative, status the other two meanings. In line with this, a normativist theory is one that holds law primordially as a norm; a decisionist theory is the one that holds law primordially as a decision; and a concrete-order-thinking is one that holds law primordially as a concrete-order or ordering. As we will see later in the case of

[97] Some authors, like Leo Strauss, think that Schmitt's critique of decisionism in his post-Weimar works, including *On the Three Types of the Juristic Thought*, marks a shift from his pure-decisionism of the Weimar Period (see, Bendersky, 2004:27). My reading of Schmitt I develop in this work approaches the matter quite differently. It is true that Schmitt seems to be much closer to a pure-decisionism in the Weimar period. However, it is only because his major treaties on "the political", i.e. both *The Concept of Political* and *Political Theology*, were written during this period. As we have seen, Schmitt thinks that "the political" in its purest form concerns the situation of abnormal, i.e. the state of exception, and this situation falls under the need of taking a decision *ex nihilo*. Yet, for Schmitt, the thinking about law should reflect on the normal situation as well as the abnormal situation; and, a pure-decisionism does not suffice to take into consideration the normal situations. Therefore, I think, Schmitt's all works on law, no matter written in the pre-Weimar, the Weimar, or the post-Weimar periods, reflected an understanding of law which cannot be reduced to a pure-decisionism. This is why he remarks in his own "Preface" to the second edition of *Political Theology*, that "the decisionist, focusing on the moment, always runs the risk of missing the stable content inherent in every great political moment –[this stable content being law itself]" (Schmitt, 2005:3). To state explicitly, I read Schmitt's conception of "the legal" as the domestication of the "the pure political", i.e. of the moment of the decision *ex nihilo*. In line with this, I also think that Schmitt's self-presentation as a legal-theorist who is critical of pure decisionism as well as of normativism holds true for all periods of his intellectual career.

[98] As is usual in translations from German into English, the translator leaves the word *Recht* non-translated, so as to differentiate it from another German word *Gesetz*. Since it is particularly important to hold this distinction in mind in our context, I will do the same in the following. The meaning that Schmitt attributes to the word and its differentiation from *Gesetz* will be disclosed throughout my examination.

Schmitt's arguments concerning legal-positivism of the 19th century, however, this is a categorization in the sense of Weber's ideal-types, and there is always place for specific syntheses of these ideal-types in the real world.

The most basic tenet of normativism was already mentioned above: the idea of *Recht* as a norm. For a pure normativism, Schmitt argues, it is characteristic that it isolates the element of norm in *Recht* and makes it absolute to the point of the negation of elements of decision and concrete-order (Schmitt, 2004:49). The norm as such is an abstract, general rule regulating many particular cases. It is thus assumed to be holding over the reality in a superior and eminent manner without the need to take any account of the factual nature of the concrete individual case, the changing situation and the changing will of men. The legal order is, in turn, explained as a smooth functioning of an aggregate of such general norms by the normativist thinking. In my view, Schmitt underlines three features of normativist conception of *Recht* and exposes all them to criticisms from the standpoint of his "concrete-order-thinking": 1) the idea of self-enforcing norm; 2) the idea of a legal order as a mechanical regulation; 3) the idea of two distinct spheres of human existence as that of normativity (ought) and that of factuality (is).

The normativist conception of *Recht* as norm presupposes, above else, a distinction between *ratio* (reason) and *voluntas* (will), or *veritas* (truth) and *autoritas* (personal authority) and identifies law with the former[99]. In this view, *Recht* is an objective, impartial and general standard differing from a particular command of someone. This identification underlines the normativist inspiration for "the Rule of Law" whereby reason as an impersonal and objective standard, not the arbitrary will of some particular individuals, rules over things and events. In line with this, legal order itself is conceived of as a system of norms in which norms are derived from other norms, a highest or utmost norm, i.e. a norm of norms, standing at the peak of the whole architecture of this aggregate of norms[100]. Yet, Schmitt

[99] As Schmitt remarks in his *Legality and Legitimacy*, the normativist distinction between *nomos* and mere *thesmos* expands to the following dualities: *ratio* (intelligence) vs. *voluntas* (blind will); rationalism vs. pragmatism and emotionalism; idealism and just law vs. utilitarianism; validity and moral command vs. coercion and the force of circumstances (Schmitt, 2007:11). As we will just see in the main text, Schmitt thinks that all such dualities which are prevalent in the modern legal consciousness are problematical. One may also note, in passing, that the rejection of such distinctions is typical for a thinker influenced by nominalism because nominalism is marked by the tendency to refute any idea of a standard which precedes and thus limits the founding will.

[100] In his criticisms of the idea of a legal order as a system of norms and the idea of a highest norm, Schmitt has evidently taken as his target Kelsen's conception of legal order and his idea of the *Grundnorm*, which we examined in the previous chapter. See, particularly pp.30–31 above.

contends that since it belongs to the nature of *Recht* that it is to be enforced, such a normativist conception either cannot account for this essential character of *Recht* or goes to absurd in fantasying the self-enforcement of norms by norms themselves. He thus insists that "a law [i.e. a norm] cannot apply, administer, or enforce itself. It can neither interpret, nor define, nor sanction itself; it cannot –without ceasing to be a norm– even designate or appoint the concrete men who are supposed to interpret and administer it" (Schmitt, 2004:51). The very enforcement of a law as a norm presupposes both the order founded by a decision of a personal authority and the institutionalization of that order. Likewise, even the idea of a judge as a pure organ for the applications of norms presupposes a concrete-order and its institutionalization along the line of a hierarchical sequence of authorities. Schmitt then offers a realistic correction to the idea of "the Rule of Law", i.e. *Rechtsstaat*, by referring to Pindar's famous formulation: *Nomos basileus*, i.e. *Recht* as king or *Lex* as *Rex* (Schmitt, 2004: 51). In the view of Schmitt, Pindar's formulation meant two things at once. First, *pace* the normativist thinkers, it emphasized that the element of norm in law cannot be separated from the element of authority. Second, in opposition to tyranny, it emphasized that to be an authority claiming legitimacy requires the institutionalization in the form of a continuous and stable order.

A second defect Schmitt detects in normativism is a confusion of a mechanical regulation and a concrete-order in human affairs. He argues that normativism demands a calculable functioning of human relations through predetermined, calculable and general rules (Schmitt, 2004: 53). It thus imagines a traffic-like regulation for human societies: a smooth, standardized running like the traffics on metropolitan highways where the traffic policeman is replaced by "precisely functioning, automatic traffic lights" (Schmitt, 2004:54). In view of Schmitt, there may be areas of human life which can be exposed to such traffic-like regulations. For instance, the perfect calculability that such a sure regulation brings about is very desirable for the economic affairs of a commercial society. Yet, it does certainly not hold for all societies and all spheres of life. Schmitt's examples for the spheres of life which defy a complete standardization and regulation are very rich: "the cohabitation of spouses in a marriage, family members in a family, kin in a clan, peers in a *Stand* [i.e. Estate], officials in a state, clergy in a church, comrades in a work camp, and soldiers in an army" (Schmitt, 2004:54). In all these instances of the institutionalized spheres of human life, there is a particular substance of order

articulated into legal terms. Also, each of these concrete-orders consists of general rules and regularities; but these rules are subservient to the substance (i.e. to the substantial end), not *vice versa.* They are open-ended principles rather than exact precepts, like the principle of the *bonus pater familias* (i.e. the good head of a family). They are thus usually instructions for the end to be realized by the institution, not exact prescriptions of actions. The general norms are thus generated by and bound to the specific order and its conception of the *normal*. Despite its length, I find quoting the following paragraph necessary, since here Schmitt summarizes his criticism directed against to the conception of the norm as a mechanistic regulation:

> A general rule should certainly be independent from the concrete individual case and elevate itself above the individual case, because it must regulate many cases and not only one individual case; but it elevates itself over the concrete situation only to a very limited extent, only in a completely defined sphere, and only to a certain modest level. If it exceeds this limit, it no longer affects or concerns the case which it is supposed to regulate. It becomes senseless and unconnected. The rule follows the changing situation for which it is determined. Even if a norm is as inviolable as one wants to make it, it controls a situation only so far as the situation has not become completely abnormal and so long as the normal presupposed concrete type has not disappeared. The normalcy of the concrete situation regulated by the norm and the concrete type presupposed by it are therefore not merely an external, jurisprudentially disregarded presupposition of the norm, but an inherent, characteristic juristic feature of the norm's effectiveness and a normative determination of the norm itself. A pure, situationless, and typeless norm would be a juristic absurdity (Schmitt, 2004:57).

The third point that Schmitt particularly criticizes in normativism is the distinction between the "is" and "ought"[101]. This distinction follows necessarily from normativism. For, once legal order is conceived of an aggregate of predetermined, general rules or statutes, its correspondence to real life becomes very problematic. More precisely, since normativism demands a sure regulation on the basis of abstract and general rules, and since the real life necessarily defies such a sure regulation, it dismisses fully any consideration of the real life, lamenting it as

[101] At this point too, Schmitt has in his mind primarily Kelsen by whom the distinction between "ought" and "is" reaches its most precise form in the philosophy of law.

sphere of irregularity to which the legal theorist should be indifferent. In this sense, nothing factual can prove or defy the legal order. For Schmitt, such an understanding of legal order that is radically separated from the factual reality is not simply meaningless. Much more crucially, it is also "an order-destroying and order-dissolving juristic absurdity" in its disregard of the operational logic of human institutions as concrete orders (Schmitt, 2004:53). Having examined his objections to normativism, let me now present his criticisms of decisionism.

In regard of decisionism in its pure sense, Schmitt's argument follows much a descriptive path than a critical one. Indeed, he says nothing against decisionism beyond indicating that it is an insufficient view of *Recht* to emphasize the element of decision to the point of ignoring the element of stability of concrete-legal-order and its institutions. He first notices that, in opposition to normativism, decisionism takes seriously the problem of the "force of law". The decisionists think that the "force of law" can stem only from a *voluntas* (i.e. a will). That is, every *Rechts*-order consists of "norm-contradicting decisions", which then provides the newly created laws with the "force of law"; and, these decisions themselves derive their "force of law" only from themselves (Schmitt, 2004:59-60). Thus, for the jurists of the decisionist type, the authority or sovereignty of the decision becomes the sole source of all norms and orders. Schmitt points out an affinity between the decisionist conception of law and a particular conception of the God, which reached its peak with the Calvinistic strand of the Christianity. According to later, the God's omnipotence means that his power is even not bound by the good: The God is not fettered by any law but an absolutely free-lawgiver. The believers, therefore, obey to a law not because that it is good, but because it is willed or commanded by the God. This conception of the God and his law was transported to legal and political theory by Bodin in a relatively secularized discourse. Yet, it still lacked a pure-decisionist standpoint as a result of the Christian belief that this world as the God's own creation was not a complete disorder or chaos, and thus that decisions taken were not out of nothingness but presupposed the concrete-order of the God.

Only with Hobbes does one encounter the first case of decisionism in a pure form[102]. For, he conceives of all *Recht* (all norms, all statutes, all orders and all

[102] Here, I again feel myself obliged to note that Schmitt's reading of Hobbes will sound controversial for many other interpreters of him. As I noted before, we will see a very different reading of Hobbesian theory of law by Höffe in the subsequent chapter. At this juncture, however, I

interpretations of laws) as instances of decisions of sovereigns, the sovereigns being not legitimate rulers but merely ones who factually decide in a sovereign manner (Schmitt, 2004:61). In regard of the source of all *Recht*, he claims famously that *auctoritas non veritas facit legem*, i.e. the power, not the truth (i.e. rightness) makes law. As Schmitt notes, in opposing authority to rightness, Hobbes's decisionism goes far to the point of negating the ages-lasting distinction between *potestas* (mere power) and *auctoritas* (legitimate power): In the view of Hobbes, whoever establishes peace, security, and order is sovereign and legitimate (Schmitt, 2004:61). His procedure of acquiring power and of making laws, together with the content of his laws, can in no way be exposed to criticism, in the same sense the believer cannot judge the ways of the God. Schmitt suggests that Hobbes reaches such a point of purity in decisionism, because, unlike Calvin and Bodin, he presupposes a normative nothingness and complete disorder before the sovereign decision. This is evident in his conception of the state of nature as the ruthless struggle of all against all, in which man becomes a wolf to man (Schmitt, 2004:62). In this anarchistic situation of insecurity, it suffices that a particular man (whoever he is) takes a decision (however and whatever it is), so as to call him as sovereign authority and his command as law.

Through some extrapolation on the basis of his other works, I can argue that Schmitt has not much quarrel with decisionism as regards to the moments of the foundation of a political entity. His point is that the presupposition of a normative vacuum ceases as an aftereffect of this constitutive decision. Law acquires, then, a settled-on or sediment existence in the life-form of the people as its concrete order; and, decisionism cannot account for this subsequent stage insofar as it remains as an account from an individualistic standpoint of original arbitrariness. For, to understand the sedimentation of *Recht* within the life-form of a people, one should go beyond the individualistic notion of contract or pact (*Vertrag*) to "agreement" (*Vereinbarung*: "coming-together" or unison) in which there is the identification between all with all on the matter of common form of existence.

In this way, Schmitt seems to come close to Hegel's communitarian understanding of *Recht*. This becomes evident when he cites the latter's legal and

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may cite Dieter Hüning's "From the Virtue of Justice to the Concept of Legal Order: The Significance of the *suum cuique tribuere* in Hobbes' Political Philosophy" as a compact and lucid argumentation displaying the rationalist core of Hobbesian theory. Such readings imply that Hobbes could be interpreted not as a realist, but a rationalist political-legal theorist.

political theory as the "summation" of the concrete-order-thinking in modern era (Schmitt, 2004:77). As Hegel's credentials, he points out: his idea that *Recht* should be cultivated, in the consciousness of people, as custom and habit; his idea that the truly divine is not the individual but the institutions like family, the Estates and the State; his idea that the State is a form which is the complete realization of the Spirit in being; and his idea of the State as *Reich* representing objective reason and morality (Schmitt, 2004:77-78). Schmitt then argues that, thanks to these credentials, Hegel offers us a vision that stands far from the dilemmas of the state as it is conceived by "western-liberal rational law or positivism":

> This latter concept of the state is suspended between the Decisionism of the dictatorial state construction of Hobbes and the normativism of the latter rational-law thinking, between dictatorship and bourgeois *Rechtsstaat*. Hegel's state, in contrast, is not the civil peace, security, and order of a calculable and enforceable legal functionalism. It is neither mere sovereign decision nor a "norm of norms", nor a changing combination of both notions of the state, alternating between the state-of-exception and legality. It is the concrete order of orders, the institution of institutions (Schmitt, 2004:78-79).

Yet, Schmitt's appreciation of Hegelian philosophy of state should not be exaggerated. For, Schmitt agrees with only Hegel's insight that the *Recht* should be embedded and cultivated within the consciousness of the people. On the other hand, he is not at his ease with the general proposition of Hegelian theories of law, namely that *Recht* does not emanate from the state, but arises from within society itself[103]. Relevantly, his adherence to the "concrete-order-thinking" is not without qualification. For, he argues that "*Recht* is norm, as well as decision, and, above all, order" (Kelsen, 2004:50). Thus, for Schmitt, law is not exclusively concrete order, but also decision and norm. This means that a pure version of concrete-order-thinking would not suffice for a true understanding of law either. Indeed, his warning in the "Preface" to *Political Theology* is revealing here: "whereas the normativist in his distortion makes of law a mere mode of operation of a state bureaucracy, and the decisionist, focusing on the moment, always risk of missing the stable content inherent in every great political movement, an isolated institutional thinking leads to the pluralism characteristic of a feudal- corporate

[103] For a very brief explanation of the neo-Hegelian theories of law and their comparison to neo-Kantian theories, see Bendersky, 2004:9.

growth that is devoid of sovereignty" (Schmitt, 2005:3). Sovereignty, as Schmitt understands it, is a notion marking the constitutive role of the political entity over the society; and thus the idea that *Recht* emanates from society but not from the state negates this notion. Thus, it would lead to a crucial inconsistency in Schmitt if he were adhered to a mode of juristic thinking that negated the notion of sovereignty while this notion was most essential for his political thought.

III.2.3. The Dilemma of Legal-Positivism: Misconceiving the Source of Juristic Security

I have already underlined above that Schmitt conceives of normativism, decisionism and concrete-order-thinking as ideal types in the Weberian sense. Thus, he thinks, one always encounters with factual *Rechts*-orders that are specific syntheses of these ideal types. One such factual and thus synthetic *Rechts*-order Schmitt particularly examines is the legal-positivist order. In his view, this is the mode of juristic thought that marked the factual systems of law of the 19th century Continental Europe, particularly of France and Germany. As a mode of juristic thought, it was closely related to the ages-lasting movement of the codification of all legal norms under the written-law. The most remarkable characteristic of this mode was that it identified all *Recht* with "statutory governing" (Schmitt, 2004:64). That is to mean, law is reduced to the "normative fixed legality"; and thus any distinction between *Recht* and law in the sense of a posited norm (i.e. *Gesetz*) is foreclosed (Schmitt, 2004:64).

Under this fixation of *Recht* with the legality of posited norms lies a search for firmness, stability, calculability and objectivity, i.e. a search for legal security. Here it becomes clear that there is a kinship between legal-positivism and the positivism in the natural sciences: the rejection of any *meta-physicality* so as to achieve precision in thought. Hence, legal- positivism refutes everything "extra-legal" or "meta-juristic", i.e. "all *Recht* not created through human statutes, whether it appears as Divine, natural, or rational law" (Schmitt, 2004:64). The domain of "extra-legality" or "meta-juristic" comprises "the ideological", "the moral", "the economic", and "the technical", and etc.. What counts as legal consideration is only that which is exclusively based on the contents of norms. The norms, the archetype

of which is statutes, are the only authority in the tribune of the juristic thought as the positivist conceives of it.

The positivist assertion that the statute is (or should be) the sole authority in legal considerations reflects the peculiar syncretism inherent in legal-positivism. As Schmitt argues with favor, this assertion reveals that legal-positivism is indeed a synthesis of decisionism and normativism. For, the statute is, at first of all, nothing but the decision or the will of a legislator. In subjecting himself exclusively to the content of a statute, a positivist jurist indeed subjects himself to a decision of a legislator. Moreover, given that there is no place to any meta-juristic consideration in jurisprudence, it also becomes clear that the positivist jurist takes the competence of the legislator to decide unbound. This is the decisionist aspect of legal-positivism. Yet, this decisionist view concerning the foundation of a norm gives way to a normativism at the very point that the positivist jurist takes the substance of the decision as the "objective law", and thus demands that the legislator himself is bound by his own decision too. Once the statute is posited, it reigns without regard to anything else, even without regard to the original intention of the legislator. This is what he means when a positivist refers to the ideal of *Rechtsstaat*[104].

In this way, the positivist proceeds "from will to norm, from decision to regulation, from Decisionism to Normativism" (Schmitt, 2004:68). The peculiar nature of this proceeding is, as Schmitt notes, well expressed in the idiom which legal-positivist authors feel obliged to repeat frequently: "normative power of the factual" (Schmitt, 2004:69). In the view of Schmitt, this idiom is evidently an empty tautology, and thus shows the inconsistency inherent in legal-positivism. Indeed, it would have a meaning if it is revised as "the positive power of the factual". However, a positivist would not employ this formula because it would mean to accept that legal-positivism is in fact not an original type of juristic thought but a diluted decisionism (i.e. a decisionism window-dressed by normativism), at least in regard to the crucial issue of the source of law.

The key to a true understanding of legal-positivism will be gained, Schmitt implies, only if one takes into account its objective: certainty and calculability. To

[104]The positivist understanding of *Rechtsstaat* should be distinguished from the rationalist understanding of *Rechtsstaat*. As Schmitt himself indicates, the positivist conception means a *legislative-state* where mere legality reigns (Schmitt, 2004:67), while the rationalist conception is based on the idea of objective justice as the grounding and regulative principle of law.

achieve this objective, the legal-positivist may appear in more decisionist or more normativist guises, depending on the historical-factual circumstances:

> In appealing to the will of the state legislator or state laws, to an actually existing "supreme power" as an expressed and prevailing decision of the state legislator, he [i.e. the legal-positivist] is, in terms of legal history, bound to the decisionist state theory that developed in the seventeenth century and must fall with it. However, in appealing to law as norm, he binds its certainty and firmness only to the certainty and firmness of the legality of the legislative state which achieved domination in the nineteenth century" (Schmitt, 2004:70).

To put in exact terms, Schmitt considers legal-positivism as the modern form of the "universal-human striving for protection against risk and responsibility" (Schmitt, 2004:70). The peculiarity of the moderns (i.e. of legal-positivism), in this regard, lies in that they assume that the juristic security is possible on the basis of mere *legality* (i.e. an aggregate of norms). Yet, Schmitt contends, any juristic security cannot be attained by norms, but by a concrete order within which these norms acquire existence[105]. And, any concrete order depends upon what the positivist dismissed as ideological, moral, cultural, economic, or political considerations. Indeed, such considerations provide for the criteria of *legitimacy*. Thus, to clean law off all these considerations means to clean off the notion of legitimacy from law. The inevitable consequence of such a cleaning off is to dissolve any substantial content for right, objective and normal in opposition to wrong, subjective and abnormal. This reveals the paradox of legal-positivism: in demanding complete precision on the basis of norms, it risks losing the kind of security attainable for

[105] When Schmitt argues for the insufficiency of norms in sustaining juristic security, the resemblance between his theory and American legal-realism becomes particularly evident: "Even the simplest problem of interpretation and proof had to teach one that the firmness and security of even the most painstakingly and carefully written legal texts remain in themselves entirely questionable. Wording and literal meaning, historical development, sense of justice, and communication requirements operate confusingly in the most varied manner in establishing the 'unquestionable' contents of legal texts and regarding questions of proof and qualification of the 'facts' in the 'pure juristic' establishment of evidence" (Schmitt, 2004:66). This passage whereby Schmitt emphasizes that legal norms, however well written they are, require juridical decisions to be applied in any concrete case is an expression of the thesis of legal indeterminacy of norms. This thesis constitutes the core claim of American legal-realist school represented by the authors like Jerome Frank, Oliver Wendell Holmes and Karl Llewellyn. *Philosophy of Law*, edited by Joel Feinberg and Jules Coleman in 2008, includes the representative texts for American legal-realism, namely J. Frank's "Legal-realism", O. W. Holmes's "The Path of the Law" and K. Llewellyn's "Ships and Shoes and Sealing Wax". For a short and clear overview of this school, see also Brian Leiter's "American Legal-realism" edited in M. Golding & W. A. Edmunson's *Philosophy of Law and Legal Theory*.

human beings: the security that a concrete-order provides thanks to the substantial criteria it depends upon.

We have thus examined the basic tenets of Schmitt's conception of law and his critique of the alternative modes of legal thinking. In underlying the essential indeterminacy of the general rules *vis-à-vis* particular cases, the importance of the category of decision and of the role of the men authorized to decide for the maintenance of the legal-political process, and the inevitable interference (or entanglement) of moral, political, cultural, and economic considerations into the domain of law, Schmitt's conception saliently betrays a kinship to the conception of law developed by the school of American legal-realism. Indeed, Schmitt may be considered as providing a philosophical reconstruction and defense of the realist premises, of which, Brian Leiter thinks, American legal-realism is in need (Leiter, 2006: 50).

As we have seen, the most emphasized point in both Schmitt's realist conception of law and his criticisms of alternative approaches is, by far, the following one: that any legal norm or any legal decision should be located within a concrete-order, i.e. *régime* that has its own substantial criteria called "legitimacy". Now, we should engage in a detailed examination of Schmitt's own theory of "the juristical" (i.e. the *Recht*) which is built upon this notion of the concrete order. As the reader will then see, Schmitt's construction of his theory is indissolubly connected to his critique of the "constitutionalist approach" (i.e. the theories of *Rechtsstaat*) in political and legal thought. Thus, our examination will disclose to us both Schmitt's criticisms of the essentials of *Rechtsstaat*-theories, including human rights, and what a meaning for human rights and the basic rights is left within the confines of his realist juristic-thought.

III.3. Schmitt's Constitutional Theory

III.3.1. The Concept of Constitution

III.3.1.1 The Constitution in the Absolute Sense

Schmitt's most voluminous and systematical work, *The Constitutional Theory*, is devoted to an elaboration of the concept of the constitution as both the origin and

the apex of "the juristical". Schmitt's political-existentialism and juristical-realism, both of which we have examined up to now, culminate into a systematic theory of the constitutional law, which is highly challenging to the mainstream understandings of the constitutional law in modern ages, particularly to the "Constitutionalist" visions of the state and legal order that has been dominant since the Age of the Enlightenment.

In the beginning of his work, Schmitt differentiates three distinct meanings attributed to the concept of the constitution in political and legal discourses: 1) the constitution as "the political unity of the people", i.e. a concrete type and form of state existence; 2) the constitution as "a closed system of norms", i.e. an *ideal* unity; and, 3) the constitution as any individual statute, i.e. any individual "constitutional" norm (Schmitt, 2008:59). Schmitt takes the first two meanings as designating *the constitution in the absolute sense*, since both of them suggest that the constitution is *a unified form*, rather than an aggregate of individual norms.

As for the first meaning of the constitution, Schmitt points out to several sub–meanings it includes. First, it designates certain principles of political unity and social order and a certain decision-making authority that is to be definitive in cases of conflicts of interests and power (Schmitt, 2008:59). This sense of the constitution of a state as a political unity and social order should not be misconstrued as something normative. Rather, it has an existential meaning: in this sense, the state does not have a constitution; it is the constitution itself. When the constitution is eliminated, the state will be eliminated too. It is thus the "soul", "concrete life" and "individual existence" of a people as a political unity: all essential-existential traits which provide a people with a particular *accord* or a particular *composition*, and thus form a state.

Second, the constitution in the sense of the political unity of the people may designate "the special type of the political order" (Schmitt, 2008:60). In the view of Schmitt, to speak of the types of political order is to speak of the special-concrete type of super- and subordination relations within a collectivity, since the relations of super- and subordination are essential for any social order. Thus, the constitutional forms the states take in this sense are designated by the words like mon*archy* (the rule of the one), aristo*cracy* (the rule of the few or the rule of the best), demo*cracy* (the rule of the all), and etc. Unlike the case with the first sub-

meaning, the state does not cease to exist, if it loses its constitution in this second sub-meaning.

Third, the constitution may be conceived of in its dynamic dimension, not in the static form as is the case with the former two sub-meanings. Here, the state as the political unity is not a form already existing, but a *formation* which is in the "process of constant renewal": "the constitution is the active principle of a dynamic process of effective energies, an element of the becoming, though not actually a regulated procedure of 'command' prescriptions and attributions" (Schmitt, 2008:61). Though Schmitt does not use the following terms, he seems to have in mind something like an organism freely evolving in time without ceasing to be a unity.

As noted above, there is a second meaning of "the constitution in the absolute sense": "the constitution as a unified, closed system of higher and ultimate norms" (Schmitt, 2008:62). According to this conception, all state life is nothing but a fundamental legal regulation, at the apex of which stands a basic law as the "norm of norms" or the "law of laws". This conception tolerates any existential or non-normative element neither in law nor in the state. It reduces the latter to "the legal order" and attributes sovereignty to the constitution. For Schmitt, it was the French "doctrinaires", i.e. the representatives of bourgeois liberalism, who first designated the constitution as sovereign and appealed to a state that would function only as legal order. There was an essential element in their conception: law that is to be sovereign was not a simple positive will or command, but a precept of reason having certain qualities such as generality. Otherwise, the sovereignty of law would indeed be that of the particular wills positing these laws. In this vein, Schmitt refers to Guizot, a classic representative of liberal commitment to the *Rechtsstaat*, who spoke explicitly of "the sovereignty of reason and of justice" (Schmitt, 2008:63). In this view, Schmitt underlines, the rationality of law consisted in the guarantees of bourgeois freedom and private property, which the general statutes were expected to bring about. He then argues that, in its great epoch during 17th and 18th centuries, liberal bourgeoisie could make law conceivable as a normative unity, thanks to its idea of *correct* law. Yet, this becomes later more and more controversial to the extent that the belief in the universality of bourgeois rationality or reasonability dissolves. In other words, the rationalism of this epoch of the greatness gives way to a problematical positivism in the following centuries. Schmitt refers to Kelsen as

the perfect example of this. The latter tries to found the normative unity of law solely upon actual validity of positive norms, without any reference to the substantive rationality of norms. The result is strange in the view of Schmitt: a kind of normativism which relies on the assertion that a norm is valid when it is valid and because it is valid (Schmitt, 2008:64). For, Kelsenite form of normativism, i.e. positivist-normativism, founds the validity of norms not on their justice, reasonableness or etc, but on the mere factuality that they are positive norms.

Schmitt's foregoing arguments make it clear that he views the rationalist strand of normativism as superior to the Kelsenite-relativist strand. Yet, this does of course not mean that he approves the former[106]. Rather, he only concedes that the rationalist strand could at least account for the unity of law in its own way, albeit defectively. For Schmitt, there can in fact be no closed system of pure norms. The unity in law can only arise out of a "pre-established, unified will", i.e. out of "a constitution-making power" (Schmitt, 2008:64-65). A glance at contemporary constitutions would suffice to see that constitutional norms within a single constitution are indeed so diverse from each other that they defy the attribution of any logical unity, sometimes even consistency, to them. In line with these, he argues with regard to the Weimar Germany:

> The unity of the German Reich does not rest on these 181 articles and their validity, but rather on the political existence of the German people. The will of the German people, therefore something existential, establishes the unity in political and public law terms beyond all systematic contradictions, disconnectedness, and the lack of clarity of the individual constitutional laws. The Weimar Constitution is valid because the German people "gave itself this constitution" (Schmitt, 2008:65).

As this quotation evidences, Schmitt thinks that, although normativist schools of legal thought aspire to present an idea of constitution as a unity (i.e. an idea of "the constitution in the absolute sense"), they all fail. For, the unity of constitution is conceivable only at an existential level, never at a normative level. Hence, there is indeed only one viable conception of "the constitution in the absolute sense": the constitution as a concrete type and form of the political unity of a people. The normativist conception of the constitution as a closed system of norms is merely a *fake* or non-viable conception of "the constitution in the absolute sense". We should

[106] For Schmitt's opposition to rationalism, see p. 97 above.

now consider what Schmitt calls "the constitution in the relativist sense" –a conception which he sees as an absurdity arising from normativism. More precisely, as we will see below, Schmitt points out the conception of "the constitution in the relativist sense" as if it is an *illegitimate* offspring of normativism.

III.3.1.2. The Constitution in the Relativized Sense

Schmitt thinks that, particularly in an age of rising disbelief in bourgeois rationality, the misled attempt to search for the unity of law in the wrong place, i.e. in a fictional logical unity among pure norms, gave rise to the relativized concept of the constitution. By the term "constitution in the relative sense", the author means the approach that misconceives constitution as a group of constitutional laws, i.e. individual norms codified in the form of statutes. In this way, the constitution as a unity is confused with the formal qualities of constitutional laws which are indeed nothing more than details in comparison to the unity of order. Yet, as we will see just below, he thinks that no formal quality attributed to laws may be sufficient to demarcate the category of "the constitutional".

Schmitt underlines that two features are generally cited as the formal qualities of constitutional laws. First, the constitutional law is the *written* rule stemming from the will of the legislator in the form of "statute" (Schmitt, 2008:68). This is indeed the contemporary form that the Roman notion of *lex scripta* (i.e. law as written rule) takes; and, the reason for the contemporary adherence to this notion is same with the Romans': demonstrability and stability. The only significant difference lies in that the modern version brings up the element of popular consent, since the legislators in the modern world are popular assemblies. For Schmitt, the idea of constitution as written rules of the legislator does not suffice to account for the constitution as a unity. For, the legislator can pass any norm she wishes; and thus the mere criterion of being written rules does not provide constitutional laws with a substantive, systematic and normative completeness.

The second formal feature generally cited as the defining characteristic of constitutional laws is "the qualified alterability" (Schmitt, 2008:71). Hence, a constitutional law is understood as a rule to which a special guarantee of durability and inviolability is accorded through the fact that its amendment is made bound to

qualified forms and procedures (Schmitt, 2008:71). There are many ways to provide constitutional norms with "the qualified alterability". For instance, their amendment may be bound to the affirmative vote of two-thirds of the legislative-parliament while a vote of majority holds sufficient for the amendment of other laws; or the amendment of constitutional laws may be bound to an approval by another authority like the president, a second assembly or popular vote, while this restriction does not hold in the case of other laws; or it may be forbidden to amend constitutional laws for a determinate time, etc.. The "qualified alterability" of constitutional laws is regulated by an individual constitutional law in many contemporary constitutions[107]. From the standpoint of Schmitt, the attempts to demarcate the category of "the constitutional" on the formal basis of the "qualified alterability" stands as the most striking instance of the contemporary positivistic replacement of the concept of constitution as a unity in favor of a relativized conception of constitution. These attempts have led to crucial, even absurd, consequences in legal and political thought[108]. By referring to the Weimar Constitution, he contends that such a perspective meant to build the essential core of the German constitution merely on the Article 76 which regulates the amendment of the constitutional norms. Then, the result is the following absurdity:

[107] To give an example, the Weimar Constitution, to which Schmitt is about to refer in his discussion, included such an individual constitutional law regulating the "qualified alterability" of the constitutional laws in its Article 76. This article reads as follows: "The Constitution can be amended *via* legislation. However, a decision of the *Reichstag* regarding the amendment of the Constitution only takes effect when two-thirds of those present consent. Decisions of the *Reichsrat* regarding amendment of the Constitution also require a two-thirds majority of the votes cast. If a constitutional amendment is concluded by initiative in response to a referendum, then the consent of majority of enfranchised voters is required. If the *Reichstag* passes a constitutional change against the objection of the *Reichsrat*, the President is not permitted to promulgate this statute if the *Reichsrat* demands a referendum within two weeks".

[108]Indeed, as we have also seen in the case of Kelsen, the modern constitutional orders are differentiated as "rigid (unyielding) constitutions" or as "elastic (flexible) constitutions" in accordance with whether or not they have such positive regulation among constitutional laws. For Schmitt, this differentiation is not simply meaningless. It is rather an absurdity arising out of the contemporary confusion between the constitution as unity and constitutional laws as details. For instance, England is usually taken as the primary example of the flexible constitutions merely because of the fact that it has no codified norm provisioning a qualified amendment conditions for essential norms. Indeed, however, certain norms, like the ones captured under the title of *Habeas Corpus*, have so high status of inviolability in England that probably no other norm has in any other country. Hence, the constitution of England is not more yielding than that of France or of Germany, despite the fact that the former contains no norm for "the qualified alterability" of certain norms. Indeed, from the standpoint of historical reality, the constitution of England is much more unyielding than the others. However, it becomes impossible to account for this reality when one loses insight into the genuine conception of the constitution as an existential unity and wrongly identifies the constitution with the constitutional laws.

> The entire constitution would only be provisional and, in fact, an incomplete law, which must be filled out each time in line with the provisions on constitutional amendment. The following additional provision must be appended to every valid constitutional principle of current German constitutional law: excepting a change by way of Art.76. "The German Reich is a Republic" (Art.1), excepting a change *via* Art.76; "marriage is the foundation of family life" (Art.119), when something else is not determined in accord with Art.76; "all inhabitants of the Reich enjoy full freedom of belief and conscience" (Art.135), so far as these are not taken from them *via* Art. 76; etc (Schmitt, 2008:74).

In the view of Schmitt, enacting an individual constitutional norm prescribing a qualified amendment procedure for constitutional laws is certainly a proper legal technique to provide some important provisions with some degree of guarantee against shifting majorities or coalitions. However, a conception of the constitution which reduces the core of "the constitutional" to such an individual law is not an acceptable one. Put simply, one cannot orient oneself in such a terrain. For, the constitutional unity disintegrates in an arena for partisan tactics where parties refer to law and constitution only in a skeptical and cynical manner. To reorient oneself, one should recall the idea that the constitution is something special and distinctive not because it has qualified alterability but because its substance has a fundamental significance. We are now to consider Schmitt's proposal for such a reorientation: the positive concept of the constitution.

III.3.1.3.The Constitution in the Positive Sense

That the constitution as unity is distinct from constitutional laws is the first insight in the way of grasping what Schmitt calls "the constitution in the positive sense". In Schmitt's own terms, this distinction is "the beginning of any further discussion" *vis-à-vis* the state and the constitutional theory (Schmitt, 2008:75). But, what is the constitution in the positive sense, if it is not constitutional norms? The answer to this question can be found in the subtitle of the section on the positive concept of the constitution which reads: the constitution as the complete decision over the type and form of the political unity[109]. There is an original moment in

[109] Here, one may easily notice the relevance of Schmitt's conception of the ancient concept of *Nomos* to what he calls "the constitution in the positive sense".

every constitution: "an act of the constitution-making power" which consists in the determination of the form and type of the political unity in its entirety through a single instance of decision (Schmitt, 2008:76). It is essential to take into account that such an act presupposes the prior existence of the political unity as the subject of the act. By employing an existentialist terminology, one may argue that the political unity as a *Dasein* (i.e. an "undetermined being" or "simple existence") decides for its *Sosein* (i.e. its particular form of existence) at the moment of giving itself a constitution. Or, the relation between this already existing subject and the constitution is like the relation between the unitary-subject and the external form it takes[110]. Hence, Schmitt argues, the "constitution is a conscious decision, which the political unity reaches *for itself* and provides *itself* through the bearer of the constitution-making power" (Schmitt, 2008:76-77). An important point to hold in mind in this regard is this: since every being can exist only in a concrete and thus somehow determined form, every political existence has its constitution in some sense, i.e. in the sense of "a constitution in the absolute sense". However, not every political unity decides for its complete form and type in a conscious action. This conscious action as an existential decision brings into existence what Schmitt calls "the constitution in the positive sense". It is this sense of the constitution, which is the true object of the constitutional theory, in opposition to both "the constitution in the absolute sense" and "the constitution in the relativized sense".

The insight that the constitution is *given to* a concrete (and already present) political unity *by itself* leads to important further insights. First, it makes clear that the constitution does not establish itself, but comes into existence (i.e., is constructed) by the virtue of a will external to it. Second, the unity of constitution derives not from itself, but from the political unity that brings forth into existence this constitution. Third, the validity of a constitution cannot be founded upon its internal characteristics, like normative correctness or systematic completeness. Rather, for Schmitt, a constitution is valid solely by the virtue of the power of the political unity that decides for it. Relevantly, if the notion of validity is to be

[110] This explains, in turn, that the political unity remains as ever-present even when its external form is subjected to a radical change or a complete alteration. For instance, Russia remains existent as the same political unity even after its complete alteration from Czarism to Communism. At this point, it will be worthwhile to note that Schmitt's distinction between the state as the unitary-subject and the constitution as its particular form is the opposite of Kelsen's identification between the state and the constitution as the legal order. From the standpoint of Kelsen's positivism, there is no such a unitary-subject, and thus Czarist-Russia and Communist Russia should be taken as two distinct states rather than the various historical forms of a single entity.

understood as designating some form of justification, this justification can have only an existential, not a normative, sense:

> Every existing political unity has its value and its "right to existence" not in the rightfulness of norms, but rather in its existence. Considered juristically, what exists as *political* power has value because it exists. Consequently, its "right to self-preservation" is the prerequisite of all further discussions; it attempts, above all, to maintain itself in its existence, "in suo esse perseverare" (Spinoza); it protects "its *existence*, its *security*, and its *constitution*", which are all existential values (Schmitt, 2008:76).

To re-capture, "the constitution in the positive sense" originates from *an existential decision* based solely on existential values by an already present political unity. Every form of normativity which is expressed in the form of legal principles, legal norms, legal concepts or even frameworks of laws are secondary in importance when they are compared to this existential decision. The latter gives the essence and substance of the constitution as a unity and constitutes the fundamental prerequisite of all subsequent norms, including constitutional laws. In this regard, Schmitt points out as a striking fact that the written constitutions of modern period are almost always preceded by *Preambles*, i.e. by the statements of the reasons and purposes. The jurists of positivist and normativist strands cannot account for *Preambles*, dismissing them as "mere statements [defying legal form]" or "merely tasteful modes of address" (Schmitt, 2008:78). Yet, in the view of Schmitt, *Preambles* are vitally important and above all the following parts of the written constitution. For, they express the fundamental decisions providing the form of all political and juridical existence; and thus they express the unity underlying otherwise a sum of disconnected individual provisions.

As one might expect, Schmitt's example for such fundamental decisions comes from the Weimar Germany. Referring to the Preamble and initial articles of the Weimar Constitution, Schmitt insists that the Weimar regime was founded upon decisions on a democratic republic, a federal-state structure for the Reich, a parliamentary-representative form of legislative authority and government, and a bourgeois *Rechtsstaat*[111] (Schmitt, 2008:77-78). He then argues that the really

[111] In the Preamble of the Weimar Constitution, there is the expression that "the German people provided itself this constitution". The Article 1 reads: "The German Reich is a republic. State authority derives from the people". The Article 2 reads: "The Reich territory consists of the areas of the German Lands"

inviolable elements in a constitution are only these fundamental decisions taken by the constitution-making power. In opposition to them, all individual constitutional laws can be amended, suspended and even violated. That is, the term "inviolability of the constitution" applies only to these decisions, not to individual provisions. For the latter are nothing more than the particular form for the execution of the former. For instance, a basic right is not susceptible to abolition in a bourgeois *Rechtsstaat* as the Weimar Republic; yet, any individual constitutional provision for this basic right is vulnerable to suspension and violation, even to abolition without eliminating the basic right itself (Schmitt, 2008:81). To understand this precisely, we must focus more closely on the nature of the constitution-making power, which is involved in taking fundamental-existential decisions for a political unity.

In Schmitt's view, a true understanding of the constitution-making power needs a critique of the identification of constitution-making with the social contract. This is an identification which has arisen out of the western mixture of democracy and liberalism, i.e. the mixture of idea of popular sovereignty and individualism. This is a contradictory mixture which has contaminated theoretical-thinking on constitutional politics since 1789 up to now. The idea of popular sovereignty has ascended as a new theory of constitution-making according to which the people as an already existing unity politically decides upon its form and type of existence as one and indivisible nation. On the other hand, the idea of social contract was a derivation from the concept of contract which plays a central role in private law. This concept of contract presupposes the existence of separate subjects who then agree on coordinating their pursuit of diverse interests in the form of a mutual or reciprocal compromise. Thus, the crucial contradiction here is: the constitution can be either a political decision affecting the one and indivisible nation or a compromise between separate individuals for cooperation of their diverse interests; there can be no mid-point between these two conceptions. What is exhibited up to now makes already clear that, for Schmitt, the constitution-making can be grasped only in the first model and the model of social contract is totally misleading. For him, any act for constitution-making necessarily presupposes the existence of the unity to which the constitution would be given. Hence, there is a tripartite constellation in the formation of any constitutional unity. First, there is the pre-constitutional stage of *pactum unionis* (i.e. a pact of unison) whereby the people as

a unity is established[112]. Second, there is the stage of constitutional act, i.e. of constitution-making, which is the constitutional stage *par excellence*[113]. Third stage is the post-constitutional one whereby individual constitutional laws are posited.

In line with this, Schmitt contends that, no matter whether one sees law as command or ratio, the constitution should, in any case, be understood as an act of decision by a constitution-making power (Schmitt, 2008:125). It is a subject of a will who constitutes the source of all law, all normativity. It is a political existence bound by nothing, not even by laws it establishes, but only by the existential principle of self-preservation. Thus, to the extent that it cannot eliminate itself, the constitution-making power cannot be exhausted, absorbed, or consumed within the order it establishes. The constitution-making power "remains alongside and above the constitution" (Schmitt, 2008:125-126). It may stay latent in normal situations following the regulated order; but, in the dramatic situations of "genuine constitutional conflicts", it comes to the scene by its full force as the active deciding power[114]. Hence, the constitution-making decision designates the *unified*

[112] At this point, one should underline that Schmitt refers to *pactum unionis* only for the sake of his argumentation against the theories of social contract. For, even as a idea that would be left out of the constitutional theory, the idea of *pactum unionis*, i.e. social contract, is based on the idea of the precedence of the individual over society, and thus incompatible with Schmitt's anti-individualist (communitarian or quasi-communitarian) vision.

[113] Schmitt argues that constitutional acts resemble to a specific form of contract in the case of the formation of federal states. For, the federal states presuppose the prior existence of more than one seperate entities prior to their existence. However, even in such cases, the contract founding a federal state is called a "status contract" which is very different from liberal-bourgeois meaning of the contract in the private law. For the latter leaves the individual parties as separate individuals, and regulates only particular relations with definable and limited content, and never involves the entirety of a person, while a status contract "founds an enduring life relationship that takes into account the person in his *existence* and incorporates the person into a total order; which exists not only in definable individual relations and which cannot be set aside through voluntary termination or renunciation" (Schmitt, 2008:118). Therefore, when considered from the angle of its aftereffects, even the constitution-making in federal states designates a process whereby *a unity confers a constitution upon itself*, more than a process whereby certain separate entities *agree upon a common constitution*.

At this point, I think, it will be proper also to note that, for Schmitt, federal states have a problematic nature due to the tension between the presupposition of a unity as a one state, on the one hand, and the presupposition of more than one constitution-making power, i.e. individual federated states, on the other hand. For him, this tension is particularly remarkable in democratic-federal states: "for a federal constitution on a democratic foundation, that is, with the constitution-making power of the people, a peculiar difficulty results from the fact that the federation presupposes a definite similarity among its members, a substantial homogeneity. The national similarity of people in different member states of the federation, when the feeling of national unity is strong enough, easily leads to contradictions with the ideas of the federal constitution in general" (Schmitt, 2008:116).

[114] For Schmitt, only those conflicts that concern the comprehensive political decisions should be called genuine constitutional conflicts: "a constitutional dispute in the actual sense does not involve each of the many constitutional law details. Such a dispute concerns only the constitution as fundamental decision" (Schmitt, 2008:81).

and *indivisible* substratum of all other powers and divisions of powers[115] (Schmitt, 2008:126).

Among modern authors, Schmitt thinks, an adequate understanding of the genuine nature of the constitution-making power is found in the views of Sieyes. After the model of the Christian image of the God as *potestas constituens* (i.e. the constitutive power of all), Sieyes's theory of popular sovereignty designated the nation[116] as the constitutive power in opposition to the constituted powers. In the theory of Sieyes, the year 1789 chronicles a decision by the French nation for a particular type and form of existence, i.e. an action whereby a nation gives itself a constitution. The fact that this action arose out as revolution, i.e. a complete destruction of the old and a complete beginning, is very natural. For, any legal or procedural regulation for such a power is irrelevant. As Sieyes puts it, for something comes to be valid, "it is sufficient that the nation wills it" (Schmitt, 2008:128). Or, in Schmitt's own formulation, the nation as the constitution-making power is *always in the state of nature*. That means it is a power of giving a form to the reality without itself taking a form, i.e. without itself being bound by the form it gives to the reality.

Schmitt then underlines three distinctive features of the people as a constitution-making power (Schmitt, 2008:131-135). First, it is not a stable and organized power. Thus, it can neither have predetermined competencies in a constitutional order, nor be made a magistrate. As a power superior to every formation and normative framework, the people can be neither eliminated, nor located in a definite space within the constitutional order. Second, the natural form of expression of this unstable and unorganized power is a declaration of an approval or disapproval in the form of *acclamation*. Despite the fact that the people's acclamation has attained complicated form in modern large states, which we label under the word "public opinion", the essence of popular acclamation is always a fundamental "yes" or "no"

[115] Hence, Agamben makes a true statement when he metaphorically argues that the sovereign power was conceived by Schmitt on the basis of the presupposition of a *pleromatic* universe, i.e. a structure in the form of an undifferentiated substance whereby power is not distributed to different elements and is thus total (Agamben, 2005:6).

[116] Schmitt differentiates the word nation from the word people as follows: "the word 'nation' is clearer and less prone to misunderstanding. It denotes, specifically, the people as a unity capable of political action, with the consciousness of its political distinctiveness and with the will to political existence, while the people not existing as a nation is somehow only something that belongs together ethnically or culturally, but it is not necessarily a bonding of men existing *politically*" (Schmitt, 2008:127).

which then constitutes the content of the constitution. Third, the constitution-making will is always an unmediated will defying any regulation or prescription. The gap between a constitution-making power (i.e. a sovereign power) and a constitutional competency is insurmountable. Some democratic constitutions provide the people with some competencies *via* popular elections or plebiscites. However, "the people" acting in accordance with such competencies is different than "the sovereign people". The latter can exist only as an unmediated, self-affirming and self-justifying power. Just as the existence of an individual is a supra-legal fact given to the order of private law and there is no need for justification of this existence by a norm within this order, the existence of a constitution-making power is a supra-legal fact which neither needs a justification nor can be justified in a normative sense within the order of public law. In other words, a particular public-law-order takes the power founding itself as a superior (even, sacral) factual entity that can not be exposed to a judgment within the established public-legal order.

As Schmitt himself emphasizes, this theory of the people's constitution-making brings about further insights and clarifications for the much confused issues in the theory of the state. Many of these insights and clarifications stem from the distinction between the constitution-making decision, on the one hand, and its execution and further formulation in the constituted order, on the other hand. The former is the sovereign power that cannot be delegated, alienated, absorbed or consumed; the latter is any power granted to a person functioning as a commissioner. Since the sovereign power remains alongside and above individual provisions of the constitution and even the constitution itself, it always has the right to revise, to reform and to change the constitution, as the Article 28 of the French constitution of 1793 degrees in regard of the people. As such, the constitution-making power is the core kernel of any state, i.e. "the constitutional minimum" (Schmitt, 2008:140). That means a state continues to exist only insofar as the constitution-making power remains unchanged, no matter if constitutional laws are eliminated or even if the constitution in the positive sense, i.e. the fundamental political decisions, is abolished.

In fact, Schmitt goes on to argue that, from a consistently democratic perspective, a change in the constitution-making power is inconceivable. For, such a perspective should attribute the staying power of any constitution to the fact that

the people approve it expressly or tacitly. Without even a tacit approval of the people, there can be no state but only a senseless power apparatus, i.e. a tyranny. Hence, a consistent democratic thinker should consider that all states, including monarchies and aristocracies, are indeed based on the sovereign power of the people[117]. In line with this, he should see a revolutionary passage from a monarchical form to a republican form, and *vice versa*, merely as a change in the governmental form (i.e. as a new *pactum subiectionis*) rather than a change in the constitution-making power[118].

The full meaning of the proposition that the constitution-making power differs from all derivative constitutional competencies is yet more complex than it seems at a first instance. This proposition makes it clear, for anyone, that the constitution-making power has a different nature than the ordinary constitutional competencies. However, it deserves particular emphasis that the constitution-making power differs also from the extraordinary forms of competencies within the constitutional framework. Schmitt classifies five basic types of extraordinary powers (Schmitt, 2008:147-148): 1) *constitutional annihilation* (the simultaneous abolition of the existing constitution and of the constitution-making power); 2) *constitutional elimination* (the abolition of the existing constitution); 3) *constitutional change* (a revision in the text of previously valid constitutional laws, which includes the elimination of certain constitutional provisions and the reception of new provisions); 4) *statutory constitutional violation* (the infringement of constitutional laws in particular cases, but only as exceptions under the presupposition that the violated laws are still to be valid in other cases); 5) *constitutional suspension* (the temporary setting aside of single or multiple constitutional provisions).

[117] Against Schmitt's argument in question, one might raise the objection that he misrepresents democratic-position as if it were an ontological one (i.e. as a position concerning the actual states). However, for most of democrats, democratic position is fundamentally a normative one (i.e. a position concerning "how the political-legal orders *ought to be*", rather than "how they *already are*").

[118] Schmitt thinks that this is the core message of Rousseau's political theory. He states that "indeed, Rousseau does not speak of a special and distinctive power of the people. However, he certainly does discuss the *lois politiques* or *lois fondamentales*, which regulate the relations of sovereign (of the people) to the government (Book II, chap.12 of the *Social Contract*). These statutes are constitutional laws, and, as such, they are relative. In other words, they are derivative and limited in principle. They rest on the sovereign will of the people, and they can establish a monarchical, aristocratic, or democratic form of government. But the people always remain sovereign. Even the most absolute monarchy would be only a governmental form and dependent on the sovereign will of the people" (Schmitt, 2008:143).

Except constitutional *annihilation and constitutional elimination*, the latter three of the foregoing extraordinary powers are specific forms of constitutional competencies, i.e. they can be, and are usually, regulated through the constitutional laws and procedures. The third form, the power to *constitutional change*, is regulated through the procedures for constitutional amendments. It is a genuine competence in the sense that it is a limited. That is, it is a power which can be enjoyed by the empowered authority only to the extent that the identity and continuity of the constitution as a unity is not risked. Thus, the authority to amend constitutional laws cannot extend to the fundamental decisions of the constitution[119]. Taking and changing such decisions are a matter only for a much superior power, i.e. a constitution-making power which is neither granted by nor bound to a constitution.

On the other hand, a *statutory constitutional violation* reflects a constitutional competency which is quite different than the power to amend constitutional laws. In this case, constitutional norms are not altered, but an individual order is established, which deviates from the normal cases as an exception. That is, an empowered authority acts through a *measure* rather than general *norms* which remain valid otherwise. The ground for the performance of such an extraordinary action is existential, not normative: the reality *necessitates* taking such actions for the sake of the interest of the political existence of the whole. Precisely because this form of extraordinary power has its basis in the existential reality, it defies a precise normative limitation: a power that acts "according to prevailing conditions and without being hindered by limitations of valid laws" (Schmitt, 2008:154). This is why Schmitt argues that "whoever authorized to take such decisions and is capable of doing so, acts in a sovereign manner" (Schmitt, 2008:154). Yet, to the extent that this power is still an authorization within the constitutional order, i.e. a competency, it should be distinguished from the pure sovereign power held by the

[119] For instance, a power to amend constitutional laws cannot include the power to transform a state based on the democratic principle to a monarchical state. At this point, it will be revealing to note a decision taken by Turkish Constitutional Court in 2008 (the decision registered as *Anayasa Mahkemesinin E: 2008/16, K: 2008/116 Sayılı Kararı (5735 Sayılı Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Değişiklik Yapılmasına Dair Kanun ile İlgili)* and published in *22 Ekim 2008 Tarihli ve 27032 Sayılı Resmî Gazete*). The court thereby annulled a constitutional amendment by the Turkish parliament on the basis of the principle of laicism which is cited as an essential and inviolable principle of Turkish State in the Preface of the Constitution of 1982. In this way, the constitutional court interpreted laicism as an existential decision taken by the constitution-making authority of Turkish people and read all the derivative powers of the legislative assembly as subordinate to this decision.

constitution-making power: this competency can only be used for the sake of the unity of the constitution in the positive sense, i.e. for the sake of the existential political decisions already taken by the constitution-making power, not against them.

At this point, I want to intervene that, for the sake of conceptual clarity, it would have been better for Schmitt not to call this extra-ordinary competency to statutory constitutional violation as sovereign power. It is true that this competency resembles to the sovereign power in that, practically, it functions in the manner of *pleromatic-totality* (i.e. a totality in which power is not distributed to different elements but held as total). Yet, this does not suffice for its being an instance of the sovereign power in the absolute existential (supra-normative) sense Schmitt has given to this concept, since the power to statutory constitutional violation (together with its more generalized case, i.e. the power to constitutional suspension) is restricted by the end of protecting the substance of the existing state order while the sovereignty is not bound by such a restriction. Indeed, Schmitt's term *commissarial dictator* seems to me much more appropriate to designate this extra-ordinary competency. According to Schmitt, a *commissarial dictator* is the one who is empowered with the unlimited power to reestablish public security and order within an already established constitution, while a *sovereign dictator* would be the one who establishes a completely new constitution[120]. Hence, the latter is located in a purely political-existential level, while the former is a judicial category. One can, in fact, see the extraordinary power to *statutory constitutional violation* (and the extraordinary power to *constitutional suspension)* as an expressive track of "the political" in the legal order. Such a track is expressive; since it brings back that the brute power of the sovereign permanently stands as the sword of Damocles over his own artifact, i.e. the legal order.

As for the power to *constitutional suspension*, Schmitt indicates that it may be seen as a more generalized case of the power to *statutory constitutional violation*, i.e. a disregard of certain constitutional norms not in an individual case, but for a certain time. During the disturbances of public safety and order in times like war and domestic upheaval, it may require that some constitutional provisions,

[120] For Schmitt's comparative elaboration of the categories of *commissarial dictatorship* and *sovereign dictatorship*, see his *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*. For his arguments on the role of the Weimar president as a *commissarial dictator*, see also his *Der Hüter der Verfassung*.

particularly those limiting the political action of state authorities[121], should be disregarded so as to give an end to this exceptional situation and return to the normal situations in which all provisions are to be applied. Again, it is necessary to emphasize that the power to *constitutional suspension* cannot suspend "the fundamental political decisions [of the constitution-making authority] but the general constitutional norms established for their execution when it is in the interest of the preservation of this political decisions" (Schmitt, 2008:156). By referring to the article 48 of the Weimar Constitution[122], Schmitt argues that this extraordinary power is indeed a power to *commissarial dictatorship*. In the view of Schmitt, this article of the Weimar explicitly brings, in the figure of the president, into existence a power presupposed in all state orders: a dictatorial power as the protector and defender of the public security and order, the timely scope and content of whose action is bound nothing other than his own discretion.

The extraordinary powers to *statutory constitutional violation* and to *constitutional suspension*, together with the pure sovereign power of constitution-making, is utmost important for a true understanding of the state as a constitutional order. For, in the so-called "states of exceptions" whereby these extraordinary powers come to the fore, it becomes evident that a constitutional state is more than "a series of state power *restrictions*", as the liberal-modern theories of the state and law conceive it[123]. For Schmitt, these extraordinary powers demonstrate that the constitutional state is also "a system of *political activity*" beyond the series of power restrictions (Schmitt, 2008:156). This reveals, in turn, that the modern constitutional states, which the liberal representatives of bourgeoisie reduce to the *Rechtsstaat*, have indeed a dualistic structure composed of two distinct elements.

[121] Here, Schmitt has in mind the Basic Rights. Hence, his argument comes to this: in the Weimar Republic, which reflects the German people's decision for a bourgeois *Rechtsstaat*, the principle of the protection of the bourgeois freedom cannot be suspended, but all basic rights which were norms established for the execution of this principle are susceptible to suspension in the cases of necessity.

[122] The second paragraph of the article 48 in Weimar Constitution reads: "If in the German Reich the public security and order are significantly disturbed or endangered, the President can utilize the necessary measures to restore public security and order, if necessary with the aid of armed force. For this purpose, he may provisionally suspend, in whole or in part, the basic rights established in Articles 114[personal freedom], 115[inviolability of living quarters], 117[privacy of the mail], 118[freedom of opinion and freedom of the press], 124[freedom of association], 153[private property]".

[123] Indeed, one may note that in both its identification of the state with the legal order and its definition of the state as the regulation of power along the lines of mutual restrictive competencies of persons, Kelsen's theory stands as a perfectly typical example of the approaches reducing the constitutional state to "a series of state power restrictions". Hence, Schmitt's foregoing arguments may be read as an outright stroke against Kelsen's theory.

As Schmitt calls them, these are the *Rechtsstaat component*, on the one hand, and the *political component* on the other hand. Now, one should take into account these both components if she is to offer a sufficient model for understanding of modern *concrete* constitutional orders and its major concepts like right, legitimacy, and authority.

III.3.2. The *Rechtsstaat* Component and the Meaning of the Basic Rights in the Modern Constitutions

III.3.2.1. The Principles of the Modern-Liberal *Rechtsstaat*

In the view of Schmitt, the bourgeois *Rechtsstaat*[124], which contemporary liberal authors equate with the constitutional state as such, arises out of a fundamental decision for bourgeois freedom. The latter comprises personal freedom, private property, contractual liberty, and freedom of commerce and profession. In an ideal *Rechtsstaat*, then, these freedoms constitute the substantial values underlying all norms, and the state has its end nothing other than the maximum protection of them for all its members. Taking the maximum protection of bourgeois freedom as the end of the state leads to two essential principles that define any *Rechtsstaat*: the basic rights and separation of powers. The first principle takes the freedom of individual as unlimited in principle and the authority of the state with respect to the possible intrusions into the sphere of individual freedom limited (Schmitt, 2008:170). The principle of separation of powers is, on the other hand, the principle of organization which serves for the attainment of the maximum level of guarantee

[124] In the original version, Schmitt uses the term *bürgerliche Rechtsstaat*. Though Jeffrey Seitzer literally translates it into English as bourgeois *Rechtsstaat*, the difference between the German word *Bürger* and the English word bourgeois should be hold in mind. For, while the both word designate a particular social class, the *Bürger* has also certain remarkably positive connotations like civility and modernity –the connotations which remain, to a great extent, lurked in the word bourgeois. Furthermore, the word *Bürger* may also stand for the word citizen in German. Indeed, Schmitt's use of the term *bürgerliche Rechtsstaat* exploits all ambiguity inherent in the German word *Bürger*. In line with this, the reader should hold in mind that when Schmitt refers to bourgeois *Rechtsstaat* in a pejorative manner, he does not suggest that certain wrongs arise out in such a state just because it is a *bourgeois* state (i.e. a state of a partial class). Rather, Schmitt sees a *bourgeois* state problematical to the extent that, in its aspiration to reach a general consent or to attain the general interests of all, such a state turns out to be impotent to realize the intended result, i.e. a social-political order in accord with bourgeois values and interests.

for individual liberty in the face of state authorities[125]. Hence, the article 16 in the French Declaration of the Rights of Man and of Citizen, the founding text for the modern Constitutionalism, reads that "any society in which the guarantee of rights is not ensured, nor a separation of powers is worked out, has no Constitution". Indeed, Schmitt argues, it is even unnecessary to state explicitly the principles of the basic rights and of the separation of power within modern constitutions; they must rather be considered as the essential part of the positive-legal content of any constitution that relies on (founded upon) a decision for the bourgeois *Rechtsstaat* (Schmitt, 2008:171).

In this vein, he formulates the general meaning attributed to the word *Rechtsstaat* in the modern era as follows: "every state that respects unconditionally valid objective law and existing subjective rights" (Schmitt, 2008:172). That is, modern *Rechtsstaat* is considered as a state in which the rights of individuals and of corporate persons are elevated above the political existence and security of the state. If one strips it off the perspective of bourgeoisie freedom, one reaches a more general meaning of *Rechtsstaat* simply as a state whose action is unconditionally bound to the existing legal norms. According to the author, the western world was indeed already familiar with such a type of political entity strictly bound to legal norms before the modern era. Citing the traditional German Reich, the Roman-German Empire, as an example of this type, he contends that the *Rechtsstaat* in this most general sense is nothing other than an expression of a state in the period of its political decline: a state where the historically earned rights (more precisely, concessions earned from the political entity) of corporate bodies such as estates and vassals hinder any effective political action on the part of the political entity. Schmitt also points out, in passing, what he regards as the paradox of the *Rechtsstaat* in the instance of the traditional German Reich: "with the destruction of the Reich's political existence, even all these well-earned rights themselves were

[125] With regard to the principle of the separation of powers as one of two tenets of the modern *Rechtsstaat*, Schmitt cites Kant. He notes that the later argued, with ardor, that the rule of law (in contrast to the rule of men or arbitrariness) can be realized completely only in a "pure republic" where the powers are separated (Schmitt, 2008:170-171). Kant fiercely defended the principle of separation of powers, because he was worried that the legislator which is to make general, universal laws should not be burdened with their execution (administration) and application (jurisdiction), both of which require involving into the particularities. Underlying this worry was, in turn, Kant's idea of law as an impartial and general rule in opposition to an arbitrary command of a particular person. Kant's idea of law is the archetype of what Schmitt calls the *Rechtsstaat* conception of law. We will examine Schmitt's arguments concerning this conception of law below.

certainly also eliminated" (Schmitt, 2008:173). For, once the political entity is made bound unconditionally to every norm, the self-preservation of the political entity in the face of the necessities of real life defying any prior normative regulation becomes impossible. Any norm requires the norm-al order that can only be sustained by the normatively unbound decisions of the political entity in the face of such necessities. This seems to raise a vitally important contention against the idea of the *inviolability* of human rights, which we will have to consider at the end of this chapter.

The modern-bourgeois form of *Rechtsstaat* acquires its specific meanings from a series of oppositions. First of all, modern-bourgeois *Rechtsstaat* "signifies opposition to the power state, the oft-discussed opposition of *liberté du citoyen* to the *gloire de l'état*" (Schmitt, 2008:173). Because of its underlying liberal perspective which is critically and negatively disposed toward political power, it is much more a system of the control of the state power than an organization of power. It, hence, reflects an aspiration to repress the dimension of the political: to absorb all state life within a normative framework and limit all state activity to predetermined competencies of state organs. This is an aspiration which Schmitt considers impossible to be fulfilled, as we have seen above. Beside its vain aspiration to repress the dimension of the political, the modern-bourgeois conception of the *Rechtsstaat* also contrasts with "the ordered, welfare, or any other type of state that does not limit itself to only upholding the legal order" (Schmitt, 2008:173). That means to say, the modern-bourgeois *Rechtsstaat* stands as a form which defies substantial-collective purpose, like common welfare or promotion of a conception of ethical life. Its only function is to be the armed guarantor of order, peace and security for the bourgeois society of individual liberties and private property[126].

[126] At this point, I want to note that Schmitt's argument that the *Rechtsstaat* defies any substantial-collective purpose is also shared by many defenders of the *Rechtsstaat*. For instance, Michael Oakeshott refers to the absence of a substantial-collective purpose as the defining feature of the *Rechtsstaat* (the 'rule of law'). Oakeshott elaborates his idea of *Rechtsstaat* in the light of an ancient concept, namely *civitas*. He suggests that *civitas* is a civic engagement of human beings solely on the ground of recognized rules. In opposition to *universitas*, it is not a managerial engagement in relation to a common purpose, which may be a moral, or a religious, or an economic or a political one. In a *civitas*, i.e. a civic order of the "rule of law", no common purpose is prescribed upon individuals; rather they are left free to choose whatever substantial purpose they will follow, only with the restriction that their actions should not contradict with the commonly recognized rules of interaction, which are called laws. See, Oakeshott's *On Human Conduct*. For an excellent

Further specification of the modern-bourgeois *Rechtsstaat* requires taking into account of its organizational principles. The basic organizational principle, the separation of powers, is already mentioned. It establishes a system of reciprocal controls and limitations for any state authority, and is conceived so as to avoid the intrusions of any particularity and arbitrariness into law *via* setting apart the legislator from the execution of laws in particular situations and in particular cases. This basic principle is supplemented with some derivative organizational principles during the modern history of the bourgeois *Rechtsstaat*: 1) the principle of legality of administration (i.e. that "any intrusion into the sphere of individual freedom may be undertaken solely on the basis of a statute"); 2) the principle of general calculability of all expressions of state power (i.e. that "entire state activity is wholly comprised in a sum of precisely defined competencies"); 3) the principle of independence of judges and the judicial supervision over governments' power; 4) the principle of the conformity of the entire state life to *general* judicial forms (Schmitt, 2008:173-176).

Schmitt puts a special emphasis on the last principle in that it directly reflects modern-liberal conception of law. This modern-liberal conception, which assumes an Archimedean point in the *Rechtsstaat*, takes law as *statute*, i.e. *general norm* posited by the competent legislator *in advance* of the particular cases to which it will be relevant. I should now examine Schmitt's arguments concerning this conception of law as statute.

III.3.2.2. The *Rechtsstaat* Conception of Law

If the word *Rechtsstaat* is to have any distinguishing sense, the "rule of law" must be distinguishable from the "rule of men". This latter distinction is possible only if one can incorporate certain properties in the concept of law. From the time of the philosophy of Plato to the 18th century rationalism, all advocates of the "rule of law" incorporated properties such as reasonableness, rectitude, rationality and justice into the concept of law. As early as Aristotle, it was explicitly stated that law is neither the will of one nor the will of many, but *ratio*, i.e. reason. By virtue of its moral and logical qualities, law has been distinguished from a simple command of

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presentation of Oakeshott's views on civil condition and the rule of law, see Terry Nardin, 2001: 183-224.

the powerful, and justified on the basis of this distinction[127]. Though Schmitt cites many authors, like the *Monarchomachs*[128], Montesquieu, Locke, Kant, and Hegel, as modern representatives of this mode of thought, he seems to find its most clear self-expression in Bolingbroke[129] who argued as follows:

> The true state is established like the cosmos. Led by an all-wise being and governed by another that is all-powerful, the order of the cosmos rests on the linkage of wisdom and power, which means legislative and executive. The former issues laws, which should be valid without exception. It is the *wisdom* of the state, and prescribes rules for the *power* of the executive. Neither god nor king can violate a law (Schmitt, 2008:182).

According to such a perspective which evidently has a deistic orientation, to the extent that law is defined in its opposition to command or degree, a legitimate order is defined in opposition to a "despotic" order where a power "can issue discrete individual commands without being bound by general, stable, and enduring laws" (Schmitt, 2008:182). Thus, the subordination of all power to general and "inviolable" norms stands as the Archimedean point in the thought of liberal advocates of the modern-*Rechtsstaat*.

However, after 18th century, this orthodox strand of modern-liberal *Rechtsstaat* tradition has faced a crisis due to the fact that any reference to objective standards like reasonableness or justice has become controversial under the pluralist-relativist conditions of modernity. For Schmitt, there remain two alternatives in such conditions: either to hold to the principle of the *generality* of law as the last

[127] Of course, there has been, in western thought, also the opposing strand of thought which began with the Sophists and resurrected in the nominalism of protestant sects and then continued in modernity by the authors of legal-positivist and legal-realist schools. The underlying tenet of this tradition may be cited as the following proposition: it is not the rightness (i.e. the reason), but the might that makes law, i.e. law is nothing other than a command or a will. Evidently, Schmitt is the heir of this anti-rationalist tradition which goes back to the Sophists. Likewise, Schmitt's many assertions concerning the relation between laws and might have already pointed out, in Plato's *Republic*. There, Thrasymachus, the sophist adversary of Socrates, expressly articulated arguments, in an embryonic fashion, that are asserted today by modern positivists and, particularly, by modern realists like Schmitt. This connection between the Sophists and legal-realism supports my suggestion that a specific, i.e. a sophistic, conception of *nomos* constitutes the basis of Schmitt's theory of law as a concrete order.

[128] The *Monarchomachs* were the late 16th century French theorists who are known by their opposition to the absolute monarchy and by their justification of tyrannicide. A rationalist-universalist vision of law stands as the basis of their political opposition. They have thus been considered as the precursors of social-contact theories.

[129] Bolingbroke was an English philosopher and statesman of the early 18th century, who has been considered to have significant impacts on Voltaire, and on American thinkers like John Adams, Thomas Jefferson and James Madison.

guarantee of the *Rechtsstaat* or to shift into an "helpless positivism" which misconstrues law as everything that is "issued by the offices authorized for legislation and in the prescribed procedure for legislation" (Schmitt, 2008:184). The latter alternative suggests, thus, "an absolutely 'neutral', value- and quality free, formal-functional concept of legality without content" (Schmitt, 2007:23). In this way, law loses its distinguishing character which made, in earlier periods, possible to separate it from commands or decrees. Relevantly, any reference to the requirement that law should be a general and lasting regulation with a definable and certain content vanishes[130]. It is sufficient that the authority attained for legislation passes a regulation as law. In this vein, Laband, the famous legal-positivist thinker of the 19th century, asserted that "there is not an object of the entire state life, indeed, one can say, not even an idea that cannot be made into the contents of a statute" (Schmitt, 2008:186-187). Thus, the legislative power was considered to have a magic wand that transforms any thing it touches into law. Schmitt contents that this mode of thought turns the idea of *Rechtsstaat* into an empty slogan. For, this idea is dependent on a conception of law to which the principle of equality before law is essential. Yet, if one sees anything that passes through legislation as law without any regard to the requirement of generality, the very principle of equality before law is defied: there can be no equality before an individual measure or command, since it is necessarily determined by the individual circumstance of the single case (Schmitt, 2007:194). Thus, the kind of positivism that Laband defends is far from being compatible with the idea of *Rechtsstaat*; rather, it implicates an absolutism of legislative offices.

In line with this, Schmitt maintains, the principle of the generality of law is the Archimedean point of the *Rechtsstaat*. Both the basic rights as norms preceding the state power and the principle of the separation of powers are meaningful only on the basis of the conception of law as a general norm. In this vein, Schmitt argues as follows:

> Any other properties of the statute as a substantive-rational, just, and reasonable order have become relative today and

[130] At this point, the contrast between the rationalist view of law and the functionalist view of law becomes most outright. For, as Schmitt argues, during the times when the bourgeois belief in the objective values of reason and justice was strong (i.e. during the times when the rationalist view had been dominant), the statute, the archetype of bourgeois law, had been considered to have definable and certain content, i.e. it has been considered as a norm containing a substantive legal principle like justice, freedom, equality or whatever (Schmitt, 2007:22).

> rendered problematical. The natural law belief in the law of reason and reason in the law has been displaced to a great extent. What protects the bourgeois Rechtsstaat against complete dissolution in the absolutism of shifting parliamentary majorities is only the factually still present residue of respect for this general character of the statute (Schmitt, 2008:195-196).

The paragraph I just quoted discloses that Schmitt gives some credential to the principle of *generality* of law in the face of a radically positivist conception of law. Yet, it would be a misconstruction to think that he thereby approves the account of law offered by the liberal-advocates of the idea of *Rechtsstaat*. The latter account is distorted in regard of the actual reality of law even in the state-orders called *Rechtsstaat*. For, it overlooks the political dimension of law as an act of sovereignty. In fact, Schmitt insists, any law results from the political form of existence of a particular state and thus reflects the concrete manner of the formation of the organization of the political rule (Schmitt, 2008:187). If one overlooks this, she would not grasp the fact that the *Rechtsstaat* law in the 19th century, for instance, does designate not only a promotion of certain abstract principles, but also a promotion of certain anti-monarchical institutions in the name of a relatively more popular rule. That is why the actual law had to have a dual characteristic in modern-*Rechtsstaat*: law as a *general norm*, and law as the will of the people. We will consider more about the political dimension inherent in law in a later section where we will examine Schmitt's political conception of the constitution. For the moment, it is sufficient only to underline that this dual character demonstrates that it is a "murky fiction" to separate "the legal" from "the political". I should now focus on Schmitt's arguments concerning the "genuine" meaning and scope of the basic rights.

III.3.2.3.Schmitt's Realist Assessment of the Basic Rights

In the beginning of his discussion on the basic rights as an essential component of modern-*Rechtsstaat*, Schmitt points out to a common mistake: that many authors find in the *Magna Carta* of 1215, the Habeas Corpus Act of 1679, and the Bill of Rights of 1688 the origin and the first declarations of the basic rights. Though the contents of legal regulations which these charts bring about are similar to the basic

rights, Schmitt thinks, they should not be confused with the basic rights. For, these charts are no more than contractual and statutory regulations of the freedoms and privileges of aristocrats or majority of citizens in an already established constitutional order. That is, they represent mutual concessions between state authority, on the one part, and aristocrats or citizens, on the other part. They have arisen out as a result of the historical configuration of power relations within a state and brought about a change only in the operation of state-authority, not in the understanding of its nature and its end. On the other hand, the American Declaration of 1776 and the French Declaration of 1789 represent the true beginning of the history of the basic rights and modern-*Rechtsstaat*. For, these declarations posit individual freedoms, articulated as the basic rights, as the end of the state-authority and construct the constitutional form of a particular state on the basis of these freedoms. That is, these are the declarations of an existential-fundamental decision taken for the sake of the supremacy of individual freedoms in a particular state. In this vein, Schmitt sees in these declarations "the proclamation of a new state ethos" or the expression of "the constitutive total purpose": "the establishment of principles on which the political unity rests and whose validity is recognized as the most important presupposition of the fact that this unity always produces and forms itself anew" (Schmitt, 2008:200).

As for the substantial content of the basic rights, Schmitt again points out the aforementioned declarations which cited freedom, private-property, security, right to resistance, and freedom of conscience as the basic rights. He then underlines that all these rights presuppose the existence of a sphere of private individual beyond the sphere of state authority. Only when such spheres of liberty for private individuals are recognized, the basic rights acquire some sense. Otherwise, they are inconceivable, as was the case in the ancient and medieval political communities where the idea of liberty sphere for private individual was absent. In line with this idea that the basic rights have their ground not in the sphere of state authority but in the private sphere, they are not conceived as something conferred upon individuals by the state, but something the state is obliged to recognize. They are prior and superior to the state; the latter recognizes them as given and protects them on this basis. Indeed, precisely because the state, i.e. the modern-*Rechtsstaat*, recognizes and protects these rights as given, its existence is seen as justified (Schmitt, 2008:202). This means that, in the structure of the modern-*Rechtsstaat*, the basic

rights are something much more than constitutionally secured norms. For, they owe their status not to any statute or a standard of statutes or within the statutes, but to a principle on which all state-law is constructed: the principle of freedom[131]. This principle indicates that the liberty sphere of private individual is essential while any intrusion to it by the state is in principle limited, definable and subject to review. Thus, the states can intrude upon these rights in some cases. Yet, such intrusions should be "only to a degree that is in principle definable and then only through a regulated procedure" (Schmitt, 2008:202). Moreover, these rights cannot be subjected to elimination and no law may be interpreted or applied in contradiction to them in a modern-*Rechtsstaat*, which remains consistent to its idea.

To sum up in simple terms, the basic rights, in a modern-bourgeois *Rechtsstaat*, are *absolute* rights since neither their guarantee nor their content result from the statutes. Rather, their principle is that there is nothing more important than freedom. Therefore, a basic right is not simply a legal entitlement that can enter into a balancing of interests with other entitlements. It is inviolable in the face of all legal entitlements. The basic rights are thus the fundamental distributional principle of the modern-*Rechtsstaat*; and any state limitation to individual freedom appears as an *exception* in such a state (Schmitt, 2008:204).

A second point Schmitt particularly emphasizes in regard of the basic rights is that they are "essentially rights of the free individual person" (Schmitt, 2008:203). More strictly, they are based on the proposition of *the man versus the state*. Almost all of the classical rights counted under the basic rights are the rights of man as an isolated individual: freedom of conscience, personal liberty, private property, and inviolability of living quarters. Though some of the basic rights, such as freedom of speech, freedom of the press, freedom of religion, freedom of assembly and freedom of association, are the rights of the individual in connection with other individuals, they "must be considered genuine basic rights as long as the individual does not leave the nonpolitical condition of mere social relations" (Schmitt, 2008:203). In line with this, Schmitt suggests that the basic rights as individualistic liberty rights should be differentiated from three other basic categories of rights, namely political rights, social rights and rights of communities.

[131] That the basic rights cannot be reduced to constitutionally secured norms is particularly evident in the case of the right to resistance. For, as Schmitt notes, this right which is an essential component of any consistent conception of basic rights cannot be subjected to legal regulation within a constitutional system (See, Schmitt, 2008:202-203).

Firstly, political rights which, as Schmitt notices, take the form of democratic rights of state citizenship in the modern-*Rechtsstaat*, are quite different from the basic rights, primarily because they are based on the concept of the citizen living in and bound to a particular state, not on that of individual free person in the extra-state condition of freedom. All political rights as such designate a particular *status* determined inside a particular legal order. Thus, political rights, in opposition to genuine basic rights, are not principally unlimited liberties of all, but definite and therefore limited entitlements of some[132]. Among such political rights in a modern-*Rechtsstaat*, Schmitt counts, "equality before law", "the right to petition", "the equal electoral and voting right", and "equal access to all public offices" (Schmitt, 2008:207).

Second, social rights which Schmitt calls "socialistic rights of the individual" are very different from the basic rights at several points. Such rights as exampled with "right to work", "right to social welfare and support", and "right to a guardian, training and instruction" are indeed entitlements of individuals to the positive services of the state. In opposition to principally unlimited liberties, any social right presupposes a duty in the form of a positive action on the part of the duty-holder who is responsible to the holder of the social right. Like political rights, they can have a meaning only within a particular constitutional context. That is, they can be, at best, constitutional guarantees, not supra-legal principles. In fact, one may even argue that, in the view of Schmitt, there is a contradiction between genuine basic rights and social rights in that while the former essentially bring about restrictions for the operation of the state authority, the latter lead to enlargement of the scope of the state authority in line with social demands.

Third, the rights of communities, which may be called as communitarian rights, are evidently dissimilar to the basic rights in that they negate the individualistic proposition of the basic rights. Moreover, communitarian rights are also in tension with the idea of modern-*Rechtsstaat*. For, the modern state is a total *status*, for which only the existence of individuals, not of any institution, can be taken as given. It rather renders relative all other institutions within itself. Principally, the modern state "cannot recognize a status internal to its own that is inalterably prior

[132] Even if political right is granted to all citizens in a particular country, it is still the right of some, since the non-citizens or non-inhabitants are excluded from the category of those who are the subjects of this right. This means that, from the standpoint of Schmitt, a conception of human rights which incorporates political rights is a contradiction in terms.

and superior to it, and that, therefore, has a public law character with its rights equal to the state" (Schmitt, 2008:211). In line with this, when a church, for instance the Roman-Catholic Church, was recognized as having rights prior and above a particular state, this designated a mutual contract between the state and the church and the latter acquired a status not within the public law of the state but within the context of international law (Schmitt, 2008:212). For Schmitt, this was an awkward situation which was at odds with the sovereignty of the modern state. Thus, when one speaks of a right of family or religion within the context of a consistent modern-*Rechtsstaat*, this means not that these institutions have rights, but rather that they are protected constitutionally for the sake of individual members. Relevantly, much referred minority rights are nothing to do with the basic rights if they are to be understood as rights of a collectivity. For, either they are extensions of the basic rights in the form of guarantees of the freedom and equality of the individual members of a minority, or they are the recognition of a status to a particular collectivity within the context of international law, not that of a particular public law (Schmitt, 2008:212).

At the end of his discussion of the basic rights, Schmitt comments on their significance in the legal practice of the modern-*Rechtsstaat*. We have already mentioned that the fact that the basic rights are absolute does not mean that certain intrusions and limitations are completely excluded. In the face of the necessities arisen out of the real life, the state authorities are sometimes obliged to carry such intrusions and limitations. They thus decide and act upon "exceptions". However, these exceptions should come about only on the basis of statutes, whereby the term statute is understood as law in the *Rechtsstaat* sense having certain substantive properties, most of all the property of being a *general* norm. As we know, that the state authority should act on the basis of general norms is indeed the principle called the "legality of administration"; and, Schmitt notes, some thus argued that the meaning of the principle of the basic rights can be reduced to the principle of the legality of administration (Schmitt, 2008:216). However, he maintains, this reduction is improper at least at two major points. First, a reservation to a basic right may be brought about, in a *Rechtsstaat*, not by a simple act of the legislative body, but only when this act leads to a law having the properties of law in the sense of *Rechtsstaat*. Second, and much more important, the protection of individual freedom ensured by the basic rights does not exhaust itself in the requirement for a

"statutory-basis". Rather, the basic rights as the essential component of the bourgeois-*Rechtsstaat* may, indeed, be modified but not completely eliminated even by the constitutional legislation. A complete elimination of personal freedom or the basic rights means the elimination of the constitution of the modern-*Rechtsstaat*, since they are not simply constitutional laws but the constitution in the sense of fundamental-existential decisions. And, Schmitt argues, the elimination of the constitution cannot be the purpose of a constitutional revision. Therefore, the basic rights present a guarantee for individual liberty beyond the mere principle of the legality of administration and this guarantee binds the legislature as well as the administration and judiciary in a modern-*Rechtsstaat*.

Schmitt's foregoing arguments for the absolute status of the basic rights in a modern-*Rechtsstaat* implicates, in turn, a revision or correction in the conception of the *Rechtsstaat*. They provide the insight that the modern-*Rechtsstaat* designates something more than the restriction of the operation of the state power to existing general norms[133]. Rather, the modern-*Rechtsstaat* is a political *form* which is founded upon a fundamental decision for individual liberty and the basic rights. The basic rights are the defining substance of this political form; they are the substantial end to which the political power serves. Thus, everything else, including the principle of legality (i.e. the principle of operation of state power through general norms), has a role which is subservient to this substantial end. Being more than a system of the restriction of power, hence, the modern-*Rechtsstaat* designates essentially *a structure of power*, in which the legality is respected only so far as it is beneficial for the end of the basic rights.

In this way, we have completed our review of Schmitt's account of the role of the basic rights in the *Rechtsstaat*. Thereby we are faced with a very interesting result: though Schmitt's account is objectionable in its restriction of the basic rights to negative-liberty-rights at the price of excluding social and even political rights, he achieves what liberal thinkers of legal-positivist strand could not. That is, he achieves to demonstrate that the basic rights are inviolable within the confines of the modern-*Rechtsstaat*. He can do this because he takes the basic rights not as norms of a higher status within the framework of the constitution, but conceives

[133] As we saw above, this was the conventional-positivist meaning attributed to the concept of the *Rechtsstaat*. See, pp.135–136 above. One should also recall that Kelsen understood the concept precisely in this vein. See, pp.64–65.

them as instancing a fundamental-existential decision taken by the constitution-making authority on behalf of the individual liberty. He can thus argue that the elimination of the basic rights is indeed the elimination of the constitution in a *Rechtsstaat*, which, in turn, means a revolution, i.e. a factual situation designating the dissolution of an existing order as a whole. That is to say, for Schmitt, you cannot negate the basic rights in a modern-*Rechtsstaat* without dissolving the constitutional order as a whole. Given the incapability of 20th century thinkers of liberal-positivist strand in grounding the inviolability of the basic rights, this seems to be a striking gift, by the strongest opponent of liberalism in the 20th century, to the proponents of the liberal idea of the basic rights.

As far as his *Constitutional Theory* is concerned, Schmitt's argument is far from raising a rejection against the modern-*Rechtsstaat* and its basic rights. When his arguments have a critical tone, their target is *Rechtsstaat-theories* rather than the *Rechtsstaat* itself. He underlines that beside the *Rechtsstaat*-component, modern constitutions necessarily have a *political* component, which should be accounted for by any theory of law and state. I should also emphasize that Schmitt's embracing of the *Rechtsstaat* and the basic rights in a modified form does not stand as an exception to the general framework of his thought, as it is presented in his other works we examined above. In those works, Schmitt was critical of classical-rationalist theories at two essential points, so far as the ideas of *Rechtsstaat* and the basic rights are concerned. First, these theories were based on a deistic vision which proposed that a political (i.e. transcendental) intervention into the established order of law is neither necessary nor desirable. Second, relevantly, the scope of these rights cannot achieve a full generality, i.e. universality, extending beyond a particular state recognizing them as supreme principles, precisely because of the irrepressibility of the political, i.e. the friend-enemy distinction. Schmitt is still insistent on these "deficiencies" of classical-rationalist theories; and he tries to give a sense to the ideas of *Rechtsstaat* and the basic rights on a theoretical terrain which can avoid these deficiencies. We will be in a position to discuss the viability of Schmitt's alternative in a more satisfactory way, after revising what he calls the *political* component of the modern constitutions.

III.3.3. The *Political* Component of the Constitution and the Question of Legitimacy

Above we have seen the idea of *Rechtsstaat* lays primarily in two essential principles: the basic rights and separation of powers. Both of these designate "a series of limitations and controls on the state, a system of guarantees of bourgeois freedom that makes state power relative" (Schmitt, 2008:235). Yet, these very limitations and controls presuppose the existence of a state, more precisely a state form, at the first hand. That is, a state form should stand prior and alongside the *Rechtsstaat* component. One may further explain this distinction in the following terms: while the *Rechtsstaat* concerns the content of the fundamental-existential decision taken by the constitution-making power, there is also the prior question concerning the nature of the constitution-making power, which is precisely the question of the form of the state. Hence, Schmitt argues, "the constitution-making power in particular remains always external to this *Rechtsstaat* component, and the problem of the constitution-making power cannot be resolved either theoretically or practically with the principles and concepts of mere *Rechtsstaat* legality" (Schmitt, 2008:238).

The constitution-making power is the founder and bearer of the particular type of formation of the people as a unity, i.e. as a state. Two opposing principles are at issue in determining the nature of this power: the principle of identity and that of representation. The first principle indicates a condition in which "a political unity is a genuinely present entity in its unmediated self-*identity*" (Schmitt, 2008:239). Such an unmediated presence may be the case to the extent that the people "can be factually and directly capable of political action by virtue of a strong and conscious similarity, as a result of firm natural boundaries, or due to some other reason" (Schmitt, 2008:239). This presence of the people as already a unity makes redundant any other entity that would provide a unity to the people through re-presentation or mediation. On the other hand, the principle of representation arises out of the idea that "the political unity of the people as such can never be present in actual identity and, consequently, must always be *represented* by men personally" (Schmitt, 2008:239). This principle finds a clear expression in the famous statement by Louis XIV of France: "L'Etat c'est moi", meaning that he alone represents the unity of the French people.

With regard to these principles, it is essential to hold in mind that they are always mixed in the reality; a state-form cannot be exclusively based on one of them but comprises a mixture of them. One may speak of a pendulum through which all conceivable state-forms shift: to the extent that they aspire towards a pure condition of identity, they come close to a democratic form; and, to the extent that they aspire towards a pure condition of representation, they come close to an autocratic/monarchic form. To understand any political entity, one should always have in mind that "there is no state without representation" and "no representation without images of identity is possible" (Schmitt, 2008:240). Thus, even in a direct democracy which would be more than being merely imaginative, there will be a place for representation: there the adult man as Rousseauan citizen, not man in his natural condition as an individual person will be the bearer of the constitution-making power. Likewise, even in the most absolute monarchy, which would be more than a mere tyranny, the ruler will have to preserve a bond of identity with his people. On both two edges of the pendulum between the principle of identity and the principle of representation, the political entity dissolves. In the extreme case of the pure identity, the form of life of the people would regress into a sub-political, vegetative form of existence; while, in the extreme case of the pure representation (i.e. representation without any image of identity), the political unity will disintegrate into a meaningless yoke of the ruler over the completely alienated ruled[134].

The meaning that Schmitt gives to the concept of representation deserves particular emphasis[135]. This is because the principle of representation designates the principle of authority, i.e. the transcendent power which founds and maintains a

[134] At this point, I want to point out a crucial gap within Schmitt's theory. He rightly underlines the need for the assumption of an identity with the political rulership on the part of the subjects. However, he never considers upon the conditions of the possibility of such an identity, i.e. on the question in what cases the subjects can assume an identity between themselves and the political rulership. This is an essentially important question, since the answer to it is essential for the demarcation of the nature of the political-legal rule from a mere tyranny, even in Schmitt's own account. As we will see in the next chapter, Höffe takes this question as fundamental to the theory of law and the state. More generally, I can argue that the rationalist theories of law and the state have been founded upon an answer to this vital question, upon which Schmitt's realist account remains silent.

[135] Schmitt elaborates the concept of representation in a particular book, namely *The Roman Catholicism and Political Form*. There, he argues that, in the European world, the Roman-Catholic church has been the transcendent-representative power of social unity for ages. It attained this on the basis of the idea of the God which is invisible but is made visible by the church. He then implicates that, in modern age, the state should take this function of a transcendent-representative power of unity on the basis of a new idea. Otherwise, the European peoples would fall into the apolitical condition of full immanence, which is suggested by the anarchist thinkers.

unity of the people. The representative of the unity is the constitution-making power as such, i.e. the sovereign in the true sense of the term. The representative should thus not be misconceived as the derivative or secondary of something else. For, what is represented, i.e. the unity of people, is not a person or even something having existence of its own beyond the representative. Rather, the represented is something invisible which is made visible only by the virtue of the representative. Therefore, representation is a relation that should be strictly distinguished from the categories of private-law, like assignment, interest advocacy, business leadership, commission and trusteeship. In all these forms of relations, there are two separate persons distinguished from each other. In all of them, the acting person acts as a subordinate commissioner of another person. It is this "another person" (i.e. the represented person) and her interests that is essential, though she is the inactive party in the relation. In the case of representation, however, the representative is not like an employee, a commissioner, a servant or any other kind of agent who is subjected to *normative* processes or procedures. Rather, the representative is an *independent, public* figure who establishes and maintains the concrete unity of the state. Therefore, the representative is an *existential*, non-normative, personal will, who rules by the simple fact that it is the exclusive representative of the unity of the state. This fact of representation is also the sole standard for distinguishing a ruler from a violent oppressor, i.e. a tyrant: a state authority cannot be distinguished from the power of a pirate "from the perspective of the ideas of justice, social usefulness, and other normative elements, for all these normative concepts can apply even to thieves. The difference lies in the fact that every genuine government *represents* the political unity of a people, not the people in its natural presence" (Schmitt, 2008:245).

Acknowledging that representation is essential to *any* political form has very important consequences in conceiving the state and law. It points out the fact that the unity of a state and the substantial content of this state are established by the virtue of the existence of a transcendent authority, which is called the sovereign. In so far this transcendent authority is the necessary presupposition of any state form or any order, the latter cannot be reduced fully into a system of *immanence* in which the rule of individuals over individuals is replaced by the self-regulation of

human societies without a need for a transcendental power[136]. Relevantly, the fact of representation points out that no constitutional-legal order can be conceived as a completely closed system which operates automatically through norms. Rather, the fact of the representation suggests, the order is founded by the substantial decision of the sovereign. Furthermore, this transcendent figure continues to stand alongside the system of normative regulations so as to supervise the normal order and to intervene in any case of "short-circuit" (i.e. the cases which Schmitt calls exceptional situations) within the normative system, i.e. in any case which he thinks the substantial order is risked. Indeed, the ever-presence of the sovereign makes the normal functioning of the order itself something more than the self-regulation of society through norms. It provides the normal functioning with the character of a concrete order operating through the distinctions of high and low, superior and anterior. For the functioning of this concrete order, decisions of competent authorities, i.e. personal discretions, are as important as norms.

The liberal view which reduced the constitutional order to its *Rechtsttaat* component has negated this transcendent moment of sovereignty; it thus failed to account for the recurrent instances whereby the sovereign as a transcendent authority introduces itself into the affairs of the state and law. The liberal view conceives such an occurrence as a deviance and a mere factuality without any legal significance. And, the price of this liberal mis-understanding is too high: it makes impossible to account for a real significance of the concept of legitimacy. For, once one overlooks the role of the sovereign as the representative of the substantial order of the state and the bearer and protector of the fundamental-existential decisions of this order, there is no court of appeal except established legal procedures and regulations, i.e. except mere legality. But, the question of legitimacy is at issue precisely at the moment whereby a result which is incompatible with the fundamental-existential decisions of political unity, i.e. with the substantial-form of the state, arises out of the established legal procedures and regulations. This is precisely the point where liberal view of the *Rechtsstaat* falls into silence. For instance, if a parliamentary majority of a modern *Rechtsstaat* passes –in a way completely abiding with pre-established procedures– a law which is incompatible with basic liberties, the liberal standpoint on law which is blind to the role of the

[136] It may be noted that Schmitt opposes once again the reflections of the deistic mode of thinking into the theory of law and the state in his foregoing arguments.

sovereign as the representative of the substantial order of the state should endure the legal validity of the passed law, because it has lost the standpoint of legitimacy as a further court of appeal beyond that of legality.

Schmitt elaborates his conception of legitimacy in his *Legality and Legitimacy*. He does this in the form of a critique of the positivist understanding of the *Rechtsstaat*, more precisely of its actual instance, the Weimar Republic, as merely a parliamentary legislative state. Embracing a fundamentally relativist worldview, the legal-positivism conceives the whole Weimar order of law as a completely value-neutral procedure in which "one can open legal channels and legal process to all conceivable aspirations, goals and movements" (Schmitt, 2007:10). For such an understanding, therefore, legitimacy has no meaning other than legality in the sense of abiding to the established procedures. Legal-positivism as such suggests that to the extent that you have risen to a position of significant majority in the parliament and act there in accordance with the established procedures, there is nothing you cannot change in the order of law of the Weimar state. You can even transform the Weimar into a monarchy or a socialist state while still remaining within the boundaries of legality.

Schmitt maintains that such a relativization of the constitution and functionalization of the concept of law is unacceptable. As every state, the Weimar depends upon a particular ethos. In so far as it is a *Rechtsstaat*, this ethos lies in the principle of individual freedom and the liberty rights that rise out of this principle. This principle and rights, thus, define the basic end, to the maintenance of which the state and all laws should serve (Schmitt, 2007:57). He cites the second principal part of the Weimar constitution as explicitly expressing "a value assertation" for the sake of personal liberty as the substantial principle of the unity of the Weimar constitution (Schmitt, 2007:46). This stands in an irreconcilable opposition to the alleged "value neutrality" and the functionalist view of law proposed by the legal-positivist. In this way, the principle of liberty and liberty rights designate the standard of legitimacy in the Weimar as a *Rechtsstaat*; and thus no elimination of them can be brought about through legal procedures and norms. In other words, if the basic rights have been decided to be the fundamental principle of the construction of a complete state form –as it was the case in Weimar– they have thus been made "always superior" to any legal procedure and regulation, "so long as another system is not being established" (Schmitt, 2007:85).

In line with this, Schmitt maintains that legality has, in a *Rechtsstaat*, a place which is subordinate to its principle of legitimacy. That is, a *Rechtsstaat* aspires for exercising as much power as possible on the basis of pre-established procedures, regulations and norms only because that such an exercise of power is considered advantageous to personal freedom. Thus, the principle of personal freedom, i.e. the basic rights, conditions the very principle of legality. When the established procedures and norms culminate in a consequence which is inimical to this principle of legitimacy, they are subjected to the intrusion by the supra-legal authority of the sovereign as the representative of the substantial unity of the political form. Here, it becomes clear that the question of legitimacy is indissolubly connected to the question of the political component of the constitution and thus that of sovereignty. In other words, it becomes clear that the order of law is not a closed system in which higher and lower norms interpret, apply, protect and guard themselves in accord with a hierarchical normative order; rather, any such order is essentially a hierarchy of concrete persons, at the peak of which stand a sovereign who is "the source of legality and the ultimate foundation of legitimacy" (Schmitt, 2007:5). Without a sovereign guarding for the substantial content of the unity, the constitution would disintegrate into a meaningless aggregate of procedures and regulations with which individual parties seem to be in accord only so as to win over other parties. In such a situation of cynical obedience to "formalities", there remain, of course, neither the basic rights nor any other substantive principle which can be taken as the collective values/ends of the political community. Hence, in the view of Schmitt, the loss of the insight into the substantial decisions of the sovereign and thus into the criteria of legitimacy runs the risk of paralyzing the unity that is called political society[137]. In line with this, the basic message that

[137] In regard of the actual situation in the Weimar Republic, Schmitt warns that the constitutional order is faced with such a risk. For, in the Weimar, the relativized conception of the constitution and the functionalized view of law had not only been prevalent in theory, but also had come to determine the constitutional practice completely. Thus, the following conviction had been dominant: if a political party or a coalition of parties acquires parliamentary majority *via* elections, it has right to make any legislation or legislative revision in the constitution so far as it follows the procedural rules for legislation and legislative-revision. Logically, this means it can even transform the parliamentary system to another one as well as it can eliminate basic rights, because the idea that there are fundamental-existential decisions which cannot be negated within the constitutional unity is absent in such a perspective. In the view of Schmitt, this turns the constitution into a terrain of tactics and strategy in which political parties as *enemies* fight for power without any responsibility for the whole. Thus, the parliament which was, at the beginning, thought to be the representative of the unity of the people turns out to be a showplace of a plurality of social groups, from which only a temporal compromise of heterogonous groups can rise at most (For Schmitt's more speculative-

Schmitt's constitutional theory as a whole suggests may be stated as follows: any constitutional order, even a *Rechtsstaat* of the basic rights should, at first, be considered as a *form* with the right of guarding itself against its own paralysis or dissolution.

III.4. Concluding Remarks: Considering the Virtues and Vices of Schmitt's Realism

We have now completed our examination of Schmittian theory of law and the state. We are now in a position to assess that Schmitt presents a *realistic* account of state in which public-law can never be divorced from the political relations of power. Any system of law is founded upon and sustained through the existence of the political power. More precisely, Schmitt insists, any state is founded upon a tripartite structure: 1) the establishment of a political entity; 2) the establishment of the constitution; and 3) the establishment of the constitutional laws. The first phase is the moment whereby a group of human beings acquires a collective identity through a demarcation from others: a "we" rises in opposition to "them". This moment is purely existential and defies any normativity in that there is no rational or universal basis for the justification of demarcation of a "we" in any particular, but not in another manner. The only thing one can say is this: the earthly conditions of human beings force upon them the necessity of demarking a "we" from "them"

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theoretical critique of liberal-positivist parliamentarism, see *The Crisis of Parliamentary Democracy*). As a result of the corruption of parliament, the system transforms from a liberal-*Rechtsstaat* into a pluralistic-*Parteienstaat* (i.e. a state of parties). In the latter "form", there is no sovereign and also no security, but only a tactical combat of a plurality of groups. Indeed, in the view of Schmitt, a pluralistic-*Parteienstaat* is a "form" only with a quotation mark, because the idea that such a plurality can balance and limit itself is no more than a deistic illusion. For, as Hobbes argued long ago, it is only a sovereign who can bring about security through his direct power –i.e. a power that does not disguise its political character and thus can only sustain obedience only to the extent that it provides its subjects with protection – (Schmitt, 1996b: 71-72). So far as the corrupted parliament cannot act as the sovereign representative of the substantial unity of the people, Schmitt proposes, the *Rechtsstaat*-order in Germany can be rescued if an extraordinary will is recognized as the sovereign representative and thus the guardian of the essentials of the constitution. Certainly, this extraordinary will play, in the reconstruction and maintenance of the legal-political order of Germany, the same role that the God plays in the construction and maintenance of the world in the theistic accounts. As he elaborates in the fifth chapter of his *Legality and Legitimacy* and his *Der Hüter der Verfassung*, not a collective organ like the constitutional court but the president of the *Reich*, who has a *personal* will, seems to be best alternative for this position. Furthermore, Schmitt asserts, there is found a basis for such recognition in the written constitution of the Weimar, given its article 48 that grants extraordinary powers to the president in the exceptional situations. In the view of Schmitt, the foregoing article does, indeed, implicitly recognize the role of the president as the true representative of the unity, since he is authorized to *suspend* (not eliminate) even the essentials of the *Rechtsstaat*, so as to protect them.

in any way, so as to achieve a condition of relative security. The second phase is the one whereby the *nature* of the form of the political collectivity is determined. As we have elaborated above, the word "the nature of the form" designates here the fundamental values (or, the supreme criteria of legitimacy) and thus the substantial content of the unity called a political entity. This determination is realized in the form of a fundamental decision by a will that is taken to be as the representative of the unity. Again, the content of this decision defies any normativity, since this decision justifies itself existentially, i.e. solely by the virtue of the fact that it comes to existence as the decision of an actual will that is actually recognized as the representative of the political unity. Hence, this decision constitutes the very basis of all normativity that subsequently arises in the order of law. The third phase is the one whereby individual constitutional laws are produced. What is essential to underline in regard of this phase is: since this phase is founded upon the second one, no individual norm produced here can be in discord with the spirit of the political unity which is determined in the second phase[138]. In line with this, the sovereign always stands alive alongside the order of legality, so as to guard against deviations from the spirit of the constitution, which means the dissolution of the particular form of the political entity.

I think this tripartite structure is the core of Schmitt's realist perspective which he calls as "concrete order-thinking". For, this tripartite structure accounts for the fact that the domain of law cannot be separated but founded upon and continuously sustained by the domain of political power. It is true that, from the standpoint of Schmitt's theory, power is the foundational and essential component in the concrete order of the state. Yet, this neither means that Schmitt has distaste for law or normativity and wants to reduce them to the arbitrary operation of power relations. Of course, he does not reject the validity and virtue of law; quite reverse, he tries hard to distinguish law form the arbitrary operation of power: law is the *collective* power which operates *consistently* in the form of a *unity*, i.e. an *order*, by the virtue

[138] Of course, the hierarchy applies also to the relation between the first phase, i.e. the phase of political entity, and the second phase, the constitutional phase. For, *Dasein* (i.e. an 'undetermined being' or 'simple existence') precedes *Sosein* (i.e. the particular-substantial form a being takes over in the process of its existence). This means that the protection of the political entity is existentially superior to, i.e. trumps over, the protection of its substantial-constitutional form. Thus, a political entity, i.e. the representative of its unity, may renounce the very substantial form of this entity in an action taken for the sake of preserving the entity. For instance, in a *Rechtsstaat*-form, the founding principle of individual freedom and basic rights may be violated, so as to protect the political entity itself.

of fundamental-existential decisions which are taken at a prior and superior moment and cannot be negated in the subsequent moments.

As our detailed analysis has demonstrated, Schmitt's realist perspective does not even culminate into a rejection of the form of state called the *Rechtsstaat*, i.e. a state order based on the principle of individual liberty. Rather, it can account for it as a form of state based on a fundamental-existential decision for individual liberty. In line with this, and in opposition to the superficial readings of Schmitt's theory, his perspective does not culminate into a rejection of the basic rights, but rather can account for their inviolable status in a *Rechtsstaat.* As he repeatedly argues in his *The Constitutional Theory*, the basic rights may be suspended temporally but never eliminated in a *Rechtsstaat* without changing the form of the state. For, they are the instances of the fundamental-existential decision for the individual liberty.

That Schmitt's realism can account for the inviolable status of the basic rights in a *Rechtsstaat* is striking. For, this is precisely what the prevalent mode of thinking on law and state which is identified by liberalism, i.e. legal-positivism, cannot account for. Indeed, Schmitt's target has always been liberal theories of law and the state, rather than the *Rechtsstaat* of the basic rights. He thinks that all liberal theories have been vested with the impossible aspiration of suppressing "the political", i.e. for effacing the element of power in law. This aspiration required the embracing of all within the political unity through remising any distinction between friend and enemy. Such an aspiration culminates, in turn, into nowhere but into the idea of neutral state, the relativized conception of the constitution and the functionalized view of law. This is why the Rationalism of the Enlightenment, which has never hesitated to assert and defend certain values as universal, has led, in the end, to the positivist-relativism in the 19th century. The latter explicitly offers a vision of the order of state as a mere formality of procedures and regulations which may be filled out with any content by competing parties so far as they make their manner of acts in accord with foregoing formalities. Schmitt's primary point against the positivist-relativism is that this is not an account of law and the state as a unity. No form of state, even the *Rechtsstaat*-form, can operate in actuality in this way. Renouncing any substantial-political content for the order of state, in the name of neutrality and pluralism, bring about nothing less than the dissolution of the state as a unity. More precisely, such renunciation in the name of neutrality brings about the possibility of the negation of the basic rights in a *Rechtsstaat*. This is because, a

fully-neutral state, in which the constitution is completely relativized and law is completely functionalized, should have to open its doors to those who are inimical to the basic rights and who will thus close the doors to all others after they rise to the power.

I think that Schmitt's realistic theory and his critique of liberal theories of law and the state contributes to our understanding of legal-political phenomena in certain essential aspects. His contributions, which I will call *realistic remainders*, are basically given way by the following tenets of his thought: the objection to tearing apart the human existence into distinct-isolated spheres, and the insistent endeavor to account for the stately-life of human beings in a way reckoning in both its existential-political component and its normative-legal component. The first of these realist remainders is that the role of political power in our earthly collective-existence cannot be eliminated. Once you eliminate the political power of the state, you will not achieve a situation where power ceases to play its role. Quite reversely, you will thus have a situation whereby a plurality of social powers engages in competition with each other. In view of Schmitt, this latter situation makes things much worse, for the reason that social forms of power differ from the political power in that they may set aside the bondage of responsibility, which is characteristic to the relationship between the political rulership and its subjects. As he repeatedly argues through citing Hobbes, a sovereign-political power is burdened with founding and sustaining the correlative relation of "protection-and-obedience" (*protego ergo obligo*) with its individual subjects. Yet, this is not the case with so-called social powers, at least with regard to individuals of different parties. Second realistic remainder is closely relevant to the first one: since the role of power in human co-existence cannot be eliminated, the most one can expect is to restrain it. The demand for a complete security against power in human life is thus always paradoxical. For, such an exaggerated demand turns against the state itself or burdens the state with the impossible mission of eliminating power. This brings about the risk of dissolving the state. Yet, the state with its sovereign power is the most proper *Katechon*, i.e. the Restrainer of the Violence, available in our earthly existence. In this context, the third realistic remainder points out to the paradox of the liberal-constitutionalism: the liberal-constitutionalism locates liberty rights in a position prior and superior to the state; yet, these rights are annihilated at the very moment when the state-order is collapsed. This demonstrates that the political

authority is not simply the counterpart of the basic rights but a necessary condition of them. Again in line with former ones, the forth realistic remainder is that a neutral state claiming to embrace all the plurality of the societal level cannot work out. The basic rights can be guaranteed only within a particular political form, i.e. a *Rechtsstaat*-form. Like any other form, this particular form has a substantial content which demarcates between the inside and the outside. Thus, like any other state-form, a *Rechtsstaat* is not neutral in the face of aspirations, goals and movements which challenge its substantial values. In the face of them, the *Rechtsstaat-form* stands as a political enemy, not as an impartial structure of procedures open to everyone.

Having argued that Schmitt can account for the inviolable status of the basic rights in a *Rechtsstaat* –without a normative defense of the principles of *Rechtsstaat*– and having pointed out the realist virtues of this account, I should now note that the conception of the basic rights Schmitt embraces is a very peculiar one. Evidently, Schmitt's conception of the basic rights is so restricted in their content and scope that these rights cannot be mistaken to have some relevance to the idea of human rights. In their content, the basic rights include only liberty-rights, not social rights and even not political rights. In their scope, the basic rights should be applied only to friendly-subjects of state; and thus all non-citizens should be necessarily considered as potential enemies, i.e. out of the scope of the basic rights. Yet, the peculiarity of Schmitt's conception of the basic rights goes beyond their restricted nature. For, the basic rights have always been considered as reflections of "natural rights" in the positive law. They have been thus considered as designating a pact between state authority and individuals. This pact is supposed to be based on the principle of "protection-thus-obedience": "if you protect my individual existence – i.e. my life, my liberty and my property– I will obey you". Schmitt replaces this familiar contractual conception of rights with a new conception based on a fundamental decision for personal liberty. This is, indeed, to dismiss the common and widespread conception of basic-human rights as *institution-determining* standards (i.e. as *supra-institutional* standards for the judgment of institutions themselves) in favor of a peculiar conception of basic rights as *institution-*

determined standards[139]. In this way, the basic rights cease to designate the general reason for one's subjection to a particular political authority. Rather, in Schmitt, I, as an individual subject, should obey unconditionally to the political authority of the political entity with which I am identified, and have the basic rights only if the representative of the unity of my political entity has taken a fundamental decision on behalf of them. Hence, he transforms the concept of the basic rights from being *general conditions* of individuals' subjection to a political authority into being substantial core of the particular form of collective life in a particular political entity, i.e. in a bourgeois-*Rechtsstaat*.

At this very point, it becomes clear how contingent and slippery the foundation Schmitt provides for the basic rights is. For, when the foundation of the basic rights is made the *fact* of a fundamental-existential decision for a *Rechtsstaat* of the basic rights, there raises the problem: that a similar *fact* of a fundamental decision for a totalitarian-state will provide this entity with a foundation too. Since there is no court of appeal beyond such facts of founding, there is no argument for why one form of state should be considered as having more systemic legitimacy than the other. At this juncture, a comparison between Schmitt's realism and its rival, i.e. Kelsen's positivism, may be suggestive. While Kelsen abandons the question of legitimacy in favor of the question of validity, Schmitt relatives it to a point whereby there can be drawn no distinction between legitimate orders and illegitimate orders. For, from the standpoint of Schmitt's system-relative conception of legitimacy, it is not the legal-political orders (i.e. the substantial decisions founding these orders) but only certain norms within legal-political orders that can be exposed to the question of legitimacy. However, this also means that the distinction between a legal-political order (i.e. the state as such) and an arbitrary order of power remains contingent and slippery in Schmitt's realist account. For, a law of the sovereign may be distinguished from a command by a gangster only on the basis of the fact that the former has elicited a long-term systematic obedience and identification on the part of the people, once the question of legitimacy is broken off the question of Righteousness (i.e. the question of Truth as it is applied into the sphere of practical thought).

[139] I borrow the distinction between "institution-determining standards" and "institution-determined standards" from Alistair M. Macleod. He employs the distinction to highlight the supra-institutional (that is, "institution-determining") nature of human righs (see, Macleod, 2005:17).

Is the lack of a more secure foundation for the basic rights (more generally, is the contingency or slipperiness of any substantial criteria of legitimacy) a necessary result we should accept when we acknowledge the political component in law? Schmitt's realism suggests that it is precisely so. But, I think that it may not be so. I think that such a result arises in Schmitt's theory not because he tries to incorporate the political component into the account of law, but because of his "value-relativism". Precisely like Kelsen, Schmitt is highly influenced by the Weberian idea of incompatibility of values –an idea which involves a disbelief in practical reason, as we mentioned in the second chapter. But, unlike Kelsen, he is insistent on the need of "value-assertation" which will overcome the possible anarchical situation of competing pluralities of modernity and thus establish orderly-unity. Since practical reason is renounced at all, this "value-assertion" can be conceived only as expressing the power of an arbitrary will. As a result, the element of power stands so high with respect to the element of norm and the political authority should have so high discretionary power that the concept of legitimacy can have a sense only in reference, and conditional to political power in Schmitt's theory of law and the state. In bitter words, legitimacy turns out to be no more than an epiphenomenon of the political power.

Thus, if we are to search for a more than contingent and slippery relation between the state and rights, we should look beyond "value-relativist" schemas, i.e. beyond legal-realism as well as legal-positivism. This means that perhaps we should revise the rationalistic mode of thinking which was dominant during the 18th century. In Second Chapter of this thesis, we have seen that Kelsen discards the rationalist alternative by simply asserting the plurality of moral standpoints as a fact of human co-existence. In this chapter, we have seen, Schmitt adds another argument against the rationalist mode of thinking: that it necessarily culminates into positivism, because of its incapability to account for the political component inherent in law and the state. In the following chapter, I will thus inquire for the possibility of a version of rationalist mode of thinking which does not *moralize* law –i.e. which can escape the impasses of legal moralism– and can incorporate the political component of law and the state. In doing this, I will discuss one of the most recent versions of rationalist theories of law and the state, namely Otfried Höffe's theory.

CHAPTER FOUR
HÖFFE'S ETHICAL PHILOSOPHY OF LAW AND THE STATE: A RATIONALIST REJOINDER

In the previous chapters, we have examined subsequently a refined version of legal-positivism, namely Kelsen's Pure Theory of Law, and then an elaborated version legal-realism, namely Schmitt's concrete-order-thinking. Given the respective weaknesses of these approaches in mapping out an overall theoretical vision embracing the interconnected and even transitive concepts of (human) rights, law and the state in an adequate manner, I will now examine an alternative theory recently offered by Höffe. As we have seen up to now, legal-positivism and legal-realism converge upon the point that philosophical rationalism designating the 18th century thinking on law and the state is obsolete in the modern world. In the face of this conviction, Höffe's theoretical endeavor amounts nothing less than a re-vindication of rationalism under the conditions of modern society. More precisely, he revives the rationalist mode of thinking, which characterizes western political philosophy from Plato and Aristotle to Hobbes and Kant, so as to reconstruct the essential cord linking law, the state and the moral standpoint of justice (human rights).

In reconstructing the rationalism of political philosophy, Höffe promises not only to overcome the alienation of philosophy from political and legal theory, but also the alienation of legal theory from ethics. It should be underlined that this is a promise which is extremely difficult to fulfill, given that the late-modern consciousness is usually designated by the following interrelated characteristics: the deafness with respect to any claim for ethical objectivity or universality, the belief in the legitimacy of the self-assertion of individual particularity even in most arbitrary and spontaneous manners, and the cynicism with respect to any political-legal authority. One may challenge that these characteristics really define the prevalent form of common consciousness in our age. However, even in the case that this challenge is hold true, the burden of proof, at the theoretical level, falls on the part of an ethical philosophy of law and the state, which will argue for an essential cord linking justice (human rights), law and the state. Against these

convictions, the latter has to demonstrate the following theses without any appeal to a substantive conception of good life: (1) that there are objective (universal) standards for collective human life, which we call political justice; (2) that these standards constitute the essence of the reciprocal coercion which we call law; (3) that the state arises as a necessary moment of these reciprocally coercive relations, which is to say that it is political justice that defines, legitimates and also limits the state power.

In this examination, I will first present Höffe's argument for the proper form of the political-legal theory. We will see that his argument amounts, at the end, to a call for a revival of the "lost paradigm", the rationalism of the tradition of practical philosophy, particularly of its Kantian variant. Then, I will engage in an elaboration of his argument for the essential cord linking political justice (human rights) and law. As it will become clear, this part of his theory raises a powerful strike against amoral theories of modern law, particularly against legal-positivism. Having established the essential linkage between political justice and law, I will, in the third part, investigate why Höffe thinks that the actualization of law which is in accord with political justice requires the state as a necessary moment of human cooperation. I think that Höffe's arguments for the state as the necessary moment in the actualization of co-existing freedom of human beings constitute the most innovative and remarkable part of his theory. For, these arguments are developed in a confrontation to anarchism, which Höffe considers as a serious philosophical challenge for law and the state under the conditions of modernity. Such an argumentation promises, at the end, a conception of the state not as a *Leviathan*, but as a *Justitia* (i.e. an institution of justice) which is defined (i.e. both legitimated and limited) by political justice (human rights). In the end, I will present an assessment whereby I discuss the achievements of Höffe's modern (Kantian) rationalism in comparison with straight out legal-moralism which has certain conspicuous shortfalls rightly attacked by legal-positivism and legal-realism.

Throughout the examination, Höffe's *Political Justice: Foundations for a Critical Philosophy of Law and the State* (1995) will be the main text I will draw upon. Beside this, his arguments from *Categorical Principles of Law: A Counterpoint to Modernity* (1996) and *Kant's Cosmopolitan Theory of Law and Peace* (2006) will be deployed in relevant contexts.

IV.1. Reviving the Political Project of Modernity: A Rationalist Ethics of Law and the State

A diagnosis *vis-à-vis* contemporary intellectual climate constitutes the point of start for Höffe's theoretical endeavor. He first recalls that the theories of law and politics in the western world had been, from their very beginning in the Ancient Greece, in the form of "a philosophical ethics of law and the state" (Höffe, 1995:4). It does not matter much that a particular form of such a theory is called natural-law-theory or divine-law-theory, or rational-law-theory or a theory of political justice; in any case, it is presented in the form of a theory formulating the universalistic supra-positive normative criteria which define and thus justify the true (correct) form of political-legal entity. Indeed, the works of Plato, Aristotle, then Augustine and Aquinas, and then Hobbes, Spinoza, Locke, Rousseau and Kant have been important cornerstones in this tradition of the philosophical ethics of law and the state in their own distinctive ways. However, a rupture with this tradition occurred in the 19th century. The rise of historicism and positivism as the new prevalent modes of thinking on law and the state power reflects the modern distance (and even allergy) against universalistic supra-positive (or meta-physical) claims of the "philosophers". During the historical process of modernity, this distance has deepened more and more and, at the end, culminated at the thesis of "a release from morality" (*Entmoralisierung*) (Höffe, 1996:7). In the contemporary theories of law and the state, one thus faces with a "double alienation": first, an alienation of philosophy (i.e. rationalist argumentation) from political and legal theory; second, an alienation of legal theory from ethics and morality (Höffe, 1995:4).

This "double alienation" explains why the concept of political justice as a supra-positive criterion of law and legitimate power is either discarded (the case of legal-positivism) or used in an ungrounded, arbitrary and particularistic manner (the case of legal-realism) in contemporary theories of law and the state. It is Höffe's basic contention that neither law nor the state can be accounted for without a universally grounded concept of political justice. I will later elaborate his arguments to this effect. For the moment, however, this should be emphasized: the fact that the ethical philosophies of law and the state, and the concept of political justice are overshadowed in modern era is striking in a particular sense. When one speaks of law and the state, she speaks of coercive power. An ethical philosophy embracing

the concept of political justice, on the other hand, provides a "critique" of state power. As Höffe underlines: "such a critique investigates just and unjust forms of *Herrschaft*[140], juxtaposes just and unjust forms of *Herrschaft*, and uses moral arguments to impose limits on the otherwise naturally expanding power of the state" (Höffe, 1995:4). What is bizarre is that such critique has been overshadowed precisely in the modern era, i.e. in an era of utmost sensitivity against coercions limiting the freedom of individuals.

The foregoing bizarreness of modernity is understood (but not justified) when we take into consideration that while positivism has started to dominate the realm of political and legal theory, the critique of the state power has become much more radical and stepped out of this realm. That is, it has taken the form of anarchism, presenting itself not simply as a critique of unjustness of a given particular political and legal rule, but as an outright rejection of all rulership in general. Then, we are faced with a modern antinomy concerning law and the state: the antinomy between positivism and anarchism. In other words, modern mentality left only two opposite options: either to suggest an approval of all that it presents itself as legal; or to reject any moral quality for "the legal" distinguishing it from brute force. In the view of Höffe, the resolution of this antinomy is the fundamental task of any adequate theory of law and the state.

On the one hand, there is positivism which signifies the rejection of moral perspective in law and the state *in toto*. From the standpoint of positivism, the legal order is nothing but a set of positive laws, which are "coercive regulations" backed by the powers of the state (Höffe, 1995:6). Put simply, there is an authority from which laws emerge (i.e. parliament as the legislation), an authority which enforce these already posited laws (i.e. the executive) and an authority which interprets law in cases of conflicts (i.e. the courts as the judiciary). Thus, political and legal structure is nothing more than a complex of positive rules in which authorities and

[140] The translators of both *Political Justice* and *Categorical Principles of Law* prefer to not translate the German term *Herrschaft* into English and thus leave it in the original form in the translated texts. Their basic reason is that *Herrschaft* is a complex term which may stand for various English terms in different contexts. As Jeffrey C. Cohen argues, it may mean "hegemony", "mastery", "domination", "governance", "government", "rulership", and "rule" (Höffe, 1995:viii). He then points out another advantage of leaving the term in the original German version: while English terms all have evaluative senses, *Herrschaft* is a neutral term; and this neutrality is essential for Höffe's argumentation (Höffe, 1995:viii). As for myself, I think that the English word "rulership" approximates closely to *Herrschaft* and does not connate an evaluation. Thus, I will generally employ the term "rulership", or "political and legal rulership" instead of the German original in my study.

powers are balanced in relation to each other, but the power of the structure as a whole is unrestricted. This is to say, the idea of justice as a supra-positive critique is expelled to no man's land in the positivist agenda. Law and politics are restricted to the scope of positive sciences as legal science or political science. In this way, the political and legal order turns out to be the Leviathan which is "immunized against limitations imposed from a moral perspective" (Höffe, 1995:7). For, positivism discards the question of legitimation and provides a *carte blanche* of unlimited endorsement of a political-legal order.

If positivism develops a thesis justifying *any* political-legal authority, anarchism is the antithesis consisting in the radical rejection of the political order. In opposition to positivism, it raises the question of legitimation, and then decides, once and for all, any coercive regulation, any enforcement of a sanction or any threat of a sanction is unjustified. Anarchism gives this verdict in the name of the principle of freedom. This is nothing less than a radical rejection of the necessity of political order as such. In opposition to the ideal of political justice, i.e. a just political rule, it defends the ideal of freedom from any political rulership. The anarchist asserts that there is even no need for law and the state. As Höffe wittingly expresses, when one holds to this claim, political justice seems to her "as useless as lamplighters in a world of electric lights" (Höffe, 1995:7).

In a way reminiscent of the antinomy between dogmatic rationalism and empiricist skepticism Kant detected in the realm of theoretical reason, Höffe calls the opposition between positivism and anarchism as an antinomy between political-legal dogmatism and political-legal skepticism (Höffe, 1995:8). As the opposite poles of this antinomy, both positivism and anarchism provide their accounts for law and the state, which seem to be plausible on their own. Each of these approaches has a sense of plausibility on its own, because each of them has been fueled by one of the two extremities experienced in modernity: positivism by the experience of civil war, and anarchism by the experience of political oppression.

Civil war is a situation whereby the shattering of the political order is brought forth. In such a situation, it becomes vividly clear that basic political-legal institutions are necessary for attaining peace, human freedom and happiness. Höffe thinks that a political-legal theory which exclusively focuses on the danger of civil war (or, less dramatically, on the specter of ungovernability) inevitably develops upon the "categories of friend and foe, of decisions and their enforcement, of

commands and obedience" (Höffe, 1995:10). As one can observe in the cases of many positivist and even procedural theories[141], the result of this exclusive focus on the danger of civil war is the denial of a constitutive role of justice and the subsequent absolutization of the established political-legal order. Law is, then, conceptualized solely in terms of power and/or competition –a conceptualization which reflects political amoralism and cynicism.

Taking exclusively the experience of political oppression as fundamental, on the other hand, anarchism denigrates any form of political rule as exploitation and domination. The latter are assumed to be at issue everywhere there is an authority. Even in situations where exploitation and domination do not appear in a solid form, the anarchist thinks, they should be there in a hidden form. Hence, she calls for the dismantlement of every political-legal order in the name of freedom from exploitation and domination. In this way, however, anarchists do not only play down the human need for the assurance of her safety in the face of her peers. They also do not take seriously the plausible argument that freedom in the collective human life can be actualized only under the conditions of a political-legal authority. As a result, anarchists too (like positivists) reject the perspective of political justice: they reject it since they reject all that is relevant to "political" in the name of a standard of "a pure justice/a pure Right", i.e. freedom. To the extent that a sort of cynicism lays under positivism, Höffe notes, sentimentalism designates the anarchist attitude against political-legal authority (Höffe, 1995:10). There is yet a point on which positivist cynicism and anarchist sentimentalism converge: the ignorance of the fact that political justice is a necessary condition of human social organization and definitive for law and the state.

Above I argued that Höffe granted a certain degree of plausibility to each of the poles of this political-legal antinomy. That is, he thinks, both positivism and anarchism articulate a partial truth of their own on the basis of the experience they take as fundamental, i.e. either civil war or political oppression. The problem with both of them is that they take the partial truth they represent as exclusive and absolute truth. In both of them, Höffe argues, "exclusive orientation to one of the

[141] Höffe never mentions legal-realism in his texts. However, as it is clear in his reference to Schmittian category of friend and foe as one of the basic categories of political dogmatism, he would see legal-realism as a sub-variant of positivist theories of law and the state. In other words, from Höffe's rationalist standpoint, legal-realism would seem as a radicalized version of the non-cognitivist (i.e. will-based) account of law and morality, which marks the legal-positivist approach in general.

two basic principles, and the consequent isolation of the concept of "law and the state" from that of "justice" amounts both to a philosophical mistake with practical consequences, and to a political prejudice with theoretical consequences" (Höffe, 1995:11). He then makes his point that this political-legal antinomy and its negative consequences can be overcome only by a *critical* standpoint bringing forth a "determinate negation" (*Aufhebung*) of the partiality of positivism and anarchism. Against legal- positivism, on the one hand, this critical standpoint will defend the moral perspective and certain moral constraints it imposes on legal and political institutions (i.e. it will establish the link between law and justice). Against anarchism, on the other hand, it will defend the necessity of legal and political institutions for the actualization of justice (i.e. it will establish the link between the state and justice). Now, we should consider what Höffe means by a critical theory of law and the state.

First of all, I should clarify what Höffe means by the term critical or critique. In his *Categorical Imperatives of Law*, he indicates that there can be three forms of theories on a social phenomenon: an affirmative theory, an emancipatory theory and a critical theory (Höffe, 1996:18-22). The first form of theory takes as its task to vindicate what exists. Hegel's philosophy of history –which is based on the assertion that "what is actual is rational"– is usually understood as an affirmative theory of history. Quite reversely, an emancipatory theory launches objections and contradictions to what is given. Höffe points out the Frankfurt School, which is, for him, wrongly called as critical theory, as an example of emancipatory theory. On the other hand, a truly critical theory takes a "judicative" stance in the face of its theme. Like a judge delivering a verdict, he is not committed to a certain stance *a priori.* A critical stance is thus that of impartiality from which a balanced judgment of the theme is issued, and which endorses either emancipation or affirmation according to this balanced judgment. In our case, i.e. in the case of law and the state, one can argue that while positivism stands as an affirmative theory (since it vindicates any order of coercive regulation as law and the state), anarchism stands as an emancipatory theory (since it refutes the necessity of any form of political and legal authority). As for a critical theory of law and the state, one can initially assert the following: it should be a theory which judges the positivity (i.e. what is given) in accordance with a standard of validity that transcends the merely positive. From the very beginning of the political thought in the Ancient Greece, this standard of

philosophy of practice is called *to dikaiton*, i.e. the just or the right, which substitutes the role the concept of truth plays in the realm of the philosophy of nature (Höffe, 1996:23).

Second, Höffe's critical theory is a rationalist-ethical theory of law and the state, because it brings forth the idea of the just or the right as a standard transcending over the merely positive. To the most of the modern readers, the idea of a standard transcending over the merely positive recalls for a metaphysics. Thus, his theory seems to be, by definition, indefensible. Indeed, I have already noted that what Höffe attempts is nothing less than reviving the rationalist philosophical tradition of western thought on law and the state in a modern conjuncture. In line with this, it is precisely true that Höffe's theory will belong to metaphysical tradition in the sense that it will involve normative propositions that cannot be proved within experience, but are nevertheless constitutive for experience. However, one can say, Höffe's theory is not more ambitious than Kelsen's pure theory. Both of them investigate the founding propositions underlying our legal practices through a transcendental-inquiry. The difference between them occurs at the point when a transcendental inquiry into law and the state indicates certain moral principles. As we have seen, Kelsen stops his inquiry at that moment, because he thinks that there can be no objectivity in the realm of morals. Yet, Höffe is insistent on the need for furthering this pursuit to the end. For, unlike Kelsen, he does not close himself off the basic promise of the tradition of practical philosophy: that reason can find objective standards that will sound reasonable for all in the practical sphere of human action and interaction. Such standards may be, by right, called metaphysical. In this case, Höffe suggests, it is not his theory but law and the state themselves that are metaphysical. For, the fundamental claim of his theory is that law and the state cannot be accounted for without universally valid criteria which are constitutive for our domain of experience designated by the concepts of law and the state.

Beside the possible objection to its metaphysical character, there are of course other objections to a rationalist-ethical theory of law and the state. In a non-exhaustive manner, I can note here the following objections: (1) the argument for the naivety of any ethical concept of law and the state: that such a theory overshadows the element of power inherent in law and the state; (2) the argument that a rationalist political ethics runs the risk of introducing "moral paternalism" over citizens; and (3) the argument that a rationalist political ethics is inimical to

democracy since it suggests a rule of the wise over the common people. It is true that certain forms of political-legal rationalism are vulnerable to such objections. Throughout my study, I will test to what extent Höffe's contemporary version stands in the face of these modern objections.

Having drawn the basic framework of Höffe's rationalist approach to law and the state, I will now engage in a presentation of his semantic analysis of the concept of political justice. In doing this, Höffe intends to defeat the widespread modern conviction that political justice is a notoriously relative issue. As we will see, he will thereby formulate a universal conception of political justice –i.e. a conception on which we all implicitly agree– and later argue, against legal-positivism, that this conception of political justice is inherent in law as its constitutive proposition.

IV.2. Political Justice as an Objective Idea: A Semantic Analysis with a Normative Intent

At the beginning of his discussion concerning the idea of political justice, Höffe expresses that relativism about justice arises out of an empiricist ground. It simply calls attention to the diversity of commonly held views on justice. In line with this "observation", relativist argues that no objective concept can overcome such a diverse array of ideological and hence partial views about justice. Höffe argues that it is, yet, not only relativists who are aware of the diversity of actually held conceptions of justice. From the very beginning, i.e. from Plato and Aristotle now on, non-relativist theorists have acknowledged the existing diversity of the views on justice. Yet, they have still insisted on the need for looking behind the competing principles of justice and seeking a common ground among them.

Moreover, Höffe underlines, relativism about justice is indeed confined to the matters concerning a specific sphere of justice, namely distributive justice, which is the justice in the distribution of benefits and burdens to the members by the political authority. In this sphere, the libertarian argues for the principle "to each according to her abilities"; the aristocratic for "to each according to her deserts"; the socialist for "to each according to her needs"; and the advocate of the rule-of-law for "to each according to her lawful rights" (Höffe, 1995:22). While a remarkable controversy arises in this sphere, the controversy concerning the basic principle is much milder in the other spheres of justice. For instance, the principle

of equal value is almost universally recognized as valid in the sphere of barter and exchange. There, the controversies arise mainly out of the issue of the correct application of this principle to particular cases. Similarly, certain principles are generally recognized as just in procedural issues: the obligation to listen to the argument of the other party, the prohibition on being judge in one's own case, etc.

Now, Höffe states, there is a higher principle of justice underlying the foregoing non-controversial principles: the principle of impartiality which constitutes a minimal condition against arbitrariness. Indeed, the common image of justice as a beautiful blindfolded woman holding a balance reflects the principle of impartiality. Thus, one may hope that the principle of impartiality can also bring forth a resolution to the battle between different perspectives in the sphere of distributive justice. Yet, such a resolution is much more difficult than it seems at first. For, impartiality as the principle of justice has two levels. The first level concerns the application of a rule. At this level, impartiality means "treating the similar cases similarly" (Höffe, 1995: 24). We usually call this formal and abstract justice, i.e. the justice defeating arbitrariness by the prescription that rules should be applied without regard to personal identities. The second level is the level of formulation of the rules. At this level, justice as impartiality prescribes that the rules concerning the distribution of benefits and burdens should be formulated without respect of individual personalities. In comparison to the first level, this level is much more fundamental; and Höffe calls this level *original justice* while the former one is labeled as *subsidiary justice*. For, "impartial application of rules can be carried out in the service of an organized crime syndicate or in flagrantly unjust political systems, and it can incorporate obvious and massive privileges and discrimination" (Höffe, 1995: 25). On the other hand, there is an original (i.e. true) justice only when the rules themselves, by and large, are just. This means that a resolution of the battle over distributive justice can be resolved only if we can formulate "right" rules, i.e. rules prescribed by the principle of impartiality.

Höffe thinks that a semantic analysis of the concept of justice can provide the formulation we need. He then makes two qualifications with regard to the semantic analysis he has in mind. First, a semantic analysis of a practical concept such as justice cannot have only a descriptive character. It should also carry a normative-critical function: such analysis should yield to a sharpening and rectification of the object of the inquiry (Höffe, 1995: 27). Second, a semantic analysis of justice

should not stop at the point where an objective conception is achieved. It should comprise a second phase whereby the perspective of justice is defended in the face of any other normative or non-normative considerations. In regard of this latter point, Höffe points out the need for encountering utilitarianism. While utilitarianism is compatible with an objective concept of justice; it does not recognize the supremacy of justice, but rather make it secondary in relation to the principle of general utility. In opposition to such an approach, Höffe insists, a semantic analysis of justice should have a normative dimension in that it can account for the supremacy of the standpoint of justice with respect to the standpoint of general utility.

When one considers the usages of the concept of justice in the life-world by the ordinary people, one first sees that designating something as just signifies approval, and unjust disapproval. The very important point with regard to such designations is that the ordinary actor employing the concept claims to express not a subjective feeling, but an "objective judgment" about something that happens to be. Thus, it is raised as a claim that others *ought* to recognize by the virtue that it is objective. Second, we do not designate any species of phenomena by the word just or unjust. For instance, a natural phenomenon like storm may be an undesirable occurrence for us to the utmost degree. Yet, it would be childish to designate this fact as unjust because of its undesirability. The species of phenomena that can be designated as just or unjust are those related to human praxis: "actions, agents, rules and systems of rules of action, and, not the least, institutions" (Höffe, 1995: 28). In other words, the object of justice is only the phenomena that are "susceptible to human manipulation" (Höffe, 1995: 28). Third, the concept of justice is used not for any human action, but only for socially relevant actions. In the absence of a relevance to other persons, our actions may be evaluated in terms of various criteria like prudence, courage, and etc, but never in terms of justice or injustice. Justice is an issue that arises only in the context of social praxis, i.e. in relation to interaction between two or more persons. Fourth, as a further specification, justice concerns not any situation of social praxis, but only in cases where there is a "conflict". For, justice is always invoked by a party, i.e. an individual or a group of individual, against another party, i.e. an individual or a group or an institution. It is a claim having this form: "I (or we) have a right on my (or our) part, which you, as a person or as a collectivity or as an institution, are obliged to respect, but do not actually".

These four points of specification reveals that the concept of justice indicates, in any case, "a notion of social obligation" (Höffe, 1995:28). Again, however, social obligation is a too broad term to define justice. Social obligations may be specified into two basic categories. First, there is the type that can be called positive or conventional social obligations. Customary rules constitute the archetype of such obligations. Second, there is the type of obligations which are used to evaluate positive or conventional obligations. Höffe calls the latter "critical-social obligations". Leaving aside positive or conventional social obligations, he focuses on this second type of obligations. The "critical-social obligations" designate an action or a relation as good or bad through employing a supra-positive or supra-conventional standard. It is reason, more precisely practical reason, that provides such critical, i.e. supra-positive, standards. Hence, in a way corresponding to the tripartite structure of practical rationality, critical-social obligations are divided hierarchically into three different conception of goodness: (1) instrumental rationality (good as useful); (2) pragmatic rationality (good as advantageous); and (3) moral rationality (good as virtue and good as just). We should consider briefly each of these conceptions respectively in order to further specify what the standpoint of justice is.

At the first level of critical-social obligation, i.e. the instrumental level, a practice or a relation is assessed in terms of its usefulness for attaining a goal chosen arbitrarily. Usually, we appreciate means, ways, or procedures as good in this sense. Insofar as this form of goodness remains fully indifferent to the goal or end which is strived, it has purely of a technical or strategic significance. It is simply "good for something"; and this "something" itself may be good or bad (even evil). For instance, it is instrumentally good to suppress freedom of thought for a tyrannical regime.

The second level of critical-social obligation, i.e. the level of pragmatic rationality, assesses the ends of an action or a relation to a certain degree. More precisely, it is sensitive to ends in an empirical fashion. Aristotelian notion of "prudence" presents the standpoint of pragmatic rationality perfectly. If we are to apply this notion to human beings, for instance, we should first notice that man is a being who has a complexity of needs: nourishment, sheltering, education, spirituality, love, friendship and etc. Given this complexity, it is better, i.e. prudent, even for the best hunter to live in companion with his peers and share his game with

them rather than having the whole game but living in desolation. In regard of prudence, Höffe emphasizes, evaluation is made on the basis of the totality of empirically given ends. It is thus still a partial conception of good in the sense of "good for someone" (Höffe, 1995: 29). For him, it would be more convenient to express pragmatic judgments grammatically in the comparative form of "the better or the worse", rather than the simple form of "the good or the bad". For instance: it is better, i.e. prudent, for a merchant to maintain his reputation to honesty rather than cheating someone for maximizing his profit in a particular trade; or it is better, i.e. prudent, for a teenager to devote a certain time to study on mathematics and literature rather than spending her all time for joy.

Since pragmatic rationality means "good for *someone*", there is an essential bifurcation in this form of goodness. If the vantage point is taken as an individual, as is the case with my examples just above, there is an "individual-pragmatic evaluation"; however, if the vantage point is taken as the welfare of a whole group or a community, we are then faced with a "social-pragmatic evaluation" (Höffe, 1995: 29-30). The social-pragmatic evaluation, which takes the welfare of the community as the standard of good, is characteristic of utilitarianism, since the latter promotes the social-pragmatic evaluation to the point of highest level of practical rationality. However, Höffe thinks, this utilitarian tendency cannot survive in the face of the semantics of the ordinary discourse on justice. For, in such discourses we come with expressions such as "prudent but not just", "perhaps imprudent, but fair" (Höffe, 1995: 30). For instance, an ordinary person can argue that "firing workers in such a time of deep economic crisis may be prudent, but also unjust". This means that ordinary practical consciousness itself indicates a level beyond social-pragmatics as the ultimate standpoint of normativity. This level is that of moral or ethical evaluation to which justice belongs.

It is already clear now that moral rationality, i.e. the level of unconditional goodness, is the supreme level of practical rationality in the face of which even the maxims of social-pragmatic evaluation is relativized. Yet, we still need a last specification within the realm of moral rationality to attain to the concept of justice. For, there are many normative concepts which belong to morality, but have nothing to do with the concept of justice: e.g. "beneficence, charity, generosity, sympathy, empathy, solidarity, perhaps also gratitude, friendship, love, and forgiveness" (Höffe, 1995: 30). The foregoing concepts are truly moral and surpass both

individual- and social-pragmatics insofar as they indicate to dispositions reaching beyond individual and collective self-interest. Hence, it would be a crucial mistake to identify the perspective of the justice with the standpoint of morality in the comprehensive sense. This would lead either to overburden justice by making it include all moral obligations[142] or to ignore all morality falling out of the concept of justice. For, as will be further clarified in the following paragraphs, justice is not identical to morality, but a featured subset within the category called morality.

The concept of justice should be somehow differentiated from other forms of moral evaluations. The key for such a distinction is this: unlike other moral characteristics, justice is something that we demand others to respect. That is, we cannot demand others to be beneficent, generous or friendly; we can only hope for it. They are social obligations only in the sense that I, as an ethical person, should submit myself to what they instruct, not in the sense that I have a right to see that others, too, submit themselves to what they instruct. On the other hand, justice is "a social obligation the fulfillment of which human beings hold each other accountable for" (Höffe, 1995:31). That is, I can demand that all others are to act justly. As Höffe himself remarks, it is thus the Kantian distinction between *duties of right* and *duties of virtue* that provides us with the distinctive standpoint of justice. Justice corresponds to the former the fulfillment of which can be demanded by others, while the latter are the duties the fulfillment of which cannot be demanded by others, but solely depends on the autonomous will (*Wille*) of the moral person.

Then, to say that justice corresponds to the duties of right, i.e. duties that others can demand my fulfillment of it, analytically means that others have moral rights: others' moral right is a necessary complement of my duty of right. When they are thought to be hold without need of a contract and under all circumstances, such rights are designated as absolute moral rights, which we call human rights. Since we will later elaborate the issue of human rights, for the moment it is enough to underline that the perspective of justice is that of human rights. We can say that an

[142] Indeed, such an overburdening of the concept of justice is found in the so-called "perfectionist theories of law and the state". Since they do not separate morality as virtuous disposition from morality as justice, such theories imply a legal-political order which will force virtuous disposition upon its citizens. Rousseau's argument that the republic, i.e. the just state, would force its citizens to be free is usually understood as invoking a perfectionist vision of law and the state.

initial formulation of justice is thus already reached: "to render to each one his right"[143].

Of course, the above formulation should be further substantiated. Before it, however, we should distinguish two spheres of justice: personal justice and political justice. We know that justice, in any case, concern human praxis. Human praxis takes, in turn, two basic forms: personal praxis and institutional praxis. When we evaluate a person in terms of justice or injustice, we raise a question concerning personal justice. A person can be subjected to such a question in two ways. First, we can apply the predicates of just or unjust in reference to her actions. In this case, our judgment will have a practical significance for that person, since we have the right to demand justness of her actions. Second, it is also possible to apply predicates of just and unjust in reference to her character (i.e. her disposition). In this case, yet, our judgment has of no practical significance. For, while *to act justly* is the duty of right (i.e. the duty that can be demanded by others), *to have a just character*, i.e. a moral disposition to justice, is a duty of virtue which cannot be demanded by others. In a way similar to this, when we evaluate a political institution in terms of justice or injustice, we raise a question concerning political justice. Like an individual person, a political institution, too, can be subjected to such the question of justice in two forms. First, particular rules or executive actions of this political institution can be found just or unjust. Second, we can judge that a particular political institution has a just or unjust character in general. Höffe sums up these distinctions quite well by the following example:

> When we accuse an individual police officer, judge, or politician of injustice, we apply the concept in the first-level, personal sense. If we maintain that such violations are the rule rather than exception in that person's career, then it is their character that is at issue and we have entered the realm of second-level personal justice. If we remark that a violation of this short goes unpunished, political institutions become target of our criticism. If an unjust act in the first-level personal sense goes unpunished once, it is a problem of first-level political justice. If, finally, we detect a systematic failure to punish personal justice, our complaints call into question the character of the regime, and we level the charge of second-level political injustice against these institutions (Höffe, 1995:33).

[143] Although Höffe does not expressly assert this formulation of justice, he refers to Aquinas's formulation as the classical formulation of justice of the character: "Justice is the perpetual and constant will to render to each one his right" (Höffe, 1995: 32).

This example illustrates quite well the similar structures of personal justice and political justice. However, as Höffe himself maintains, there is a crucial difference between personal justice and political justice: while we cannot demand a disposition to justice at the personal level, we can and do primarily demand such disposition on the part of the state at the level of political justice. That is, while only *actions* of an individual insofar as they affect others can be exposed to our judgments of in/justice, the whole existence of the state may be exposed to our judgments of in/justice. For, as it will be elaborated in the following parts, Höffe suggests that political justice is the *raison d'etre* (the reason of existence) of the state.

To put in a nutshell, justice is the moral point of view in relation to actions that affect others, and political justice is the moral point of view on political-legal institutions. Political justice as such is the standpoint through which the institutional structure we call political-legal entity is normatively determined (i.e. both justified and limited). Now, we should substantiate the concept of political justice. In order to do this, Höffe suggests, we should first differentiate two components of the concept: the normative dimension, i.e. the moral standpoint, and the non-normative dimension, i.e. the political-legal institutions themselves. Höffe takes first into consideration the latter dimension, so as to investigate what makes it necessary to expose political-legal institutions to an evaluation by the standpoint of justice.

If one takes aside the historical variation from the ancient polis to the modern state, Höffe underlines, common elements that define political-legal institution as such may be briefly counted as follows (Höffe, 1995:35): First of all, a political-legal entity is a union of persons. Second, such a union constitutes a network of organized social relations which persist among generations. Third, in relation to other social institutions, a political-legal institution is an *umbrella institution*, since it encompasses and transcends all other institutions. Fourth, such a form of union of persons comprises both elements of cooperation and conflict. Relevantly, from the standpoint of its individual members, a political-legal institution comprises both benefits and costs. This last point is crucially important for our examination: political-legal institutions are (or should be) exposed to the evaluation from the

standpoint of justice, precisely because these institutions have certain costs for its members.

The costs of political-legal institution, on the part of its citizens, lay in the fact that such "institutions restrict [their] freedom of action and if necessary oppose certain actions with force" (Höffe, 1995:35). That is, political-legal institution as such brings forth *coercive power* over its citizens. In fact, one can argue that coercion, in its implicit or explicit forms, is a necessary element of all human institutions, not only of political-legal institution. Yet, the latter is peculiar in that its coercive regulation of human praxis takes the form of *juridical obligations.* In a way differing from coercive regulations exercised by non-political/non-legal institutions, the coercive power of the state-law "takes the form of commands and prohibitions that are for the most part known in advance, and that in cases of conflict are authoritatively interpreted and, if necessary, executed with force or with threat of penalty" (Höffe, 1995:36).

In the part where we consider upon the state as a necessary idea of practical reason, we will discuss why human co-existence should have a dimension of coercive regulation and also why this dimension should take the peculiar form of legal regulation by a state authority. At the moment, it is enough to underline that both that law and the state are marked by coercive power and that political justice concerns the scope and the content of this coercive power: "coercive power requires legitimation [i.e. requires to be exposed to the moral standpoint of justice] because it restricts freedom and as such constitutes a disadvantage for the affected parties" (Höffe, 1995:38).

Hence, the question of political justice is precisely this: when can a system of restriction of freedom be just? Höffe first points out a traditional answer which many philosophers have raised in regard of this question: the idea of common good as formulated in the Roman principle of law: *salus populi suprema lex*, i.e. the welfare of the people is the supreme principle of law. This idea of common good suggests that when there would be a collective benefit or collective advantage in a particular social regulation, it is just to exercise it coercively. That means, when one is faced with a legal norm (with a coercive power) or a legal order (a system of coercive power), one should make a cost-benefit analysis in relation to the all affective parties, and then decide on justness or unjustness of that coercive power. Such a decision should be reached by reflecting on the following question: Is the

presence or absence of coercive power (legally binding norm) is more advantageous for the collectivity? Höffe thinks that this traditional view is crucially distortive, because it confuses the moral standpoint of justice, which is the true standpoint that can provide a justification or legitimation, with the standpoint of social-pragmatic evaluation. To substantiate this, we can take the example of slavery as a coercive social regulation. By a certain degree of right on her part, one could thereby argue that slavery is a just institution, because it brings forth a collective advantage for mankind (more specifically, civilization, relative prosperity for future generations, improvements in arts, sciences and philosophy, etc), even though it exposes certain individuals, i.e. the slaves themselves, to extremely harsh conditions.

Now, we *know* that a social regulation such as slavery or serfdom is unjust, even though we are also aware of the collective benefits that such a regulation provides the society or the whole humankind with. Hence, we also *know* that the simple idea of common good, i.e. the principle of collective advantage, is not the true standpoint of political justice. Implicit in such *knowledge* is the true moral criterion: *distributive* or *mutual* advantage (Höffe, 1995:40). This criterion, i.e. the principle of justice, prescribes that a coercive social regulation should bring about a comparatively advantageous circumstance for *each* of the affected parties. That is, the benefits of the coercive social regulation in question should surpass its costs for *each* of the affected persons.

To simplify, political justice means that the presence of a political-legal system of coercion should provide *each* subject with a relatively advantageous situation compared to the situation of its non-presence. One should concede that this formulation of political justice is too abstract to be assessed as a recipe for evaluating automatically any particular case. It is open to different interpretations and applications. As Höffe himself notes, there are, at least, two possible interpretations of the principle of distributive advantage: first the "weaker construal" which is satisfied in the case that some advantages occur for each individual; second, the "stronger [egalitarian] construal" which demands that benefits should be equal for each individual (Höffe, 1995:42). Yet, we do not tackle with the question "which of the possible interpretation is more reasonable". At this point, I will limit myself to note that, no matter how abstract the principle of distributive justice may seem to be, it is sufficient to constitute a ground for human

rights. We will dwell more upon this later. What is important for us, at the moment, is that Höffe provides an objective criterion of justice beyond the social-pragmatic principle of evaluation. This means to break away moral relativism which has engendered the impasses we saw in the positivist and realist paradigms.

As argued above, political justice is the standpoint of morality upon which law and the state have been constituted. In the subsequent part, we will start to examine Höffe's criticism of legal-positivism through which he intends to account for the constitutive role justice plays for the concepts of law and the state. Just before this, however, one should make a remark about the significance of the claim that the moral standpoint of justice is constitutive for law and the state. We have seen above that the moral standpoint occupies the peak of practical reasoning, surpassing the standpoints of technical and pragmatic normativity. While the latter standpoints always articulate a conditional good –i.e. a good in relation to a certain end that itself may be good or bad–, the moral standpoint of justice articulates the unconditional good for political-legal structure. As Höffe himself expresses, it thus represents a *categorical imperative*. This means that, above all, the system of coercive power structure that can be truly called law and the state is a just entity in the sense that it has distributive advantage for *each* of its members. Every other element in the definition of law and the state has of a secondary and subsidiary importance in relation to this element of justice. For instance, the much referred concept of "the rule of law" is only a pragmatic standpoint concerning the actualization of just social relations. It demands that, for the end of sustaining political justice, it is essential that durability, reliability and impartiality should be respected in the procedures whereby laws are created applied and interpreted (Höffe, 1995:38). If there is not primary justice in the substantial content of a political-legal order, the existence of the secondary-procedural justice cannot amount to a justification of this order. Höffe sums up all these in a conclusive paragraph as follows:

> Even if a coercive social order brings about coordination, efficiency, security and stability, and thereby the collective welfare, of a society, it lacks legitimacy if this is accomplished by disrespect for the interests of individuals or groups within the society. This legitimation deficit explains our opposition to social institutions such as serfdom and slavery and to religious oppression, even when they improve the lot of the overwhelming majority of a community. We

> reject, that is, any situation in which the welfare of the society is pursued in one-sided fashion, with disregard for the interests of groups, instead of in a distributive fashion, which sees to the interests of all (Höffe, 1995:40).

In the foregoing paragraph, Höffe asserts that we should reject a coercive power without distributive advantage for each, because its quality as law and the state should be negated. He thinks that we should negate the quality of law and the state for an unjust order, because justice appertains to law and the state by its very definition. As we will elaborate later, this indeed means that a state that does not guarantee any respect human rights does not deserve the quality of a state, due to the fact that human rights constitute the substance of justice. Yet, this cardinal assertion concerning the cord linking justice and an order of law needs to be substantiated and defended in the face of prevalent positivist contention against it. For Höffe's substantiation of his assertion for the essential cord linking justice, on the one hand, and law and the state, on the other, we should now focus upon his criticisms of legal-positivism.

IV.3. Legal-Positivism: A Concept of Law without the Element of Justice?

In the beginning of his critique of legal-positivism, Höffe first recalls that this is a very broad tradition associated with various figures. The sophists of the ancient Greek, Hobbes, Bentham and Austin, Kelsen, and Luhmann are much referred figures in debates on legal- positivism. Due to this variance in points of references, a bundle of arguments and forms of argumentations are taken as representative for legal-positivism. As the reference to the sophists invokes, legal-positivism is frequently associated with political amoralism. Yet, political amoralism can only be an implication from legal-positivism; it does not constitute the essence of legal-positivism. This essence can be grasped in reference to its agenda: the investigation of extant valid laws, not the morally right laws. It thus presents itself as an analytical theory of positive laws. In relation to the idea of justice, Höffe states, positive theories of law take three types: 1) the type of legal-positivism claiming that there is no place for justice in a scientific treatment of law (Kelsen); (2) the type arguing that justice is not a condition for validity of law (Hart); and (3) the

type arguing, from a socio-historical perspective, that justice is not pertinent to the modern law (Luhmann) (Höffe, 1995:70).

Among the foregoing types, the first one presents the strongest disclaimer against the element of justice. It adheres to the thesis of the strict separation between law and morality. This thesis holds that an objective (scientific) analysis of law can be achieved only when any proposition about justice is surpassed. As we have seen in our analysis of Kelsen, relativism about justice (more precisely, moral emotionalism) underlies this type of legal-positivism. The suggestion for expelling the moral point of justice from law is also articulated by the third variant. As instanced by Luhmann's functionalist account of law[144], the socio-historical form of legal-positivism asserts that imbuing law with a moral perspective of justice is neither desirable nor realizable under modern conditions. Luhmann suggests that modern life-world is one whereby complexity of situations reaches its peak. In the face of this complexity, only a law which "involves an institutionalization of arbitrary (*Beliebigkeit*) in legal change" can be functional (Höffe, 1995:110). For, morality or moral law, which consist, by definition, in general immutable principles, are incapable of regulating human interactions in these complex contexts. The second type of legal-positivism represented by Hart holds, on the other hand, a moderate thesis of separation between law and morality. It limits itself to the thesis that the legal theory should thematically concern itself with valid extant laws, and that the validity of a law is an issue which should be investigated in a manner independent of its moral significance. Thus, this variant of positivism does not raise the unjustified-radical claim that morality is purely a matter of subjectivity. Even more, as Hart illustrates, it can articulate an objective *minimal morality* which is implicit in a legal order (Hart, 1977). Yet, this minimal morality is argued to have nothing to do with the substantial content of laws, and to have no point of relevance for the question of the validity of laws.

Now, we are to deal with the foregoing moderate thesis suggesting that justice has no analytical relevance for validity of laws. In order to this, Höffe invites us to consider the famous Hobbesian motto at first: *non veritas sed auctoritas facit*

[144] Luhmann's dispersed arguments on law were collected in a recent book titled *Law as a Social System (Oxford Socio-Legal Studies).*

legem, i.e. *it is not the truth, but authority that makes law*[145]. This motto has usually been understood as the first clear formulation of the modern-positivist standpoint on justice. For, it has been understood simply as an outright renunciation of the legal-moralistic thesis formulated by Augustine and Aquinas: "that which is not just seems to be no law at all" (Höffe, 1995:75). That is, Hobbesian formula is reduced to simple assertion that law is an extension and function of power rather than being a function of justice[146]. Höffe contents that Hobbes' position is much more complicated than it seems at a first instance.

First, although it is true that the foregoing Hobbesian formula of law, *non veritas sed auctoritas facit legem*, attacks the natural law theory, its primary point is not concerned with the relation between justice and law, but with the fact that laws are *made* by human beings. Laws are not some already existing entities, which wait to be discovered by human intelligence through contemplation: laws are thus not natural but artificial, i.e. something coming to existence solely by virtue of being legislated by a human will. The point that law has validity by virtue of authority comes in a manner subsequent and dependent on this primary point. With regard to this later point, it is also essential to hold in mind that Hobbes speaks of "validity by virtue of authority", not "validity simply by virtue of a superior power". It is true that, for Hobbes, a will powerful enough to carry out itself is a necessary condition of any positive law. Yet, it does not constitute the sufficient condition. Only a will that is *authorized* can articulate valid laws. Thus, Hobbes' concept of law involves two necessary elements: "the power of enactment and the authorization for enactment and enforcement" (Höffe, 1995: 81). In line with this dual structure of law, Höffe suggests that it behooves to formulate Hobbes' theory of validity as "validity by virtue of *authorized* power" (Höffe, 1995: 82).

Once Hobbes formulates legal validity as a function of authorized power, the question arises for him: "in what authorization consist?" or "whence authority derives?". It is Hobbes' epoch-making answer to this question which brings about a third dimension to his theory of law. In his rejection of any *a priori* normative

[145] As we will see in the following, Höffe develops a rationalist/objectivist interpretation of Hobbes' theory of law, which is quite at odds with Schmitt's purely nominalist-subjectivist interpretation. In accordance with the objectives of this thesis, I do not need to involve in an exegetical debate on 'true' reading of Hobbes. I should nevertheless concede that I find Höffe's account of Hobbes elucidatory, even though it may seem somehow inflated from the standpoint of many interpreters like Schmitt who read Hobbes as a purely nominalist-subjectivist thinker.

[146] For, such a reductionist understanding of Hobbesian motto by Schmitt, see p.103 above.

anchor over human will legislating valid positive laws, Hobbes defies any conception of authority founded upon an allegedly objective externality such as Nature or God. Here is indeed found his essential strike against the theories of Augustinian-Aquinasian strand. However, he still works out their research program in that he searches a foundation for authorized power, which will respond to Augustinian question "what differentiates law and the state from robber-bands enlarged?" Eventually, Hobbes, the prime theorist of social contract, provides a response that is immanent to human will: authorization can only be grounded in nothing but the *consent of all parties* [*allgemeine Zustimmung*] *affected* by the coercive power.

To the extent that Hobbes' elaboration of validity of laws culminates in a conception of authority founded upon "consent of all affected", Höffe states that his concept of law can be more precisely formulated as "validity by virtue of a power authorized by all affected parties" (Höffe, 1995: 83). Höffe further contends that, at this culmination point, it becomes evident that Hobbesian concept of law has a dimension which articulates the standpoint of legitimacy or justice as the terminating point in considerations of validity of laws. For, this dimension reveals that, for Hobbes, "the character of law does not devolve on just any coercive force, but only on that coercive force exercised by an institution which has been empowered on grounds of justice" (Höffe, 1995:84).

In Höffe's account of Hobbes, there is in Hobbes' terminating standpoint of legitimacy or justice not only a formal criterion but also a material criterion. In the formal sense, justice means that there is a legal-political order that deserves its name only when there is consent of all affected. The material sense is revealed when Hobbes argues for the reason why people (should) submit to the coercive power of authority: unlimited yet insecure natural liberty is exchanged for the sake of mutual security of civic liberty (Höffe, 1995:83). In line with this, Höffe argues that the idea of distributive advantage as foundational for a legal-political order lies under Hobbes' theory of law.

If this is so, i.e. if Hobbes provides a justice-relevant concept of law in the last instance, the question arises: why has he been taken to be the founder of the modern legal-positivist school? In the view of Höffe, this ambiguity lies in the restrictive role Hobbes recognizes for justice in the concept of law and the state. Hobbes employs the perspective of justice merely as a *foundational* or *constituting*

principle for law and politics (Höffe, 1995: 84-85). That is, justice in Hobbes serves only for authorizing the coercive power of law and the state, i.e. for the legitimation of the existence of public powers. Yet, Hobbes represses the role of justice as a *determining* or *limiting principle* for law and the legal order: "justice for Hobbes constitutes but does not define law; he advocates a legitimation of law and the state without any limitation of law and the state" (Höffe, 1995:85). Hobbes thinks that once justice as distributive advantage plays its role of constituting the legitimacy of the establishment of political-legal institutions, the established authority can and should perform its function only in a manner whereby it rules without any constraints. That is, public authority should then be conceived as having a "blank check" (*carte blanche*) for justification of any of its acts. It is by virtue of such a "blank check" that it is called the sovereign, and that it resembles the undefeatable see-monster called the Leviathan. Once the sovereign comes to existence, Hobbes thinks, she is accountable in her ruling substantially in respect with the principle of justice (i.e. principle of distributive advantage of all subjects) only to the "internal court" (i.e. conscience or God), but not to her subjects, which have consented on granting to her the sovereign power at once.

We will later see more clearly that such a Hobbesian restriction of the concept of justice merely to a constituting or legitimating function –a restriction which invokes political absolutism– is not theoretically defensible from the standpoint of Höffe. For the moment, we will consider Höffe's employment of the three dimensions of law Hobbes detects (i.e., law as will or power, law as authorization, and law as authorization by consent of the affected) for a systematic classification of legal-positivist theories and then a critical examination of them. Höffe calls these three versions respectively as (1) naïve legal-positivism (Bentham and Austin); (2) reflective positivism (Kelsen); and (3) residual positivism (Hart).

Naïve Legal-positivism designates the so-called imperative or command theories of law. Their essence lies, thus, in a conception of law as will and supreme power. Höffe points out that, for a command-imperative theory of law, a legal norm comprises four elements: a positive law is (1) a command, (2) deriving from a supreme power, (3) attached by a threat of sanction in the cases it is disregarded, and (4) generally obeyed by subjects because of this threat (Höffe, 1995: 86). Such an understanding of law evidently inheres a deterrence theory of obedience and a psychology of negative hedonism (according to which avoiding displeasure is the

basic orientation in human action). In understanding law simply as the command of a superior power, naïve legal-positivism discards the moment of authorization as well as the moment of the consent of the affected parties from the definition of law. Here, in the view of Höffe, we are faced with a "sociological reductionism"; since law can be explained by nothing but by "pre- and extra-legal social facts" once one abandons the category of authorization (Höffe, 1995:87). In this way, naïve legal-positivism grounds the distinction between the coercive power of law and a "pure" or "naked" force on the basis that the former appropriates a relatively much superior force: the one is the sovereign power of a political-legal order if his force is so superior that all others obey (at least, generally) him because of their manifest deficit of power in the face of him. Therefore, for naïve legal-positivism, anyone who speaks of the normative force of law is nobody but one stunned or duped by the "Gorgon's head" of power[147]. This means that naïve legal-positivism is less a theory of law than an emancipatory-critique of law.

However, Höffe states that naïve legal-positivism suffers from serious defects even when conceived as an "emancipatory-critique" of law. First, quite strikingly for a theory which has a predominantly Anglo-Saxon origin, this standpoint cannot explain common law. For, common law presents itself in the form of a set of already (eternally) valid laws in existence; and it is thus incompatible with the voluntarism of the command theory of law. As is best illustrated in the political-legal systems of the United Kingdom and the USA, common law signifies that law is, at least partially, a constraint on the power of political authority, which may be altered but never completely eliminated[148] (Höffe, 1995:88). Second, there is also the difficulty in that while an imperative or command holds for others, a legal norm

[147] In the Greek mythology, Gorgons are creatures whose gaze has the effect of turning someone into a stone. Therefore, the term 'Gorgon's head' excellently symbolizes the situation whereby one comes close an area of taboo. This is why the ancient sanctuaries usually tried to protect themselves from the contaminative entrance of infidels by erecting a figure of the 'Gorgon's head' on the point of their entrance. Hence, the figure of the 'Gorgon's head' suggests that obedience to a rule stems from the following fact: the power decreeing the rule is so superior as to have the effect of foreclosing the cognizance of alternatives other than obedience to rule on the part of those to whom the rule is directed.

[148] At this point, Höffe also refers to Austin's own arguments on common law, so as to show that common law cannot be accounted for by a naïve legal-positivist perspective. As he tells, Austin argues that common law is indeed primarily nothing other than conventional morality. Yet, they become positive laws to the extent that the courts as the agent of sovereignty recognize them as laws. However, Höffe contends, the very reference to the courts as agents of sovereign involves an implicit recognition of the necessary moment of authorization, which is at odds with the voluntarism of Austin's command theory. For, the courts can be conceived of as agents of sovereign not by the virtue of their supreme power (they simply lack of such a power), but only by virtue of their authorization as such within the system of political-legal order (Höffe, 1995:88-89).

is usually directed to its authors as well. As we have seen in our examination of Kelsen's theory, even many positivist authors disclaim the imperative theory for this reason and conceptualize law as rules or norms. Third, while the imperative theory holds that threat of sanction is essential to any legal norms, this is only true for criminal law, not for most of civil laws[149].

One should yet underline that the defects counted just above are marginal in comparison to the major defect of naïve positivism: its incapability of making a qualitative distinction between a political-legal order and a crime syndicate. This incapability is best illustrated in Austin's very arguments for distinguishing between the sovereign power and the holder of a sheer force. For him, Höffe recalls, the sovereign is the one "who is appointed uniformly and unambiguously by the entire society, and must obtain obedience from most of the people most of the time" (Höffe, 1995:92). This definition can be understood in one of these two senses: Either "the appointment by society" has the sense of "authorization", and thus Austin defies here his own imperative theory of law; or the sole difference between a Mafia and the state lies in that the latter is an "enlarged" form. In the latter case, Austin should concede that a paramilitary group or a crime syndicate will turn out to be a state when its influence extends over the majority of a society (Höffe, 1995:92). For, due to the fact that there is no objective restriction regarding the substantial content of a political-legal order, any commander acquires the status of the sovereign and his any command acquires the status of law by the sole virtue that he can enforce his will over the entire society. Thus, naïve legal-positivism, with its implications that a valid law is enforceable force and the political-legal authority is a kind of "robbers-band enlarged", is an indefensible position.

Reflective legal-positivism presents an upgraded approach which tries to overcome the impasses of the former one. This upgraded version, which is best illustrated by Kelsen's pure theory of law, rejects the imperative theory of law while still holding to the claim that a threat of sanction is constitutive for law. In the view of Höffe, the essence of reflective positivism lies in the second moment of law we detected in Hobbes: law as authorized coercive power. As we know, Kelsen

[149] In this juncture, Höffe also attacks Kelsen's presentation of formal coercions in civil law as a particular form of penal coercions, i.e. his argument that the essence of civic laws, too, lies in a particular form of sanction: the nullification of a civic procedure. See Höffe, 1995:91-92. Höffe's arguments against à la Kelsen understanding of formal coercion as a particular form of sanction are important in that they challenge Kelsen's view that sanction (rather than the content of the rule) is the most essential element of a legal norm.

holds that a prescription is law only when its author is conferred upon the power to proclaim and apply such a prescription within the legal order. The legal order itself is thus a hierarchical system of authorizations. On the one hand, such a view remarkably diverges from Austin's conception of law. For, law is not explained with some pre- and extra-legal social reality like the strength of someone in enforcing his will over others. Rather, the explanation of a valid law is fully internal to legal phenomenon itself: that a legal norm is valid because it is authorized *within the legal order*. On the other hand, Kelsen's position also opposes legal-moralism for the same reason, i.e. for the reason that it aspires to be a *purely* legal explanation which excludes moral-explanations as well as sociological explanations. Thus, Kelsen rejects the role of justice in the evaluation of the validity of laws in a way not less outright than Austin. This is evidenced in Kelsen's disturbing assertion that: "any content might be law".

Since I have elaborately presented Kelsen's theory in the second chapter of my study, I will skip Höffe's sketch of it. I will rather focus on the objection Höffe raises against Kelsen's theory. Höffe's objection devolves upon the concealed implications of Kelsen's distinction between a legal community and a gang of robbers. He first notes that Kelsen presents his distinction in a purely formal way: while coercive powers of a gang of robbers are directed *outwards*, the coercions of laws are directed *inwards*. More accurately, while a gang of robbers establishes an asymmetrical relationship whereby the outsiders exclusively pay the burdens and insiders (i.e. the robbers themselves) collect the benefits, there is a more symmetrical relation in the case of a legal order since it regulates the mutual relationships of members. As Kelsen himself underlines, collective security or relative peace is thus the function of law[150]. Quite similarly to what I argued in the second chapter, Höffe thinks that Kelsen's analysis comes, at this point, to face with a substantive (non-formal) principle which would be able to both "help to defend the existence of a legal order…[and] serve the distinction between a legal order and non-legal coercive order" (Höffe, 1995:100). This principle which both legitimates and limits law and legal order is nothing but a minimal conception or a fundamental layer of justice. Whereas Kelsen, for whom the moral standpoint of justice constitutes a taboo, i.e. the "Gorgon's head", obstinately insists: neither

[150] See, p.33 above.

collective security can be taken as a principle of justice, nor this function of law can be conceived as constitutive for law. This is because Kelsen is not attentive to the distinction between the fundamental layer of justice and the moral principles of intermediate (more concrete) level. Hence, his righteous claim that an unjust legal obligation can still be a valid law (since it is proclaimed by an *authorized* power) leads to the bizarre claim that law and the legal order can take any content.

To sum up, Höffe thinks, Kelsen's reflective legal-positivism (i.e. his theory of law as authorized coercive power) should have led him to the recognition of the third moment of law: the moment whereby all legal authorizations and the legal order itself is authorized on the basis of a supra-legal principle. This supra-legal principle is the one Höffe calls political justice as distributive advantage *–the principle which prescribes that only those arrangements of coercive power which consist in a minimum level of symmetry in the sense of taking all affected parties as insiders (i.e. holders of both rights and duties) are called political legal orders in opposition to crime syndicates.*

Residual legal-positivism is the sole positivist version that embraces the third moment of law. Höffe refers to Hart, the influential British legal-philosopher, as representative of this version. In his definition of law as a complex system of rules and in many other aspects of his theory, Hart seems to be only presenting the Kelsenite position without its Neo-Kantian philosophical baggage, i.e. in a way which would be more charming to the common Anglo-American reader. Yet, Höffe underscores, Hart's account remarkably differs from Kelsenite theory in one crucial aspect. In explaining the ground of legal obligation, Hart is not satisfied with the elements of efficacy and authorization, but introduces the element of "recognition": "the decrees of a lawmaker, like the rules of a game, meet not only with the habitual obedience of the affected parties, but also with their free recognition" (Höffe, 1995:103). That is, while naïve positivism (Bentham and Austin) explains legal obligation with a "must" necessitated by the superior power of the commander and Kelsen's reflective positivism with an authorized "ought" that is by and large efficacious, Hart finds the source of legal obligation in "free will" of, at least, the great majority.

Hart's theory of recognition stands, thus, as an exception within the positivist tradition. However, Höffe states that this theory is also *sui generis* among theories of recognition. This is because Hart conceives the element of recognition in a solely

empirical-psychological fashion (Höffe, 1995:103). For, he means by recognition simply the actual acceptance of a legal order and its laws by the great majority of citizens in a society. In this way, his theory of recognition defies an inquiry into the conditions which a legal order should hold for its recognition as such. Höffe contends that this *empirical* conception of recognition is problematical for several reasons. One reason is that it may be "partly too wide and partly too narrow" for the delineation of a legal order from a non-legal power structure: people may sometimes appear to be giving actual recognition for a tyrannical structure of power; and they sometimes appear to not to be giving actual recognition to a coercive order which otherwise holds the credentials for being a legal order. Also, the inquiry into the existence of actually existing "free-will" for submission to laws of a particular order on the part of the majority of citizens is an impossible inquiry. This is due to the fact that what appears as a free-submission may indeed be an internalized fear of sanctions operating on the unconscious and instinctive level. As Höffe notes, Hart invokes citizens' feeling of repentance in the case of disobedience to laws to delineate the free-acceptance of laws from the fear of sanctions. Even when we take aside the question whether repentance reflects free-acceptance or an operation of a coercive power structure on the level of unconscious[151], there is the crucial problem that binding law with such a moral feeling as repentance *over*-moralizes law. For, we thereby lose the distinction between the sphere of comprehensive-personal morality (*Tugendlehre*) and the sphere of justice (*Rechtslehre*). Once the problem of obedience or disobedience to law is linked to moral feelings like repentance or peace of mind, this means that law or legal obligation is directly associated with the sphere of personal morality, rather than the sphere of institutional-political morality. As Höffe warns, it should always be hold in mind that, while morality in the comprehensive sense is based on willingness (i.e. internal coercion), *external* coercion constitutes the essence of law (Höffe, 1995:104). Hence, the problem of recognition (i.e. the problem of the basis of obedience) cannot be resolved by merely referring to subjective feelings of

[151] The proposition that 'what seems to be free-consent' in a first instance might, indeed, be a historical-social imposition over individual is fundamental for the various strands of contemporary social-political thought such as Marxist or Marx-inspired theories of ideology, Lacanian school of psychoanalysis, early period of Frankfurt school, and postmodern and post-structuralist theories of society and culture.

subjects of law in an empiricist fashion, but by setting forth an objective-normative ground for obligation in a rationalist fashion.

In this way, Höffe completes his critical survey of legal-positivist approaches. The basic conclusion which Höffe derives from this survey is: "without certain collective (more precisely, distributive) interests, positive law cannot be adequately distinguished from an external force" imposed on people (Höffe, 1995:105). This positivist failure of distinguishing law from brute force does even persist in Hart who introduced the requirement of recognition of law by the subjects. This is because of the fact that one cannot distinguish "free acceptance" from "forced acquiesce" on an empiricist-positivist ground: what seems to be "free acceptance" may indeed be an instance that the subject acts only so as to avoid sanction which will follow if she disobeys the rule. This means that an objective *analysis* of law is incomplete without taking into account the third dimension of law, i.e. the element of recognition understood in a normative (justice-theoretical) fashion. Legal-positivisms are insistently deaf to this insight, because any *positivist* analysis of law adheres to two basic presuppositions: given the distinction between the form of coercion and the content of coercive prescriptions, (1) law can be determined (defined) solely by the form of coercion, while (2) justice wholly belongs to the content. The logical inference from these presuppositions is the basic positivist thesis that justice of a norm has nothing to do with its quality as a law. The inevitable problems we face with in the most sophisticated legal-positivist authors like Kelsen and Hart constitute, at least, a *prima facie* evidence for the conclusion that an analytical research program pursued with these presuppositions are deficient.

However, the conclusion that derives from Höffe's critical examination of legal-positivism is not so simple that one can thereby easily embrace legal-moralism. The moral standpoint of justice which plays a role in the definition of law is the *constitutive* or *original* justice that should be distinguished from justice as a normative principle testing righteousness of individual laws. Although the original justice (the principle that a minimum level of symmetry in the sense of taking all affected parties as insiders –i.e. as holders of both rights and duties–) is constitutive for a political-legal order as such in the sense it legitimates a power structure as a political legal order, the *validity* of individual positive legal norms does not depend on their being justified by the idea of justice in its normative sense,

but by their being proclaimed by authorized powers within a political-legal order. Thus, Augustinian moralism which holds "that which is not just is not law" is wrong as well, if the foregoing assertion is meant as raising the criterion of the *validity* of positive laws. Augustine's formula should be understood as defining law as a system, i.e. the legal-political order *in toto* or, alternatively, as defining the criterion of *excellence* for individual laws. However, Höffe suggests, it would be a false formula if it were understood as defining the criterion of validity for *any* individual legal norm.

In the light of all these arguments, Höffe provides a sketch of three essential features of law. The first two of these features are formal while the last one is substantial. First, law is a coercion authorized within a hierarchy of authorizations. Second, laws have a rule-like character in that, within the legal order, they are usually made categorically (rather than hypothetically) binding[152]. Third, there is the distinguishing characteristic which Höffe calls the moral standpoint of *original* justice built on the distributive advantage of each[153]: while in an organized crime the parties subject to coercion (i.e. those who are disadvantaged by it) are sharply separated from those who exercise coercion and benefit from it, the two groups should come together as the bearers of mutual rights and duties in the form of social organization we call the legal order (Höffe, 1995: 107).

An important point that should be emphasized in relation to this architectonic of the concept of law is that the third moment is the superior (or genuine) moment distinguishing law from other forms of social coercion. Höffe indicates that this

[152] I think that what Höffe means by the rule-like character of laws may be explained by comparing it to Kelsen's conception of law. For Kelsen, any legal norm presents a hypothetical (conditional) prescription in the sense of the following example: you should not steal if you do not wish to be imprisoned for a certain time. In opposition to this, Höffe supports a common-sense understanding of laws as acquiring a categorical status within political-legal order: the legal prescription that "one should not steal" simply means that "I, as a subject of the political-legal order, should not steal". As Höffe himself indicates, however, civil-law norms concerning procedures cannot be understood in this simple form.

[153] It may be noted that there is a blatant affinity between Höffe's formal definition of the moral standpoint of justice as the distributive advantage of each and John Rawls's two principles of justice he elaborated in his famous *A Theory of Justice*. Rawls's first principle prescribes that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty of others", while his second principle suggests that "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all" (Rawls, 1971:60). Yet, Höffe is not contented with Rawls's suggestion on the necessity of a somewhat tentative (or, open-ended) definition of the standpoint of justice. Rather, as we will see below, he thinks that the moral standpoint of justice should be considered as encapsulated (or substantialized) by the idea of human rights. Indeed, this is one of the basic distinctions, which Aslı Çırakman emphasized in her article comparing Rawls and Höffe in regard of their respective conceptions of political justice(Çırakman, 2000: pp.144-147).

insight is incorporated within modern political-legal orders in the very assertion of the supremacy of basic rights or of the inviolability of human rights. This assertion indeed means that the "rule of law", which means an order whereby coercive power acts only out of authorization and in accordance with pre-established and impartially applied norms and procedures, has only a *subsidiary* importance in relation to fundamental role played by *original* justice, which consists in human or basic rights. If the latter is absent in a particular system of power, it will be more reasonable to call it as a "perversion of political-legal order" rather than a political-legal order. This explains why we rightly think that all that is given to us in the form of positive norms and procedures (i.e. an existing rule of "law") should be broken off in a case where abiding to them would bring about a violation of human rights of anyone: that is, we rightly think that *justice surpasses the rule of formal law.* Indeed, as we saw above in this chapter, the latter (which is sometimes called subsidiary justice) has of significance only because it is eventually instrumental for the former[154].

We have so far seen that the concept of law has an essential connection with the concept of political justice –a connection which is left unaccounted in legal-positivist paradigm with its various types. Now, we should examine Höffe's argument that there is also an essential connection between the concept of justice and the concept of the state in that the existence and the form of existence of a state is a function of justice, i.e. the state is conceptually necessitated and defined by justice. To see why this is so, I should now engage in Höffe's critique of anarchism, i.e. of the modern current of thought which denigrates the state (indeed, any instance of authority) as unjust. Hence, Höffe's critique of anarchism promises both a justification and a limitation of the state on the basis of the concept of justice.

IV.4. Höffe's Critique of Anarchism: the State as a Necessary Derivation from the idea of Justice

In most general terms, anarchism comprises the kind of ethical-political discourses which reject the legitimacy of any form of rulership (*Herrschaft*). Many think that anarchism is a discourse which is simply defied by the human reality

[154] See, page 169 above.

itself. For, reality proves that human co-existence is always encumbered with rulership of different forms. Yet, such an easy refutation misses the very point of anarchism, because the anarchism is essentially a *normative* standpoint opposing the very existing reality. Very simply, anarchism takes the principle of freedom in an unlimited sense as the good/the right, and refutes any form of coercive power since the latter constitutes a hindrance/a negation of freedom. Hence, a satisfactory refutation of anarchism, i.e. a successful defense of the state for Höffe, should take the form of a normative argumentation, not of a realist one based on empirical improbability. We are to investigate such a normative argumentation at this part. Yet, it will be better to note Höffe's clarifications concerning the concepts of anarchy and rulership at first.

Höffe points out that, from the very beginning of political philosophy, anarchy has been a persistent theme. The Greek term *anarchia* literally means "the freedom from rulership (*Herrschaftsfreiheit*)". Plato's and Aristotle's views on *anarchia* are representative for all Greeks. Both of these authors designate *anarchia* as disorder and unlawfulness, more radically as chaos. They take it granted that such a situation is *unnatural* for human beings. In their view, human nature, i.e. human potentialities, can be developed fully only through a cooperative existence which requires, by definition, *arche* (the rulership). Höffe underlines that, for Plato and Aristotle, both the collective advantage of cooperative existence of human beings and the linkage between such an existence and the rulership were so evident that they did not even imagine that *anarchia* could be defended in a normative fashion. In quite opposition to the moderns, their conception of the rulership had been heavily loaded by an affirmative import. In the medieval era, a relatively different approach to anarchy and rulership come to the scene. The Christian philosophers conceded that rulership in social co-existence of human beings was indeed not desirable in principle. Nevertheless, they think, it was necessitated by the fact of original sin (not by the nature) and could be overcome only at the moment whereby God would return so as to establish his kingdom. This means that political rulership was conceived as a necessary lesser-evil which human beings should endure so as to avoid greater-evil. Hence, one finds in the Christian thinkers only a conditional-political (not an unconditional-moral) refutation of the freedom from rulership.

It is yet in the modern era that anarchism acquires a quite remarkable significance. This is, to a great extent, due to the paradigm shift occurred at the

edge of modernity: the replacement of the cooperation model of political order by the conflict model. In explicitly defining external coercion as evil, the latter model inevitably brings into consideration burdens of political order on the part of individuals. This makes necessary to provide a normative refutation of an existence free of rulership. The well-known thought-experiment called the state-of-nature has aroused out of this necessity. Much more strikingly, however, we begin to encounter with theorists who explicitly defend anarchism as an ideal in the modern age. Proudhon, the first influential anarchist, advanced a positive definition of anarchy as a social order based on free contracts rather than coercive powers (Höffe, 1995: 130). In doing this, he was challenging the ages-lasting assumption that any social order depends upon the existence of coercive powers. Following Proudhon, Kropotkin claimed that true harmony in human co-existence can be achieved not by submission to laws and authorities, but by free agreements of freely constituted groups. There is no need to enlist all modern authors who embrace anarchist arguments on their own fashion from the 18th century to now on. The important thing is that the possibility of a rulership-free social co-existence (i.e. of a state-free co-existence) is acknowledged and even defended on moral grounds in the modern age.

In order to encounter anarchism as a normative discourse, Höffe suggests that one should, at first, advance a non-polemical conception of rulership. This conception should be neither positive nor pejorative, but neutral in the sense that while it is sensitive to the element of coercion in a political rulership, it can also distinguish between a political rulership and a robbers-band enlarged. Höffe advances such a non-polemical conception *via* a differentiation of 3 basic levels of rulerships: (1) pre-political rulership, (2) political rulership, (3) post-political rulership (Höffe, 1995:135-136). The pre-political rulership is also called the natural rulership since it designates forms of hierarchy arising from natural superiorities like "manual dexterity, physical strength, or emotional security, as well as certain types of knowledge and capacity to give advice" (Höffe, 1995:135). In fact, the much more elementary form of natural superiority, i.e. the superiority of parents over children, is usually taken as the archetype of all pre-political rulerships. Yet, in view of Höffe, this may easily lead to confusions in defining pre-political rulership. For, a parents-children relationship, in its basic function, is a one-sided and non-reciprocal relationship: one party (parents) provides protection

and aid while the other party (children) derives benefits from such a relationships. That is to say that, the *original* parental authority is not a justice-relevant relation in that the inferior derives all benefits from it and the superior gains nothing. Hence, it is much more appropriate to call the original parental authority as "a degree zero of *Herrschaft*" rather than "natural or pre-political *Herrschaft*" (Höffe, 1995:135). In the case of a parent-children relation, however, a pre-political rulership occurs at the moment whereby the authority of parents expands temporally and materially beyond the scope determined by the uprising of children. In this way, a surplus-value of parental authority is brought about and a first level, i.e. a pre-political, rulerships comes to existence among the elder and the younger. Thanks to this surplus-value of their parental authority, the elder acquires a long term benefit from their relationship to the younger. *Vis-à-vis* the pre-political rulerships, hence, Höffe suggests that they are the forms of hierarchical relationships established on both the formal and material criterion of justice: formally, the inferior party *freely consents* to the hierarchical relationship by accepting the protection or aid that the natural superior provides; and, materially, there is a mutual benefit for each in this relation.

On the other hand, Höffe's definition of the political level of rulership is very concise: "political *Herrschaft* consists in firmly articulated official empowerments, which are conferred on individuals for a specified period; political power consists in the power of office" (Höffe, 1995:136). In regard of this definition, one may note that it resembles much to the Kelsenite view of the state as an ensemble of authorized offices, which should not be personified. The political level of rulership may be, thus, understood more clearly in its contrast to the post-political level of rulership whereby personification takes place. In this level, coercive powers are re-anchored to individual persons rather than offices. There is a fundamental (once and all) authorization of a person as the incarnation of the order. This fundamental authorization provides the ruling person with, at least, a potentially absolute discretion in exercising power. This assumption of a fundamental authorization for a person causes nothing less than the obliteration of the distinction between *imperium* and *dominium*. *Imperium* was the Latin term used to designate the sovereign power to rule over man[155]. It is true that it denoted the discretionary

[155] My sketchy account of the distinction between *imperium* and *dominium* is a summary of what I could grasp from Michael Oakeshott's excellent genealogy of these terms elaborately presented in his *Lectures in the History of Political Thought*. For an exact understanding of these and certain

power of the ruler, yet it always involved a recognition of this discretion by the virtue of fact that *imperium* is a public and legal authority over human beings, i.e. beings who has a free capacity to choice. *Dominium*, on the other hand, originally stands for the relationship between an area or a thing and the man who has it as its private-property. Thus, it denotes an absolute or unlimited right to employ the thing in any manner one may wish. Although the distinction is Latin, the ancient Greeks were, too, aware of the difference between the political rule as such and the rule consisting in property-like relationships. For instance, the very beginning part of Aristotle's *Politics* emphasizes that, in opposition to the rule of a father over his household, politics is a relation between free and equal peers. In both the Ancient Greek and Roman accounts, *dominium* had been expanded to the relationships between human beings only in the specific situations of slavery and extreme forms of serfdom whereby a group of human beings reduced to a status which is hardly distinguishable from *thingness*. Hence, the post-political level of rulership, which marks absolutisms of the late medieval and modern eras, stands as a crucial regression in relation to the ancient wisdom *vis-à-vis* the nature of the "political" relation. For, defining sovereign power to rule as "the right to dispose of an area and its inhabitants as one wishes" is a crucial confusion of the public and legal power of *imperium* with the private power of *dominium*. This confusion, which lies under so many "realist" accounts of political-legal power (for instance, Weber, Marx, the figures of Frankfurt School and, of course, Schmitt), also explains why repugnance with respect to political-legal power is so widespread in modernity. That is, public-political power seems so repulsive to the moderns, because they have lost insight into the genuine meaning of "a public-political relationship": the relationship wherein all parties recognize each other as *persons*. Once this insight is lost, the state (the public-legal power) seems to be greatest evil, because it has quantitatively greatest power.

Having advanced this three-levels conception of rulership, Höffe suggests that anarchism can be conceived of "as a progressive undoing of *Herrschaft* in three stages" (Höffe, 1995:136). In a way reversing the levels of rulership, there are: (1) moderate anarchism which opposes the post-political, i.e. personified, forms of

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relevant notions, like *autoritas*, *potestas*, and *gubernaculum*, I may recommend this book which is comprised of notes from Oakeshott's lectures on the western political thought delivered at the London School of Economics and Political Science.

rulership; (2) strict anarchism which opposes the political-legal form; (3) radical anarchism which opposes any form of social coercion beginning with the natural rulership of the parents (Höffe, 1995:137). With regard to the first form (moderate anarchism), Höffe implicates that it may be called indeed the zero-level of anarchism, because it does not argue for the freedom from rulership, but freedom from all authorities anchored to personalities. To a genuine anarchist who sees even an ideal constitutional democracy as illegitimate, this position would sound as a fake anarchism. Yet, the acknowledgement of such a zero-point of anarchism is important for our inquiry in that it shows anarchism has, at least, a very reasonable core at its basis. In regard of the second form, i.e. strict anarchism opposing the political-legal institutions, Höffe points out its inconsistency: since the political-legal coercive power is the least arbitrary (impersonal) and the most normatively-restricted form of social coercive power, a consistent anarchist rejecting the political-legal coercive power should also oppose the other forms of social coercion. That is, a consistent anarchist should be a radical anarchist opposing pre-political level of rulership as well as the political level of rulership.

It has gone so far without saying that the basic objective of anarchism in its proposal for undoing all forms of social coercion is the maximization of freedom of action for all. Now, it should be emphasized that there is nothing normatively wrong with the objective of the maximization of freedom of action for all. Indeed, such an objective is perfectly compatible with what we have formulated in the previous part of this chapter as the moral standpoint of justice, i.e. the principle of distributive advantage. Yet, what remains really questionable in the anarchist thesis is this: Is the freedom of action of everyone attainable *via* undoing of rulership? If this question can be responded negatively, we will thereby have attained not only a justification of the state, but also a limitation of the state by the moral standpoint of justice.

Now, we are to engage in "a critique of anarchism with the intent of legitimizing (i.e. both justifying and limiting) the state-coercive-power". In the view of Höffe, such a critique should necessarily take the form of *a fundamental ethics plus a fundamental anthropology*. For, such a critique will advance two basic propositions: first, there is the normative-moral claim of the standpoint of justice that human coexistence *should* serve the distributive advantage of each; second, there is the descriptive claim that "there *are* such distributive interests, which may

be secured by social coercion and remain beneficial all things considered" (Höffe, 1995:139). This descriptive claim falls naturally under the category of fundamental anthropology conceived as the "science" of essentials of the *conditio humana*.

The fundamental anthropology Höffe has in his mind is a "science" that should argue from the universal presuppositions of human life. It should thus be "abstracted from all anthropological variables, psychological differences, and particular historical and social experiences" (Höffe, 1995: 184). Particularly, it would not involve any premise that would be controversial to anarchist perspective from the very beginning. For instance, despite all evidence to the persistent existence of conflicts and violence in human history, one cannot argue from this historical fact that conflict is an anthropological constant of human social life. Recall that the authors like Rousseau, Proudhon and Marx argued that it is not human nature but historical constructions like economic conditions, private property and capitalism that are responsible for the persistency of conflicts in our social world. Of course, one is not obliged to agree with these thinkers; but their contentions reveal that the ever-presence of conflict in human history may be explained on many bases other than "malign" human nature. Likewise, the fundamental anthropology, of which we are in search, should be beyond both optimistic and pessimistic accounts of human nature. The common characteristic of such accounts is that they all reduce the inexhaustibly complex structure of human nature to a few particular traits.

To sum up, the mission of the fundamental anthropology is to prove, by the help of least number of uncontroversial premises, both that the conflicts are unavoidable and that coercive resolution of these conflicts is beneficial for each. Then, Höffe declares that the enterprise of fundamental anthropology may be best pursued in the form of the thought-experiment called the state-of-nature (Höffe, 1995: 185). This thought-experiment will involve two parts: the stage of designing, and the stage of performing. In the first stage, we will design a situation of human life where there is no social coercion and all variable characteristics of human life are eliminated. In the stage of design, only those anthropological constants, whose absence will make the thought-experiment an idle exercise, are acknowledged. In the latter stage of performing of the thought-experiment, it will be first investigated whether or not the state of nature (i.e. a human life devoid of any social coercion) is viable. If not,

we will search whether it is more beneficial for each to regulate social coercion in a political form rather than non-political forms.

It will be appropriate to express, at the very beginning, the anthropological constants which will be employed in the design of the state-of-nature. These are: (1) a human life takes places as co-existence in a shared environment; (2) human beings are *persons*, i.e. beings with the freedom of action; (3) human beings are vulnerable to violent actions of the other members of their species. Let us now shortly explain these constants. The first one, which simply underscores the fact that we all have been "thrown together" in the same world, is so self-evident that it defies any further debate. This seemingly banal proposition for our thought-experiment is deserved to be expressed, because it recalls the fact that we have a spatial-physical proximity that makes interaction among us probable. With regard to Höffe's second anthropological constant, i.e. the freedom of action, it should be, at first, underlined that it has nothing to do with Kantian autonomous will that legislates her own rules in complete independence from external and internal nature. Rather, the freedom of action is what Kant referred as the external freedom of choice (*Willkür*): it is up for an agent to decide both her ends and the means of the attainment of these ends. This is an uncontroversial level of freedom, because it is compatible with acknowledging that we are creatures conditioned and even determined, in a heteronomous manner, by both our internal and external nature. It only suggests that we are not things, but *persons*, i.e. beings whose form of existence is mediated by their capacity to reflection over what they experience. In opposition to animals acting out of instinct, this specific trait of human action, i.e. the capacity to act out of reflection, comprises freedom in two senses: first, an action out of reflection is an *intentional* (*conscious*) action; second, it is *chosen* among various possibilities. To illustrate how uncontestable such conception of human freedom of action is, Höffe gives the example of one of our most organic (i.e. naturally determined) needs: nutrition. He argues that, though the feelings of hunger and thirst impel us instinctually toward nutrition, "what, when, and how often we drink and eat, how we find, prepare, and store up provisions, are all placed in our own hands and bound up with additional (aesthetic, social, etc.) factors" (Höffe, 1995: 223). The third constant, i.e. our vulnerability from violent actions of others, is resulted partly by our freedom of action and partly by our physiological-psychological formation. Given that human species is biologically the most

indeterminate being of the nature in that the nature very rarely fixes its means, ways and even aims and goals[156], and given that we are physiologically not constituted as crab-like structures having shell-covered bodies, our life and limbs, and all subsequent possessions are exposed to threat of others' violent actions.

Having acknowledged these constants at first, we need some abstractions in order to reach to the state of nature –a situation which should be understood not in contrast to history or society or civilization, but only in contrast to any form of co-existence involving coercive authority. More precisely, Höffe thinks, we need a three-stage of abstraction (Höffe, 1995: 185). First, there is a historical abstraction whereby all differences among different forms of rulership are erased. In this way, we take aside all historical peculiarities in order to put at the stake the question whether *any* rulership can be legitimate. The second moment of abstraction is more decisive and radical. Here, we abstract from "the legal and political form of human co-existence" (Höffe, 1995: 188). According to Höffe, this level of abstraction marks the point where Lockean models of the state-of-nature fail to pass out. For, Locke imagines the state-of-nature as co-existence where the state-power is absent while law persists: a situation of the life of perfect freedom "led within the bounds of the Law of Nature" (Höffe, 1995: 188). Locke's Law of Nature, like any other law, is by definition a limitation over individuals' exercise of freedom. However, the basic objective of the thought-experiment of the state-of-nature is to justify the requirement of some limitations over the exercise of individual freedom. In postulating objective limitations for freedom at the very beginning, hence, Locke commits a *petitio principii*, that is, he "prematurely breaks off the process of abstraction required by the state of nature and thereby introduce an element into the design of the experiment about which the experiment is supposed to inform us" (Höffe, 1995: 189). To avoid such a *petitio principii*, Höffe emphasizes that we need a third level of abstraction whereby the state-of-nature is conceived of as a situation where not only the state but all forms of law are absent. In a way paying a tribute to the respected authority of Locke, he then differentiates between a

[156] On the basis of "a biologically oriented anthropology", Höffe develops a conception of man in the following lines: "man is a poly-component being, lacking in definiteness and possessed of an indeterminate but determinable manifold. He has nearly unlimited possibilities for perception and for interaction with what he perceives, for developing an interest in something and forging a relation with it" (Höffe, 1995:221). This conception emphasizes plasticity of our nature, our sophisticated ability for adaptation, and our openness to the world, and indeterminateness of our action-oriented desires.

secondary state of nature and a *primary state of nature*. The former designates the situation where "we abstract from the political form of human coexistence, from the public legislation and enforcement of subjective rights", while the latter stands for the situation where "all rights and the corresponding limitations on freedom are set aside" (Höffe, 1995: 189). As he indicates, it would in fact more proper to call the *secondary state of nature* as "a state of natural law or a pre-political society of law" (Höffe, 1995: 189). Höffe proceeds with the *primary state of nature* where there is no limitation on freedom.

Now, the crucial moment in the thought-experiment called the state-of-nature is this: the principle of freedom is taken unlimited in social sense. Although there are certainly inevitable restrictions for anyone's freedom of action mandated by her internal nature ("by her needs, interests, and emotions, abilities, and talents") and by the external nature ("by the unavailability of resources or by the dangers that threaten her"), there should be no social restriction standing over her freedom: "in short, there may be, in our state of nature, coercion exercised by inner or outer nature. Only the curtailment of a person's freedom by other people is hypostasized away" (Höffe, 1995: 192). This means that we will imagine a condition of existence whereby our social-normative obligations to our fellows are absent while natural and anthropological restrictions to our freedom persist.

A further point that should be emphasized in regard of the principle of freedom of action in the state-of-nature is this: it is a non-substantive principle which relaxes any substantive principle hanging over human action. As Hobbes glimpsed, the principle of freedom action in the state-of-nature amounts to a pure subjectivity in that it suggests nothing more or less than "doing as one sees fit", i.e. "the freedom to everything". This makes redundant any further principle that would prescribe an objective end, and thus a substantive limitation, over human actions. Any conceivable objective principle is either a false universal principle (for instance, Hobbes' principle of self-preservation the universality of which is defied by the many cases in which human beings sacrifices their lives for some other ends) or a fully formalized principle not distinguishable from the principle of freedom of action (for instance, happiness which amounts nothing more than "to pursue a life as one sees fit"). To capture: in the state-of-nature, it is fully up to individuals to decide upon both their end (the highest interest) and the means of their actions; and, individuals cannot be hold to be exposed to the question why they choose some end

and means. Otherwise, there would be subjected to a social coercion prescribing itself as an objective standard over individuals' freedom of subjective choice.

Yet, the question is whether it is conceivable that a group of persons live with their freedom of action and no social coercion, in overt or covert fashions, pervades this group. To answer this question, we will now pass out to the level of performing the thought-experiment. Now, we will imagine a situation whereby a group of persons live in a shared environment with their unrestricted freedom to everything. For the sake of simplicity, Höffe suggests to imagine that there are three persons or groups (A, B, C) and certain things (T1, T2, T3, etc) in a shared environment. In such a situation, let A come to have a design over T1. As a part of her freedom to everything, A is entitled to actualize her design over T1. However, let also B to have the same or a similar design over the same thing T1. Certainly, she has freedom to everything too; and she is entitled to act for the realization of her design too. In such a case, "the action-oriented desire of the one then comes into genuine conflict with the action-oriented desire of the other" (Höffe, 1995:210-211). Höffe then formulates what this simplistic illustration of the state-of-nature amounts to, in three abstract propositions: "(1) human beings need means for the satisfaction of their needs; (2) they themselves decide what means are required, and how urgently, for their own needs; (3) given their shared living-space, more than one of them is likely to desire one and the same means" (Höffe, 1995:213).

The decisive point in such a case of genuine conflict is not how to resolve it, but that there is a conflict and there will be a restriction of freedom to everything as a consequence of the *any* way by which the conflict is resolved. That is, no matter whether parties engage in a negotiation or in a battle or a single party yields to the other, freedom to everything is forfeited and freedom of action has lost its socially unconstrained character in any case: "in negotiation, this forfeiture takes place willingly and mutually; if one party yields, willingly but unilaterally; if battle takes place, violently and ultimately unilaterally" (Höffe, 1995:211).

In this way, the following results arise out of the thought-experiment of the state-of-nature: (1) conflict is an ever-persistent probability in a situation of co-existence of free persons in a shared environment; (2) limitations to individuals' freedom inevitably come to existence in the cases of such conflicts; (3) two and more spheres of freedom cannot co-exist together if freedom were understood in full independence from mutual restrictions; and (4) because these limitations do not

originate from the desire of individual, but externally imposed upon her by the mere fact of existence of others, they amount to (social) coercion even when the subject reasonably concedes to mutual restrictions on her freedom. Though they seem to be very modest, these results suffice to refute radical anarchism that argues for freedom from all rulership (i.e. a human co-existence without any social coercion over individuals). For, they demonstrate that social coercion is a product of neither the faults of human psychology such as "insatiable desire" or "essential aggressiveness" (*pace* Plato, the Christian philosophers, and Hobbes) nor the distorted structure of our historical-social reality (*pace* Rousseau, Proudhon, and Marx). Rather, the social coercion is an essential feature of the co-existence of *persons* (i.e. beings with freedom of action) not only in the present world, but also in all possible worlds (Höffe, 1995: 214). The radical anarchist thesis of freedom from all rulership is thus self-disqualifying not because it is a *non-entity* for the present but because it is a *non-entity* eternally.

From a pre-moral perspective and without a need to rely on controversial empirical premises, the thought-experiment of the state-of-nature refutes the most radical anarchist thesis. Yet, the task of legitimating the political-legal order as such has not been completed in this way. What has been so far achieved is the refutation of the *grand utopia*, i.e. freedom from all social coercion. However, a relatively *modest utopia* stays untouched. This modest utopia still opposes the political-legal form as such by the following argument: if social coercion is inevitable, it is still better to defuse (i.e., hold minimal the effects of) coercion by eliminating the surplus value of coercion which is brought about by the institutionalized, i.e. the political-legal, forms. Hence, we should now consider whether non-institutionalized form of coercion is really better than institutionalized form.

To make it clearer, the relatively modest anarchist thesis concedes that human co-existence is always encumbered with coercion. Yet, it goes on, it is better to stay in a *Natural Rulership*, i.e. in the very state-of-nature where neither a legal-political order nor any other social institutions exist, but the resolution of conflicts of freedom is left to spontaneous self-regulation. As Höffe notes, the proponents of this relatively modest thesis, consciously or unconsciously, take as their model the "free market" where the conflicts of freedom are left to the "free interactions of various forces" (Höffe, 1995:215). In favor of a *Natural Rulership* or a strict-self regulation, the modest-anarchists usually draw upon three basic points: (1) first of

all, a natural-rulership avoids the superfluous constraints on freedom, which emerge in the institutionalized forms of rulership; (2) it avoids extra material and effort costs that the maintenance of institutions bring about for individual members; and (3) it has the virtue of flexibility, i.e. capable of adjusting itself to specific situations (Höffe, 1995:215-216).

However, Höffe recalls, a natural-rulership is indeed a situation where there is no limitation for the limitation on freedom. For, when there is no law, there is no obligation on the part of individuals; and when no social obligation exists, there is no limit imposed on the power of action, but only an unlimited permissiveness. Arbitrary power of an individual or of a group is the sole claim-holder in such a situation. Hence, Höffe contends that it is utmost cynicism to see in natural-rulership a minimal and flexible form of rulership. What is really the case is indeed "the law of jungle": "in the absence of social regulation, it is not the 'play' or interaction of supply and demand, but that of power and opposing power; in the state of nature, everything is up for grabs and all means may be utilized" (Höffe, 1995:216).

The implications of unlimited permissiveness, which make everything up for grabs, should be underlined in their full scope. Because human desire may settle on any object, the conflict of freedom is not restricted to the realm of things. When granted unlimited permissiveness, an action-oriented desire may invest on another person: her "life and limbs, honors and labor capacities and free space for one's self-development" (Höffe, 1995: 217). In such conditions of zero-social-obligation, an agent sees in another human being nothing but either a helpful or a resistant feature of the external nature; hence, the distinction between person and thing vanishes from the standpoint of the individual living under the conditions of natural rulership. At this point, it is necessary to recall the various features in Hobbes' consideration of the state-of-nature. First, Hobbes argued that the state-of-nature turns everyone into both a potential victim and a potential perpetuator of vain violence and deceit. Höffe thinks that he was quite right in this argument only by the qualification that the symmetry of victimization and perpetration does not hold for each: "there are indeed weaklings [extremely old people, little infants, people having certain permanent sickness, etc] who are only victims, but there is no one so strong to be only a perpetrator and never a potential victim" (Höffe, 1995: 216). Second, Hobbes argued that, given this universality of potential victimization, the

state-of-nature stands not for the right to everything, but indeed the right to nothing. For, even my life and limbs, together with my all other possessions, are laid open to the grabs by others in this situation. Third, Hobbes concluded that the state-of-nature is a state of *latent war*. It is important to note that Hobbes' description of these features of the state-of-nature is dependent neither on his pessimism on human nature nor on his alleged possessive individualism. Rather, they arise from his sharp awareness of the implications of a co-existence of *persons* whereby liberty in the sense of permissiveness is not limited at all.

If all these are true assumptions, one wonders how some people can defend the natural rulership or the state-of-nature. Höffe suggests an answer: they should be over-trusting to our natural equality, which Hobbes himself pointed out. That is, they think that, since no one is as strong as to be only a perpetrator but never a victim, wars would be the exception and peaceful existence would be the rule. Yet, this is nothing else than investing the whole hope for peaceful existence on "a natural equilibrium of power" (Höffe, 1995: 218). The crucial point is that, even when such a natural equilibrium of power occurs at a moment, there is no guarantee for its endurance. Precisely because of the deficit of the guarantee for its endurance, individuals are, by the reasons of prudence, forced to act on the assumption of the latent war even when the foregoing equilibrium exists. In other words, the circle of violence and deceit can never be avoided in the state-of-nature. For, even an individual, who would indeed not prefer to act violently and deceitfully for moral or prudential reasons, is forced to act violently and deceitfully in order to reduce the risk of her future victimization. This is why Höffe concludes in a manner reminding Hobbes: "natural and unregulated limitation of freedom amounts to the opposite of what the utopia of freedom from *Herrschaft* seeks; it presents the persistent danger of unlimited, arbitrary, and hence total *Herrschaft* of human beings over human beings" (Höffe, 1995: 218).

Having acknowledged both that a rulership-free human coexistence is an impossibility and that the natural-rulership (i.e. the state-of-nature) can never be defended as the best of the possibilities, we have thus proved the necessity of social regulation for the resolutions of the conflicts among human beings. We should now determine the scope and the substantial content that such a social regulation should have. This is indeed a search into "Natural-Justice", i.e. a search into the question: what kind of constraints over freedom of co-existing individuals would be

considered as improving the lots of all affected parties. We will see that this research will necessarily yield to the recognition of fundamental subjective entitlements called human rights, in a stage prior to the recognition of the necessity of the political-legal order called the state. In a further step, we will see that the state is indeed an entity called for by human rights themselves.

IV.5. Deduction of Natural Justice: Human Rights

Let's first sum up the situation in the state-of-nature: 1) there is complete freedom of action; 2) given their common environment, a person's complete freedom of action may not only probably encroach upon the freedom of his fellows, but also theoretically defies the recognition of the freedom of his fellow; 3) given the universality of probable victimization, everyone is under the constant threat of violence in the state-of-nature. An exit from this "poor, nasty, brutish, and short" form of existence is possible only through a reciprocal renunciation of a portion of freedom by every person. This means: each person gives up a certain portion of her freedom so as to be safeguarded against the threat under which others' unlimited freedom puts her personal "essentials" like her life and limb, and all other possessions. In this way, each one exchanges her unlimited but insecure sphere of freedom with a limited but secure sphere of freedom.

We should now examine what inheres in the notion of a reciprocal-renunciation-of freedom. First, it replaces spontaneous and unrestricted employment of other-regarding-actions by a frame of interactions regulated by *rules*. These rules have the nature of *prohibitions*. For, they do not directly prescribe the actions of persons. Rather, these rules construct the frame of interactions indirectly, i.e. by prohibiting certain actions among the possible actions allowed by the situation of unrestricted permissiveness. From the standpoint of individuals, these prohibitions take primarily the form of *obligations.* However, these prohibitions are rules which appertain to others' actions as well as one's own actions. This means that the protections called *rights* are concomitant to restrictions called obligations. Rights and obligations (duties) are thus two faces of the same social phenomena: I and others acquire the *rights* to integrity of life and limb and to personal honor, at the moment that we all renounce *freedoms* to (or recognize *obligations* to not) murder and libel. Then, the reciprocal renunciation of unlimited freedom replaces the state-

of-nature whereby one is permitted to be *both* a victim *and* a perpetrator of violent acts with a new situation where one is permitted to be *neither* a victim *nor* a perpetrator of violent acts.

We have so far seen that a renunciation of *some* portion of freedom, a regulation *in general*, with *some* rights entitled to individuals and *some* obligations corresponding to these rights, is necessary. We should now specify the details of this regulation, which will amount to specification of the natural (i.e. fundamental) rights and duties. In this specification, our compass will be again the fundamental principle of justice: the distributive advantage of each. With the help of this principle, we will uncover "intermediate principles of justice" in the form of fundamental rights and duties.

The first step in deducing the fundamental rights, Höffe argues, should be giving up the quest for a highest end or a dominant desire (Höffe, 1995: 251, 253). The history of political thought comprises many instances of such futile quests. Among them, Hobbes' quest may be pointed out as relatively more convincing. Hobbes thinks that the choice between the freedom to murder and the right to life is clear not because of a dominant desire, but because of our most powerful repulsion: the fear of violent death. Yet, even Hobbes fails, because the fear of violent death can be an overriding instinct for many people, but it is not a universal feature of all members of our species. That is, it is not an anthropological constant. Indeed, the religious wars of Hobbes' time have evidenced the fact that some people give much more value to "remaining true to their religious or political convictions" than mere survival. Likewise, honor, wealth or fulfilling one's moral duties may be taken as the highest end by some others. Thus, Höffe states that "although many people have a highest end, from the realization of which they hope to attain happiness, there is precious little agreement with respect to the content of this highest end" (Höffe, 1995: 251).

Given that anchoring fundamental rights in an alleged highest end for all human beings is not a viable solution, the alternative that remains is this: the fundamental rights should be founded on the "necessary conditions of possibility of human freedom of action in a social context" (Höffe, 1995: 262). To illustrate his point, Höffe refers to the right to life and limb, which is the most basic human right. He states that no ambitious philosophy of life is required to convince us about the fact that the integrity of life and limb stands as a pre-requisite for any human action.

That is, whatever the highest desire you come to have and want to act out of it, you need your integrity of life and limb to pursue your life-plan: "even the religious or political martyr wants to decide for himself in what cause he is sacrificing his life" (Höffe, 1995: 255). Thus, without the need to postulate a "universal" highest desire, i.e. the desire for survival (or self-preservation), the fundamental right to life and limb is conceivable as a fundamental right on the basis that it is a pre-requisite of human freedom of action.

One should acknowledge, however, that Höffe's formula of fundamental human rights as pre-requisites of human freedom of action is far from being sufficient. For, it holds good for the most basic right to life and limb. Yet, fundamental human rights which Höffe takes as the intermediate principles of justice are certainly not restricted to the single right to life and limb. Beside the right to life ands limb, he himself refers to right to honor, right to property and right to freedom of conscience as fundamental for a just (i.e. distributively advantageous) co-existence of human beings (Höffe, 1995: 249). However, it is not completely clear why such rights should be held as a pre-requisite of human freedom of action; and Höffe's *Political Justice* provides no explicit answer to this question. Nevertheless, there is a clue given for establishing the linkage between these further basic rights and human freedom of action, when Höffe argues in passing as follows: "Coercion of one person by another is only legitimate to the extent of distributively advantageous renunciations of freedom which are essential to basic rights. Any coercion which reaches further is a violation of the basic liberties of others, and as such a case of elementary injustice" (Höffe, 1995: 264). This is a very Kantian argument, the whole meaning and importance of which will be grasped if we look at Höffe's work where he develops an innovative exegesis of Kant's philosophy of law.

In his *Categorical Principles of Law*, Höffe devotes a section to explicating the constitutive role that Kant recognized for human rights in law. He first recalls Kant's definition of a just co-existence for human beings: "*Recht* [i.e. law in the sense of a rightful human co-existence] is therefore sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom" (Kant, 1996:24). This very condensed formula comprises much of the insights we have so far tried to reveal in this chapter. It first indicates that individuals' freedom of action (or choice) precedes law. The function of law is only to "unite" (coordinate) them, not to "create" them. This implies that

without law, individuals' freedoms are not compatible: they cannot co-exist. This is because, Kant thinks, freedom without the coordination of law would amount to one's unlimited permissiveness which would conflict with others' freedom. The decisive point in Kant is that there is nothing wrong in man's unlimited permissiveness in itself. Like anarchists, he approves that freedom is not something that is in need of justification. Rather, it is any restriction to freedom that is in need of justification. In this case, it is law (understood as a system of regulating rules over individuals' freedom) which is in need of justification. And, law is justified insofar as it restricts our unlimited permissiveness, only so as to attain the maximum portion of co-existent rightful freedom of each of us. This is what Höffe invokes in the above-mentioned quotation: any coercion reaching further than what is necessary for the co-existence of our freedom is an injustice.

Now, Kant's idea of law as the "necessary restrictions of what would otherwise restrict the freedom of others" makes explicable many human rights as immediate principles of justice. For, Kant's way of thinking suggests that we preserve our *right to freedom* except the situations where our actions would negate others' right to freedom. Indeed, Kant explicitly argues that the right to freedom is our *Innate Right*: "Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of humanity" (Kant, 1996:30)[157]. Insofar as freedoms like conscience, expression of

[157] At this point, I would like to refer to Arthur Ripstein's "The Innate Right of Humanity", published in his *Force and Freedom*, where Kant's foregoing formula of freedom in its legal-political sense is excellently elaborated. Ripstein suggests that Kant's formula is a derivation from Roman law. Citing the classical distinction, from Roman law, between persons (as beings capable of setting their own purposes) and things (as something that can be used in the pursuit of whatever purposes the persons who have them might have), he argues that what Kant means by the innate right of humanity is indeed "the right to be your own master" in a "contrastive and interpersonal" sense (Ripstein, 2009:36). In Ripstein's own words, "to be your own master is to have no *other* master. It is not a claim about your relation to yourself, only your relation to others…The idea of being your master is also equivalent to an idea of equality, since none has, simply by birth, either the right to command others or the duty to obey them. So the right to equality does not, on its own, require that people be treated in the same way in some respect, such as welfare or resources, but only that no person is the master of another. Another person is not entitled to decide for you even if he knows better than you what would make your life go well, or has a pressing need that only you can satisfy" (Ripstein, 2009:36-37). As Ripstein himself makes the point, the right to be your own master amounts to a true understanding of the right to equal freedom, and comprises a legal-political idea which is very similar to what authors like Philip Pettit elaborated as the neo-roman or republican conception of freedom: freedom as non-domination which is reducible neither to the liberal idea of negative-liberty as non-interference nor to the communitarian idea of positive freedom as one's subjugation to what is good for her/him. For Pettit's republican conception of liberty and its relation to legal theory, see his "Law and Liberty".

thought, religious practices, are not incompatible with the same freedom of others, they fall under the category of Innate Right of humanity, and thus of human rights.

Yet, what about the right to honor or the right to property, which Höffe also mentions as human rights? The obligation to respect such human rights can not be explicated in the manner presented above. In the case of the right to property, one may suppose that it may be defensible as a pre-condition of human freedom of action, since freedom of action needs the objects in the external world as its tools and means. Yet, this would be a confusion of "simply having or using a thing (i.e., empirical possession)" with "having it as a property (i.e. *noumenal* possession)". To use a thing as a tool or means, it is sufficient to have it empirically; there is no need to have it as a property. I think that the status of the right to property as a human right, as well as that of the right to honor, can be conceivable only on the condition that such entitlements are seen as integral parts of the personality of a human being. Even in this case, they would differ from the former category of human rights in that they are acquired rights, not Innate right. That means, a human being has acquired the entitlement to them by her efforts, on the basis of an initial permission to acquirement. The recognition of the possibility of such acquired rights is thus to be understood as concomitant with the recognition of the status of human beings as *persons*. For, the concept of person stands for the kind of being whose free actions should have more than physical effects, that is, normative effects reflecting in both her own nature (e.g. the right to honor) and the nature of things she contacted with (e.g. the right to property)[158].

[158]In a section of his Kant's Cosmopolitan Theory of Law and Peace, Höffe indeed indicates that there is such an argument for human rights from the notion of personality in Kant (Höffe, 2006:119-131). Höffe argues that, for Kant, the recognition of man as person, i.e. the recognition of human freedom of action, leads to three fundamental duties upon which law and the state as such are grounded (Höffe, 2006:119-131) These duties, which were considered to be first formulated by a Roman jurist named Ulpian, were already known as Ulpian Principles. They are: (1) *honeste vive* ("live as an honorable man"); (2) *neminem laede* ("wrong anyone"); and (3) *suum cuique tribue* ("give to each what is his"). As Höffe interprets them, the first duty, which amounts to asserting oneself as a free being, is an ethical duty *par excellence*. Yet, one's self-assertion as a free being also leads to a fundamental duty of right when one finds oneself in an inter-subjective realm of co-existence: "the duty of wronging any one" means that what is honored in oneself, the status of personality consisting in freedom of action, should also be honored in all others who have it. This duty, which Kant sees as the principle of justice of exchange, is regarded as the founding principle of the sphere of private law. The third duty states the principle of justice from the perspective of distribution; and it is the principle upon which the public law of the state is grounded. I think that this argument from the notion of personality furnishes a way to explain the whole scope of human rights as intermediate principles of justice. However, with respect to both the argument from the conditions of the possibility of human freedom of action and the argument from the Innate Right to freedom, this argument, in its form presented by Kant, has the disadvantage of invoking an ethical duty (a duty regarding personal sphere) at the ground of law. This is a serious problem in Kant's

The above illustration of how certain human rights are deduced as immediate principles of justice does not suggest that fundamental human rights are restricted to the abovementioned rights. In any further case where one demonstrates that a certain entitlement is a condition of freedom of action, or an integral part of the notion of personality, or subsumable under our Innate Right, she also demonstrates that such entitlement constitutes a human right.

To put in a nutshell, human rights are the *rules* which consist in reciprocal (i.e. *impartial* and *equal*) renunciations of freedom so as to protect the essentials of human capacity to freedom of action from the threat of *negation* by fellows. The category of human rights, then, stands for "a renunciation of freedom based on an interest in freedom" (Höffe, 1995:258). Because the freedom of action is itself the essential element of the choice and pursuit of any conceivable highest end, we can conclude, without appealing to an allegedly objective highest-end, as follows: human rights are derived from the fundamental principle of justice, i.e. the distributive advantage of each in the protection of the maximum portion of his Innate Right to freedom. In other words, a human-rights-rule, which consists in the reciprocal renunciation of freedom, is a principle of justice, insofar as it is an *absolute* (*unconditional*) imperative of human practical reason. For, the rejection of such a principle amounts to exposing oneself to the possibility of being treated as a thing rather than as a person (Höffe, 1995: 262).

One more point with regard to human rights remains to be made. It is usually argued that a human right, in virtue of being a principle of justice, is an inviolable right. As Höffe underlines, the assertion of the inviolability of human rights is true only in "an elliptical way" (Höffe, 1995:255). For, the secure protection one gains by a human right is only a protection against its negation by a human fellow. However, our essentials as a person with freedom of action remain under the threat of the external nature. It is certainly desirable that we have protections in such cases too. Yet, an obligation to aid one's fellows in such cases where she is not responsible for this fellow's malign situation cannot be incorporated under the category of human rights. That is, one cannot appeal to human rights to oblige others to help in a situation her life, limbs, freedom, honor, and etc are risked without the responsibility of others, though she can appeal other ethical standards

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account of law because it risks the distinction of the domain of justice from the domain of comprehensive morality.

for calling for others' help. In line with this, the inviolability of human rights does also not apply to the situations where one jeopardizes her own life and limb, freedom, honor, and etc (Höffe, 1995:254). Moreover, it should be always held in mind that a human right violation occurs only in the situations where one *negates* his fellow's essentials concerning the freedom of action. The term *negation* here should be understood in contrast to *limitation*. As it is evident from our examination up to now, one's even mere existence with others in the same environment brings about certain limitations for the latter's freedom. To illustrate concretely, I may be raising a restriction to one of my fellow's freedom to feed up when I hunted a deer in the nearby forest to feed up myself. Yet, this is only a limitation, not a negation to his freedom; for he can seek to satisfy his need in other ways. There are of course much more complex situations in which it would be hard to distinguish between a *negation* and a *limitation*. As we will see soon, such situations are those which unleash major reasons for replacing the order of natural justice with a legal-political order.

Höffe's argument has so far demonstrated that it is just (i.e. distributively advantageous for each) to regulate our interactions with rules, i.e. to engage in *a natural society of law*, rather than remaining in the spontaneous self-regulation of natural rulership. We have also seen that human rights are to be "the elementary building blocks of law" (Höffe, 1995:265). Yet, there is still something deficient in the natural law of society as such: there remains the problem of coercive authority which has "the right to a final say" in the interpretation and execution of the rules. For, in the natural law of society, the exercise of justice is completely left upon each individual: every person would defend her human rights against incursions of others. Now, we will see that trusting the exercise of justice upon each person is not a viable solution, and that the natural society of law should be replaced by a political-legal order that will exercise justice in an impartial and anonymous manner.

IV.6. Derivation and Definition of the State as *Justitia*

Once the distributive advantage of basic liberties has been demonstrated, the question remains: whether actualization of basic liberties should rest directly with the affected parties or with an institution standing above individuals. Höffe calls the

former case as the "thesis of residual anarchism" (Höffe, 1995:266). This thesis suggests that, since basic liberties (i.e. the standpoint of justice) are instructed by the distributive advantage of each, justice was to instantiate itself spontaneously and pre-institutionally. Institutionalization would, in this case, mean only bringing about "additional, superfluous constraints on freedom" (Höffe, 1996:266). In the view of Höffe, the thesis of residual anarchism is wrong for two basic reasons. More precisely, basic liberties are damned to remain as "pure oughts" in the natural state of law for two basic reasons[159]: (1) the difficulties of interpretation; and (2) the dilemma of recognition (i.e. the problem of free-riders).

As for the first kind of problems, Höffe states that, even when everyone is agreed upon the renouncing their natural right to unrestricted liberty (i.e. all permissiveness) so as to respect each others' basic liberties, a peaceful co-existence securing basic liberties are not still fully settled upon due to certain cognitive difficulties, on the one hand, and differences in individual perspectives, on the other hand. The cognitive difficulties concern the absence of commonly recognized boundaries. Even when people agree, in principle, upon basic liberties such as life and the integrity of life and limb, freedom of consciousness or respect for personal honor, the following task remains: these *principles* should be translated into *applicable rules*. Such translation consists in the specification of the precise content of the sphere of freedom which a right protects. As Arthur Ripstein elaborates in his various articles, the case of right to property is particularly illustrative in showing the need for specification of basic rights[160]. Drawing upon Kant's philosophy of law and the state, Ripstein argues that it is a dictate of reason that persons, as independent agents, should be able to acquire property in the external world. Yet, reason is almost completely silent on the specific issues of how one can acquire a right to property over a land or a thing, or how far can a personal sphere of property extend, or etc. Such specific yet essential issues, which would make the right to property actual, should be determined by the human authority itself. To a certain extent, this need of specification by a human authority arises for all basic liberties. For, as Höffe emphasizes, basic liberties are "principles yielding only general directives for adjudication and leaving us bereft of concrete definitions of realms of

[159] One may note that the argument that rights without law and the state would be senseless "mere oughts" was precisely the one Hegel elaborated throughout his *Elements of the Philosophy of Right*.
[160] See, Ripstein:2004; Ripstein:2006, and Ripstein: 2009.

freedom" (Höffe, 1995:268). Taking aside this problem of the absence of commonly recognized boundaries, there is also the further difficulty of interpretation concerning the differences in personal perspectives. This difficulty is relevant to our natural "tendency to define one's own realm of freedom expansively and that of others restrictively" (Höffe, 1995:269). Because of this tendency, we may designate the same action in the same situation either as an act of self-defense if we perform the action or as a murderous offense if others perform the action.

Underlining these difficulties does not mean to deny that there can also be imagined clear-pack cases whereby everybody concur upon the same evaluation of an action at the stake. However, conceding simply that there are hard cases should lead one to the recognition that the difficulties of interpretation, if left unresolved, jeopardize the sphere of basic rights *wholly*. For when the power of adjudication of basic liberties is devolved upon each and every individual, conflict resolution rests upon nothing other than brute force, no matter prevailing forces appeal to basic liberties. Hence, Höffe argues that "so long as the basic liberties are not given precise boundaries and so long as no such boundaries are respected in common, the entire range of legitimate freedom is threatened, precisely the danger to which the critics of the institutional solution and defenders of the natural solution draw upon our attention" (Höffe, 1995:269). That is, the cases where there occur difficulties of interpretations (i.e. "hard cases" as Hart calls them) may be perhaps rare; however, the very possibility that such a case can occur at a time risks the whole of a system of rights. For, once the "liberty to act, in 'hard cases', on the basis of their particular convictions" is conceded to parties, the "liberty to decide upon what a 'hard case' is" is also conceded to them[161]. There can be no disagreement to the assertion that the latter liberty would be disastrous for any system of rights, i.e. for any system of reciprocal restriction of freedom.

Indeed, Höffe's arguments concerning the difficulties of interpretation cannot be taken as new arguments. One can find precisely the same arguments in the authors like Hobbes and Kant. Yet, Höffe's argument, or more precisely his way of argumentation, concerning the dilemma of recognition in the natural state of law is

[161] In regard of this point, I want to recall Schmitt's argument that the authority to decide arbitrarily (i.e., without the need of justifying one's decision to concerning parties) in the state of exception logically extends to the right to decide whether there is a state of exception in any particular case. I think that Schmitt was right in his foregoing argument; and the same applies to the problem of hard cases that might occur in the natural society of law.

quite innovative. He underlines that there is a crucial gap in the residual anarchist thesis for the natural society of law. This thesis suggests that there are two basic alternatives: either the unregulated coexistence of free agents in the primary state of nature or the reciprocal renunciations of freedom in a natural society of law. Since the second alternative is more advantageous, the residual anarchist thinks, rational individuals would opt for it. Yet, Höffe contends that there is a third alternative which would seem most advantageous from the standpoint of a rational egoist. This alternative, which residual anarchism cannot see, is the *free-ridership*. A free-rider pays verbal tribute to social conventions but does indeed not bind oneself with them. In the case of mutual renunciations of freedom, a free-rider would be the one who pretend to be bound with basic liberties but does not in fact. In this way, she would attain the best alternative: the unilateral renunciations of freedom by others while preserving her unrestricted liberty. For instance, she would have a combination of the right to live and the freedom to kill. This means that one can not argue that the respect for basic liberties (the substantial standpoint of justice) is distributively advantageous for each (the formal standpoint of justice) in a natural society of law.

In the view of Höffe, the free-rider dilemma does not only arouse a crucial handicap in the residual anarchist theory. It also constitutes the basic problematic that any adequate theory of law and the state should resolve. To cope with this dilemma, one should at first note all the options before the individuals with a rational egoist perspective. Option 1: the primary state of nature where everyone is both a potential victim and aggressor; Option 2: the natural state of law where each one is neither a victim nor an aggressor; Option 3: the free-ridership whereby one chooses to be a pure aggressor through cheating others; Option 4: exploitation whereby one becomes a pure victim. Now, no rational egoist facing these options would choose to respect the basic liberties of others. Disrespect will be more advantageous whether or not the others will really respect her rights. If others respect, she will have the Option 2 and the Option 3, the latter (the Option 3) being evidently more advantageous. If others disrespect, she will have the Option 1 and the Option 4, the latter (the Option 4) being the worst situation to which a person can be exposed.

From the above presentation of options, the conclusion arises that, without an authority enforcing rules, it is foolish to comply with rules in any case. This means,

in turn, that the natural state of law retreats to the primary state of nature. However, the situation of non-compliance with rules is also ridiculous, due to all's second order interest to live in regulation with social rules. The dilemma that non-compliance with rules is both rational and ridiculous can be resolved only on the condition that all are assured that the others will comply with rules. Such an assurance can be attained only if all know that the non-compliance by others will not pay. In turn, this knowledge will be achieved if a common coercive authority for executing rules is established. The practical consequence of all these is that it is a necessary precept of practical reason that all should submit to a shared coercive authority. Otherwise, they will be exposed to the situation which the game-theorists call as "the prisoner's dilemma" –a situation whereby the most rational option to cooperate is structurally excluded (Höffe, 1995:274-279).

One should also underline that the prisoner's dilemma, i.e. the problem of enforcement, in the natural society of law has an additional dimension concerning the relations between generations. Höffe calls this as the "diachronic dimension" which arises out of the anthropologic trait that human beings experience temporal disjunctions in their "threat potential" (Höffe, 1995:279). That is, while adults are naturally potential aggressors in relation to both children and elders, the latter are naturally potential victims in relation to the former. Thus, if one considers the mutual renunciations of freedom among generations merely in its synchronic dimension, she views only a one-sided relation favoring the weak. From a diachronic point of view, however, one will acknowledge that mutual renunciations among generations favor all, because there is a constant shift in the threat potential of subsequent generations. That is, there is the fact that today's adults will be tomorrow's elders, and today's children will be tomorrow's adults. Here again arises the dilemma of free-ridership in a natural society of law, for there would be no guarantee that today's adults who take on their obligations toward today's children and elders, will be treated in the same manner when they become elders and the latter adults. Hence, the fear of prospective exploitation by the subsequent generation should be overcome in order that justice among generations can be realized.

In the light of all these, Höffe argues that the model of unchecked free market proposed by the idea of a natural society of law is essentially contradictory. For, dishonesty pays in such a society. That is, the free-ridership becomes really the best

option for individuals. Justice (i.e. a co-existence whereby rights are reciprocally respected) is not a viable alternative there, precisely because disrespect for justice pays under such conditions. One can thus argue that a common coercive power which ensures compliance and/or penalizes non-compliance sufficiently is an essential component of the concept of law. Moreover, such an authority and the obligations it brings about on the part of individuals are just by the virtue of the fact that they improve the lot of each person (Höffe, 1995:278).

Upon such a ground presented above, Höffe makes his conclusive argument that the practical deficiencies of a natural society of law can be overcome and the relations of justice can be realized only within a form of association having the political-legal form. To see this more clearly, let us reconsider the solutions for aforementioned deficiencies of a natural state of law. First, the difficulties of interpretation designated the lack of a capacity or authority to impart clarity and specificity to basic right claims. These difficulties are resolved by *positivization* –i.e. making rules precise– and by *resorting to an authority*, which is neither individual nor particular, nor private but general and public –i.e. making rules common– (Höffe, 1995:282). Positivization and the recognition of a public authority will determine what actions are licit and what actions are illicit from legal standpoint. In this way, they will help in transforming the principles into laws, and bring about *formal coercion* to individuals' actions. Second, the more crucial difficulty concerning the enforcement of laws cannot be resolved on the basis of these formal coercions which determine the legal significance of individual actions, i.e. determine whether a particular action is licit or illicit. Here, there is the need for *penal coercion* which Hobbes called "the sword of justice" (Höffe, 1995:283). To obstruct free-ridership, public legal authority should exert restrictive or retributive force upon those who disrespect others' rights. Such penal restrictions or retributions will make disrespect for others' rights less advantageous than the case whereby one respects these rights (Höffe, 1995:283). In resolving these difficulties, we have already achieved to an acknowledgement of the need for "a positive legal order behind which stands a public authority which is prepared to enforce positive law by coercive means if necessary" (Höffe, 1995:283). We should add to this the need for institutionalization, for the problem of diachronic justice (i.e. justice among generations) can be resolvable only if a positive legal order survives over generations.

Positivization, public enforcement, and institutionalization are the defining features of a political form of order; and they are functional for enabling that the political-legal form is advantageous for each (i.e. it is just). More precisely, the political-legal form as such is just by the virtue of the fact that the mutual renunciations of freedom make their best sense only when they are enforced by a public and institutionalized authority. One should note that the political-legal form does not need to take its specific form of the modern state. As Höffe argues, the modern-state with its "territorial sovereignty, and centralization and bureaucratization of political power" is only one among the alternatives of the political-legal form (Höffe, 1995:284). One may imagine other alternatives or revisions in the very model of the modern-state for the sake of actualizing the cause of justice in a better way[162].

In this way, Höffe has justified the need for the state through a critique of anarchism. There are certain essential points that should be underlined with regard to this justification. First, Höffe's justification of the state is not a fundamental but a subsidiary one. The state is legitimate only on the condition that it operates as a necessary vehicle in the actualization of justice among the members of a given people. Hence, such a view of the state is exclusive not only with respect to the claims of anarchism, but also with respect to the basic presumptions of legal-positivism and legal-realism. From the rationalist standpoint presented by Höffe, the state as a specific structure of coercion is conceivable only as a structure based on the distributive advantage of each, i.e. on human rights. Hence, in contradiction to what positivism and realism suggest, an all-powerful state which is unbounded by justice is a deviant-state, i.e. an actual entity which defies its own concept. Because there is an essential cord tying the concept of the state to the concept of justice, a state without justice may exist as an oxymoron –no matter how widespread such deviant-states in our world are.

In line with all these, Höffe's rationalist argumentation (i.e. his argumentation from the standpoint of practical reason) suggests that the state cannot be conceived as the *creator* of justice. Justice (i.e. human rights in more substantial terms) precedes the state. From the standpoint of practical reason, the state comes to

[162] For instance, regional political-social formations of our age such as EU may be considered as bringing about a new alternative to (or, at least, significant revisions in) the specific form of political-legal order which is called the modern state.

existence only as a *servant* or *defender* of justice, not *vice versa*. This means that it would be a mistake to think that a state bestows rights upon its citizens when it codifies certain human rights as basic positive rights within its constitutional-legal order. To the one who insists that human rights require a moment of legislation, it should be responded: the moment of "legislation" of human rights can be conceivable only as a moment preceding the state, i.e. as the very moment whereby individuals mutually renounce their unlimited liberty. Indeed, as we have seen in detail, the state arises out of the need for precise definition of rights and the enforcement of respect for them. That is to say, justice (human rights) is the *raison d'être* (reason of existence) for the state. Hence, even if the state has the authority of specifying justice in a society, it is justice that determines the state, not *vice versa*.

One may argue that an immediate consequence resulting from Höffe's argumentation for the state concerns the absolutist conception of sovereignty. As is well known, Bodin first formulated this conception as the absolute power of the state authority over its subjects. Yet, what Höffe has argued so far crucially defies such conception of sovereignty. For, the source of political-legal authority in his account cannot be the absolute power; but rather it is "the surrendering of rights by those who are, in a primary or original sense, themselves sovereign" (Höffe, 1995:287). All these signify nothing less than a crucial strike against Hobbesian image of the state as *Leviathan*. In Höffe's view, Hobbes was right in thinking the state as made up of man (i.e. not as something additional to them). He was right also in portraying the state as the rightful possessor of the might (i.e. in putting the sword in the hand of the king). Yet, he was mistaken in putting a bishop's staff in the other hand of the king since the state authority extending to religious matters violates one of the distributively advantageous renunciations of liberty, i.e. the right to be not interfered in matters of pure conscience. Furthermore, Hobbes displays only the sword of the political authority, precluding the symbols of the scale and the blindfold. Only through such exclusion can he assert that the state is a self-authorized sovereign. In opposition to this distorted image of the state as *Leviathan* –an image which, as we have seen above, is defied even by Hobbes' his account of law–, Höffe's account resurrects the concept of the state as *Justitia* which employs its sword in the service of just renunciations of liberty (i.e. in the service of rights), and which does not bring about superfluous tutelage to its citizens in matters of

morals and religion. That is, Höffe's *Justitia* is a coercive order which fully acknowledges the nature of its citizens *qua* persons with the freedom of action and regulates their interactions on the basis of this acknowledgement. To avoid a probable confusion, as Höffe himself warns, *Justitia* should not be confused with the liberal ideal of a *tamed Leviathan* (Höffe, 1995:288). For, this liberal ideal is in full agreement with Hobbes on the point that the state power is a monster devouring upon men. It diverges from Hobbes only on the subsequent point that it is both possible and desirable to domesticate this monster. Indeed, modern cynicism with regard to law and political power is remarkable in liberalism from its very beginnings. This is why many rightly have argued that there is an essential connection between liberalism and legal- positivism, i.e. the kind of legal theory which cannot hide its cynicism toward political power. In opposition to both the tamed and untamed versions of *Leviathan*, Höffe's *Justitia* designates law and the state not as a necessary evil to which we should endure, but as the assurance of what is most valuable in human life, i.e. justice consisting in our mutual respect for each other *qua* free persons in our transactions.

Another essential point in regard of Höffe's justification of the state as a coercive structure concerns the abovementioned distinction between political-rulership and pre- and post-political rulerships. Rationalist understanding of law and the state does indeed concede to anarchism that all personal rulerships are illegitimate. Indeed, this mode of thinking holds that we do not speak of a legal-political authority in the cases where particular persons occupy the position of power solely by the virtue of who they are. On the other hand, a political-rulership as such is an a-personal and public coercive authority whereby "human beings no longer rule fellow human beings, [but rather] public authorities govern the arbitrary private acts of individuals" (Höffe, 1995:188). This rejection of personal form of rulership is raised not only against the allegedly realist accounts of law and the state we find in authors like Hobbes or Schmitt, but also against the normatively oriented aristocratic accounts we first find in Plato's conception of philosophers as naturally born good-rulers. To put simply, since all human beings are parties in the renunciations of freedom, nobody can be an impartial arbitrator in such an issue. Thus, the unlimited natural freedom of each individual can be transferred only to the collectivity, i.e. to the public authority, not to a private party. There is, of course, the need to trust public authority to certain bodies, particularly in such

complex societies as ours. However, it is essential to hold in mind that public authority is *trusted upon* not to "the personal rulers (*Herrschern*) but to *officials* whose tenure is limited and who have been chosen from the people and by the people for the assumption of such responsibilities" (Höffe, 1995:289). In line with this, the rationalist mode of thinking Höffe proposes conceives the legal-political order primarily and principally as a society of equal persons who mutually renounce their unlimited freedoms and determine the rules of their interactions. Any hierarchy in such a society, which comes out of factual necessity, should remain minimal and should be anchored into officialdoms.

As Höffe points out in the end of his discussion, law and the state have, from a conceptual (not a historical) standpoint, their foundation in a dual agreement. This dual agreement –which does not take place as an historically actual one– can be called a transcendental agreement in that it is necessarily presupposed as "the condition of possibility of the coexistence of liberty with liberty" (Höffe, 1995:295). In the first moment of this transcendental agreement, the members of a society reciprocally renounce their unlimited liberty so as to secure their co-existence as *free persons*. In the second moment, individual subjects trust their right to enforce justice to the community itself on the condition that the community will shoulder the burden of concretizing and enforcing the justice. That is, there are, at first, an agreement on co-existing freedom and, then, an agreement on the political rulership. From the standpoint of practical reason, law and the state are made up of this agreement. Hence, the systemic validity of a legal-political order (i.e. its legitimacy rather than the validity of any individual legal norm it comprise) depends upon their attainment of justice, i.e. of human rights of each member. The objection that such an account of law and the state is blindly idealist in the face of existing legal-political orders does not hold in regard to Höffe's rationalist account. For, the fact that actual states do not fulfill their task of justice does not defy that justice is the distinguishing conceptual determination of law and the state as such. Indeed, a legal-political order considerably diverging from justice is as an entity that negates its own concept, because the concept of the state has an intrinsic cord to the concept of justice. Such orders lose the basic right a just legal-political order has: the right to obedience by its members. For, though any form of power organization (including mafia or power syndicates) can actually force individuals to

obedience, it is only the state *as an institution of justice* that can assert a right to obedience by those who are subjected to its power.

In this way, we completed a detailed analysis of Höffe's modern-rationalist approach to law, the state and justice (as human rights). The next chapter of my work will comprise a defense of modern legal-rationalism in an explicit comparison to alternative approaches within legal-political thought (i.e. legal-positivism, legal-realism and also legal-moralism). As a preliminary step for such a defense, I should present a prior assessment whereby I recapitulate, in an express and concise manner, the credentials of Höffe's rationalist theory on its own in terms of its success in accounting for the complexity of intersections between "the legal", "the political" and "the moral".

IV.7. A Prior Assessment of Höffe's Legal Rationalism

For an assessment of Höffe's theory of law and the state, I should, at first, underline that it stands much less as a new approach than as a rejoinder of the most ancient approach to law and the state in the contemporary context: the rationalist-philosophical approach which goes back to Plato, i.e. to the very moment whereby law and political power were taken as the objects of a systematic study for the first time in political thought. Though many aspects of Plato's particular rationalist account would be criticized and even radically rejected by his rationalist heirs, all subsequent rationalists have remained loyal to him at one essential point: the point that law is distinguished from other organizations of power by the virtue of its conformity to an objective standard of normativity called justice. Höffe's own theory stands very close to the Enlightenment version of this philosophical-rationalism. As we have seen above, the insights of modern and/or Enlightenment figures like Hobbes, Locke, Rousseau, and foremost Kant constitute the background of Höffe's argument. Indeed, Höffe's way of argumentation, which usually proceeds with a discussion of Hobbes or Kant, suggests that his theoretical endeavor consists, indeed, in clarifications and improvements in the methodology and substantial arguments that the foregoing figures have already articulated or implicated. Most of these clarifications and improvements have been achieved by the application of the "prisoner's dilemma" of the rational choice theory to the imaginary situation which was conventionally called as the state of nature by the

modern political philosophers. Most basically, the "prisoner's dilemma", as Höffe employs it, reveals this: our initially amoral interests lead us to unite in organizations of power based on the moral standpoint of justice. That means: the concept of justice is inherent to the concepts of law and the state. In line with this, Höffe's basic theoretical intention can be read as a resurrection of the legal-rationalist approach to law and the state in the face of currently prevalent paradigms of legal-positivism and legal-realism.

Clarity and simplicity may be pointed out as the most remarkable credentials of Höffe's argumentation. As we have seen above, Höffe does not differ from Kant on the fundamental standpoint that the legal theory proper is somewhat a metaphysical issue, i.e. law is a branch of human praxis comprising certain necessary *meta-physical* propositions. Precisely like in Kant, such propositions cannot be verified within empirical reality as clear facts, but only as transcendental premises necessary for the constitution of any empirical reality as law. Höffe's particular achievement lies in his cleaning off the unhandy traditional terminology in Kant's practical philosophy for law and the state. To tell in most simple terms: In a way differing from both legal-positivism and legal-realism, Höffe's rationalism first indicates that a legal-political order as such is not simply an entity laying out there in a way independent of us. It is a *human artifact* constructed by human activity, precisely like a house or a car. Since any human artifact embodies a human intention, Höffe further means, we should seek into the specific human intention underlying legal-political order so as to understand it. To illustrate: despite the enormous variety of cars, any car is a vehicle for land transportation. Hence, it would not be a complete understanding of what a car is when one defined it as a construction out of metal which has four cylinders at bottom, some piece of glasses at the front and the sides, etc. In the absence of the acknowledgement of the fact that it is a vehicle for terrestrial transportation, the car is not understandable as an entity distinguished from all other entities. This is similar for all human artifacts including legal-political order. The latter, too, cannot be understood, on a merely empirical basis, simply as a system of coercive power. Rather, a legal-political order is an artifact which we design and construct as the instrument for the realization of justice in our collective life. That is, justice is an essential part of the very definition of law and the state, since it is the *raison d'être* (reason of existence) of law and the state.

To conclude, Höffe's inquiry to legal-political order within the framework of practical reason shows that a legal-political order can be thought only as a human artifact collectively constructed to attain the conditions of possibility of our co-existence as *persons*, i.e. as beings with freedom of action. Despite the huge scope across which existing political-legal orders may differ, our freedom of action is their common-transcendental presupposition and the need to restrict it so as to make co-existent with others' freedom of action is their common-basic practical task. The acknowledgement of this transcendental presupposition and this basic task leads to a vision whereby fundamental/human rights, law and the state are conceptually bonded to each other. As we have seen, fundamental/human rights which *conceptually* precede law and the state designate nothing but the mutual restrictions over our unlimited liberties insofar as the latter contradict each other. Hence, they are indeed the restrictions to the restrictions of rightful freedoms (i.e. freedoms that can coexist). These rights constitute the core-kernel (i.e. the "elementary building blocks") underlying the legal-political order. The latter arises out of the need to specify and coercively enforce the rights and obligations[163].

On the basis of the idea of fundamental rights as the core-kernel underlying positive legal-political orders, Höffe's rationalist approach provides a sophisticated account of the questions concerning validity and legitimacy. Quite similar to legal-positivists, Höffe expresses that the source of validity of individual legal norms lies not in their normative content, but in their enactment by authorized public powers in accordance with provisioned procedures. Furthermore, he indicates that justice or legitimacy is not a question generally raised against individual norms. Unlike legal-positivists, however, Höffe maintains that the concept of justice has still a vital significance for legal-political theory. Beside the question of the validity of individual legal norms, there is the question of the general (overall) validity of the positive legal-political order as a whole. The latter question is that of legitimacy,

[163] Hereby, I don't mean that all individual legal norms constituting a legal system derive from, or even are directly relevant to fundamental rights. There are legal issues which are either left undetermined by these rights or seem trivial from the standpoint of them. For instance, the content of many procedural regulations which any positive legal order should comprise cannot be determined on the basis of fundamental rights. These rights suggest, at most, that there should be predetermined procedures (i.e. what Höffe calls formal coercions of law) applied impartially to each. Determinations of the contents of these procedures are left to the decisions of empowered authorities of law. I want to call to the readers' attention that, in the determination of such points which are not directly concerned with fundamental rights, authorities act not as trustees of justice but as authors of positive laws.

which is resolved only by reference to justice as a universal standard. It should be well understood that Höffe's legal-rationalism not simply claims that the question of legitimacy and the idea of justice is essential for legal-political order. Such a claim may be embraced by other non-positivist but also non-rationalist paradigms. As we have seen in the previous chapter, Carl Schmitt's legal-realism could also distinguish the question of validity from the much more essential question of legitimacy. However, what is peculiar to legal rationalism, as Höffe well illustrates it, is this: the claim for the essentiality of the question of legitimacy for any legal-political order is concomitant to another one: that the question of legitimacy has a *universal* response. To argue more clearly, the standpoint of justice, which lies under *any* political-legal order, is *always same*: the distributive advantage of each member. As we have seen above, the substance of this distributive advantage consists in nothing other than fundamental human rights. This means that such relativization of the criterion of legitimacy as we saw in the case of Schmitt's concrete-order-thinking is unacceptable.

It should also be underscored that in establishing the conceptual symbiosis between justice as human rights, law and the state, Höffe's legal rationalism succeeds in escaping a naïve moralism. Höffe's theory well underlines the difference between two assertions: the rationalist claim that legal-political order has its constitutive basis in the moral standpoint of justice, on the one hand; and, the moralist claim that positive legal-political authority should promote virtuous life for its subject-citizens. The latter claim comprises a paternalistic vision of legal-political authority; and, such a vision is indeed incompatible with the recognition of our common status as *person*, i.e. as a being with the capacity to freedom of action. Any community which assumes the task of realizing a collective realm of virtuous life (i.e. a collective domain of comprehensive morality) for its members is anything but a legal-political order. The latter should avoid any interference into the realm of virtue. This is not because virtue is a partial or relative issue, but because virtue depends solely upon the autonomous will (i.e. the morally good intention) of individual for acting out of virtue. Trying to impose an external coercion upon individuals in order to create a collective realm of virtue would be a crucially self-contradictory: it would be a negation of our status as person, which is the prerequisite for virtuous life. On the other hand, the morality of justice (i.e. the morality that is relevant to the legal-political order) has nothing to do with our good

intentions. That is, such an order does not and cannot judge our virtue. It only maintains the condition of each member's living as a *person* through providing for each a security against the threat that the others may negate her quality as a being with freedom of action.

In line with what I argued in the just preceding paragraph, Höffe's theory makes also clear that a consistent legal-rationalism is incompatible with any conception of "good rulers". For, he shows that a coercive order of power can be called a legal-political order, and be assumed as legitimate, only on the condition that authority has a *non-personal* or *public* nature. From the standpoint of practical reason, a legal-political entity is by definition the rule of law (that is, not the rule of men over men). Hence, an aristocratic rationalism, like Plato's ideal polis ruled by philosophers, is indeed a contradiction in terms from the standpoint of the modern-egalitarian rationalism Höffe elaborates.

Besides its all these positive credentials, however, Höffe's legal-rationalism comprises a point of weakness: a lacuna in relation to the cases designated by the notion of *the reason of the state* (*raison d'état*), i.e. the cases whereby the states act in a way trumping over the established legal normativity. I think that Höffe's distaste for such cases, which should be the reason underlying his dismissal of them from his theoretical agenda, is certainly understandable and justified. Yet, I do not think it is a good strategy to expel such cases from the theoretical-philosophical account. As will be elaborated in the next chapter, this engenders, at least, cynicism with respect the moral claims of theory by giving way to the presumption of an unsurpassable split between "the way of theory" and "the way of the real world". In line with this, I will try to work up a more responsive rationalist framework which will be able to take into account the foregoing cases as well, just after I will have highlighted the achievements of modern legal-rationalism in comparison to the alternative modern paradigms of legal-positivism, legal-realism and legal-moralism.

CHAPTER FIVE
A LEGAL-RATIONALISM WITH A REALIST PROVISO: GIVING LAW, MORALITY AND POLITICAL POWER THEIR DUE

As many authors have already argued, one of the major historical ruptures designating the passage to modernity has occurred in the domain of legal-political thought. The moderns have broken off the ages-lasting paradigm known as the natural-law tradition in the west[164]. The natural-law tradition had presented a standpoint whereby law, morality and political authority were accounted as integral to each other. In the view of its modern critics, one can argue, such a standpoint was crucially defective at two basic points. First, the natural-law view rested ultimately upon a dogmatic-theological ground, which is at odds with the moderns' belief in the critical powers of reason. Second, as Hegel would later emphasize, the newly arising age was also an age of subjectivity or of subjective freedom which makes a mockery of the natural-law premise that human beings are creatures who are assigned to a certain pre-determined place in the hierarchical order of universe.

Hence, the early moderns of the 17th and 18th centuries in the western world had strived for replacing the pre-modern view with a new paradigm on law and the state. The theories of Hobbes and Kant can be pointed out as significant instances of the modern paradigm. These authors had tried to rearticulate the concepts of law, morality, and political authority on the new intellectual terrain of then newly rising modern age. Since they tried to account for the integral cord between the

[164] I should emphasize that, in the following, the terms natural-law-tradition (i.e. straight out legal-moralism), legal-positivism and legal-realism will be employed as designating ideal-types in the Weberian sense. Hence, my criticisms against these approaches might not apply to certain particular edifices counted within one of these strands of thought. For instance, it might be argued for John Finnis's contemporary version that it overcomes the most of the shortfalls of natural-law-theories (i.e. legal-moralism) articulated below. The same can be also argued for H.L.A. Hart's theory in the face of my criticisms against legal-positivism. I concede that such individual edifices might really be overcoming the shortfalls I identify with legal-moralism and legal-positivism. However, this is only because such authors does not follow a pure (i.e. a paradigmatically) moralist (in the case of Finnis) or positivist (in the case of Hart) line of thought, but a synthetic one incorporating modern-rationalist insights.

concept of law, morality and political authority on a specifically modern mode, I call this mode of thinking as modern-rationalism[165].

This modern re-construction of the cord between the concepts of law, morality and political authority was quite different than the pre-modern view. The natural-law tradition founded its account upon the idea of an order pre-given in the sense of transcendent-underlying reality. More precisely, it suggested that the legal-political order is the part and the micro-model of the "cosmic order" (i.e. the godly order of universe). On the other hand, modern-rationalism has held an ultimately agnostic standpoint on the actual structure of reality. Desisting from any onto-theological argument, it has brought about the idea that the order, at least at the political-legal level, is the design and the work of human beings[166]. Hence, the conception of a pre-given order was replaced with a modern conception of order as a human project, i.e. as something to be constructed[167]. Also, as indicated above, modern rationalism was based on the recognition of the principle of subjectivity or subjective freedom. For the early modern, the order in the sphere of collective human life would be attainable through the regulation of subjective freedom (*Willkür*) of individual members in a way not annulling these freedoms but making

[165] I know that many might find it a controversial argument that authors like Hobbes and Kant, particularly the former, attempted to establish the integrality of law, morality and political authority to each other. Indeed, these very figures are frequently referred as founding fathers of legal-positivism and even of legal-realism. However, I think, the view that these authors had simply untied the cords between the foregoing concepts relies on a misreading. Hence, I agree with authors like Höffe who suggest that these early modern authors establish the integral cord between the concepts of law, morality and political authority in a complex manner rather than breaking off it. I will explicate the basic tenets of this modern perspective in the following sections of this chapter.

[166] In her article, titled "The Rule of the State and Natural Law", Blandine Kriegel summarizes well the remarkable difference between the moderns and the ancients *vis-à-vis* their conceptions of order: "[By the moderns,] the concept of natural law is gone. The order of human nature is now conceived in terms of art and making, a product of convention and intellection. Man is now set on the path to discover being anew through a hard and complicated demand. The adventures of modern subjectivity begin, as man sets himself to inventing new possible worlds" (Kriegel, 2002:21). As she underlines, what she just suggested concerning the conceptions of the order of human nature holds true also in the case of the conceptions of legal-political order: "[by the moderns,] the force of law has ceased to be natural and objective; it has become rational and subjective" (Kriegel, 2002:21).

[167] Because of this very important distinction between the ancient conception of a pre-given order and the modern conception of order as a human project, I am reluctant to employ the term "modern natural law school" or "natural rights school" which many authors have used to designate the current of thought beginning with Hobbes, and then continuing with Locke, Rousseau and Kant. Among these authors, only Locke's theory has certain resemblances to the pre-modern mode of argumentation from a natural (or a divine) order. Except him, the moderns (particularly and most self-consciously, Kant) have substituted such an idea of natural/divine order with an idea of rational order originating from our own reason, not from the external nature or cosmos. This may be, of course, read as the reflection of what Weber called "the moderns' disenchantment of the world" into the legal- political domain.

them co-existent. Hence, for the early moderns, law or legal-political order cultivated the aim of sustaining the conditions of free exercise of subjectivity in a way consonant with others'. In line with these tenets, modern-rationalists suggested that the moral idea of justice is inherent in the definition of the political-legal order: justice as the condition that the subjective freedoms (i.e. the fundamental rights) of individual members are respected. Hence, the idea of fundamental (human) rights has been the keystone in the modern re-construction of law, morality and political authority[168].

Below, I will discuss further the nature of the modern re-construction of law, morality and political authority. For the moment, however, it should be underlined that this modern-rationalist re-construction was historically very precarious. As early as the 19th century, there occurred a paradigm shift from modern-rationalism to legal-positivism and legal-realism –a paradigm shift which has spoiled the integrity of law, morality and political authority. The protagonists of positivist and realist strands of legal-political thought saw in modern-rationalism nothing more than a vain metaphysics. In regard of this, it is very important to see that indeed the seeds of legal-positivism and legal-realism nestled in modern-rationalism. Indeed, one can argue that the shift to positivism and realism came up as the result of the radicalization of the insights of modern-rationalism at two points mentioned above. First, the recognition of "subjectivity" or "subjective freedom" as the basic fact and principle of human collective existence by modern-rationalist account stimulated the view that law was and had to be a completely amoral entity. For, once the principle of subjectivity or subjective freedom is recognized, it is merely one step further to cast off any possibility of a general standard of rightness. Under

[168] I have the contention that this is true even for the case of Hobbes' theory of law and the state. Despite the fact that many reads Hobbes superficially as an author negating any significance for subjective freedom or individual rights in the face of the state authority, the idea of subjective freedom and individual rights stands as the fundamental postulate of his reasoning. Rather than simply championing the political cause of "security" against "individual liberties", Hobbes' point is that individuals should consent to not exercise a remarkable part of their natural liberties, in order to acquire a *secure* enjoyment of civic rights within a commonwealth. Thereby, Hobbes' argumentation suggests that the protection provided for a minimal core of our natural liberty, which turns into civic rights by the very reason of this protection, constitutes the justifying-legitimating element for the Leviathan. If the sovereign ruler of the Leviathan violates this projection, s/he thereby risks the very reason of the existence of his/her state. Hence, even though Hobbes' theory is crucially vulnerable in neglecting to consider on the delimiting effect of the fundamental-subjective rights over the content of legal-political rule, Hobbesian vision of law and the state is, in its essence, anchored to the idea of fundamental-subjective rights as moral principles of justice. In fact, as I presented in Fourth Chapter, Höffe provides a convincing account and elaboration of Hobbes' reasoning on this aspect. See, pp. 180-183.

the conditions of moral relativism, law was considered to bring about a resolution of social conflicts exclusively by virtue of the power of the will underlying it, not by virtue of the rightness of its content. Hence, the cord between law and morality was untied. This breaking off has been expressed by "the thesis of separation" which characterizes legal-positivism.

The second radicalization concerns the modern rejection of the assumption of a divinely established concurrence between "the real" and "the normative". More precisely, the natural-law theories assumed that the existing universe has been structured in the form of an order which is either the ideal or the process leading to the ideal. As I argued above, the early-moderns replaced this pre-modern vision with the conception of order as human projection and human project, i.e. as the intellectual design and the work of human beings. In a further step, this gave way to the idea that there is a strict opposition (not simply a separation) between the reality (i.e. the concrete life) and any normativity (i.e. any abstract regulation of life by rules). As well illustrated in the case of Carl Schmitt's theory, particularly the realist strands in legal-political thought are to exploit this move from the conception of order as something pre-given towards the conception of order as a human project. By completely casting off the element of reason, realism exclusively emphasized the role of human will for the construction of order in the midst of what it conceived of as an essentially chaotic existence. In this way, law and political order was conceived as a precarious historical-achievement associated with the categories of "the artificial", "the conventional" and "the accidental", rather than "the natural", "the rational" or "the universal". This realist casting off the element of reason and the subsequent adoration for human will were again suggested, even forced upon by moral-relativist turn designating modernity. For, once the distinction between "the rational" and "the irrational" (or between "the reasonable" and "the non-reasonable") is relativized, any normative order among human beings is conceivable as the product of nothing but of arbitrary human will. From the moral-relativist standpoint, any normative regulation among human beings is designated by the term "the conventional", i.e. the sum of the modes of behaviors deriving from decisions taken in the past and respected for a remarkably long time in a particular society. Hence, for the moral-relativist, the references to the category of "the rational" or "the reasonable" with regard to a particular norm or a particular normative order are vain and even

absurd, if these categories are to be understood as supra-conventional (i.e. as universal) categories.

Given the fact that the shift from modern-rationalism to legal-positivism and legal-realism has been so effective that the latter are now the dominating paradigms, the primary question that the contemporary political-legal thought should ask is this: to what extent these paradigms can reflectively account for our collective legal-political experiences? I particularly choose the phrase "reflectively account for", because I mean a paradigm aiming at *understanding* our legal-political practices and vocabularies as *meaningful* sets, rather than a paradigm which would allegedly *explain* law and the state in a manner that represents the common man's idea and practice of law and the state as loaded with illusions/ ideological distortions. That is, I mean a paradigm which will make meaningful the legal-political experience as such by manifesting the general-constitutive prepositions underlying it, in opposition to the modes of thought which defy such general-constitutive prepositions from a theoretical point of bearing inscrutable to the common man. Let me now recapitulate why both legal-positivism and legal-realism can not reflectively account for our legal-political experience, but eventually (mis)represent this form of experience as structurally imbued with delusions on the part of their ordinary actors.

Legal-positivism as the champion of the separation-thesis suggests a vision of law strictly distinguished from the domain of morality. Law is defined as the set of rules of interaction enacted by the legislative authority. In line with this, legal-positivists hold that while people obey a moral rule because they think this rule is right, legal rules are obeyed merely because they are enacted by a coercive political-legal authority. This means that, though law and morality are both normative systems, i.e. systems of "what ought to be", they are of quite different nature. I think we can understand this difference by referring to a distinction between a system of direct normativity (whereby the obligation arises directly out of norms themselves) and a system of indirect normativity (whereby the obligation arises out of the authority of the norm-giver). From the perspective of the legal-positivist, law is a perfect example of the systems of indirect normativity. By virtue of this, the legal-positivist holds that the validity of a legal norm has nothing to do with the concurrence of its content with moral principles or rules. By leaving aside the "matter of righteousness" (which is a question concerning direct

normativity), legal-positivism declares that legal validity exclusively lies in the enactment of a norm by the authorized agent.

One should add that, for the legal-positivist, the validity is the sole point of justification for a legal norm. That is, the notions of "just" or "unjust" that the common man employs in his evaluation of legal norms is either synonymous with "valid"/"invalid" or meaningless attributes. An idea of justice in the form of a supra-legal normative substance restricting the authority of law-maker has no sense from the standpoint of legal-positivism. If there are certain restrictions to legal authorities, these can be only intra-legal restrictions. Particularly in the formalist strands of legal-positivism, we come across with a plenty of restrictions standing before the legal-political authorities. For instance, the requirement that a norm should have the formal characteristic of generality, the requirement that a norm should be enacted in accordance with pre-established procedures, and the requirement that a legal norm is a rule binding its legislator too may be pointed out as the instances of the intra-juristic restrictions that some legal-positivist have underlined. However, even such intra-legal restrictions seem controversial for some other legal-positivists. Indeed, Kelsen's premise that legal authority can make law out of any content may be demarcated as the position defining the positivist school of political-legal thought in general.

The position that legal-positivism takes *vis-à-vis* the relationship between law and political authority is also inherent in Kelsen's premise that authority can make any content law. For, this premise suggests a vision of authority that has a power analogue to the king Midas: authority turns out everything it wills into law, precisely as the king Midas turned everything he touched into gold. Hence, as Kelsen himself understood better than anyone else, legal-positivism makes law identical to the will of the political authority, more specifically, of the state. Indeed, Kelsen thinks that the state is no more than a pleonasm (i.e. a redundant phrase) for the legal-order. In his view, this pleonasm reflects the still on-going influence of the theistic mode of thinking (i.e. the mode of the pre-scientific thinking based on the illusionary category of a subject or person standing prior to her/his relations). Hence, he suggests that, if it were not the remnants of this pre-scientific mode of thinking upon the modern legal-political thinking, modern jurisprudence would have completely renounced the phrase of the state in favor of the concept of legal-order.

In the face of the positivist identification of law and the state, a crucial question arises: which one of the identified entities does assimilate the other? Kelsen, the positivist with a strong distaste for the theistic mindset, optimistically suggests that law is the real element in this identification, the state as the person standing behind the legal order being nothing more than a pleonasm. Yet, I think, the quite opposite is the case: the ultimate result of the positivist identification is the assimilation of law by the state, not the reverse. Recall the positivist assumption that any state is the rule of law or that any state is legitimate insofar as it maintains its rule. Just as the word "just" has no meaning other than the word "legal", once law is separated from morality; the word "legitimacy" has no distinct sense, once law is made identical to the powerful will of the state. These entire amount to nothing less than accepting the sophist critique of law as the rule of the stronger. Hence, the positivist identification of law and the state risks, indeed, loosing the idea of law as a normative order. For, if whatever the state decrees is to be considered as law, the distinction between the legal-normativity and any arbitrary rule of brute-force is essentially blurred. This is known as the problem of drawing a distinction between the state and a gang of bandits at large. Although there have been attempts among legal-positivists to resolve this question by reference to the consent of the ruled in the case of the state authority, such attempts fail in the end. That is because there can be no clear demarcation between what is consented and what is not, once the obedience is taken as expressing a tacit approval. To the extent that I obey to the commands of the bandit who points a rifle at me, I may be considered as giving consent to his power over me. I think that the only distinction legal-positivism can draw between the authority of the state and the power of a gang of bandits is a quantitative, not a qualitative distinction: if you are so powerful that you are very rarely challenged, you are a state; if you are frequently challenged, your claim to be a state is, at most, a controversial one.

Hence, legal-positivism discards the ideas of justice and legitimacy as supra-legal references from its account of law and the state. However, such a renunciation destroys, in the end, the whole idea of law and the state. For, this idea is founded upon the assertion of being essentially different from a random structure of power, that is, upon the assumption that right (i.e. *Recht*) and might are not the same things. The power exercised by law and the state is assumed to be a righteous power or a power in the service of the right. Once you discard the

ideas of justice and legitimacy, you degrade this assumption into the status of common man's illusion. The idea of human rights, too, gets a similar scolding. From the perspective of legal-positivist, the idea of human rights as a supra-legal normativity is simply a moralistic non-sense. Human rights may have a sense only as remarkable instances of a specific form of legal regulation, if the constitution-making-power wished them to be a principal part of the constitutional order. This specific form of regulation, which is widespread within contemporary constitutional systems, is known as subjective-rights-norms. Beyond this, the legal-positivist suggests, human rights have no sense: the assertions concerning their inviolability, universality and etc are no more than contemporary myths in the western world.

If legal-positivism does not outspokenly present itself as a deconstruction of law and the state, it is because it does not follow its own implications completely. With a remarkable stubbornness, legal-positivists still hold to the idea of law as a normative system which should not be reduced to sociological facts. However, one may rightly argue, legal-positivism has opened the way both for those who reduce law to sociological facts (i.e. for legal-realism) and, then, for those who deconstruct law (i.e. for "critical legal studies"). Legal-positivism opens the first path because the identification of law with the will of the state suggests that law is in fact a function of the asymmetrical power relations in a given society. To illustrate, such identification suggests that even such an evidently malignant form of social asymmetry as slavery can be sanctified as law if the political-authority wills it be so. Relevantly, legal-positivism also opens the second path (i.e. the path for *deconstructing* the whole idea of law): once law is (mis)conceived purely as a function of power relations (i.e. law as the expression of the will of the most powerful), the very idea of law is rendered redundant. For, this idea depends upon the possibility that law as a specific organization of power (i.e. a just/a distributively advantageous organization of power) can be distinguished from all the given asymmetric power relations (e.g. economic, political, social, and gender-based) within a society.

As for legal-realism, I think that this approach is a close successor of legal-positivism. For, realism can be best understood as the radicalization of the revolt against legal-rationalism. It challenged the very idea that legal-positivism has left intact: the idea of law as a normative system. Legal-realism suggests that the idea

of law as a purely normative system is no more than an order-disrupting utopia. For the realist, there can be no self-regulating and self-enforcing hierarchy of laws whereby more particular norms are automatically deduced from more general ones. Rather, there are only concrete-orders established and maintained by concrete decisions of concrete persons in particular cases. Law is essentially a function of will and power. The element of reason or normativity in law is, thus, only of secondary importance, if it has any.

From the perspective of the legal-realist, the political power has a constitutive role over the domain of law. This constitutive role of the political power suggests much more than the legal-positivist identification of law with the will of the political ruler. For, in the view of the legal-positivist, law still has an autonomous existence in relation to its author. That is, though it is created and subjected to change by the political-power, law can still be recognized as an entity distinct from the political ruler, i.e. as a work distinct from its author. In opposition to this, the realist holds the view according to which law is indissolubly bound to the personality of the political-ruler. The distinction between positivist and realist view can be better understood by an analogy to the distinction between the deistic cosmology and the theistic cosmology: while deism sees the universe as an order functioning immanently in the fashion of a mechanism, theism understand the universe as the *God's* order functioning by the virtue of the God's supreme will and power as a transcendent force. Hence, in the view of the realist, law can never be an immanently functioning system of normativity. Rather, law designates an existential (concrete) order founded upon and sustained by the force of the political ruler. This is why the concept of sovereignty designating the constituting-founding power, i.e. a power creating order *ex nihilo*, is so central for the realist legal-political theorists like Carl Schmitt.

Once law is so strictly identified with, even assimilated to political power, the question arises: what about the ideas (or expectations) such as justice and legitimacy? Like legal-positivism, legal-realism takes granted the modern conviction of moral relativism. However, it radically differs from the former in regard of the conclusion to be drawn from moral relativism. The legal-realist suggests that, thanks to this relativism, it is up to men to decide for their substantial moral standards (i.e. principles and values) and establish their political associations on the basis of them. Then, any decision is as just as any other one.

The realist gives the precept that one should decide upon certain substantive moral standards in any case. For, such decisions are essential for the constitution of legal-political orders, and an order in any case should be preferred to disorder. Any legal-political order requires a certain element of supra-legality to be based on. This supra-legality designates the criteria of justice or legitimacy peculiar to that particular order. Hence, though there is no trans-systemic (i.e. universal) standpoint from which one can judge which of the various substantial orders is more legitimate, there is always an intra-systemic standpoint of legitimacy for a given particular legal-political order. Human rights, torah, the Sheri' a, any particular understanding of natural law, the Nazi ideology, or any other substantive set of normativity can substantiate this intra-systemic standpoint. Any substantive set of normativity suffices only insofar as those who represent the political-legal order (i.e. those who found and maintain the order) decide for them as supra-legal criteria in the light of which all that are legal should be interpreted. Thus, in opposition to legal-positivist school, legal-realism re-introduces the necessity of a substantive set of normativity over any concrete legal-political order. Yet, it is essential to underline that, for the realist, such a substantive set of supra-legality can be based only on a contextual (i.e. historical-cultural) ground, never on a universalistic ground as the legal-rationalist plead for.

In comparison to legal-positivism, one should concede, legal-realism stands as a much consistent and frank approach. More precisely, it is an approach which frankly defends what legal-positivism glimpses but can not dare to defend explicitly. Indeed, the realist assimilation of law to the will of the stronger is not quite new. It goes back to the Sophists of the ancient Greek society. What is striking in legal-realism is, however, that the realist combines such an account of law with a defense of it, rather than arguing in the mode of a critique of law. I should concede that, despite the bitter taste of a strong conservatism penetrated into it, the realists' line of argumentation has a noteworthy dimension particularly under the conditions of modernity –the era which is characterized both by the "disenchantment with the world" (i.e. by the renunciation of the ideas of a pre-given harmony in the nature or cosmos) and by the rise of moral-relativism. Two basic suggestions (which have, indeed, found particular emphases in Schmitt's theory) encapsulate this noteworthiness: 1) since a substantial order brings about, at least, a minimum of peace and stability, it is preferable to disorder; 2) since

there can be no grounding, in a rationalist fashion, for any substantive set of moral standards (i.e. since there is no universal moral standpoint), the order should be build upon the commands which are to mend the primordial normative abyss in the existence, never upon a justification on the basis of a "universal" normative ground.

As I will return later in this chapter, I think that the realist approach to law and the state is salutary at the point of underlying that the order is the first virtue of political-legal institutions, and that the political-legal order cannot be sustained in an automatic (i.e. self-regulating) fashion merely on the basis of self-enforcing norms. However, its overall vision of law might easily turn out to be devastating for the idea and practice of law. To argue that any substantive set of normativity, the Nazi ideology as well as the Human Rights, may stand as the principles of legitimacy under the condition that they are supported by enough power is indeed to mock of the very idea of legitimacy. If legal-positivism conceives the concepts of justice and legitimacy as moral non-sense, legal-realism makes them epiphenomenal to power. Here again, common man's idea and practice of law is degraded to the status of illusion. For, as any inquiry into the constitutive propositions of the phenomena called legal relations should reveal, such relations are based on the presumption of an objective (i.e. *allgemeingültig*: valid for all) idea of justice which is considered to bind all parties impartially, rather than being identical to the will of the stronger party (i.e. rather than being an arbitrary decision taken by those who are so powerful as claiming to represent the state). If you renounce the objective idea of justice, you can conceive a man appealing for his rights before a court as nobody but either an ideological-dupe (i.e. someone deceived by the distorted self-representation of the rule of the stronger) or a cynic (i.e. someone who knows that law designates nothing other than the yoke of the stronger, but who does not explicitly challenge law).

Given the impasses into which legal-positivism and legal-realism sweep us, I insist that we should return to the rationalist paradigm of law and the state, i.e. to a vision which can account law, morality (in its thin sense of respect for human rights) and political authority as elements integral to each other. Yet, this return should be attentive to certain traps which had stimulated the shift from modern-rationalism to positivism and realism in the past. First point concerns the implications of the recognition of the principle of subjectivity or subjective

freedom. It is certainly true that once this principle is recognized, the ethical objectivity in its pre-modern fashion becomes obsolete. That is, the idea that there are (naturally or divinely) pre-given ends embracing every aspect of individuals' lives is to be abandoned. However, this should not be misconstrued as implicating a moral-relativism. There remains a realm of moral objectivity with a restricted scope, but also with a stronger certainty in comparison to the pre-moderns' comprehensive-ethical objectivity encompassing the whole human life. This restricted scope is the sphere of interactions between human beings. In this sphere, subjective freedom of one individual necessarily comes across with subjective freedom of other. Hence, subjectivity should be restricted here. Since the principle of subjective freedom of *each* is recognized, this restriction can only be a symmetrical, mutual one, i.e. a restriction based on the general principle of equality. As a result, there arise certain objective standards which we call human rights.

This is why, I think, the distinguished nature of human rights as a set of objective standards can never be overemphasized. Unlike pre-modern ethical ideals which have the form of paternalistic-regulation over individual, the role of human rights is to maintain the conditions for the maximum amount of the practice of subjective freedom by each person. That is, in a terminology reminiscent of Kant, while pre-modern ethical objectivity functioned as hindrance to subjective freedom, the rules called human rights are the *hindrances to hindrances to subjective freedom*. Hence, they are the constitutive element of the idea of law as a regulation of mutual affairs of persons *qua* persons (i.e. of beings with subjective freedom). Similar to their role, the scope of human rights as objective standards over human subjectivity can be best designated through Kantian terms: they constitute a kind of moral objectivity that is pertinent to the moral domain of Right (the social domain which comprise the rules of human interaction), rather than the comprehensive-ethical domain (the personal domain of morality which concerns the intentions underlying any human action). Legal-rationalism, in its modern form, leaves the latter as a sphere whereby the individual conscience exclusively reigns, while the former domain is thought as comprising rules of universal rightness (i.e. rules of justice) that should be publicly enforced *via* laws. Here lies the essential difference between legal-rationalism and (straight-out) legal-moralism. The viability of modern legal-rationalism depends upon the

maintenance of this difference, i.e. upon its success in accounting for law as a topic of practical reason without assimilating it to the domain of comprehensive ethics.

The second point to which a contemporary proponent of modern rationalism should be attentive concerns the distinction between the force of law and the sheer force of the powerful, i.e. between the rule of law and the rule of brute power. For a true insight into this distinction, the apocryphal conception of the rule of law should be abandoned at first. By this apocryphal conception, I mean the mechanical conception of a legal order in which norms are considered to be deduced from each other and enforcing themselves into relevant cases in an automatic fashion. This apocryphal conception misconstrues legal order as a closed system with no vault for a deciding authority. As we have seen in our examination of Carl Schmitt's legal-political theory, such a conception has been particularly attacked by realist paradigms.

The point is that the mechanistic conception of legal-political order –a conception which is closely correlated to deistic and/or pantheistic presumptions prevalent in the modern age– is not only undesirable in terms of its practical consequences (e.g. in its inadequacy in the protection of certain constitutional ideals such as human rights), but also essentially wrong. We should come into terms with the fact that legal-political orders is not closed systems of self-enforcing norms, but open systems which stand upon decisions of authorized persons or bodies. However, the assimilation of legal-political order into any successful organization of power should be avoided too. This dual program can be achieved only by virtue of the concept of "publicity" constituting the distinguishing essence of the legal-political order. "The public" is the opposite of "the private", i.e. the personal. To qualify an organization of power as a public order comes to mean that the authority to rule within that order is *indisponible*[169],

[169] In his "Morality and Law", Habermas employs the term "indisponible (*unverfügbar*)" to designate an essential dimension of law. See, Habermas, 1986:261-264. The adjective "*unverfügbar*" is a derivation from the German verb "*verfügen*" which means something close to English verb "to enact". Hence, *unverfügbar* means, originally, something that is not enacted or posited. The pre-modern conception of natural law (in opposition to enacted-positive laws) was based on this original meaning. However, as is implied in Habermas' text too, the term indisponible (*unverfügbar*) qualifying law has another meaning which would attain a particular importance in modern era. In this second sense, something is indisponible if it belongs to the public and cannot be asserted as the possession of a private person or a particular sub-group. Then, the recognition of the indisponible character of the political-legal order and the political-legal rule has far reaching consequences. Above all, it shows how contradictory were the pre-modern

i.e. something that cannot be taken at the disposal of a private person or of a particular group. This means that, in a legal-political order, the "public will" or the "general interest" constitutes the principle of authority. Those who occupy ruling positions in a legal-political order hold their positions as functionaries of the public, not as possessors (i.e. masters or lords) of the realm. Although these functionaries have privileges to enact new laws, execute, interpret and enact already existing laws, they are bound with (i.e. they may act only for the sake of) the "public will" or the "general interest". To put in clear words, if a certain rule cannot be referred to "general interest", this system cannot be defined as a political-legal order, i.e. a state, but only as an arbitrary yoke of some over some others. In line with this, the assertion that a legal-political order is indisponible should not be misconstrued as meaning that such an order is a completely closed system of automatically self-enforcing norms. Rather, a legal-political order is an open system which is run by decisions of particular persons or bodies that are authorized by the public so as to realize the most basic public/general good (i.e. justice).

It should also be underlined that the idea of the "public will" or the "general interest" is not a mystic ideal as many argued. The contemporary exposition of modern-rationalist approach presented by Otfried Höffe demonstrates this. For, he explicates convincingly that the "public will" is identical to the principle of distributive advantage of each member. This principle is then substantiated as fundamental human rights by him. To sum up, the state (i.e. the legal-political order) has the distinguishing character of depending upon the "public will" or the "general interest"; the latter is, in turn, identical with the distributive advantage of each or, more substantively, human rights. From these, the conclusion analytically follows that human rights are the essential component of the concept of any legal-political order. In this way, we can see that, in avoiding the traps which had led to legal-positivism and legal-realism in the past (i.e. in avoiding the destructive presumption that our practice of law is, in fact, full of false or illusionary presuppositions), the idea of human rights plays a vital role. Human rights designate both the objective-moral idea of justice underlying the concept of law

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conceptions of political societies as realms of the dominium of a particular dynasty. For, such conceptions suggest that particular individuals take the political society at their disposal as their particular dominium, despite the fact that a legal-political order is, by definition, *res public*, i.e. something that cannot be taken at disposal by particular individuals or groups.

and the objective-criteria of legitimacy as the distinguishing principle of the state-power. As Höffe well explicates, neither law nor the state is accountable without reference to human rights as the universal standard of justice and legitimacy. For, they stand as the pre-condition of the legal-political order constituting itself as the "public thing" (*res public*).

Besides avoiding the foregoing traps, I think, a contemporary rationalism should also gain insights from positivist and realist critiques of modern rationalism. Particularly important is the point which both positivist and realist authors have emphasized against liberal accounts of rights: the point that rights presuppose a legal-political order at first. Liberalism has a tendency to conceive of subjective rights as a category out of the domain of positive legal order of authorizations. Subjective rights are, thus, understood as serving to restrict or check this domain and the state power backing up it. Although positivist and realist accounts or critiques of rights are unacceptable in many other points, they are right in arguing that the antinomy between subjective rights and the positive legal-political order is a false antinomy. Rather, subjective rights should be understood as a specific normative element within this order, even though they have constitutive significance for it. Moreover, it should be acknowledged that the legal-political order does much more than enhancing the prospects for human rights. Rather, it provides the only possible way for the co-existing entitlement of a plurality of persons to such equal freedoms. As Ripstein rises to our notice, the relation between the public authority and human rights can be conceived on the model of the relation between public roads and traffic rules. Refuting the naïve liberal presupposition that a road was initially a natural free space open to the use of every person but then the state steps as an extrinsic agent limiting this natural freedom for the sake of general convenience, Ripstein contends that "the road and public rules regulating it come as a package" (Ripstein, 2009:249). That is, it is only the existence of a public authority positing public rules that makes a certain space a public road whereby people are entitled to get from one place to another. Hence, while it is the case that the legal-political order as such has significance, from the standpoint of practical reason, only as the means of the realization of justice (i.e. of human right), it should also be held in mind that the political-legal order is *the necessary* means which is intrinsic to its very end of justice.

Indeed, Höffe's contemporary exposition of rationalist account of law and the state avoids the foregoing liberal fallacy. Drawing upon the insights provided by Hobbes and Kant, Höffe explicates that human rights are dependent upon legal-political order at two basic points. First, most of individual human rights require specification by laws. The right to property well illustrates this requirement: though reason instructs that persons should be able to appropriate things, it suggests no determination concerning the form and scope of this right to personal property. Such determinations should be decided upon by the legal-political authority in the form of positive laws. Second, any human right not backed up with the enforcement by a legal-political order would be merely a provisional right. That is, it is inherent in the concept of right that it should be enforced; precisely as Kant suggested when he stated that a right is indeed a title (or an authorization) to coerce (Kant, 1996:25). The enforcement of rights is guaranteed, to a certain level, only on the condition of the existence of a public order. Hence, Höffe's account suggests that the relation between human rights and legal-political order is far from being an antinomy. As a matter of fact, I think, his account implicates that the right to a legal-political order should be considered as the primary human right, since leaving off the state of nature and living under a legal-political order is the condition of possibility (though, of course, not the sufficient condition) of all subsequent human rights[170].

[170] At this point, I want to underline that a clear expression of the right to a legal-political order as the primary human right is already found in Kant. In the *Metaphysics of Morals*, he argues that to be able to live in accordance with *right*, in contrast with *violence*, human beings should engage into a *civil union* which is, for Kant, a structure of political-legal authority and thus should be distinguished not only from the imaginary solitary existence usually called as the state of nature, but also from the non-authoritative forms of co-existence exclusively based on social fellowship (Kant, 1996:85). It follows then, Kant thinks, there is "the postulate of public right" which analytically arises from the concept of universal right: the postulate that "when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition" (Kant, 1996:86). As Ripstein's impressive interpretation of Kant's legal and political philosophy underscores, Kant considers this postulate as comprising "the right of human beings as such" and sees a "wrong in the highest degree" in the violation of this right, i.e. in the recalcitrant insistence to be and to remain in a non-rightful condition where human beings are not assured of what are theirs against violence (Ripstein, 2009:325-352). I think that, in the following passage, Kant well articulates both the essence of his position on what he calls "the right to a rightful condition" and its justification: "[H]owever well disposed and law-abiding men might be, it still lies *a priori* in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings, peoples, and states can never be secure against violence from one another, since each has its own right to do *what seems right and good to it* and not to be dependent upon another's opinion about this. So, unless it wants to renounce any concepts of right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter

Acknowledging the right and duty to a legal-political order as the prime human right has very important consequences. Above all, this acknowledgement seems granting a *prima facie* justification to any existing legal-political order[171]. For, the recognition of the legal-political order as a pre-condition of human rights exposes the *reason for the state*: the reason *why* we are morally obliged to form and maintain the type of co-existence designated as the state (that is, the legal-political association) and the reason *why* it is right (i.e. just) to exercise force upon anyone who refuse to engage in a political-legal order[172]. To state in the most simple and general terms, the rationalists' *reason for the state* is as follows: *In a legal-*

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into a condition in which what is to be recognized as belonging to it is determined *by law* and is allotted to it by adequate *power* (not its own but an external power); that is, it ought above all else to enter a civil condition" (Kant, 1996: 89-90).

[171] In regard of this point, one may also cite Hermann Heller, a left-wing German philosopher of law from the Weimar period. As a philosopher whom should be considered within the strand of thought I call modern-legal-rationalism, Heller points out the problem of indeterminacy and uncertainty of the principles of justice. He then suggests that this problem is resolved only by the establishment of "an authoritarian power" called the state. See, the precept from his *The Essence and Structure of the State*, edited by A. Jacobson and B. Schlink in *Weimar:A Jurisprudence of Crisis*.

[172] In developing the following conception of *reason for the state* and its distinction to the *reason of the state*, Miguel Vattel's interesting article, titled "The Idea of Public Reason and the Reason of State: Schmitt and Rawls on the Political", has been very stimulating for me. In his work, Vattel argues that the idea of public reason (*ratio publicae utilitatis,* i.e. something which is of utility for all equally), as it was originally articulated by the western-medieval political thought, had two dimensions: "on the one hand, the concept [of public reason] refers to a reason *for* an estate (*status*) with a superior right or *jus*. The public reason in question is that this estate serves the good of the entire community and that community 'has a public right that is superior to and embraces all private rights of kings and subjects'. On the other hand, the concept of public reason refers to a reason *of* the estate which is charged with interpreting or deciding, case by case, what the good of the community requires. One can say that the first sense of public reason (*ratio status rei publicae*, "by reason of the government of public affairs") denotes the superiority of the power of the political community over that of the estate, and I shall refer to it as a *reason for the state*, whereas the second sense of public reason (*ratio status magistratus*, "by reason of the ruling office or power") denotes the superiority of the power of an estate over the rights of private persons, and thus I shall refer to it as a *reason of the state*" (Vattel, 2008:246). Having underlined these two dimensions of the idea of public reason, Vattel takes Schmitt and Rawls as figures who focus exclusively on merely one aspect of the idea. On the one hand, Rawls assimilates the idea into the *reason for the state* (i.e. into the principle of justice), which he elaborates in a Kantian fashion: the reason for the state is the recognition and respect for each individual's status as *sui juris*, i.e. as a person who is capable of managing her own affairs and taking the responsibility. In Rawls's own vocabulary, as Vattel notes, this means that "first, [each person should] be considered by all as capable of participating on equal terms in the construction of principles of justice that apply to all; and, second, [each person should] be considered by all as the last judge of the goodness of anything for oneself" (Vattel, 2008:253). On the other hand, for Vattel, Schmitt assimilates the idea of public reason to the *reason of the state* (i.e. to the logic of legitimacy), neglecting any normative consideration other than the superiority of an order (i.e. the stability) over a disorder (i.e. the instability). Although Vattel's basic objective in his work –i.e. to show how Schmittian and Rawlsian theories share a common space of reasons traceable back to the European medieval thought, and then to critically thematize how both of these conceptions of the idea of public reason may be instrumental for the "fact of oppression" of the minorities– is very different, his arguments may be read as indicating the impasses of the theories which deal up the *reason for the state* or the *reason of the state* in a one sided fashion. This is, indeed, what I am about to elaborate in the main text.

political order, one is treated as a person, not as a thing. Refusing to engage in a legal-political order would mean to take the risk of being treated as a thing by others. In such a case, one would thus be renouncing her status as a person, which is, in fact, the basis of all our subjective rights.

The vitally important point in regard of the rationalist *reason for the state* is that it does not only justify the necessity of the institution called the state, but also bring about limitations to the state-power. For, once the reason of the existence of the state is explained as the preservation and promotion of our status as *persons*, any actual organization of power which claims to be a state should be considered as a deviant entity when this actual organization has a form not compatible with the recognition of (and respect for) the status of everyone as a free and equal being (i.e. as a person). Hence, the rationalists' *prima facie* justification of the legal-political order is very different from the realists' *absolute* justification of the state. As we have seen in the case of Schmitt's political theory, the latter suggests that any existing order is justified (more precisely, exempt from our normative judgment) solely by virtue of the fact that it provides orderliness (stability). In line with this, Schmitt confronted any possibility for a consideration on the *reason for the state* by indicating that like individual in the private law, the state in the public law is in no need of justification for its existence[173]. Indeed, the realists' much beloved phrase, the *reason of the state* (i.e. *raison d'état*) –as distinguished from and seen superior to the *reason for the* state– well expresses their conviction that no standpoint can judge the supreme standpoint of the state and its actions in founding and maintaining the order. In opposition to this, the rationalists' *prima facie* justification of the state only expresses the insight that order designates a first virtue and, in this sense, can be taken as the *minimum level of justice*. However, this minimum level is, though necessary, not sufficient for the justification (i.e. legitimation) of a state. To be justified/to be legitimated, a state should be exposed to the standpoint of substantive justice, i.e. to the substantially normative standpoint designated by the criteria called human rights. Moreover, for the rationalist, only a state which meets such criteria would be an entity that remains true to the very idea of law and the state as something more than a random system of power.

[173] See, p.129 above.

My arguments above make clear that the rationalists' *reason for the state* comprises a strong critique of the realist notion of the *reason of the state*. In postulating a moral standpoint of justice universally binding over concrete political-legal authorities, the rationalist *reason for the state* assigns to these authorities a responsibility far beyond merely maintaining the order, which is the much extended responsibility to maintain an order *in accord with the principles of justice*. Hence, the rationalist conceives the *reason of the state* (*raison d'état*) as dependent upon the *reason for the state*. This is, of course, a sound standpoint, since the concept of law and the state as something not reducible to any successful organization of power can be accounted only in this way. However, the rationalist standpoint evokes a lacuna in its account of the phenomena called law and the state, when it attempts at a complete assimilation of the *reason of the state* into the *reason for the state*. It should be conceded that many individual versions of legal-rationalism lapses into such a standpoint whereby the *reason of the state* is omitted or even overtly rejected. By ruling out any reference to the *reason of the state*, Höffe's theory examined in this thesis well illustrates this rationalist revulsion against the foregoing notion. In the following part, I will explicate why such a complete renunciation of the notion of the *reason of the state* is detrimental for any theory of law and the state. Then, I will make my own point that legal-rationalism is, indeed, opportune to a more sophisticated account of law and the state than the inviable (and cynicism-evoking) account whereby the *reason of the state* is expelled out. In turn, I think, this sophisticated standpoint will provide us with the most satisfactory account of the intersections between "the legal", "the moral" and "the political".

As I have emphasized both in the previous chapter on Schmitt's legal-political theory and in the above sections of this chapter, the whole realist argumentation *vis-à-vis* law and the state (particularly, the realist notion of the *reason of the state*) is, in fact, founded upon an *opposition* (not simply, a distinction) between "the real" and "the normative". In the view of the realist, "the real" –i.e. "the concrete life" as Schmitt calls it– is a flux of accidental events, which eventually transgresses any normative regulation[174]. If human co-existence happens to

[174] That is, as a post-structuralist employing the Lacanian terminology would say, "the real" is the underlying chaotic existence that cannot be definitely sutured (i.e. amended or fixed) by "the

achieve an orderly form in a certain place and time, the realist thinks, this happens for the reason that everyone summits herself to a certain will and power, not because a set of normative principles and rules, e.g. human rights, are recognized as rationally valid and then respected by all. This is why the notion of the *reason of the state* understood as a will and power overwhelming all normativity has of such a high significance within the realist argumentation. I have already underlined that the realist assumption concerning the opposition between "the real" and "the normative" is a very controversial one, since it is an arbitrary-dogma as unfounded as its antagonistic counterpart, i.e. the natural-law dogma that there is a pre-established coincidence between "the ideal-normative" and "the real". However, the essential point here is that our justified renunciation of the realist dogma of the *opposition* should not lead us to ignore the *distinction* between "the real" and "the normative". That is, even when we refute, with right reason, the ontological assumption of the legal-realist, the challenge he raises concerning the realization of justice remains in force. Encountering this challenge will, indeed, mean to settle an account with the notion of the *reason of the state*.

Let me first clarify what I mean by the *distinction* between "the real" and "the normative". I present this thesis as a third-way beyond the realist thesis of *opposition* and the naturalist (or the dogmatic rationalist) thesis of *identification* between "the real" and "the ideal". Renouncing both the dogma of the necessary antagonism between the reality and the moral idea of justice and the dogma of their necessary concurrence, the thesis of distinction suggests that the relation between reality and justice is indeed a contingent (i.e. non-predetermined) relation, whose temporal-historical instances might only be shaped by the interplay of human practice and fortune. Hence, the thesis of distinction suggests that, though the principles and the rules which characterize justice are indeed external/transcendental to reality (because they do not originate from reality itself), reality can be made, at least partially, accommodating to them by human endeavor. In other words, the principles and rules designated as justice should not be understood as ontological premises, but as regulative standards, which designate a point of destination for reality. Then, we should conceive the contingent (non-predetermined) relation between "the real" and justice in terms of their

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symbolic" (i.e. the image of the existence which human beings construct in accord with their desire for order).

approximation and moving away in a particular moment of the historical existence of a particular society or of the whole humanity.

We should now re-think the relation between the state and the moral idea of justice in the light of the foregoing thesis of the distinction between "the real" (i.e. "the concrete life") and "the normativity" (i.e., in our case, a vision of co-existence encapsulated by the rules of justice). The state, whose *raison d'être* is justice as human rights, is the human artifact which we conceive for the indefinite approximation to the normativity designated by the rules of justice. Hence, the relation between the state and justice is a *teleological* relation, in the sense that the latter constitutes the *telos* (the end/the objective) of the former. For an exact understanding this teleological relation, the basic characteristic of reality within which the actual state partakes should be held in mind: the reality is neither the hell evoked by the realist, i.e. a place whereby any normativity (particularly, the normativity designated by the rules of justice) is *necessarily* disturbed or negated, nor the heaven evoked by the natural-law thinker, i.e. a place whereby "the is" and "the ought" is always-already in a relation of coincidence even if it does not seem so at a first instance. Rather, as is suggested by the thesis of distinction, the reality is a place whereby the negation or violation of justice is always *probable*. To speak much more concretely, the point of the foregoing thesis is that the reality is neither friendly nor hostile to justice (i.e. human rights): it may rather be considered as apathetic to justice in the sense that the latter is not *spontaneously* realized in the real world. The distinctive task (i.e. the end: *telos*) of the state is to minimize the probability of negation or violation of justice (i.e. of human rights) by the achievement of a normative order of justice as much as possible.

The distinctive task of the state underlines that the state as an institution is conceived so as to be a *mediator* between "the real" and "the normative". That is, its *calling* (*Beruf*) concerning justice is a complex one: unlike individual human beings, its ethical responsibility to justice goes beyond the duty to abide with the rules of justice. Beyond this duty, the state has the ethical responsibility to construct and maintain the very normative order substantiating human rights. If "the normative" means a form of existence framed by norms, or modes of action performed in accord with pre-existing norms, we must concede that the state has a dimension which surpasses "the normativity" –the very dimension leading to the notion of *the reason of the state*. That is, the relation between the state and law

cannot be completely captured within a *deontic* relation, i.e. a (norm-following) relation between a duty-holder and duty. It is also a *consequentialistic* relation, i.e. a (end-pursuing) relation between an author and her work. I think that, albeit dangerously confusing in many other respects, Machiavelli's following passage from his *Prince* has the virtue of calling our attention to the consequentialistic nature of the state:

> It must be understood, however, that a prince…cannot observe all of those virtues for which men are reputed good, because it is often necessary to act against mercy, against faith, against humanity, against frankness, against religion in order to preserve the state. Thus he must be disposed to change according as the winds of fortune and the alterations of circumstance dictate. As I have already said, he must stick to the good so long as he can, but being compelled by necessity, he must be ready to take the way of evil…In all men's acts, and in those of princes most especially, it is the result that renders the verdict when there is no court of appeal. (Machiavelli, 1981:63-64).

I will return to the dangerous confusions this passage evokes. Let me articulate, at first, what I see as the truth it emphasizes: the state's ethical responsibility goes beyond the individual man's simple duty to abide with "the good". Machiavelli emphasizes that, though the state must stick to the good [i.e. to remain within the dimension of "the normativity"] as much as possible, its primary duty –the duty on the basis of which it is judged– is to maintain the civic order under alternating circumstances. For him, it is the privilege of the common man to be content with simply abiding with the norm. The statesman, on the other hand, should always be care of consequences: she should always act in a goal-oriented way. If "doing evil" would be the way to achieve the optimal amount of the goodness (or the least amount of evil) in the end, the statesman has no option but to contaminate her own soul for the good of the people, i.e. to do the evil thing. That is, the actions which are considered as vicious when they are committed by the ordinary people may, in certain circumstances, be duties for the statesman if they are *necessary* for the maintenance of the legal-political order. Now, the bitter pill that should be swallowed is this: this excess in the duty of the state brings about an excess in the power of the state. This excess in the state power becomes most evident in the extraordinary cases like civic wars or revolts whereby the task of the mediation

between "the real" and "the normative" becomes most urgent. In such cases wherein the normative order is considered as being under threat, it is rarely the case that the states cope with the situation in a way abiding with the substantial prescriptions of the normative order called law. Rather, they act in a manner that seems arbitrary or even violating from the standpoint of the positive law. In the extraordinary cases, the state is considered as a ship which is caught in a storm and should be conveyed to the reliable shores in any way[175]. Here, what is essential to the statesman conceived as a helmsman is to achieve her task, not to follow the path of pre-established rules. Hence, the very task to maintain the normative order of justice provides the states with open-ended, supra-normative privileges, i.e. not precise and limited authorizations *within* the normative-order, but privileges to discretionary action (i.e. actions unbounded by the positive-legal normativity) in certain cases. The very notion of the *reason of the state* designates such privileges.

As I already remarked, it is a virtue in Machiavelli that he brings to front that the state has a dimension going beyond "the normative". At this point, his mode of thinking, usually considered as founding the realist school of modern political-legal thought, rectifies the misconception we find in many modern theories of law and the state: the misconception that the state is a purely normative entity. As we have seen in Second Chapter, Kelsenite positivism serves as a perfect model for such theories. By postulating the state as an entity identical to the hierarchical system of norms called law and thus having no form of existence other than the processing regulated by these norms, Kelsen's positivist perspective purports that

[175]As Oakeshott remarks, such actions of a political authority are designated by the word *gubernaculum* in the medieval Europe (Oakeshott, 2006: 266). The word *gubernaculum*, he further remarks, was originally a word designating the activity of a helmsman or a pilot. In politics, it was used in opposition to *jurisdictio*, which designated the rights of the ruler over a certain territory and a particular people in the ordinary situations. While *jurisdictio* referred to activities which are precise and limited, *gubernaculum* was an open-ended activity. As he later argues in reference to the medieval English monarchy, the king's rights of *gubernaculum*, which he uses as "the custodian of the interests of his [whole] realm, with the task of defending these interests against external enemies", were "not bound by law; their virtue was precisely that they enabled him to move in a region where there is no law" (Oakeshott, 2006:320). In ending his genealogical analysis of *gubernaculum* and *jurisdictio*, Oakeshott makes a remark which is quite in line with my point in the main text: "This is, no doubt, a subtle distinction. But two things are obvious: (1) That a ruler denied the rights of *gubernaculum* would be ill able to deal with the emergencies of politics and ill equipped to guard the interests of the realm. (2) That a rule in which *jurisdictio* was constantly being invaded by *gubernaculum*, a rule in which a king constantly governed on the edges of the law, appealing always to his personal, gubernatorial, "prerogative" rights would constitute a serious breach of the notion of medieval kingship" (Oakeshott, 2006: 321). I should underline that Oakeshott's subtle distinction between the medieval notions of *gubernaculum* and *jurisdictio* has been inspiring for the subtle understanding of the relation between the *reason for the state* and the *reason of the state*, which I try to develop in the main text.

there is no state, as well as no law, in any case which cannot be conceived as a regulation prescribed by legal norms. The problem with such an account of the state is not simply that it is a deficient one. Also, such a strict identification of the state with the normative-legal order as such invokes cynicism against actual states, since they sometimes act (and, indeed, should act) on a discretionary basis (i.e. on a basis unbound by the positive legal-normativity) in the real world. For, the very task to mediate between "the real" and "the normative" presupposes a agent which is partially transcendent to "the normative" (i.e. to the positive legal order).

Having stressed the insight Machiavelli's above quoted passage invokes, I should now underscore the confusions the same passage harbors. These confusions constitute not only the reason why Machiavellian theory is so irritating from the standpoint of common sense, but also the reason why Machiavelli has been considered as the founder of the strand of political and legal thought called modern realism. I think that once we diagnose and guard against these "realistic" confusions, we can be in a position to incorporate his positive insight without falling into the trap of legal-realism. Three basic confusions may be found in Machiavelli's foregoing passage. First, and most importantly, there is the confusion between the privilege to be exempt from norms on certain occasions and a situation of being ethically unbounded. As I conceded to Machiavelli above, it is true that the state is partially transcendent to "the normative", that is, has a kind of deontological non-liability, particularly in the case of the positive legal normativity. However, what Machiavelli fails to stress in the foregoing passage (and, what legal-realism fails to acknowledge) is that this partial transcendence from "the normative" might be understood as concomitant with the devotion to a moral end: the task of the maintenance of a legal order substantiating justice. Without such devotion, there would be no state, but merely a relationship whereby a group of person exerts arbitrary power over another group or groups. The second and third confusions come about as a result of the first one. Machiavelli speaks of the prince as the personification of the state. Yet, as I elaborated above, the state is *res public* (a thing of the all) par excellence. Since a public-thing cannot be possessed/appropriated (i.e. turned into a *dominion*) by a private person or a particular group, no one can come up to be the master/holder of the state. Hence, Machiavelli was simply wrong in suggesting that the state might be incarnated in a particular individual, who would then be granted all the privileges the state as the

public institution has. Third, as the careful reader has probably already noted, Machiavelli's above quoted passage points out to the "preservation of the state" as the ultimate end of politics. Yet, taking the "preservation of the state" as the ultimate end on its own means nothing other than worshipping power for the sake of power. Instead, as I argued above, the ultimate end, for which we conceive the state itself as an artifact (i.e. as the instrument), is the realization of the conditions of justice. All these three confusions can only be eliminated if one recalls the point which the realist mode of thinking wiped away. That is the very point that the state has an indissoluble cord to the idea of justice as a *universal* idea encapsulated by human rights, i.e. the very idea upon which modern legal-rationalism founds law and the state[176].

All these I have discussed so far give us a roadmap for re-formulating the relation Vattel evoked between the *reason for the state* (*raison d'être*) and the *reason of the state* (*raison d'état*), i.e. the bond between the moral principles of justice and the political authority. First of all, in opposition to the realist's exaltation of the *reason of the state*, this notion may have only a role subordinate to (and, thus, limited by) the *reason for the state*. For, we have already acknowledged that the perpetuity (*Ewigkeit*) of the state –i.e. what Machiavelli called "the preservation of the state"– cannot be taken as an ultimate end on its

[176] Indeed, the position I defend concerning the nature and compass of the state authority is well illustrated in a decision of the German Constitutional Court, with which I acquaint from Ripstein's text (Ripstein, 2009:221-222). The decision, taken on 02/15/2006, concerns an authorization of the minister of interior to shoot down a hijacked aircraft that is intended to be used as weapons in crimes against human lives. Thereby, the German Constitutional Court decrees that the authorization is void because it "is incompatible with the fundamental right to life and with the guarantee of human dignity to the extent that the use of armed force affects persons on board of the aircraft who are not participants in the crime. By the state's using their killing as a means to save others, they are treated as mere objects, which denies them the value that is due to a human being for his or her own sake". As Ripstein remarks, the Court hereby decrees that the right to human dignity, which brings out, on the part of the state authority, the obligation to not make use of any person as a means without his/her consent for the sake of the common good, constituted a limit for the compass of the state power. That is, the state cannot victimize or sacrifice the guiltless persons on the basis of a calculation that this will lead to the betterment for the common good of the society. Yet, there is a striking clause in the same decision conceding that this decision does not negate "the idea that the individual is obliged to sacrifice his or her life in the interest of the state as a whole in case of need if this is the only possible way of protecting the legally constituted body politic from attacks which are aimed at its breakdown and destruction". With this clause, the German Constitutional Court maintains that the state acquires a deontological exemption in the cases where the legal-political order itself is seriously put at the stake. This exemption encompasses only such cases and is justified by the fact that the right to legal-political order, i.e. what Kant called "the right to rightful condition", is the pre-condition of all other human rights.

own[177]. Rather, it has a sense of importance only when the state is considered as generally in accord with the *reason for the state* (i.e. as a public entity for ensuring human rights of each). Hence, my recognition for a role to be played by the notion of the *reason of the state* does in no way negate that a political authority is dependent upon certain moral principles which we call the principles of justice. However, the mode of the dependency of a political authority to the moral principles of justice has of a somewhat different nature than the subjection of individual citizen to the principles of justice. Except the exceptional cases where the laws of the state contradict with the laws of the reason, individual subjects have the simple duty of abiding by positive laws. That is, the relation between individuals, on the one hand, and laws and justice, on the other, is a *deontological* relation, i.e. a relation between a subject of duty and the norm to be abided with. In this way, individuals abide by the principles of justice and might become just persons. On the other hand, the rightness/the justness of the political authority cannot be assessed by its abiding by pre-established norms. To the extent that the state is conceived of as a human device for the actualization of a certain end (i.e. the end of *ordering* our co-existence *in a just/right manner*), the standard in accordance with which the actions of the state are judged is the realization of (or, more precisely, the approximation to) this very end. Hence, the very moral principles of justice to which the state is bound authorize it to use its power in a way *relatively* independent of pre-established legal-normative restrictions. For, the task of the realization of justice in this world is trusted upon the prudential reasoning and power of the state. It is, then, true that the state has a dimension that surpasses law understood as a pre-established set of norms and procedural norms. This is the dimension of the *reason of the state*.

[177] Indeed, as Meinecke elaborated in his famous book titled *Machiavellism: The Doctrine of Raison d'État and Its Place in Modern History*, theories which have articulated the notion of *raison d'état* have rarely gone far to assert that the preservation of the state is an end in itself. Meinecke indicates that, in the post-Machiavellian political thought, it is almost a point of convergence that the notion of *raison d'état* has a value conditional to the well-being of the people as a whole. That is, the preservation of the state was considered as a just cause only insofar as it is subservient to the well-being of citizens. Then, inferring from the foregoing notion the assertion that the preservation of the state is the ultimate goal in itself is at odds even with the classical formulations of this notion. I think that the latter assertion, and not the notion of *raison d'état* in itself, is the one that has been the basic motto of the 20th century totalitarianisms which brought forth the disastrous experiences of Nazism and Fascism. Also, I think, the association of the notion of *raison d'état* with the assertion of an ultimate value for the preservation of the state remains characteristic for the contemporary forms of practices and actions of the states, which betray fascist or neo-fascist resonances.

Once the *reason of the state* is taken under the subordination of the *reason for the state*, it turns out to be a less ambiguous and elusive notion compared to the realist understanding of the notion. In this manner, the *reason of the state* designates not an unbounded right to do whatever that is considered to be instrumental for the preservation of the state, but certain normative-privileges which are concomitant to (and thus bounded to) its mission to realize the conditions of justice. Such a conception of *the reason of the state* may be then formulated as *the political premium* (i.e. *overwhelming or surpassing powers*) *the state has as the indispensible result of its mission as the guardian of justice*. This means that, in certain exceptional situations (e.g. in the cases which the German constitutional court described, in its above mentioned decision, as the situation whereby the political-legal order as whole is seriously attacked by the forces aiming at its breakdown and destruction), it might be understandable that the state will probably execute an non-legal reaction, since its basic motivation will be "end-achieving" rather than "norm-following". However, the very essential point here is that "the non-legal" (i.e. "that which is not regulated or sanctioned by law") should not mean unbounded and arbitrary, but morally conditioned by the cause of justice. That is, "the non-legal" practices in question should always be bound to moral and prudential judgments in terms of remaining loyal to the cause of justice (i.e. of human rights) and following the prudent tract for the achievement of this cause. There are certain further conditions if such practices are to have some admissibility. First of all, the political-legal order at the stake should be of the type aiming at the realization of justice (i.e. formally: distributive advantage of *each*, and substantially: human rights). Hence, the arguments from the *reason of the state* have no normative force when applied to the practices of tyrannical regimes (i.e. any regime which is not grounded upon the principle of the distributive advantages of each person). Second, the menace against the legal-political order and public security should be severe or substantial enough. Third, the non-legal practices in question should be necessary. That is, it should be assured that the menace against the public order and public security cannot be coped with if the state abides by the pre-existing legal-norms and legal-procedures. Fourth, such activities should be pursued only under the command of the people in charge with the public order, i.e. the highest legal-political authorities. Fifth, it should always held in mind that a final judgment concerning such practices can only be given in

the long run by the public opinion. That is to say, the arguments from the *reason of the state* can never attain a normative-justification in the proper sense, but only a partial justification that might be re-judged in the tribunal of public conscience after the state of urgency is managed. I may introduce a further condition which is closely related to this fifth one. The political-legal order should be institutionalized in such a manner that allows for the possibility that popular dissentions and oppositions to against the ruling authorities can be expressed in the civic form of public discussion. To state in Habermas' terms, there should be no political-legal impediment for a public sphere whereby the democratic-communicative power of the people continuously interrogates and then molds both laws and the political rule. For, the existence of a non-manipulated public sphere is the only thing that may be taken as something close to a genuine assurance against the abuses of power by the state-authorities. Hence, I think that the arguments from *the reason of the state* are of consequence only in the cases of the democratic states which allows for the public interrogation against the abuses of the state-powers.

I have then reconstructed the notion of the *reason of the state* in a way that makes this notion subservient to the *reason for the state*. Now, I want to note that this reconstruction does, at the same time, suggest the insight for a reasonable conception of the sovereignty of the state. This reasonable (sober) conception of sovereignty is quite different from the realist exaltation of sovereignty as a power unrestricted in any respect. As we elaborated in Third Chapter, Schmitt's conceived the sovereign as the transcendent power founding and maintaining the legal-political order. For Schmitt, the sovereign power was absolute in the sense that s/he *creates* the legal-political order *ex nihilo* (i.e. out of the chaos) and *asserts* the values and principles of this order as s/he wishes. In opposition to such a God-like conception of the sovereign power, the rationalist position I defend suggests that the state power may acquire, in certain cases, a free-standing nature only in regard of the wills of private individuals or particular groups composing the state, but never in regard of the principles of justice designating the *reason for the state*. Rather, as my examination of Höffe's theory revealed, the very concept of the state invokes an entity that should *recognize* and *respect* the principles of justice underlying the idea of law, i.e. the idea of human rights. Indeed, the whole authority of the state is conditional to its *subservience to human rights*. Beside this substantial restriction for the sovereign-state power, an equally important

restriction is the formal one: the sovereign power of the state is a *vacant* (i.e. *public:* not loaded with the private or the particular) place in the sense that it cannot be permanently anchored in a particular person. The people (i.e. the public) may authorize particular persons to wield the power of the state. But, such authorizations are always conditional: they encompass a definite time limit; and the authorized persons should wield the power on behalf of the public/general interest (i.e., their actions should be conceivable as expressing the *omnilateral will,* in the words of Kant). Hence, those persons who have the political premium are also restricted by the fact that they are considered as the *trustees*, not as the true *owner* of the sovereign power, which is "the public" itself.

Let me illustrate this relation between the people as "the public" and the state-authorities by a well-known mythical story from Ancient Greece: the story of Odysseus and the Sirens[178]. Knowing that his ship is about to pass the island of the Sirens, the marvelous singers whose voices lure man to forget everything else and then steal their life away, Odysseus asks (i.e. authorizes) his sailors to tie him to the ship's stick while the ship passes the island. Then, the sailors act as he wishes. What is essential here is: the power the sailors exercise is neither arbitrary nor uncontrolled. Its ultimate ground is Odysseus' own will, and its ultimate reason is Odysseus' own good. If there is any master-servant relationship in this story, Odysseus (the one upon whom the power is exercised) is the master, and the sailors (who wield the power) are the servants. As Pettit remarks, "the sailors operate [indeed] as devices whereby Ulysses exercises self-control, enabling the reason with which he identifies to triumph over the unwelcome passions that he expects the sirens to excite. The sailors are the conduits of that control, not the channels whereby an alien will might be given control in his life"(Pettit, 2009: 35). In the relation between the people as the public and the state authorities, the former resembles to Odysseus and the latter to the sailors. Hence, the ultimate ground of the state power should be referable to the people's own will, and the ultimate reason for the state power is the people's own good (*salus populi est*

[178] I should note that an article by Philip Pettit, namely "Law and Liberty", gave me the inspiration to illustrate the relation between the political authorities and the people as the public by the mythical story I am about to cite above. In the mentioned article, Pettit uses the same story so as to elaborate his Neo-Roman republican understanding of freedom as non-domination, in opposition to the liberal conception of liberty as the absence of interference (Pettit, 2009: 35). In doing this, Pettit's intention is to show that, in opposition to what the legal-political theorists from Bentham's circle (i.e. the liberal legal-political thinkers as Pettit likes to call them), coercive laws might not represent an assault on freedom, but be the very expression of freedom.

suprema lex, as the Romans say). In line with this, those who actually wield the political power (i.e. those who have the political premium) should be conceived only as the *trustees*, not as the true *owners* of the sovereign power, which is "the public" itself.

In this way, we can incorporate the notion of *the reason of the state* (*raison d'état*) into the legal-rationalist schema of thought. Hereby, I think, we arrive at a sophisticated schema which account for the legal-political phenomena in a manner much more complete than its alternatives. This schema of thought which may be called "legal-rationalism with a realist proviso" has the virtue of polishing off skepticism and cynicism concerning the moral claims of law and the state, which the alternative schemas (i.e. legal-moralism, legal-positivism and legal-realism) engender. For, "legal rationalism with a realist proviso" tries to explain, in the most honest and the least one-sided fashion, what we are obliged to the actual legal-political orders and authorities, what these orders and authorities themselves are obliged to us, and what we should and can expect from them.

Let me now put in a nutshell the essentials of the refined-rationalist vision I defend in this thesis: Law is a system of force, i.e. of external power over individuals. Its distinguishing feature among the systems of force lies in the fact that it is bound to the principles of justice (i.e., the principle of distributive advantage of each, which human rights substantiate). Thanks to its connection with justice, law may be defined as *rightful public force* in contrast to *force as private (arbitrary) violence*. On the other hand, the state is a kind of power-organization that arises out of the need for the spatial-temporal specification and enforcement of the principles of justice. It is the human artifact that is conceived to *determine* and *secure* law. More precisely, the state is both authorized by law (i.e. by law in the sense of *Recht*: the principles of Right), and the author of law (i.e. of positive law which designate the system of norms arisen as the result of the spatial-temporal specification and substantiation of the principles of justice). In line with this complexity of the relation between the state and law, we should be wary of two mistakes. On the one hand, *pace* Kelsen, the positivist, the state cannot be conceived as precisely identical to law or legal order. The latter designates a *normative-practice* (i.e. a modality of human actions and interactions expressed in their abiding with certain rules); while the former designates an *institution* wherein the foregoing practice takes place (i.e. a concrete-ordering of a

segment of the real time and space as the terrain of a normative practice). The state has, thus, a dimension which surpasses the sphere of legal-normativity –a dimension necessitated by the very end of maintaining the conditions of justice and law. Hence, law as a positive-normative-order and the state as an entity securing justice and law do *somewhat* diverge. On the other hand, *pace* Schmitt the realist, it should be emphasized that the deviations of the state from law as positive-normative-order cannot be read the state's independency from law understood as *Recht* (i.e. principles of Right: human rights). For, the respect for human rights and the abidance with the public will which law (i.e. *Recht* in the sense of rightful law) prescribe for all are the basic objectives that constitute the basis of existence (i.e. *raison d'être***)** of the state. Without these objectives, the state ceases to be a state and becomes an arbitrary power-organization. Thus, forsaking the basic task/duty of the state (the realization of the conditions of "justice as human rights") would mean forsaking the basic quality of a legitimate authority: the quality to invoke the duty to respect on the part of its subjects. In such a case, deviant state would invoke its subjects' moral right to resistance and even to rebellion.

To reiterate the essence of the refined rationalist vision I defend: the moral idea of justice encapsulated by human rights, law and the state are conceivable only as elements of a triad, i.e. only in reference to each other. However, this does not make them identical elements: positive law is not completely identical to justice (human rights) but a system of norms contrived to regulate human collective life in a way substantializing the very idea of justice; the state is not completely reducible to the normative order called law, but an artifact contrived to work out "a normativity substantializing justice" out of the "justice-apathetic reality". Hence, the relation between law, justice (human rights) and the state can be best designated as *a necessary symbiosis* (i.e. relation of indissoluble co-existence and inter-dependency). Law is a normative practice (i.e. a practice based on determinate norms characterized as legal norms). On the one hand, this normative practice owns its meaningfulness to its essential connection to the ideal of justice. If this connection to the ideal of justice were broken off, law would seem to be a pointless ritual which puts human beings under the yoke of abidance for the mere sake of abidance. We would thereby lose the insight that law is indeed an *artifact*, i.e. an entity proceeded from human intellect and effort. Naturally, however, such

a human artifact as law should not only be conceivable by a certain human interest or motivation underlying it, but also malleable by human beings in accordance with this interest or motivation. Hence, once we recognize the ideal of justice as the fount of law, we thereby recognize that abiding with legal norms designate, in fact, not a pointless ritual (i.e. a reified form of practice suppressing the constitutive role of human subjectivity), but rather a practice based on a rational motivation (namely, the motivation for a just –i.e. distributively advantageous– form of co-existence). On the other hand, law as a normative practice has also an essential connection to the state. For, the domain of the normativity which the idea of law suggests should be *instituted* within real world, if this normativity will mean something more than "the imaginary". This task of institution marks what we call the state. The state acts *upon* the domain of "the real" in order to set up the domain of legal normativity *within* "the real", with the motivation/intention that this setting-up will close up the gap between "the real" and "the ideal" (i.e. justice which stands as the aspiration point of law). Here follows that, unlike law, the state is an entity that cannot be completely absorbed within "the normative" or "the ideal" or "the real". Rather, it is the *necessary instrument* we deploy for bridging the rift between them. It is very important to acknowledge the instrumental character of the state as an institution. For, this provides the insight into the complex form of relation between the state, law and justice: the state is the means for the end of instituting a framed domain out of "the real", wherein law as a normative practice is to reign (i.e. is to be "must" in the very sense of the coincidence of "ought" and "is"), with the intention of realizing a *just* form of human co-existence, i.e. a co-existence whereby human rights will have acquired a deontological respect from all.

In concluding, I should underline this: the foregoing fact that justice (human rights), law and the state are not completely identical, but in a symbiotic relation (i.e. integral) to each other reveals both the genuine meaning of politics and why politics is unsurpassable element of human life. For, politics is the peculiarly human response to the relative distance between justice, law and the state. This response may consist in two basic alternatives; and what really matters is which one of these alternatives we choose. These alternatives are: either striving for bringing closer justice, law and the state in a balance (which is the rationalist alternative I have defended in this thesis) or causing a dissociation of them by

favoring one element over others (which is the alternative suggested by ideologues, who might show up in the guise of a realist, or of an anarchist, or of a liberal, and etc). That is, in this realm of practice too, Aristotelian wisdom stands true: prudence lies holding to the mean between the authoritarian adoration of the state and the utopian animosity against "political authority as such" in the name of human freedom. These two extremes would not work out. For, human freedom can flourish only in the context of a political-legal authority based on the recognition of the fundamental rights of each person; and, to say the same thing in the reverse order, the state as the political-legal order has its virtue only because it makes human freedom flourish.

CHAPTER SIX
CONCLUSION

To capture the basic thesis elaborated in my work, a shift towards what I call modern legal-rationalism (more precisely, towards modern legal-rationalism with a realist proviso) is necessary. This is because only such a schema of thought makes possible to express the necessary-conceptual nexus between law, political authority and human rights as the universally valid moral standards of justice. By calling the argument for such necessary-conceptual nexus as *the thesis of integrity* (or *the integral view*), I defend this thesis against both *the (positivist) thesis of separation* (which breaks off the essential cord between law and the state, on the one hand, and the moral standpoint of justice, on the other hand), and *the theses of assimilation* (whereby either law and the state are assimilated into moral standpoint of justice –i.e. the extreme viewpoint which might be called *the moralist-naivity*– or, conversely, law and justice are assimilated into the brute force –i.e. the extreme viewpoint which might be called *the realist-cynism*–). The integral view on law, political authority and "justice as human rights" is, in turn, necessary for contemporary legal-political theory, because only on the basis of such a view can our legal-political experiences be *reflectively made sense of*. That is, modern legal-rationalism expressing the thesis of integrity is the sole approach that can account for our legal-political practices and vocabularies in a way that does not reduce them into partial or ideological discourses loaded with distortions, illusions, and even phantasies concerning the real world.

I have articulated my thesis through a confrontation with alternative modes of legal-political thought. In the introduction part, I first made a distinction between moral-universalist approaches and moral-relativist approaches. Within the former group, I suggested, one can make a further distinction between legal-moralism (or straight out legal-moralism) and legal-rationalism (or delicate legal-moralism). By the term legal-moralism, I refer to those approaches which found the validity of legal norms upon "the moral good", and thus which see legal value as identical to moral value in the compherensive sense. Having pointed out the natural-law tradition as a family of theories well exemplifying the legal-moralist mode of

thought, I noted various reasons why legal-moralism does not stand as a viable approach for law and the state. That is, I noted that, particularly under the conditions of modernity, the assimilation of law and morality in the comprehensive sense is neither defenseable nor desirable: It distorts our understanding of both morality (a modality of norm-following based on free-will) and of law (a modality of norm-following sustained by the public power). These distortions or confusions engender, in turn, forms of patronizations, inequalities, and undue control encapsulated by the term political paternalism. As is already noted in the introduction chapter and then elaborated in Fourth Chapter, a system designated by paternalism can be, at most, a deviant instance of the idea of political-legal order as such, to the extent that such a system does, in fact, put at stake the very quality of its individual members *qua persons*, i.e. qua beings with the capacity and right to choose their own way of doings.

Having dismissed "straight out legal-moralism" as an inviable approach, I focused on two moral-relativist approaches which prevail in the modern ages, namely legal-positivism and legal-realism. In Second Chapter, Kelsen's pure theory of law, which is undisputably one of the most paradigmatic edifice of legal-positivist school, was examined. I first gave an outline of the Neo-Kantian philosophical research programme of the Kelsenite theory, which promises to uncover, in a systematic fashion, the universal characteristics constituting the domain of human-experience we call law. On the basis of such a philosophical research programme, I stressed, he developed the conception of law as a specific *normative* order (i.e. a particular system of "ought") which should be distinguished both from morality (another normative order) and from the order of mere facts (i.e. the order of "is"). As is also elaborated in detail, this positivist conception of law brings about a very distinctive conception of rights as a specific technique of law consisting in the authorization of individual-subjects to initiate the law-creating processes in particular cases. Thereby, it was emphasized, Kelsen dismissed the idea of fundamental-human rights as constitutive principles (or standards) for law. For, he assimilated the concept of rights into a merely legal-technical sense. That is, for Kelsen, there can be no absolute or inviolable right above legal-orders, but only determinate authorizations within positive legal orders.

Having noticed that Kelsen's conception stands more as a deconstruction rather than an account for the necessity of the idea of rights, I engaged in an examination

of Kelsen theory of state. Here again, he develops a specifically positivist conception which should be distinguished both from idealist (i.e. moralist) conceptions and sociological (i.e. realist) conceptions. This positivist conception suggests that the state is indeed identical to the legal-order as such. Such an identification seems, at a first instance, to bring forth a vision of the state which is essentially domesticated –that is, a vision of state assimilated into the normative order of law. Yet, I have argued that this is very misleading. For, the positivist identification between the state and law yields to the assimilation of law into the state, not the reverse. This is precisely because moral relativism underlying legal-positivism rejects any reference to certain supra-legal principles as universal standards of justice or legitimacy. Under the moral-relativist premises of legal-positivism, any order should be regarded as a state, and hence as a rule of law, insofar as it can sustain its order in the factual world. That is, the state and law are conceived, at the last instance, as nothing but any successful organization of power. This means that the positivism can never secure its conception of law as a *normative* order in the face of sociological legal-theories (i.e. realist theories) which Kelsen, the positivist, dismissed for the very reason that they fail to distinguish law from brute force. In the light of this, I concluded that legal-positivism (which tries to account for law as a normative order without a resort to any universal-moral standard defining and justifying the essentials of law) is an unsteady position shuttling between legal-moralism and legal-realism. In the particular case of Kelsen's pure theory of law, the problem becomes more acute. This is because the Kelsenite positivism, which explicitly presents itself as a transcendental inquiry into the universal characteristics and constitutive propositions of legal-phenomena, refutes the very possibility of such supra-legal criteria as justice and legitimacy, while invocation to these criteria constitutes an essential dimension of our legal-political practices.

In Third Chapter, I discussed Carl Schmitt's political and legal theory as an exemplar of the realist approaches to law and the state. Because "the political" seems, from his realist perspective, to be constitutive for all other domains of human existence in the earth, I began with keynoting the basic tenets of his conception of politics. Thereby, I emphasized "the state of exception" and the Schmittian conception of sovereignty both as the pinnacle of "the political" and the point of entry into the public (constitutional) law. Then, I engaged in an elaboration

of the essentials of Schmitt's general approach to law, namely "the concrete-order-thinking", which he developed through confronting alternative approaches he called normativism, decisionism, and positivism. This approach suggests that law is a multi-dimensional phenomenon the essence of which lies in the composition of the categories of ordering, decision and norm. Such a conception of law is, in turn, correlated with the credos characterizing legal-realism: the essential indeterminancy of the general rules vis-à-vis particular cases, the importance of the category of decision and the role of the men and women authorized to decide for the maintanence of the legal-political process (i.e. the suggestion that "the judicial" is indeed "the juristical"), the necessary exposure of legal orders to the real life processes (i.e. the open texture of legal orders), the inevitable entanglement of moral, political, cultural, and economic considerations into the domain of law.

In the next step, I explicated how Schmitt's general approach to law brought about an interesting conception of constitutional (public) law, which he understood as the constitution of the state. I elaborated that, in line with his general conception of law, Schmitt understood any state (i.e. any constitutional order) as a tripartite structure comprising the constitutive (i.e. the pure political) level of delineating the political-legal entity, the subsequent level of deciding upon the substance of this entity (i.e. upon the substantive values, principles or creeds), and the last level of the determination of the constitutive laws. Schmitt's tripartite model emphasizes, above all, two basic points in regard of law and the state. First, law and legal relations, at least as far as public law concerns, cannot be separated from power relations. For, Schmitt underscored, law is founded upon and sustained by the political power. Second, Schmitt's model manifests that certain supra-legal criteria is the necessary element of any political-legal order. Such supra-legal criteria which designate the measure of legitimacy provide legal-political orders with their particular unity/spirit –a unity which legality understood as the aggregate of individual legal norms can never attain.

Then, I sized up Schmitt's analysis of the consitution of the particular form of the state illustrated by the Weimar Republic, i.e. the form which may be best called as modern-liberal *Rechtsstaat*. Thereby, I particularly focused upon his arguments on the basic rights as the criteria of legitimacy of this particular form of the state. I contended that, in opposition to legal-positivism which is usually assumed to be the reflection of liberalism in the domain of legal-theory, Schmitt's legal-realism could

strikingly account for the supra-legal status of the basic rights within the modern-liberal *Rechtsstaat*. It portrays these rights as unamendable principles emanating from the fundamental decision taken on behalf of individual liberty at the moment of constituting the substance of the state. This means that without challenging the substantial form of the state, the basic rights cannot be annulled –though, can be suspended– in the modern-liberal *Rechtsstaat.* In regard of such a realist justification of the supra-legality of the basic rights, I also underlined that this is a provisional/contextual (not a universalistic) justification. For, the source of justification is not considered as lying in the rightness of the content of the criteria of legitimacy, but in the fact of a fundamental decision taken by the sovereign power of a polity. Because a sovereign power may decide upon for any substance, the realist conception of legitimacy has not much to do with the idea of justice understood as a universal criteria of rightness. In fact, from the standpoint of Schmitt's realism, any substance, e.g. torah, the Sheri' a, any particular understanding of natural law, even the Nazi ideology as well as human rights, can be made into the standard of legitimacy in a particular regime on the condition that the sovereign power there declares them to be so.

In the light of all these, I suggested that Schmitt's realist approach to law and the state can be read as an endavour to re-bridge the domains torn apart from each other by legal-positivism. First, it tried to re-connect law and political reality by invoking an ever-present significance to the sovereign as the law-constitutive and the law-maintaining power. In this realist re-connection of law and political reality, the sovereign and *his* order is conceived (and, in a sense, justified) as the restrainer of violence (i.e., the *Katechon*) in a world where power is not eliminable. Second, Schmitt's realist approach tried to re-connect law and social-moral values by emphasizing the central importance of the concept of legitimacy in opposition to the legal-positivist assimilation of legitimacy into legality. Hereby, he brought back the insight that a legal order is not a closed-circle system of norms, but an open system in the sense of being sensitive to social-moral values, and permitting (in fact, requiring) the intervention of concrete individuals in concrete cases. Despite these repairings, I maintained, Schmitt's realist approach followed and even radicalised a particular tenet of legal-positivism, namely moral-relativism which has, in relation to the domain of law and the state, the effect of tearing apart law from the question of the *right* (i.e. of the *truth as it concerns the spheres of human*

practice). Under the premise of moral-relativism, I stressed, legal-realist insistence on the need of the substantive criteria of legitimacy does not mean to bring about a moral guide and moral determinations for the activities of the state, but an authorization to regenarate all legal and moral value by decision. This means that while legal-positivism dismissed the idea of legitimacy as a supra-legal standard from its own agenda, Schmittian realism made legitimacy as epiphenomenal to political power. However, in such a context where every value is determined by the will of the sovereign-commander and where there can be no *unsurpassable* standard (e.g. human rights), the idea of law and the state as refering to something more than a successful organization of power (i.e. as something distinguishable than a gang of bandits *by quality*, not merely by quantity of its power) seems to be a crucial illusion. Hence, I concluded that legal-realism, as it was illustrated by Schmitt, drives us away to a *cul-de-sac* not very different to the one whereby legal-positivism culminates: once you dismiss that *right* stands for something more than *might*, it matters not very much whether that might is conceived to be expressed simply in legal norms (Kelsen, the positivist) or in the substantial decision providing the unity of legal norms (Schmitt, the realist).

Having made the contention that neither legal-positivism nor legal-realism can *make sense of* our legal-political practices and vocabularies (i.e. account for them as meaningful phenomena), I suggested, in Fourth Chapter, to consider upon Höffe's ethical theory of law and the state as a contemporary exemplar of the approach I called modern legal-rationalism. By modern legal-rationalism, I mean an approach accounting for the universal-moral principles underlying law and the state without falling into the above mentioned dilemas characterizing (straight out) legal-moralism –that is, an approach for which Kant's legal philosophy stands as the most conscious and consistent pioneer. In examining Höffe's theory, I first set forth his conception of legal-political theory proper, that is, a truly *critical* theory of law and the state which *judges* "the positivity" (i.e. what is given) in accordance with a standard of validity that transcends "the positivity". Since the foregoing standard of judgment (which, by conceptually *delimiting* what a genuine law and the state is, might result in either *vindication* or *denunciation* of the positive existence) is the universal moral ideal of justice, Höffe's theoretical endavour amounts nothing less than re-establishing the essential cord linking justice as a universal moral ideal, law and the state under modern conditions. Underscoring that a first requirement for

such a project is to attest that there are objective (i.e. universal) standards for collective life which are called (political) justice, I focused on Höffe's semantic analysis of the concept of political justice. Dismissing the currently widespread conviction that political justice is a purely subjective notion, his semantic analysis unearthed that political justice is an objective concept which stands for *the distributive advantage of each*. As I emphasized, Höffe found in the idea of human rights a substantialized expression of this advantage. In the subsequent step, I recounted his critique of legal-positivism by which he established that the concept of law designates a relationship of reciprocal coercion, the substantial core of which is determinated by the principles of political justice (i.e. by human rights).

Having founded the nexus between law and the moral idea of justice, there remains an eventual task: to establish the nexus between the state (i.e. the political power), on the one hand, and law and justice, on the other hand. In line with this, I rehearsed Höffe's critique of anarchism whereby he strived to show that the state (i.e. political authority as such) arises as a necessary moment of sustaining political justice by law. By an impressive application of game-theoric model of the prisoners' dillema to the well-known theoretical-construction of modern political philosophy, namely the state of nature, Höffe articulated the idea of the state as *Justitia* (i.e., as *the* institution of justice) which stands as the beraring point both for the justification and limitation (in the sense of enframing) of actual power structures aspiring for the title of being a state. In the final section of the chapter on Höffe's modern-rationalist theory, I concluded that, by re-establishing the nexus between law, the state and the moral ideal of justice (as human rights), this theory provides a convincing account of our legal-political practice and vocabulary as a meaningful cluster of phenomena. Moreover, I emphasized, such a modern-rationalist approach avoids the shortfalls of (straight-out) legal-moralism thanks to the fact that it is utmost sensitive to the distinction between "the legal" and "the just" on the one hand, and "the moral in the comprehensive sense" on the other hand.

Fifth Chapter provided a recapitulation of what I see as basic insights arising from the critical examinations presented in this study. I underscored the achievements of the integral view of justice (as human rights), law and the state articulated by modern legal-rationalism in comparison to alternative accounts suggested by legal-positivism, legal-realism and (straight out) legal-moralism. I

added, however, that legal-rationalist mindset is prone to dismiss a certain dimension of legal-political phenomena out of its account. This is the dimension characterized by the *reason of the state* (*raison d'état*). Arguing that to expel such nasty cases out of account is not a wise way to cope with them, I suggested that it is possible and desirable to work up modern legal-rationalism so as to account for the sub-phenomena characterized by the *reason of the state* as well. I tried to show that, from a legal-rationalist standpoint, it is conceivable to recognize a restricted role to be played by the *reason of the state* under the guidance of the rationalist understanding of *the reason for the existence of the state* (its *raison d'être*) which is nothing other than the achievement and maintanence of the optimal approximation to the regulative ideal of a perfectly just co-existence in the earth. In order to this, I underscored, we should always hold in mind that there always remains a nuance between law and the state: law being the normative practice with the preposition that justice actualizes in the very cases we abide with its norms; the state being the public institution designated with the intention to enframe a humanly space for law (i.e. the sphere of justice) out of the natural (i.e. justice-insensitive) reality. Holding in mind this nuance between law and the state which are otherwise not conceptually separable, I think, we can conceive the nexus of "the moral standpoint of justice", "the legal" and "the political authority" in the most accurate fashion.

As for the final word for my study, I want to reiterate a fundamental suggestion which this thesis cultivates: it is not that we should renounce legal-positivism and legal-realism simply because they are not incompatible with our modern "conviction" for human rights; rather, we should renounce them because neither law nor the state can be properly accounted for without reference to the idea of justice, which is substantialized by the idea of human rights.

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APPENDIX
TURKISH SUMMARY

Bu çalışmada geliştirilen ana düşünce, benim modern hukuksal-akılcılık olarak tanımladığım yaklaşımın (daha dikkatli bir ifadeyle, gerçekçi eleştiriler karşısında duyarlı olan bir modern hukuksal-akılcılığın) benimsenmesinin çağdaş hukuksal ve siyasal düşüncenin çıkmazlarını aşmak açısından zorunlu olduğudur. Çünkü sadece modern akılcı yaklaşım hukuk, siyasal otorite (yani devlet) ve evrensel ahlaki bir ölçüt olarak adalet (yani insan hakları) arasındaki zorunlu kavramsal bağı ortaya koymaya olanak tanımaktadır. Çalışmada, *akılcı bütünlük tezi* ya da *akılcı bütünlükçü görüş* olarak ifade edilen hukuk, devlet ve insan hakları arasında asli-kavramsal bir bağlantı olduğuna dair iddia hem *pozitivist ayrılma tezi* hem de *massetme tezleri* karşısında savunulmaktadır. Pozitivist ayrılma tezi hukuk ve devletin ahlaki bir ölçüt olarak adalet ile olan bağlantısını keserken; massetme tezleri ya sofu-ahlakçı bir tutumla hukuk ve devleti ahlaka indirgemekte ya da tersine sinik-gerçekçi bir tutumla hukuk ve adalet kavramlarını kaba güce indirgemektedir. Çağdaş hukuksal ve siyasal düşünce açısından, bütünlükçü görüşü benimsemenin gerekliliği, hukuksal-siyasal deneyimlerimizin ancak bu görüş çerçevesinde hakkıyla *anlamlandırılabileceği* iddiasına dayandırılmaktadır. Daha açık bir ifadeyle, *bütünlük tezi* üzerine inşa edilen modern hukuksal-akılcılığın, hukuksal-siyasal pratiklerimizi ve bu pratiklere dair söz dağarcıklarımızı nihayetinde onları çarpıtmalar, yanılsamalar ve hatta fantasmalarla yüklü ideolojik (yani nesnel gerçekliği yansıtmayan) söylemler olarak nitelendirmeden anlatabilecek tek yaklaşım olduğudur. Bu anlatabilme kapasitesi, modern akılcılığın hukuku kendi dışına duran ve insani dünyanın temel hakikatini belirlediğine inanılan bir kerteriz noktasına referansla (örneğin, ekonomiye, kültüre, ilahiyata ya da siyasal güce referansla) yapılan açıklama modelini reddetmesinden kaynaklanır. Bunun yerine, modern hukuksal-akılcılık Kant'ın "aşkınsal metodunu" (*transcendental method*) hukuk alanına uygulayarak, verili hukuksal pratiklerin altında yatan evrensel-kurucu varsayımları (yani belirli bilişsel önermeleri ve belirli normatif ilkeleri) ortaya koymaya çalışan bir *anlama* ya da *anlamlandırma* (*Verstehen*) çabası sunar. Böyle bir çaba açıkça normatif bir içerik de barındırır.

Çünkü hukuksal pratiklerin everensel kurucu önerme ve ilkelerinin ortaya çıkarılması, söz konusu pratiklerin akılcı eleştiri yoluyla gözden geçirilmesine ve daha tutarlı (*reflective*) bir form almasına olanak sağlar.

Yukarda ifade edilen temel düşünce, hukuksal-siyasal alana dair belli başlı yaklaşımlarla yürütülen bir yüzleşme aracılığıyla geliştirilmeye çalışılmıştır. İlk olarak, Giriş Bölümünde ahlaki-evrenselci yaklaşımlarla ahlaki-görececi yaklaşımlar arasında bir ayrım yapılır. İlk grup yaklaşımların kendi içerisinde hukuksal-ahlakçılık (sofu hukuksal-ahlakçılık) ve hukuksal-akılcılık (incelikli hukuksal-ahlakçılık) olarak ikiye ayrılabileceği ifade edilir. Hukuksal-ahlakçılık terimiyle hukuksal normların geçerliliğini "ahlaki iyi" kavramında temellendiren ve dolayısıyla "hukuksal değeri" kapsayıcı anlamıyla "ahlaki değer" ile eşitleyen yaklaşım kastedilmektedir. Bu yaklaşımın en iyi örneklerini, modernite öncesi dönemde kuramsal alanda egemen olan Doğal Hukuk Geleneği kapsamındaki öğretiler oluşturur. Özellikle modern dönemi tanımlayan çoğulcu koşullar göz önüne alındığında, hukuk ile kapsayıcı anlamıyla ahlakı özdeş kılan bu tür bir yaklaşım ne savunulabilir ne de arzu edilebilirdir. Sofu hukuksal-ahlakçılık hem aslında sadece ve sadece özgür irade temelinde gerçekleşebilecek bir norm-izleme modalitesi olan ahlaka hem de kamusal güçle sağlanan bir norm-izleme modalitesi olarak hukuka dair çarpık bir anlayış ortaya koyar. Bu tür bir çarpıtma, siyasal paternalizm kavramı çerçevesinde ifade ettiğimiz türden eşitsizlikler, himayecilik ve kişiler üzerinde diğer gereksiz ve/veya uygunsuz denetim biçimlerine yatak hazırlar. Bu noktada, paternalist bir siyasal rejimin siyasal-hukuksal düzen fikriyle örtüşmediği; en fazla, bu fikrin gerçeklikte sapkın bir biçimde vücut bulması olarak görülmesi gerektiği ifade edilmelidir. Çünkü siyasal-hukuksal düzen fikri insan öznenin *kişi* olma vasfı (yani kendi eylemlerini seçme kapasitesini ve hakkını haiz varlık olma vasfı) ile özsel olarak bağlantılıyken, paternalist bir siyasal rejim en azından bir kısım üyeleri için bu vasfı tanımaz.

Sofu hukuksal-ahlakçılığın savunulabilir ya da arzu edilebilir bir yaklaşım olmadığını belirttikten sonra, çalışma 19. yüzyıldan günümüze kadar egemen olagelen iki yaklaşım üzerine odaklanır. Ahlaki-görececilik ortak paydası üzerinde uzlaşan bu iki yaklaşım hukuksal-pozitivizm ve hukuksal-gerçekçiliktir. Çalışmanın ikinci bölümü, hukuksal-pozitivist ekolünün en geliştirilmiş ve etkili kuramlarından biri olarak değerlendirilen Hans Kelsen'in Saf Hukuk Kuramının incelenmesine ayrılmıştır. Bu inceleme, büyük oranda Kelsen'nin hukuk kuramını

sistematik bir şekilde sunduğu *The Pure Theory of Law* ve *General Theory of Law and State* başlıklı iki temel eserinin metinsel analizi çerçevesinde gerçekleştirilir. Bu analiz belirli noktalarda, Kelsen'nin *Introduction to the Problems of Legal Theory* ve *What is Justice?: Justice, Law and Politics in the Mirror of Science* gibi başka eserlerinde ortaya koyduğu görüşleriyle de desteklenir. Bahsedilen ikinci bölümde ilk olarak, Kelsen'nin hukuk kuramının temelinde yatan Yeni-Kantçı felsefe ve onun araştırma programı ortaya konmaya çalışılır. Söz konusu program hukuk diye adlandırılan insani-deneyimler alanının evrensel niteliklerini ortaya çıkarmaya yöneliktir. Bu felsefi çerçeveden hareket eden Kelsen'nin nihayetinde özgün bir normatif düzen (ya da kendine özgü bir "ödev" sistemi) olarak hukuk anlayışını geliştirdiği ayrıntılı bir şekilde ortaya konulur. Böyle bir hukuk anlayışının en temel niteliği olarak, hukukun hem başka türden bir normatif düzen olan ahlaktan hem de tamamen olgusal temelde anlaşılabilecek bir düzenden (yani cari olarak hüküm sürmekte olan herhangi bir güç örgütlenmesinden) farklı düşünülmesi gerektiği savı özellikle vurgulanır. Ardından, Kelsen'in sıra dışı "sübjektif hak" kavrayışı tartışılır. Bu kavrayışa göre hak özgün bir hukuk tekniğinden öte bir şey değildir. Söz konusu teknik ise belirli durumlarda bireyleri hukuk-oluşturucu süreçleri başlatma konusunda (en basit ve yaygın örneğiyle hak ihlali olduğu gerekçesiyle dava açma konusunda) yetkilendirmekten ibarettir. Böyle bir haklar anlayışıyla bağlantılı olarak, Kelsen hukukun kurucu ilkeleri olarak anlaşılan temel-insan hakları fikrini reddeder. Çünkü hak kavramı bütünüyle bir hukuk tekniğine massedilince, gerçekten de hukuk düzenleri üzerinde bağlayıcı niteliği olacağı düşünülen mutlak ve dokunulmaz haklar anlayışı saçma hale gelir; sadece ve sadece pozitif hukuk sistemleri içerisinde belirlenmiş yetkilendirmeler söz konusu olabilir.

Kelsen'nin "sübjektif haklar" kavramsallaştırmasının aslında hak kavramının bir yapı-çözümü (dekonstrüksiyonu) olduğunu ifade ettikten sonra, aynı yazarın devlet üzerine olan düşünceleri incelenir. Bu noktada da Kelsen, hem idealist (ya da ahlakçı) hem de sosyolojik (ya da gerçekçi) anlayışların ötesine geçecek olan özgün bir pozitivist konum geliştirmeye çalışır. Bu pozitivist anlayışa göre devlet aslında hukuk düzenine özdeştir. İlk bakışta, bu özdeşleştirme devlete dair ehlileştirilmiş bir anlayışı yani devletin tamamıyla normatif hukuk düzenine massedildiği bir anlayışı ortaya koyuyor gibi gözükmektedir. Ama bu tür bir değerlendirme yanlıştır; çünkü devlet ile hukuk düzeninin özdeşleştirilmesi aslında hukuk

düzeninin devleti massetmesine değil tam tersine devletin hukuk düzenini massetmesine yol açar. Bu sonuca yol açan şey, hukuksal-pozitivizmin temelinde yatan ahlaki-görececiliğin adalet ya da meşruiyet kavramlarına dair herhangi bir evrensel hukuk-üstü ölçütü reddetmesidir. Pozitivizme temel teşkil eden görececi önermeler çerçevesinde, olgular alanında kendisini bir düzenlilik olarak idame ettirebildiği ölçüde herhangi bir güç örgütlenmesi devlet olarak nitelendirilmelidir. Yani, başarılı olan her güç örgütlenmesi hukuk ve devlet düzeni olarak tanınır. Bundan çıkarılan sonuç pozitivizmin aslında gerçekçi yaklaşımlar karşısında *normatif* bir düzen olarak hukuk fikrini güvence altına alamıyor olduğudur. Oysaki Kelsen sosyolojik yani gerçekçi hukuk kuramlarını tam da onların hukuku kaba güç örgütlenmelerinden ayıramadıkları gerekçesiyle eleştirmekteydi.

Yukarıda ortaya konan bu önemli sorundan hareketle, Kelsen'in pozitivist hukuk kuramına dair şu genel sonuca varılmıştır: Hukuku onu tanımlayan ve haklılaştıran evrensel-ahlaki ölçütlere referans vermeden kendine özgü bir *normatif* düzen olarak açıklamaya çalışan hukuksal-pozitivizm nihayetinde hukuksal-ahlakçılık ve hukuksal-gerçekçilik arasında durmaksızın salınan istikrarsız bir pozisyondur. Kelsen'nin Saf Hukuk Kuramı'nda bu gerçek çok keskin bir şekilde ortaya çıkar. Çünkü kendisini hukuksal görüngülerin evrensel özünü oluşturan kurucu önermeleri araştıran Kantçı anlamıyla aşkınsal bir sorgulama (*a transcendental inquiry*) olarak sunan Kelsenci pozitivizm hukuksallık-üstü ölçütler olarak adalet ve meşruiyet anlayışını reddederken, bu ölçütlere yakarış (niyaz) insanoğlunun hukuksal-siyasal pratiklerinin asli ve evrensel bir niteliğidir.

Çalışmanın üçüncü bölümü ise hukuk ve siyaset felsefesindeki gerçekçi yaklaşımların bir örneği olarak Carl Schmitt'in siyaset ve hukuk kuramını tartışır. Oldukça çok eser veren bir yazar olan Schmitt'in hemen hemen mevcut tüm eserleri üzerinden bir değerlendirme yürütülmeye çalışılmasına rağmen, doğal olarak belirli eserleri bu çalışmanın amaçları doğrultusunda öne çıkarılır. Söz konusu eserler, *The Concept of Political, Political Theology: Four Chapters On the Concept of Sovereignty, On the Three Conception of the Juristic Thought, The Constitutional Theory, Legality and Legitimacy* ve *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* başlıklı olanlardır. Schmitt'in gerçekçi perspektifinden bakıldığında "siyasal olan" kategorisi insanoğlunun dünyevi varoluşunu oluşturan sanat, kültür, hukuk ve ahlak dahil tüm diğer alanlar açısından kurucu ve dolayısıyla öncel nitelik taşıdığı için, ilkin Schmitt'in siyaset anlayışının

temel akidelerinin gözden geçirilmesi gerekirliği ifade edilir. Sırasıyla, dost-düşman ayrımı olarak siyaset, siyasal varlığın ayırıcı niteliği olarak savaş hakkı ve siyasetin aşılamaz bir olgu olmasına dair tezleri işlenerek Schmitt'in ünlü istisnai durum ve egemenlik kuramının incelenmesine varılır. İstisnai durum ve egemenliğin Schmitt'de "politik olanın" doruk noktasına denk düşmelerinin yanı sıra onun kamusal hukuk yani anayasa hukukuna dair kuramına da bir giriş noktası oluşturduklarının altı çizilir. Böylelikle, Schmitt'in siyaset kuramından hukuk kuramına geçiş sağlanır. Kendisinin Somut-Düzen-Düşüncesi olarak adlandırdığı hukuka dair özgün gerçekçi yaklaşımı, ağırlıklı olarak yine kendisinin normativism, karar-vermecilik (*decisionalism*) ve pozitivizm olarak belirlediği alternatiflerin eleştirileri yoluyla ortaya koyduğu ifade edilir. Bu eleştirilerde temel sav hukukun ne norma, ne karara, ne de düzenlilik/ düzenleme (*ordering*) unsurlarına indirgenemeyecek çok katmanlı bir görüngü olmasıdır. Schmitt'e göre hukuk daima bahsi geçen bu üç unsurun birleşimi olarak algılanmalıdır. Bu sav temelinde ortaya konan Somut-Düzen-Düşüncesi genel olarak hukuksal-gerçekçilik ekolüyle özdeşleştirilen belirli temel akideleri savunur. Bunlardan en göze çarpanları şöyle sıralanabilir: 1) genel kurallar olan hukuk normlarının tikel olaylar karşısında belirsiz kalması; 2) hukuksal-siyasal düzenin ve süreçlerin yürütülmesi açısından karar kategorisinin ve karar alma yetkisini haiz öznelerin rolünün can alıcı önemi [yani "yargısal olanın" (*the judicial*) aslında "yargıçsal olana" (*the juristical*) özdeş olması]; 3) hukuk düzenlerinin daimi bir biçimde gerçek hayatın etkilerine açık olmaları (yani hukukun açık bir dokuya [*an open texture*] sahip olmasının zorunluluğu); ve 4) hukukun zorunlu olarak siyaset, ahlak, kültür, ekonomi ve başka alanlarla iç içe olması durumu.

Schmitt'in hukuka dair genel yaklaşımının sunulmasının ardından, bu yaklaşım doğrultusunda ortaya konan kamusal (anayasal) hukuk kuramına odaklanılır. Schmitt için anayasa (*constitution*) aslında devletin iskeleti anlamına geldiğinden, anayasanın incelenmesi aslında devletin incelenmesidir. Ona göre, her devlet yani her anayasal düzen üçlü bir yapı şeklinde kendisini ortaya koyar. İlk olarak, siyasal-hukuksal varlığın sınırlarının çizilip tanımlandığı saf-siyasal aşama vardır. İkinci olarak, siyasal-hukuksal varlığın tözsel içeriğine yani onun kendisiyle özdeşleştireceği tözsel değerlere, ilkelere ve/veya öğretilere karar verilmesini içeren aşama gelir. En son da anayasayı oluşturan tikel normların belirlenmesi aşaması söz konusu olur. Schmitt'in bu üç aşamalı devlet ya da anayasal düzen anlayışının iki

temel noktanın altını çiziği söylenebilir. Birincisi, en azından kamu hukuku söz konusu olduğunda, hukuk ya da hukuksal ilişkiler güç (iktidar) ilişkilerinden bağımsız düşünülemez. Çünkü Schmitt'in birinci ve kurucu aşama olarak vurguladığı saf-siyasal aşamanın işaret ettiği üzere hukuk siyasal güç tarafından kurulur ve idame ettirilir. İkincisi, belirli hukuk-üstü ölçütlerin siyasal-hukuksal düzenin zorunlu bir öğesi olarak var olmaları gereğinin altı çizilir. Bir siyasal-hukuksal düzende meşruiyeti tanımlayan bu hukuk-üstü ölçütler o düzenin birliğini bütünlüğünü yani değişmeceli bir deyimle ruhunu ortaya koyarlar. Schmitt'in sıkça vurguladığı üzere böyle bir ruh hiçbir şekilde hukuksal normlar toplamı sayesinde ortaya çıkamaz.

Bir önceki paragrafta ana hatlarını çizdiğimiz kamusal-anayasal hukuk anlayışı çerçevesinde, Schmitt'in modern-liberal Hukuk Devleti diye nitelendirilebilecek devlet formunun tipik bir örneği olarak gördüğü Weimar Cumhuriyetine dair çözümlemeleri oldukça ilginç olmalarının yanı sıra bu çalışmanın derdi açısından da büyük önem taşırlar. Özellikle önemli olan, yazarın bu devlet formu için temel hakların hukuk-üstü meşruiyet ölçütleri olduklarına yönelik iddiasıdır. Liberalizmin hukuk kuramı alanında bir yansıması olarak kabul edilen hukuksal-pozitivizmin tersine, Schmitt'in hukuksal-gerçekçiliği şaşırtıcı bir şekilde modern-liberal hukuk devletinin yapısı içerisinde temel hakların hukuk-üstü niteliğini açıklayabilmektedir. Bu haklar devletin tözsel içeriğinin kurulduğu aşamada alınan bireysel özgürlüğün temel değer olduğuna dair karardan kaynaklanan hukuk düzeninin değiştirilemeyecek öğeleridir. Bu demektir ki, devlet biçimine meydan okumayı göze almıyorsanız, bir modern-liberal hukuk devletinde temel hakları belirli durumlarda askıya alabilirsiniz ama hiçbir durumda ilga edemezsiniz. Böylece Schmitt temel hakların hukuk-üstü niteliğini gerçekçi bir çerçeveden gerekçelendirmiş olur. Bu gerekçelendirmeye ilişkin olarak öncelikle altı çizilmesi gereken şey evrensel değil muvakkaten (*provisional*) veya bağlamsal olmasıdır. Çünkü gerekçelendirme meşruiyet ölçütünün (yani bireysel özgürlüğün ya da temel hakların) normatif içeriğinin doğruluğuna/haklılığına değil bir siyasal varlığın egemen iktidarı tarafından alınan temel bir karar olması olgusuna dayanmaktadır. Egemen iktidarın herhangi bir normatif içeriğe karar kılabilecek olması, gerçekçi meşruiyet anlayışının doğruluğun/haklılığın evrensel ölçütü olarak tanımlanan adalet fikriyle pek ilişkili olmadığı anlamına gelir. Aslında, Schmitt'in gerçekçi bakış açısından temel ya da insan haklarının yanı sıra Yahudi ya da İslam şeriatı,

doğal hukukun herhangi bir yorumu ve hatta Nazi ideolojisi belirli bir siyasal rejimin egemenleri tarafından meşruiyet kıstası olarak ilan edildiklerinde geçerlilik kazanmış sayılmalıdırlar.

Schmitt'in siyasal-hukuksal kuramına dair tüm bu incelemeler sonucunda, ortaya çıkan temel bir sonuç, onun gerçekçi yaklaşımının pozitivizm tarafından birbirinden ayrıştırılmış olan alanlar, kavramlar ya da kategoriler arasında tekrar köprüler kurmaya çalıştığıdır. Schmitt öncelikle, hukuku ve siyasal gerçekliği birbirine bağlamaya çalışır. Bunun için, hukuk düzeni içerisinde egemene hukuku kuran ve idame ettiren güç olarak daimi bir önem atfeder. Hukuk ve siyasal güç arasındaki bağa dair bu gerçekçi bakış açısından, egemen ve *onun* düzeni zorun ve şiddetin tamamen ortadan kaldırılmasının olanaksız olduğu bir dünyada *Katechon* (Hıristiyan teolojisine göre zoru ve şiddeti sınırlandıran, tahammül edilebilir sınırlar içerisine hapseden varlık) olmaları dolayısıyla haklılaştırılmış olurlar. İkinci olarak, Schmitt'in gerçekçi yaklaşımı hukuk ve toplumsal-ahlaki değerler arasındaki bağı yeniden kurmaya çalışır. Bunun için de pozitivistlerin hukuksallık kavramına indirgeyerek gözden düşürdükleri meşruiyet kavramının merkezi önemini vurgular. Böylelikle Schmitt, hukuk düzenin içerisinde sanki hukuk normların kendiliğinden işledikleri bir kapalı devre sistemi olmadığını, tersine toplumsal-ahlaki değerlere duyarlı ve somut durumlarda somut bireylerin müdahale etmesine olanak tanıyan ve hatta bu müdahaleleri zorunlu kılan açık sistemler olduğunun altını çizer. Pozitivizmin kopardığı bu bağları tamir etme çabası bir yana, Schmitt'in gerçekçi yaklaşımı belirli bir noktada hukuksal-pozitivizmi takip eder ve hatta onun tavrını köktenleştirir. Söz konusu ortak nokta, hukuk ve devlete dair düşünümde nesnel/evrensel bir ölçüt olarak Hak (*Recht*) sorunsalının dışarıda bırakılmasına neden olan ahlaki-görececiliktir. Ahlaki-görececi önermeler çerçevesinde dile getirildiğinden dolayı, hukuksal-gerçekçiliğin tözsel meşruiyet ölçütlerinin olması gerekirliğine dair ısrarı devlet eylemlerine yönelik ahlaki sınırlamalar ya da yol göstericilik sağlamaz. Aslında tam tersine, devlete alacağı kararlarla sadece hukuki değil ahlaki değerleri de üretmesi konusunda yetki sağlar. Bu demektir ki; hukuksal-pozitivizm hukuk-üstü bir payanda olarak meşruiyet kavramını gündeminden düşürürken, Schmitt'in hukuksal-gerçekçiliği meşruiyet kavramını siyasal gücün (yani iktidarın) bir gölge-görüntüsü (*epiphenomenon*) haline getirir. Yani söz konusu olan her değerin egemen karar alıcının iradesiyle belirlendiği ve insan hakları benzeri *dokunulamaz* hiçbir evrensel normatif payandanın tanınmadığı

bir bağlamdır. Böyle bir bağlamda, herhangi bir başarılı iktidar örgütlenmesinden ayırt edilebilecek bir birliktelik olarak hukuk ve devlet fikri (yani bir haydut çetesinden gücünün niceliksel büyüklüğü ile değil, iktidar düzeninin normatif niteliği ile ayırt edilebilecek bir birliktelik olarak hukuksal-siyasal düzen fikri) anlamsızlaşır ve hatta bir yanılsama olur. Dolayısıyla, Schmitt'in hukuksal-gerçekçiliğine ilişkin olarak bizi hukuksal-pozitivizminkinden daha hayırhah olmayan bir çıkmaza götürdüğü yargısına varılır. Eğer hakkın (*right*) güçten (*might*) fazlaca bir şeyi dile getirdiğini reddediyorsanız, ister pozitivist olan Kelsen gibi gücün kendini hukuk normunda ifade ettiğini isterse gerçekçi olan Schmitt gibi gücün kendisini belli bir rejimdeki hukuksal normların altında yatan ortak ruhu ortaya koyan tözsel içeriğe dair alınan kararda görün. Her iki durumda da hukuksal-siyasal düzen ile basit bir haydut çetesi arasındaki fark muğlak hale gelmiştir.

Böylece, hem hukuksal-pozitivizmin hem de hukuksal-gerçekçiliğin hukuksal-siyasal pratiklerimizi ve onlara ilişin kullandığımız söz dağarcığını *anlamlandıramadıkları*, yani hukuksal-siyasal deneyimlerimizi anlamlı-sahici görüngüler olarak açıklayamadıkları iddiası ortaya konmuş olur. Bu iddiadan hareketle, çalışmanın dördüncü bölümünde hukuksal-akılcı yaklaşımın çağdaş bir örneğini oluşturduğu düşünülen Otfried Höffe'nin hukuk ve devlete ilişkin etik temelli kuramı incelenir. Modern hukuksal-akılcılıkla kastedilen, hukuk ve devlet kavramına içkin evrensel-adalete ilişkin ahlaki ilkeleri yukarıda belirtilmiş olan sofu hukuksal-ahlakçılığın çıkmazlarına düşmeden açıklayabilecek bir yaklaşımdır. Höffe için en temel ilham kaynağı olarak gözüken Kant'ın hukuk ve siyaset düşüncesi bu yaklaşımın en tutarlı ve bilinçli öncüsü olarak değerlendirebilir. İnceleme temel olarak Höffe'nin *Political Justice: Foundations for a Critical Philosophy of Law and the State* başlıklı eseri üzerinden yürütülür. Ama okuyucu için aydınlatıcı olacağı düşünülen noktalarda aynı yazarın *Categorical Principles of Law: A Counterpoint to Modernity* ve *Kant's Cosmopolitan Theory of Law and Peace* başlıklı eserleri de tartışma kapsamına alınır. İlkin, Höffe'nin *gerçek anlamda eleştirel* bir kuramın genel formuna dair görüşleri ortaya konur. Söz konusu eleştirel tutum hem gerçekliği topyekün reddeden yadsıyıcı kuramların hem de gerçekliği topyekün savunan haklılaştırıcı kuramların ötesinde bir konum almayı gerektirir. Gerçek anlamda eleştirel olan bir hukuk ve devlet kuramı, "verili olanı" yani pozitif gerçekliği bu gerçeklik için kurucu nitelik taşıyan ve dolayısıyla yadsınmasının çelişki yaratacağı bir geçerlilik payandası temelinden *yargılar*. Tıpkı

bir yargıcın önüne getirilen bir kimseyi topyekün kötü (*evil*) ya da topyekün iyi (*angelic*) olarak değil ancak dava konusu olan olay açısından suçlu ya da masum olup olmadığını yargılaması gibi. Eleştirel kuramın hukuk ve devletin çerçevesini çizerken ve dolayısıyla belirli tarihsel-mekânsal bağlamlarda söz konusu olan hukuk ve siyasete ilişkin gerçeklikleri yadsır ya da doğrularken kullandığı bu payanda evrensel-ahlaki bir kavram olarak adalettir. Başka bir deyişle, Höffe'ye göre gerçek anlamıyla eleştirel olan bir hukuk ve devlet kuramı, evrensel adalet kavramı ile hukuk ve devlet arasındaki asli bağı modern dönemi tanımlayan şartlar çerçevesinde yeniden inşa etmelidir. Böyle bir yeniden-inşa projesi için ilk gereksinim, adalete dair ahlaki-görececi bakış açısını çürütmektir. Yani, ortak yaşama dair bizim siyasal adalet olarak tanımladığımız evrensel (yani herkesi bağlıyor olma anlamında nesnel) ölçütler olduğunu tanıtlamaktır. Höffe bunu siyasal adalet kavramının semantik (anlambilimsel) çözülmesini sunarak yapar. Bu çözümlemenin sonucunda siyasal adaletin tamamen öznel bir mefhum olduğuna dair yaygın kanı çürütülerek, onun *her bir kimsenin dağıtımsal çıkarını* (*distributive advantage of each*) ifade eden nesnel bir kavram olduğu ortaya konur. Dahası, Höffe insan hakları fikrinin bahsedilen çıkarın görece tözselleşmiş ifadesi olduğunu iddia eder. Siyasal adalet kavramının nesnelliğine dair tanıtlamanın ardından düşünürün hukuksal-pozitivizme yönelik eleştirisi ortaya konur. Bu eleştiriden ortaya çıkan temel iddia, hukuk kavramının siyasal adalet ilkesi tarafından belirlenen kişilerarası karşılıklı sınırlamalara (*reciprocal coercion*) denk düştüğüdür. Yani hukuk her bir kimsenin çıkarını gerçekleştirmek doğrultusunda, ya da daha tözsel bir ifadeyle her bir kimsenin insan haklarının gerçekleştirilmesi doğrultusunda, kişilerin keyfi davranış özgürlüklerinin karşılıklı sınırlandırılmasıdır.

Hukuk ve evrensel-ahlaki bir kavram olarak adalet arasındaki asli bağın kurulması, çağdaş bir akılcı hukuk ve devlet kuramı geliştirme projesi açısından sadece ilk aşamanın tamamlanmasıdır. İkinci aşama olarak, bir tarafta adalet ve hukuk, diğer tarafta devlet yani siyasal iktidar arasındaki bağ da kurulmalıdır. Bu çerçevede, Höffe'nin anarşizm eleştirisi üzerine odaklanılır. Çünkü bu eleştiri, siyasal adaletin hukuk yoluyla sağlanmasında devletin zorunlu bir uğrak olarak ortaya çıktığı savını ortaya koyar. Oyun-Kuramında sıkça kullanılan mahkumların ikilemi (*prisoners' dillema*) diye bilinen modeli modern siyaset felsefesinin en temel kuramsal inşası olan doğa durumuna etkileyici bir biçimde uygulayan Höffe

anarşist toplumsal-siyasal tahayyüller karşısında çok keskin bir sonuca varır. Siyasal adaletin tözsel ifadesi olan insan haklarının pratik anlam kazanabilmesi açısından bu hakların kamusal gücü kullanan bir tarafsız kamusal otorite tarafından (yani devlet tarafından) kesinleştirilmesi ve zor yoluyla güvence altına alınması (yani onlara uyulmaması durumlarının yaptırım altına sokulması) zorunludur. Yani, devletin kuruluşu, bir topluluğu oluşturan her bir bireyin güvence altına alınmış en geniş özgürlük alanına sahip olması açısından zorunludur. Böylelikle, Höffe devleti akılcı bir izlekten haklılaştırmış olur. Ama altı çizilmesi gereken şey, bu noktada sadece bir haklılaştırmanın değil aynı zamanda da bir sınırlandırmanın (*limitation*) ve/veya çerçevelendirmenin (*enframing*) söz konusu olmasıdır. Haklılaştırılan şey *Leviathan* olarak devlet değil, *Justitia* (yani Adalet'in Kurumu) olarak devlettir. Dolayısıyla verili güç örgütlenmeleri kendilerinin devlet olarak tanıtlanmalarını istiyorlarsa güçlerini adalet doğrultusunda sınırlandırmalıdırlar. Tüm bunlar ışığında, çalışmanın dördüncü bölümünü sonlandırırken Höffe'nin modern-akılcı kuramına ilişkin olarak şu sonuca varılır. Yazar hukuk, devlet ve evrensel-ahlaki bir kavram olarak adalet (yani tözsel ifadesiyle insan hakları) kavramları arasındaki bağlantıyı yeniden-inşa ederek hukuksal-siyasal pratiklerimizi ve bu pratiklere ilişkin söz dağarcığımızı anlamlı-sahici bir görüngüler kümesi olarak sunabilen etkileyici bir yaklaşım ortaya koymaktadır. Ayrıca modern-akılcı yaklaşımın bu bağlantıyı inşa ederken bir yanda "hukuksal olan" ve "adil olan (*just*)" diğer yanda "kapsayıcı anlamıyla ahlaki olan" arasındaki ayrımı koruyabilmesinden ötürü sofu hukuksal-ahlakçılığın çıkmazlarına düşmediği de vurgulanmıştır.

Çalışmanın en özgün bölümü olan beşinci bölümünde ise çalışma boyunca sürdürülen eleştirel incelemelerden çıkartılan temel fikirler derli toplu bir biçimde ortaya koyulmaya çalışılmaktadır. Modern-akılcı yaklaşımın ortaya koyduğu hukuk, devlet ve adalete (insan haklarına) dair bütünlükçü yaklaşımın kazanımları alternatif yaklaşımların (yani hukuksal-pozitivizm, hukuksal-gerçekçilik ve sofu hukuksal-ahlakçılık) çıkmazlarıyla karşılaştırılarak savunulmaktadır. Ama bu kazanımların yanı sıra, hukuksal-akılcı düşüncenin takipçilerinin hukuksal-siyasal görüngülerin belirli bir sınıfını görmezden gelerek çözümlemeleri dışarısında bırakmaya yatkın olduklarının altı çizilir. Söz konusu görüngüler sınıfı devletlerin "devlet-aklı" (*raison d'état*) mefhumu kapsamında anılan eylemlerdir. Bu nahoş durumları görmezden gelip kuramsal incelemelerin dışarısında bırakmanın, hukuk

ve devlet düzenine ilişkin olarak sinisizime yol açtığı ve dolayısıyla bunun pek bilgece bir tavır olmadığı belirtilir.

Ortaya konan bu eleştirinin ardından, modern-hukuksal akılcılığın bahsedilen görüngüler sınıfını da değerlendirebilecek bir şekilde geliştirilebileceği tezi ortaya atılır. Daha doğru bir ifadeyle, modern-akılcılık açısından "devlet-aklı" mefhumu için sınırlı bir rol tanımak hem olanaklıdır hem de akıllıca olacaktır. "Devlet-aklı" mefhumun sınırlandırılması akılcı düşüncenin ortaya koyduğu bir fikir olan "devletin varoluş nedeni" (*raison d'être; the reason for the existence of the state*) aracılığıyla sağlanır. Modern-akılcı anlamıyla "devletin varoluş nedeni", onun düzenleyici bir fikir (*regulative ideal*) olan siyasal adaleti (yani bir topluluğu oluşturan bireylerin adalet çerçevesinde bir arada yaşayışını) dünyevi koşullar altında olası en üst düzeyde (*optimal*) gerçekleştirmesi ve sürdürmesidir. "Devlet aklı" mefhumunun "devletin varoluş nedeni" aracılığıyla sınırlandırılmasının anlamı şöyle ifade edilebilir. Varoluş nedeniyle belirgin ölçüde uyumluluk taşıyan bir devlet, hukuksal-siyasal düzene yönelik ağır tehdidin söz konusu olduğu ve başka türlü önlemlerin bu tehditle mücadele etmekte etkisiz kalacağı olağanüstü durumlarda adaletin gerçekleşmesinin ön koşulu olan hukuksal-siyasal düzenin korunması adına hukuksal olmayan (*non-legal*) eylemlerde bulunabilir. Burada öncelikle vurgulanması gereken nokta, söz konusu hukuksal olmayan eylemlerin adalet (yani insan hakları) gayesine sadakat ve bu gayenin elde edilmesi için doğru yolu izliyor olma noktasında ahlaki ve basiret-temelli (*prudential*) yargılamalara tabi olacak olmalarıdır. Yani hukuksal olmayan eylemlerde bulunabilmeye dair tanınan imtiyaz hiçbir zaman ahlak-dışılığa dair bir imtiyaz olarak anlaşılamaz; tam tersine ahlaki gayeyi gerçekleştirme nedeniyle tanınmıştır ve dolayısıyla ona bağlılığı şart koşar. "Devlet aklı" mefhumu çerçevesinde gerçekleştirilen pratiklerin mazur görülebilmeleri için gerekli bazı şartları şöyle ifade edilebiliriz. İlkin, söz konusu olan siyasal-hukuksal düzen adaleti (yani her bir üyesinin dağıtımsal çıkarı ilkesini) gerçekleştirme gayesi üzerine temellenmiş olmalıdır. Bu ilkeyi tanımayan güç örgütlenmeleri devlet ve hukuk düzeni değil tiranlık olarak tanımlanmalı ve dolayısıyla bunların herhangi eylemine dair "devlet aklı" mefhumu çerçevesinde yapılacak mazur görme ya da görülme iddiası geçersiz kabul edilmelidir. İkincisi, "devlet aklı" mefhumu temelinden bir iddia düzgün (*decent*) bir hukuk ve devlet düzeni tarafından dahi ancak kamusal güvenliğe yönelik yeterince ciddi ve kesin bir tehdit söz konusu olduğunda anlam taşır. Üçüncüsü, tartışmaya konu olan hukuksal

olmayan eylemlerin zorunlu addedilebilmeleridir. Yani, kamusal düzene ve kamusal güvenliğe yönelik tehdidin verili olan hukuksal normlara ve hukuksal izleklere bağlı kalınarak bertaraf edilmesinin olasılık dışı olması gerekir. Dördüncüsü, bu tür eylemler ancak ve ancak kamusal düzen tarafından yetkilendirilmiş ve sorumlu kılınmış en üst merciler tarafından yapılırsa bir maruz görülme iddiasında bulunulabilir. Beşincisi, unutulmamalıdır ki, bu tür eylemlere dair son yargıyı uzun vadede kamuoyu verecektir. Bunun anlamı, "devlet aklı" mefhumu çerçevesinden hareketle ortaya konan haklılaştırmaların hiçbir zaman esas ya da kesin anlamıyla haklılaştırma olamayacakları, acil önlem alınmasını gerektiren durum hallolduktan sonra kamusal vicdan tarafından yapılacak yeniden-yargılamalara hazır olunmasını gerektiren ancak kısmi haklılaştırmalar olduğudur. Bu beşinci koşulla bağlantılı son bir koşul da ortaya konabilir. Buna göre, "devlet aklı" mefhumu temelinden belirli pratikleri haklılaştırılabilecek bir siyasal-hukuksal düzen kendisine yönelik itirazların ve karşıtlıkların kamusal tartışmalar yoluyla medeni bir biçimde ifade edilmelerine olanak verir bir biçimde kurumsallaşmış olmalıdır. Jurgen Habermas'ın kavramları ile ifade edersek, halkın demokratik-iletişimsel gücünün hukuku ve siyasal iktidarı sürekli bir biçimde sorgulayabildiği ve uzun vadede şekillendirdiği bir kamusal alana dair siyasal ve hukuksal engellemeler olmamalıdır. Çünkü manipüle edilmemiş bir kamusal alan devleti temsil eden otoriteler tarafından devlet gücünün kötüye kullanılması riski karşısında düşünülebilecek tek gerçek güvencedir. Dolayısıyla, "devlet aklı" mefhumu çerçevesinden dile getirilecek iddialar, devlet gücünün kötüye kullanılıp kullanılmadığının kamusal sorgulamaya açık olduğu demokratik devlet biçimleri söz konusu olduğunda anlamlı görülebilir ancak.

Böylelikle, hukuksal-akılcılığın "devlet aklı" mefhumu çerçevesinde anılan görüngüleri de değerlendirme kapsamına alması olasıdır. Bunu yaparken dikkat edilmesi gereken nokta, hukuk ve devlet arasında bir ince ayrımın hep var olduğudur. Hukuk onun normlarına her durumda uyulması şartı ile adaletin gerçekleşeceği iddiasından temellenen bir normatif pratikler kümesidir. Devlet ise insanoğlunun adalet talebine kayıtsız kalan doğal gerçeklik karşısında adaletin hâkim olacağı bir toplu yaşam alanı kurabilmek için insani çabayla oluşturulan kamusal örgütlenmedir. Yani, hukukun adalet ile olan bağı ödevsel (*deontologic*) iken devletin adalet ile gayesel (*consequentalist*) bir bağı vardır. Bu ince ayrımın farkında olmak, hukuk, siyasal otorite (yani devlet) ve evrensel-ahlaki bir kavram

olarak adalet (yani insan hakları) arasındaki çok yönlü ve çok boyutlu bağlantıları daha hassas bir biçimde değerlendirebilmemize şans tanır.

Bu özeti, çalışma boyunca geliştirilen temel bir fikri yineleyerek bitirmek istiyorum. Hukuksal-pozitivist ve hukuksal-gerçekçi yaklaşımlar terk edilmelidir. Ama bunun nedeni basitçe insan haklarına dair ön kabulle örtüşmüyor olmaları değildir. Asıl neden şudur ki hukuk ve devlet ancak ve ancak evrensel adalet fikri (yani görece daha tözsel bir biçimde ifadesiyle insan hakları fikri) temelinden tanımlanabilir.

CURRICULUM VITAE

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MA	METU Political Science and Public Administration	2003
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WORK EXPERIENCE

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FOREIGN LANGUAGES

English (excellent), German (fair)