Abstract

This dissertation aims at showing that a new way for (re)thinking law, democratic politics and justice has to take into account the literary imagination by stressing the complicity between philosophy, law, and literature. Legal theory and adjudication have not only to presuppose but also to be committed to the crisscrossings and interweavings that are at the very basis of their concerns. From a close reading of Kafka's *Before the Law* this essay shows the paradoxes and aporias that are at the origin of literature, law, and justice and the difficulties they pose for the traditional discourse of legal philosophy, namely, for legal positivism and, then, the need to approach them from different discourses or practices such as Dworkin's constructive interpretation or Derrida's deconstruction and its contamination in the movement of critical legal studies. These latter are possible responses in face of the failure of legal positivism insofar they lead to diverse forms of asking (and answering) the question of law, democracy and justice (as well as the way they are related to each other) and that their theoretical disagreements are not indifferent to their practical (legal, ethical, and political) interventions. From whichever perspective – epistemological, aesthetic, ethical, political, legal – we look at the relation between philosophy, law, and literature we realize that language is what 'crisscross and interweave' it: they are bound to language and language is reassuring and disquieting at the same time. My effort to (re)think law, democratic politics and justice and the 'languages' I chose to do it are, finally, a response-in the sense of taking the responsibility - in face of the plural, conflictual and unequal world we live in.

Before the law: philosophy and literature
(the experience of that which one cannot experience)

by

Vera Karam de Chueiri

September 2004

Submitted to the Graduate Faculty of Political and Social Science of the New School University in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

Dissertation Committee:
Dr. Dmitri Nikulin
Dr. Agnes Heller
Dr. Claudia Baracchi
Dr. Emmanuele Castano

To Eliane and Silvia

Acknowledgments

"Vim pelo caminho difícil,
a linha que nunca termina,
a linha bate na pedra,
a palavra quebra uma esquina,
mínima linha vazia,
a linha, uma vida inteira,
palavra, palavra minha."

Paulo Leminski

Here I am before my writing, just like Kafka, K. or whoever stands before writings, laws, doors…This exercise of belonging by not belonging (to my writing), of a certain displacement, begins at the moment I dare to signify in English experiences from the Portuguese; to bring to philosophy and literature legal concerns and to be at home by being miles away from home. Looking at my writing (and my life) I recognize some people that have -silently or loudly- been there. Their being (existence) and support were definite in the hard process of writing (and of living) this dissertation: my father, Elias (Neno), who saw its very beginning but unfortunately could not see to where New York, the New School, philosophy, law and Kafka have taken me; my mother, Zalfa, from whom I learned that delicacy should govern our actions. Eliane, Fernando, Fernanda, Vanessa, and Silvia thank you for all you have done and sorry for the times I was so "Chueiri" (stubborn). I am also thankful to my aunt Fátima and my cousin Fernando (Gui) whose generosity is incommensurable. My friends for a kind of support that resists the distinction between the intellectual and the personal, specially: Katya "P." Kozicki, Bethania Assy, Claudia Barbosa, Lilian Barra, Marco Bessa, Fabiane L. Bueno Bessa, Luciane B. Bistafa, Gege Ramos Braga, Raquel Illescas Bueno, Cristiane Lucena

Carneiro, Rodrigo Córdova, Zena "Warrior" Eisenberg, João Feres Jr, José Antonio P. Gediel, Fred Gonzaga Jayme, Andrea Iesheck, Simone Kohler, Celso Ludwig, Ana Letícia B. Duarte Medeiros, Deborah Mitchel, Simone Mucida, Titi R. Narciso, Francisco Ortega, Carla Amato, Gabi Polewka, Tarsys "Babe" Poterio, Ricardo Ruiz, Cesar Serbena, Paulo da Silva (in memorian), Dani Romanelli, Neide Sydney, Marcela Tovar, Antonio Jorge Melo Viana, Sandra Zawadzki, and Anna Paula Zetola. I owe a special word of appreciation to my former professor of constitutional law at the Federal University of Paraná Law School, Sansão J. Loureiro who first showed me the enchantment of learning law from literature. My professors at the Graduate Faculty of the New School for Social Research to whom I owe the freedom of thinking (and writing) besides the privilege of their ever challenging lessons: Claudia Baracchi, Richard Bernstein, Jacques Derrida, Agnes Heller, Christoph Menke and Dmitri Nikulin. To Dmitri Nikulin I owe a particular thank, since the very first moment when I decided the theme of the dissertation and he kindly said: "for a Russian there is no philosophy without literature". My appreciation to Professor Ronald Dworkin and Thomas Nagel who let me join the Colloquium in legal, political and social philosophy at NYU Law School in the years of 1998 and 1999. I still want to express my gratitude to Claire Martin, Yvonne Billig and Tsuya Yee whose professional skills and cordiality turn bureaucratic difficulties into pleasant conversations. The Brazilian Government, State Department of Education, CAPES (Federal Agency For Graduate Studies) and the School of Law of the Federal University of Paraná, all public institutions, that awarded me a fellowship (1997-2001) and with it the privilege of the years spent in New York at the New School. I am also grateful for the Donnelley Fund Scholarship and JRE Everett

Fellowship (2001-2003) I was awarded by the New School for Social Research and mostly for its commitment to an education based on diversity and respect (for diversity). Maurice Blanchot in an essay called *Kafka and literature* says that "literature consists of trying to speak at the moment when speaking becomes most difficult", for instance, at this moment. I wish I could write in Portuguese, that is: "*Esta não é minha língua./ A língua que eu falo trava / uma canção longínqua,/ a voz, além, nem palavra. / O dialeto que se usa / à margem esquerda da frase, / eis a fala que me lusa, / eu, meio, eu dentro, eu quase.*" (Leminski) Again, thanks!

Table of Contents

Chapter 1

(Pre)text (or what comes before the *Before*)

> "To address oneself to the other in the language of the other is, it seems, the condition of all possible justice, but apparently, in all rigor, it is not only impossible …but even excluded by justice as law (*droit*), inasmuch as justice as right seems to imply an element of universality, the appeal to a third party who suspends the unilaterality or singularity of the idioms." [1]

"Vor dem Gesetz steht ein Türhüter. Zu diesen Tühüter kommt ein Mann vom Lande und bittet um Eintritt in das Gesetz. Aber der Türhütersagt, dasser ihm yetzt den Eintritt nicht gewähren könne".[2]

Before the Supreme Court of the United the States of America stands an inscription: "equal justice under law". But the inscription does not grant equal justice, at the moment. The literary discourse, the discourse of the law and the US Supreme Court

---

[1] Jacques Derrida, "Force of Law: the Mystical Foundation of Authority," *Cardozo Law Review* 11: 5-6 (July/August) 1990, 949.

[2] Franz Kafka, "Vor dem Gesetz,"*Gesammelte Werke* (European Union: Eurobuch, 1998), 34-36. "Before the law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment." Franz Kafka, "Before the Law," *The Complete Stories* (New York: Schocken Books, 1971), 03.

discourse do not say 'no' but 'not yet'. This (perhaps) indefinitely 'not yet' of literature, law and justice is at the core of Kafka's *Before the Law*, of the US Supreme Court and of this dissertation.

Martha Nussbaum, at the very beginning of her book *Love's Knowledge,* writes that: "there may be some views of the world and how one should live in it – views, especially, that emphasize the world's surprising variety, its complexity and mysteriousness, its flawed and imperfect beauty – that cannot be fully and adequately stated in the language of conventional philosophical prose, a style remarkably flat and lacking in wonder – but only in a language and in forms themselves more complex, more allusive, more attentive to particulars."[3] Derrida, in his *Acts of Literature,* affirms that "the 'economy' of literature *sometimes* seems … more powerful than other types of discourse: such as … historical and philosophical discourse. *Sometimes*: it depends on singularities and contexts. Literature would be potentially more potent.[4] Writing beyond the unity and totality of philosophical science, beyond the encyclopedia is the literary experience. Indeed, I could not start this dissertation otherwise but with Kafka (and the doorkeeper's warn): "… versuche es doch, trotz meines Verbotes hineinzugehen… Ich bin mächtig."[5] The countryman and the doorkeeper state the subject matter of this work: we are bound by this complicity between philosophy and literature,[6] and, more

---

[3] Martha Nussbaum, *Love's Knowledge* (New York and Oxford: Oxford University Press, 1990), 03.

[4] Jacques Derrida, *Acts of Literature* (New York and London: Routledge, 1992), 43.

[5] Kafka, "Vor dem Gesetz," 34. "If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful". Kafka, "Before the Law," 03.

[6] Bloom has a different understanding with which I do not agree. According to him, literary study does not depend upon philosophy and he defends the autonomy of aesthetic in order to stress the "autonomy of imaginative literature and the sovereignty of the solitary soul, the reader not as a person in society but as

specifically, between philosophy, law and literature. Paradoxically (and unfortunately), my discussion here is mostly in flat, conventional philosophical prose; nevertheless, it aims at showing that a new 'way' for (re)thinking law, politics, and justice (in the realm of legal philosophy) has to take into account the literary imagination by stressing the complicity between law and literature. Legal philosophy and legal theory have not only to presuppose but also to be committed to the 'crisscrossings and interweavings'[7] that are at the very basis of their concerns. As Derrida well puts it: "(m)y first inclination wasn't really philosophy but rather towards literature, no, towards something that literature accommodates more easily than philosophy."[8]

Therefore, it is necessary to (re)affirm what is, on the one hand, the obvious subject matter of this dissertation: we are impelled by this complicity among philosophy, law, philosophy of law, and literature. On the other hand, when we come to the (de)construction of this complicity, either in the conventional prose of legal philosophy or in the narrative of Kafka's *Before the law*, we have already left the realm of the obvious to the very task of this dissertation. My argument, then, begins here.

The countryman prays for admittance to the law. What law? And what is the law? "(E)s ist möglich, …yetzt aber nicht"[9] replies the doorkeeper who also immediately observes: "… versuche es doch, trotz meines Verbotes hineinzugehen… Ich bin

---

the deep self, our ultimate inwardness." Harold Bloom, *The Western Canon* (New York : Harcourt Brace & Company, 1994), 10-11.

[7] I am thankful to professor Richard Bernstein who phrases this 'more-than-interdisciplinary' attitude: 'crisscrossings and interweavings.' Richard Bernstein, *The New Constellation. The Ethical-Political Horizons of Modernity/Postmodernity* (Cambridge, Mass.: The MIT Press, 1995), 334.

[8] Derrida, *Acts of Literature*, note, Interview, 02.

[9] Kafka, "Vor dem Gesetz,"34. "It is possible,…but not at the moment". Kafka, "Before the Law," 03.

mächtig."[10] It might sound reasonable the doorkeeper's remark (and authority) yet not just: the law should be accessible at all times and to everyone. Nevertheless, what justice and what is just(ice)? Kafka's text not only refers to law and justice but it is inscribed in the critical experience of literature, which poses the same question, however each time singular: what is (authority, law, justice and literature itself)?

As we can see, literature first calls our attention to the "What is" of the question: "What is authority?", "What is law?", "What is justice?" as well as "What is literature?" In the words of Derrida, "literature 'is' the place or experience of this 'trouble' we also have with the essence of language, with truth and with essence, the language of essence in general."[11] The experience of literature disturbs the authority and the pertinence of the question "What is…?" Thus, the significance of literature to authority, law, and justice dwells first, in this disturbing manner of traversing the language of essence and truth. The literary narrative detaches the metaphysical belief, the 'what is', even when it apparently puts it forward. Second, law and literature share the same conditions of possibility what means that the origin of law is also that of literature, which is, after all, a non-origin. A story as a kind of relation is "linked to the law that it relates, appearing, in so doing, before the law, which appears before it."[12] Accordingly, law should not bring up any story unless it is without history and origin. This is the law of the laws: "(w)hat remains concealed and invisible in each law is thus presumably the law itself, that which makes

---

[10] Kafka, "Vor dem Gesetz," 34. "Just try go in despite my veto… (I)am powerful." Kafka, "Before the Law," 03.

[11] Derrida, *Acts of Literature*, 48.

[12] Derrida, *Acts of Literature*, 191.

laws of theses laws, the being-law of these laws."[13] Thus, law appears and interferes but detached from any origin, that is, "(i)t appears as something that does not appear as such in the course of a history. At all events it cannot be constituted by some history that might give rise to any story."[14]

Thus, the origin of the law is not an event but it is not pure fiction either. It is neither history nor fantasy but the law; the law of the laws and this is the *aporia* of law. "The *aporia* of law occupies the middle ground between reality and fiction, opening up the distinction, but always already exceeding its terms."[15] An *aporia* is, then, this *non-chemin* which we cannot experience, this impossible in its possibility and possible as its impossibility. Reading Aristotle's *Physics* and Heidegger's *Being and Time,* the idea of aporia occurs to Derrida, precisely concerning the question of present, presence and the presentation of the present, of time, of being, of nonbeing and of certain impossibility as a *non-chemin*. "I suggested that a sort of nonpassive endurance of the aporia was the condition of responsibility and decision. Aporia rather than antinomy: the word *antinomy* imposed itself up to a certain point since, in terms of the law (*nomos*), contradictions and antagonisms among equally imperative laws were at stake. However, the antinomy here better deserves the name of aporia insofar as it is neither an 'apparent or illusory' antinomy, nor a dialectizable contradiction in the Hegelian or Marxist sense, nor even a 'transcendental illusion in a dialectic of the Kantian type', but instead and interminable experience."[16]

---

[13] Derrida, *Acts of Literature*, 192.

[14] Derrida, *Acts of Literature*, 194.

[15] Richard Beardsworth, *Derrida and the Political* (London and New York: Routledge, 1996), 34-35.

[16] Jacques Derrida, *Aporias* (Stanford, Cal.: Stanford University Press, 1993), 16.

For the *aporia* is also the law of literature. According to Derrida, literature is a kind of discourse that identifies its source of writing to be 'within' the *aporia*. Literature asseverates the non-origin of the origin of the law that is reinscribed as both the content and the event of the text. The non-advent of the law is the advent of a text. Then, law and literature come together in this impossibility of the account of the origin of law. Blanchot also says that it is the impossibility of literature that makes literature possible.[17]

Hence, law and literature experience an aporetic relation, the same relation that Derrida finds in justice. An idea of justice that must guide our actions in the sense of one's responsibility in taking decisions (in enforcing the law in the case of judicial officials such as judges), an idea of justice as *aporia:* "An aporia is a non-road. From this point of view, justice would be the experience that we are not able to experience…I think that there is no justice without this experience, however impossible it may be, of aporia. Justice is an experience of the impossible. A will, a desire, a demand for justice whose structure wouldn't be an experience of aporia would have no chance to be what it is, namely, a call for justice."[18] This idea of justice should contaminate legal theory (against all theoretical efforts of 'purifying' law) as something that never takes place in the present but in a time to come; an idea of justice that is beyond the law.

The originality of this dissertation is not to ask what law is or what justice is but the possibility of (re)(de)constructing such questions from/in/through/with literature. Kafka's *Before the Law* is, then, the point of departure of this work (as well as its point of

---

[17] Simon Critchley, *Very Little…Almost Nothing* (London and New York: Routledge, 1997), 36.

[18] Derrida, "Force of Law: the Mystical Foundation of Authority," 946. »Une aporie, c'est un non-chemin. La justice serait de ce point de vue l'expérience de ce dont nous ne pouvons faire l'expérience…je crois qu'il n'y a pas de justice sans cette expérience, tout impossible qu'elle est, de l'aporie. La justice est une experience de l'impossible. Une volonté, un desir, une exigence de justice dont la structure ne serait pas une expérience de l'aporie n'aurait aucune chance d'être ce qu'elle est, à savoir juste appel de la justice.»

arrival). Law and its intricate relation to justice are, then, at the core of Kafka's work, of this dissertation and of ourselves. It is noteworthy that a first attitude (mine) towards deconstruction is to admit the manifold of senses of any *name* (concepts, categories etc)[19].

The complex relation between law, politics, and justice has been exhaustedly explored in the traditional domain of legal philosophy. Tradition is considered here, regarding either the Anglo-American or the Roman-Germanic legal system, on the one hand, the natural law school and, on the other, legal positivism – the most influential theoretical bases of what may be called 'conservative' legal discourse.

Beyond tradition we can find other domains such as legal realism, legal hermeneutics, critical legal studies within which the relation between law, politics, and justice has gain new impulses. I would like to stress two of these new impulses, which, somehow, have rescued legal discourse from its isolation within humanities as well as from its traditional conservative feature: on the one hand, Dworkin's legal philosophy and on the other hand, Derrida's deconstruction and its *contamination* in legal philosophy, specially in this broad movement called critical legal studies (CLS)[20]. As a matter of fact, we cannot refer to 'critical legal studies' as a system of thought insofar as it is not unified: the idea of a system somehow contradicts this movement's critical approach. We can identify many critical tendencies among legal scholars assuming

---

[19] Any attempt to define deconstruction is dangerous. I take John Caputo's consideration that "the very meaning of deconstruction is to show that things – texts, institutions, tradictions, societies, beliefs and practices of whatever size and sort you need- do not have definable meanings and determinable missions, that they are always more than any mission would impose, that they exceed the boundaries they currently occupy." John Caputo, *Deconstruction in a Nutshell. Conversation with Jacques Derrida* (New York: Fordham University Press, 1997), 31.

[20] From now on I will refer to critical legal studies as CLS.

different characteristics, but unified in their project of opposing the conservative developments in legal theory – especially the recent development of what has been called an economic approach to law in American legal education. The philosophical failures of liberalism or its attempt to combine fairness and individual wealth – are some of the arguments that have been pointed out by this movement. Derrida points out that "the developments in 'critical legal studies' or in work by people like Stanley Fish, Barbara Herrstein-Smith, Drucilla Cornell, Sam Weber and others, which situates itself in relation to the articulation between literature and philosophy, law and political institutional problems, are today, from the point of view of a certain deconstruction, among the most fertile and the most necessary."[21] Derrida refers to critical legal studies as a movement, which does not remain enclosed in pure speculative, theoretical, academic discourses, but is engaged in a project to intervene and change the world we live in.

Therefore, the (im)possible relation between law, politics, and justice experiences either Dworkin's constructive enterprise through interpretation or deconstructive attitudes such as Derrida's and some representatives of the so-called CLS.[22] It is noteworthy that

---

[21] Derrida, "Force of Law: the Mystical Foundation of Authority," 930-931. »les développements des 'critical legal studies' ou des travaux, comme ceux de Stanley Fish, Barbara Herrstein-Smith, Drucilla Cornell, Sam Weber et d'autres, qui se situent à l'articulation entre la littérature, la philosophie, le droit et les problèmes politico-institutionels, sont aujourd'hui, du point du vue d'une certaine déconstruction, parmi les plus féconds et les plus nécessaires.»

[22] Derrida refers to this "conjunction or conjuncture stressing that, if it has seemed urgent to give our attention to this joint or concurrent development and to participate in it, it is just as vital that we do not confound largely heterogeneous and unequal discourses, styles and discursive contexts. The word "deconstruction" could, in certain cases, induce or encourage such confusion. The word itself gives rise to so many misunderstandings that one wouldn't want to add to them by reducing all the styles of Critical Legal Studies to one or by making them examples or extensions of Deconstruction with a capital "D." However unfamiliar they may be to me, I know that these efforts in Critical Legal Studies have their history, their context, and their proper idiom, and that in relation to such a philosophico-deconstructive questioning they are often (we shall say for the sake of brevity) uneven, timid, approximating or schematic, not to mention belated, although their specialization and the acuity of their technical competence puts them, on the other hand, very much in advance of whatever state deconstruction finds itself in a more literary or philosophical field. Respect for contextual, academico-institutional, discursive specificities, mistrust for analogies and hasty transpositions, for confused homogenizations, seem to me to be the first imperatives

although these two processes (of construction and deconstruction) represent a critical response to what I have called tradition in legal philosophy, they are just contingently complementary. My point is that they lead to diverse forms of asking (and answering) the question of law, democracy and justice (as well as the way they are related to each other) and that their theoretical disagreements are not indifferent to their practical (legal, ethical, and political) interventions.

In bringing out Kafka, Derrida, and Dworkin in this very beginning I am setting not only the path of the dissertation but also what precedes it, its origin, that is, the inexorable relation among philosophy, law, and literature. From whichever perspective – epistemological, aesthetic, ethical, political, legal – we look at this relation we realize that language is what 'crisscross and interweave' it. Philosophy, law, and literature are bound to language and language is reassuring and disquieting at the same time.[23] My effort to (re)think legal philosophy in this way and the 'languages' I use to do it reveal a dissatisfaction with the 'dominant' approach of twentieth-century legal philosophy as well as a disquiet which I specially find either in the deconstructivist idea of law and justice as aporia or in Dworkin's theory of adjudication. Impelled by either this sentiment of dissatisfaction or of disquiet I present the argument to follow.

To this (pre)text (this before), it follows the second chapter [2], in which I will recount the story of Kafka's *Before the Law.* To paraphrase Nikulin,[24] recounting Kafka's

---

the way things stand today. I am sure,…I hope, that this encounter will leave us with the memory of disparities and disputes at least as much as it leaves us with agreements, with coincidences or consensus". Derrida, "Force of Law: the Mystical Foundation of Authority," 933-935.

[23] Maurice Blanchot, *The Work of Fire* (Stanford: Stanford University Press, 1995), 322.

[24] In a paper called *Mikhail Bakhtin: A Theory of Dialogue*, Nikulin points out that Bakhtin "is infinitely rich and so may be especially helpful when rigidly established limits between academic disciplines and

Before the Law "may be especially helpful when rigidly established limits between academic disciplines and fields of study are redefined or put into question." However, the dissertation is about (n)either Kafka (n)or *Before the Law*. As Derrida points out, "under the pretext of fiction, literature must be able to say anything; in other words, it is inseparable from the human rights, from the freedom of speech, etc."[25] Literature is not just a metaphor for the struggles and aporias that constitute law and justice but rather it is the place of such struggles and aporias. The brake with disciplinary boundaries is, then, a political attitude.[26] Samuel Weber, in an article called *In the Name of the Law*,[27] stresses that the possibility to talk about deconstruction, law, and justice in an interrelated manner can be said as one of certain transference not just between different languages but within each of them as well. This transference between languages, be they natural languages or the languages of individual disciplines "becomes dependent upon the transfers going on *within* their borders"[28] and "tends to uncover 'hidden articulations…within assumedly monadic totalities,' and thus opens the possibility, and even the necessity, of elaborating

---

fields of study are redefined or put into question." Dmitri Nikulin, "Mikhail Bakhtin: A Theory of Dialogue," *Constellation*s 5, 1998, 381.

[25] Jacques Derrida, "Remarks on Deconstruction and Pragmatism," ed. Chantal Mouffe, *Pragmatism and Deconstruction* (New York and London: Routledge, 1996), 80.

[26] Deleuze and Guattari say that Kafka is/as a *minor literature* (a minor literature doesn't come from a minor language; it is rather that which a minority constructs within a major language), in contrast to major literature where the individual concerns (familial, marital, etc) join with other no less individual concerns, the social milieu serving as a mere environment or a background, is completely different; its cramped space forces each individual intrigue to connect immediately to politics…When Kafka indicates that one of the goals of a minor literature is the "purification of the conflict that opposes father and son and the possibility of discussing that conflict", it isn't a question of an Oedipal phantasm but of a political program. Gilles Deleuze and Felix Guattari, *Kafka*: *Toward a Minor Literature* (Minneapolis and London: Minnesota University Press, 1986), 17.

[27] Samuel Weber, "In the Name of the Law." *Cardozo Law Review* 11: 5-6 (July/August) 1990, 1515-1516.

[28] Weber, "In the Name of the Law," 1516.

new networks between areas in the process of turning themselves, as it were, inside-out."[29]

Therefore, my reading of Kafka's *Before the Law* (and its unfoldings) is already an experience of transference between languages (and disciplines). For my discussion will focus on (2.I) cloudiness, (2.II) revelation, (2.III) surprise, (2.IV) Kafka, K., *kavka,* (2.V) authority, and (2.VI) the law. This approach is more or less arbitrary. I believe that there is a movement in the text that follows the sequence I propose (and the purpose of the dissertation) which starts with the 'cloudy spot' Benjamin talks about and that is always there in literature and law. This cloudiness in Kafka's short story is at the same time the law that prohibits its revelation and the prohibited law. To be before the law (or literature) is to experience this cloudy yet revealing atmosphere. It is not exactly the meaning of what appears or is revealed that strikes me most but appearing as such.

The appearing of the countryman, the doorkeeper, and K. has a revelatory force even without a content or meaning. Characters appear and through their appearance they forward the plot. It is not a propositional content that entangles us, readers, throughout the plot but the always revealing appearing of characters, which does not raise dogmas, beliefs, ideas, or meanings. Then, instead of taking this process (of appearing) as a mystical relation, we could, following Hegel, take it phenomenologically as an essential relation. In taking a phenomenological shortcut, revelation (as appearing) come to be a key category for Kafka's fragmented prose, however divested of a theological meaning.

Following Hegel, in the dialectics of the categories (the truth of Appearance is essential relation and Appearance has to be understood as appearing, that is, the

---

[29] Weber, "In the Name of the Law," 1516.

happening, the revelatory) there is a moment of surprise that shakes up and moves the logical system. That which takes place, the surprise, the event in its eventfulness, the continuous of the verb, and the 'ing' of the present implies a time or rather, it is the time. Nothing precedes or succeeds such time, as it is the taking place. This surprise, this taking place, or still this timeless time is there in Kafka's *Before the Law* (and in *the Trial* -as the unfolding of it). Accordingly, they (*Before the Law* and *The Trial*) can be understood as a narrative of time experiences, which can be translated into legal, political and personal experiences, namely: Kafka, K., *kavka.*

These time experiences, these experiences of being (a man, an author, a character etc), raise the question of identity: of the text itself and in the text. I understand that literature, philosophy, and law, in their narratives and in the interweaving of their narratives, problematize their identity as well as the identity of their subjects. Looking at Kafka, at the man, at the writer, not without a great suffering he deals with himself. Especially because his exasperating experience either as a Jew, a Czech or a Bohemian in the bureaucratic bourgeois milieu of East-European (Jewish) community, I will talk about institutional resources of recognition such as, the state and the law. To be before the law can be either an attempt of being (or belonging) to an institution or still an act of resistance in belonging to, in getting his or her recognition from an institutional (other).

Institutions such as the state and the law (and literature as well) rely upon the idea of authority, which was thought by the Romans as 'strengthening the foundations', until its modern conception as *Gewalt*: violence, force, and legitimate power. In this topic I follow Arendt's historical reconstruction of the concept of authority to the point where I turn my attention to the concept of legal authority and the very idea of law.

Kafka's *Vor dem Gesetz* can be read as a story of the inaccessibility of/to the law, being this inaccessibility the very possibility to accede to the law. The assumption of this aporia leads to what is at the very constitution of law (and literature) that is this exceptional *topos* on which sovereignty marks the limit of the law. Hence law as well as literature can evade neither the sovereign power, which is in their origin, nor the paradoxical structure of such power. There remains my special interest that is, in the paradoxes that constitute sovereignty, law, and literature and the deconstructive attitude that makes such -paradoxical or rather aporetic- reading possible.

Sovereignty is a key concept not only for/in Kafka's *Before the Law* but for/in political and legal philosophy as well as for/in literature. I believe that not just language is at the core of literature, law and justice, but a cloudy, revealing, surprising, authoritative and sovereign language, which is possible, because it is never there (in literature and law) but somewhere else: before, behind or in the next the hall; it is *deterritorialized* (in the words of Deleuze and Guattari) or as I just mentioned above on an exceptional *topos.*

The discussion on sovereignty departs from Carl Schmitt's concept of it. Schmitt stresses the political commitments of such concept to the detriment of its usual legal justification. Then, the third chapter will focus on Schmitt and Kelsen's theoretical dispute on sovereignty to which I called [3] Schmitt before Kelsen, especially because of their emphasis either on the political or on the juridical as the referential point from which we must look at sovereign power as well as at law.

Schmitt's concept of sovereignty cannot be properly understood without a close view on his critique of parliamentary liberalism and liberal democracy. In the path of

Schmitt, I also intend to relate sovereign power to constituent power. Both concepts are crucial to understand the constitution and the force of law in the terms this dissertation suggests, that is, as an aporia. For, my discussion will focus on (3.I) will, (3.II) *Ausnahme,* (3.III) enemy-and-friend: Schmitt-and-Kelsen, (3.IV) sovereignty and constituent power: from political philosophy to first philosophy and then, the (3.V) threshold between the third and forth chapter, that is, between force and (the) enforcement (of law).

From Schmitt-and-Kelsen's debate it falls out that the founding moment is a moment of suspension of the law (according to Schmitt) or of a *coup de force* or performative violence in the words of Derrida, which no previous law could guarantee. This fact puts various difficulties, but particularly the indiscernible character of the force (or violence or power), which institutes the law and that which conserves and enforces it. To acknowledge that this aporia cannot be eliminated and that law in its constitution is paradoxical does not condemn us to obscurity or to live in permanent suspension. On the contrary, following Derrida, this structure in which law is essentially deconstructible because it exceeds the opposition between founded and unfounded is what makes deconstruction possible and this possibility is what will weave the chapters of this dissertation to follow. For, I understand that assuming the deconstructivist character of law does not mean that law cannot be applied and legal disputes cannot be adjudicated. However, the enforcement of law implies a movement from before to within the law.

Then, the forth chapter [4] will take us inside to the law, particularly to the place and time of its enforcement. Once law must be enforced and legal disputes adjudicated, legal interpretation is at stake. On this matter, Kelsen's positivism is unsatisfactory for it

understands law as a closed, autonomous system in which cases are decided logically by applying the correct legal norm to the fact to be ruled and the tension between them (fact and norm) is underestimate as far as it is not assumed as constitutive of the very idea of law. For positivists like Kelsen, in the case of controversial interpretations, law (as nothing but a system of norms) is the frame within which any interpretation must be fitted. Kelsen's absolute assumption is that legal adjudication has nothing to do with politics or the possibility of justice; it is just a matter of formal imperatives. Even Hart's positivism is unsatisfactory as it discards the possibility to attribute validity to law on a moral or political basis. Hart shares this understanding of law as a closed system of norms but different from Kelsen, in the case of controversial interpretations, where there is no explicit rule to apply to the case in question the judge is free to make the law, that is, the decision is a matter of the judge's discretionary power. But this discretionary power of the judge does not amount to say that law is a matter of politics or morality.

On the other hand, Schmitt's decisionism and Derrida's deconstruction and its *contamination* in legal philosophy never intended to be a theory for legal adjudication but an alert of its crisis and difficulties. Both are also excellent criticisms of legal liberalism and legal formalism.

A theory of law that acknowledges the controversial character of legal interpretation and the role of politics and morality in adjudication is Ronald Dworkin's. His legal theory is particularly interesting for it stresses the importance of literary narrative at law and mainly for deciding hard cases at law. Dworkin's legal theory is also a strong criticism of legal positivism, above all Hart's. Then, the forth chapter will first take a step back on the (4.I) traditional narrative of legal positivism, particularly (4.I.I)

Kelsen's and Hart's whose deficits Dworkin's theory of adjudication intends to avoid, specially through his idea of a 'chain of law' insofar as it highlights the relation between philosophy, law, and literature. Dworkin's *chain of law* challenges not only the tradition of legal positivism but is in dialogue with (4.II) legal realism and critical legal studies that in taking the opposite route of legal positivism (tradition) can be thought as a movement of contradiction. So, any effort to understand Dworkin's theory of adjudication, principally *the chain of law* requires also a step back on legal realism and critical legal studies. My claim is that Dworkin's theory of adjudication goes further than avoiding the deficits of legal positivism, legal realism, and legal hermeneutics by establishing a hermeneutical-critical paradigm in the realm of jurisprudence. From a methodological viewpoint, Dworkin's philosophy of law – in a step well beyond Hart's – highlights the hermeneutic character of legal science and its interpretative attitude, mainly to oppose the descriptive aspect of legal positivism. In this sense Dworkin (re)presents a middle ground proposal to (4.III) the dilemma between description (legal positivism) and prescription (legal realism and critical legal studies).

For, interpretation becomes crucial to the understanding of what law is in the context of a coherent, cogent, legitimate, and just normative narrative. Following what Dworkin calls a constructive model of interpretation he justifies legal practices on the basis of a reconstruction of law whose paradigmatic moment is that of adjudication. Law consists basically in the narrative history that most improve these practices. This idea will be central for Dworkin's idea of a (4.IV) *chain of law*. Dworkin's *chain of law* attempts to reconcile law, politics, and ethics stressing the moment of adjudication and, in this latter, the attitude of the judge, this privileged interpreter of the narrative (legal practices)

that (re)constructs the law. In fact, the act of deciding is the most fundamental at law and in deciding the judge enforces the law. However, to enforce the law does not necessarily entail a just decision and moreover the responsibility in taking (just) decisions does not end in the juridical sentence but exceeds it as far as it is as legal as ethical. Indeed, the question of justice is beyond the legal system despite Dworkin's efforts of constructing a Herculean legal system of right answers. The movement from Dworkin's theory of adjudication to the question of justice requires, then, to unchain the law (4.IV.I), and accordingly, to go from construction to deconstruction (4.IV.II).

Legal systems exist to render stable what is not stable, that is, tensions, conflicts, and uncertainties that are constitutive of us, of our lives, and of the very idea of law. This stability is not natural but produced by men in an environment of difference and dissension (violence and exclusion). On the side of the application of the law (within the legal system) there is a claim to produce stability, that is, the judge must decide. However, this decision is always contingent and in being contingent, always transitory yet not necessarily just. Then, law provides a provisional stability however this does not answer either to the aporetic origin of law or to the question of justice. In fact, the question of justice is not there in the enforcement of the law but beyond it. The fifth chapter [5] is on that which is beyond the law: the possibility of justice. Assuming that there is no justice without the experience of aporia, its possibility remains on an experience of the impossible. I, then, take Derrida's arguments in respect to justice. Indeed, the respect for/to justice in the sense of a deferential esteem whose lack we experience these days is a theme deconstruction is engaged in. The discussion that will follow in this last chapter will focus on (5.I) the deconstruction of law and (for) the

undeconstructibility of justice and, hence, on (5.II) the idea of justice as an aporia. On the one hand, it is the inaccessibility of law that places it at stake in *Before the Law* but on the other hand, it is its undecidability. The law to which the man from the country has no access should be general, however, the exclusivity of the open door confronts him with this irreconcilable relation between the general and the singular. Moreover, this aporia that turns the access to the law into a constant deferment is not just what the narrative of *Before the Law* is about, but it is the very idea of literature itself. The next section of this chapter (5.III) is on the aporia of law and literature. Joseph K. dies *like a dog*, after a parody of justice, executed by two men. His death is the end of a trial that never took place, the final sentence to the question of law and justice and the end of the narrative. Kafka's writing, the content of his writings and my writing about it end with Joseph K.'s or the countryman's death: (5.IV) death is the end(ing).

This is a (pre)text: a presentation, a justification of what will follow as well as an excuse, a defense. It announces in the future tense what you will read as well as what I will already have written. "The *pre* … makes the future present, represents it, draws it closer, breathes it in, and in going ahead of it puts it ahead. The *pre* reduces the future to the form of manifest presence."[30] The 'pre' is neither future nor past but present as far as future and past are altered presents: pastness and futureness are simultaneously 'present' in the (pre)text. Thus, a (pre)text precedes, presents, predicts.

Pretexts, prefaces, forewords, preludes signify not only a beginning but 'the' beginning, that is, with what must philosophy (or literature) begin. At this point, it is impossible not to mention Hegel, specially his warnings on prefaces and beginnings. In

[30] Jacques Derrida, *Dissemination* (Chicago and London: University of Chicago Press and Athlone Press, 1981), 07.

the preface of the *Phenomenology of Spirit* he says that, "it is customary to preface a work with an explanation of the author's aim, why he wrote the book, and the relationship in which he believes it to stand to other earlier or contemporary treatises on the same subject. In the case of a philosophical work, however, such an explanation seems not only superfluous but, in view of the nature of the subject-matter, even inappropriate and misleading. For whatever might be appropriately be said about philosophy in a preface- say a historical *statement* of the main drift and the point of view, the general content and results, a string of random assertions and assurances about truth- none of this can be accepted as the way in which to expound philosophical truth."[31] It seems that Hegel condemns the preface yet he does it in/through the preface itself, which is, then, both impossible and indispensable. Contradiction is at the basis of Hegel's assertion. For him, everything that can be asserted, it just 'is' because further it 'is not' anymore, or rather it just is because it implies what is not. This is the most elementary inference we take from Hegel's *logic*, that is, we are bound by a totality, not a simplistic and 'totalitarian' totality, but a complex and contradictory totality. Contradiction is at the basis of Hegel's philosophical system whose dialectical movement has shown its commitment to what is both indispensable and incoherent: concepts of reality are in conflict with their own criterial properties.

Moving from the *Phenomenology* to the *Logic,* this movement itself concerning to what I have been discussing, that is, the 'pre' that qualifies what precedes, presents and predicts as a text, there is again Hegel's worries and warnings about beginning in philosophy. The preface and the introduction of the *Logic* are different, yet

[31] G.W.F Hegel, *Phenomenology of Spirit* (Oxford: Oxford University Press, 1977), 01.

they raise the same problem regarding their relation to the text that comes after them. He precisely begins by pointing out the complexity and difficulty of beginning: "it's only in recent times that thinkers become aware of the difficulty of finding a beginning in philosophy. What philosophy begins must be either mediate or immediate and it is easy to show that it can be neither the one nor the other."[32] This difficulty of making a beginning "arises immediately, because a beginning (being something immediate) does make a presupposition or, rather, it is itself just that."[33] For this very reason we may see the beginning of the *Logic* as a presuppositionless beginning. In support of this perspective, right there in the preface of the first edition of the *Logik,* Hegel says: "It has been necessary to make a completely fresh new start with this science [the Logic], the very nature of the subject matter and the absence of any previous works which might have been utilized for the projected reconstruction of logic, may be taken into account…(W)hat is involved [in the Logic] is an altogether new Concept (*Begriff*) of scientific procedure."[34] For Hegel, a system of philosophy demands an autonomous, self-constitutive, "fresh new" beginning. Philosophy as a Science demands a new and independent structure. Because the main feature of the system is its immanency regarding its genesis and development, the realm of philosophical thought, in its own immanent activity "had therefore to be a fresh undertaking, one that had to be started right from the

---

[32] G.W.F. Hegel, *Science of Logic* (Atlantic Highlands, NJ: Humanities Paperback Library, 1996), 67.

[33] G.W.F. Hegel, *The Encyclopaedia Logic* (Indianapolis and Cambridge: Hackett, 1996), 24.

[34] Hegel, *Science of Logic*, 27. Preface to the first edition *Die Notwendigkeit, mit dieser Wissenchaft wieder einmal von vorne anzufangen…die Natur des Gegenstandes selbst und der Mangel an Vorarbeiten, welche fürdie vorgenommene Umbildung hätten benutzt werden können, mögen bei billigen Beurteilern in Rücksicht kommen, wenn auch eine vieljähre Arbeit diesem Versuche nicht eine grössere Volkmmenheit geben konnte.* G.W.F. Hegel, *Wissenchaft der Logik I* (Frankfurt am Main: Suhrkamp, 1996), 16.

beginning."[35] A system -a totality- must be free from external determinations in the constitution of its categories. Thus, devoid of external determinations, the beginning it is a presuppositionless beginning. It is a 'homeless' beginning, which immanently imparts and justifies its own presuppositions in the unfolding of the circular movement of the *Logic*. So, if no presupposition can be made the beginning itself is taken immediately and its own determination is that it is to be the beginning of *Logic*, of Thought as such. A pure beginning, purely immediacy that cannot possess any determination relatively to anything else.

Further on the preface to the second edition of the *Logic* Hegel asserts "…the need to occupy oneself with pure thought presupposes that the human spirit must already have traveled a long road".[36] The beginning of the *Logic* seems to be otherwise a beginning that presupposes the *Phenomenology:* "the human spirit must already have traveled a long road". Again in the introduction Hegel says, "(t)he Notion of pure Science and its deduction is therefore presupposed in the present work in so far as the *Phenomenology of Spirit* is nothing more than the deduction of it."[37] The *Phenomenology* reaches absolute, pure knowing as the Notion of Science. Absolute Knowing – which is the Notion of Science-, is, then, the ultimate absolute truth of consciousness and the beginning of the *Logic* has to be made in pure knowing. It is noteworthy that in Absolute Knowing, in the Notion of Science, the opposition of consciousness is eliminated,

---

[35] Hegel, *Science of Log*ic, 31. (preface to the second edition)

[36] Hegel, *Science of Log*ic, 34.

[37] Hegel, *Science of Log*ic, 49.

sublated, overcome. The dichotomy between subject and object is overcome as far as pure science presupposes liberation from the opposition of consciousness.

The *Logic* is considered as the result of a preceding science and so the former presupposes the latter. In reference to that result, the *Logic* can be defined as the science of pure thought, the principle of which is pure knowing, the unity which is not abstract but concrete unity in virtue of the fact that in it the opposition of consciousness is overcome. Then, the beginning of the *Logic* is a mediate beginning (in this sense) because pure knowing is the ultimate, absolute truth of consciousness. Then, because the *Logic* presupposes pure knowing, this is, in a certain sense, the beginning of the *Logic*. *Logic* is thought thinking itself as pure knowing. However, pure knowing as the end point of a mediated process overcomes that mediation and concentrates itself in absolute unity. "Pure knowing as concentrated into this unity has sublated all reference to an other and to mediation; it is without any distinction and as thus distinctionless, ceases itself to be knowledge"[38]. In this sense the *Phenomenology* is a self-sublating mediation for the Logic. It is a mediation whose elimination/sublation is what is presupposed for the beginning of science: the *Phenomenology* as a preface to the *Logic* and the *Logic* as an introduction to the *Phenomenology*.

The mutual support and interconnection between the *Phenomenology* and the *Logic* stress Hegel's undertaking towards a philosophical system. As Heidegger remarks, "(i)n addition and apart form the inner, essential relation which the *Phenomenology* has to the *Logic*, Hegel refers explicitly to the *Logic* in many passages of the *Phenomenology of Spirit.* Not only we find anticipatory references to the *Logic in the Phenomenology*, but

[38] Hegel, *Science of Log*ic, 69.

also the reverse: references back from the *Logic* to the *Phenomenology.*[39] The *Phenomenology,* thus, is the ground, the foundation of the system. It inaugurates it and as such it marks its beginning by pointing out that the appropriate beginning has to be fresh new, has to be absolute, that is, has to be the *Logic.*

From this point on we can see the beginning of the *Logic* from a third perspective, that is, " …(s)tarting from this determination of pure knowledge, all that is needed is to ensure that the beginning remains immanent in its scientific development, is … simply to take up, *what is there before*. Pure knowing as concentrated in this unity has sublated all reference to another and to mediation; it is without any distinction and as thus distinctionless, ceases itself to be knowledge; what is present is only *simple immediacy*. ...This simple immediacy, therefore, in its true expression is pure being…Here the beginning is made of being which is represented as having come to be through mediation, a mediation which is also sublating itself; …"[40] .The beginning is made with being which has come through mediation, a mediation which is also a sublation of itself.

The reason why the beginning is made with pure being in the pure science of logic is given in the science itself as far as pure being is the unity into which pure knowing departs. Being is also the content of pure knowing. Being in the sense of pure indeterminess because if it were determinate, it would be taken as something mediate, it would imply an other to be a first. Pure knowing does not stand back from its content

---

[39] Martin Heidegger, *Hegel's Phenomenology of Spirit* (Bloomington and Indianapolis: Indiana University Press, 1994), 03. According to Derrida, "Absolute knowledge is *present* at the zero point of the philosophical exposition. Its teleology has determined the preface as a postface, the last chapter of the *Phenomenology of Spirit* as a foreword, the *Logic* as an Introduction to *Phenomenology of Spirit.* Derrida, *Dissemination,* 20.

[40] Hegel, *Science of Log*ic, 69.

(being) allowing it to be free and not determining it. Pure knowing as pure being is empty of all determinations, internal and external. Thus the beginning of logic is both an immediate beginning and a mediate result. The being contained in the beginning is a being which removed itself from non-being (a something from nothing – the idea of pure mere beginning), being which sublates it as something opposed to it. The opposites of being and non-being are united in the beginning, which is their undifferentiated unity.

The *Logic* is concerned with the spirit, with revealed being, that is, with the determinate reality in thought of what is inner and with the determinateness possessed by such inner in this reality. But what is actually presented in the beginning of the Science, is a simple determination, a first, an immediacy: mere being, which is considered only to the way in which it enters into our knowing as thought. The beginning is first (immediate) and other than first (mediate: the result of mediation). It could be said that for Hegel the beginning of the *Logic* has always already begun. A beginning, which has always already begun has to be understood in the movement of the Logic, which is not linear (but contradictory, dialectical and circular).

It is worth pointing that Hegel in the preface of the second edition of the *Science of Logic* refers to it as a reconstruction. A 're-construction' in which the necessary 're' is not just a mere promise of a repetition (of a movement), but it is the constituting or constitutive movement of a complex and contradictory totality. A totality whose limits are given by 'constructions' which further come to be (or be-come) 'de-constructions' in order to 're-construct' such philosophical system. Thus, the 're' that ascribes a crucial movement to our philosophical 'constructions' is more than mere recurrence; it leads to something new - a new categorial Concept – and it engenders a

triple rhythm. By not being mere recurrence I am concerned with a kind of re-petition which is present in the whole dialectical movement and also in the idea of circularity that Hegel talks about in the very beginning of the *Logic* in his speculation about *with what must the science begin.*[41] I risk saying that such idea of re-petition is the proper (re)conciliation of circularity with dialectics. A re-petition that, according to Bernstein, has to be understood as what is repeatedly said (or done) but which makes all the difference in the world.[42] Putting in more risking or polemical terms a re-petition that implies rupture and (because of this) makes all the difference in the world.[43]

So far, we may assert that a movement that is wholly immanent characterizes the *Logic*. From one categorial Concept we come to its negation, not from any external source, but from the Concept itself (the categorial Concepts deduce –justify- themselves). That is, the Concept contains its own opposite and it is identical with it what generates a contradiction, which will be re-conciled in a new categorical Concept that contains within itself the opposition of the other two, and yet it contains their unity.

Hegel shows us that a moment of negation not simply happens to be there in his *Logic* (or re-construction) but that it generates (what is both indispensable and incoherent) a necessary contradiction. Negation is made the vehicle for the re-

---

[41] Hegel, *Science of Logic,* 67.

[42] Richard Bernstein, Hegel's Science of Logic Seminar, New School for Social Research, April 20th, 1999.

[43] Bernstein, *The New Constellation,* 58. In the chapter on 'Incommensurability and Otherness Revisited' Bernstein points out that "(i)f we read the history of philosophy as an attempt to reconcile identity and difference, then we can understand why Hegel might be seen as the culmination of this tradition. More systematically and thoroughly than any previous philosopher, Hegel sought to think through a "final solution" to this problem. Hegel himself claimed that the entire tradition of Western philosophy achieves its *telos* with the unity of identity with difference." Further on, in the chapter on 'Allegory of Modernity/Postmodernity' Bernstein quotes Derrida in saying that "memory and promise, repetition and rupture always *come* together". (210).

construction. As Taylor points out, "… the Hegelian dialectic of categories seems to require two separate lines of argument: the first showing that a given category is indispensable (as Kant does in the transcendental logic), the second showing that it leads us to a characterization of reality which is somehow impossible or incoherent. But in fact Hegel fuses these together."[44] It is not just a matter of a lexical game (negation/generation) but of what is in the very nature of everything: reality is in contradiction[45]. A contradiction, which is re-conciled by means of the rational structure (the system) in which it occurs by the fact that a rational structure cannot rest in what is self-contradictory, it must go on, move, re-construct. For Hegel, reality is grounded on contradiction and a science that aims at apprehending such reality has to be a system in which reality is permanently re-constructed through its categories by means of the affirmation and negation of such categories, which fit together and are necessary to each other. As Taylor points out, "(t)he type of thought which underlies this form of science Hegel calls 'reason' (*Vernunft*); this is the thinking which follows reality in its contradiction and therefore can see how each level turns into the next one". [46] Therefore, it is in the 're' (of the construction) Hegel's most instigating and provocative insight. It is a seductive and appealing 're' by means of the ceaseless dialectical movement it implies.

As I said above, Hegel affirms, "the science of logic in dealing with the thought determinations (…) will also be a reconstruction"[47]. That is, *the Science of Logic*

---

[44] Charles Taylor, *Hegel* (Cambridge, UK: Cambridge University Press, 1997), 228.

[45] Hegel, *Phenomenology of Spirit,* 99. § 160 " (w)e have to think pure change, or *think antitheses within the antitheses itself, or contradiction*."

[46] Taylor, *Hegel,* 116.

[47] Hegel, *Science of Logic*, 39.

is the science of the determinations of thought to the extent of its (the thought's) immanent determinations. Pinkard observers that "thought in its 'immanent determinations' has 'the same content' as 'the true natures of things' (*Dinge).* The 'matter in itself' (*Sache an sich selbst*) is, moreover, a pure thought (*reine Gedanke).* If the method is the 'course of matter itself' (*der Gang der Sache selbst)*, then it follows logically from Hegel's own words that the *Science of Logic* is a reconstruction not of the movement of things in the cosmos but instead one of conceptions". [48] Pinkard is stressing the necessary distinction between *Ding and Sache* in the sense that the *Logic* is concerned not with things *(Dinge)* but instead with the 'Notion' of them (*Begriff*)[49] to what he refers as conceptions. It is noteworthy Bernstein's reference to a self principle of activation: "there is no *Begriff* as substantive"[50]. According to Hegel, "(t)his Notion is not sensuously intuited or represented; it is solely an object, a product and content of *thinking,* and is the absolute, self-subsistent object [*Sache*], the logos, the reason of that which is the truth of what we call things".[51]

So far, I am still in the beginning of this dissertation, now driven by the rhythm of (the beginning of) the *Logic*. I just said elsewhere that the beginning of the *Logic* could be seen as a presuppositionless beginning. This would not be possible without conceiving the circularity the *Logic* experiments/ experiences. For Hegel the beginning is either mediate or immediate but we realize that it can be neither when we

---

[48] Terry Pinkard, *Hegel's Dialectic* (Philadelphia: Temple University Press, 1988), 12.

[49] Hegel, *Wissenschaft der Logik I,* 29. "Mit dieser Einführung des Inhalts in die logishe Betrachtung sind es nicht die *Dinge*, sondern die *Sache*, der *Begriffe* der Dinge, welcher Gegenstand wird."

[50] Bernstein, Hegel's Science of Logic Seminar, New School for Social Research, April 20th, 1999.

[51] Hegel, *Science of Logic*, 39.

come to the understanding that there is nothing for Hegel, which does not contain mediation and is not also immediate. In its circularity, the beginning justifies its own presuppositions: "(t)he essential requirement for the science of logic is not so much that the beginning be a pure immediacy, but rather that the whole of the science be within itself a circle in which the first is also the last and the last is also the first". [52] On the one hand, the beginning of the *Logic* is the immediate first but on the other hand, it is the result of what comes before, already a mediate something and this is what Hegel means by a "new" beginning. A beginning that in thinking itself as such, produces its own object, that is, what appears to be immediate is, in fact, a result which further reaches its beginning again and then returns to itself.

As we already can perceive there is not a linear but a circular development setting the logical path (which then has already been set). My claim is that because Hegel's idea of circularity is thought in the domain of his dialectics it is not a simple circularity. The *Logic* begins with conceptual thought and has to end with conceptual thought and it does not know beforehand "all there is to know about scientificity, the Concept of which will also be its ultimate acquisition. And yet the ultimate acquisition must already be its premise; it must announce from the first, abstractly, what it can only know at the end, in order that even in its exordium it move already *in* the element of its own content and need not borrow any formal rules form any other science".[53] The key to (under)stand Hegel's circularity is to perceive it in the perspective of his dialectics where rupture occurs each time it generates something 'new', a new categorial Concept for

---

[52] Hegel, *Science of Logic*, 71.

[53] Derrida, *Dissemination*, 19.

instance, and then it allows us to think systematically in what it may signify the possibility of the different. In the *Encyclopaedia*, precisely in its § 14 and § 15, Hegel says, "philosophizing *without system* cannot be scientific at all; … Each of the parts of philosophy is a philosophical whole, a circle that closes upon itself; but in each of them the philosophical Idea is in a particular determinacy or element. Every single circle also breaks through the restriction of its element as well, precisely because it is inwardly [the] totality, and it grounds a further sphere. The whole presents itself as a circle of circles, each of which is a necessary moment, so that the system of its peculiar elements constitutes the whole Idea-which equally appears in each single one of them".[54]

Prefaces, pretexts are either inside or outside of the text. For Hegel, the preface is inside and outside of the Notion/Concept (*Begriff*) but the inside of the system sublates its own outside as a moment of its negativity. As Derrida nicely puts it: "(t)he prefatory moment is necessarily opened up by the critical gap between the logical or scientific development of philosophy and its empiricist or formalist lag. … If the foreword is indispensable, its is because the prevailing culture still imposes both formalism and empiricism; that culture must be fought, or rather "formed" better, cultivated more carefully. The necessity of prefaces belongs to the *Bildung.* This struggle appears to be external to philosophy since it takes place rather in a didactic setting than within the self-presentation of the Concept. But it is internal to philosophy to the extent that, as the Preface also says, the exteriority of the negative (falsehood, evil, death) still belongs to the process of truth and must leave its trace upon it."[55]

---

[54] Hegel, *Encyclopaedia*, 39.

[55] Derrida, *Dissemination*, 12.

We, then, learn with/through Hegel that either the preface dialectically already belongs to the System of Philosophy engaging it and being engaged in it or it does not have any internal relation with what it announces being a merely mechanical statement. Nevertheless, Derrida alerts us to the status of such a text, which cannot "simply be either inside philosophy or outside it, neither in the markings, nor in the marchings, nor in the margins, of the book"[56]. Prefaces, introductions, (pre)texts however dialectically articulated with the whole system (of the text) leave always an excess; a residue. Such a remainder of the text should be read (instead of something dialectically sublated) as *dissemination*: a mark, a march, a margin, and the threshold of the text. "The 'three' will no longer give us the ideality of the speculative solution but rather the effect of a strategic re-mark, a mark, which, by phase and by simulacrum, refers the name of one of the two terms to the absolute outside of the opposition, to that absolute otherness which was marked-once again- in the exposé of *difference.* Two/four, and the 'closure of metaphysics' can no longer take, can indeed never have taken, the form of a circular line enclosing a field, a finite culture of binary oppositions, but takes on the figure of a totally different partition. Dissemination *displaces* the three of ontotheology along the angle of a certain re-folding [*reploiement*]." [57]

From Hegel's perspective, the whole issue on *the beginning* (prefaces or either introductions) is, after all, of the system's responsibility. That is, the philosophical system (the text) has to (and always does) give a response. Absolute knowledge is present at the zero point of the philosophical exposition. We might see the preface to the

---

[56] Derrida, *Dissemination*, 15.

[57] Derrida, *Dissemination*, 25.

Phenomenology as a postface or yet the entire *Phenomenology* as the preface to the *Logic* and this latter as the introduction to the *Phenomenology*. Speculative dialectics reduces both, what comes before and the outcome, to mere appearances or to sublated negativities. However, such a system does not account for what escapes the logic of binary oppositions *disseminating* itself through/in supplement, mark, march, margin and so for: "(w)e have come to a remarkable threshold of the text: what can be read of dissemination: *mark, march, margin.*"[58]

A (pre)text can be seen as a supplement of the text, a fold (a *pli*). However a 'pre', this text already (in)forms the text itself as well as the other supplemental texts do in being below the text (as footnotes) or at its margins. Therefore, the authority of this dissertation as well as of Kafka's text is also before, behind, below, and at its margins.

[58] Derrida, *Dissemination*, 25.

Chapter 2

Kafka's *Before the Law*

2.I. cloudiness

Before the law stays its guardian mediating its access. The man from the country begs access to the law. He wants to be admitted into it or rather, to be subjected to it to what the doorkeeper, its guardian, answers: "Es ist möglich …, jetzt aber nicht". *Vor dem Gesetz* is the story of whoever wants to belong (to the law) and in this movement of belonging to be subjected (to the law). In its very sense, it is also the story of the outlaws (*band*its). It is not by chance that Kafka's plot entangles us in the "world of offices and registries, of musty, shabby, dark rooms" and court rooms[59].

Joseph K., in beginning of *The Trial (Der Prozess)* is taken by surprise in his bedroom by the law - two warders and the inspector: "…Das ist alles, was wir sind, trotzdem aber sind wir fähig einzusehen, dass die hohen Behörden, in deren Dienst wir stehen, ehe sie eine solche Verhaftung verfügen, sich sehr genau über die Gründe der

[59] Walter Benjamin, *Illuminations.* (New York: Schocken Books, 1969), 112.

Verhaftung und die Person des Verhafteten unterrichten. Es gibt darin keinen Irrtum. Unsere Behörde, so weit ich sie kenne und ich kenne nur die niedrigsten Grade, sucht doch nicht etwa die Schuld in der Bevölkerung, sondern wird wie es im Gesetz heiβt von der Schuld angezogen und muss uns Wächter ausschicken. Das ist Gesetz. Wo gäbe es da einen Irrtum?"[60] Not only the arrest, but the authority and the law under which K. is arrested became, since then, unclear: "von wem bin ich angeklagt? Welche Behörde führt das Verfahren? Sind Sie Beamte? Keiner hat eine Uniform…"[61] This cloudy atmosphere of *The Trial* provokes, on the one hand, the same sensation of astonishment K. (and us) felt before (the authority of) the law (and literature) and, on the other hand, is what law and literature are about: the ambiguous, the opaque, the cloudy. Benjamin talks about the "cloudy spot" that is always there in literature and law. As Hamacher says, "(w)hen Benjamin speaks of the 'cloudy spot' in the 'interior' of the parable 'Before the Law', this reminiscence touches on the point in Kafka's text where he mentions the 'interior' of the law. It brings the parable in close proximity with the law: the 'cloudy spot' in the parable is the law that forbids its own presentation but is at the same time the forbidden law; it is the forbidden law and the forbidding law and thus the law that forbids itself and every self, the law as the retreat of the law, a law without law."[62] Deleuze and Guattari

---

[60] Kakfa, "Der Prozess," *Gesammelte Werke*, 319-20. "…That's all we are, but we're quite capable of grasping the fact that the high authorities we serve, before they would order such an arrest as this, must be quite well informed about the reasons for the arrest and the person of the prisoner. There can be no mistake about that. Our officials, so far as I know them, and I know only the lowest grades among them, never go hunting for crime in the populance, but as the Law decrees, are drawn toward the guilty and must then send out us warders. That is the Law. How could there be a mistake in that?" Franz Kafka, *The Trial* (New York: Schocken Books, 1992), 06.

[61] Kafka, "Der Prozess," *Gesammelte Werke*, 324. "What authority is conducting these proceedings? Are you officers of the law? None of you has a uniform…" Kafka, *The Trial*, 11.

[62] Werner Hamacher, *Premises* (Stanford, California: Stanford University Press, 1999), 301.

speak of a rhizome or a burrow referring to Kafka's prose and here again the idea of obscurity is associated to it.

Benjamin nicely asserts that *The Trial* is nothing but the unfolding of *Before the Law*.[63] In this movement of unfolding Kafka's prose turns into fragments of prose which are almost poetry. It is not an allegory or a doctrine but a poetic reality. Form and content in Kafka's narrative somehow defer themselves. In a passage of his *Diary,* on December, 8th, 1914, he writes: "Yesterday for the first time in ever so long an indisputable ability to do good work. And yet wrote only the first page of the 'mother'chapter, for I had barely slept at all two nights, in the morning already had indications of a headache, and had been too anxious about the days. Again I realized that everything written down bit by bit rather than all at once in the course of the larger part (or even the whole) of one night is inferior, and that the circumstances of my life condemn me to this inferiority".[64] There are many reasons for Kafka's fragmented prose, but mainly both the (lack of) time and space of the man and of the writer baste a *textum* whose plot gains impulse, unfolds itself until reaching and joining the night (the wakefulness) it came from and there "painfully to retain him who was unable to bring it forth into the light."[65] Reading Kafka's texts in the way I am proposing (deconstructively) is to resist to accommodate them into the literary categories of mimesis, reference, form, content, genre, origin, intention and so forth as far as (my/any) reading is required by that which is unreadable in a text. The deconstructive reading does not call attention, for instance, to the weakness of an author or to his great

---

[63] Benjamin, *Illuminations*, 122. For this very reason, I move all the time from *Before the Law* to *The Trial*.

[64] Franz Kafka, *The Diaries* (New York: Schocken Books, 1976), 320. December 8th, 1914.

[65] Maurice Blanchot, *The Space of Literature* (Lincoln and London: Nebraska University Press, 1982), 60.

erudition, but to the fact that what the author presents is systematically related to what he does not present.

Parables that instead are distorted parables and a doctrine that, according to Benjamin, does not exist but of which we may have an allusion. Thus, for Benjamin, Kafka's pieces of prose could be seen as precursors preparing doctrine. I do not want to bring out the discussion on Kafka and his relation to religion as well as Benjamin's considerations on Kafka and mysticism. I rather stress Benjamin's point on Kafka's prose when he affirms that "in the stories which Kafka left us, narrative art regains the significance it had in the mouth of Scheherazade: to postpone the future."[66]

Before the Law might be seen as a parable if we take it at its face value and a parable alludes to a doctrine. Yet aphorisms can be the form of Kafka's text. Nevertheless, it is not a parable or a doctrine but fragments of prose; an endless prose, short or long. Were it a parable (now moving to the content) and a pedagogical or moral function would be there in the text instead of a cloudy spot. Were it a doctrine and an exegesis would be the case for Kafka's narrative. But Kafka's text is made to avoid its interpretation. The task here is not (and it cannot be) exegetical, as it would sacrifice the author, his work, as well as this dissertation. Kafka himself was aware of the fact that his texts were not to be interpreted and "he took all conceivable precautions against the interpretation of his writings."[67] The task here is to deconstruct Kafka's narrative and in

[66] Benjamin, *Illuminations,* 129.

[67] Benjamin, *Illuminations*, 124.

this movement (of deconstructing) to discuss the interweaving of philosophy, law and literature.[68]

Benjamin often refers to *Before the Law* as a parable, yet he stresses that Kafka's parables "are never exhausted by what is explained"[69] and in this sense, even frustrating a kind of interpretation that seeks for a sole meaning in the text, his parables are given to an interpretation: a hindered exegesis, "a judgment, and indeed the slow execution of the text. Even the deferral of interpretation interprets"[70]. For this very reason, instead of parables, aphorisms or doctrines I rather think of Kafka's literary form as fragments of prose, a narrative that invariably postpones the decision, just like Scheherazade, and in doing it so provides the decision: in Kafka the undecidable provides the decision.[71] The Kafkan prose shows that there is something either in literature, philosophy or law that cannot be grasped, something that makes the claims of self-sufficiency and exhaustiveness of each of these discourses questionable or rather fuzzy. In spite of the decision each reading of the text engender, in spite of the fact that each criticism of the text thinks it has mastered the text, Kafka's *textum* is always surprising. We (readers, critics, scholars…) are always trying to undo the web Kafka weaves through our *interpretation*, however the web never completely undo itself and interpretation is always

---

[68] From the perspective of deconstruction, especially of Derrida, "*no* text is wholly governed by the concepts and oppositions of philosophy, *every* text can be read … as 'literary'. Equally, no text could be *wholly* 'literary': all acts of language and interpretation depend on philosophical categories and presuppositions". Derrida, *Acts of literature,* 07.

[69] Benjamin, *Illuminations*, 124.

[70] Hamacher, *Premises*, 298.

[71] Hamacher, *Premises*, 298.

a frustrated interpretation as the meaning of Kafka's *textum* is merely basted and not really sewed by any interpretation.

Rejecting the task of exemplary, educational, doctrinal narrative Kafka's prose calls our attention to what it is hazy and not present there: it is before (as before) or before (as behind). Thus, *Before the Law* is there, before (the law of) the parable, "and it does so by not presenting a rule, a teaching, a doctrine, a moral, a law; by inhibiting itself and dissembling itself; and as a 'cloudy spot', by placing itself before its own function of presentation before itself as a parable".[72] *Before the Law* is itself the haziness of all parables, of Kafka's fragmented prose disturbing the authority of (the law of) fiction in the tradition of doctrinal instructive fiction. *Before the Law* remains before the law (of fiction) just as the countryman. As a matter of fact, either for the text (form) or for the country man (content) the law is obstructed: this is the law of the law. The law is at the same time prohibited and prohibition. One cannot have access to the law but can have access to its representatives who are the same time its interrupters and its agents.

In *The Trial,* three officers, three unknown types, three bank employees come to the scene and to Josef K.'s attention: " '…Und um Ihnen das zu erleichtern und Ihre Ankunft in der Bank möglichst unauffällig zu machen, habe ich diese drei Herren Ihre Kollegen hier zu Ihre Verfügung gehalten'. ‚Wie?' rief K. und staunte die drei an. Diese so uncharakteristischen blutarmen jungen Leute, die er immer noch nur als Gruppe bei den Fotografien in der Erinnerung hatte, waren tatsächlich Beamte aus seiner Bank, nicht Kollegen,.... aber untergeordnete Beamte aus der Bank waren es allerdings."[73] A

---

[72] Hamacher, *Premises*, 301.

[73] Kafka, "Der Prozess," *Gesammelte Werke,* 327-328. "And to facilitate that, and render your arrival at the Bank as unobtrusive as possible, I have detained these three gentlemen here, who are colleagues of yours,

perpetual transformation goes through Kafka's *Trial* as far as whom or what seem to be outside of the law is also, by means of an aporia, inside of it. The three (officers, bank employees, ordinary people…) that no longer are officers, bank employees, ordinary people… neither three but four, five, a multitude, as if one of the points of a triangle is open and it turns into a square or any other figure or it begins to proliferate or still because the sides of the triangle do not stop deforming.

Kafka usually (and ingeniously) sacrifices (and somehow subverts) the logic of the plot, technically understood as "essentially a spatial constrict, a design of events, with a casual scheme for beginning, middle and end,"[74] for a postponement of time -this latter being always rescheduled- in a space that surprisingly (to us readers) is that of strange tunnels, rhizomes, labyrinths and multiples doors. The very idea of plot is not in Kafka's *textum* especially because for him to be entangled is to avoid the plot as a sequence of events linearly organized in time in a scheme of beginning, middle, and end. The time of being and the time of the text are always in suspension and the dramatic time of Kafka's literature is not linear at all or rather the *time* in/of Kafka is dramatic: "Before the law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law…. 'It is possible,' says the doorkeeper 'but not at the moment'. … He (the man form the country) decides that it is better to wait until he gets permission to enter. The doorkeeper gives him a stool and lets him sit down at one side of the door.

---

to be at your disposal'. 'What?' cried K., gaping the three of them. These insignificant anemic young men, whom he had observed only as a group standing beside the photographs, were actually clerks in the Bank, not colleagues of his -…- but they were subordinate employees of the Bank all the same." Kafka, *The Trial,* 15.

[74] Wylie Sypher, *The Ethic of Time* (New York: A Continuum Book, 1976), 44.

There he sits for days and years."[75] Joseph K. is beforehand convicted and he moves from one repetition to another and with him the climax is always postponed. It would be of no difference if we could bring the last scene of *The Trial* to its very beginning. Whenever the narrative seems to merge with its explanation it frustrates whoever expects an explanation, as it does not arrive at the point of what it is supposed to be explaining. Blanchot nicely says that "(t)he endless wanderings of thought, its new beginnings taking off from an image that breaks that reflection, the meticulous rigor of reasoning applied to a nonexistent object, constitute a style of thinking that plays at generalization but is thought only when caught up in the density of a world reduced to a the unique instance."[76] We, readers, go through something opaque (here is the cloudy spot again) that we do not understand or once we get to understand the meaning we cannot get back to the darkness of which it (the meaning) is the light. In this sense, as I said before, to read Kafka, to interpret him is impossible as these "two readers can never meet; we are one, then the other, we understand always more or always less than is necessary."[77]

The *textum*[78] Kafka weaves with offices, musty, shabby, dark rooms, court rooms, boarding houses, landladies, doorkeepers, warders, countrymen, bank clerks, etc merely bastes its plot and not really sews it as far as it is always opened up to alterations. What appears, or rather, to mention Benjamin and Gershom Scholem's dialogue, that which is revealed by Kafka's *textum*, by the countryman, by the doorkeeper, by K. and so forth, has no meaning: appearing as such is what counts. Scholem talks about the *nothingness*

[75] Kafka, "Before the Law,"03.

[76] Blanchot, *The Work of Fire*, p. 03.

[77] Blanchot, *The Work of Fire*, p. 04.

[78] *Textum*, *textus*, *tecido*, *textura* etc. Derrida, *Dissemination,* and *Pharmacy of Plato*.

of revelation. "A state in which revelation appears to be without meaning, in which it still asserts itself, in which it has *validity* but *no significance* [*in dem sie gilt, aber nicht bedeutet*]."[79] The appearing of the countryman, the doorkeeper, and K. has a revelatory force even without content or a meaning. Characters appear and through their appearance or rather, in appearing they forward the plot. It is not a propositional content that entangles us, readers, throughout the plot but the always revealing appearing of the characters. This appearing of Kafka's characters does not raise or propose dogmas, beliefs, ideas, or meanings however it has its validity. Instead of taking this process (of appearing) as a mystical relation, we could, following Hegel, take it phenomenologically as an essential relation. In taking a phenomenological shortcut, revelation (as appearing) come to be a key category for Kafka's fragmented prose, however divested of a theological meaning. Thus, I would like to argue in two different ways: on the one hand, literature (as a text) itself is already a manifestation (and a surprise in the sense of the event) and, on the other hand, in the literary text, particularly in Kafka's, the manifestation, the (surprising) appearance of the characters, regarding us, readers, is what forwards the *plot*.

2.II. revelation

According to Hegel, we see things as far as they appear to us and not because they are immediately there (and nothing in Kafka's *Before the Law* or *the Trial* is immediately

[79] Gershom Scholem, Letter to Benjamin, 20 September 1934. Gershom Scholem ed., *The Correspondence of Walter Benjamin and Gershom Scholem 1932-1940* (New York: Schocken, 1989), 142.

there). The force of appearance relies on this movement of appearing and when we see things appearing they are taken in relation to others.[80]

Appearance implies this movement of a reflection-into-self, which is at the same time reflection-into-another. This identity between Appearance and Essence turn them one in the sense that it is the Essence itself that appears. Maybe a proper way of referring to this "one" of Appearance and Essence is thinking them from the standpoint of the relationship (either movement) they establish between each other. A relationship or movement that leads to the verbal form of the noun that is "appearing".

Thing is a contradiction. On the one hand it is reflection into-self and as such wholly independent of everything else as well as self-subsistent. On the other hand is reflection-into-an-other, completely dependent on another. It is, thus, existence whose independence annuls itself and turns out to be dependence. In this sense, existence is Appearance.

Appearance is the contradiction of a reflection-into-self which is at the same time reflection into-another. This identity leads us to conclude (with Hegel) that Appearance is identical with essence, which appears. The reflection-into-self and the reflection-into-an-other are then, identical. This movement generates a unity. Essence and Appearance are one in the sense that it is the essence itself that appears. For Hegel the world is correspondingly Appearance but Appearance is the Essence - which is no less essential than essence itself -. Therefore, it is essential for Essence to appear.

---

[80] Taylor, *Hegel*, 273.

In this relationship Appearance is first simple self-identity, which also contains various content-determinations that, on their side, remains self-equal in the flux of Appearance.

In the moment that Appearance is essential existence and it is possible to identify a unity between them it becomes clear that Hegel is, above all, stressing the relation through which this moment occurs. Putting in a more sophisticated, Hegelian and specific terms "the existent is, as an Appearance, reflected into an other which has for its ground, which other is itself only this, to be reflected into an other. The essential self-subsistence, which belongs to it because it is a return-into-self is the return of the nothing through nothing back to itself on the account of the negativity of the moment;"[81] This negative side of Appearance implies the positive identity of the existent with itself. The identity of the existent is the essential content of Appearance, which is, first, the form of positedness or external immediacy and secondly is the positedness as self-identical. First there is *Dasein*, unessential, contingent, subject to transition and secondly the simple content determination, the enduring (persistent) element of it. The law of Appearance is exactly this movement of the negative in the realm of the essential side of Appearance that self-sublates itself and returns into identity; "an indifferent *subsistence*, which is not the sublatedness, but rather *the subsistence*, *of the other.*" [82] The outcome is a unity. Hegel yet emphasizes the permanent subsistence that Appearance has in law and the positedness that comes to be essential and in which rests the essential relation of the two sides of the

[81] Hegel, *Science of Log*ic, 501.

[82] Hegel, *Science of Log*ic, 502.

difference that law contains. This difference alludes to diversity with regard to the content-determinations. Yet, diversity happens in relation.

A third aspect Hegel brings out is the same content of law and Appearance, which constitutes the substrate of Appearance. "This identity, the substrate of Appearance, which constitutes law is Appearance's own moment; it is the positive side of essentiality by virtue of which Existence is Appearance." [83] Hegel pictures this 'unity' in a stable, tranquil image of the world of Appearance with regard the realm of laws.

In the *Encyclopedia* Hegel (re)places the same discussion in terms of the relation between content and form. The point to stress is also the relatedness either brought up by the elements in a totality or of this totality of elements and the subjacent reality. As says Taylor, "what we are dealing at this stage (…) is a pair of alternative ways of conceiving this relatedness as beyond or underlying external reality. One such way is to contrast the manifold heterogeneous external reality with inner relatedness of laws, which underlie it. An other way is to contrast the content of intuition with the form in which the heterogeneous manifold of intuition is seen as related."[84]

Hegel advances his argument saying that Appearance as what manifests constitutes a world (of Appearance), however, when such manifestation in its very sense of what reveals itself as an outcome of a reflection into itself constitutes a world in and for itself (above the world of Appearance). Hegel refers to the former as a sensuous world, thus determined for intuition; and to latter as a supersensuous world. The world of Appearance as a supersensuous shows its characteristic phenomenality. The point here is

---

[83] Hegel, *Science of Log*ic, 503.

[84] Taylor, *Hegel,* 275.

that both worlds have their corresponding contents related to each other as polar opposites. "The north pole in the world of Appearance is *in and for itself* the south pole, and conversely;"[85] What happens is that the world of Appearance and the world-in-itself constitutes each a totality in themselves. They are both self-subsistent and as says Hegel "the one is supposed to be only reflected Existence, the other immediate Existence; but each *continues* itself in its other and is therefore in its own self the identity of these two moments". [86] This "continues" is nothing but the "essential relation" that after all permeates the whole discussion on Appearance. After all, law is "realized". "The truth of unessential world is, at first, a world in and for itself and *other* to it; but this world is a totality (…)."[87] Hegel's outcome of an essential relation "expiates" the manifoldness of the world - in the sense of compensation - redeeming totality of what could be worst, that is, the impossibility of conciliation and reconciliation of its elements (in their manifestness/manifestation).

As Hegel affirms, the truth of Appearance is essential relation. In the sphere of essential relation new categories arise such as whole and parts, force and its manifestation and an inner and out having as its distinctive feature that each category consists of two sides, which are completely equal and identical with each other. The one side is just the other side under a different aspect. "(T)he subsistence of either side equally has its meaning only in relation to the other or in their negative unity."[88] Hegel follows saying that "the sides of the essential relation (…) are posited as self-subsistent totalities. It is the

[85] Hegel, *Science of Log*ic, 509.

[86] Hegel, *Science of Log*ic, 510.

[87] Hegel, *Science of Log*ic, 511.

[88] Hegel, *Science of Log*ic, 512.

same opposition as that of positive and negative, but at the same time an inverted world. (*) The side of essential relation is a totality which, however, as essentially an opposite, has a *beyond* of itself; it is only Appearance; its Existence is not its own, but rather that of its other."[89] In order to manifest itself, essence (already as Existence) must appear; and then, the verbal form of the noun, 'appearing', is the point. But 'appearing' is nothing but a relation, which intends to be the 'beyond' of Existence in the extent of its manifestness. And this relation carries opposites but not the 'weight of the opposites', that is, the relation takes the opposites, which, despite their two-foldness, are identical with each other. In this sense the relation resolves the opposition in a moment of unity. But this "resolution" it is not complete, of course. Something remains suspended. Appearing is not sufficient. We had to come to what is *Die Wirklichtkeit,* that is a union of Essence and Appearance, "which is external and yet fully manifestation of the essential." [90]

Back to essential relation, it is immediately the relation of whole and parts. The first stage of relation is the immediate relation, that is, a relation in which the two terms do not involve each other but are indifferent to one the other. We then come to conclude that the two terms are equal to one another and yet they are indifferent to one another. The relation of whole and parts possesses these two characteristics. The whole is equal to the sum of its parts but at the same time they do not involve each other, that is, one is indifferent to the other. For this reason the relation is immediate. For the part it is indifferent if it is in relation to the whole or not. That is, it makes no difference to the slice of a chocolate cake whether it is a part of a cake or whether it stands by itself. It is

---

[89] Hegel, *Science of Log*ic, 512.

[90] Taylor, *Hegel,* 279.

the same slice of chocolate cake in anyway. On the other way around, a whole can only be a whole by having parts but it is indifferent to the whole whether it is a whole or not. The cake is just the same whether not sliced or sliced. Putting in more Hegelian terms, "this relation thus contain the self-subsistence of the sides, and equally their sublatedness, an it contains both simply in one relation. The whole is self-subsistent, the parts are only moments of this unity; but equally they, too, are the self-subsistent and their reflected unity only a moment; and each is, in its self-subsistence, simply the *relative* of an other."[91]

Hegel stresses the identity the relation has as well as the indifference of its sides. "The whole which is indifferent to the parts is the *abstract identity* which is not internally differentiated; this is a whole only as *internally differentiated* (…). And the identity of reflection has shown through its movement that it has this *reflection into its other* for its truth. Similarly the parts are indifferent to the unity of the whole, are only the unrelated manifold, *that which is within itself other*, which as such is the other of itself and only sublates itself". [92] Each of the sides somehow determines the other according to which the self-subsistence of each is in the other instead of within itself.

Whole and parts are essentially related to their other. At the same time that they just are whole and parts because of the relation that each establishes with the other this leads to the negation of each one as such. This contradiction shows that there is a movement from unity (the moment of self-relation) to multiplicity (the moment of negative self-relation which leads to the distinction of itself from itself) and back again.

---

[91] Hegel, *Science of Log*ic, 514.

[92] Hegel, *Science of Log*ic, 516.

The point here is that we do not look to either the whole or the parts but to the relation, which became manifested by virtue of its inner force. As Taylor points out, "this relation of exteriorization is that of force and its manifestation. It is the whole seen dynamically as inner force which produces external reality as its manifestation".[93] Therefore, "(f)orce is the negative unity into which the contradiction of whole and parts has resolved itself".[94]

Force must manifest itself otherwise it is non-existent. That is why Hegel refers to force and its manifestations as the same thing and so if we take the force away it remains nothing (but a state of emptiness). Force in itself and apart of its manifestations is a pure self-relation without involving the other. Hence, it is nothing or, in other words, self-relation necessarily involves relation to other in order to exist. "The activity of force is conditioned by itself as by the other, by a force". [95] Force is then a relation where both sides (force itself and its manifestation as well) are, as it was said above, the same thing.

In order to manifest itself force requires certain conditions. "Force is conditioned because it contains the moment of immediate Existence as something only posited – but because is at the same time an immediate- as something *presupposed* in which force negates itself. Accordingly, the externality which is present for force is its *own presupposing activity*, which at first is posited as another force."[96] Force acts on/against another as well as is an impulse to it. The impulse solicits force. As says Taylor, "(t)hen to see the word as manifestation of forces is to see it as the joint product of many forces

[93] Taylor, *Hegel,* 277.

[94] Hegel, *Science of Log*ic, 518.

[95] Hegel, *Science of Log*ic, 520.

[96] Hegel, *Science of Log*ic, 521.

which are complexly related as soliciting each other"[97]. The soliciting force is the precondition to the relation of force.

As it was asserted, force must manifest itself. Its activity is such of expressing itself. When it manifests itself it shows that its relation to the other is relation to itself. The impulse to act is its own soliciting (this is the precondition). "(T)he externality which it affects it is not an immediate but is mediated by force itself. (…) In other words, what force expresses is this, that its externality is identical with its inwardness".[98]

Appearance's last discussion concerns 'inner and out'. By means of their identity Hegel puts an end with regard to the dual character presented in the whole issue of Appearance. What most characterize this chapter on Appearance are the relations one establishes and by which it (the chapter/Appearance) is meant.

In the inner and out discussion what we have is the relation, the link, and so, the unity of them. Each entirely involves the other and depends on the other. "(…) What is here present is not only the relation of the two to each other but the determinate relation of the absolute form in which each is immediately its opposite, and their common relation *to their third* or rather *to their unity*."[99]

The unity constituted by inner and outer avoids some common mistakes such as the identification of inner with essential and consequently, outer with inessential. Hegel gives some examples of it in the *Encyclopaedia* such as the distinction between spirit and nature. The former is commonly thought in terms of inner while the latter in terms of

---

[97] Taylor, *Hegel,* 277.

[98] Hegel, *Science of Log*ic, 523.

[99] Hegel, *Science of Log*ic, 526.

outer. We, then, realize that a lack of dialectical thinking was responsible for this equivocal understanding. The lack of dialectical thinking is also responsible for a kind of blindness to what is in very structure of things turning them interesting, that is, contradiction. Of course, avoiding contradiction everything seems to be much easier, at least, writing dissertations.

Well, the unity of inner and out stresses the externality of things. Hegel approaches Appearance from the standpoint of a movement that implies reflection-into-self as well as reflection-into-an-other (of what appears) whose externality is "the expression [*Äusserung*] of what is in itself." [100] Through this path we arrive to *Die Wirklichkeit.*

The logic of the *Logic* does not mean logical *thought* considered in itself, but *Being* revealed in and by thought or speech (*Logos*). Everything that is true is a real entity, that is, Being itself, which is revealed by thought or speech. According to Hegel, the Notion/Concept of Being (*Begriff*) signifies to take reality as conceptually understood by means of a coherent discourse. Being is, then, revealed by the concept as it exists. The structure of thought, therefore, is determined by the structure of the Being that it reveals. So, if for Hegel, Being is dialectical, what reveals it is also dialectical. "Thought is dialectical only to the extent that it correctly reveals the dialectic of Being that *is* and of the Real that *exists.*"[101] Scientific thought in the Hegelian philosophical system aims at revealing, through thought or speech, "*Being* (*Sein*) as it *is and exists* in the totality of its

---

[100] Hegel, *Science of Log*ic, 528.

[101] Alexandre Kojève, *Introduction to the Reading of Hegel.* (Ithaca and London: Cornell University Press, 1969), 170-71.

objective-Reality (*Wirklichkeit*)"[102]. The phenomenological trait of the Hegelian method is what justifies its dialectics as far there is a dialectic of scientific thought only because there is a dialectic of the Being which that thought reveals.

Further in the *Logic,* in its second volume concerning 'the doctrine of the Notion', particularly in the chapter on 'the Notion in General', Hegel says that "Philosophy is not meant to be a narrative of happenings but a cognition of what is true in them, and further, on the basis of this cognition, to comprehend that which, in the narrative appears as a mere happening"[103]. It is noteworthy that for Hegel, since the very beginning of the *Logic* and the dialectical movement of the categories, the world as an object of knowledge is structure by concepts (Notions). The logic of the concept, contrary to Kant, is not a logic of the category or of the idea as abstract universality but it is a logic of the identity of concept and thing. Thus, the concept comprehends all the determinateness, all the difference, and all the exteriority of real effectivity. As Jean-Luc Nancy affirms, "that is why the concept in this sense is the element on which it is revealed … that 'the Appearance, far form being incompatible with essentiality, is a manifestation of essence'. The Concept, in truth, is the Appearance grasping itself as truth, rather than opposite of a merely phenomenal appearance." [104] If the Concept comprehends all the exteriority of real effectivity, all the determinateness and all the difference, then it is not just in our minds but it makes happen the real and as such it is a universal but with a difference within it.

---

[102] Kojève, *Introduction to the Reading of Hegel*, 171.

[103] Hegel, *Logic*, 588.

[104] Jean-Luc Nancy, "The Surprise of the Event," ed. Stuart Barnett, *Hegel After Derrida* (New York and London: Routledge, 1998), 92.

A conventional reading of the following passage, '(p)hilosophy is not meant to be a narrative of happenings but a cognition of what is true in them' suggests, first, that the philosophical undertaking is to comprehend that of which the event is only the Appearance. It means that the philosophical undertaking is first to comprehend the truth contained in that, which happens, and further, on the basis of this cognition, by the light of that truth, to comprehend that which appears externally. It seems that the eventfulness of the event is only the appearance/presentation of the true, its outer face. Nevertheless, the event is not necessarily an inessential event, a mere event. For, it is possible to have a less conventional understanding of the passage mentioned above, according to which the eventfulness of the event remains as essential as the comprehended event. Following the argument of Jean-Luc Nancy, on the one hand, there is the cognition of the truth of the thing that happens and, on the other hand and further, there is the "comprehension of what appears as simple event, that is, not the thing that happens (the content or the non-phenomenal substrate) but *the fact that* it happens: to wit, the eventfulness of its event…. Unquestionably, this eventfulness, when comprehended in terms of the truth of the thing, distinguishes itself form the Appearance [*phénomène*], and indeed, opposes itself to it: but it does so only insofar as the eventfulness is the non-phenomenal truth of the *phenomenal itself as such*, that is, as event, as *Geschehen.*"[105] The philosophical task is to know the truth of that which happened and to comprehend the happening as such. As I said elsewhere before, the difference that makes this difference remains in this happening/appearing/surprising. At this point it is possible to think essence in terms of the happening instead of substance and here I agree with Jean-Luc Nancy when he

[105] Nancy, "The Surprise of the Event," 92-93.

stresses that the "era proper to Hegel in philosophy, the period of the modern closure/opening, consists itself of this surprise: gnawing anxiety about the event."[106] Hence, the eventfulness of the event arises from surprise and by the same token surprise is essential to the Concept. As a matter of fact, surprise is a bit beyond what happens in the sense of the happening itself. The essence, the being of the event (the happening) is surprise. The logic (of surprise) of Hegel's *Logic* is at the heart of philosophy. "From the beginning of philosophy until its end (which re-enacts its beginning all over again), this surprise would constitute the sum of what was at stake…".[107]

It is worthy to (re)assert that philosophy for Hegel is a system and it is not possible (and it is not my intention) to reduce the reading of Kafka (and of literature) to such system and its categories. It seems as problematical as authoritarian to reduce Kafka's *textum* to a philosophical system. Nevertheless, the dialectics of the categories (the truth of Appearance is essential relation and Appearance has to be understood as appearing, that is, the happening, the revelatory) show us that a moment of surprise is there as what agitates and moves the logical system. The surprising about surprise is what, perhaps, is there either in the logical system or in the literary *textum* of Kafka, that is, the element of tension, the surprising tone of existence, the tension of the bow of existence. Nietzsche in the preface of *Beyond good and evil,* says "(b)ut we who are neither Jesuits nor democrats, nor even German enough, we *good Europeans* free, very free spirits-we still feel it, the whole need of the spirit and the whole tension of its bow.

---

[106] Nancy, "The Surprise of the Event," 95.

[107] Nancy, "The Surprise of the Event," 97.

And perhaps also the arrows, the task, an-who knows? -the goal-"[108] Perhaps the interweave of philosophy and literature is the tension, the bow, the bent. A totalitarian reading of Hegel's totality insists in unbending the philosophical bow. However, the most elementary inference we take from the *Logic* is that we are bound by a totality, not a simplistic and 'totalitarian' totality, but a complex and contradictory totality or yet a (in)tense surprising totality.

That which takes place, the surprise, the event in its eventfulness, the continuous of the verb, the 'ing' of the present implies a time or rather, it is the time. Nothing precedes or succeeds such time, as it is the taking place. Yet how to acknowledge that nothing precedes or succeeds time? Is the origin of time timeless? Is time an empty time? Thus, is the event as surprise an empty time? Does it mean that time is an aporia?

2.III. surprise, timeless time or the aporia of time

In the tradition of western philosophy, since Aristotle's *Physics*, time is conceived in relation to motion and space. "But as time most usually supposed to be motion and a kind of change… Now the change or movement of each thing is only *in* the thing which changes or *where* the thing itself which moves or change may chance to be. But time is present equally everywhere and with all things."[109] It is noteworthy that Aristotle's discussion on time in *Book IV* of the *Physics* highlights its aporetic structure: time is that

[108] Friedrich Nietzsche, *Beyond Good and Evil* (New York: Vintage, 1989), 03.

[109] Aristotle, "Physics", *The Complete Works* I, (Princeton, NJ: Princeton University Press, 1984) 370-371.

which "either does not exist at all or barely, and in the obscure way."[110] Time is what is not, that is, the moment of time, its "now" is simultaneously that which is no longer as well as that which is not yet: "(o)ne part has been and is not, while the other is going to be and is not yet."[111] Further Aristotle remarks that if time is divisible and exists; its parts must exist as well. However, some parts of time have been and others are going to be and none of its parts is in the present. According to Derrida, time is first conceived in/by Aristotle in conformity with "its relation to an elementary part, the now, which itself is affected -as if it were not already temporal- by a time which negates it in determining it as a past now or a future now. The *nun*, the element of time, in this sense is not in itself temporal. It is temporal only in becoming temporal, that is, in ceasing to be, in passing over to no-thingness in the form of being-past or being-future. Even if it is envisage as (past or future) nonbeing, the now is determined as the intertemporal kernel of time, the non-modifiable nucleus of temporal modification, the inalterable form of temporalization. Time is what overtakes this nucleus, in affecting it with no-thing. But in order to be, in order to be a being, it must not be affected by time, it must not become (past or future). To participate in beingness, in *ousia*, therefore is to participate in being-present, in the presence of the present, or if you will, in presentness. Beings are what *is*."[112] Time is, thus, defined in terms of what is without being or of what is never present or what is only barely and hazily. Time is nothing and does not belong to anyone.

---

[110] Aristotle, "Physics," 370.

[111] Aristotle, "Physics," 370.

[112] Jacques Derrida, *Margins of Philosophy* (Chicago: University of Chicago Press, 1986), 40.

Hegel (re)thinks Aristotle's *aporia* of time but dialectically. In the *Encyclopedia*, particularly in section 257, Hegel restates the aporia: „Die Negativität, die sich als Punkt auf den Raum bezieht und in ihm ihre Bestimmungen als Linie und Fläche entwickelt, ist ber in der Sphäre des Aussersichseins ebensowohl für sich und ihre Bestimmungen darin, aber zugleich als in der Sphäre des Aussersichseins setzend, dabei als gleichgültig gegen das ruhige Nebeneinander erscheinend. So für sich gesetzt, ist sie die Zeit".[113] Time and space are categories of nature, that is, of Idea as exteriority. As such they are immediate or rather abstract and undetermined: the abstract outside-of-one-another. "Since space, therefore, is only this inner negation of itself, the self-sublating of its moments is its truth. Now time is precisely the existence of this perpetual self-sublation…The truth of space is time, and thus space becomes time."[114] The dialectic of space, of its being shows itself as time. Space (as time) happens punctually in the (moment of) negation of negation. The point posits itself for itself as a now-point, always as this point, and then it has its actuality in time. As Heidegger says, "(t)he condition of *possibility* of the point's positing itself for itself is the now. This condition of possibility constitutes de being of the point, and being is at the same time being-thought. Thus, since the pure thinking of punctuality, that is, of space, always "thinks" the now and the being-outside-itself of the nows, space "is" *time*".[115] Further, in section 258 of the *Encyclopedia* Hegel says: "(t)ime as the negative unity of being-outside-itself, time is similarly something absolutely abstract and

---

[113] G.W.F. Hegel, *Encyclopadie der Philosophischen Wissenchaftern* (Verlag Von Felix Meiner: Leipiz, 1949), 212. "Negativity, as a point, relates itself to space, in which it develops its determinations as line and plane; but in the sphere of self-externality, negativity is equally *for itself* and so are its determinations; but, at the same time, these are posited in the sphere of self-externality, and negativity, in so doing, appears as indifferent to the inert side-by-sideness of space. Negativity, thus posited for itself, is Time".

[114] Hegel, *Encyclopedia*, § 257, addition.

[115] Martin Heidegger, *Being and Time* (New York: State Univresity of New York Press, 1996), 393.

ideal. It is the being that, in being, is not, and, in not being is: it is intuited becoming. This means that the absolutely momentary distinctions that directly supersede themselves are determined as external, but external to themselves. Time reveals itself for this interpretation as intuited becoming."[116] This becoming is coming to be as well as passing away, which means that the being of time is the now: "But it is not *in* time that everything comes to be and passes away, rather time itself is the *becoming*, this coming-to-be and passing away, the *actually existent abstraction*, *Chronos,* from whom everything is born and by whom its offspring is destroyed."[117] Yet, it is an *intuited* becoming as far as the now is either no-longer or is not-yet, that is, it is nonbeing. "The now is intuited as something objectively present, though objectively present only ideally. The now is enormously privileged-it is nothing but the individual now but this now that is so exclusive in its revolt is dissolved, diffused and pulverized by my expressing it"[118]. It is worthy to remark that the truth of being is becoming in the sense that being does not exclude becoming but is becoming. To be within the movement of becoming is to exist and then to be determinate. Heidegger is of the opinion that the Hegelian interpretation of time is, thus, trivial.

However trivial, Hegel (restating Aristotle's aporia of time)[119] calls our attention to the negation of negation which time is. A step beyond Hegel's dialectics and this

---

[116] Hegel,*Encyclopaedia*, § 258 .

[117] Hegel, *Encycloapedia,* § 258.

[118] Hegel, *Encyclopaedia*,

[119] Heidegger remarks that "(i)n terms of the priority of the now leveled down, it becomes clear that Hegel's conceptual determination of time also follows the course of the *vulgar* understanding of time, and that means at the same time the *traditional* concept of time. We can show that Hegel's concept of time is even drawn *directly* from Aristotle's *Physics*.... Aristotle sees the essence of time in the *nun*; Hegel in the now. Aristotle conceives the *nun* as *horos;* Hegel interprets the now as "limit." Aristotle characterizes the

movement leads us to the negativity of time or empty time and as such the event. "'Time' or the 'event' perform or *are* the 'site of existence'".[120] More than (be)coming, time or the event is the coming(up), the taking place of something: appearing and disappearing. Yet, the event is not presentable in the sense that there is something unpresentable stuck in the present itself which is its structuring difference[121]. That this structuring difference of the present is not presentable does not mean it is not thinkable. In order to think this structuring difference must surprise itself by/in its object. A becoming-surprise of thought answers the coming-up of the present. Following Jean-Luc Nancy's argument, the event is the event as it happens, as it out-comes, meaning by 'as' either its modal or its temporal function. In other words, the event is the time itself as the time of the coming-up. And the time of the coming-up is an 'empty' time.

The emptiness as (in the mode of) time is in Hegelian terms 'negativity for itself'. However, different from Hegel, the relation of negativity to itself is not abstract but non-abstract. Coming (up) is negativity for itself, is the event, is (empty) time in which, the 'for itself' is the place of existence. "Negativity, here, does not negate itself, and does not raise [*relève*] itself out of itself. It does something else; its operation or its in-operation is other and obeys another mode. One might say that it extends itself: tension and extension – by which alone something will be able to appear as 'passage' and 'process'- ex-tension neither temporal, nor local, of the taking place as such; spacing by which time arises;

---

nun as *stigme*; Hegel interprets the now as point. Aristotle characterizes the *nun* as *tode ti*; Hegel calls the now the "absolute this". Aristotle connects *chronos* with *sphaira*, in accordance with the tradition; Hegel emphasizes the "circular course" of time. Of course, Hegel misses the central tendency of Aristotle's analysis of time of discovering a foundational connection (*akolouthein)* between the *nun, horos, stigme,* and *tode ti.*" Heidegger, *Being and Time,* 416-417.

[120] Nancy, "The Surprise of the Event," 98.

[121] Nancy, "The Surprise of the Event," 99.

tension of nothing that opens time – *Spanne*, as Heidegger says."[122] From Aristotle we learned that not just human affairs form a circle but that there is circle in all things, which came into being or pass away. This means that there is a circle of time whose measure is given by the circular movement: *kronos* is connected with *sphaira.* As I said before, Hegel's *Logic* (re)conciles dialectics with circularity. For Hegel, time obeys a circular course and is conceived as a circle (a vulgar concept according to Heidegger).

Dramatic time traditionally –by traditionally I mean the Greek drama- follows the revolution, the motion of the earth and can also be described as a circle (of twenty-four hours). As says Heller, "time as a unit-the time of repetition and repeatability"[123]. On the other way around, "historical time is not circular and neither is it linear, at least not quite… It is also frequently pointed out that historical time, in the form of linear time, appears first in the Bible, especially in the Book of Kings, where the events constitute time"[124] Nevertheless, in the Greek tragedies, both cyclic and historical time are present as far as tragedy respects the cycle of the seasons (repeatability) as well as the irreversibility of the past. This fact allows us to think that even for the Greeks there are times (in the plural).

The literary time can also be plural and dramatic yet not in the sense of the Greek tragedies. In Kafka the dramatic is otherwise, the interruption of the time, the postponement that, somehow, stops the time. Time is interrupted. In a certain sense, the circle of time is (dis) (inter)rupted. In/for Kafka, life is so intensively entangled that its

---

[122] Nancy, "The Surprise of the Event," 100.

[123] Agnes Heller, *The Time is Out of Joint* (Lanham, Boulder, New York, Oxford: Rowman & Littlefield Publishers, Inc., 2002), 120.

[124] Heller, *The Time is Out of Joint,* 120.

"natural" course is that of suspension and surprise (for us, readers). A rupture in/with the circle of time, in/with the philosophical vulgar (according to Heidegger) conception of time suggests a lesser trivial conception and time is taken as a leap. Surprise is *nothing* but a leap. "The tension, the extension of the leap –the spacing of time- the discord of being as its truth: this is surprise".[125] Time remains suspended in (the tension and extension of) the leap. Life remains suspended in/through/by time. Being there (in the world or in the text) is always a surprise subverting the cycle of life, the dusk to dusk of life, as well as the rhythm of the plot, the dusk to dusk of the plot. Then, each time the man from the country tries to get into the Law and he is hindered, there is a surprise, there is the leap: "(t)hese are difficulties the man from the country has not expected; the Law, he thinks, should surely be accessible at all times and to everyone, but as he now takes a closer look at the doorkeeper in his fur coat, with his big sharp nose and long, thin, black Tartar beard, he decides that it is better to wait until he gets permission to enter. The doorkeeper gives him a stool …".[126] Nonetheless, in Kafka's *Before the Law,* time also follows its linear curse meaning nothing but a merely chronological succession of events: "during these many years the man fixes his attention almost continuously on the doorkeeper".[127] 'Each time' in Kafka is nothing but a surprise, a leap. Instead of a circle time can be described as a leap; the time of the event (as surprise) is like a leap. It is the already of the event that leaps out along with the not yet.

---

[125] Nancy, "The Surprise of the Event," 102.

[126] Franz Kafka, "Before the Law," 03.

[127] Franz Kafka, "Before the Law,"03.

In the interweaving of philosophy, literature, and law, Shakespeare (another canon, in the words of Harold Bloom) in *Hamlet* says: "The time is out of joint."[128] Joint means junction, connection, or place. Out of joint is what or who is *dis*jointed, *dis*connected, or *dis*placed. In German, the verb *verrücken* means to move, to disarrange, and to displace. Yet the participle of the verb when it turns into an adjective *ver-rückt* means crazy, mad, and wild. In Portuguese, *verrücken* means *deslocar* (to dis-place) while *verrückt* means *louco (crazy).* When we come to the adjectives *deslocado* (displaced) and *verrückt* we have that who or which 'is' by not being there or who or which 'is' by being out. The common sense refers to whom or what is out (of joint), displaced, as crazy, mad, or wild. The physiognomy of Kafka's world seems *verrückt, deslocada,* that is, either crazy or disjoined, displaced. The crazy, disarranged appearance of (our) *time* is not a problem for Kafka as far as it is what (our) *time* is about: out of joint. Kafka disarranges/displaces the apparently normal appearance of (our) *time*: "(s)omeone must have been telling lies about Joseph K., for without having done anything wrong he was arrested".[129] Therefore, there is not one sense of time in Kafka but there are times out of joint.[130] Heller in her beautiful book on Shakespeare[131] begins with *Hamlet* since the title already states that (t)*he time is out of joint*. Thus, she goes over Shakespeare stressing the historic, personal, political, and existential *tempo* and

---

[128] William Shakespeare, *Hamlet* (New York: Signet Classic, 1982) 64. Act I, Scene V.

[129] Kafka, *The Trial*, 01.

[130] Sypher in his *The ethic of time,* affirms that time experience is multiple and he explores such idea in an insightful study on Shakespeare. There he says, "there is no such thing as 'the' Greek sense of time; there are mainly, as in *Hamlet,* times out of joint". Wylie Sypher, *The Ethic of Time* (The Seabury Press: NY, 1976), 03.

[131] Heller, *The Time is Out of* Joint, 01.

time(s) of his verses. Back to Kafka, to his *textum,* we see that the act of writing signifies not merely a form of literature but an enunciation that is always historical, political, and social. "Never has there been a more comic and joyous author form the point of view of desire; of enunciation. Everything leads to laughter, starting with *the Trial.* Everything is political, starting with the letters to Felice".[132] In this sense, *Before the Law* (and *the Trial* -as the unfolding of it) can be a narrative of time experiences; cycles, lines, and leaps, which can be, translated into legal, political, ethical and personal experiences.

2.IV. Kafka, *kavka,* K.

Kafka says in his diary: "(o)nly writing is helpless, cannot live in itself, is a joke and despair"[133]. The very possibility of writing and of literature is, according to Derrida, "the essential nothing on whose basis everything can appear and be produced within language"[134]. Essential nothing, pure absence in which all presence is announced is what instigates one to work, is inspiration. It is this emptiness that constitutes the literary object whose origin is hidden or it is a non-origin. One writes in order to say that he or she cannot write anything at all. Writing is, then, helpless: frivolity and despair.

The origin of writing is a non-origin as far as it is not in itself, nor "in the conventions of a life and a language to which it is continually bound without being able to derive from them a law for its presentations"[135]. Without a self and without a norm

---

[132] Deleuze and Guattari, *Kafka: Toward a Minor Literature,* 42.

[133] Kafka, *The Diaries,* 397-8. December 6th, 1921.

[134] Jacques Derrida, *Writing and Difference* (Chicago: Chicago University Press, 1978), 08.

[135] Hamacher, *Premises*, 295.

based on the self to give it support writing is helpless. Then, the only law is that there is no law for writing but frivolity and despair. At the origin of writing, of literature there is an aporia. Pure absence, inspiration is in the first moment nothing and so, despair(s). However, for Kafka, this homelessness of writing, of literature soon turns to be frivolity, a joke, which he surely plays very well. As Hamacher says, "… all talk of absence, losing, and missing the mark is not only hypothetical; it misses the mark in principle. It has forfeited the epistemic security that would have been able to provide a background for the pathos of failure and the pathos of salvation."[136] Actually, the aporia, which is at the foundation of (Kafka's) literature, generates an interesting movement, that is, literature does not dwell in itself but does not dwell in this homelessness of its absence moving "in a realm in-between, a hybrid realm that no longer bears a canonical or even a disposable name"[137]. Thus, it is not just the case of asking what literature is but also what asking (what is literature?) is. As I said in the beginning of the dissertation, literature first calls our attention to the "what is" of the question yet disturbing the authority and the pertinence of such question. As a matter of fact, it is the case of turning again (or back) our attention to *die Herkunft,* the very origin, the place one belongs, the name one calls, which can be this hybrid realm: Kafka, *kavka,* K..

Kafka was (not) Czech, yet a Czech Jew. He was then alien to the Christian Czech community. As a Jew, he was not really exemplary, as he did not completely devote himself to the Jewish community and kept always a bit of indifference with regard to it. Among the Jews, Kafka was not comfortable of his bourgeois lineage still he did not

---

[136] Hamacher, *Premises,* 295.

[137] Hamacher, *Premises,* 296.

belong to the Eastern Jewish community that, in his view, embodied the Jewish people. Nevertheless, Kafka was a Czech Jew German-speaking writer who did not fit in very well among the Czechs either. In one of the letters he wrote to Milena, he says: "Then there is the question of being Jewish. You ask me if I'm a Jew, maybe that's just a joke, maybe you're only asking if I'm one of those anxious Jews, in any case as a woman form Prague you can't be as innocuous in this respect as Mathilde, Heine's wife."[138] Further, in the same letter, he tells her about his youngest sister who was supposed to marry "a Czech, a Christian; once he was talking with one of your relatives about his intention of marrying a Jew, and this person said: 'Anything but that, just don't go getting mixed up with Jews!'"[139]. In the very beginning of I*nvestigations of a Dog,* the narrator says: "How much my life has changed, and yet how unchanged it has remained at bottom! When I think back and recall the time when I was still a member of the canine community, sharing in all its preoccupations, a dog among dogs, I find on closer that from the very beginning I sensed some discrepancy, some little maladjustment, causing a slight feeling of discomfort which not even the most decorous public functions could eliminate…."[140]

Despite being a (Czech Jew) German-speaking he did not belong to the Bohemian community and, even being there, he neither felt himself as belonging to Austria. Referring to the translation Milena did of one of his writings he goes: "I am moved by your faithfulness toward every little sentence, a faithfulness I could not have thought

---

[138] Franz Kafka, *Letters to Milena*, (New York: Schocken Books, 1990), 19. Meran, May 30, 1920. In the sequence of the letter he says that Mathilde was always annoying Meissner, a Germna-Bohemian writer, with her outbursts against the Germans. "But you don't know the Germans at all," Meissner finally replied one day, "after all, the only people Henry sees are German journalists, and here in Paris all of them are Jewish." "Oh," said Mathilde, "you're exaggerating, there might be a Jew among them here and there…"

[139] Kafka, *Letters to Milena,* 20. Meran, May 30, 1920.

[140] Kafka, "Investigations of a Dog," *Complete Stories* (New York: Schocken Books, 1971), 278.

possible to achieve in Czech, let alone with the beautiful natural authority you attain. German and Czech so close to each other?"[141] In this beautiful and vast material of the letters he wrote to Milena, he literally asks her to write to him in Czech once she belongs to this language and only there, in Czech, she can be found in her entirety whereas in German there is part of her, the part which is preparing for Vienna. Talking about himself, he, then, asserts: Ï have never lived among Germans. German is my mother tongue…"[142] Just like Shylock to the Venetian society, Kafka was a stranger: it was his faith and his fate. As he asks Milena: "… but do you also enjoy foreignness for its own sake?"[143]

Czech, Jew, or German, the hybrid realm that is, the origin as a non-origin. Kafka experience of being (Jew, Czech, German) is that of deterritorialization. In Czech, *kavka* means jackdaw and jackdaw used to be the emblem of Kafka's father company which was found in his (Kafka's father) stationary. *Die Herkunft,* the name in which one recognizes oneself is singular. Then, *kavka* is a particular self until it becomes a concept and so, a general term. The name, the mark (of identity), is either particular or general. When *kavka* becomes Kafka still it (the name) does not conform itself to a uniformly valid rule but neither does it merely refer to a particular self. Kafka is the rule for the whole family, that is, there is a class of people named Kafka and it is also what distinguishes Franz, a member of this class, of this family, known exactly by being Kafka (or *kavka*). Yet Kafka can also be identified as K. but K. is the one who also stands

---

[141] Kafka, *Letters to Milena,* 07-08. Meran, end of April, 1920.

[142] Kafka, *Letters to Milena,* 14. Meran, May, 1920.

[143] Kafka, *Letters to Milena*, 03. Meran, April, 1920.

before the law in being accused as outlaw. Of course that the name, the signature Kafka traverses the literary class but once it becomes K. or Gracchus (the hunter) it is a singular piece of literary work. Jackdaw whose meaning in Czech is *kavka* once translated to Italian comes to be *gracchio*. Then, there (or they) are *kavka, gracchio,* Kafka, K., Gracchus: transformation, transmutation, and translation. "Wherever names and nouns, singular and general terms, can be generated from one another through antonomasia, critical distinctions in the domain of concept are no longer possible without qualification. And the same can be said of the production of concepts, the transparency of the particular within the general, and the subsumption of an individual under a universal law-, all which are demanded by conceptual thought. Virtually all words, not only nouns, construct a gloomy court around themselves by means of antonomasia, a court that becomes impenetrable once antonomasia spins out an entire story."[144] It is not exactly the antonomasia what strikes me most but the various 'trans' -transformation, transmutation, translation- that we find in Kafka's texts: of a word to another, of a meaning to another, of a person to another (person or animal).

(Trans)formation, (trans)mutation and (trans)lation pose the question of identity (of /in the text) and it does so from a perspective that necessarily implies the other as far as the preposition 'trans', from the Latin, means across, over, beyond or on the other side. For this very reason, my reading of Kafka's literary *textum* from now on will focus on the identity: of the text itself and in the text (of the name, of the person, of the thing, of the place). This reading is especially due to the fact that the literature, philosophy, and law in

[144] Hamacher, *Premises,* 310.

their narratives and in the interweaving of their narratives problematize their identity as well as the identity of their subjects.

Looking at Kafka, at the man, at the writer, not without a great affliction he deals with himself. This is clear in his *Diaries,* literally in his daily writings (or living), in the recurrence of suicidal thoughts because he does not have (the) time (to write or to be). Because of his bureaucratic work it seems that once he had the time for writing (and living) his conflicts would vanish. But this not the case when Kafka seems to have time after quitting his job. Even when he is sick and he has "all" the time for writing and living his conflicts persist. Kafka's lack of time (for writing and being) would not simply be resolved with more time but with another time, a timeless time. But life and living for Kafka is the annoying experience of the bureaucratic time, the time of obligations and duties of the East-European (Jewish) bourgeoisie. In his diary, on September 23rd, 1912, Kafka writes: "This story, 'The Judgement', I wrote at one sitting during the night of the 22nd-23rd, from ten o'clock at night to six o'clock in the morning. I was hardly able to pull my legs out from under the desk, they had got so stiff form sitting. The fearful strain and joy, how the story develops before me, as if I were advancing over water. Several times during this night I heaved my own weight on my back. How everything can be said, how for everything, for the strangest fancies, there waits a great fire in which they perish and rise up again. How it turned blue outside the window. A wagon rolled by. Two men walked across the bridge. At two I looked at the clock for the last time. As the maid walked through the ante-room for the first time I wrote the last sentence. Turning out the light and the light of day. The slight pains around my heart. The weariness that disappeared in the middle of the night. The trembling entrance into my sisters' room.

Reading aloud. Before that, stretching in the presence of my maid and saying, 'I've been writing until now.' The appearance of the undisturbed bed, as though it had just been brought in. The conviction verified that with my novel-writing I am in the shameful lowlands of writings. **Only *in this way* can writing be done, only in such coherence, with such a complete opening out of the body and soul.**"[145] (my emphasis) As we can see, the moving from the tedious and oppressing time of the man Kafka to a timeless time, or rather to a disjointed, disconnected or displaced time only happens when the man gives place to the name, the mark, the literature: Kafka. It is there, in his literature, that Kafka experiences the enchantment of a time being out of joint. It is, then, there, in his literary writings that identity is put into question: in the wakefulness of the man that the writer shapes the (cloudy) identities of his subjects.

In Kafka's literature, in the various time experiences it brings forth, identity is put into question through the apparently normal appearance of mutable types. This is very much clear in *The Metamorphosis* or in a short story called *A Crossbreed.* In *The Trial,* however, the characters do not turn themselves into someone or something else, yet officers could be taken as bank employees, ordinary people, or court officials in the sense of the multiplicity of the same. Distinct identities function as one.

Thinking in terms of Aristotle's concept of identity as substance (*ousia*) [146], it would be such a challenge to grasp the substance of Kafka's hybrid types. According to

---

[145] Kafka, *The Diaries,* 212-13. See, September 23rd, 1912.

[146] "In what sense is it asserted that all things *are* one? For 'is' is used in many ways. Do they mean that all things are substance or quantities or qualities? And, further, are all things *one* substance…or quality and that one and the same…? For if *both* substance and quantity and quality are, then, whether these exist independently of each other or not, what exist will be many. If one the other hand it is asserted that all things are quality or quantity, then, whether substance exists or not, an absurdity results, if indeed the impossible can properly be called absurd. For none of the others can exist independently except substance; for everything is predicated of substance as subject. … only substance it is not infinite and has no

Aristotle only substance can exist independently and everything is predicated of substance as subject. Only substance is or come to be without qualification as far as in the cases other than substances there is something underlying, that is, which becomes. Substance is not predicated of another subject, as it is a primary being. "Our explanation … is that for something to come to be from what is or from what is not or what is to do something or have something done to it or become some particular, are in one way no different from a doctor doing something or having something done to him, or being, or becoming something from being a doctor…nothing can be said without qualification to come from what is not. But nevertheless we maintain that a thing may come to be from what is not in a qualified sense, i.e., accidentally…. In the same way we maintain that nothing comes to be from what is, and that what is does not come to be except accidentally. In that way, however, it does, just as animal might come to be from animal, and an animal of a certain kind from an animal of a certain kind. Thus, suppose a dog to come to be from a dog, or a horse from a horse. The dog would then, it is true, come to be from animal (as well as from an animal of a certain kind) but not as *animal,* for that is already there. But if anything is to become an animal, *not* accidentally, it will not be from animal; and of what is, not from what is – nor from what is not either, for it has been explained that by 'from what is not' we mean *qua* what is not."[147] If our substantiality is

---

magnitude; for to have that it will have to be a quantity. (p. 316)…. Things are said to come to be in different ways. In some cases we do not use the expression 'come to be', but 'come to be so-and-so'. Only substances are said to come to be without qualification. Now in all case other than substances it is plain that there must be something underlying, namely, that which becomes. For when a thing comes to be of such a quantity or quality or in such a relation, time, or place, a subject is always presupposed, since substance is not predicated of another subject, but everything else of substance." (p. 325) Aristotle, "Physics," 316-325. See also Heller, *The Time is Out of Joint*, 33.

[147] Aristotle, "Physics," 327.

our identity there is something that is exclusive to every person despite any change a person might go through his or her life.

Instead of a substantial referent for identity, which might not be the case for Kafka, we could turn our attention to that which is not substantial but institutional. I am not neglecting other spheres of identity constitution but, considering that (our) identity is mediated by institutional resources of recognition, it is worth looking at the institution sphere. In *The Trail,* for instance, when we can take a bank employee by a court official or an officer it is the institutional that appears abolishing all differences in the name of an institution that becomes the *tribunal* for all identities. By the same token, one is never substantially and what he or she comes to be is neither predicable. Or, his or her substance is, at most, remote and identity is constituted in/through the burrows of the state power and the law.

Kafka, perhaps because of his own experience, that is, his own webs of identity in which his recognition was being woven either as a Jew, a Czech or a Bohemian, distrusts institutional resources of recognition such as, for instance, the family, the church, the state and the law. To be before the law can be either an attempt of being (or belonging) to an institution and thus, an effort towards recognition from an institutional other or still an act of resistance in belonging to, in getting his or her recognition from an institutional (other) whose authority is doubtful.

A substantial concept of identity like Aristotle's does not take the other into account. Aristotle's literally says that only substance is said to come to be without qualification. It primarily is or has come to be. In this sense, one essentially is by nature and his or her substance does not change despite any modification it might happen

through (his or her) life. What changes in one's self is not his or her substance, that is, the first category that constitutes him or her as such, but what is attributed to them accidentally. "…(I)n nature nothing acts, or is acted on by, any other thing at random, nor may anything come from anything else, unless we mean that it does so accidentally."[148] That of which all other things are predicated and which itself is not predicated of anything else is the Greek *hupokeinemon* whose translation into Latin is *subjectum.* Subject is then, this who continues through changes and to know the subject, to who one is entails a movement of recognition of his or her constitution as a primary being and such movement is nothing but a look on the (*meta*)*physics,* the underlying nature to substance; a look on that which lies under. In this sense, by asserting that one who is most purely, most essentially Jew, Czech or Bohemian would allow us to translate what it is to be Jew, Czech, or Bohemian in general. Nevertheless, a hybrid essence, an essence that could allow us to hyphenise the identity, that is, a Jew-Czech-Bohemian subject or Kafka-*kavka*-K., or still a crossbreed, half kitten, half lamb seems not to be possible in Aristotelian terms.

When we abandon Aristotle's notion of substantial identity and Aristotle's logic and approach the modern inter-subjective notion the difficulty in relating this latter to Kafka's hybrid types (to the hyphen) does remain. Modern inter-subjectivity remains silent to that hyphen and this silence "does not pacify or appeases anything, not a single torment, not a single torture. It will never silence their memory. It could even worsen the terror, the lesions, and wounds."[149] Moreover, a hyphen is not enough to conceal the

---

[148] Aristotle, "Physics," 321. See also Aristotle's *Metaphysics*, books delta and zeta.

[149] Derrida, *Monolinguism of the Other*, 11.

suffering, the cries, and the noise of weapons. In the realm of political and legal modernity, that is, in the realm of the rule of law in the course of the achievements of liberalism and social democracy, identity has always been dogmatically presupposed as a matter of gaining either a political or a legal status as a matter of belonging. This kind of recognition given by an institutional other such as the state and the law which, then, become one's (our) resources of recognition seems to be an achievement of/to us, modern subjects, of/to us 'citizens'. Yet, it does not make room to those who experience identity troubles. Kafka knew very well or rather felt the suffering of his disorder identity and we do know (and feel) that a legal status such as citizenship does not cover all modes of belonging. There are many cases of people who got their citizenship just in the course of their life, because the state and the law said so and suddenly based on opposite arguments the same authority took it away. Or there are people who are the second, third or forth generation of immigrants still deprived of their citizenship and obviously far away of their origin. They become a sort of quasi-national of foreign origin. If the sphere of recognition is that of the state and the law it is worth thinking on which bases the state and law have the authority to define one's (our) identity and also why the status of one's (our) identity once established by the authority never allows a hyphenised identity.

Kafka clearly doubts institutional authority and in doubting it, in questioning it he shows that in literature and perhaps only in the literary sphere one can have his or her identity disorder recognized. A doubtful authority does not necessarily mean a suspicion authority. Of course it can be suspicious but this is the least. A less naive critique one can address to the authority of the state and of the law has to take into account that by doubtful is meant either the uncertain or ambiguous structure of it, which is

systematically ignored. K. is bizarrely guilty from an inexplicably authority that is as impersonal and invisible as his guilty: "(w)ho could these men be? … What authority could they represent?"[150]

2.V. authority

> " 'You can't go out, you are arrested!' "[151]
> "Autoritas, non Veritas facit Legem."[152]

Doorkeepers, court officers, judges are holders of power to whom one shall obey: "…'What authority is conducting these proceedings? Are you officers of the law?' ..."[153] At the heart of the above obvious assertion –and at the heart of political and legal discourse- lays the ever-disturbing question of why one (the man from the country, K., we) shall obey. It is unavoidable to stop and take a step back on the discussion turning our attention to the constitution of authority, its origin and then try to answer the question on why one shall obey; why the syntax and the semantics of the sentence are not fortuitous, that is, in terms of obedience one must or ought to.

---

[150] Kafka*, The Trial*, 04

[151] Kafka, *The Trial*, 03.

[152] (Authority, not truth, makes the law). Carl Schmitt, *The Crisis of Parliamentary Democracy* (Cambridge, Mass. and London: The MIT Press, 2000), 43. See also Hobbes, *Leviathan or the Matter, Forme and Power of a Commonwealth Ecclesisticall and Civil* (New York: Touchstone Book, 1997), 198. "And first, it is manifest that law in general, is not counsel, but command."

[153] Kafka, *The Trial*, 11.

The authority I (Kafka, K. and the countryman) am (is) concerned is the one that is constituted in the public sphere. Hannah Arendt in *Between Past and Future*[154]*,* points out that we are not able theoretically as well as practically to know exactly what authority is. However, through a historical reconstruction of this category, she sketches out what authority is not or never was in order to approach its meaning and its strength. In the path of Arendt, it is necessary to distinguish authority from power, violence, and persuasion as far as obedience lies at the center of all of them. Then, for Arendt, authority has nothing to do with coercive power or violence. Whenever one makes use of force in order to be obeyed his or her authority has already failed. It would not be the case if there were an act of recognition on the part of the one who obeys towards the person to whom he is submitted. Authority is also different from persuasion. Persuasion implies an egalitarian order and a process of argumentation and whenever arguments are at stake, authority is hold in suspension. Accordingly, an appropriate definition of authority has to oppose coercive power and persuasion. For this very reason, Arendt recuperates the Roman tradition and its notion of *auctoritas,* which is there, in the foundation of Rome.

Auctoritas, then*,* leads to the past yet a time that has always been (re)presented in the ancient tradition. The *auctor* is, by the same token, the founder, the originator, and the Latin verb *augere/augeo* from which *Auctoritas* is derived means to augment*,* to increase, and to strengthen. Politics is the ever-recurring act of founding Rome and its constitutive authority has to do with force yet not in the sense of coercion or violence or persuasion but in the sense of strengthening the foundations. There is a sacred meaning in the founding *act* and the founded thing retains it and there remains the authority, which is

---

[154] Hannah Arendt, *Between Past and Future* (Penguin Books: NY, 1993).

revived through politics. In this sense, authority is closely connected with the tradition through which the past was sanctified. "Tradition preserved the past by handing down from one generation to the next the testimony of the ancestors, who first had witnessed and created the sacred founding and then augmented it by their authority throughout the centuries. As long as this tradition was uninterrupted, authority was inviolate".[155] Therefore, the past is always binding and the tradition that grows out of precedents must not be broken otherwise authority vanishes.[156] The breaking with tradition, the lost of authority threats the necessary hardiness and permanence of the world we live in.

It is noteworthy the Greek influence over the Roman political thought and above all the acknowledgement that a step back to the Greeks, to the "founding fathers" of the western thought was absolutely necessary as far as the Greek philosophy and poetry became the authoritative beginning for Roman political foundations. Since the Greeks authority is divorced from coercive power, violence and persuasion. I take Arendt's reading of Plato's *Republic*, especially Plato's efforts to find a legitimate form of coercion and his belief that reason could exercise such coercion in the hands of the philosopher. Ideas become standards for human existence, for political and moral behavior and therefore, they rule and oblige, that is, they become authoritative. In the

---

[155] Arendt, *Between Past and Future*, 124.

[156] For Arendt, authority has vanished from the modern world. It is noteworthy that for Arendt "the loss of tradition in the modern world does not at all entail a loss of the past, for tradition and past are not the same…With the loss of tradition we have lost the thread which safely guided us through the vast realms of the past, but this thread was also the chain fettering each successive generation to a predetermined aspect of the past. It could be that only now will the past open up to us with unexpected freshness and tell us things no one has yet had ears to hear. But it cannot be denied that without a securely anchored tradition- and the loss of this security occurred several hundred years ago- the whole dimension of the past has also been endangered. We are in danger of forgetting, and such an oblivion-quite apart from the contents themselves that could be lost-would mean that, humanly speaking, we would deprive ourselves of one dimension, the dimension of depth in human existence. For memory and depth are the same, or rather, depth cannot be reached by man except through remembrance." Arendt, *Between Past and Future,* 94.

words of Arendt, "(t)he ideas become measures only after the philosopher has left the bright sky of ideas and returned to the dark cave of human existence. In this part of the story Plato touches upon deepest reason for the conflict between the philosopher and the polis. He tells of the philosopher's loss of orientation in human affairs, of the blindness striking the eyes, of the predicament of not being able to communicate what he has seen, and the actual danger to his life, which thereby arises. It is in this predicament that the philosopher resorts to what he has seen, the ideas, as standards and measures, and finally, in fear of his life, uses them as instruments of domination."[157] For the philosopher reason is sovereign and ideas become standards for being (behaving) in the polis. In establishing reason as a ruler in the *Republic*, Socrates stresses the conflict between the philosopher and the polis and the necessary political attitude of the philosopher towards the polis by claiming to be him the ruler. The authority held by the philosopher is, one the hand, necessary for the institution of the political order and, on the other hand, a threat to the political order. As Baracchi nicely puts it, "(t)he philosopher comes to appear as the de-forming and trans-forming force, the dynamizing impulse operative within the city, disrupting the closed circle of doxastic determinations and breaking through the fixity of necessity in its purely mechanical aspects."[158]

In spite of the fact that the philosopher rules over human action and speech, that is, philosophy rules over mundane affairs such as the life in the city and in spite of a host of tensions implied in this relation (between the philosopher and the city), either the philosopher (the ruler) and the ruled people are mutually astonished by and subjected to

---

[157] Arendt, *Between Past and Future,* 109-110.

[158] Claudia Baracchi, *On Myth, Life and War in Plato's Republic* (Blommington and Indianapolis: Indiana University Press, 2002), 40.

the domination of something that is outside the realm of human affairs. Arendt's reading of Plato's parable of the cave stresses a common interest between the ruler (philosopher) and the ruled people, between contemplation and action, that is, both desire to see. "(T)he whole realm of human affairs is seen from the viewpoint of a philosophy which assumes that even those who inhabit the cave of human affairs are human only insofar as they too want to see, though they remain deceived by shadows and images. And the rule of the philosopher-king, that is the domination of human affairs-by something outside its own realm is - justified not only by an absolute priority of seeing over doing, of contemplation over speaking and acting but also by the assumption that what makes men human is the urge to see. Hence, the interest of the philosopher and the man qua man coincide; both demand that human affairs, the results of speech and action, must not acquire a dignity of their own but be subjected to the domination of something outside their realm."[159] Thus, in the concept of authority it is reflected this originally platonic relation between ruler and ruled yet we might say that neither Plato nor Aristotle offers a concept of authority that results from the life of city, that is, from political experience.

Plato clearly opposes thought and action and claims that the philosopher should be sovereign ruling in/against the *polis.* Aristotle foresees the relation between rulers and ruled, command and obedience in nature and the idea of authority it implies functions as a prerequisite for the institution of political sphere.[160] To be a citizen of the *polis,* that is,

---

[159] Arendt, *Between Past and Future*, 114-115.

[160] In the beginning of *Politics,* particularly in Book I, Aristotle already presupposes a relation of authority between who rules and who are ruled and in this sense, such relation is a precondition for the political community. Aristotle, "Politics," *Complete Works,* 1986 ff.

the consciousness of belonging (to the *polis*) is already a step further to the relation of authority posited by nature in the private sphere.

The point Arendt makes is that Aristotle affirms in Book VII of *Politics* that "a state is a community of equals, aiming at the best life possible" (1328 ^{a} 35)[161] what leads to the idea that at the political realm there is no differentiation between rulers and ruled yet on the other hand, he stresses that by/in nature there is a difference in terms of authority between rulers and ruled clearly seen in Greek household and family life. Hence, there is a twofold possibility for being (existing) in the (Aristotelian Greek) world: in the sphere of non-equals (private) and in the community of equals (*polis*). Authority is foremost experienced in the first (non)(pre)political sphere. Despite the Greeks do not offer a concept of authority they embodied the very idea of authority as far as Greek philosophy is the foundation of a tradition, the origin, the beginning of western thought being itself the authority. For this very reason it is possible to translate Greek philosophy into Roman auctoritas in the sense of something that since its foundation remained binding for all future generation; a binding force yet not equal to violence.[162]

The Romans were aware that the durability and continuity of a political community depended on preserving the past through tradition and it is exactly what turned the Greeks authorities for the western philosophic thought. This bond Romans established with their Greek ancestors gives the very notion of authority, of a non-coercive force, which, according to the formers, was able to constitute a political organization.

---

[161] Aristotle, "Politics," 2108 and also Arendt, *Between Past and Future*, 116.

[162] A recurrent critique either to philosophy or politics is the binding force of its western pattern, which instead of being authoritative became then authoritarian.

The binding force of the past and the growth of tradition that characterizes the Roman (positive) concept of authority is taken by the Catholic Church, however such appropriation led since its (the Catholic Church) foundation to a considerably different content of authority specially by means of a transcending justification. The Church accepts the distinction between authority and power and, on behalf of the first, works for the preservation of the ecclesiastical foundations, reaffirming it on the basis of a sacred enduring commitment to a Christian God and His transcending rules. Besides strengthening its ecclesiastical foundations the Roman Church meddle with secular affairs. Then, on behalf of the second (power), the Church overcomes "the antipolitical and anti-institutional tendencies of the Christian faith" [163] and experiences a process of politicalization. The consequence of this fact is that although authority sustains the Christian community around the deeds of the past revived through rites and tradition, specially and primarily the death and resurrection of Christ and its promise for (us) all (Christians), the sustainability of (our) earthly (politically) community depended on power. This meant a divorce of the political from authority or rather, authority in its temporal dimension turned to be power.

It is worth to remember that this appropriation of the Roman's concept of authority by the Church, which also incorporated Greek philosophy into the structure of its doctrines, was not smooth yet convenient. Since the Empire's first signs of weakness there was a conviction that Christianity, in recommending the renouncement of this world, turned the citizens of Rome away from their political community, that is, the practice of Christian virtues caused the ruin of their earthly community. On the other way

[163] Arendt, *Between Past and Future*, 125.

around, there was a conviction (and this was Augustine's) that it was not Christianity responsible for the downfall of the Empire but its own vices despite what happened around the year of 408.[164] As Arendt says, "when the purely religious development of the new creed had come to an end and the Church had become aware of, and willing to take over, political responsibilities, she found herself confronted with a perplexity similar to the one that had given rise to Plato's political philosophy. Again it had become a question of imposing absolute standards on a realm which is made up of human affairs and relations (…)".[165]

For the sake of men's eternal salvation they should be bound by absolute standards, eternal ideas located in the divine mind, following the divine Word in their mundane lives. This fact strengthened the authority of the Church so that its ends took precedent of temporal ends and secular power. The consequences were manifold: the weight of an eternal guilty, notwithstanding the relief one could experience in punishment through the expiation of his/her (our) sins; in secular political affairs, the dilution of Roman concept of authority and the assumption that another content should fill it up, namely, coercive power. Then, power and violence became institutionalized either in the Church or in the state and fear turned to be the oil of such gear. "Nothing perhaps in the whole development of Christianity throughout the centuries is farther removed from and more alien to the letter plus spirit of the teaching of Jesus of Nazareth than the elaborate catalogue of future punishments and the enormous power of coercion

---

[164] On August 24, 410, Alaric and his troops entered Rome and plundered the city during three days and on the forth day they went away leaving behind a pile of corpses and ruins. Augustine, *The City of God* (New York, London, Toronto, Sydney, Auckland: Image Book Double Day, 1958) 67.

[165] Arendt, *Between Past and Future,* 132.

through fear which only in the last stages of the modern age have lost their public, political significance."[166]

Machiavelli had a precious diagnosis of the decline of authority in Italian politics and his *Discorsi* can be read as an attempt to regain authority based on the Roman meaning of strengthen the foundations. With a strong criticism, Machiavelli imputes to the Church of Rome the cause for the decline and ruin of Italy. It was not only the case that the Church experimented temporal power but its enjoyment in doing politics was unable to extend its power all over the territory fragmenting it (the Italian territory) and weakening the very realm of politics as a *locus* and a *logos* without a foundation. The Roman trinity formed by religion, tradition, and authority was substituted by a plurality of powers mainly based on an irrational and mundane violence. Machiavelli witnessed a situation of corruption in Italy, which nourished him with a total disdain for Christian and Greek tradition as presented and reinterpreted by the Church: "then at the present time, in order to discover the virtue of an Italian spirit, it was necessary that Italy should be reduced to the extremity she is now in, that she should be more enslaved than the Hebrews, more oppressed than the Persians, more scattered than the Athenians; without head, without order, beaten, despoiled, torn, overrun; and to have endured every kind of desolation."[167]

After all, he denounced a kind of moral humanism whose values served to the immoderate use of violence and a kind of Christianity that abused its position of power teaching the human being to resign in face of his or her actual/present situation.

---

[166] Arendt, *Between Past and Future,* 133.

[167] Machiavelli, Niccolò. *The Prince* (Chicago, London, Toronto: William Benton Publisher, Encyclopedia Britannica, INC, 1952), 36. (chapter XXVI)

Then, all Machiavellian efforts were to (re)conduct Italy to the path of Romans' political experiences (these latter free of the burden of their Christian interpretations) for he retakes the Roman concept of authority without which a unified Italy would not be possible or rather, politics itself would not be possible. According to Arendt, for Machiavelli "founding was the central political action, the one great deed that established the public-political realm and made politics possible; but unlike the Romans, to whom this was an event of the past"[168], he thought that to such a supreme end all means were justified. Machiavelli's claim was to *make* a unified Italy and it is not by chance that he is considered not just a political thinker but also a thinker of action.[169] We might affirm that Machiavelli aims at a process of realization. It is worthy to note that at the core of the word realization there is 'real' or what is 'actual' both implying present time and action. Hence, Machiavelli points out that the knowledge of the past teaches us about human nature, about what we are in this world. His realism means that every present action can be thought in terms of past events so that we can make use of old remedies as well as envisage new ones yet warned about the mistakes we have made. Anyway, our power of intervention in the world cannot avoid the struggle that historically opposes the ruling class to the people.

The rescue Machiavelli does of classic authority looking at past and present political experiences links it, as I just mentioned, to the very idea of action. Hobbes, in the *Leviathan* says that, "the right of doing any action, is called AUTHORITY. So that by

---

[168] Arendt, *Between Past and Future,* 139.

[169] Claude Lefort in his *AsFormas da Historia,* points out that Machiavelli as well as Marx had a realist passion, that is, both thought politics in terms of action whose ends envisaged an empirical humanity. Machiavelli's realism as well as Marx's is based on the idea that empirical reality, in the way it is determined by man's history, is accessible to knowledge, which takes from it the basis of an appropriate action. Claude Lefort, *As Formas da História* (São Paulo: Brasiliense, 1990), 187.

authority, is always understood a right of doing any act; and *done by authority,* done by commission, or license from him whose right it is."[170] Following Hobbes, one (a person) has the right or is entitled to give out commands, make decisions, impose obedience which means he or she has authority. This person who acts (in giving commands, making decisions and imposing obedience) can be either the author or the actor. Both are entitled to do something in the sense that they have the authority. This double perspective of being directly the authority or by representation is present in the Latin origin of the word *persona* that means mask, disguise, outward appearance of a man. Then, *persona* is the one who represents in speech and action, the actor; to personate is, to act or represent (himself or another). In short, authority is to be shown.

If on the one hand Machiavelli goes to the Romans and (re)discovers the concept of authority as strengthening the foundations, on the other hand he reinterprets it in terms of a justification of means for a supreme end. In his endeavor to rescue Italy, its history and the dignity of politics there is a rationalization of these means in terms of violence. Hence, Machiavelli rethinks the classic Roman concept of authority yet with a new (and crucial) element, that is, violence: a founding, constitutive violence.

This kind of violence has been at the heart of modern revolutions, constituent power, and modern state. In other words, violence has been incorporated or rather rationalized into the concept of authority that arose with modern revolutions and the kind of state they brought forth. It is not the case that the concept of authority has been corrupted or lost in the modern world but it has finally assumed its inexorable link to

---

[170] Hobbes, *Leviathan*, 125.

violence; that which has legitimated either liberal-bourgeois or socialist revolutions and has been at the origin of modern constitutional state.

When we turn our attention to the meaning of the German word *Gewalt* we find violence, force, authority and legitimate power. The difficulty of translating *Gewalt* just as violence, coincide with the difficulty (and pleasure) about this whole work since its assumption of an aporetic constitution of law (and justice). It is the same difficulty that Joseph K. felt when he could not understand the force under which he was being arrested. Then, how to distinguish violence from *violence,* that is, from the force of law, authority, and legitimate power (a distinction between the violence that institutes and the violence that conserves and enforces the law)? And how to justify this original, institutive violence that established authority (rationalized violence)? I would like to approach these significant and somehow bothering questions –as they traverse this whole work- in the following manner: considering that this violence that institutes the law touches the problem of sovereignty and constituent power I propose to discuss it in the next chapter of this dissertation whose focus will be on Hans Kelsen and Carl Schmitt's debate. What I have been calling institutive or original violence will be discussed there from the perspective of the one who, in standing before the law, faces a situation of foundation in which violence in itself is neither legal nor illegal, neither just nor unjust. On the other hand, this violence that conserves the law touches the problem of legal authority and law's enforcement, which will be discussed in the following section of this chapter.

2.VI. law

> "'Don't be deluded', said the priest. ' How am I being deluded?' asked K." [171]

The image Kafka gives us through the narrative of his story is that of a man from the country that stands before a doorkeeper. As a matter of fact, the man from the country stands before the authority of the doorkeeper. Generally, I could say that it is a situation of authority as far as the doorkeeper exercises a type of influence or control or command over the countryman: "if you are so drawn to it, just try to go in despite my veto. But take a note: I am powerful…"[172] The man accepted the doorkeeper warning, particularly after taking a close look at his fur coat, his sharp nose and long, thin, black Tartar beard, and there he sat down at one side of the door for many years. Assuming that the doorkeeper is entitled by a system of rules or legal conventions to exercise his power over the countryman we might otherwise say that this authority is a legal authority, that is, it already is institutionalized through the law. This means that there are some established *criteria* from which what the doorkeeper says must be obeyed.

Kafka's *Before the Law* highlights the paradox that inhabits jurisprudence: on the one hand, any claim of legal authority depends on some criteria, namely a system of rules or legal conventions that confer it and, on the other hand, to authorize rules and conventions to exist there must be some source invested with legal authority to create them. Philosophers of law have desperately tried to solve this paradox. On the side of legal positivism, Hans Kelsen and Herbert L.Hart, offer different yet connected answers

---

[171] Kafka, *The Trial*, 213.

[172] Franz Kafka, "Before the Law," 03.

to this dilemma. Both author, despite their alliance to distinct legal traditions –Roman-Germanic and Anglo-American- agree that legal authority cannot be thought without referring to the legal norm/rule and that, in a certain sense, it depends on it.

Kelsen solves the paradox by means of a logical operation according to which there is a basic norm from which all other legal norms must be deduced. The former is a presupposed norm on the basis of which all other legal norms are valid and its content has nothing to do with justification but with establishing a criterion for producing legal norms, i.e., a norm that determines how other legal norms must be created. By being a presupposed norm (and not a posited one), the basic norm (*Grundnorm)* is not dependent on anyone's authority or anything: it is self-referent. It is anterior to the constituting act of making a Constitution or it is even anterior to the costumes from which a Constitution arises. It is, then, the establishment of the very fact of legal creation, that is, the starting point of the process that creates the law.[173] Putting in other terms, Kelsen's basic norm is a cognitive device used when one is unable to attain one's cognitive goal with the material at hand.

Given the fact that the criterion for a legal norm to be valid is another norm, this presupposition means that whenever there is a legal norm, the subjective meaning that generated it is interpreted according to its objective meaning: 'ought' requires that the subjective meaning of a prescription be interpreted as its objective meaning. As Kelsen suggests, the proposition that describes such basic norm is of that mode: we must behave ourselves according to what the Constitution prescribes. It does not affirm any transcendent value to positive law itself. The basic norm itself is the logic-transcendental

[173] Hans Kelsen, *Teoria Pura do Direito* (Coimbra: Armenio Amado Editor, 1979), 270.

condition for asserting that a given positive legal order is valid. For instance, a legal norm is and only is valid because of a superior norm, such as Constitutional norm, which was promulgated in conformity with some historically prior Constitution. To avoid an *ad infinitum* regress in the chain of validation, Kelsen claims that, at the very beginning, those who promulgated the first constitution were empowered by a presupposed basic norm (*Grundnorm)*. Validity not only denotes membership to the system of norms; it also denotes bindingness: a valid norm ought to be obeyed. Positivists like Kelsen underline the closed character and autonomy of the legal system resistant to extralegal standards.

Legal positivism of the sort associated with Hart argues that wherever law exists, there is a standard that ascertains which of the community's norms are legal ones. This standard is what Hart calls rule of recognition. Then, while Kelsen's basic norm is logically presupposed Hart's rule of recognition is a posited norm that stands for a complex social practices serving as a criterion of validity for the other rules in the system, being, then, an ultimate rule. Hart warns us that the idea of a superior and a supreme criterion does not import any idea of legally unlimited legislative power yet "in simpler forms of legal system the ideas of ultimate rule of recognition, supreme criterion and legally unlimited legislature seem to converge".[174] In most modern Constitutional States there are no unlimited legislative power and the Constitution functions as the ultimate rule of recognition and the supreme criterion of validity. For Hart, the question concerning the validity of the rule of recognition is generally misleading as the rule of recognition is unlike other rules in the system and its existence is a matter of fact, that is,

---

[174] Hebert L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1972), 103. This is the case of United Kingdom where the legislature is subject to no constitutional limitations and competent by its enactment to deprive all other rules of law emanating from other sources of their status as law. In this case, the rule of recognition refers to the enactment by the legislature as the supreme criterion of validity.

it has to do with the practice of the courts, officials and people in identifying the law by reference to a certain criteria. In this sense, the rule of recognition is embedded in a practice and assumed by the participants themselves as self-evidently valid. Hence for Hart legal authority is not dependent on a legal rule (in the sense Kelsen suggests) as both come into being at the very same time.

In a step beyond positivism, Ronald Dworkin claims that legal authority is rather a matter of principles about people's rights and duties than a matter of rules. It depends on considerations of morally relevant interpretations of principles that are firmly established in positive law, especially in the Constitution. One obeys the law as far as this obedience is a matter of principle whose paradigmatic sense is that of equality, which asserts that it is not enough to treat all citizens equally but above all and in any case to treat them with equal concern and respect[175]. Thus, legal practices (the law) should be interpreted in the light of the principle of equality and because of this they (it) become (s) authoritative.

For Dworkin a principle is not a rule but a different standard whose observation (obedience) is a requirement of justice, fairness, or some other dimension of morality. His premise is that positive law cannot elude a moral content, which flows from the political will formation of the lawmaker and the political commitments set in the public sphere. In this case, to enforce the law demands a hermeneutic exercise in the search for the best argument that based on a principle is able to justify a decision that stands for a right. Dworkin does a significant move in bringing moral contents into play for the

[175] For Agnes Heller, Dworkin's idea of equal respect is misleading to the extent that it considers equal respect as a category of equality (equality of respect) whose main value is respect and not equality. Agnes Heller, *Além da Justiça.* (Rio de Janeiro: Civilização Brasileira, 1998), 215.

identification of law in a clear opposition to Hart for whom the source of law (facts of official practice) is what allows one to identity the law. For the idea of validity becomes more complex than the positivistic reduction (Kelsen-Hart) to the authority of an ultimate and supreme rule in (or thanks to) a self-referent legal system: it rather is a matter of coherence.

From the hermeneutic tradition we learn that narrative is a middle ground between the descriptive and the prescriptive viewpoint on action. According to Ricoeur: "narrative theory finds one of its major justifications in the role it plays as a middle ground between the descriptive viewpoint on action, to which we have confined ourselves until now, and the prescriptive viewpoint…. A triad has thus imposed itself on my analysis: describe, narrate, prescribe– each moment of the triad implying a specific relation between the constitution of action and the constitution of the self. Now narrative theory would not be able to perform this mediation … if it could not be shown, on the one hand, that the practical field covered by the semantics and pragmatics of action sentences and, on the other hand, that the actions organized into a narrative features that can be developed thematically only within the framework of ethics."[176] My claim is that Dworkin's approach to law recovers the idea of narrative as a middle ground between description and prescription, that is, between legal positivism and legal realism. His understanding of law as an exercise in constructive interpretation highlights the idea of narrative through which the meaning of law is developed, elaborated, and improved over time.

After all, law is a social phenomenon whose practice is argumentative. What this argumentative practice permits or requires depends on the truth of certain propositions

---

[176] Paul Ricoeur, *Oneself as Another* (Chicago, London: The University of Chicago Press, 1992), 114.

whose sense is given by and within the practice which means that this practice is nothing but deploying and arguing these propositions which are not merely descriptive or prescriptive. The argumentative character of legal practice requires, then, an internal point of view, the point of view of the participant in the practice (the interpreter). In this sense, legal practice is an exercise in interpretation by the participant. "Legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally…. I propose that we can improve our understanding of law by comparing legal interpretation with interpretation in other fields of knowledge, particularly literature. I also expect that law, when better understood, will provide a better grasp of what interpretation is in general."[177] Following Dworkin I may (re)assert that law is interpretative and its sense constructed through/in the narrative. I take this argument to bring him (Dworkin) close to Ricoeur's idea of a triad (describe, narrate, prescribe) in order to overcome the description-or-prescription structure. Dworkin's first attempt to overcome these description-prescription models (positivism-legal realism and CLS) is his normative theory of adjudication, which is based on the distinction between principle and policies.

This distinction is particularly important in cases whose issues are so novel that they cannot be decided even by stretching or reinterpreting existing rules. In these hard cases, decisions could be made either by policy or by principle. "Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe

[177] Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), 146.

rights; policies are propositions that describe collective goals."[178] Thus, arguments of principle justify decisions, which advance or protect individual or collective rights, while arguments of policy justify decisions, which advance or protect collective goals. When a lawsuit cannot be brought under a clear rule of law, instead of creating the law, the judge should decide according to the principle and the right it (the principle) brings out.

By denying any possibility of deciding a hard case on the basis of a judge's own discretion Dworkin understands that the potential of originality and creativity in law lie in its possibility of being conceived (or constructed) interpretatively. For this, decisions must rather be based on principled arguments.

As far as principles themselves do not submit to a test (of validity) what really matter is the coherence of a decision based on a principle "with a rationally reconstructed history of existing law"[179]. This coherence attained in the process of constructive interpretation is more than the absence of logical contradiction, that is, 'bare' consistency. Coherence means consistency in principle, which "requires that the various standards governing the state's use of coercion against its citizens be consistent in the sense they express a single and comprehensive vision of justice."[180] This 'single and comprehensive vision of justice' that makes law strongly consistent depends on (is viscerally linked to) the notion of integrity, which is central to Dworkin's constructive model of a liberal philosophy of law. Integrity is the key to the best constructive interpretation of legal practices, and also to how judges decide 'hard cases' at law.

---

[178] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1982), 90.

[179] Jürgen Habermas, *Between Facts and Norms* (Cambridge, Mass.: The MIT Press, 1996), 211.

[180] Ronald Dworkin, *Law's Empire* (London: Fontana Press, 1986), 134.

Integrity calls a community to principled interpretation of its legal practice. Law is defined or rather narrated through a comprehensive, interpretative, and reflective attitude, which makes each citizen responsible for his society's public commitments to principle. Integrity is the value of this principled consistency and also the core of Dworkin's liberal-democratic community in which all rights are respected on the basis of the most fundamental right to equal concern and respect. According to Dworkin, "(w)e accept integrity as a distinct political ideal and we accept the adjudicative principle of integrity as sovereign over law because we want to treat ourselves as an association of principle, as a community governed by a single and coherent vision of justice and fairness and procedural due process in *the right relation*."[181] In liberal democracies such as United States' the principle of integrity can only be preserved if judges grant a significant place to controversial interpretations of liberal principles such as fairness, justice and due process of law. Law as integrity makes the content of law depend on concrete and sophisticated interpretations of the same legal practice it has begun to interpret.

Therefore, law is conceived not as a closed system of rules that command actions to what is permitted or forbidden but instead as a set of principles that express the moral and political values of the community one (the participant/interpreter) lives in. To interpret such values means to take the law as the result of the interpreter's own political and moral principles articulated as a participant in such community.

It is possible to say that Kelsen and Hart on the one hand and Dworkin on the other hand are motivated by the same unquietness, this "chicken-egg" problem that is at the origin of law and which Kafka's ingeniously points out in the dramatic narrative of

---

[181] Dworkin, *L*aw's *Empire*, 405.

(being) *Before the Law*. How to justify the coercitive power under which one (we) ought to? In their efforts to give us an answer none of them assume the constitutive aporetic structure of law. Perhaps a possible, contingent answer or justification to the problem of law and the respect one must have (be)for(e) it is to assume it (the law)-as the subject of many (as theirs) narratives- as self-contradictory and incomplete in pure essence. A deconstructive attitude towards law incites us to think of (or to take) a way, which originally is a non-way (*non chemin*), an exceptional way, as far as its access is given by its inaccessibility. There are some passages in the *Trial,* in very sense of a way through which K. could have access to the law, but instead these passages postpone or impede his access leading him to somewhere else. The attics, their surprising doors and hidden rooms promise the encounter that never happens (to be with the law). There inhabit the lawyer, the chief justice, Leni, Tintorelli and many others who could lead him to the law but instead, K. knows the law to the extent he cannot accede to it.

Derrida, in his *Acts of literature* says that "*Vor dem Gesetz* is the story of this inaccessibility, of this inaccessibility to the story, the history of this impossible history, the map of this forbidden path: no itinerary, no method, no path to accede to the law, to what would happen there, to the *topos* of its occurrence."[182] The assumption of this aporia drives the arguments to follow in this dissertation. For, the next chapter is on Carl Schmitt and his debate with Hans Kelsen on the problem of sovereignty (and the law). Schmitt stresses this exceptional *topos* on which sovereignty marks the limit of the law. The paradox of sovereignty or the schema of sovereign exception is beautifully experienced by the countryman (and K.) as far as the law applies to him in no longer

[182] Derrida, *Acts of Literature*, 196.

applying to him. Schmitt calls attention to the fact that the state's authority declines to the law to create the law. This constitutes what he calls *Ausnahme.*

Chapter 3

Schmitt before the law

> « Comment se fait-il qu'à certains égards le discours schmittien le plus farouchment conservateur se reconnaisse tant d'affinités avec les mouvements en apparence les plus révolutionnaires de ce temps, de Lénine à Mao ? »[183]

3.I. will

According to Schmitt, law consists in/of norms whereas power is a matter of will.[184] This assertion refers to the category of the will, which is present at the very moment of the constitution of modern liberal state this latter being extremely criticized by Schmitt himself. Generally speaking, the idea is that 'we' subscribe to a contract, leaving the state of nature to a rationally grounded state, in order to have a 'better' life in political and civil society, which in turn are the outcome of our individual and egoistic will (even though intended to provide us a 'better' life). The same individual and egoistic will that we find in Shakespeare's *The Merchant of Venice* (or in Goethe's *Faust*). At the

[183] Jacques Derrida, *Politiques de l'Amitié* (Paris: Galilée, 1994), 102 (footnote).

[184] Carl Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen* (Tübingen, 1914), 29.

moment Antonio agrees to the flesh-bond, and so makes a pact with Shylock (precisely like Faust does with the 'devil') this link, sealed because of/by their will, is fated to its dissolution as far as its enforcement is fatal. It is not different with Kafka's countryman. Since the moment he sat down on the stool by the side of the door and decided to stay there for the rest of his life, he did it of his own will. As we can see, the paradox is introduced at the beginning: the product of our will is our "damnation". We, then, experience the same fatality when 'we' engage in this undertaking of leaving the state of nature, which following Hobbes is a condition of war, to a 'peaceful' and secure Commonwealth whose legitimacy is forged by a free contract. We are fated in the modern liberal-bourgeois State to a constitutive egoistic will, which is our own, to render us a better life in a well-ordered and safe society; a will that, according to Hobbes, is either *desiderium* or *appetitus* and, as such, ambiguous and antagonistic.

Hobbes, who exemplifies this understanding, asserts: "the mutual transferring of right, is that which men call CONTRACT."[185] The contract assumes the form of a pact or covenant in a sense that "one of the contractors, may deliver the thing contracted for on his part, and leave the other to perform his part at some determined time after, and in the mean time be trusted."[186] According to Hobbes, contracts are communicated through signs, which can be either express or tacit: "Express are words spoken with understanding of what they signify: and such words are either of the time *present,* or *past*; as, *I give, I grant, I have given, I have granted, I will that this be yours***:** or of the future; as, *I will*

[185] Hobbes, *Leviathan,* 106.

[186] Hobbes, *Leviathan*, 106.

give, I will grant: which words of the future are called PROMISE."[187] In this sense, signs of contract are words of the past, present, and future. It is not by chance that 'will' is the key word to signify Hobbes's or even Shylock and Antonio's or Faust's contract. 'Will,' on the one hand, signifies a present act of the will (one's or our will) and, on the other hand, a promise of an act of the will to come (I will..., you will...). And Hobbes continues: "because all contract is mutual translation or change of right; and therefore he that promiseth only, because he hath already received the benefit for which he promiseth, is to be understood as if he intended the right should pass: for unless he had been content to have his words so understood, the other would not have performed his part first. And for that cause, in buying, and selling, and other acts of contract, a promise is equivalent to a covenant; and therefore obligatory."[188] In willing (the moment of the contract), one will do … (the moment of promises). Hobbes's depiction of the 'State of Nature' is of a society where one is not able to make promises. Therefore, in the 'State of Nature' no contracts or covenants or bonds would be valid. For Hobbes, a 'state' where one is able to make promises and to accomplish them is, first, the outcome of one's individual will (in the present), by means of which a contract is settled. This latter is then itself an act of deliberation, i.e., an act of will (in the future).

Yet, precisely here resides our drama: this will, which signifies the contract, can, according to Hobbes, be understood either as desire or appetite. According to the first understanding, desire comes from the verb *desidero* which, in its turn, comes from the noun *sidus* (singular)/*sidera* (plural). *Sidera* means the figures made by groups of stars,

---

[187] Hobbes, *Leviathan*, 106.

[188] Hobbes, *Leviathan,* 107.

i.e., constellations. *Sidera* thus lead to the heights. *Desiderare* means to abandon the heights or be abandoned by them. *Desiderium* is the decision of taking our destiny in our own hands and desire is the conscious will obtained from deliberation. However, *Desiderium* also means a loss, a privation, and a lack. [189] Thus, desire is, on the one hand, decision, deliberation, and, on the other hand, lack, privation, loss. Hobbes says: "that which men desire, they are also said to LOVE: and to HATE those things for which they have aversion. So that desire and love are the same thing; save that by desire, we always signify the absence of the object; by love, most commonly the presence of the same."[190] The will as desire cannot escape the ambiguity that constitutes and defines it as well as the fatality of losing or lacking. Still following Hobbes, the will can equally be expressed by *appetitus*: "In deliberation, the last appetite, or aversion, immediately adhering to the action, or to the omission thereof, is that we call WILL; the act, not the faculty, *of willing*."[191] *Appetitus* comes from a*ppeto,* which comes from *peto,* that is, to go to, to attack, to go to seek, to pursue – followed or not by violence. It also has to do with soliciting, demanding (at law). *Appeto,* then, implies to attack, to pursue, and to solicit. But *Appetitus* is also a natural desire to satisfy our hunger and thirst. On the one hand there is activity: attacking, pursuing and soliciting; on the other there is passivity: need, lack.

In fact, every situation of will, desire, or appetite is dramatic, anguished... This is true, following Hobbes and Schmitt, for the modern State, formally known as the Rule of

---

[189] Marilena Chauí, "Laços do desejo," *A Ética* (São Paulo: Cia das Letras, 1990), 19-66.

[190] Hobbes, *Leviathan*, 48.

[191] Hobbes, *Leviathan,* 54.

Law, as it is for Shylock and Antonio, Faust and the devil, the countryman or Joseph K. It is not by chance that for Schmitt a constitutional system is valid only when it rests on an authoritative decision made by a concrete will whose structure (the will's and so the constitutional system's) is dramatic, paradoxical and exceptional. It is the will, precisely a decision of the sovereign, grounded in nothing else but in itself, that is, in the very act of willing or taking the decision that makes possible to institute the order passing from a "pure normative order to the actuality of social life" [192]: it is the foundational act. Then, the sovereign's will is the principle of order, that is, any concrete order presupposes it. Yet the sovereign's act, his decision, stands on an exception whose paradoxical structure means that we are compelled to obey the laws exactly to the extent that his act -his decision- is the point of suspension of the law. It is the sovereign, his will, and the situation of exception that turn localizable and thus justifie the origin of political obligation. On this matter, it follows the next topic of this chapter.

3.II. *Ausnahme*

> „Souverän ist, wer über den Ausnahmezustand entscheidet".[193]

For Schmitt the state has the monopoly of the decision remaining on this fact the essence of its sovereignty. For it must be endowed with power and authority. However,

---

[192] Slavoj Zizek, "Carl Schmitt in the Age of Post-Politics,"ed. Chantal Mouffe, *The Challenge of Carl Schmitt* (London, New York: Verso, 1999), 18-19. It is interesting the argument this author brings out when he says that Schmitt opposes legal normative formalism with another kind of formalism which is decisionist meaning that "there is no way of escaping formalism within the horizon of modernity". (p. 19)

[193] Carl Schmitt, *Théologie Politique* (Ëditions Galllimard: Paris), 1988, 23.

Schmitt calls our attention to the fact that the state's power and authority do not need the law to create the law and to this situation he calls exception (*Ausnahme*). The exception cannot be subsumed and it appears in its absolute form whenever it is the case of creating a situation in which juridical rules can be valid. « Il n'existe pas de norme qu'on puisse appliquer à un chaos. Il faut que l'ordre soit établi pour que l'ordre juridique ait un sens. Il faut qu'une situation normale soit créée, et celui-là est souverain qui décide définitivement si cette situation normale existe réellement. Tout droit est 'droit en situation'. Le souverain établi et garantit l 'ensemble de la situation dans sa totalité. Il a le monopole de cette décision ultime. Là réside l'essence de la souveraineté de L'État. »[194] Thus, sovereignty is not the monopoly to rule or sanction but to decide. According to Schmitt, the decision take by the sovereign reveals the essence of the state authority, which, then, does not need the law to create the law. Therein remains the exceptional situation. « L'exception est plus intéressante que le cas normal. Le cas normal ne prouve rien, l'exception prouve tout; elle ne fait pas que confirmer la règle: en réalité la règle ne vit que par l 'exception. »[195] The law in its strict sense as a general (posited) legal rule in the way it is described by a legal proposition does not comprise an absolute exception as

[194] Schmitt, *Théologie Politique,* 23. (There is no rule applied to chaos. Order must be established for juridical order to make sense. A regular situation must be created, and sovereign is he who definitely decides if this situation is actually effective. All law is "situational law". The sovereign creates and guarantees the situation as a whole in its totality. He has the monopoly over final decision. Therein consists the essence of state sovereignty.)

[195] Schmitt, *Théologie Politique*, 25. (The exception is more interesting than the regular case. The latter proves nothing; the exception proves everything. The exception does not only confirm the rule; the rule as such lives off the exception alone).

far as the exception and who decides about the exception (the sovereign) are not placed in the general legal rule but in its margins.[196]

As we can see, Schmitt's *Ausnhame* or the sovereign exception is the very condition of possibility of legal rule "and, along with it, the very meaning of state authority".[197] Schmitt brings into question the validity of a legal rule founded on a basic norm like Kelsen's *Grundnorm.* The sovereign exception is the necessary situation for creating the law. Yet, it is paradoxical as it consists in a situation of suspension (of the rule). It signifies that the sovereign by means of the exception creates the situation the law needs in order to exist which ironically it is the situation of suspension of the rule.

In his book *Homo Sacer* Giorgio Agamben exemplary compares the law and the exception with positive and negative theology.[198] At this point it is worthy remembering Nicolai De Cusa's assertion in his ***De venatione sapientiae CII 32***: *the better one knows that one cannot know this, more knowing/learned one will be.* ***(Quanto igitur wuis melius sciverit hoc sciri non posse, tanto doctior)***[199]**.** This ignorance it is not a merely empty one, that is, an ignorance of someone who is not aware or conscious or yet indifferent to what he or she is capable to know. It is, instead, a *docta ignorantia*, a learned ignorance, which is developed in thinking. Learned ignorance is to know that which is never given to knowledge as far as God remains unknown to all who seek Him by way of reason. Therefore, one will be more learned the more one comes to know

---

[196] This means that exception as a 'state of exception' or a 'state of emergency' constitutionally asserted represents only a relative exception.

[197] Giorgio Agamben, *Homo Sacer*. *Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), 17.

[198] Agamben. *Homo Sacer,* 07.

[199] Nicholas De Cusa, *Learned Ignorance* (Minneapolis: Banning Press, 1996).

himself or herself for ignorant. De Cusa's negative theology shows us that the only knowledge man has is that he or she does not in truth know. Through this negative way we come close to the knowledge of God, which is our own ignorance about Him. Well, analogously, because the validity of positive law is suspended in the situation Schmitt calls of exception, it is then possible for it to define the normal case as the realm of its own validity.

According to Agamben, the exception is nothing but exclusion in the sense of the singular case, which is excluded from the general norm and even though (excluded) keeps its relation to the norm in the form of a suspension: "*the rule applies to the exception in no longer applying*, in *withdrawing from it.*"[200] The situation of exception is the consequence of the suspension of the rule. Taking Schmitt's conception of sovereign exception Agamben asserts that "(h)ere what is outside is included not simply by means of an interdiction or an internment, but rather by means of the suspension of the juridical order's validity-by letting the juridical order, that is, withdraw from the exception and abandon it. The exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule."[201] The general and abstract rule does not comprise an absolute exception and so it cannot establish the decision. In this sense, the sovereign decides for the suspension of the rule what renders possible the validity of all legal order. The sovereign decision on the exception is the necessary and original

[200] Agamben, *Homo Sacer*, 18.

[201] Agamben, *Homo Sacer*, 26.

political and legal structure that not only validates positive law but also makes meaningful what is included in and excluded from legal order.

Schmitt's idea of exception highlights the aporetic constitution of law: at the same time it makes possible the institution of a *locus* (of a localization) for the establishment of legal order, the state of exception itself is not localizable. It demarcates the line between chaos and normal situation being itself not demarcable. The ordering (*nomos*) and its localization (the earth), that is, *the nomos of the earth*[202] cannot be thought in terms of a merely geographical relationship, of an appropriation of land but it is the threshold between chaos and normal situation, outside and inside: the (situation of) exception[203]. The decision on the exception is a "décision en un sens eminent"[204] for it is unable to be fully deduced from the content of the legal rule. Then, every ordering (*nomos*) rests rather on a decision than on the legal rule since this latter does not comprise an absolute exception and "Souverän ist, wer über den Ausnahmezustand entscheidet." [205] At this point we might affirm that sovereignty is a political and not a legal matter, which has to do with the act of deciding on the situation of exception. It then requires an human action, the action of the sovereign who is "en marge de l'ordre juridique normalement en vigueur tout en lui étant soumis, car il lui appartient de decider si la Constitution doit être

---

[202] Carl Schmitt, *The Nomos of the Earth*. *In the International Law of the Jus Publicum Europaeum*. (New York: Telos Press, 2003).

[203] Aganbem, *Homo Sacer*, 19. Agamben argues that this link between *Ortung* (localization) and *Ordnung* (ordering) that constitutes the *nomos of the earth* is even more complex than Schmitt maintains as it contains a fundamental ambiguity, "an unlocalizable zone of indistinction or exception that, in the last analysis, necessarily acts against it as a principle of its infinite dislocation". (p. 19-20) It is worthy noting that discourses on globalization have, against Schmitt, depoliticized the *nomos of the earth;* the word's localization and ordering became a matter of global, virtual market in 'post-sovereignty' era.

[204] Schmitt, *Théologie Politique*, 16.

[205] Schmitt, *Théologie Politique*, 16.

suspendue en totalité."[206] The exception can only be conceived within the framework of a decision, that is, of an actual historical *event* and not within that of a legal norm.

From where Schmitt stops Agamben moves further and there he nicely says, "when our age tried to grant the unlocalizable a permanent and visible localization, the result was the concentration camp".[207] According to this, the situation of exception constitutes a *locus* of indifference between exclusion and inclusion. I would like to retain this idea and the significance of it for the argument I have been supporting (which transverses this work), that is, the sovereign decision is precisely the placement of the undecidable. The political-juridical arrangement of the world suffers since its very (ins)(cons)titution the responsibility of the undecidable. This sounds paradoxical. In fact it is. Responsibility means to give an answer, to respond, to decide and what we can grasp (indeed not in but) from Schmitt that this decision is about the undecidable. This *locus* of indifference is of an event that is neither presentable nor relatable. In the words of Derrida "the history of that which never took place".[208] The countryman approaches the doorkeeper willing to have access to the law. He wills and he decides to get in but as soon as the doorkeeper tells him that he cannot be admitted 'at that moment' and he adjourns his will (his decision), he, thus, decides not to decide. Through Kakfa's narrative or K.'s trial or the spatial and temporal situation of the doorkeeper and the countryman, this *locus* of indifference between inclusion and exclusion that is at the origin of law in the situation of exception stresses also the inaccessibility of law.

---

[206] Schmitt, *Théologie Politique*, 17.

[207] Agamben, *Homo Sacer*, 20.

[208] Derrida, *Acts of Literature*, 194.

In the sixteenth century Bodin defined sovereignty as absolute and perpetual power [209] whose meaning, in Schmitt's view, implied since then the notion of decision (and of deciding). "The first attribute of the sovereign prince therefore is the power to make law binding on all his subjects in general and on each in particular. But to avoid any ambiguity one must add that he does so without the consent of any superior, equal, or inferior being necessary…Law is promulgated and imposed by authority… All the other attributes and rights of sovereignty are included in this power of making and unmaking law, so that strictly speaking this is the unique attribute of sovereign power".[210] The power Bodin talks about is not neutralized in the form of a legal rule but refers to an act of authority, an act of decision, of taking the responsibility. We might say that Schmitt's references, such as Bodin, Machiavelli, and Hobbes, have the following common trait: they highlight the subject of sovereignty. For sovereignty does not merely imply a decision but it is the very act of deciding, of taking the responsibility, which for Schmitt means a decision on the exception taken by the sovereign. Schmitt's reading of Bodin, Machiavelli, and Hobbes for defining the structure of sovereignty from the localization (*Ortung* and *Ordnung*) of exception it is a critique to the liberal theory of the state, which, after all, equates sovereignty with the rule of law. The modern constitutional state refuses to acknowledge the problem of the exception, the sovereign's direct intervention in the valid legal order. It is also a critique to Kelsen and his legal positivism to the extent that for Schmitt the sovereign -his (political) will and not the law as legal rule- constitutes the

---

[209] Jean Bodin, *The Six Books on The Commonwealth* (Oxford: Basil Blackwell Oxford, 1955), 53. [http://www.constitution.org/bodin/bodin_.htm] "SOVEREIGNTY is that absolute and perpetual power vested in a commonwealth which in Latin is termed majestas ... The term needs careful definition, because although it is the distinguishing mark of a commonwealth, and an understanding of its nature fundamental to any treatment of politics, no jurist or political philosopher has in fact attempted to define it."

[210] Bodin, *The Six Books of the Commonwealth*, 69.

supreme authority of/in the State. The sovereign decision on the exception demarcates the limit(ation) of the rule of law.

Kafka accuses this limit(ation) when he narrates the situation of exception as that of suspension of the law. The law is suspended and its access postponed either to the countryman or the doorkeeper (to K. or the priest). Yet, both stand before the law: the countryman by facing it and the doorkeeper by turning his back to it. The former does not belong to that place where the law is and the latter has a remote sense of belonging as he represents the law but does not know it from inside. As says Derrida, "the two characters in the story, the doorkeeper and the man from the country, are both before the law, but since in order to speak they face each other, their position 'before the law' is an opposition."[211] The encounter between these two characters paradoxically and dramatically, does not approximate them except when it accuses their opposition.[212] The man from the country (or K.) accuses the limit(ation) of (the rule of) law's construction: door(s), hall(s), attic(s) and their keeper(s). "'What do you want to know now?' asks the doorkeeper… 'Everyone strives to reach the Law', says the man, 'so how does it happen that for all these many years no one but myself has ever begged for admittance?'[213], to what the doorkeeper answers: '"No one else could ever be admitted here, since this gate was made only for you. I am going to shut it.'"[214] The construction, its foundations, and its structure are unable to give the answer the man (or K.) expected as his exceptional

[211] Derrida, *Acts of Literature,* 200.

[212] The enchantment of the Kafkan *textum* – the enchantment we find in the encounter of different characters such as the man from the country (or K.) and the doorkeeper (or the priest) – lies in its ever - conflictual structure even when it seems not to be.

[213] Franz Kafka, "Before the Law," 04.

[214] Franz Kafka, "Before the Law," 04.

situation could not be decided from within. Despite all being before the law neither the man nor K. want to be in the position of the doorkeeper or the priest and, for this very reason, instead of respect it is rather curiosity for sharing this life experience of being included, of belonging that move the former to beg access to the law. There is no sense of submission in this curious desire/will for getting into the (rule of) law's entanglement. This leads to a different idea of being subject(ed), which cannot be translated by being submitted. Perhaps, the man as well as K. wanted to be part of the law as subjects (of law) without a sense of submission but with a sense of belonging; a will for becoming (subject). The difficulty or the impossibility of satisfying this will is part of Kafka's plot. It seems that either for Kafka, K. or the man from the country that what remains as possibility is a sense of belonging that far from signifying to take part in, to be in or included means, otherwise, to be out. The limit(ation) of the (rule of) law to its participants, its subject(s)(ed) suggests that only by being part of it or submitted to it that one is able to respond to the question on the foundation of political obligation. The one who is at its margins like K. or the man or even the doorkeeper who is an external participant would answer to that question by justifying why one should obey first by denouncing the limit(ation) of the (rule of) law and thus by deterritorializing his/her answer to somewhere before or beyond.

Schmitt also accuses the excluding logic of the rule of law as he sees in the experience of parliamentary democracy by pointing at the formal and abstract equality on which it rests. "Equality is only interesting and valuable politically so long as it has substance, and for that reason at least the possibility and the risk of inequality."[215] As

[215] Schmitt, *The Crisis of Parliamentary Democracy*, 09.

observes Mouffe[216], despite the "chilling effect" of the last part of this assertion we cannot reject Schmitt's emphasis on the need of a substantial equality, which on its turn requires, first of all, homogeneity. For Schmitt, a democratic conception of equality asks for a substantive and not merely formal and abstract equality, as it seems to be enough for liberal purposes. "Universal and equal suffrage is only, quite reasonably, the consequence of a substantial equality within the circle of equals and does not exceed this equality. Equal rights make good sense where homogeneity exits. But the 'current usage' of 'universal suffrage' implies something else: Every adult person, simply as a person should *eo ipso* be politically equal to every other person. This is a liberal, not a democratic, idea; it replaces formerly existing democracies, based on a substantial equality and homogeneity, with a democracy of mankind. This democracy of mankind does not exist anywhere in the world today."[217] An equality of the mankind is a liberal individualistic claim which, according to Schmitt, is a non-political form of equality to the extent that in the political sphere "people do not face each other as abstractions, but as politically interested and politically determined persons, as citizens, governors and governed, politically allied or opponents…"[218]

An absolute human equality is too vague and practically meaningless as it dissolves the necessary substance citizenship (or belonging) calls for ending by being a formal nonetheless empty conception. As Schmitt asserts, in different modern democratic states, in spite of their commitment to a universal human equality, there are some people

---

[216] Chantal Mouffe, *The Democratic Paradox* (London, New York: Verso, 2000), 38.

[217] Schmitt, *The Crisis of Parliamentary Democracy*, 10-11.

[218] Schmitt, *The Crisis of Parliamentary Democracy*, 11.

(foreigners, strangers) who still remain excluded, that is, who do not belong to the state remaining outside of it. Equality is not general and abstract and it has to be materialized through its specific meanings: political, economic, juridical, and so forth. For equalities (in the plural) entail some form of inequality. According to Mouffe, "in his view, when we speak of equality, we need to distinguish between two very different ideas: the liberal one and the democratic one. The liberal conception of equality postulates that every person is, as a person, automatically equal to every other person. The democratic conception, however, requires the possibility of distinguishing who belongs to the demos and who is exterior to it; for that reason, it cannot exist without the necessary correlate of inequality."[219] For Schmitt, equality -substantially meant- and then belonging and citizenship are political concepts, which have to be conceived not generally but with regard to a specific people. This substantial equality expressed through citizenship is the basis for all other forms of equality. For it is necessary to define who does and who does not belong (to the demos) and thus who are and who are not entitled to equal rights. Schmitt calls our attention to the fact that the very idea of belonging cannot be subtracted from an abstraction such as humanity but from the concreteness of a *demos*. Democracy demands to define who the people are in the political domain. In the search for this definition Schmitt thinks the political domain from/in the relation between friend and enemy whose discussion constitutes the following section of this chapter.

As I have been pointing out the inscription before the law determines more than a division of territory or an opposition in situating with regard to the law. It accuses the limit between outside and inside and calls our attention to this dilemma, proper of

[219] Mouffe, *The Democratic Paradox*, 39.

modern state since its foundation, of belonging or not and, accordingly, the conflict between liberal and democratic commitments. From the first sentence of the *Before the Law* or *the Trial* either the man from the country or K. are cast out of this construction – the rule of law - and their efforts to have a favorable answer as well as their death dispel any illusion about the kind of world they (we) live in. But either the trial or the countryman's process (of admittance) were a process of errors, limitations, and even injustice like almost everything which is linked to the world of offices and registries, of musty, shabby, dark rooms and court rooms; to the world of rules and the law. In the path of Carl Schmitt a possibility to (deal with) this dilemma starts by rejecting the liberal-bourgeois tools such as the contract theory that forged a political equality of all man who subscribed the contract to found the state regardless the substantial inequality it entails. Yet by rejecting the state conceived as and limited to a rule-bound entity endowed with a general and abstract supreme power 'pretending' that the political, as a field of struggle, could be there neutralized. For Schmitt the nature of the political as well as its autonomy can only be inferred from its conflicting constitution, namely the relation between friend and enemy, according to which the state is, then, arranged. For it is worthy to displace the question of sovereignty and the state from the (pretentious) neutral sphere of the rule and the law to the conflicting arena of the political.

3.III. enemy-and-friend: Schmitt-and-Kelsen

In my effort of recuperating Schmitt's idea of sovereignty I also want to point out the rich debate he had with Kelsen whose legal philosophy became the paradigm of the

so-called legal positivism in the tradition of Roman-Germanic law. This debate is crucial for the argument I have been presenting in this thesis, that is, to (re)think law from/within its interweavings with philosophy, politics and literature in order to show its aporetic constitution from which one cannot evade. This argument is not only to (re)think law in/by (de)(re)constructing it but it is also committed to the intervention it might bring about for a more just and radically democratic world.

In his book *The Concept of the Political*[220] Schmitt says that the state is a specific entity of a people; it is the supreme authority whose sense is inferred from its political trait. It means that the state as a specific entity of a people becomes incomprehensible when the nature of the political is misunderstood.[221] For Schmitt the equation that equalizes state and politics is wrong and deceiving at the moment the state and society penetrate one into another. In this sense, he advocates that a proper definition of the political implies to find out and to define the specifities of political categories. Then, we must assume that the political has criteria that express themselves in a peculiar way. It is always pertinent to remember that wherever the political does not provide the self-understanding of society horror and madness take place.

In Schmitt's view what distinguishes the political, that is, it is peculiarity is the friend-enemy relation to which all motives and political actions can be reduced. This is not an exhaustive definition but a distinguishing and independent criterion. The friend-enemy antithesis is relatively independent of other antitheses such as good and evil,

---

[220] Schmitt, Carl. *The concept of the Political* (Chicago and London: Chicago University Press, 1996). *The Concept of the Political* and *Political Theology* complement each other. In the former work Schmitt reflects on the category of the political, which he extends to the latter in the context of sovereignty and statehood managing to criticize some of the most consacrated myths of liberal thought.

[221] Schmitt, *The Concept of the Political*, 20.

beautiful and ugly. The political enemy does not have to be morally bad or aesthetically ugly or still economic weak. Schmitt avoids universal and normative conceptions to situate the antithesis as the political realm is founded on and located at something very peculiar, that is, the (sovereign) exception. The political is neither ethics nor economics and in its field of battle the enemy is not the debating adversary or the market competitor but the other, the stranger, the *extranèus.* And it is necessary the enemy to be *extranèus*, stranger, foreigner, (the different and the difference) for conflicts to be possible. The relation between friend and enemy is the most extreme antagonism and more political a relation will be the closer it approaches this point. It is the political criteria for designating "le degré d'intensité d'une association ou d'une dissociation…".[222] Without the figure of the enemy and the possibility of a real conflict the political would no longer exist, that is, the disappearance of the enemy leads to a process of depolitization. This process could be identified in the very meaning of humanity *qua* humanity, this undetermined subject against who there is no possible enemy. For Schmitt, humanity is not a political concept therefore any political entity corresponds to it. For the human rights' theory the consequence is either its abstraction and generalization or ineffectiveness in so far as the rights of a person as a human being can only be affirmed through the particular 'language' of particular (national) and not universal law.[223] The human rights' theory based on natural law and liberal individualistic doctrines is,

---

[222] Schmitt, *Théologie Politique*, 96. See also *The Concept of the Political*, 26, and 29.

[223] Schmitt, *The Concept of the Political*, 54. "The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form it is a specific vehicle of economic imperialism...Whoever invokes humanity wants to cheat." See also Carl Schmitt, *Teoria de la Constitucíon,* (Madrid : Alianza Editorial, 1992), 230.

accordingly, a depolitized theory of rights whose effects can be otherwise seen in the sacrifice of its democratic commitments such us substantial equality.

Schmitt's appropriation of Machiavelli and Hobbes is also clearly seen in his emphasis on power, conflict, and the concrete situation (the historic event) as well as his critical and somehow pessimistic reading of political events. An ever-increasing political realism approaches him to Machiavelli as well as his political perspectives that at the time of *The Concept of the Political* became strikingly not moral: "(t)he friend and enemy concepts are to be understood in their concrete and existential sense… not mixed and weakened by economic, moral, and other conceptions, least of all in a private-individualistic sense as psychological expression of private emotions and tendencies"[224]. For he claimed that universal morality, natural law, or the law of reason are ideas that a group uses to justify its own position and to vilify its opponents. The political cannot be grounded or reduced to a set of neutral universal norms or strategic rules in order to arrange individual interests through regulation. The very idea of 'universal' principles or norms is troublesome. On the one hand, universal principles or norms are conceived as limitless aiming at a universality that, in fact, transcends them. On the other hand, for essential reasons, they fall in their own contextual particularism and then, they are unable to accomplish their universal aim.[225]

The clear-eyed 'Machiavellian' Schmitt looked at the foundations of politics without liberal moral illusions. His concern is neither abstract nor normative but with the real possibility of this antithesis: "…it cannot be denied that nations continue to group

---

[224] Schmitt, *The Concept of the Political*, 27-28.

[225] Ernesto Laclau, *Emancipations* (New York and London: Verso, 1996), 57.

themselves according to the friend and enemy antithesis, that the distinction still remains actual today, and this is an ever present possibility for every people existing in the political sphere."[226] This real possibility, according to Derrida, alludes to the passage from possibility to eventuality and from this latter, then, to an effectivity-actuality or real possibility (*real Möglichkeit*). The possibility of the conflict it is already its taking place. "Dès lors que la guerre est possible, elle est en cours, semble-t-il dire, présentement, dans une société de combat, dans une communauté présentement en guerre puisqu'elle ne se présent à elle-même comme telle que par référence à cette guerre possible. Que celle-ci ait lieu ou non, qu'elle soit ou non décidée, qu'elle soit ou non déclarée, c'est là une alternative empirique au regard d'une nécessité d'essence: la guerre a lieu, elle a déjà commencé avant de commencer, dès lors qu'elle est tenue pour *éventuelle* (c'est-à-dire annoncée comme un événement non exclu dans une sorte de futur contingent). »[227] Schmitt does not dissociate the possible of the eventual. The event takes place from the moment it is thought as possible, that is, the possibility-eventuality of the conflict accuses the existence of the enemy. It is in the figure of the enemy that the possibility-eventuality turns itself into real possibility (effectivity-actuality).

The enemy is recognized by the challenging parties as *iustus hostis* (just enemy) in the sense, not of good, but of equal and distinguished from the rebel, the criminal, and the pirate. "The enemy is *hostis,* not *inimicus* in the broader sense; πολεμιοζ, not εχυοοζ"[228], that is, the enemy is publically and not privately understood existing when,

---

[226] Schmitt, *The Concept of the Political*, 28.

[227] Derrida, *Politiques de l'Amitié*, 106.

[228] Schmitt, *The Concept of the Political*, 28. (*polémios* not *ekhthrós*)

"at least potentially, one fighting collectivity of people confronts a similar collectivity".[229] The enemy embodies not the competitor in a determined conflict or yet the particular adversary or opponent who one hates but the one who fights against us in the public realm. From this perspective, the friend and enemy relation means the political, that is, it is not a competition but a public confrontation, which is not limited by the law but precedes it, that signifies the political. If, then, for Schmitt, the nature of the political as well as its autonomy can only be inferred from this antithetical relation, consequently the state is arranged according to this antithesis.

The contending situation between friend and enemy, the political battlefield does not come to terms by reaching the truth through a harmonious discussion. For Schmitt, following Hobbes, '*auctoritas non veritas facit legem*'.[230] The political and thus the state require authority and decision but not truth. In this sense, the state functions as a means to organize and to continue the political conflict (re)stressing the friend-enemy antithesis which, beyond Schmitt, is symbolically taken as the real possibility for a radically democratic society. Schmitt literally affirms that a political entity does not determine every aspect of a person's life and what really matters is only the ever possibility of conflict.[231] A non liberal yet democratic reading of Schmitt's (anti)thesis turns the state into a decisive entity -however non totalitarian- which becomes sovereign "in the sense

---

[229] Schmitt, *The Concept of the Political*, 28.

[230] Authority not truth makes law.

[231] Schmitt, *The Concept of the Political*, 39.

that the (political) decision about the critical situation, even if it is the exception, must always necessarily reside there" [232], in the conflict.

The liberal view of the state reduces the conflict until its complete eradication as far as it sees the state as that organized space on a determined territory in which the power is constrained by the law. Following Schmitt, this is a shortsighted view as far as it perceives only the stabilized effects of the conflict. Schmitt starts at the point Hobbes stops: "with the natural condition between organized and competing groups or states. No amount of discussion, compromise, or exhortation can settle issues between enemies. There can be no genuine agreement, because in the end there is nothing to agree about".[233] The political (and the state as well) once thought in terms of the friend-enemy relation does not requires discussion but decision. For Schmitt, the bourgeois liberalism has always denied the political and the state, nevertheless this denial has itself a political meaning when, in concrete situations, this means to deny a determined state and its political power.

But Schmitt is radical. For him liberalism is not a political theory or a political idea as far as it refutes the political and its conflicting structure. This attitude of refuting or denying is typical of individualistic liberalism, which implies a political practice of distrust with reference to political forces and forms of state and government. As a consequence liberal policy appears in the form of an antithesis against the state and all other institutions that restrict individual freedom. "… (L)iberal thought evades or ignores

---

[232] Schmitt, *The Concept of the Political*, 38.

[233] Paul Hirst, "Carl Schmitt's Decisionism," ed. Chantal Mouffe, *The Challenge of Carl Schmitt* (London, New York: Verso, 1999), 09.

state and politics and moves instead in a typical always recurring polarity of two heterogeneous spheres, namely ethics and economics, intellect and trade, education and property. The critical distrust of state and politics is easily explained by the principles of a system whereby the individual must remain ***terminus a quo*** and ***terminus ad quem.***"[234] At this point we face again a very Hobbesian argument for justifying the existence of the absolute –yet not absolutist- power of the sovereign for safeguarding the political community (the state) although, later on, liberals like Locke supported that not the sovereign's power but the power of the law (the rule of law) should be sovereign and thus, protect the political community. For, the safeguard of the state depended more on legal than on political compromises. Whereas for Hobbes (and Schmitt as well) the confidence on the sovereign's attitude as a politically engaged attitude would protect the interests of the political community, for liberals like Locke and mostly for modern liberalism this confidence was (re)assigned to the law, to the rule of law. This belief on the rule of law (*Rechtstaat*) that through an independent judicial branch would appease (or neutralize) our antagonistic interests as members of the political community displaces the decision from the political to the judicial realm, at the same it replaces the concrete will or command of the sovereign with the impersonal authority and universal reason that constitute the essence of the law. Instead of will or desire there is reason at the basis of the rule of law and modern constitutionalism[235]. "The whole theory of the *Rechtstaat* rests on the contrast between law which is general and already promulgated, universally

---

[234] Schmitt, *The Concept of the Political,* 70.

[235] Properly speaking there is not a constitutionalism, but various constitutional movements such as the English, the French, and the American constitutionalism, which, in spite of their peculiar historical time and space, have in common the assumption of a government, constrained by the law. It is a technique of power limitation for guaranteeing fundamental rights.

binding without exception, and valid principle for all times, and personal order which varies case to case according to particular concrete circumstances."[236]

Liberalism with its predilection for vacuous abstractions, its universalism of rights, its oppressive legal formalism, and its real adoption of inequality cannot define the political sphere. For this reason, Schmitt formulates an antiliberal alternative to modern constitutional state as well as to liberal parliamentary democracy. In what particularly matters to this work, Schmitt's critique starts from the category of the political, precisely from its conflicting structure, to oppose the liberal conception of the state that subordinates the political and, then, the state to the law. As Paul Hirst nicely puts it, "Schmitt considers nineteenth-century liberal democracy anti-political and rendered impotent by a rule-bounded legalism, a rationalistic concept of political debate, and the desire that individual citizens enjoy a legally guaranteed 'private' sphere protected from the state. The political is none of these things. Its essence is struggle".[237] In a passage of the *Teoria de la Constitución* (*Verfassungslehre)*, Schmitt observes that when some representatives of liberalism, the so-called doctrinists, affirm that the constitution of a state is sovereign they mean that not men but legal norms have (and make use of) power. "Deste modo se soslayaba la cuestión política de si era o soberano el Principe o el Pueblo; la respuesta era sencillamente: no el Príncipe ni el Pueblo, sino la "Constitucíon" es soberana. Es la respuesta tipica de los liberales del Estado burguês de Derecho, para

[236] Schmitt, *The Crisis of Parliamentary Democracy*, 42.

[237] Hirst, *The Challenge of Carl Schmitt*, 09.

los cuales tanto a Monarquia como la Democracia deben limitarse en interés de la libertat burguesa y de la propriedad privada."[238]

Contrary to Schmitt, Kelsen sustains in his theory of the state that the state is a system and a unity of legal norms yet, in Schmitt's view, without making clear the objective principle and the logic of such system and unity and also without explaining how and for what reasons positive legal prescriptions of the state and distinct constitutional norms form such system or unity.[239] In this sense, Schmitt affirms that Kelsen's theory of the state becomes understandable only if it is taken as a derivation of the authentic liberal-bourgeois rule of law theory, which reduces the state to a system of legal norms/rules.

It is worth mentioning that Kelsen deviates himself from the more traditional liberal thesis when he defends the divorce between moral and legal claims. Nonetheless, Schmitt is implacable when he observes that for Kelsen positive legal norms/rules are what really and only matter. "No valen porquem en justicia **deban** valer, sino sólo porque son **positivas,** sin consideración a cualidades como razonabilidad, justicia, etc. Aquí cesa de repente el **deber ser** y desaparece la normatividad; en su lugar aparece la tautología de unos simples hechos: una cosa vale, cuando vale y porque vale. Esto es "positivismo".[240]

Schmitt's critique to Kelsen can be understood, on the one hand, as part of his general critique to the liberal constitutional state, as far as in (and because of) this structure the political is not autonomous -in the sense defended by Schmitt- but otherwise

---

[238] Schmitt, *Teoria de la Constitución,* 33.

[239] Schmitt, *Teoria de la Constitucíon*, 34.

[240] Schmitt, *Teoria de la Constitucíon*, 34.

it is dependent on the juridical. On the other hand, his critique intends to demonstrate the inconsistency of Kelsen's system: "decir que una Constituición no vale a causa de su justicia normativa, sino sólo de su positividad, y que sin embargo, funda como pura norma un sistema o una ordenación de puras normas, es una confusión llena de contradicciones. No hay ningún sistema constitucional cerrado de naturaleza puramente normativa....[241] For Schmitt, the unity and the arrangement of the constitutional system cannot be a matter of positive norms/rules but it is a political matter depending on the conflicting existence of the State based on the friend-and-enemy (op)position. For instance, he mentions the 181 articles of Weimar Constitution and the diversity of ideas they embrace questioning, with an ironic accent, the positivistic pretension of conceiving the constitutional system as a normative and logic unity. "La unidad del Reich alemán no descansa en aquellos 181 artículos y en su vigencia, sino en la existencia política del pueblo alemán. La voluntad del pueblo alemán- por tanto, una cosa existencial- funda la unidad política y juridica, más alla de las contradicciones sistemáticas, incongruencias y oscuridades de las leyes constitucionales conretas. La Constitución de Weimar vale porque el Pueblo alemán 'se la ha dado'".[242]

The Schmitt-Kelsen's debate gains strength in two works published in 1931, respectively, Schmitt's *Der Hünter der Verfassung* and Kelsen's *Wersoll der Hüter der Verfassung sein?* Schmitt's argument is structured along the critique he does either to liberalism or parliamentary democracy initially in a book published in 1923 called *Parlamentarismus,* whose second edition of 1926, thanks to the critiques the former

---

[241] Schmitt, *Teoria de la Constitucíon*, 35.

[242] Schmitt, *Teoria de la Constitucíon*, 35.

received and the editor's suggestion, came to be *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (*The Crisis of Parliamentary Democracy)*.[243] Schmitt observes that parliamentarism, especially from the nineteenth century on, has gone forth ever associated to democracy but without a careful and necessary distinction between the two.

On the side of parliamentarism, public discussion has been its characteristic trait whose intellectual roots could be identified in the rationalistic metaphysics of Enlightenment, particularly Locke and Montesquieu. In this sense, parliamentary arrangements such as freedom of expression, process of rational public debates, parliamentary immunity etc would act against the arbitrary exercise of power. This is especially true regarding the principle according to which a representative is independent from his or her electorate and from his or her political party as far as he or she represents indistinctly all people. This principle of public discussion, regardless its constitutional recognition, has been discredited along the time what, accordingly, jeopardizes all parliamentary arrangements. According to Schmitt, discussion means to exchange opinions in order to persuade the antagonist through "argument of the truth or justice of something, or allowing oneself to be persuaded of something as true or just". [244] All parliamentary constitutions are distinguished by the fact that they assume that law, as an ensemble of legal norms, arises out of conflict of opinions and not out of a struggle of interests. For this very fact Schmitt asserts that the situation of parliamentarism became

---

[243] For Schmitt, modern parliamentarism deviate itself form its moral and intellectual foundations becoming an empty apparatus and thus indefensible before ideological movements such as Bolshevism and fascism. Joseph W. Bendersky, *Carl Schmitt. Theorist for the Reich* (Princeton: Princeton University Press, 1983), 68.

[244] Schmitt, *The Crisis of Parliamentary Democracy*, 05.

critical at the moment modern mass democracy has turned argumentative public discussion into an empty formality. Therefore, in the parliamentary realm, the argument in its very sense, that is, as the essential element of a proper discussion vanishes and in its place remain calculation and individual or collective interests to get the power. "The parties … do not face each other today discussing opinions, but as social or economic power-groups calculating their mutual interests and opportunities for power, and they actually agree compromises and coalitions on this basis." [245] Then, to persuade the antagonist of the truth or justice of something is not the case any more but to obtain the majority in the parliament became 'the' issue. "The belief in parliamentarism, in government by discussion belongs to the intellectual world of liberalism. It does not belong to democracy".[246] The parliament became no longer an institution in which compromise and political unity could be achieved remaining, in the case of the Weimar Republic, contrary to the very spirit of the constitution.

From Schmitt's viewpoint, democracy is based on the principle that not only are equals equal but also unequals will not be treated equally. "Democracy requires, therefore, first homogeneity and second-if the needs arises-elimination or eradication of heterogeneity."[247] In Mouffe's words, without neglecting Schmitt's political involvement in the third Reich and the "chilling effect" it might cause on us, it is worthy mentioning that his critique of parliamentarism underlines a fundamental trait of democratic politics

---

[245] Schmitt, *The Crisis of Parliamentary Democracy,* 06.

[246] Schmitt, *The Crisis of Parliamentary Democracy*, 08.

[247] Schmitt, *The Crisis of Parliamentary Democracy*, 09. See also Schmitt, *Teoria de la Constitucíon*, 230ff. "La igualdad democrática es, en esencia, homogeneidad, y, por cierto, homogeneidad del pueblo. El concepto central de la democracia es *Pueblo*, y no *Humanidad. Si la democracia ha de ser una forma politica, hay sólo Democracia del Pueblo y no Democarcia de la Humanidad...Democracia ... es identidad de dominadores y dominados, govbrnantes y gobernados, delos que mandan y los que obedecen ."*

which liberalism aims at eliminating today: the idea of homogeneity inscribed in the democratic conception of equality considered then, as substantive equality. As I have already discussed in the preceding topic, Schmitt does not sustain an abstract conception of equality like liberals generally do. "Equality is only interesting and valuable politically so long it has substance, and for that reason at least the possibility and risk of inequality."[248] It means that for democracy to be substantive a citizen has to be able of being recognized as such. To belong or not to the *demos*, to be or not a citizen and still, to have or not equal rights traces a line whose demarcation is important for the recognition of who share and who does not share a common substance. "It is not the nature of the similarity on which homogeneity is based" but this "possibility of tracing a line of demarcation" that matters after all.[249] Democracy, politically understood, aims at creating an identity based on homogeneity while liberalism radically emphasizes the individual with his or her idiosyncrasies. In this sense, Schmitt affirms that democratic identity is based on the idea that everything there is in the state, that is, every act of state power or government remains within the substantial homogeneity. For him, democracy implies, thus, immanency and not transcendence. "*Toda especie de transcendencia que se introduzca en la vida política de un pueblo lleva hacia distinciones cualitativas de alto y bajo, elegido y no elegido, etc., mientras que en una Democracia el Poder estatal ha de emanar del pueblo y no de una persona u órgano exterior al pueblo y colocado sobre él."*[250] As far as parliamentary democracy is a combination of the two, that is, democracy

---

[248] Schmitt, *The Crisis of Parliamentary Democracy*, 09.

[249] Mouffe, *The Democratic Paradox,* 40.

[250] Schmitt, *Teoria de la Constitucíon,* 233.

and liberalism, substantial equality and liberty (and formal equality), it consequently is a non-feasible political model.

Having in mind Schmitt's argument for the failure of parliamentary democracy it is possible to understand why he affirms that the president is the natural defender of the constitution. First of all, he claims that to guard and, to defend the constitution is a political and not a legal task. It means that the answers for the problems that surround the constitution cannot be found in a procedure of a juridical type. To insist on this procedure is to disdain the profound difference there is between a legal decision and an answer on doubts and criterion divergences about the content of a constitutional prescription. Second, he points out the inadequacy of the German Constitutional system at that time regarding the variety of jurisdictional instances that acted in the defense of the constitution such as the State Court (*Staatgerischtshof*), the Supreme Court of the Reich (*Reichsgerichtshof*), the Financial Court (*Finanzgerichtshof*) etc[251]. Sustaining his critique of parliamentarism Schmitt argues that the constitution should be protected from the legislative body as far as its representatives irresponsibly legislate against it. The legislative branch became then, a danger to the constitution, which should be defended by a political (which does not confound itself with the parliament) and not a legal guardian. With the Supreme Court's decision of October 13, 1927 in which the Supreme Court proposed itself to be the defender of the constitution, Schmitt claims that to assign the task of guarding the constitution to the courts is a rudimentary mistake as far as it disregards the limitation they have since they lack the necessary political authority. The

[251] Bendersky, *Carl Schmitt, Theorist for the Reich*, 111. The Spanish translation for *Staatgerischtshof* is "Tribunal de Justicia Política". Schmitt, *Teoria de la Constitucíon*, 129. "(L)a receción de este tribunal ha tenido lugar según la ley del Reich de 9/7/1921".

authority to enforce political decisions and to defend the constitution should be, then, ascribed to the president.

In chapter two, precisely in section 2.5, I discussed the notion of authority first distinguishing it from power, violence, and persuasion. Following Arendt (and ancient tradition), I assumed that authority has nothing to do with coercive power or violence. Conversely, the use of force for being obeyed demonstrates that authority has already failed. However, the president as a defender of the constitution (and to enforce his or her decisions) must have authority: an authority that is either *Auctoritas,* in the very sense of strengthening the foundations of political community, or *Potestas* as (coercive) power. We have seen that in the twilight of Middle Ages there was a break with tradition –with the dawn of modernity- and a lost of authority as the ever-recurring act of founding the political community. Not *Auctoritas* but *Potestas* became meaningful for the political and modern state and our toughness and permanence became vulnerable in this world. At this time and space (modernity) the difference between *Auctoritas* and *Potestas* practically vanishes and who ever is the president cannot prevent strengthening the foundations of political unity for the sake of its continuity and permanence but principally has to make his or her commandments obligatory by means of his or her power.

The president is not a "higher third" above other institutions of government and he acts, as a defender of the constitution, as a neutral third, a *pouvoir neutre, intermédiaire,* and *régulateur.*[252] This peculiar function attributed to the neutral third is basically a mediatory, protective, and regulative attitude for exceptional circumstances. A Schmittien interpretation of the Weimar Constitution (*Weimarer Verfassung*), especially

[252] Schmitt appeals to Benjamin Constant's theory of neutral power. Schmitt, *La Defensa de la Constitución* (Madrid: Tecnos, 1998), 214.

of its *Artikel 48*[253] suggests that without recurring to Constant's theory of *pouvoir neutre* we would come to a confusing understanding of the presidential endeavor in defending the constitution: "(s)egún el derecho positivo de la Constitución de Weimar, la posición del President del reich, elegido por la nación entera, solo puede construirse con ayuda de una teoria muy desarrollada de un poder neutral, mediador y tutelary. El Presidente del Reich está dotado con atibuiciones que le hacen independiente de los órganos legislativos, aunque simultáneamente está obrigado al refrendo de los Ministros, quienes, a su vez, dependen de la confianza del Parlamento."[254] Accordingly, the equilibrium between popular sovereignty and parliamentary representation, the independence before the *Reichstag* as well as the dependence on the ministers based on the need of having their referendum, the defense of the constitution before the territories of the Reich and the

---

[253] **Artikel 48** Wenn ein Land die ihm nach der Reichsverfassung oder den Reichsgesetzen obliegenden Pflichten nicht erfüllt, kann der Reichspräsident es dazu mit Hilfe der bewaffneten Macht anhalten.
Der Reichspräsident kann, wenn im Deutschen Reiche die öffentliche Sicherheit und Ordnung erheblich gestört oder gefährdet wird, die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung nötigen Maßnahmen treffen, erforderlichenfalls mit Hilfe der bewaffneten Macht einschreiten. Zu diesem Zwecke darf er vorübergehend die in den Artikeln 114, 115, 117, 118, 123, 124 und 153 festgesetzten Grundrechte ganz oder zum Teil außer Kraft setzen.
Von allen gemäß Abs. 1 oder Abs. 2 dieses Artikels getroffenen Maßnahmen hat der Reichspräsident unverzüglich dem Reichstag Kenntnis zu geben. Die Maßnahmen sind auf Verlangen des Reichstags außer Kraft zu setzen.
Bei Gefahr im Verzuge kann die Landesregierung für ihr Gebiet einstweilige Maßnahmen der in Abs. 2 bezeichneten Art treffen. Die Maßnahmen sind auf Verlangen des Reichspräsidenten oder des Reichstags außer Kraft zu setzen.
Das Nähere bestimmt ein Reichsgesetz.

(If a state fails to perform the duties imposed upon it by the federal constitution or by federal law, the President may enforce performance with the aid of the armed forces.
If public order and security are seriously disturbed or endangered within the Federation, the President may take all necessary steps for their restoration, intervening, if need be, with the aid of the armed forces. For the said purpose he may suspend for the time being, either wholly or in part, the fundamental rights described in Articles 114, 115, 117, 118, 123, 124, and 153.
The President has to inform the Reichstag without delay of any steps taken in virtue of the first and second paragraphs of this article. The measures to be taken are to be withdrawn upon the demand of the Reichstag.
Where delay is dangerous a state government may take provisional measures of the kind described in paragraph 2 for its own territory. Such measures are to be withdrawn upon the demand of the President . . . or of the Reichstag ...)

[254] Schmitt, *La Defensa de la Constitución,* 220-221.

prevalence of the constitution over federal law etc would be incomprehensible out of the context of Constant's *pouvoir neutre* theory.

Kelsen recognizes that Constant's theory of the *pouvoir neutre* became for Schmitt the main tool for interpreting the (Weimar) Constitution. His critique points out that to affirm that the president is the holder of a neutral power presupposes that the executive power is divided in two: a passive power and an active power and the president rules on the basis of the first. Thus, considering that a neutral power cannot be but a passive power, Kelsen is of the opinion that Constant's theory forges a 'passivity' that in fact does not happen: "no puede ignorar la ficción que aquí se esconde, al hacer aparecer el poder del monarca –a quien la Constitución le confiere la representación exterior del Estado y en especial la firma de los tratados internationales, la sanción de las leyes, el comando supremo del ejército y la armada, el nombramiento de funcionarios y jueces, y otras tareas más- como meramente passivo."[255] Yet, Kelsen observes that in the way Schmitt claims to be the president the defender of the constitution, that is, from the perspective of a neutral power and without being in a higher position with a more extensive power, he would be in the same level of the remaining constituted powers.

For Kelsen, more than the parliament, the government (the executive power) itself represents a danger for the constitution: "!Como si 'hoy"em Alemania el problema de la constitucionalidad de la función del Gobierno constituido por Presidente y Ministros (...) no fuese una cuestión vital para la Constitución de Weimar! Por supuesto que, si no se plantea el problema de una violación de la Constitución por parte del Gobierno, la fórmula que proclama al jefe del Gobierno como "defensor de la Constitución"suena sin

[255] Hans Kelsen, *Quien deve ser el defensor de la Constitución?* (Madrid: Tecnos, 1995), 11.

duda como verdaeramente impensable (...)".[256] Contrary to Schmitt, Kelsen interprets *Artikel 48* of the Weimar Constitution as a menace to the constitution. According to him, Schmitt underestimates the possibility, somehow allowed by article 48, of having the president violating the constitution. Kelsen also criticizes Schmitt's assertion –yet not proved- that a Constitutional Court would only oppose itself to the parliament. For him such an understanding alters the purpose of being the defender of the constitution, that is, of being a mere counterweight for the parliament instead of having judicial control over all governmental acts. For Kelsen, according to Article 48, the Weimar Constitution ascribed to the president such a role of being the counterweight for the parliament and not to a Constitutional Court. Then, Schmitt's mistake was not to conceive the president as the counterweight for the parliament but to think that the task of defending the constitution would be there presupposed. For Kelsen, the task of protecting the constitution is due to the Court, that is, to a legal -an unpolitical- decision maker. Then, to exercise constitutional jurisdiction and to review ordinary laws demanded an unpolitical attitude.

Following Schmitt's anti-liberalism as well as his skepticism about parliamentary democracy, we could say that his denial of a judicial procedure for defending the constitution is more than a denial of unellected officers such as judges that have the privileged function of deciding case of complaint against laws enacted by people's representatives -electorally accountable legislatures. For him what is at stake is the (lost of) autonomy and dignity of the political based on its conflicting structure. Schmitt-Kelsen's debate is traversed by this dramatic tension between the political and the

[256] Kelsen, *Quien deve ser el defensor de la Constiotución?,*14.

juridical. It is worthy remember that both experienced the time and space of Weimar's crisis[257] which became especially meaningful for Schmitt's strong criticism of liberal democracy, mostly in its parliamentary mode. For him an unpleasant combination of individualism (for the sake of securing property) and legalism gave rise to a political form that could not account for the exception, that is, a situation where the very existence of the rule of law (of liberal state) is at stake. For Schmitt, constitutional arrangements to deal with this situation such as to stipulate constitutionally by whom and under what circumstances emergency powers may be exercised are not capable or rather inadequate for this purpose. How can the law in its generality adequately deals with the problem of exception or, in other words, with the problem of suspending the entire legal order itself? Posing this question to Kelsen, he would primarily say, by avoiding a political attitude as far as a strict legalism understands sovereignty in terms of (or within) a system of general legal norms.

As I have already said before, Schmitt's support to Hitler in 1933 cannot be ignored. However, taking Mouffe's advice that "political theorists, in order to put forward a conception of a liberal-democratic society able to win the active support of its citizens, must be willing to engage with arguments of those who have challenge the fundamental tenets of liberalism"[258], it would also be a mistake to ignore Schmitt's intellectual unquietness in the face of some disturbing questions generally avoided by liberal and positivists like Kelsen. Then, even having Schmitt experienced another time and space (critical and complex) the pertinence of his work remains as we still live under

---

[257] The crisis of Weimar Republic can be either thought as an internal constitutional crisis or externally as the consequence of the defeat in World War I, the Treaty of Versailles and its liberal agreed basis.

[258] Mouffe, *The Democratic Paradox*, 36.

the auspices of liberalism -yet in its updated (neo) version. It works as a warning against the dangers of a pleased liberal society where a vacuous but exultant freedom reigns with the sacrifice of (substantial) equality. "Indeed, humanitarian rhetoric has today displaced political stakes and, with the collapse of communism, western liberals imagine that antagonisms have been eradicated. Having reached the stage of 'reflexive modernity', ethics can now replace politics. We are told that with the development of 'post-conventional identities', the archaic forms of friend-enemy politics are on the wane. The conditions are claimed to be ripe for 'deliberative' or 'dialogic' forms of democracy to be implemented internationally. Alas, Schmitt's insistence on the ineradicable dimension of conflictuality inherent in 'the political', and on the 'political' exterior of law, reveal all this to be wishful thinking."[259] Feeling the contemporary consequences of liberalism, the triumph of individualism over solidarity (or Schmitt's political unity) the words of a sensitive reader of Kafka weaves again this *textum* and there Benjamin goes: "the tradition of the oppressed teaches us that the "state of emergency" in which we live is not the exception but the rule."[260] There we are back to the exceptional locus of sovereignty and constituent power to which I will devote the next section of this chapter stressing their aporetic structure and the necessity of assuming this idiosyncratic yet democratic trait.

[259] Mouffe, *The Challenge of Carl Schmitt*, 02.

[260] Benjamin, *Illuminations*, 257.

3.IV. sovereignty and constituent power: from political philosophy to first philosophy

The state's vitality depends on the ever-present possibility of conflict requiring, then, a sovereign who, in the face of political uncertainties, embodies an authority that is superior to that of the law itself. For, repeating Schmitt: "the sovereign is he who decides on the exception." As I have already mentioned through out this dissertation, the concept of sovereignty faces a disturbing but constitutive aporia. Kafka's story is for that reason exemplary. The notion of sovereignty in early modernity appears at the end of the sixteenth century,[261] linked to the notion of the state meaning the perpetual, absolute and supreme power that should rule over a political community. According to this notion, the state is founded on a cohesive power having the monopoly of the means for the legitimate application of force on a given territory and over certain people. In a certain sense, this is a simplification legal scholars traditionally do in defining the state from its constituting elements, namely, sovereignty, territory and the people.

Back to sixteenth century, Bodin says in his book *De la République* «(l)a souveraineté est la puissance absolue et perpétuelle d'une République… ».[262] These two characteristics, absolute and perpetual, were thought as fixed conditions for the exercise

---

[261] "Not until to the end of sixteenth century, when it became apparent that religion had become a highly divisive force and the powers of the sate would have to be separated from the duty of rulers to uphold any particular faith, did the nature and limits of political authority, law, rights and obedience become a preoccupation of European political thought from Italy to England. David Held, *Prospects for Democracy* (Stanford, Cal.: Stanford University Press, 1993), 18.

[262] Bodin, *The Six Books on The Commonwealth*, 53. "SOVEREIGNTY is that absolute and perpetual power vested in a commonwealth which in Latin is termed majestas ... The term needs careful definition, because although it is the distinguishing mark of a commonwealth, and an understanding of its nature fundamental to any treatment of politics, no jurist or political philosopher has in fact attempted to define it."

of power. It is perpetual as far as "(t)he true sovereign remains always seized of his power. A perpetual authority therefore must be understood to mean one that lasts for the lifetime of him who exercises it."[263] It is absolute to the extent of its unconditionality. A power is given to a sovereign not in virtue of some office or commission, nor in the form of a revocable grant. The people has renounced and alienated their power in order to invest him with it and put him in possession, and it thereby transfers to him all its powers, authority, and sovereign rights.[264] If the power given by the people is charged with conditions is neither properly sovereign, nor absolute, except the conditions that are inherent to the laws of God and of nature. So, it is an absolute power in the sense that it does not owe obedience to the positive laws passed by whom earlier had the power and, neither to the laws the sovereign himself has made. For Bodin, neither the laws of the sovereign's predecessors nor the sovereign own laws can bind him as there would be no sense in him giving orders to himself. He was only subjected to divine and natural laws "and even to certain human laws common to all nations", being these exemptions to him who exercises the absolute power. [265]

Bodin assumes that there is a hierarchy of laws that must be respected. For, he says: "just as contracts and deeds of gift of private individuals must not derogate from the

---

[263] Bodin, *The Six Books on The Commonwealth,* 54.

[264] Bodin, *The Six Books on The Commonwealth*, 54.

[265] Bodin, *The Six Books on The Commonwealth,* 55. "The absolute power of princes and sovereign lords does not extend to the laws of God and of nature. He who best understood the meaning of absolute power, and made kings and emperors submit to his will, defined his sovereignty as a power to override positive law; he did not claim power to set aside divine and natural law". (p. 56) "Law is nothing else than the command of the sovereign in the exercise of his sovereign power. A sovereign prince is not subject to the laws of the Greeks, or any other alien power, or even those of the Romans, much less to his own laws, except in so far as they embody the law of nature which, according to Pindar, is the law to which all kings and princes are subject." (p. 61).

ordinances of the magistrate, nor his ordinances from the law of the land, nor the law of the land from the enactments of a sovereign prince, so the laws of a sovereign prince cannot override or modify the laws of God and of nature. ..."[266] At the top of this hierarchy are the laws to which even the sovereign is bound as they involve some principle of natural justice. These cannot be amended or annulled. Hence, for Bodin, absolute power only implies freedom in relation to positive laws, and not in relation to the law of God or nature. This means that if power is absolute however, it is not unlimited. The essence of sovereignty is in the power of making and annulling the laws what means that through the monopoly of the law the unity of the state would be maintained.

One century later, Hobbes affirms that "(t)he final cause, end, or design of men, who naturally love liberty, and dominion over others, in the introduction of that restraint upon themselves, in which we see them live in commonwealths, is the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting them out of that miserable condition of war"[267]. This miserable condition of war of everyone against everyone is the consequence of men natural passions, precisely when there is no power to keep them in peace "and tie them by fear of punishment to the performance of their covenants, and observation of those laws of nature…"[268] And he adds: "covenants, without the sword, are but words, and of no strength to secure a man at all."[269] For

---

[266] Bodin, *The Six Books on The Commonwealth*, 60.

[267] Hobbes, *Leviathan,* 129.

[268] Hobbes, *Leviathan,* 129.

[269] Hobbes. *Leviathan,* 129.

Hobbes, the origin of this coercive power is the will. Initially, the will of every man to concede to one person or to a group of people his or her own will, that is, "to reduce all their wills, by plurality of voices, unto one will".[270] Here we have the will as a prior condition for constituting the political community. As I have already pointed out, a will whose structure is paradoxical and without which the state -the great Leviathan or mortal god- would not exist. This situation of willing to get out of the miserable condition of war is dramatic precisely for costing the alienation of part of one's liberty. This the price one (we) pay for getting out of that 'wild' condition for a time and space where promises and covenants can be accomplished. But the act of willing is not enough if there is not a will that, according to Hobbes, reduces the plurality of all voices into one voice. For it is necessary power. It is exactly this picture of will plus power that Hobbes shows us figuring the sovereign. *(T)o define it, is one person, of whose acts a great multitude, by* ***mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defense****. (...) And he that carrieth this person is called SOVEREIGN and said to have* ***sovereign power;*** *and every one besides, his subject*[271]. The sovereign's will becomes the principle of order. For the sovereign must have the monopoly of force. It is in this movement of willing, monopolizing force (violence), and establishing order that we have the very aims of sovereignty.

Hobbes and Bodin identify the sovereign power in its site, which is occupied by the figure of the king. Nevertheless, even Bodin was careful in defining sovereignty

---

[270] Hobbes. *Leviathan*, 132.

[271] Hobbes, *Leviathan*, 132.

abstractly and impersonally. In this sense, we could abstract the figure of the sovereign either form the government or the parliament or still the people. It is a fact that the rule of law was compelled to bind and neutralize the sovereign power as an attempt to exorcize its own original sin (the paradox that has constituted it).

The late modern thought about sovereignty – I mean, from the end of nineteenth to the twentieth century- has reacted to abstract definitions and formal analysis of sovereignty and some authors, like Schmitt, rethought it in the context or rather, in the field of political struggles. In the case of Schmitt, his notion of sovereignty is temporally and spatially meant by the late modern German history, as Derrida nicely says, by the "exorbitant price Germany had to pay for defeat, the Weimar Republic, the crisis and impotence of the new parliamentarianism, the failure of pacifism, the aftermath of the October revolution, conflict between media and parliamentarism, new particulars of international law, and so forth."[272] This is what moves Schmitt to think the sovereign as who decides on the exception, that is, on a situation in which it is crucial to suspend the law for the sake of political cohesion. The sovereign has a right that does not concern to the monopoly over the law or punishment but to the decision (on the exception). In Schmitt's words, "(t)he usual definition of sovereignty today rests on Bodin's recognition that it will always be necessary to make exceptions to the general rule in concrete circumstances, and that the sovereign is whoever decides what constitutes an exception".[273]

---

[272] Derrida, "Force of Law: the Mystical Foundation of Authority,"1017.

[273] Schmitt, *The Crisis of Parliamentary Democracy,* 42.

The exception (*Ausnahme*) is the temporal and spatial sphere of the suspension of the whole legal order; of the law. If the sovereign is who decides for (re)establishing the normal situation in which the legal order makes sense then, he must situate himself out of the legal order and so, being able to suspend it. Considering the exception as what founds (in the sense of creating and basing) sovereignty, then, Agamben instigates us to think that "sovereignty is not an exclusively political concept, an exclusively juridical category, a power external to law (Schmitt), or the supreme rule of the juridical order (Kelsen); it is the originary structure in which law refers to life and includes it in itself by suspending it.[274]

The force that is at the origin of sovereignty, that constitutes it, it is not simply force but violence; precisely, the violence that the legal state wants to expurgate through the rationalization of force (by the law). It is not by chance that the German word *Gewalt* means force, violence, authority, and legitimate power. There we have the originary sense of the order founding violence and maintaining violence (which is the order itself). In a paragraph above I said that force and the law are the very aims of sovereignty. At this point I dare saying that violence and law do not differentiate themselves within sovereignty. Here is sovereignty as a zone of indistinction (between outside and inside)[275]. This paradox is even more visible when we relate sovereign power to constituting/constituent power.

The foundation of most states follows as the consequence of a situation we might generally call revolutionary. It is revolutionary in the sense that it installs a new legal

---

[274] Agamben, *Homo Sacer,* 28.

[275] Agamben, *Homo Sacer,* 31ff.

order and mostly in a context of violence, even considering that such revolutionary situations are not spectacular genocides, expulsions or deportations that often go with the foundation of states. [276] "In these situations said to found the law (droit) or state, the grammatical category of the future anterior all to well resembles a modification of the present to describe the violence in progress. It consists in, precisely, feigning the presence …".[277] Revolutions are invariably terrible, as they do not happen without great suffering. They are also terrible, according to Derrida, as far as they are in themselves and in their very violence uninterpretable and indecipherable.[278] This violence is not strange to law; instead it is in the law that suspends the law. "It interrupts the established *droit* to found another. This moment of suspense (…) this founding or revolutionary moment of law, is, an instance of non-law."[279] Kafka's countryman is before an undetermined law, a law still not existent, a law to come. Thus, he cannot reach it and there he stays before it, that is, it him who founds it (in/through) violence.

For legal science, the constituent/constituting power is, traditionally, the source from where it springs the new state constitutional order. It is the power to make a (new) constitution from which the remaining (constituted) powers of the state get their structure. From this perspective, the constituting power installs a whole new legal order. In the warmness and enthusiasm of the French Revolution, a French abbot from Chartres,

---

[276] Derrida, "Force of Law: the Mystical Foundation of Authority," 991. Blanchot says that "revolutionary action is in every respect analogous to action as embodied in literature: the passage from nothing to everything, the affirmation of the absoloute as event and of every event as absolute. Blanchot, *The Work of Fire*, 319.

[277] Derrida, "Force of Law: the Mystical Foundation of Authority," 991.

[278] Derrida, "Force of Law: the Mystical Foundation of Authority," 991. To (and because of) this Derrida calls it mystical violence.

[279] Derrida, "Force of Law: the Mystical Foundation of Authority," 991.

called Joseph Sieyés develops a theory about the constituting power having in mind - from the facts he experienced- that every constitution presupposes, above all, a sovereign and constituting power to which all other state powers are subjected. This power is not bind by anything except by its own will which, according to Sieyés, it is the nation's will. For, the constituting power is omnipotent and unconditioned: the nothing from which springs everything (the suspension of the law is what creates the law). The constituting/constituent power is temporally and spatially unlimited. In fact, it breaks out destroying all previous equilibrium and all possible continuity.[280]

Following Negri, the constituting/constituent power does not emanate from any constituted power; it is not an institution of the constituted power. It is rather an act of choice, the radical determination that unfolds a horizon or yet, the radical device of something that still does not exist and whose conditions of existence presuppose that the creating act does not loose its characteristics in the creation.

In the grammar of legal science, constituent/constituting power means omnipotence, omnipresence and no limitation, however these meanings are sacrificed by the pragmatics of this grammar that, instead, plays a sort of domestication of the constituent power. No matter the way legal science domesticates the constituent power but in any way (it does), it concomitantly empties its meaning as a liberating power. Not exactly agreeing with the critique Negri does regarding the type of relations legal science establishes with constituent power –transcendental, immanent, and co-extensive- I do

[280] Antonio Negri, *Il Potere Costituente*. *Saggio sulle alternative del moderno* (Roma: Manifestolibri, 2002), 21.

agree with him when he says that legal science neutralizes and mystifies it and in doing it so, empties its meaning.[281]

Constituent power opposes constitutionalism as the government constrained by law. The limitation of power by the law and, accordingly, the control over government do not fit in a constituent/constituting movement (a present time) but is, precisely, the opposite, the constituted thing (a past time). We are dealing here with times (in the plural). A time in the present (continuous) that in constituting a new time not just redeems the old time but reverses it. Constitutionalism is always a look back to the past or rather; it is the past legally and politically constituted time. According to Negri, constitutionalism is the reference of/to the past time, of/to the consolidated power and its inertia whereas the constituent/constituting power is the present continuous time: "La pretesa del constituzionalismo di regolare giuridicamente il potere costituente non è solo stolta perché e quando vuole dividerlo - lo è soprattutto quando ne vuole blocarre la temporalità costitutiva."[282] In its relation to time, the constituent power accelerates it, breaking with the past and instituting a new time.

Constitutionalism conforms the liberal State to a mechanism of mutual negotiation among its constituted powers annihilating the democratic principle conceived as absolute power. Negri thinks the constituent power as an outburst and expansive force whose concept is linked to the pre-constitution of the democratic totality. In the past, there is no expansive and omnipotent force, which only happen (happening) in/as presen(t)(ce). In the grammar of legal science and in the limits of constitutionalism the

---

[281] Negri, *Il Potere Costituente,* 21.

[282] Negri, *Il Potere Costituente,* 22.

constituent power negates itself and democracy as well. From this arrangement Negri concludes (and with him I do too) that if in the history of democracy and democratic constitutions the tension between constituent and constituted power never came to a synthesis, it means that we have to concentrate ourselves precisely in this negativity and in this emptiness of synthesis in order to understand the constituent power. [283]

For Negri, the concept of sovereignty does not work as a criterion of truth to the constituent power as far as sovereignty reveals itself as the settlement -and then as the end- of constituent power consuming its outburst force. At this point, it is worth recalling the arguments I have just presented on sovereignty and to perceive (different from Negri) that once we understand the *locus* of sovereignty as a zone of indistinction between outside and inside, that is, (now agreeing somehow with Negri) as a zone of an ineradicable tension, we can think it in terms of constituent power without any mutual sacrifice. In this sense we may interpret Sieyès's assertion that "the constitution first of all presupposes a constituting power"[284] in the following way: the constitution presupposes itself as constituting power. This interpretation stresses the paradox of sovereignty. Agamben nicely associates this paradoxical situation to that of the state of nature with the state of law, in which the former maintains a "relation of ban" with the latter, "so the sovereign power divides itself into constituting power and constituted

[283] Negri, *Il Potere Costituente,* 23. The recent history of Brazilian constitutionalism shows exactly this tension in the constituent/constituting works of the 1987's National Constituent Assembly that gave rise to the Brazilian Constitution of 1988.

[284] Emmanuel-Joseph Sieyès, *A Constituinte Burguesa. Qu'est-ce que le Tiers État?* (Rio de Janeiro: Lumen Iuris, 2000). Also Agamben, *Homo Sacer*, 40-41.

power and maintains itself in relation to both, positioning itself at their point of indistinction." [285]

In the grammar of legal science and in the limits of constitutionalism, the state of law as a representation of a well installed –constituted- power opposes constituent/constituting power to sovereignty and it is against this opposition that I (re) claim: fixed space and time *versus* times and spaces (in the plural). There is no democratic politics wherever power (sovereign and constituent) is not absence, emptiness, suspension (of the law), and for this very reason is possible: law 'conserves' itself in its own privation, that is, enforces itself in no longer enforcing. Taking up Agamben's reference to Jean-Luc Nancy's suggestion, the relation of exception is a relation of ban, in which the law, as potentiality, maintains itself in its own privation.[286] I recall that at the origin of the verb to (a)bandon there is *bandon* whose origin is in the Medieval Latin *bannum*. *Bannum* means the proclamation of the *suserain* (sovereign) at the moment he holds his authority and *bandon* means power, force and is the result of the crisscrossing between *ban (bannjan*, to banish) and *band (bandjan* to sign/mark). Then, *bandon* is either banishing or marking and the *band*it is that who is included in his exclusion. If this relation of ban states the paradox of sovereignty specially by placing the sovereign and its power in a zone of indistinction between outside and inside where the origin of law is potentiality –in the Aristotelian sense of dynamis (δυναμιζ)- then the constituent/constituting power can be thought not as completely emancipated from the

[285] Agamben, *Homo Sacer*, 48.

[286] Agamben, *Homo Sacer,* 28, 44-8.

principle of sovereignty but as a matter of constituting potentiality. And here our political concerns (re)conduct and entangle us in the *textus* of first philosophy.

In the *Metaphysics,* in the very beginning of book *Theta,* Aristotle says: "We have dealt with primary being; that is, with what 'is' in the primary sense of the word, or with that to which the other categories of being refer. For it is with regard to the concept of primary being that we speak of the being of the others, quantity, quality, and so forth; … But since 'being' applies not only to a particular something or to a quality or a quantity but also to power or to a fulfillment or to a working, let us now explain 'power' and 'fulfillment'."[287] (1045b26-36) As we can see power (δυναμιζ), working (ενεργεια) and fulfillment (ευτελεχεια) belong to the realm of being. Then, power is not a mere category but it is essential to understand being as such what means that a question on power is also a question on being; it is an ontological question. However, power once applied to being is considered as related to change and movement. Accordingly, to understand being implies to understand power as change and movement, that is, as what moves.

Being in "change and movement" is rather becoming. Taking the word as such, being as a noun can be thought as a fixed entity. However, when this fixed entity moves and changes, the noun gives place to the present participle. This shifting in which the noun becomes the participle present or (fixed) being becomes being (in movement) implies - or rather is- *dynamis*. So, we might say that in book *Theta* of the *Metaphysics* Aristotle is concerned with being not as a fixed entity but with this becoming, that is, being-in-change and movement.

---

[287] Aristotle, *Metaphysics*, 181.

Aristotle affirms that there is a primary kind of power to which genuine powers are really related. (1046a9). This primary power "which is the source of change in another thing or in another aspect of the same thing"[288] (1046a11-12) is *dynamis,* and cannot be confounded with that which changes -the fixed entity. Then, power is primarily active –power of acting- or passive –power of being acted upon and either one has to be though in relation to the other. For, power is one yet in an active or passive mode. In a passage a bit further Aristotle says that "an incapacity, or what cannot be done, is merely the lack or privation of the correspondent active capacity; so that any power in a given object related to a given process has a corresponding incapacity."[289] (1046a29-32) Lack or privation of power is as essential as the (active or passive) presence of power. Then, lack or privation is not a negation of power but essentially constitutes it.

Not only to power but being applies also to actuality. For, Aristotle says, "actuality in things is a state of being".[290] (1048a33) Power and act differ in the sense that "something may be capable of being without actually being, and capable of not being, yet be".[291] (1047a21-23)" In the antithesis indicated by this assertion, there is potentiality in one pole and actuality in the other. Yet, Aristotle does not prefer one instead of the other, as both are two modes of primary being. The actuality of movement is related to the potentiality or the power to move. In this sense, the actuality of our world cannot be reduced to acts, events, and phenomena as far as it implies power and the possibility of becoming actual according to an end. Actuality refers to action and its fulfillment. Then,

---

[288] Aristotle, *Metaphysics*, 182.

[289] Aristotle, *Metaphysics*, 182.

[290] Aristotle, *Metaphysics,* 188.

[291] Aristotle, *Metaphysics,* 185.

the end of actuality is the doing of the action, which can either results in a product (the activity of building lies in the house being built) or in the agent (living is in the actually living being). For, it would be a mistake to think that potentiality would disappear into actuality. Potentiality or rather the "effective modes of potentiality's existence"[292] cannot dissolve into actuality and this is the case of potentiality being the power not to (do or be): "whatever is potentially in being may either be or not be" (1050b12).[293] *Dynamis* is constitutively also a-dynamis. Both *dynamis* and a-dynamis refer to the same phenomenon: "…any power in a given object related to a given process has a corresponding incapacity." (1046a32-33)[294] Potentiality appears as potentiality to and potentiality not to. The relation between potentiality and actuality can be thought in terms of a suspension, that is, potentiality relates itself to actuality to the extent of its suspension: "it is *capable* of the act in not realizing it, it is sovereingly capable of its own im-potentiality."[295] By assuming that for Aristotle being applies either to potentiality or actuality and that one does not predominate over the other but there is a relation set in the mode of a suspension, we reaffirm the idea that both –potentiality and actuality- are the two faces of the same phenomenon, namely the sovereign self-founding of being.

Agamben understands that through potentiality to or not to being founds itself as a sovereign being. It is sovereign in the sense that nothing precedes or determines it except its own capacity of not to be.[296] Likewise, "an act is sovereign when it realizes itself by

---

[292] Agamben, *Homo Sacer,* 45.

[293] Aristotle, *Metaphysics*, 195.

[294] Aristotle, *Metaphysics*, 182.

[295] Agamben, *Homo Sacer*, 45.

[296] Agamben, *Homo Sacer*, 46.

simply taking away its own potentiality not to be, letting itself be, giving itself to itself".[297] We might say that Aristotle's considerations on being became paradigmatic for modern political philosophy especially for thinking the relation between constituent power and sovereignty. It is possible to associate the Aristotelian structure of potentiality and actuality to the structure of sovereignty and constituent power. To the same extent that potentiality does not pass over actuality, Agamben advocates that sovereign power does not pass over actuality and then it retains its potentiality or its constituting power in the form of a suspension. "This is why is so hard to think both a 'constitution of potentiality' entirely freed from the principle of sovereignty and a constituting power that has definitely broken the ban binding it to constituted power."[298]

The sovereign power as a constituted order keeps, in its aporetic structure, the radical impulse or passion (of the multitude)[299] that characterizes the constituent power. This does not mean that the constituent power is ontologically reducible to the constituted order losing its autonomy and freedom but instead stresses the permanent tension (Negri would rather say crisis) that is present in these two concepts showing that there is no possible *Aufhebung* between the two. There is no dialectics –in the strong Hegelian sense- between constituent power and constituted power. At a first glance, constituting potentiality seems to be there in the constituted power in the form of its own opposite with which it is identical and whose contradiction is reconciled in the idea of sovereignty that contains within itself the opposition of the other two and yet it contains their unity.

---

[297] Agamben, *Homo Sacer*, 46.

[298] Agamben, *Homo Sacer*, 47.

[299] Negri refers to Spinoza's *constituent passion of the multitude.* Negri, *Il Potere Costituente,* 374ff.

However, sovereignty does not appease or resolve the contradiction as it is supposed to do so by the fact that a rational structure cannot rest on what is self-contradictory. On the contrary, constituting potentiality remains there, recalcitrant, as a radical passion. For, we may think beyond any possible dialectical relation between constituent/constituting power and constituted power. First, by agreeing with Agamben that sovereignty is not an exclusively political concept (according to Schmitt) or an exclusively juridical concept (according to Kelsen) but it is the originary structure in which law refers to life and includes it in itself by suspending it[300]. So, it is in the form of an abandonment -in an exceptional form- that we have to consider the sovereign power and at this point not opposed to the constituent power but as both being at a point of indistinction. Second, by assuming that there is no possible synthesis between the two and that on this impossibility -to what Negri calls *vuoto di sintesi*- that we have to focus to better understand the crisis that traverses these concepts which, is indeed, constitutive of them. A third possibility, still related to the other two above, is that they are somehow incommensurable and then, cannot one be the dialectical opposite of the other.[301] Here we could think in terms of abandonment and then of a being out, yet an emptying-out of power that for this very reason remains powerful (or retains potentiality). The tension between constituent power and constituted power has to be understood as a vigorous sign towards a radically democratic public sphere.

---

[300] This is Agamben's argument.

[301] It is a common place in legal science to conceive sovereign power as opposed to constituent power in the sense that "la sovranità come *suprema potestas* è richiamata e ricostruita come fondamento. Ma è fondamento opposto al potere costituente – è un vertice laddove il potere costituente è una base; e una finalità compiuta laddove il potere costituente è senza finalità; è un tempo e uno spazio limitati e fissati, laddove il potere costituente è pluralità multidirezionale di tempi di spazi;" Negri, *Il Potere Costituente*, 27.

The rule of law and its aged constitutional structures still sustain the liberal commitment of protecting one's (our) freedom and one's (our) property against the abuses practiced by the state's power yet it fails in guaranteeing the democratic commitment to substantial equality in a pluralistic society. This impasse between liberty and equality demands to deconstruct the old constitutional structures in order to reconstruct them on a different basis, that is, on the basis of a power that is constitutively antagonic. We all know that there is no state in which one can totally exercise his or her liberty or his or her equality. The assumption of this impossibility is what makes possible to live in a pluralistic society, in which one has rights, and exercises them, "in which freedom and equality can somehow manage to coexist".[302] As Mouffe says, the tense coexistence between freedom (liberalism) and equality (democracy) has to be thought in terms of a contamination (and not of a negotiation) in the sense that once they are articulated, even in a precarious fashion, each principle changes the identity of the other.[303]

The liberal-democratic justification for the state power does not truly differentiate constituent from constituted power confining both to the limits of constitutionalism, that is, to the limits of law, formal and systematically represented by the ultimate positive law; the constitution. Hence, instead of a constituting potentiality that originally creates the law, the constituent/constituting power is rather juridically predetermined becoming nothing but a norm for making the law, for reviewing the law or still as norm that functions as a criterion for interpreting the law. For instance, in the very recent political

---

[302] Mouffe, *The Democratic Paradox*, 10.

[303] Mouffe, *The Democratic Paradox*, 10.

history of Brazil, the constituent power was established by the constituted order, that is, a national constituent assembly was called in 1988 by means of an amendment to the former Brazilian constitution of 1969 (that in fact was itself an amendment to the constitution of 1967 which was made and approved by the military dictatorship). First, it was the outcome of the established constitutional order/power –an amendment- that, second, determined the institution of a national constituent assembly whose members had already been elected for the parliament, that is, the constituent power was beforehand subjected to electoral rules. As the theory and practice of a government bound by the law, constitutionalism proposes to legally regulate the constituent power and, according to Negri, "bloccare la temporalità constitutiva. Il costituzionalismo è una dottrina giuridica che conosce solo il passato, è una referenza continua al tempo trascorso, alle potenza consolidate e alla loro inerzia, allo spirito ripiegato – di contro il potere costituente è sempre tempo forte e futuro."[304] The constituent power interrupts the cycle of time establishing a new time to which it belongs by not belonging; by being out. It is the time of action and so it is difficult to be fitted in one temporal scheme since the historical time is not circular and neither is it linear.

The crisis concerning the constitution of power is intensely connected to the justification of power. On the basis of a negotiation between justifying principles such as liberty and equality that avoids their antagonism, the liberal-democratic framework of modern state presupposes that the dilemma of/at the constitution of power is not really a dilemma, nothing that within the limits of constitutionalism we could not find an answer for. Legal theory, especially constitutional law, has assumed, then, this task of giving an

[304] Negri, *Il Potere Costituente*, 23.

answer to this crisis and somehow it has domesticated the "beast" first by reducing it to a merely legal and not political problem. This movement from the political to the juridical realm or to the realm of legal theory converts the problem of constituent power to a problem of the constitution (or constituted power).

In an even more reductionist fashion, Kelsen's positivism is exemplary when it asserts that if we understand the constitution of a community as the norm that determine how –by which processes- general legal norms must be made, then there must be a fundamental norm, the *Grundnorm*, which has been presupposed since the moment of the constituent act which, accordingly, is interpreted as a fact of producing norms. For Kelsen, the subjective sense of the constituent act must be interpreted according to its objective sense, that is, the constitution as the set of legal norms objectively valid. For the *Grundnorm* is the logical-legal criterion for constituting the law. Then, the constitution has to be logically presupposed and legally posed. For Kelsen any attempt to ground law's normativity, that is, its 'ought' aspect, on natural or social facts fails, as an ought-end demands an ought-premise. As we can see, for Kelsen's logical scheme there is no tension between constituent power and constituted power and neither the justification of power is a problem for legal science to deal with.

3.V. threshold 1: between force and enforcement

The interweaving of power (force, violence) with law, especially at the founding moment of the legal order and the difficulty it presents for legal theory is precisely what legal scholars of a dogmatic *Bildung*, -by dogmatic I mean a strict legalism- want to

avoid for the sake of stability, consistency, certainty, security etc that must apply to the law. Nevertheless, literature (Kafka, *kavka,* K.,) and philosophy are implacable. The man from the country decides to wait, however the door remained open to him all the time. What did prevent him to enter? The force or the law? What force? And what law? The big sharp nose and the long, thin, black Tartar beard (of the doorkeeper) one could suggest.

Entering to the law, acceding to it *voilà* the founding moment, which is neither legal nor illegal; a moment of suspension according to Schmitt, or of a *coup de force* or performative violence according to Derrida, which no previous law could guarantee. Here violence, force, power, and the law again entangle us –or perhaps we have never been otherwise. I recall the argument presented at the end of chapter two, precisely in the topic on authority (2.5), concerning the difficulty of translating *Gewalt,* difficulty that Joseph K. experienced when he could not understand the force under which he was being arrested and subjected to a court he never penetrated or the force that impeded the man from the country to enter to the law, despite the gate has been opened all the time. Rephrasing the question I have made in chapter two I would ask: how to distinguish violence from force, authority, power, and the law that is, from *violence* (a distinction between the violence that institutes and the violence that conserves and enforces the law)? In this chapter three, in bringing forward the problem of sovereignty and constituent power I could (dis)(re)locate the question of force or violence or power or law to these two topics whose limits, politically or legally speaking, are very tenuous. As it is tenuous and remote, for K., the difference between the Court and a single executioner. The same indifference applies to the man from the country with regard to the localization

of the force, the sharp nose, and long, thin, black Tartar beard, that made him wait and wait. For, the recognition of a zone of indistinction between violence (constituting power) and *violence* (constituted power, the law) is to where we are reconducted. At this point I hear the priest's question to K.: "'Do you know that your case is going badly?'" to what he answers, "'I have that idea myself'".[305]

Nevertheless, the fact that this difficulty cannot be eradicated does not condemn us to obscurity or paralysis but to an enduring paradoxical situation regarding the force of law, its origin, and constitution. As Fish says, "the force of the law is always and already indistinguishable from the forces it would oppose… *there is always a gun at your head.* Sometimes the gun is...a gun; sometimes it is a reason, an assertion whose weight is inseparable from some already assumed purpose; sometimes it is a desire…; sometimes it is a need you already feel; sometimes it is a name…whose power you have already internalized. Whatever it is, it will always be a form of coercion, of an imperative whose source is an interest which speaks to the interest in you. And this leads me to a second aphorism: not only there is always a gun at your head; *the gun at your head is your head.*"[306] Ultimately, the foundation of law is by definition unfounded and there is no bad news on this."[307] Following Derrida, this structure in which law is essentially deconstructible "whether because it is founded, constructed on interpretable and transformable textual strata (and that is the history of law (*droit*), its possible and

---

[305] Kafka, *The Trial,* 210.

[306] Stanley Fish, *Doing What Comes Naturally. Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham and London: Duke University Press, 1989), 520.

[307] Derrida, "Force of Law: the Mystical Foundation of Authority," 945.

necessary transformation, sometimes amelioration)"[308] or because it exceeds the opposition between founded and unfounded (this is Derrida's 'mystical' limit of violence, authority, power, and law) is what makes deconstruction possible. And it is this very possibility (of law, of deconstruction and of deconstructing the law) that incites us to weave a more intricate web whose ethical and political knots entangle us in the question of justice and democracy, which, I will discuss in the last chapter of this work

The difficulties and controversies regarding the constitution and the force of law have driven, directly or obliquely, the course of this dissertation (and Kafka's narrative). These difficulties and controversies contrary to what one could imagine are possibilities for a deconstructionist approach of law that provokes or invokes our responsibility "without limits, and so necessarily excessive, incalculable, before memory; and so the task of recalling the history, the origin and subsequent direction…of concepts of justice, the law and law…". [309] As Derrida nicely says, the task is not merely philologico-etymological or historical, but ethico-politico-juridical. In the face of our responsibility, despite the countless doors and their guards, we might enter by any door whatsoever "and no entrance is more privileged even if it seems an impasse, a tight passage, a siphon."[310] The impasse, the tight passage, or the siphon in no way lessens responsibility. The multiple entrances to the law does not prevent its exercise or rather its application (response). Once law must be applied and legal disputes adjudicated, legal interpretation is at stake. For this purpose, Kelsen's positivism and his self-declared pure theory of law

---

[308] Derrida, "Force of Law: the Mystical Foundation of Authority," 945.

[309] Derrida, "Force of Law: the Mystical Foundation of Authority," 953.

[310] Deleuze and Guattari, *Kafka: Toward a Minor Literature,* 03.

is unsatisfactory for it understands law as a closed, self- referring system in which cases are decided logically by applying the correct rule to the fact. In the case of controversial interpretations law as a system of norms is the frame within which any interpretation must be fitted. Kelsen's absolute assumption is that legal adjudication has nothing to do with politics or the possibility of justice; it is just a matter of formal imperatives. So, interpretation at law and the decision it engenders have to be free from any ideological consideration or value judgment. On the other hand, Schmitt's decisionism and Derrida's deconstruction and its *contamination* in legal philosophy never intended to be a theory for legal adjudication but an alert of its crisis and difficulties. Both are excellent criticisms of legal liberalism and legal formalism.

A theory of law that acknowledges the controversial character of legal interpretation and the role of politics and morality in adjudication is Ronald Dworkin's. His legal theory is particularly interesting for it stresses the importance of literary narrative at law and mainly for deciding hard cases at law. Dworkin's legal theory is also a strong criticism of legal positivism, above all Hart's. In the following chapter, I intend to discuss Dworkin's theory of law, specially his idea of a 'chain of law' insofar as it highlights the relation between philosophy, law, and literature. My claim is that Dworkin's theory of adjudication goes further than avoiding the deficits of legal positivism, legal realism, and legal hermeneutics by establishing a hermeneutico-critical paradigm in the realm of jurisprudence. From a methodological viewpoint, Dworkin's philosophy of law – in a step well beyond Hart's – highlights the hermeneutic character of legal theory and its interpretative attitude, mainly to oppose the descriptive aspect of legal positivism. For Dworkin law is an interpretative enterprise and what law is depends

on coherent, consistent and just interpretations. Following what he calls a constructive model of interpretation, Dworkin sees law as the best justification of legal practices as a whole. This consists most basically in the narrative history that most improve these practices. This idea will be central for the argument the forth chapter. Tintorelli, the painter in the *trial,* says to K.: "we must distinguish between two things: what is written in the Law, and what I have discovered through personal experience; you must not confuse the two. In the code of the Law, which admittedly I have not read, it is of course laid down on the one hand that the innocent shall be acquitted, but it is not stated on the other hand that the Judges are open to influence. Now, my experience is diametrically opposed to that. I have not met one case of definite acquittal, and I have met many cases of influential intervention." [311] Tintorelli knows that law is a structure of coercion organized according to a system of norms and, no matter the objectivity of the law's command, at the moment the judge enforces the law he/she attributes meaning to that command. To apply or enforce the law is, then, to ascribe meaning to that force whose constitution we dealt in the preceding chapters of this work. Therefore, the next chapter is on this act of enforcing or applying the law, which displace us (this text) from before to within the law.

[311] Kafka, *The Trial*, 153.

Chapter 4

From before to within the law

"Within the law all is accusation, advocacy, and verdict;"[312]

Kafka's *Vor dem Gesetz* can be read as a story of the inaccessibility of/to the law, no matter its multiple entrances, being this inaccessibility the very possibility to accede to the law. The assumption of this aporia leads to what is at the very constitution of law (and literature). Nevertheless, this difficulty experienced by the man from the country, K., or us does not prevent law's enforcement: law must be applied and legal disputes adjudicated. There is no way to escape from this responsibility. To take the responsibility in enforcing and applying the law means to decide. This legal decision is articulated from the ongoing tension between the need to conform it to precedents and existing legal norms (written constitution, legislative statutes, administrative decrees, municipal ordinances and so forth) and the demand for a just decision. It is important to bear in

[312] Franz Kafka, "Advocates," *Complete Stories* (New York: Schocken Books, 1971), 450.

mind that this decision is (and must be) public and necessarily made by public officials who exercise the adjudication: judges (in black robes).

The situation of being before the law can be that of an outlaw that, externally or marginally, observes the law but on whom depends law's own foundation. At the moment the one who is before the law acts to found it, the situation is of indifference between inclusion and exclusion. But, from the situation of an established law/order whose sense is given by its enforceability, the perspective is that of a participant; it is an internal perspective. A theory of adjudication such as Dworkin's assumes the internal perspective of the participant on law, principally the perspective of judges. In a (re)constructive manner law is, then, conceived as a social phenomenon whose practice is interpretative. Accordingly, legal theory instead of being a discipline concerned with the analysis of legal concepts is, rather, interpretative of the practice of law. Legal disputes are interpretative disputes and to take the responsibility in the face of these disputes is to decide about the meaning of the practice of the law as whole. Therefore, the purpose of this chapter is to discuss Dworkin's legal philosophy as a possibility, which challenges the tradition of legal positivism, is in dialogue with legal realism and CLS, and offers an interesting alternative for rethinking legal theory from the site of the participant, of who belongs to the law: either who enforces the law or is subjected to it. Dworkin's understanding of law as an exercise in constructive interpretation implies the idea of narrative through which legal meaning is developed, elaborated, and improved over time.

Legal realism and CLS are, according to Dworkin, as unable as the positivistic approach to give a satisfactory answer to the recurring questions posed by complex societies with regard to law, politics, morality, and ethics. Dworkin claims that law's

political and ethical commitments cannot be avoided, thus interpretative disputes at law are naturally controversial. In the words of Rosenfeld and Arato "(i)n the face of widely diverging conceptions of the good and significant disagreements over fundamental values, the relationship between law and ethics as well as that between law and politics becomes increasingly problematic."[313] So, in the face of the conflictual and increasingly problematic structure of contemporary societies, especially and assumedly the North American society, Dworkin constructs a conception of law in which the aesthetic experience is fundamental to establish a new rationality in/for legal argumentation. Focusing on what he calls the *chain of law* he develops a theory of adjudication stressing the necessary link between philosophy, law, and literature yet from within the law, that is, from the perspective of who is included or the participant.

The first section of this chapter is on some issues concerning legal positivism, legal realism, and CLS. As I said before, Dworkin's *chain of law* challenges the tradition of legal positivism and somehow is in dialogue with legal realism and critical legal studies. So, any attempt to understand it requires a step back on these *languages* or narratives.

4.I. tradition (legal positivism)

One way of understanding law is through the analysis of its language or, putting in more Peircean terms, through the analysis of its "hard words and abstract concepts." I assume that the understanding of law cannot be dissociated from the language that

[313] Michel Rosenfeld and Andrew Arato, *Habermas on Law and Democracy: Critical Exchanges* (Berkley, Los Angeles, London: University of California Press, 1998), 02.

enunciates it. When we turn our attention to legal philosophy, we see that an attempt to understand law through the (semio)logical analysis of its language has been carried out by legal positivism. The latter aims at finding the philosophical basis for a 'proper' legal science (language) as well as to build a general theory of law.

Bentham, Austin, and Hart on the one hand and Kelsen on the other, are some proper (or improper) representatives of legal positivism. We may completely disagree with them, but we cannot deny that legal positivism has played a major role in the theoretical inquiry into the nature of law: in both the Anglo-American and the Continental (Roman-Germanic) legal system, the positivist paradigm has dominated the account of what law is. Then, it is possible to identify some common places in the theories (narratives) of these thinkers, which allow us to identify them as positivists. The separation of law and morality – or, rather, the distinction between moral and legal obligation, the law as it is and the law as it ought to be –, the identity between law and legal norm/rule, the descriptive-neutral account of law, and in the case of Kelsen the need of science of law to neutrally describe its object, these are some of the characteristics shared by positivist legal theorists.

Legal positivism in general presupposes the notion of norm/rule as the founding (and nuclear) element of the legal system. It rejects any thesis that aims to justify law by morality or attributes validity to law on a moral basis. Rather, positivism presupposes that the ultimate basis of legal validity must be sought in the legal system – in the system of rules/norms – and not out of it. Therefore, legal positivism, especially in the Roman-Germanic (Continental) legal system, reduces the analysis of law to an analysis of legal norms/rules. Its Anglo-American version does the same thing in a less strict way. Taking

Kelsen and Hart as the best representatives of these two branches of legal positivism, one can observe that both are principally concerned with the normative aspect of legal phenomenon and the construction of a system of norms/rules.

4.I.I. Hart and Kelsen: different traditions of legal positivism

> "Quando a si própria se designa como 'pura' teoria do Direito, isto significa que ela se propõe garantir um conhecimento apenas dirigido ao Direito e excluir deste conhecimento tudo quanto não pertença ao seu objecto, tudo quanto não se possa, rigorosamente determinar como Direito. Quer isto dizer que ela pretende libertar a ciência jurídica de todos os elementos que lhe são estranhos. Esse é o seu princípio metodológico fundamental."[314]

> "... (M)ost of the features of law which have proved most perplexing and have both provoked and eluded the search for definition can best be rendered clear, if these two types of rule (primary and secondary rule) and the interplay between them are understood. We accord this union of elements a central place because of their explanatory power in elucidating the concepts that constitute the framework of legal thought."[315]

Kelsen recognizes that there is in fact a relation between law and morality, but he rejects the thesis that this relation *must* exist. With regard to this question, Hart could in turn be considered, a soft positivist. As Dworkin says: "Hart is a moral philosopher; he has an instinct for issues of principle, and a marvelous lucidity in setting them out. In his ... *The Concept of Law*, for example, he raised the issue of whether judges follow rules in a way that made plain the connection between this problem and the moral issue of when it is proper for one man to charge another with an obligation."[316] Nevertheless, Hart rejects those theses that affirm that the rule's criterion of validity must include a reference

---

[314] Kelsen, *Teoria Pura do Direito*, 17.

[315] Hart, *The Concept of Law,* 79.

[316] Dworkin, *Taking Rights Seriously,* 07.

to morality. His concept of law is sustained by the idea of the rule/obligation as the central element of the legal phenomenon.

Taking into account the positivist assertion that legal propositions are true if and only if they describe correctly the content of legal norms/rules – i.e., legal propositions are propositions about norms/rules – we could address a unified criticism to Kelsen, Hart, and even John Austin.[317] Positivists believe that legal propositions are wholly descriptive. A proposition of law will be true if and only if some event of a kind designated as lawmaking has taken place. Yet, a generalization concerning legal positivism would be misleading as well as unhelpful to understand it and accordingly to criticize it. An all-embracing definition concerning legal positivism weakens one's (our) understanding of it as well as one's (our) criticism. So, to take legal positivism seriously we have to look at the peculiarities that characterize, for instance, on the one hand Kelsen's theory of law and on the other hand Hart's as two representatives of different legal traditions. This looking at peculiarities, in the case of Hart's positivism, sheds light on the pragmatic/pragmaticism agreements of his theory of law while in the case of Kelsen's positivism sheds light on its syntactic and semantic agreements.

For Hart, it is not possible to have a strictly descriptive analysis of law founded on the idea that law is nothing but behaviors based on rules. It is necessary to understand law as an institutional fact, which can be grasped only in social practices developed by the members of a social group, or, in other words, in the norms/rules[318] in the context of their

---

[317]Austin represents the nineteenth century Anglo-American positivism while Hart is the most important representative of this tradition in this century and Kelsen, on the other hand, the most important positivist in the tradition of Roman-Germanic Law.

[318] Hart speaks about rules instead of norms. Nevertheless, I sometimes refer to them by the general term norm.

use in a given community. Legal norms taken as signs, i.e., as language, function as a medium in a communicative situation. Hence, Hart not only analyzes how we, who engage in law, happen to think about law and then reflect, use, and endorse the linguistic practices of law; he asserts that this way of thinking about law is a 'good' one.

Hart's account displaces the logical analysis of law from syntactics and semantics to pragmatics by calling attention to the (semio)logical structure of norms that integrate the legal system. This displacement underlines the context in which the process of communication occurs, that is, the context in which legal norms are applied. This account – which implies the mediation through the language of legal norms – also stresses the role of the interpreter, that is, those to whom norms are addressed. Our understanding of law is therefore driven in an interpretative or hermeneutic direction and, accordingly, is always fallible and open to revision.

For Hart, the fact of having certain rules in a given social group means that its members perform certain acts; this accentuates what he calls the 'external aspect' of rules. But rules have also an internal aspect, which has to do with the shared, critical, reflective attitude of members of the group with regard to the conduct prescribed by rules. This internal aspect is manifested in language when it is said that one 'must or ought to' such and such. He illustrates this with the example of chess: "Chess players do not merely have similar habits of moving the Queen in the same way which an external observer, who knew nothing about their attitude to the moves which they make, could record. In addition, they have a reflective critical attitude to this pattern of behavior: they regard it as a standard for all who play the game. Each not only moves the Queen in a certain way but 'has views' about the property of all moving the Queen in that way.

These views are manifested in criticism of others and demand for conformity … upon others … and in the acknowledgement of the legitimacy of such criticism and demands…. For the expression of such criticisms, demands, and acknowledgements a wide range of 'normative language' is used. 'I (you) ought not to have moved the Queen like that,' 'I (you) must do that,' 'That is right,' 'That is wrong.'"[319] For Hart, to have a proper understanding of law means precisely to understand the obligatory content of its norms. Thus, the idea of obligation is at the core of Hart's legal theory and of his "concept of law." However, instead of having a *concept* of obligation, Hart is concerned with the term in its context of use.

In fact, Hart was the first legal philosopher to introduce what could be called a pragmatic-hermeneutic paradigm to understand law and legal theory. This is a considerable advance, since it displaces the axis of legal analysis from a kind of knowledge concerned with the syntactic and semantic aspects of legal language (legal norms) to a one concerned with its pragmatic aspects. While the first two – syntactic and semantic – dimensions do not entail the existence of the interpreter, the pragmatic dimension does. With this move, Hart privileges the uses and functions of language by the participants or interpreters of a social group. It can be said that Hart understands legal science as overcoming the two-dimensional (syntactic-semantic) approach by means of a superior three-dimensional (pragmatic) approach.

Contrary to Kelsen, Hart does not make a pure descriptive analysis of law. His hermeneutic-pragmatic approach stresses the institutional aspect of legal practice in order to understand what law is. In conceiving the problem of legal obligation as a social fact

---

[319] Hart, *The Concept of Law*, 55-56.

related to the practices of members of a social group, Hart asserts that it is insufficient to analyze law based on the assumption that it is nothing but behaviors governed by rules. Nor it is sufficient to see law as an anticipation of what courts will say it is. Rather, we must understand law by taking into account the internal view of the participant in the legal system. This is possible by elucidating how the members of a given community act in the system and how they accept that what it is prescribed to them. Recalling the idea of the internal aspect of a rule, 'having an obligation' is different from 'being obliged to.' In the first case, one who acts sees his and others' conduct from an internal point of view. Stressing the internal aspect of the rules and the role of the participant in the legal system (the one who asserts "I have an obligation"), it is possible to affirm that, contrary to Kelsen, Hart understands the legal system as an open (and fallible) system.

So far we can see that obligations lead to rules, which have to be understood in the context of the community in which they are applied, that is, in the context of communication. For this purpose, Hart stresses the role of the member of the community (participant or interpreter) in the legal system. Contrary to Austin, he does not limit himself to seeing law as a mere repetition of habits, behaviors, or commands based on a threat, and thus taking it from a wholly observational point of view.[320] To understand the internal aspect and how the members of the community act, we have to take into account both the role of morality or any other system of belief and also the role of language.

As we know, language is naturally limited. For this reason, the meaning of legal utterances may be problematic; they are sometimes uncertain. "Cannons of 'interpretation' cannot eliminate, though they can diminish, these uncertainties; for these

[320] For Austin, the legal rules of a community are the general commands its sovereign deployed.

cannons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation."[321] Hart is aware of the problem of indeterminate sense in language, which generates vagueness and ambiguity in the meaning of expressions and thus menaces communication. "Whichever device, precedent or legislation, is chosen for the communication of standards of behavior, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have … an *open texture*."[322]

This impossibility of perfectly precise communication underlines Hart's idea that the meaning of an expression can only be obtained from its use in a given context. When a legal norm is problematic in this way, when it has an open texture, Hart recognizes that its meaning has to be filled in by the interpreter. In other words, when the content of norms is not sufficiently explicit, it is up to the interpreter – especially the judge/courts – to determine their meaning. Hart says that "(t)he open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts of officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case."[323] It is important to see that Hart expressly admits that in such cases of indeterminacy, the court must act according to its discretion, what means that the content of the norm will imply the judge's moral and political convictions.

Besides this problem of vagueness and ambiguity of the meaning of legal norms, in some cases there are no corresponding legal norms and the judge has to "make" the

---

[321] Hart, *The Concept of Law*, 123.

[322] Hart, *The Concept of Law*, 124.

[323] Hart, *The Concept of Law*, 132.

law acting as a judicial lawmaker. At this point, we must step back to some general considerations of Hart's understanding of law. For him, law, as an instrument of social control, executes its functions by establishing rules and general standards of conduct. This possibility of communicating general standards of conduct to people leads to action. This would not be the case if the addressees of legal norms could not understand their content and hence could not govern their behavior according to them.

General standards of conduct or behavior are communicated through legislation and precedents, especially in the common law tradition. However, we can see that even through legislation or precedent, norms of behavior are not communicated in an absolutely clear and secure way. In addition, Hart understands that it is necessary to assume the impossibility of foreseeing all the situations that can arise in everyday life and how the law will govern them. Sometimes there is no norm on which the judge can rely. For Hart, the solution for such unregulated cases – or, as Dworkin calls them, 'hard cases' – is the exercise of discretion by the judges who "make" the law.

In contrast, for Kelsen there are no meaningless norms in the legal system; there is no 'open texture.' A vague or an ambiguous norm cannot belong to the legal system, since the fact of belonging to the system is enough to guarantee the meaningfulness and validity of a given norm. According to Kelsen, what gives validity to norms and allows them to belong to the system is a superior norm, a 'basic norm'. Logically speaking, Kelsen's basic norm is presupposed. It is a fiction, a cognitive device used when one is unable to attain one's cognitive goal with the material at hand, says Kelsen. However, he identifies it with the historically prior Constitution of a given society. To avoid a regress *ad infinitum*, Kelsen assigns the validity of the Constitution to the presupposed basic

norm that empowered the assembly to make the Constitution. What Kelsen calls 'basic norm' is comparable to Hart's 'rule of recognition.' For Hart, however, this stands for a complex of social practices and must be accepted by the legal officials – judges – from an internal point of view. Nevertheless, both Hart and Kelsen conceive of the legal system as depending on a basic rule.

Hart distinguishes two kinds of rules: primary and secondary. The union between them defines Hart's concept of law: "most of the features of law which have proved most perplexing and have both provoked and eluded the search for definition can best be rendered clear, if these two types of rule and the interplay between them are understood".[324] Primary rules are those that grant rights or impose obligations upon members of a community. Secondary rules are those that stipulate how and by whom such primary rules may be conclusively ascertained, introduced, modified, or eliminated. Hart's *basic* rule, the 'rule of recognition,' is a secondary rule that stipulates how rules may be ascertained as belonging to the system. For him, the rule of recognition is, then, the ultimate and supreme rule of the system because it provides the criteria by which the validity of other rules is assessed. The rule of recognition unlike other rules of the system is not valid or invalid but "exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact".[325] The rule of recognition can be regarded from two perspectives: "one is expressed in the external statement of fact that the rule exists in

[324] Hart, *The Concept of Law,* 79.

[325] Hart, *The Concept of Law,* 107.

the actual practice of the system; the other is expressed in the internal statements of validity made by those who use it in identifying law".[326]

Thus, the legal system depends on a set of special rules, which "can be identified and distinguished by specific criteria, by tests having to do not with their content but with their pedigree or the manner in which they are adopted or developed. These tests of pedigree can be used to distinguish valid legal rules from spurious legal rules … and also from other sorts of social rules..." [327] For Hart, what counts is the acceptance of this fundamental rule by the community. "So propositions of law are true not just in virtue of the commands of people which are habitually obeyed, but more fundamentally in virtue of social conventions that represent the community's acceptance of a scheme or rules empowering such people or groups to create the law." [328]

As we can see, Hart highlights the importance of the pragmatic aspect of legal language, that is, he is interested in the function and use of language as a mode of signifying law while Kelsen is concerned with the syntactic and semantic aspects of legal language. From this perspective, Kelsen's positivism seems more austere than Hart's, although Hart does not give up on the idea of a descriptive account of law. But in the case of Hart's legal theory, how can these two theoretical projects – a more flexible positivism *and* a descriptive concept of law – be reconciled? Despite Hart's concept of law as the union between primary and secondary rules, a rule does not limit itself to its observation by the members of a community (the external aspect), but also depends on how

---

[326] Hart, *The Concept of Law,* 108.

[327] Dworkin, *Taking Rights Seriously,* 17.

[328] Dworkin, *Law's Empire***,** 34.

participants/interpreters understand it. This understanding demands what Hart calls 'reflective critical' (that is to say, hermeneutic) attitude. MacCormick suggests that these adjectives represent two features of Hart's internal point of view: one is "cognitive awareness of a standard of conduct – hence, 'reflective'. The other is 'volitional' – hence critical."[329]

Indeed, Hart recognizes a duality of plans regarding law: a theoretical and a practical plan. The first plan provides a description of what law is without demanding a commitment to its statements. According to the second plan, the legal system depends on the participant/interpreter knowing and accepting it as such – especially the officials of the system. According to Stephen Guest: "Hart clearly offers more than a descriptive account of the law. He has not just analyzed how we who are engaged in the law happen to think now about law (and therefore reflect, use and endorse the linguistic practices of law) but also goes on to say that he proposes that way of thinking about law as a *good*, meaning a *moral*, thing. If this is right then the light he throws on law is more strongly value-laden – judgmental – than he says it is in his … *Postscript*. For what he must be offering are moral views which *justify* his according moral priority over other possible conceptions of law and *these justifications must be moral ones*…. He achieves it first, by openly investing his central set of elements constituting law in terms with characteristics showing the moral superiority of a society which has adopted a set of rules which allow for progress (rules conferring public and private powers), for efficient handling of

[329] Neil McCormick, *An institutional Theory of Law* (Dordrecht, Boston, Lancaster, Tokyo: D. Reidel Publishing Company, 1986), 131-32. See also J. W. Harris*, Legal philosophies* (London: Butterworths, 1997), 120.

disputes (rules conferring powers of adjudication) and rules that create the possibility of publicly ascertainable – certain – criteria of what is to count as law."[330]

Kelsen in his *The Pure Theory of Law* (*Reine Rechtslehre*) is concerned to build a normative system and to know the law (as a normative system) by means of a theory, which does not commit itself to its (the law) normativity. Kelsen assumes that the law as the subject matter of legal science is not neutral or pure yet the science and thus the theory that talks about it has to be neutral or pure. For Kelsen legal statements issued by legal science are different from the norms that constitute the legal system. The scientific task is to describe legal norms whose content is the human behavior and such norms must be observed and enforced. For it is through legal propositions that legal science describe the norms and the relation they constitute. These legal propositions or statements by means of which legal science talks about the law do not confuse themselves with norms created by the law-making authorities, which are commands, imperatives, permissions, or still attributions of power. Law (as a system of norms) prescribes, permits, and ascribes power while legal science explains the law. To this latter is given to externally know the law and to describe it. But in order to be known and described law must be produced by legal authorities who, accordingly, have to know it. Legal authorities, like judges and legislators, in their activity of internally knowing the law have a cognitive attitude, which for Kelsen means that they do not commit themselves to the law's normativity.

In Kelsen's theory the *Grundnorm* (basic norm)[331] plays a very important epistemological role. It is through it that the formal and necessary conditions of legal

---

[330] Stephen Guest, "Two Strands in Hart's Concept of Law," ed. Stephen Guest, *Positivism Today* (Dartmouth: Aldershot, England, 1996), 30.

reasoning are fixed. Then, Kelsen's basic norm has the epistemological function of defining the object of legal science and, at the same time, it logically serves as a criterion of meaning for the other rules in the system. If a norm, for instance a statute, does not respect this basic norm, it will not join the system of norms, which is exhaustive of the law. For a legal norm to be valid, it must be a member of the system. Its validity therefore depends on its conformity to the basic norm (*Grundnorm*). As I have already said before, for Kelsen a norm is valid if a superior norm, like the basic norm, says it is and once valid, a norm ought to be obeyed. Validity not only denotes membership to the system; it also denotes bindingness.

From a (semio)logical point of view we could distinguish two levels of language in Kelsen's *pure theory of law*: the level of legal science and the level of law. Legal science is the language that speaks about law; it is a meta-language and as I have said before its function is basically to describe the law. Since, for Kelsen, law is nothing but a system of norms, he believes that the function of legal science is to describe such norms. For this, legal science formulates propositions about norms that are true or false, while norms, in their turn, are valid or invalid. Because validity is the specific ideal existence of a norm, an invalid norm is, according to Kelsen, a null and nonexistent norm. In short, Kelsen's theory stands for a descriptive meta-language (the system of legal propositions articulated by legal science) of a prescriptive language (the law) assuming that it is possible 'to describe' the normativity from an external or observational point of view.

The idea of description leads us to an idea of neutrality. Kelsen really aims for and believes in a neutral legal science. To the legal scientist is given to know, that is, to

---

[331] Kelsen's basic norm is discussed in the second chapter of this dissertation, particularly in section 2.6 on law.

understand, and describe the object of his/her knowledge (the law) without valuing it. This cognitive attitude of the legal scientist is somehow repeated by the judge at the moment he applies the law yet with a peculiarity usually not mentioned by the critics of positivism.

A common criticism addressed to Kelsen's pure theory of law is the purely cognitive attitude of who applies the law. It would be the case of a judge deciding a lawsuit –just like a legal scientist when he addresses his/her object of study in order to know it- by first analyzing the syntactical coherence of the language of the norm, then its semantic coherence -if the case is well described by the language of the norm- to finally apply the norm. The law is interpreted in its plain meaning. For instance, the judge above in deciding a case could never take into account the social context in which the action occurred. For Kelsen, in a lawsuit it does not make any sense to take into consideration that the person of whom one is speaking and the agent on whom the action depends has a history. One's personal desires or conception of justice are not taken into account for the judge in enforcing the law.

It seems that for Kelsen the meaning of a legal statement is fixed and all hermeneutic difficulties were discussed and solved in the process of legislative enactment. Thus, the judge has to be concerned with the objectivity of the law's command putting aside any subjective moral consideration such as the justice or injustice of his decision. Despite wearing a black robe, that is, being an officer of the system, the judge acts as an external observer whose task is merely explanatory and paradoxically not judgmental. In other words, for Kelsen the judge's responsibility (his answer or decision) in enforcing and applying the law is formally an attitude of an insider to the system but

substantially he acts as an outsider, that is, as someone who knows the law and from this cognitive standpoint applies it. The judge's sense of belonging (or being bound) to the system of law is formal yet not substantial so that for Kelsen it is possible an anarchist to be a judge: he knows the law and he enforces it without committing him/herself to the values taken up by its system. Then, in certain sense or in the sense that really matters, substantially speaking, a Kelsenian judge applies the law as if he was before and not within it.

However, in the very end of the pure theory of law[332] Kelsen affirms (and it could there be here an answer to his critics) that the act of deciding is not purely cognitive but volition takes parts in it. In this sense he distinguishes two kinds of interpretation in law: one that is done by who or what[333] enforces the law and the other which is either done by whoever must obey the law, for he or she need to understand the meaning of its norms, or by the legal science when it describes the positive law. Both interpretation assign meaning to the norms to be applied. However Kelsen argues that there is an indetermination in the act of enforcing the law due to the fact that a superior norm, like the constitution, not always completely determines the law-making process of other norms or yet the content of a norm. Therefore, all legal act in which law is applied, either an act of legal creation or implementation of a norm is partially determined by the law and partially not. For Kelsen the more general norm presupposes that the individual norm that results of its application (the sentence) continues the process of determination. Indetermination is also due to the plurality of meanings of a word or of words in a

---

[332] Kelsen, *Teoria Pura do Direito*, 463ff.

[333] For Kelsen this 'who' is actually a 'what'. He always refers to the institution of the judiciary than to the person of the judge.

sentence. For this very reason he understands that there must be a frame to surround all possibilities of application so that every act that is enclosed by/in this frame can be considered as according to the law. The frame is given by legal norms but its fixation is the outcome of interpretation. For Kelsen says "(s)e por interpretação se entende a fixação por via cognoscitiva do sentido do objeto a interpretar, o resultado de uma interpretação jurídica somente pode ser a fixação da moldura que representa o direito a interpetar."[334]

Interpreting a norm does not necessarily provide a unique right answer (Kelsen literally says it) but opens to a variety of possible answers framed by the norm to be applied. "To say that a judicial sentence is founded on the law means that it is comprised by a frame represented by the law, that it is one of the possibilities given by the frame."[335] So, for Kelsen the interpretative act of the judge is not merely cognitive but it implies volition. The one who applies the law chooses one of the possible answers revealed by the cognitive act. This act of willing distinguishes the interpretation done by the court, which Kelsen calls authentic interpretation, from the interpretation done by legal science. An authentic interpretation of a particular case produces a decision that creates the law in the form of an individual norm.

The attitude of the interpreter -a judge or judges- combines cognition and volition but this latter means a minimum of discretion as it is a choice within the limits of the frame given by the law (norm). In my view, this minimum of discretion does not alter the

---

[334] Kelsen, *Teoria Pura do Direito*, 467.

[335] Kelsen, *Teoria Pura do Direito,* 466. "Dizer que uma sentença jurídica é fundada na lei significa que ela está contida dentro de uma moldura que a lei representa, ela é uma das possibildiades dadas pela moldura."

sense of belonging to the system of the interpreter, which is destituted of a substantive choice.

In the case of Hart it is different and this difference is that which makes the difference between these two legal positivists. We could say that both, Kelsen and Hart understand that the point of view of who belongs to the system of law, specially the judge, is internal in a formal sense. From this perspective they both do not give up on the absolute need of having a descriptive account of what law is. It means that the judge knows that his power to enforce the law is asserted by a norm whose validity is assessed by an ultimate norm: the rule of recognition for Hart and the *Grundnorm* for Kelsen. Nevertheless, the difference (that makes the difference) begins to appear here in the reference to the ultimate norm whose own validity can be demonstrated in the case of the rule of recognition while in the case of the *Grundnorm* is presupposed or hypothetic. "The rule of recognition of a legal system is seldom formulated"[336] and then, it is validity is given by its use by judges or others: it denotes a social practice. Those who use it in order to identify other rules in the system of law do it from an internal point of view. It means that they accept it as a guiding rule. This acceptance of a criterion for recognizing rules as well as of the rules themselves identified by this criterion reveals the commitment of who interprets and enforces the law to its system. It means that at the very first moment a judge applies the law he/she has a cognitive attitude –he/she identifies what is to count as law in his/her court- but to this cognitive attitude it immediately follows a volitional one which means that he/she accepts it, that is, he/she

[336] Hart, *The Concept of Law*, 99.

consciously commits him/herself to the political principles inherent to the constituted order of the community in question.

According to Hart, for a legal system to be enforced it is necessary that one behaves in conformity with its laws. It is also necessary that the judges accept these laws what requires judges' acceptance and endorsement of the rule(s) of recognition of the system "as customary rules practiced by the judges which provide criteria or sources by reference to which the judges identify the laws which they are to apply as judges deciding cases."[337] In other words, there is a common understanding that judges have a duty to decide disputes at law according to certain rules. For Hart there are two minimum conditions for the existence of a legal system: on the one hand, there must be rules of behavior that must be obeyed and, on the other hand these rules of behavior must be in conformity to the system's ultimate criteria of validity (rule of recognition) which along with the rules of change and adjudication complete the system. Officials of legal system, especially judges, must accept secondary rules such as rules of recognition, change, and adjudication as common public standards of official behaviors.[338]

If for Kelsen the interpretative act of the judge is not merely cognitive but also volitional for Hart could not be otherwise: the attitude of one who takes an internal point of view in the system of law is both cognitive and volitional yet in an different way. At this point I agree with MacCormick's reading of Hart, according to which the attitude of an insider to the system is cognitive as far as it implies a capacity to conceive of patterns of conduct given by the law and it is volitional as far as it implies some firm commitment

---

[337] H.L.A. Hart, *Essays on Bentham* (Oxford: Clarendon Press, 1982), 155-56.

[338] Hart, *The Concept of Law,* 113.

of the will, "in favor of conformity to acting in the conceived way whenever the relevant circumstances are realized."[339] It follows from this, though Hart himself would not agree with it and, in a different fashion from MacCormick's reading, that the firm commitments of the will to accept a determined rule and to act in the way it determines binds the participant, especially the judge, to the political principles inherent to the constituted order of the community. He can never act as an external observer to the system. As Dworkin puts it, Hart is a moral philosopher as he has an instinct for issues of principle.

Thus, although Hart is a representative of legal positivism, his philosophy approaches law with an openness that disrupts the "security" of positivism. This openness comes into view when -as I said before- Hart oblige us to look to the 'open texture' of legal norms as well as to the (semio)logical form of legal norms. For this reason, Hart's legal theory, specifically his *The Concept of Law*, can be read from a perspective that accentuates the pragmatic-hermeneutic basis of his understanding of law, which leads us to understand legal norms in terms of the pragmatic dimension of their language. As a matter of fact Hart himself leads us to have non-positivist reading of his legal positivism.

To affirm the open texture of law, the insufficiency of its language reveals it as institutional praxis as well as a medium to deal with social conflicts rather than as a medium to negate them. A committed legal discourse has to recognize, deal with, and offer possible just answers to the conflictual and complex structure of actual societies. These answers must be articulated in a legal philosophy that transcends dichotomies, that insists on criticism – a philosophy of the unrest.

---

[339] MacCormick, *An Institutional Theory of Law*, 131-32.

Hart, his followers and critics provide new breath in Anglo-American legal philosophy for (re)thinking legal theory. This is especially because of Hart's view of the linguistic foundation of law. As Stanley Fish puts it, "the safeguard that law erects in order to repel the depredations of force are made of language…a kind of language…that is capable of making what Hart calls an 'authoritative mark.'"[340] One manifestation of this new breath in legal philosophy is Ronald Dworkin, for whom language is also a central concern, although he sees it from a different perspective. Despite being a critic of Hart (whose Chair of Jurisprudence in Oxford Dworkin has occupied) and of positivism generally, Dworkin has profited from Hart's hermeneutic approach of law.

Dworkin vindicates an interdisciplinary approach to law and stresses law's understanding since a critical and hermeneutic framework. The outcome of such approach is a wholly new understanding of what law is. I take Dworkin's conception of law as part of a discourse in which the aesthetic experience is fundamental to establish a new kind of rationality in the legal sphere. This again raises the question of the relation between law and literature. Before I discuss Dworkin's legal theory, focusing on what he calls "the chain of law" I will make some considerations on legal realism and CLS.

4.II. contradiction (legal realism and CLS)

For legal realists, generally speaking, law is much more than a system of norms; it must take into account all sorts of elements that are available in a pluralist society. External factors play a crucial role in judicial decision-making. Extralegal background

[340] Fish, *Doing What Comes Naturally*, 507.

issues come into play and require an empirical approach. The judge's decision is built on sociological, psychological, ideological, and political grounds. There is therefore almost no boundary between law and politics. Theoretical disagreement in law is 'disguised politics'. The practice of decision-making becomes a matter of personal taste, conviction, or belief. If we can blame positivism for being excessively formal, legal realism can be blamed for its lack of formality. The idea of legal certainty and consistent decisions is totally absent here.

Both American and Scandinavian legal realism are very critical of legal positivism for they became targets of legal positivists. To center the analysis of law on the concept of norm/rule does not only diminish the very idea of law as a social phenomenon but as Supreme Court Justice Oliver Wendell Holmes Jr[341] once said: "the life of the law has not been logic, it has been experience." This is the basis of his legal philosophy as he claimed that the court should pay attention to the facts in a changing society, instead of sticking to useless formulas. Law should continually be reviewed to the extent of social changes so that its development would go along with the society it serves. There no single set of beliefs shared by all legal realists, yet many of them had some points in common such as the belief in the indeterminacy of law; that the law in the books did not determine the results of legal disputes; the importance of interdisciplinary approaches to the study of law such as the sociological, anthological, psychological and political approach; the belief that the law could be used as an instrument to social changes.

[341] Besides Justice Homes Jr we could mention Jerome Frank, Karl Llewellyn, and Roscoe Pound as significant representatives of American Legal Realism.

Then, legal realism understands that at the moment the judge applies the law, metalegal backgrounds come into play whose explication would only be given by empirical analysis. Alf Ross in the preface of the English edition of his book "*Sobre el Derecho y la Justicia*"[342] says that the main idea of the book is to develop the empiricist principles in the legal field until its last conclusions. It follows from this, that the study of law has to observe the traditional standards of observation and verification of modern empirical science. For him basic legal concepts should solely be interpreted as conceptions about the social reality and the human behavior in this society. Then, the question about legal validity is a matter of social facts. For Ross, legal science does not formulate 'ought' propositions but, as any other empirical science, it formulates propositions of what 'is'. It means that by observing the external factors we can predict the way judges decide and come to a conception of the law and its system that is somehow skeptical, as the legal system is seen internally by its participants and externally by its observers as an unbearable structure. So, the attitude of the judge is not that of an insider to the system and hence no longer internally determined. The process of adjudication is seen and explained from an external 'realistic' perspective.

Habermas observes that not only legal realism but also the free law school (*Freirechtsschule)* and interest jurisprudence do not clearly distinguish law and politics in terms of structural features.[343] In this sense judges act as future-oriented politicians what would put in risk the consistence of their decisions and the legal certainty that supports the legal system. For, judges deploy a selection of arguments of policy than normative

---

[342] Alf Ross, *Sobre el Derecho y la Justicia* (Buenos Aires: Editorial Buenos Aires, 1963), p. xiii.

[343] Habermas, *Between Facts and Norms,* 201.

arguments for justifying their decisions, which are not taken on the basis of the established law, but mainly on the basis of their discretion.

CLS resembles the old American legal realism, yet they assume a leftist political posture that the old realists did not explicitly have. This critical movement attempts to free law from its traditional, conservative aspect inherited either from the natural law school or legal positivism which, in different moments and for different reasons, did not have a political agenda articulated in their discourses. So, in an opposite direction from tradition, CLS asserts the political dimension of law: how tied law is to power even when it denies this tie in the name of a descriptive and neutral science (such as Kelsen's). Many judges, self-called positivists pursue ideological projects whenever they "neutrally" decide cases at law in accordance to norms that expressly secure class' interests although they could decide otherwise on the basis of principles such as substantial equality.

CLS is a movement that aims at a truly radical democratic approach to law at the same time it denounces the limits of the liberal rule of law in answering the injustices it engenders which are perpetuated by the law. As I said in the very beginning of this work we cannot refer to 'CLS' as a system of thought insofar as it is not unified. We identify many critical tendencies among legal scholars assuming different characteristics, but unified in their project of opposing the conservative developments in legal theory. CLS as a movement does not remain enclosed in pure speculative, theoretical, academic discourses but is committed to a project of social justice and radical democratic politics.

CLS reject the idea of a neutral legal science. They radicalize the study of law in the opposite way of positivism having a wholly prescriptive approach of/towards law. There is a shared sentiment among critical legal scholars that the self-understanding of

law cannot be disconnected of a strong commitment to social justice. They also retrieve the problem of the indeterminacy of meaning concerning legal language and its effects on the application of law. It means that the language of legal norms is somehow defective yet this is not a problem to be solved in a formalist way but instead this summons to a more subjective intervention of who enforces the law. The gaps in the system of norms show its uncompleted character and demand political and ethical (both in the strong sense) attitudes to fill them with radical democratic substance that diminishes rather than reinforces social injustices. What I have been calling social injustices are more precisely discriminations associated to economic power, race, gender, identity, recognition, etc. This ethical and political attitude of filling the gaps of the law is precisely the attitude of a judge in applying the law. He or she cannot avoid it as far as he or she interprets the law. In other words, whenever questions of interpretation arise they are not inseparable from norms of political morality and questions involving political issues. As Cornell says, "it is common place saying in leftist circles that law takes certain issues off the political agenda. The conclusion is that this is a bad thing because it is antidemocratic. But this is not really the case because law is always political. Any concept of right…involves a question of political morality."[344]

Despite the differences among critical legal scholars, their contribution in (re)placing the discourse of adjudication in the political agenda is of great importance for demystifying law, especially for law students whose legal education has mostly been positivist, that is, politically neutral. In the United States the economic approach of law has gained a considerable space in the American Jurisprudence to what CLS also oppose

[344] Drucilla Cornell, *Just Cause. Freedom, Identity and Rights* (Lanham, Boulder, New York and Oxford: Rowman and Littlefield Publishers Inc., 2000), 03.

because of its political rightist posture. CLS, from different manners, stress the contradictory aspect of law what for Dworkin reflects a skeptical understanding of it. As I have already pointed out in the preceding chapters of this dissertation, this contradictory character of law is constitutive of it, that is, the foundation of law is by definition unfounded and from a deconstructivist perspective this is the point from where we have to look at the possibility of law and justice. The deconstrutibility of law does not prevent it to be enforced but on the contrary it has practical consequences. Nevertheless, for Dworkin this would still be a skeptical approach of law. His critique regarding the skepticism of CLS makes sense once we consider Dworkin's argument that legal practice has to be understood as an exercise in interpretation, which is definitive for constructing a conception of law that is deeply political yet not contradictory or paradoxical: there is a right answer in law! In Habermas' words, "Dworkin gives the hermeneutical approach a constructivist turn."[345] On the other hand, Dworkin shares some perceptions with CLS foremost by criticizing legal positivism and its conception of a closed, self-referent legal system for preserving law from what is not strictly legal. For Dworkin affirms that "we have much to learn from the critical exercise it (the CLS) proposes, from its failures as well as its successes. This assumes, however, that its aims are those of law as integrity, that it works to discover whether, and how far, judges have avenues open for improving law while respecting the virtues of fraternity integrity serves."[346]

CLS played an important role in defending a humanistic and multivalued conception of law. I assume that Dworkin takes this issue as his own, and tries to work it

---

[345] Habermas, *Between Facts and Norms*, 207.

[346] Dworkin, *Law's Empire*, 275.

out in the context of the liberal tradition and of his hermeneutic-critical approach. In this sense Dworkin's theory of law is in dialogue with legal realism and CLS yet his assumed defense of liberalism as the political theory that is at the basis of his theory of adjudication is what at some point impairs this dialogue, and offers an interesting alternative for rethinking legal theory from the site of the participant, of who already belongs to the law. Dworkin's understanding of law as an exercise in constructive interpretation implies the idea of narrative through which legal meaning is developed, elaborated, and improved over time.

Dworkin's critical hermeneutics (like CLS) calls for an interdisciplinary approach without falling into the natural law mistake of assuming that law and morality are similar in permitting, prescribing and commanding in order to generate behavioral stabilizations for a possible social life. Law and morality are different, they are justified on distinct basis, and the presence of moral contents in law does not mean a moralization of law. He does not fall either into the converse, equally *naive*, view that legal issues are nothing but politics. It is necessary to maintain both the autonomy of law and its specificity, but without losing an interdisciplinary perspective.

4.III. the dilemma between description (legal positivism) and prescription (legal realism and critical legal studies) and Dworkin's middle ground proposal

As I showed in the preceding discussion, legal theory has long faced a confrontation between description and prescription. Both positivism and its descriptive approach on the one side (especially Kelsen and Hart), and legal realism and CLS and

their prescriptive approach on the other, in spite of their differences, stress the importance of language for understanding law. Positivism approaches language, but not as a specific kind of narrative built through the act of judging. Even Hart's emphasis on the pragmatic aspect of language, his hermeneutics, and his thesis of an open texture in law does not lead us to an idea of narrative as an important aesthetic category for understanding law. On the other side, critical legal studies take narrative into account; however, we cannot infer from them a theory of adjudication. However, Dworkin's conception of law as an exercise in constructive interpretation recovers the idea of narrative performing, as Ricoeur suggests, a mediation between description and prescription and, accordingly, between legal positivism and legal realism and CLS.

Dworkin understands law as a social phenomenon whose practice is argumentative. "Legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally…. I propose that we can improve our understanding of law by comparing legal interpretation with interpretation in other fields of knowledge, particularly literature. I also expect that law, when better understood, will provide a better grasp of what interpretation is in general."[347]

This argument brings an alternative to the dilemma of description versus prescription. It assumes that legal propositions are not merely descriptive of legal history nor simply evaluative and divorced from legal history: "They are interpretative of legal history which combines elements of both description and evaluation but is different from both."[348] At this point, narrative becomes essential to Dworkin's model. The interpreter

[347] Dworkin, *A Matter of Principle*, 146.

[348] Dworkin, *A Matter of Principle*, 147.

or participant does not take the propositions as some kind of description of a designated lawmaking event, as positivists wanted. On the other hand, he does not take them as the speakers' personal political preferences. Rather, he takes them as part of a narrative, that is, as part of the legal history he interprets. Let us consider the proposition: 'no man may profit from his own wrong.' People develop a complex interpretative attitude toward this rule, first assuming that the practice of not profiting from one's wrongs does not simply exist but has value, that it serves some interest or purpose or enforces some principle. Second, they assume that the proposition's requirements are not necessarily or exclusively what they have been taken to be (the behavior it calls for), but are instead sensitive to this principle. Interpretation decides not only why one may not profit from his own wrong, but also what, properly understood, this rule now requires. Values and content have become entangled. People then realize that no one may profit from his own wrong not because there is a rule that says so, but because it entails a principle of fairness which gives another meaning to this practice. "Interpretation folds back into the practice, altering its shape, and the new shape encourages further reinterpretation, so the practice changes dramatically, though each step in the progress is interpretative of what the last achieved."[349] In fact, the proposition that 'no man may profit from his own wrong' is not a proposition about a legal rule, but a proposition about a principle. As Habermas points out, Dworkin "looks to an ambitious theory that enables one, especially in hard cases, to justify the individual decision by its coherence with rationally reconstructed history of existing law…. Coherence between statements is established by substantial arguments…,

[349] Dworkin, *Law's Empire*, 48.

and hence by reasons that have the pragmatic property of bringing about a rationally motivated agreement among participants in argumentation."[350]

Positivists like Kelsen reject this account. On their view, because law is what is there in legal norms and propositions of law are about how things are in the law (norms), not about how they should be, the viewpoint of the interpreter resembles the viewpoint of an external observer just like the cognitive attitude of the legal scientist in describing his or her object of analysis. For Kelsen the meaning of a valid legal norm is there posited and to the interpreter is simply due to elucidate it. As I have pointed out elsewhere for Kelsen the act of a judge in interpreting and enforcing the law is formally an act of who belongs to the system but substantially an acts of an external observer. It is true that he talks of a volitional moment in the act of the judge but this is means a minimum of discretion within the limits of the frame given by the law. Then, interpretation on positivist's ground is basically literal interpretation, that is, cannot escape the limits of the frame of the law. We can ask at this point if seeking a literal meaning can be considered as a act of interpretation (is there such thing as *literal interpretation*?) or if it is possible to have a meaning *there* (in the norm) without any former act of ascribing meaning, i.e., without some sort of pre-interpretation. Or, in Hart's account, the viewpoint of the interpreter (participant, judge) is important as I have pointed out, but law is still understood according to its formal aspect. It is clear that neither of them consider law in terms of a narrative.

For Dworkin, to understand the law means to interpret what is narratively constructed. In this sense, law is interpretative and its meaning is constructed through a

---

[350] Habermas, *Between Facts and Norms,* 211.

kind of narrative that is similar to literary narrative. "Lawyers would do well to study literary and other forms of artistic interpretation…. [M]any more theories of interpretation have been defended in literature than in law, and these includes theories which challenge the flat distinction between description and evaluation that has enfeebled legal theory."[351] I take this argument to bring Dworkin close to Ricoeur's idea of a triad (describe, narrate, prescribe) in order to overcome the description-or-prescription structure. Dworkin's first attempt to overcome these description-prescription models (positivism-legal realism and critical legal studies) is his normative theory of adjudication, which is based on the distinction between principle and policies.

Dworkin aims to demonstrate that when lawyers reason or argue about legal rights, they make use of standards that do not function as rules, but as principles or policies. A principle is a standard that is to be observed because it is a requirement of justice, fairness, or some other dimension of morality. A policy is a standard that sets out a goal of political, social, or economic improvement for the community as a whole.

This distinction is particularly important in cases whose issues are so novel that they cannot be decided even by stretching or reinterpreting existing rules. In these hard cases, decisions could be made either by policy or by principle. "Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe collective goals."[352] Thus, arguments of principle justify decisions, which advance or protect individual or collective rights, while

---

[351] Dworkin, *A Matter of Principle*, 148.

[352] Dworkin, *Taking Rights Seriously,* 90.

arguments of policy justify decisions, which advance or protect collective goals. When a lawsuit cannot be brought under a clear rule of law, instead of creating the law, the judge should decide according to the principle and the right it (the principle) brings out.

Dworkin denies any possibility of deciding a hard case on the basis of a judge's own discretion. For him, the discretionary power of judges has nothing to do with originality and creativity. He disagrees that judges can create law. The potential of originality and creativity in law lie in its possibility of being conceived (or constructed) interpretatively. For this, decisions must rather be based on principled arguments.

Both the descriptive approach defended by legal positivism and the prescriptive one defended by legal realism and critical legal studies are, according to Dworkin, arbitrary and susceptible to 'wrong' answers to our contemporary legal-political concerns. Taking positivism as his main target, Dworkin intends to turn the 'rule's empire' into the 'law's empire.' With this enterprise, Dworkin offers a proposal to overcome the description-prescription dilemma. The core of his proposal is the analogy he suggests between law and literature.

In the following section, I will discuss the chain of law as a conception of adjudication through narrative. I will try to show how legal reasoning can be understood as an exercise in constructive interpretation, and that law consists in the best justification of legal practices as a whole, that is, in the narrative history that makes these practices the best they can be.

4.IV. Dworkin's chain of law or between tradition and contradiction

> "It may be a sensible project, at least, to inquire whether there are not particular philosophical bases shared by particular aesthetic and particular political theories so that we can properly speak of a liberal or Marxist or perfectionist or totalitarian aesthetics, for example, in that sense. Common question and problems hardly guarantee this of course. It would be necessary to see, for example, whether liberalism can indeed be traced … back into a discrete epistemological base, different from that of other political theories, and then ask whether that discrete base could be carried forward into aesthetic theory and there yield a distinctive interpretative style. I have no good idea that this project could be successful; I only report my sense that politics, art, and law are united somehow, in philosophy".[353]

According to Ricoeur: "there is no ethically neutral narrative. Literature is a vast laboratory in which we experiment with estimations, evaluations, and judgments of approval and condemnation through which narrativity serves as a propedeutic to ethics."[354] Law as well can be seen as a vast laboratory through which narrativity can (re)establish a much more interesting and exciting connection to ethics as well as to morality, politics, and so on. But while in literature narrative is a path in law it has been an obstacle. Legal positivism is a case of obstructing access to the kind of ethical, moral, and political questions we may approach *through the idea of narrative*.

Dworkin's conception of law as an interpretative concept leads him to believe that it might be better understood if aesthetic experience – including the literary imagination and its narrative model – were brought into legal theory. According to this idea, "if law is an interpretative concept, any jurisprudence worth having must be built on some view of what interpretation is."[355] The sort of interpretation Dworkin claims for social practices

---

[353] Dworkin, *A Matter of Principle*, 166.

[354] Ricoeur, *Oneself as Another*, 115.

[355] Dworkin, *Law's Empire*, 50.

resembles artistic interpretation because both want to "interpret something created by people as an entity distinct from them."[356] Both kind of interpretation are for Dworkin creative and purposive rather than merely causal. The purposes at play in this kind of creative interpretation are not those of the author but of the interpreter. For Dworkin, "constructive interpretation is a matter of imposing purpose on a object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."[357]

But this does not mean that the interpreter's purposes make of a practice or work of art whatever he wants it to be. His interpretation will be constrained by the practice or object as well, which means that on Dworkin's constructive view a creative interpretation is a matter of interaction between purpose and object.

If the participant/interpreter plays an important role in Hart's conception of law with regard to the necessity of having a point of view that reflects the way people take rules as standards of behavior, for Dworkin the viewpoint of the interpreter is even more fundamental. This is, first, because his conception of law is above all interpretative: the attitude of the interpreter is constitutive of the meaning of law. For Dworkin, the recognition of a legal practice as such demands an interpretative attitude. The mere existence of rules does not mean anything but a system of law. Second, because principles are at the core of his theory of adjudication as a standard to support legal arguments, they require an interpretative attitude from anyone sustaining (or claiming) a right. "A participant interpreting a social practice … proposes value for the practice by

---

[356] Dworkin, *Law's Empire,* 50.

[357] Dworkin, *Law's Empire*, 52.

describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify."[358] However, it is possible that each interpreter ascribes different and competing values to that practice. In this case, the criterion for choosing one interpretation over another is which interpretation will make the practice the best it can be.

Dworkin's belief that there is a right answer in law presupposes this constructive model of creative interpretation. For instance, a judge may be confronted with two possible arguments based on different interpretations of the legal practice under consideration. These arguments could rest on two different principles, such as equality and liberty, or they could appeal, on the one side, to a principle, and, on the other, to a policy. The judge should decide according to which principle ascribes a better value to that practice.

For Dworkin, equality should always prevail in ascribing value to a practice. His very idea of equality has to be understood in the context of his moral and political liberal view. He defends a liberal conception of equality, which is, accordingly, "the nerve of liberalism".[359] For equality requires that the government treat all its citizens as entitled to

---

[358] Dworkin, *Law's Empire*, 52.

[359] Dworkin, *A Matter of Principle*, 183. Further in the same chapter on liberalism Dworkin affirms the list of what he takes to be the political positions of liberals: "in economic policy, liberals demand that inequalities of wealth be reduced through welfare and other forms of redistribution financed by progressive taxes. They believe that government should intervene in the economy to promote economic stability, to control inflation, to reduce unemployment, and to provide services that would not otherwise be provided, but they favor a pragmatic and selective intervention over a dramatic change form free enterprise to wholly collective decisions about investment, production, prices, and wages. They support racial equality and approve government intervention to secure it, through constraints on both public and private discrimination in education, housing, and employment. But they oppose other forms of collective regulation of individual decision: they oppose regulation of the content of political speech…and they oppose regulation of sexual literature and conduct, even when such regulation has considerable majoritarian support. They are suspicious of criminal law and anxious to reduce the extension of its provisions to behavior whose morality is controversial, and they support procedural constraints and devices, like rules against the admissibility of confessions, that makes it more difficult to secure criminal convictions." (p. 187)

equal concern and respect. Considering the conflict between equality and liberty Dworkin observes that liberals tend to favor equality more and liberty less than conservatives do. "So we must reject the simple idea that liberalism consists in a distinctive weighting between constitutive principles of equality and liberty. But our discussion of the idea of equality suggests a more fruitful line. I assume…that there is a broad agreement within modern politics that the government must treat all its citizens with equal concern and respect."[360]

Dworkin believes that if we accept equality of resources as the best conception of distributional equality, liberty becomes an aspect of equality rather than, as it is often thought to be, an independent political ideal potentially in conflict with it.[361] His argument is that if important liberties such as, for instance, the freedom of speech, religion, conviction, sexual orientation etc have to be limited sometimes, then "why they should not yield to the normally more imperative requirements of distributional justice?"[362] For him liberty has a value for people as far as it betters their lives in terms of achieving a respectable level of substantial equality. That is, his defense of what he calls morally important liberties is based on an argument according to which these liberties must be protected according to the best view of what distributional equality is, "the best view of when a society's distribution of property treats each citizens with equal concern."[363] The sense of community is of fundamental importance as far as equal distribution depends on a process of coordinate-decisions in which people who take

[360] Dworkin, *A Matter of Principle*, 191.

[361] Dworkin, *Sovereign Virtue*, 121.

[362] Dworkin, *Sovereign Virtue*, 121.

[363] Dworkin, *Sovereign Virtue*, 122.

responsibility for their own interests are able to identify the true cost of their own plans to other people and so, to work on these plans in order to use only their fair share of resources in principle available to all as they belong to a community of equal concern.

As we can see, for Dworkin, without a substantial degree of liberty it is not possible to achieve a desired equality of resources because this latter depends on the competence of the process of discussion and choice it provides for that purpose. "So liberty is necessary to equality, according to this conception of equality … because liberty, whether or not people do value it above all else, is essential to any process in which equality is defined and secured. That does not make liberty instrumental to distributional equality any more than it makes the latter instrumental to liberty: the two ideas rather merge in a fuller account of when the law governing the distribution and use of resources treats everyone with equal concern."[364] What Dworkin calls morally important liberties such as freedom of speech, religion, conscience, sexual choice are fundamental to think and to decide in favor of equality while other simple liberties are fundamental to such process as far as they are limited.

The two normative ideals of liberty and equality are understood as two no conflicting ideals according to conceptions that are not *a priori* given but constructed. For it is important that certain conditions are met. Concerning liberty, for instance, it is necessary to identify rights to certain designated freedoms, which must not be limited by the government without special justification. They are the rights to freedom of speech, conscience, religion, sexual choice, and family. The conceptions of liberty Dworkin has

[364] Dworkin, *Sovereign Virtue*, 122-123.

in mind are to protect liberty as a set of discrete rights to particular freedom (but not as license).

Dworkin expressly says that in any contest between the two normative ideals liberty must lose: "I believe that we are now united in accepting the abstract egalitarian principle: government must act to make the lives of those it governs better lives, and must show equal concern for the life of each. Anyone who accepts that abstract principle accepts equality as a political ideal, and though equality admits of different conceptions, these different conceptions are competing interpretations of that principle."[365] Liberty must lose as far as is seen in conflict with equality. But this is not the case for Dworkin who believes that there is no genuine conflict between liberty and equality. If liberty makes people's lives (led under it) more valuable lives, then it has to be taken into account by the government in respect to the egalitarian principle that prescribes that government must have equal concern for the lives of its citizens. In this sense, equality can properly be enforced because it implies liberty: "no right to liberty we would otherwise want to recognize would be compromised by policies our conceptions of equality demands."[366]

Finally, for Dworkin the fundamental rights to liberty are part of the conception of equality he elects as the best, that is, equality of resources. These rights to liberty are protected whenever equality is achieved. At this point we can envisage two principles that are mutually committed and that reflect aspects of a single humanist ideal.

---

[365] Dworkin, *Sovereign Virtue*, 128.

[366] Dworkin, *Sovereign Virtue*, 131.

In this sense, liberalism for liberals like Dworkin is egalitarian-liberalism, that is, it consists in some constitutive political morality whose most fundamental is the principle of equality. I read Dworkin's philosophy of law as a justification for this type of egalitarian-liberalism and accordingly, his theory of adjudication as a mean to enforce equality in the sphere of liberalism[367] remembering that they are both thought in (and for) the realm of the English and American legal tradition. For this very reason, the more an argument is based on the principle of equality the less refutable it will be.

Thus, there will always be a right answer in law because when two parties disagree not just about facts but about values, the judge has to decide which value is best. This process of deciding which value better expresses a moral and a political dimension of law is interpretative. The judge does not have to discover anything. He has to interpret the arguments to find out – according to his moral and political convictions, to what judges have decided in the past, and to the moral patterns of the community – which argument rests on a better principle in terms of equality. By saying that there always is a right answer, Dworkin leaves no room for the judges to "find or invent" the law. Contrary to legal positivists that in admitting gaps in law leave room to judges' discretionary power and then to invent the law, Dworkin is far more optimistic when he says that even to the hardest case there is a right answer in law. Contrary to legal realists Dworkin argues that there is a set of constraints in the process of interpretation that lift the judge's understanding of the law above the simply personal and subjective.[368] This idea of a right

---

[367] Dworkin does not stress the conflict between values such as equality and liberty. He instead strives to dissipate such conflicts and to integrate those values. Dworkin, *Sovereign Virtue*, chapters 3 and 5.

[368] Georgia Warnke, *Justice and Interpretation* (Cambridge, Mass.: The MIT Press, 1993), 63.

answer means, on the one hand, that no matter the gaps[369] in the system of law there is always a principle on which the judge can rely his/her decision and this principle is not a metaphysical device but it is interpreted, in an articulated and consistent way, from the community's social and legal practices. According to Dworkin principles provide an overall description and justification of the community's legal, political, and moral structure. On the other hand, the right answer means that through an exercise of interpretation the judge will always arrive to a decision about a right based on a principle. The *right answer* has to be thought according to Dworkin's *right thesis*, that is, "judicial decisions enforce existing political rights…If the thesis holds, then institutional history acts not as a constraint on the political judgment of judges but as an ingredient of that judgment because institutional history is part of the background that any plausible judgment about the rights of an individual must accommodate."[370] The adjective right (that qualifies the best decision) presupposes the substantive right that justifies, after all, the attitude of the interpreter (judge) in deciding on a principled basis. In other words, Dworkin's right answer thesis presupposes his rights' thesis and from a more comprehensive point of view, his theory of adjudication presupposes his whole philosophy of law[371], which is founded on the liberal claim that individual rights must be protected from the coercive power of government. It means that the most fundamental

[369] By gaps I refer to uncertainties in the legal text that jeopardize its meaning and consequently its enforcement. Usually, in face of uncertainties in the text of the law, that is, when it is vague or ambiguous positivists like Hart are of the opinion that the interpreter invents the law.

[370] Dworkin, *Taking Rights Seriously*, 87.

[371] "So no firm line divides jurisprudence from adjudication or any other aspect of legal practice. Legal philosophers debate about general part, the interpretative foundation any legal argument must have. We may turn the coin over. Any practical argument…assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judge's opinion is itself a piece of legal philosophy…Jurisprudence is the general part of adjudication, silent prologue to any decision at law". Dworkin, *Law's Empire,* 90.

point of legal practice is to guide and constraint the power of government, that is, the force monopolized by government is legitimate as far as it is authorized or required by individual rights and responsibilities that flow from past political decisions of the right sort.[372] It is worthy remembering that the rights to be protected through legal practice are grounded on the most important right to equal concern and respect. Dworkin combines a liberal claim with a democratic one what allows me to insist on the idea that he understands law as a justification for a type of egalitarian–liberalism.

For Dworkin, the judge, law professor, or layman who interprets a social or legal practice imposes purpose over it and it is their purpose in that practice that ascribes meaning to it. However, Dworkin takes the judge's interpretation as paradigmatic, not because "only judges are important or because we understand everything about them by noticing what they say, but because judicial argument about claims of law is a useful paradigm for exploring the central, propositional aspect of legal practice."[373] The very idea of constructive interpretation in law is that of imposing purpose on a legal practice in order to make of it the best possible example of its sort. What makes interpretations creative is exactly the act of imposing purpose on the text, data, or tradition being interpreted. We cannot ignore that the practice to be interpreted has a history, which has to be taken into account by the interpreter (it is a sort of constraint to him/her) so that the interpretation combines purpose and the practice's history. Considering that legal interpretation is a matter of principles, which express the community's moral and

---

[372] Dworkin, *Law's Empire,* 93. Further in this page he says that conceiving the law of a community as the scheme of rights and responsibilities that license coercion because they flow from past decisions of the right sort, leads us to the idea of the rule of law. See also page 97.

[373] Dworkin, *Law's Empire*, 14.

political values, the judge, whenever he/she interprets these principles, he/she does it not without counting on his/her own moral and political values developed as a participant in that community. This means that interpretation at law cannot be arbitrary and relies on the interpreter personal taste or opinion. It must be consistent with the moral and political values of the community he or she belongs to.

All creative interpretations share this feature and therefore have a normative aspect. In this sense, Dworkin suggests a comparison between the judge deciding what the law is in some issue and the literary critic bringing out the various dimensions of value in some complex narrative such as a novel, or in a play or a poem. Dworkin also remarks the fact that there are many more theories of interpretation in literature than in law challenging the flat distinction between description and evaluation (that has dominated and enfeebled legal theory).

Dworkin sees the analogy between legal and literary interpretation in a certain light. First, he is interested in interpreting the meaning of a legal or literary work as a whole, instead of discovering the sense in which a word was used. He gives the following example: in *Hamlet* some assertions, such as that "Hamlet really loved his mother… or that he really hated her, or that there really was no ghost but only Hamlet himself in a schizophrenic manifestation" offer a sense, a point, a meaning of the play as a whole – that Hamlet is, for example, a play about death, or about generations, or about politics.[374] This sort of interpretation may help us to understand, for instance, the English cultural environment.

[374] Dworkin, *A Matter of Principle*, 149.

Interpreting a piece of literature is an attempt to show which way of reading the text reveals it as the best work of art. This is Dworkin's 'aesthetic hypothesis.'[375] It does not follow that this sort of interpretation of a narrative will change the narrative; rather, the interpretation will have to respect its identity. For instance, an Agatha Christie mystery cannot be interpreted as a treatise on the meaning of death. This depends on the interpreter's sensibility about the coherence and the unity of the work of art. As Dworkin says: "the aesthetic hypothesis does not assume that anyone who interprets literature will have a fully developed and self-conscious aesthetic theory. Nor that everyone who interprets must subscribe entirely to one or another school (of interpretation). The best critics … deny that there is one unique function or point of literature. A novel or a play may be valuable in any number of ways, some of which we learn by reading or looking or listening, rather than by abstract reflection about what a good art must be like or for.

Nevertheless, anyone who interprets a work of art relies on beliefs of a theoretical character about identity and other formal properties of art, as well as on more explicit normative beliefs about what is good in art. *Both* sort of beliefs figure in the judgment that one way of reading a text makes it a better text than another way."[376] Relying on the interpreters' view of what makes a work of art a good one, the aesthetic hypothesis abandons hope of saving objectivity in interpretation. In this sense, academic theories of interpretation are not analyses of the very idea of interpretation but candidates for the best

---

[375] "(A)n interpretation of a piece of literature attempts to show which way of reading (or speaking or directing or acting) the text reveals it as the best work of art. …Indeed the aesthetic hypothesis might seem only as another formulation of a theory now popular, which is that since interpretation creates a work of art and represents only the fiat of a particular critical community, there are only interpretations and no best interpretation of any particular poem or novel or play. But the aesthetic hypothesis is neither so wild nor so weak nor so … relativistic as might first appear." Dworkin, *A Matter of Principle,* 149-50.

[376] Dworkin, *A Matter of Principle*, 151-52.

answer to the substantive question put by interpretation. Thus, the difference between offering a theory of interpretation and offering a theory of a particular work of art is just a matter of level of abstraction.

For Dworkin, interpreting a work of art, a text, for instance, and making a criticism about it are similar and closely connected enterprises. Similarly, a judge interpreting a past court's decision in order to build his argument is creating at the same time he interprets. If the judge brings out an argument based on a principle such as integrity, his interpretation shows how that past decision is now articulated in terms of a better narrative. A theory of art (or law) and a theory of interpretation are mutually reinforcing. The point of the aesthetic hypothesis is that the connection is reciprocal, so that defending a certain approach to interpretation implies a reliance on more general aspects of a certain theory of art (or law).

Theories of artistic interpretation are based on and depend on normative theories of the work of art. Interpretative claims have to be understood as special and complex aesthetic claims about what makes a particular work of art a better or worse. Interpretative claims in law, in the sense Dworkin advocates, similarly depend on a political theory. Therefore, when a judge interprets a line of precedents, statutes, or whatever he recognizes as a legal practice in order to decide a case, he is actually looking for an argument that makes these practices the best in terms of moral and political values. That is, he looks for a political and moral value given by a certain political, moral, or legal theory. This value assumes the form of a principle. For Dworkin, liberalism is (and shall be) the theory on which the judge builds his argument with regard to certain

principles. Of course, Dworkin defends a particular form of liberalism[377], which subscribes to a scheme of principles based on the idea of integrity. For this reason Dworkin calls his approach: 'law as integrity.'[378]

Returning to the idea of a novel, a writer creating a novel and a critic interpreting it are connected. The writer cannot create anything without interpreting as he creates. He has at least a tacit theory of why what he writes is literature (art) and why his piece of writing is good. In turn, the critic creates as he interprets. There is a complicity between the act of interpretation and the act of creation. The critic is "bound by the fact of the work, defined in the more formal and academic parts of his theory of art, his more practical artistic sense is engaged by his responsibility to decide which way of seeing or reading or understanding that work show it as better art."[379] This does not mean that 'creating while interpreting' and 'interpreting while creating' are the same thing; otherwise, every time we encounter literary criticism we would be in front of a work of

---

[377] It is noteworthy Rosenfeld and Arato's remark that "Dworkin would be hardly pressed to justify that his liberal-egalitarian rights are more legitimate than liberal-libertarian or conservative rights, or even those goods that loom as normatively paramount within ethical theories committed to the priority of goods over rights, if it were not for his assertion that the U.S. Constitution happens to have codified liberal-egalitarian rights and principles. But this latter assertion makes Dworkin's theory doubly vulnerable: …it can be dismissed as merely parochial since it depends on contingent historical facts lacking importance beyond the United States; on the other hand, Dworkin's conclusions regarding the American Constitution may be attacked as being historically unwarranted." Rosenfeld and Arato, *Habermas on Law and Democracy: Critical Exchanges*, 04.

[378] Integrity is an independent political ideal, which, "require us to support legislation we believe would be inappropriate in the perfect just and fair society and to recognize rights we do not believe people would have there". It can also conflict with fairness and justice –the other fundamental values of our politics. However, in any case, integrity must prevail even with the sacrifice of justice or fairness. Integrity supposes that the enacted and enforced laws of a community express a **coherent** ranking of different principles of justice or fairness or procedural due process. In other words, integrity is consistent when it demands that the public standards of the community be made and be seen to express a single coherent scheme of justice and fairness. For Dworkin a community that accepts integrity as a political virtue becomes a special form of community for promoting its moral authority to assume and deploy the monopoly of coercive force. Dworkin, *Law's Empire,* 176-275

[379] Dworkin, *A Matter of Principle*, 158.

art. Nevertheless, literary criticism contributes to the literary traditions in which authors work.

Taking literary interpretation as a model for legal analysis, Dworkin wants to show how this distinction between author and critic might be very subtle in certain cases. Law and literature are taken here as two sorts of narratives in which interpretation and creation can be seen as different aspects of the same process. Judges are authors as well as critics. For this purpose, Dworkin constructs a sort of literary genre called 'chain novel' on which he will support his further idea of a chain of law.

The idea is that there is a group of novelists engaged in creating a novel. Each is responsible for writing one chapter in the novel. They draw lots to designate their order in the chain. The first writes the opening chapter and sends it to the second, who adds a chapter, and so on. Each writer in the chain is conscious that it is a common project, so he or she does not begin a new novel but rather interprets what has been written and creates his chapter respecting what the novel is so far. "He or she must decide what the characters are 'really' like; what motives guide them; … how far some literary device or figure, consciously or unconsciously used, contributes to these, and whether it should be extend or refined or trimmed or dropped in order to send the novel further in one direction rather than another."[380] After the second writer, there is no single author whose intentions will prevail.

Dworkin is aware that the chain novel is not an ideal model and disagreements will arise among the novelists regarding the formal and the substantive dimension of interpretation. Formally, they might ask how well the interpretation fits and integrates the

[380] Dworkin, *A Matter of Principle*, 158-59.

text; substantively, they might consider what makes a novel good. However, the fact that later novelists may have formal or substantive disagreements does not mean that their interpretations will therefore give up the whole idea of a single novel, written by many hands but oriented as if there were just one author.

Dworkin further elaborates this idea that the writer has to observe a certain structure of interpretation in the chain novel in *Law's Empire*, where he talks about the dimension of 'fit' instead of formal coherence. Here, he clarifies that in the first case the writer has to have an interpretation that flows throughout the text and can also explain it generally. If more than one interpretation fits the bulk of the text, he has to look to the second dimension, which requires him to judge which of these possible readings makes the novel in progress the best. For Dworkin, at this point what counts is "his (the novelist's) more substantive aesthetic judgments about the importance or insight or realism or beauty of different ideas the novel might be taken to express."[381] No one in the chain can decline the responsibility of continuing to create a single unified novel that is the best it can be.

As we can see, this is a complex task. Above all it is necessary to emphasize that this does not make the interpretation a mechanical process. Although the writer's interpretation has observed the guidelines of fit and content, he might realize that his interpretation is very different from what has been written so far. In this case he has to reconsider other possible interpretations. The writer is not wholly free to write something new, nor is he entirely constrained by the text. The constraints are "as much matters of judgment and conviction, about which different chain novelists might disagree, as the

[381] Dworkin, *Law's Empir*e, 231.

convictions and attitudes you call on in deciding whether the novel would have been better…. We might say that … the constraint is 'internal' or 'subjective.' It is nevertheless phenomenologically genuine, and that is important here."[382] Dworkin stresses the idea that what the interpretation is like depends on the viewpoint of the interpreter and the constraints he feels are genuine in this unavoidable way. We may notice that interpretation is crucial to reaching the normative dimension of the text.

According to Dworkin, this literary exercise is analogous to the act of judging cases in law, especially so-called hard cases. Thus, his thesis is that there is a chain of law. He has in mind basically common law cases, that is, "when no statute figures centrally in the legal issue, and the argument turns on which rules or principles of law 'underlie' the related decisions of other judges in the past."[383] In these common law cases, a judge has to interpret what other judges have decided in similar cases in the past. The past decisions play the same role as the written chapters the novelist has to interpret in order to continue the novel. The judge must also regard himself as a partner in this chain enterprise of which these past innumerable decisions, conventions, and practices are the narrative history. He has to continue this narrative history rather than give it a new direction of his own. According to his own judgment, he determines what is the point or theme of the practice taken as a whole. Then he decides, such that his argument shows that he has interpreted the practice in its best light. As in the literary exercise, the judge's interpretation must observe two dimensions: it must fit the practice and show its value. "Convictions about fit will provide a rough threshold requirement that an interpretation of

---

[382] Dworkin, *Law's Empire*, 235.

[383] Dworkin, *A Matter of Principle*, 159.

some part of the law must meet if it is to be eligible at all."[384] This threshold prevents interpretations based solely on the judges' personal convictions of justice. Instead, his/her interpretative judgment has to fit the political history of his/her community otherwise the very idea of integrity is jeopardized. For instance, if a judge has a case of emotional damage caused by an accident, he/she has to look over past decisions concerning this point, interpret them, and show their value in political and moral terms by demonstrating the best principle they can serve.

An interpretation that understands that a careless driver is liable to those whose damage is substantial and foreseeable is better than an interpretation that distinguishes between physical or emotional damage or makes the latter depend on the former. It is better because it states a sounder principle of justice. The judge takes his scheme of political and moral values from a certain political theory, just as the novelist takes his aesthetic values taken from a certain aesthetic theory. "Certain" means the one, which provides the better reading of the practice in question; for Dworkin, this is egalitarian-liberalism.

The two necessary dimensions of interpretation have a complex interplay in the chain of law. The interpretation has to fit and justify what has been written before. "Just as interpretation within a chain novel is for each interpreter a delicate balance among different types of literary and artistic attitudes, so in law it is a delicate balance among

---

[384] Dworkin, *Law's Empire*, 255. Further in this chapter Dworkin says that the judge's "convictions about fit, as these appear in either in his working threshold requirement or analytically later in competition with substance, are political not mechanical. They express his commitment to integrity: he believes that an interpretation that falls below his threshold of fit shows the record of the community in an irredeemably bad light, because proposing that interpretation suggests that the community has characteristically dishonored its own principles." (p. 257)

political convictions of different sorts."[385] These two dimensions are also important to assure coherence in the judge's decision – coherence is, indeed, the criterion of validity in Dworkin's legal theory.

Coherence in the chain of law satisfies the requirement of certainty and legitimacy. Thus, the justification for the judge's decision is its coherence with a reconstructed history of existing law. A coherent legal narrative demands consistency between principles and past political decisions and also consistency between the judge's moral convictions and general ethical principles. The judge's (Hercules') task is to discover principles or policies "in the light of which a given, concrete legal order can be justified in its essential elements such that all the individual decisions fit into it as parts of a coherent whole".[386] The judge's decision is part of the narrative (the law) he is engaged in constructing and his/her creativity is, precisely, in discovering a coherent set of principles that justifies the institutional history of a given legal system in the manner required by fairness, justice, and the procedural due process.[387] For, his/her (Hercules') decision also demands integrity in order to conceive and respect the body of law as a whole rather than as a set of discrete decisions freely taken with nothing but a strategic interest. Dworkin's concept of integrity reiterates the idea of government by law as well as the democratic idea that the political community is linked by a sort of associative obligations[388] speaking with a single voice, that is, the voice of its people. Integrity is a

---

[385] Dworkin, *Law's Empire*, 239.

[386] Habermas, *Between Facts and Norms,* 212.

[387] For Dworkin fairness, justice and procedural due process subsume the diversity of principles that exist in 'our' liberal-democratic state or community of principles.

[388] Associative obligations that arise from social practices are interpretative and not mechanically given through habits or conventions. For instance, it is "an open question among friends what friendship

distinct political ideal that must fit and justify the community's constitutional structure and practice that, sometimes, demand compromises with fairness, justice, and procedural due process. For it also demands an interpretative attitude towards the above mentioned constitutional structure and practice of the community, which shows it in its best light.

The chain of law shows how legal claims are interpretative judgments of legal practice and how legal practice is an unfolding moral and political narrative. For Dworkin, this chain model has to be considered according to his concept of law as integrity. This concept of law advocates, first, the narrative character of social practice; second, that judges have to have an interpretative attitude toward these practices in order to find some coherent set of principles about people's rights; and, third, that the best interpretation of these practices can be seen in terms of integrity. The sense of integrity has to be captured from the fundamental egalitarian principle that everybody has to be treated with equal concern and respect. Integrity is a central principle in a community in which its people assimilate their political obligations as associative (fraternal, communal) that is, in the liberal-egalitarian community envisaged by Dworkin. People in this community accept that they are governed not by rules forged through political compromise, according to particular interests, but by principles that flow from the sort of association they developed and constructed over time. Integrity is a politically and morally progressive basis for a liberal concept of law.

---

requires… The reciprocity we require for associative obligations must be more abstract, more a question of accepting a kind of responsibility we need the companion ideas of integrity and interpretation to explain." (p. 198) "Associative obligations can be sustained among people who share a general and diffuse sense of member's special rights and responsibilities from or toward one another, a sense of what sort and level of sacrifice one may be expected to make for another." (p. 199) Dworkin, *Law's Empire*, 198-215

In saying that integrity must fit and justify the community's legal structure and practice and that judges should decide according to it (in respect to integrity), Dworkin highlights the interpretative nature of law as far as to enforce the law requires to interpret the system of law as expressing and valuing a coherent set of principles. Judges interpret the system of law looking for implicit principles between and beneath the explicit ones.[389]

The chain of law is a reconstruction of the institutional history of the legal system whose justification on principles somehow constraints the judge's decisions so that no matter their (the decisions') distinctiveness they are taken as part of a coherent principled whole. As we know, the legal system comprises constitutional norms, ordinary statutes, common law precedents, and other legal sources that bind the judge to different degrees and it is possible that some precedents or legislation have to be disregard from the institutional history as mistaken.[390] It means that whenever a judge accepts the chain of law thesis he is engaged in a narrative (reconstruction) that combines the past (history) with the present (claim) to which he has to give a *right answer.* The decision on the right of a party does not oppose the institutional history (past decisions) but instead reflects it. As says Habermas, "(a) reconstructive legal theory of this sort should be sufficiently

---

[389] Dworkin, *Law's Empire,* 217.

[390] Dworkin gives the following example: "Suppose the law of negligence and accidents in Hercules' jurisdiction has developed in the following way… It begins with specific common law decisions recognizing a right to damages for bodily injury caused by very dangerous instruments that are defectively manufactured. These cases are then reinterpreted in some landmark decisions…as justified by the very abstract right of each person to reasonable care of others whose actions might injure his person or property. The courts…decide that no concrete right lies against an accountant who has been negligent in the preparation of financial statements. They also decide that the right cannot be waived in certain cases; for example, in a standard form contract of automobile purchase. The legislature adds a statute providing that in certain cases of industrial accident, recovery will be allowed unless the defendant affirmatively establishes that the plaintiff was entirely to blame. … Suppose now, against this background, that Hercules is called upon to decide *Spartan Steel.* Can he find a coherent set of principles that justifies this history in the way fairness requires? … In any case, therefore, Hercules must expand his theory too include the idea that a justification of institutional history may display some part. " Dworkin, *Taking Rights Seriously,* 119-121.

selective always to allow precisely one right decision stating which claims a party may assert in the framework of the existing legal order that is to which rights a party is objectively entitled."[391]

Dworkin intends to avoid the errors of legal positivism, legal realism, and critical legal studies but does he really accomplish it or does he ends up committing the same errors they do? From his critics I take Fish's arguments precisely because he focuses his criticism on the chain of law to which he refers as a *chain gang*[392]. Concerning Dworkin's analogy of the chain of law to the chain novel, Stanley Fish observes that the position of the first writer in the chain differs from that of the others, since he does not have anything to interpret and in this sense he truly creates without interpreting any previous writing. Because of this, the first writer in the chain is much freer than those who come after him. Nevertheless, Fish argues that the first writer is not free, since he has surrendered his freedom as soon as he commits himself to write a novel under the same constraints that rule the decisions of the others.[393] According to Fish, the decision about how to begin the novel depends on the context of a set of practices that, on the one hand, enable him to begin and, on the other hand, limit the act of beginning. "He is free to begin whatever kind of novel he decides to write, but he is constrained by the finite (although not unchanging) possibilities that are subsumed in the notions 'kind of novel' and 'beginning a novel.'"[394] A later writer in the chain is free and constrained, according

---

[391] Habermas, *Between Facts and Norms*, 213.

[392] 'Working on the chain gang' is the forth chapter of Fish's *Doing What Comes Naturally*. Fish, *Doing What Comes Naturally,* 87-102.

[393] Fish, *Doing What Comes Naturally*, 89.

[394] Fish, *Doing What Comes Naturally,* 89.

to Fish, in the same way. The prior understanding that the later writer has of the general points of the novel respects the novelistic construction of the text in the same way the first writer does when his choice is bound by the task of writing a novel. Both the first and the later writer create within the constraints of novel-writing practice.

It seems to me that Dworkin does not think that the first writer is free to create the novel in the way stipulated by Fish. First, the writer has, even tacitly, looked for types of narratives (literary practices) to decide which one best fits the novel he will begin. As Dworkin suggests, when the writer does that, he follows a literary (aesthetic) theory that justifies to him why the interpretation of that practice is the best. I cannot see in Dworkin's position, however, a criterion of freedom, which differentiates the first writer from his successors in the chain. My second argument stresses the complicity between creating and interpreting. Once the first writer is bound in his choice by a literary (aesthetic) theory, creating a novel is to him, at the same time, interpreting how he creates a novel and how his creation can be the best according to his aesthetic values. In this sense, Fish's argument against Dworkin that everyone in the enterprise is equally constrained seems to me misleading, since Dworkin never suggested that they were not, even the first one.

Fish also observes that Dworkin blames legal realism for its excessive extralegal basis, as the practice of decision-making becomes a matter of personal taste, conviction, or desire. Nevertheless, Fish sees the same problem with regard to the first judge in the chain of law. He says that the freedom of the first judge is equivalent to the freedom defended by legal realists, according to whom judges are bound by their personal preferences, convictions, and desires. He stretches his criticism to the other judges in the

chain, saying that the previous history by which they are bound does not have a self-evident significance: that is, this history is constituted by all the judges' personal preferences, convictions, and desires. As I said before, Dworkin's arguments do not demonstrate the freedom Fish says he advocates for the first judge in the chain. Dworkin says that the judge is bound by the moral and political principles of the community he/she belongs, which are reflected in what he understands as legal practice. It is worthy thinking that the judge who accepts the principle of integrity, especially in the so-called hard cases, decides about people's rights looking for a set of principles that signify the political and legal structure of that community. Yet this means that the judge's own moral and political principles are also binding to the extent that they (his/her own principles) are internalized as the outcome of a general commitment to integrity and ground on communal obligations or responsibilities. In fact, Dworkin is somehow close to the legal realists when his idea of legal practice subsumes normative and political contents given by a certain theoretical reading of it. Nevertheless, it is different to decide a case based on whatever social, political, religious, moral reasons they take to be relevant than to decide a case based on a principle given by and only by an understanding of legal practices that advocates what would best promote social equality.

Legal realists confound law and politics by seeing judges as legislators or delegates arguing at a political convention. Dworkin in turn understands that political convictions should play a role in the decisions judges make about what the law is, but he does not deny the specificity of law and adjudication on the one hand, and of politics on the other. He sees the link between law and politics, but thinks that it should be a matter of principle. He assumes that there is a better concept of law in the political sphere of

liberalism and that it consists in a constitutive political morality whose core is the principle of equality. This principle of equality means that it is not enough to treat all citizens equally, but above all, to treat them with equal concern and respect.

It is important to remember here that in the chain enterprise, as pointed out above, judges interpreting legal practices in their best light means in the light of the principle of equality (as Dworkin's egalitarian-liberalism interprets this principle). Dworkin is aware that liberals do not share the notion that equality is the core of liberalism. Nevertheless, he believes that this understanding would be the best for the community he envisages and for this reason a judge in a liberal community is constrained by it[395]. Taking the example of a judge who is anarchist, Dworkin says that he cannot impose his anarchistic convictions on the community under the name of law, however noble or fair he believes them to be, because these convictions cannot provide the coherent general interpretations he needs. Dworkin's argument means, first, that politics and law are intrinsically connected and, second, that "judges should enforce only political convictions that they believe, in good faith, can figure in a coherent general interpretation of the legal and political culture of the community."[396] Dworkin does assume judges' political convictions as an important and necessary element in adjudication, but these convictions have to be coherent with the political convictions of the community. The process of interpretation is what guarantees this coherency and prevents judges from inventing a

[395] Dworkin is explicit in placing his arguments within the territory of Anglo-American political and legal community. "I am defending an interpretation of our own political culture, not an abstract and timeless political morality…" Dworkin, *Law's Empire,* 216.

[396] Dworkin, *A Matter of Principle*, 02.

new history. This constraint distinguishes Dworkin arguments from those of legal realists and legal critical scholars.

But Fish stresses another point with regard to Dworkin's worry about inventing a new history. Fish does not believe that there could be such a strongly invented history because a judge making a decision will always identify (and use) elements, which characterize an already existent legal history/narrative. He also criticizes Dworkin's view that a judge cannot impose his personal preferences over this history/narrative, which is presumed to have its own proper shape. For Fish, a judge "doesn't just find a history; rather a judge views a body of materials with the assumption that it is organized by judicial concerns. It is that assumption that gives a shape to the materials, a shape that can *then* be described as having been 'found.' Moreover, not everyone will find the same shape because not everyone will be proceeding within the same notion of what constitutes a proper judicial concern, either in general or particular cases."[397] Fish says that a judge cannot just interpret a found history without somehow "inventing" it. He argues that Dworkin shows this in his account that a judge will look in the appropriate books for cases arguably similar to the one before him. This means that every time similarity is in play in legal decision-making, a judge will not find it but establish it. In establishing similarity, a judge brings out the configurations of the cited cases as well as those of the case that is to be decided. Similarity according to Fish is not a property of the text, but a property conferred by a relational argument (**A** is like **B** is a characterization of *both* **A** and **B**). So, to see a case as similar to the preceding ones in a chain means "to reconceive that chain by finding it in an applicability that has always not been

[397] Fish, *Doing What Comes Naturally*, 94.

apparent."[398] What Fish mainly wants to point out is that there is not a purely found or invented history.

It seems to me that the chain of law is vulnerable to Dworkin's own account of the ideal character of this enterprise. He compares the judges in chain with Hercules. Their intellectual capacities have to be as strong as Hercules'. Only judges with such power will be able to discover the coherent set of principles to justify the narrative in which they are engaged. Nevertheless, as Dworkin alerts us: "we must not suppose that his (Hercules') answers to the various questions he encounters *define* law as integrity as a general conception of law. But law as integrity consists in an approach, in questions rather than answers, and other lawyers and judges who accept it would give different answers from his to the questions it asks."[399]

I have analyzed the dialogue between Dworkin and Fish, which was one of the dialogues performed in this matter among many philosophers, legal scholars, and literary scholars (reminding us the purpose of this thesis). In spite of the chain of law's idealism, it definitely reconstructs law based on this seductive relation between philosophy, law, and literature; that is, on the crisscrossings and interweavings that Bernstein nicely talks about: "One of the most hopeful signs for philosophy in America today is this 'unrest in the philosophic atmosphere', this 'loosening of old landmarks. ' (…) There are all sort of crisscrossings and interweavings. (…) These interweavings extend to the interplay of disciplines which not so long ago were taken to be quite distinct – philosophy and law,

---

[398] Fish, *Doing What Comes Naturally*, 94.

[399] Dworkin, *Law's Empire*, 235.

philosophy and literature, philosophy and the social disciplines, philosophy and medicine, and so forth."[400]

Dworkin's legal theory is, after all, one possible critical response in terms of what legal discourse can offer to our complex contemporary issues. At this point, it is possible to say that because of its critical and hermeneutic attitude toward adjudication, Dworkin's legal discourse overcomes traditional discourses such as legal positivism; further, it is a reasonable alternative to legal realism and, especially, critical legal studies. As a legal response to conflicts, Dworkin's theory of law can be strictly understood as a theory of adjudication, that is, as a response given by the courts in their adjudicative function. In this sense it provides legal decisions that engender a provisional stabilization to what is intrinsically conflictual: the claim for rights and justice. Law as integrity is an attempt to ensure, as much as possible, consistent responses from within the law, which, on the one hand, avoid the danger of self-referenciality and indeterminacy in law and, on the other hand, appease the tension between rights and democracy. However, the legal system as such is not able to ensure articulated decisions founded on a single coherent vision of justice, fairness, and procedural due process. In fact, the *real*ization (accomplishment) of law as integrity depends on responses that are beyond the law (or the legal system).

Dworkin is credulous that the answers given by the courts to the ineradicable tension that moves (on) the democratic, pluralistic political community are not only the right ones but they are the best answers: "our concept of law ties law to the present justification of coercive force and so ties law to adjudication: law is a matter of rights

---

[400] Bernstein, *The New Constellation,* 334.

tenable in court"[401]. It is not by chance that his paradigmatic judge is Hercules and only judges with such super power are capable to decide according to integrity: balancing individual claims and communal goals. His/Her task is to equilibrate individual demands based on the idea of autonomy with communal ones based on the idea of identity. Hence, by being faithful to law as integrity Hercules answers to both, the liberal claim for autonomy and freedom, which implies the respect for plurality and difference, and the democratic claim for collective identification, according to which individuals recognize themselves as a community identified in principles. Hercules triumphs in the law's empire by satisfying 'our' demand for stabilization in complex plural societies to the extent he/she equalizes 'our' demand for rights with "our" demand for a fair and just society; for a community of principles. As Dworkin puts it: "(w)e have an institution that calls some issues from the battleground of power politics to the forum of principles. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally become questions of justice. I do not call that religion or prophecy. I call it law."[402]

That rights play a major role in Dworkin's theory of law we all already know: they are either its mark or qualify it. On the one hand, "(l)aw is a matter of which supposed rights supply a justification for using or withholding the collective force of the state …"[403], on the other hand, it is the judge's task (preferably Hercules') to identify

---

[401] Dworkin, *Law's Empire,* 400-1. See also *A Matter of Principle*, p. 70. "Judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not political power alone, a tranformation that cannot succed, in any case not fully, within the legislature itself. That is important beyond the importance of actual decision reached in courts so charged."

[402] Dworkin, *A Matter of Principle*, 71.

[403] Dworkin, *Law's Empire,* 97.

such rights on the belief that they were created by a single author. For the judge's answer about rights (is right if), in accordance to the principle of integrity, presupposes that law is structured by a coherent set of principles about justice, fairness, and procedural due process.[404] Yet Dworkin underlines the rightness of these principles: "justice is a matter of the right outcome of the political system: the right distribution of goods, opportunities and other resources. Fairness is a matter of the right structure for that system, the structure that distributes influence over political decisions in the right way. Procedural due process is a matter of the right procedures for enforcing rules and regulations the system has produced."[405] Hence, the judge (Hercules who is a right person), by means of a sophisticated interpretative attitude, arrives at a right answer about rights. Rightness is unconditional and accordingly, we could say that: rights have a moral meaning that confers a quality of unconditionality on individual legal claims; a right answer signifies an absolute answer given by the judge, that is, the answer to question of rights is mostly a judicial concern; rights granted through a right answer based on (sometimes conflicting) principles require a procedure of constructive interpretation; the right decision of the judge is supported by a theory of law (as integrity) that counterweighs the supposed indeterminacy of law; adjudication is concentrated on right answers to questions about rights concerning some of the judge's political theoretical views (his views about rights).

Hercules' right answer links rightness to justice, fairness, and procedural due process. Dworkin clearly says that 'law as integrity' demands a single and coherent

---

[404] The judge is committed to find the right answer in the *right relation,* so that the law will never "run out". His taks is always interpretative and never legislative. Kennedy, Duncan. *Adjudication and Legislation*, 122.

[405] Dworkin, *Law's Empire,* 404-405.

vision of justice, fairness, and procedural due process *in the right relation*.[406] Yet, he does not say what this *right relation* is. Ironically, Dworkin admits that there is not a formula through which courts can arrive at this *right relation*. Besides, Dworkin acknowledges that the consequences of justice, fairness, and procedural due process are contingent. So, no matter the rightness of Hercules and of his/her answer, this latter ends by not being absolute or unconditional.

The rightness of Hercules' right answer can also be problematic by the fact that the required coherence or integrity of the system of law is not often achieved by means of the interpretative model thought by Dworkin.[407] It is possible that in face of principles that are not coherent among themselves, for instance, between the principle of private property and the principle of property's social function [408], Hercules could fail in

---

[406] Dworkin, *Law's Empire,* 405.

[407] Habermas says that "(t)he theory of judge Hercules reconciles the rationally reconstructed decisions of the past with the claim to rational acceptability in the present, it reconciles history with justice". However, this presupposes that judges such Hercules act, consistently, over time yet there is no guarantee that this will happen. See, Habermas, *Between Facts and Norms,* 213.

[408] After the constitution of 1988, some branches of the Brazilian civil law such as property's law instead of remaining a typically private law became part of the public law to the extent of its constitutionalization. For example, Article 5, *caput* of the Brazilian constitution, under the title *Dos direitos e garantias fundamentais* (Of fundamental rights and guarantees) says: "Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se, aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à via, à liberdade, à segurança e à propriedade, nos termos seguintes:" (All are equal before the law without distinction of any nature, assuring to Brazilians and to no Brazilians permanent residents the inviolability of the right to life, the right to freedom, the right to security and the right to property in the following terms): ".... XXII – é garantido o direito de propriedade; XXIII – a propriedade atenderá a sua função social..." This article states, at the same time, the fundamental right to property and just below that the property must serve (do what is requiref for) its social function. Considering these two principles (private property and property's social function), how judge Hercules would coherently interpret and decide a case of a land of thousands of acres which had not been used by its owner and that now has been occupied by a group of homeless people who has been working on it and turning it into a productive land for their community? What would be the best answer? The one in favor of the owner and his freedom of doing whatever he feels like with his land or the other in favor of a just redistribution of the land for the homeless people? *Constituição da República Federativa Brasileira,* São Paulo: Saraiva, 2004. See also, Duncan Kennedy, "Form and Substance in Private Law Adjudication," *Harvard Law Review* 89, 1976, 1688 ff. In this article Kennedy gives a similar example concerning the "incommensurability" between two principles that are at the core of private law theory, respectively the principle of freedom of contract and the principle of good faith (*bona fides*).

constructing a coherent answer jeopardizing the idea of legal certainty and the claim to a legitimate application of law (in the terms put by Dworkin), as far as he would have to look for an answer outside the legal system, in the struggles that take place in the political arena.

In view of these difficulties we rather look at Hercules' answer as a provisional solution (stability) to the question of rights and the justification of the state's power as well as to the question of justice. Dworkin would probably not agree with this too-human deed of a Herculean system of adjudication, that is, with the provisional character of the answers given by the legal system.

After all, Dworkin offers one plausible way to reconcile law, democracy, and justice. The chain of law model shows that legal practices, as a narrative, depend on the readers/interpreters of this legal narrative. In interpreting legal practices, laypeople, lawyers but particularly judges are not only retelling the story that has been written, but also recounting it in a better way for the sake of the political, moral and ethical project they are engaged in. Indeed, law as integrity reminds us that law is not (and cannot be) self-referent to the same extent it is not (and cannot be) reduced to politics "in the pejorative sense of the unprincipled, shrewd, and often manipulative quest for advantage in the political arena."[409] Integrity in law (or as a legal practice) assures principled answers to legal disputes that asked for adjudication arranging harmoniously, even as an interim measure, conflicting demands about rights. Integrity in liberal democratic politics (or as a political practice) also intends to give principled answers to conflicts combining demands that are, in fact, intrinsically exclusive or rather, impossible to be harmoniously

[409] Michel Rosenfeld, *Just Interpretations. Law between Ethics and Politics* (Berkley, Los Angeles and London: University of California Press, 1998), 17.

arranged. Dworkin believes in a community where people are treated with equal concern and respect and where they are linked by associative (communal) obligations sharing a high level of identification. However, we cannot neglect the different identities people have as members of any community, the different positions they occupy and the different level of power they possess. This means that the accomplishment of equality in any community implies arrangements concerning rights and obligations that have, inevitably, some cost to its people. This cost could be amounted to the recognition of the contingent character of all identity. Hart, accurately, says that, " (t)hough the claim that liberal rights are derived from the duty of governments to treat all their citizens with equal concern and respect has the comforting appearance of resting them on something uncontroversial … this appearance dissolves when it is revealed that there is an alternative interpretation of this fundamental duty from which liberal rights could not be derived but negations of many liberal rights could."[410] What Hart is pointing out is that Dworkin's liberal community and its commitment to equality can be controversial affecting the very idea of identity and consensus on which it is grounded. For instance, when the general right of equal respect and concern turns into the concrete right to sexual liberty, it is possible that the latter is protected and enforced by the courts but at some cost of the identification that characterizes the community as such. In other words, Dworkin avoids the tension between democratic claims for identity and liberal claims for autonomy and difference assuming that in a liberal democratic community there is no disagreement between identification and autonomy (independence) but they mutually support each other. Contrary to Dworkin I am of the opinion that any effort in protecting and enforcing rights

[410] H.L.A. Hart, "Between Utility and Rigths," note 30, 226 ed. Marshall Cohen, *Ronald Dworkin and Contemporary Jurisprudence* (Totowa, NJ: Rowman & Allnheld), 1983.

must assume the constant and unavoidable tension between identity and difference. It means that once called to answer to this tension, law will always provide a solution (legal disputes about people's rights must be adjudicated), which will be contingently right, assuming its limitation before (in the face of) conflicts that are beyond the legal arena: in the political arena of liberal democracy whose paradoxical logic calls for a permanent negotiation "between political forces which always establish the hegemony of one of them".[411]

4.IV.I. excursus: unchaining the law

Modern liberal democracy articulates two different traditions: the democratic and the liberal one. The democratic tradition goes back to the ancient world and is ordinarily identified with the right to directly participate in the administration of the *res publica.* The most known picture of it is that of an assembly of individuals to deliberate about their community's (public) affairs. The very idea of public has to do with this gathering for deliberating in a place accessible to every man. However, the democratic picture gains a new contour with the liberal trace. Liberalism, especially from the nineteenth century on, implies the idea of representation in the domain of the *res public*, the idea of liberty and, accordingly, the idea of pluralism (it is possible to have more than one notion of the good).

At this point, we can envisage the modern picture of a political community in which individual liberty is articulated with the democratic rule, that is, a political and

[411] Mouffe, *The Democratic Paradox,* 05.

juridical structure in which individual rights are in connection with the idea of self-government. On the one hand, who governs us and, on the other hand, how far the government interferes with us are the appealing issues to be combined by such political, and juridical form. As Berlin says, "the desire to be governed by myself or at any rate to participate in the process by which my life is to be controlled may be as deep a wish as that of free area for action."[412] The (com)(im)plications of such articulation are well-known and it is not by chance that political theorists such as Dworkin and Mouffe (just to mention two) are still devoting their time and thoughts to this discussion, which is still at the core of modern political and legal philosophy. Hence, this excursus will focus on Dworkin's and Mouffe's (dis)agreements on liberal democracy.

Dworkin and Mouffe agree that human rights, pluralism, and democracy can be sacrified at no rate. This is a premise for political and legal narratives that are committed with equality and liberty. What becomes problematic is the understanding of what these principles are. As I previously pointed out, Dworkin develops a theory of law whose main issue is that of interpretation: law is an interpretative concept of legal practices. He is very much concerned with the justification of demands made in the name of law. He acknowledges that there is a constant tension between what the legal materials say and what the morally best way to interpret them is but he believes there is a right answer to this impasse. By 'best way to interpret' he means the best moral theory, which for him is the one based upon the idea that people should be treated with equal concern and respect; a moral theory, which is based on this idea of equality. For Dworkin, it is a kind of constructive interpretation that draws on equality - people should be treated with equal

[412] Isaiah Berlin, *Four Essays on Liberty* (London, Oxford, New York: Oxford University Press, 1970), 131.

concern and respect - that best justifies the legal system. As Guest nicely puts it, "(h)is perspective on law is that of justification. We must interpret the law so as to make the 'best' moral sense of it. …When we are making sense of law, we must assume that its best sense express an equal concern for people."[413]

On the other hand, instead of a constructive interpretation a deconstructive attitude shows us that interpretation has been the expression of the prevailing hegemony and however sophisticated it can be it inevitably entails a contradiction as far as liberal democracy results form the articulation of two logics, which are incompatible and no way they could be perfectly reconciled.[414] In other words, equality and liberty are principles that, as Cornell says, "have been and continue to be out to use to sustain local and global hegemonies of capitalism but this does not mean that it is advisable or even possible to jettison the ideals themselves."[415] When such principles constitute the discourse of rights and must be enforced via political and judicial decisions it does not mean a capitulation to capitalism and its 'logic'. Rather, the defense of these ideals is compatible with an attitude that does not follow the logic of late capitalism such as the positions assumed by Dworkin, Mouffe, and some others. They care about equality and foremost about material equality. They create narratives on politics and law, which are constructed or deconstructed from practical political and legal controversies. However, the difference between them lies on the fact that while for Dworkin integrity is the right answer to the

---

[413] Stephen Guest, *Ronald Dworkin* (Standford, California: Stanford University Press, 1991), 09.

[414] Mouffe, *The Democratic Paradox,* 05.

[415] Cornell, *Just Cause*, 02.

question of liberal democracy, for Mouffe this belief on an integrated community forges a solution to what cannot be solved: the democratic paradox.

Dworkin engages in a constructive undertaking that is to provide the best way of interpreting our legal and political practices in order to justify the state's power on the basis of equality assuming that there is no tension between equality and liberty as both principles/rights are compatible to each other. Mouffe, in its place, engages in a deconstructive undertaking according to which the relation between equality and liberty is not that of negotiation but of contamination "in the sense that once the articulation of the two principles has been effectuated … each of them changes the identity of the other. …(B)oth perfect liberty and perfect equality become impossible. But this is the very condition of possibility for a pluralist form of human coexistence in which rights can exist and be exercised, in which freedom and equality can somehow manage to coexist."[416] The problem with Dworkin's right answer to the question of democracy, according to Mouffe, is that instead of acknowledging the inevitability of its constitutive and permanent paradox, it aims at eradicating it. She says that a rationalist approach (such as Dworkin's) remains blind to the political and its antagonistic dimension.[417]

Mouffe radically opposes this reconciliation between the two principles. From Derrida she gets the notion of 'constitutive outside' to grasp the antagonism that are present in all objectivity and also the importance of the 'us/them' distinction in the constitution of collective political identities: 'we' are not simply the dialectical opposite of 'them'. The constitutive outside is more than a dialectical negation. "In order to be a

---

[416] Mouffe, *The Democratic Paradox*, 10.

[417] Mouffe, *The Democratic Paradox*, 11.

true outside, the outside has to be incommensurable with the inside and at the same time, the condition of emergence of the latter. This is only possible if what is 'outside' is not simply the outside of a concrete content but something which puts into question concreteness as such."[418] The constitutive outside stresses the radical undecidability of the tension between them and us. By doing this, it shows the positivity of the tension –of the possibility/impossibility. "The 'them' is not the constitutive opposite of a concrete 'us', but the symbol of what makes *any* 'us' impossible."[419] For Mouffe, the political has to retain this tension, which she finds in Schmitt's concept of the political. Schmitt's friend-enemy relation cannot be reduced to a dialectical opposition between two political collectivities but reveals an antagonism that means the ever-present possibility of politics. However, Mouffe distinguishes this kind of antagonism she finds in Schmitt's concept of the political from another kind of antagonism that takes place between adversaries and not enemies. She refers to this latter as 'agonism', whose relation is between people who share a common symbolic space yet they organize it in a different manner. Then, Mouffe says: "I see the category of the 'adversary' as the key to envisage the specificity of modern pluralistic politics, and it is at the very center of my understanding of democracy as 'agonistic pluralism'."[420] The political or antagonistic dimension of politics means that our practices, discourses, and institutions cannot avoid conflict, yet even in this context (of conflict and diversity) it is possible to create a unity, that is, an 'us' by the determination of a 'them'. The 'them' is not constituted by enemies but by adversaries

---

[418] Mouffe, *The Democratic Paradox*, 12.

[419] Mouffe, *The Democratic Paradox,* 13, 101-102.

[420] Mouffe, *The Democratic Paradox,* 14, 102-103.

whose ideas we might not agree with and then contest, nevertheless whose right to defend those ideas is unconditional. Adversaries share the same ethico-political principles as far as they agreed on the liberal democratic politics. However, the meaning of these principles, namely equality and liberty, and their accomplishment are not consensual and it is this disagreement of values that characterizes Mouffe's agonistic pluralism. Equality and liberty as the ethico-political basis of liberal democracy are acceptable to the extent of the openness of their meaning. "This requires providing channels through which collective passions will be given ways to express themselves over issues which, allowing enough possibility for identification, will not construct the opponent as an enemy but as an adversary."[421] Mouffe (re)introduces in the public space the passion rationalism aimed to completely eliminate. In the realm of passion there is a resistance to its own desire for perfect and final closure such as in the democratic public realm. In this sense, collective passions could drive our democratic demands (re)inventing the political sphere.

Mouffe acknowledges that democratic politics implies a certain amount of consensus and allegiance to its fundamental values such as equality and liberty, however, the diverging interpretations of these values leads to what she calls a 'conflictual consensus'. Consensus in a society of intense political participation is only a moment (a temporary result of provisional hegemony) and not the end of its people demands. It generates a stabilization of power and entails some form of exclusion. For this very reason this stabilization tends to be transitory (just like our passions), what asserts the "dimension of undecidability and the ineradicability of antagonism which are constitutive

[421] Mouffe, *The Democratic Paradox*, 103.

of the political"[422] in complex modern plural societies. Mouffe's agonistic pluralism warns us "against the illusion that a fully achieved democracy could ever be instantiated, it forces us to keep the democratic contestation alive."[423]

Politics is not law or ethics yet it also involves decision. Decision on politics can neither capitulate before its paradoxes nor before the appeal to a rational moral calculus that promises equality and liberty with no cost. Decision on politics does have a cost: the cost of its ant(agonistic) dimension. There is no politics in the modern pluralistic context without friends and enemies or adversaries and, accordingly, without violence and exclusion. In chapter three, particularly from Schmitt-and-Kelsen's debate, I pointed out how the founding moment of the political sphere is a moment of suspension of the law (according to Schmitt) or of a *coup de force* or violence in the words of Derrida, which no previous law could guarantee. This fact stresses the indiscernible character of the decision (or violence or power), which institutes the law and that which conserves and enforces it. The irreducibility of violence calls for stabilizations such as conventions, institutions, and consensus that became necessary "precisely because stability is not natural; it is because there is instability that stabilization becomes necessary; it is because there is chaos that there is a need for stability."[424] On the one hand, this founding and irreducible violence demands laws, conventions, and provisional hegemony (stabilization) and, on the other hand, it is "a chance to change, to destabilize. (I)t is to the

---

[422] Mouffe, *The Democratic Paradox*, 105.

[423] Mouffe, *The Democratic Paradox*, 105.

[424] Derrida, "Remarks on Deconstruction and Pragmatism," in *Deconstruction and Pragmatism,* 83-84.

extent that stability is not natural, essential or substantial, that politics exists and ethic is possible…and it is here that the possible and the impossible cross each other".[425]

4.IV.II. threshold 2: from construction to deconstruction

Then, if in the realm of legal philosophy Dworkin's discourse is non-conservative[426] committed to a liberal legal and political project of giving 'right' and 'just' answers for some of the issues (about rights) put by contemporary complex societies[427], in the realm of political philosophy it is not capable to accomplish a radical democratic project to the extent that it avoids the paradoxical structure of liberal democratic politics. Dworkin's political philosophy as well as Habermas' and Rawls' - just to mention two other thinkers that are equally engaged in rendering 'good' and 'just' answers in reconciling law and justice as well as democracy and rights through, respectively, a proceduralist paradigm of law[428] and a theory of justice – remain hostages

---

[425] Derrida, "Remarks on Deconstruction and Pragmatism" in *Deconstruction and Pragmatism,* 84.

[426] Dworkin's liberal theory of law criticizes both conservative judicial law making and leftist judicial activism. He clearly distinguishes adjudication from legislation and, accordingly, the judge from the legislator affirming that what makes law worth of respect is the fact that, through adjudication, the most important issues of political morality are understood as issues of principle and not political power alone. That is, this could only happen within the law (and not within the legislature itself). See, Dworkin, *A Matter of Principle,* 70.

[427] 'Good' and 'just' refer here to the improvement of society in terms of its democratic structure, the recognition of equality as its guiding principle, and the accomplishment of new rights that constantly arise in response to social demands.

[428] "In the proceduralist paradigm of law, the vacant places of the economic man or welfare-client are occupied by a public of citizens who participate in political communication in order to articulate their wants and needs, to give voice to their violated interests, and, above all, to clarify and settle the contested standards and criteria according to which equals are treated equally and unequals unequally." Jürgen Habermas, "Paradigms of Law"in Rosenfeld and Arato (Orgs.) *Habermas on Law and Democracy*, 18.

of the Enlightenment's legacy of universalism and rationalism: the universal human nature, universal reason and unconditional universal truth.

In political philosophy the so-called poststructuralist, deconstructivist or yet non-essentialist approaches (Lefort, Derrida, Mouffe, Cornell, etc) imply a (literally) different attitude towards a more equal and just world in the course of a radical democratic project. I assume that such approaches are not just more radical in their theoretical and practical interventions but in their commitment with kinds of discourses in which consensual (*right*) solutions have not been (and cannot be) given (constructed). The ground of a possible, (contingent) 'solution' for a pluralistic society is the assumption (of the necessity) of its conflictive structure that questions the own notion of grounds. As Mouffe says, "… the specificity of liberal democracy as a new political form of society consists in the legitimation of conflict and the refusal to eliminate it through the imposition of an authoritarian order. A liberal democracy is above all a pluralist democracy. Its novelty resides in its envisaging the diversity of conceptions of the good, not as something negative that should be suppressed, but as something to be valued and celebrated. This requires the presence of institutions that establish a specific dynamic between consensus and dissent."[429] From this radically democratic political perspective we can think of a just community where substantive notions of the good and essential notions of collective identity are discarded from the beginning to the extent of the impossibility of grounding democracy and justice on something that is not the very idea of aporia.

Kelsen affirms that the question of justice does not have to be asked by who enforces the law; I reply (sort of agreeing) it is a question that is beyond the legal system

[429] Chantal Mouffe, "Deconstruction, Pragmatism and the Politics of Democracy" ed. Chantal Mouffe *Deconstruction and Pragmatism*, 08.

and its officials. Indeed, I am just reaffirming that justice is not a legal concern, strictly speaking; it exceeds it. In being beyond, justice is 'perhaps' only possible in a time to come. Heller comments on her *Beyond Justice*[430] that Giotto's Justice in the Arena Chapel is the image of a queen carrying on her left hand the angel of war and on her right hand the angel of peace and whose eyes stare at the future; a future that is not the reproduction of the present but a promise; a 'to-come' of transformation. Derrida says that law may find itself accounted for whenever a rule was applied to a particular case or to a subsumed example. Nevertheless, law is not justice. "Law is the element of calculation, and it is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable; and aporetic experiences are the experiences, as improbable as they are necessary, of justice, that is to say of moments in which the decision between just and unjust is never insured by a rule."[431]

To such idea of justice (as aporia) legal theory should commit itself if it aspires, somehow, to intervene and change the world. This is not a messianic statement. It rather is a commitment that legal theory –legal theorists, philosophers of law, judicial officials, professors of law, legal professionals, and etc.- should have: to (co)llaborate to a radically democratic and more just world. Despite the impossibility of having a right answer to the question of law as well as to the question of democracy, we cannot stop looking for answers -in the juridical and in the political realm-, which, contingently, provide stabilization and closure to what is constitutively violent, instable and open: this world of disenchantment (of law and politics) and our life in this world. An aporia does not

---

[430] Heller, *Além da Justiça,* 27.

[431] Derrida, "Force of Law: the Mystical Foundation of Authority," 947.

preclude decision; on the contrary, it demands it, as one cannot remain within it. "At the same time, its essential irreducibility to the cut of a decision makes the decision which one makes contingent."[432]

My claim is that to deal with the contingent nature of our legal and political decisions there must be an ethical commitment to justice. Derrida beautifully raises the following question: "Does deconstruction insure, permit, authorize the possibility of justice? Does it make justice possible, or a discourse of consequence on justice and the conditions of its possibility?"[433] In a dialogue of *the Trial,* K. says to Titorelli, the painter: "'That must be a Judge'" to what the painter replies: "'It is Justice'". "'Now I can recognize it,' said K. 'There's the bandage over the eyes, and here are the scales. But aren't there wings on the figure's heels, and isn't flying?' 'Yes', said the painter … 'Actually it is Justice and the Goodess of Victory in one.' 'Not a very good combination, surely,' said K., smiling. 'Justice must stand quite still, or else the scales will weaver and a just verdict will become impossible.'"[434] Derrida's question and K.'s final remarks, somehow, sets the leitmotiv of this last chapter.

---

[432] Beardsworth, *Derrida and the Poltical*, 05.

[433] Derrida, "Force of Law: the Mystical Foundation of Authority," 922.

[434] Kafka, *The Trial,* 146.

Chapter 5

Post-text or that which is beyond (the law): the possibility of justice

> I think that there is no justice without this experience, however impossible it may be, of aporia. Justice is an experience of the impossible.[435]

"'Justice must stand quite still, or else the scales will weaver and a just verdict will become impossible.'"[436] Joseph K. is talking to Titorelli, the painter, about one of his (Titorelli's) paintings[437] but he could also be talking about his story or trial: the impossibility of justice. Justice experiences an indetermination and impossibility, which, in the language of transcendental philosophy, are its very condition of possibility. This chapter concerns, mainly, the idea of justice as aporia as the experience of that which we cannot experience (in the present) to the extent that it is yet to come, it is "*à venir*, it has an, it is *à-venir*, the very dimension of events irreducibly to come. It will always have it, this *à-venir,* and always has. Perhaps it is for this reason that justice, insofar as it is not

---

[435] Derrida, "Force of Law: the Mystical Foundation of Authority," 947.

[436] Kafka, *The Trial,* 146.

[437] The painting of Titorelli, a flying figure with a bandage over the eyes, holding a set of scales and with wings on the heels, combines the goddess of justice with the goddess of victory.

only a juridical or political concept opens up for *l'avenir* the transformation, the recasting or refounding of law and politics."[438] For Derrida, a demand for justice, in the sense of an ethical commitment legal decisions must have and whose structure would not be an experience of aporia would have no chance to be what it is, namely, a call for justice.[439] Yet, the question Derrida (we) ask(s) is how to justify the choice of a negative form (aporia) to designate a commitment that, through the impossible reveals itself as possible, that is, in an affirmative fashion? In other words, how the choice of justice as aporia becomes or is a possibility for decisions we take at law?

5.I. the deconstruction of law and (for) the undeconstructibility of justice

I called this last chapter as 'that which is beyond the law: the possibility of justice' and it could not be otherwise as far as justice cannot be confined to justice as law or as stated by the law, nonetheless as a possibility for decisions taken at law. In other words, justice as law is not justice. We obey the law because it has authority and not because it is just. As I have already said in chapters two and three, ever since the constitution of the rule of law, authority and law are inexorably linked to violence. Yet, justice is not safe of being linked to violence. Rosenfeld refers to such paradoxical situation affirming that "(j)ustice as the means to strike a fair equilibrium between the self and other confronts the paradox of having to be at once both universal and singular. To be fair to the other, justice must consider him or her in all his or her singularity; but to

[438] Derrida, "Force of Law: the Mystical Foundation of Authority," 970-71.

[439] Derrida, "Force of Law: the Mystical Foundation of Authority," 947.

strike an equilibrium between self and other justice avoid speaking in the voice of either one of them and is this compelled to embrace a universal language that transcends the peculiarities of all the selves that come within its sweep."[440] Justice as law cannot work but in a universal perspective what, on the other hand, does violence to the singular. By the same token the abstract character of justice as law does violence to the demand for singular, concrete decisions at law. As a matter of fact, justice cannot avoid producing violence.

The clash between universal and singular, abstract and concrete, I (we) and the other (them), is inherent to pluralistic societies where different conceptions of the good compete. Yet, there is a conviction that such antagonism could be appeased through a criterion of justice based on a consensus over a determinate conception of the good capable of reconciling what, indeed, is impossible to be conciliated. The question of reconciliation thus remains: how is justice possible in the conflict between singularity, the other (or myself as other) and universality (the law as norm –principle or rule- which necessarily have a general form)? This allows us to think of a contingent criterion of justice what amounts to decisions at law that are always provisional to the extent that justice (in the present) is never complete or perfect. The impossibility of justice asseverates the deconstructible character of law or of justice as law. For Derrrida, inasmuch law (authority, legitimacy and legality) is deconstructible, justice beyond the law is not deconstructible, precisely because deconstruction is justice: "the undeconstructibility of justice also makes deconstruction possible, indeed is inseparable

[440] Rosenfeld, *Just Interpretations,* 56.

form it."[441] Deconstruction is there in hiatus that separates the undeconstructibility of justice from the deconstructibility of law.

Derrida remarks that deconstruction does not renounce in face of a situation of responding to the opposition between just and unjust. For deconstruction is militant, it is an attitude taken in the name of justice itself, which initially implies to be attentive and just with justice itself, that is, to hear, read and to understand where it comes from, what it wants of us, knowing that it does so through singular idioms.[442] The insuperable antagonism between universal and singular, abstract and concrete, I (we) and them (the other) justice has to deal with or is about it, becomes a possibility for law and politics in liberal-democratic societies (complex, plural, substantially unequal, etc) when we understand that justice always address itself to singularity, to the singularity of the other, despite or even because it pretends universality. This antagonism can be thought in terms of an undecidable relation, which shows that no justice is universal enough not to be violent or not to comprehend exception when thought as singular.

As we have seen in chapter four, neither the discourse of legal positivism, nor its critics, think justice as an experience of the impossible, that is, of aporia. The aporia of justice in which deconstruction finds itself redefines the relation between justice and law as far as "*droit* claims to exercise itself in the name of justice and … justice is required to establish itself in the name of a law that must be 'enforced'."[443] This amounts to say that the deconstruction of law is necessary to be accomplished insofar it makes possible its

---

[441] Derrida, "Force of Law: the Mystical Foundation of Authority," 945.

[442] Derrida, "Force of Law: the Mystical Foundation of Authority," 955.

[443] Derrida, "Force of Law: the Mystical Foundation of Authority," 958-959.

(the law's) transformation in the name of justice. However, while justice is infinite, incalculable, and contrary to symmetry, law exists in the realm of legitimacy and legality, that is, is calculable and stable. Hence, the conciliation between justice and law demands to calculate with the incalculable. This challenging task is everyday taken by courts at the moment they must apply the law. To interpret and apply the law demands to the judge to balance between the general and the singular, between the norm (a political decision of the past) and the present exigency of justice. Then, to answer to the call of justice obliges the judge to reinvent the norm contained in the legal text, as far as his/her interpretation has to answer to each case's singularity yet through the general standards of the norm. Most of the people believe that the possibility of justice remains in the combination of the singular and the universal yet, they do not take into account that the self cannot fully get the irreducible singularity of the other what, conversely, confirms the impossibility of justice. Still, a difficulty arises, that is, how to interpret and apply the norm and at the same time answer to the call of justice, without violating the general character of the norm or even abandoning it (the norm), or still without turning fluid its content (inscribe in the past)? Before this impasse Derrida's thinking of aporia move us to the next section of this chapter, namely, justice as an aporia.

5.II. justice as an aporia

In the beginning of this dissertation, in its *(pre)text* I quoted a passage from Derrida's *Aporia* where he says that an aporia is an impossible experience. It is an experience and as such it takes place in the present, but since "one cannot figure the

aporia- that is, bring into the temporalization of time without loosing it- there can be no experience of aporia."[444] Derrida gives three examples of this impossible, somehow dramatic, experience he recognizes in justice and law[445]: *épokhè and rule*; *the ghost of the undecidable*; and *the urgency that obstructs the horizon of knowledge*. According to the first aporia (*épokhè and rule*) there is never a moment in the present that we can affirm that a decision is just. We could say it is legitimate or legal but not just. This idea has to do with the deconstruction of present. For Derrida, the past is the very constitution of temporality, as far as it marks the origins of that which presents itself, even if this origin can never be caught. Yet the present is always to be achieved as if it is a moment of suspension of something that cannot be fulfilled. In this sense, justice as aporia is something that never happens (or is) in the present but remains always as a possibility of happening (being) in the future. The second aporia (*the ghost of the undecidable*) refers to the experience of the undecidability. Justice is an experience that exceeds calculation or rather, is an experience of the incalculable. It cannot be apprehended, it is foreign to the order of the calculable, however it gives itself up to the impossible decision. The undecidable remains as a ghost in every decision, in every event of decision and it has nothing to do with a calculus of possibilities, but with this decision that never completely captures the singularity of the other. Deconstruction functions on the basis of an infinite 'idea of justice', "infinite because it is irreducible, irreducible because owed to the other, owed to the other, before any contract, because it has come, the other's coming as the

[444] Beardsworth, *Derrida and the Political*, 101.

[445] Derrida, "Force of Law: the Mystical Foundation of Authority," 961-972.

singularity that is always other."[446] According to Derrida, this kind of justice is the very movement of deconstruction at work in law and the history of law, in political history and history itself. Nevertheless, undecidability does not lessen responsibility. The third aporia (*the urgency that obstructs the horizon of knowledge*) assumes that justice is urgent and cannot wait. Decision takes place in the present and justice, even not being achieved in the present it has its call in the present, which urgently demands decision. Justice is not a regulative ideal or a horizon that accommodates our expectations, but a 'to-come'; a future that is more than the mere reproduction of the present but its transformation.

Accepting the idea of justice as an aporia and that it exceeds law and calculation cannot be an excuse in face of our political and legal responsibility to intervene, change and re-found the world we live in: not a mere world of rights but a world where the right to have rights is the contingency for a justice that (as *aporia*) is always to come. To understand justice as an aporia is an attitude that works as a "limit to any attempt to collapse justice into positive law."[447] Justice is usually seen as capable of integrating the singular and the universal but inasmuch the self cannot fully capture the irreducible singularity of the other, however, the singular and the universal are bound to continue pulling opposite directions, and justice remains impossible.

Therefore, the possibility of justice is this experience of an aporia. "(A)n experience is a traversal, something that traverses and travels toward a destination for which it finds the appropriate passage. The experience finds its way, its passage, and its possibility. And in this sense it is impossible to have a full experience of aporia, that is,

---

[446] Derrida, "Force of Law: the Mystical Foundation of Authority,"965.

[447] Drucilla Cornell, *The Philosophy of the Limit* (New York and London: Routledge, 1992), 02.

something that does not allow passage. An aporia is a non-road. From this point of view, justice would be the experience that we are not able to experience."[448] The possibility of justice in a diverse world, the possibility of what is incalculable, infinite, rebellious, and strange to symmetry, heterogeneous and unstable does not renounce the exercise of what is statutory, stabilizable, calculable, that is, law, yet is never reducible to it. As Cornell says, "… a legal system could not aspire to justice if it did not make this promise to conservation of principle and the rule of law. But it would also not aspire to justice unless it understood this promise as a promise to justice"[449].

5.III. being just (with) law and literature

> Impossibility is not the *opposite* of the possible: impossibility *releases* the possible.[450]

The dramatic experience of being Joseph K., the man from the country, the priest or the doorkeeper leads the four characters to another, no less dramatic experience: being in/for/before the law and literature: "There he sits for days and years. He makes many attempts to be admitted, and wearies the doorkeeper by his importunity. The doorkeeper frequently has little interviews with him…and always finish with the statement that he cannot be let in yet."[451] What places law at stake in *Before the Law* is, on the one hand, its inaccessibility, despite "the gate stands open as usual" and, on the other hand, its

---

[448] Derrida, "Force of Law: the Mystical Foundation of Authority," 947.

[449] Cornell, "The Violence of the Masquerade: Law Dressed Up as Justice," 1060.

[450] Beardsworth, *Derrida and the Political*, 26.

[451] Franz Kafka, "Before the Law," 03.

undecidability: "the Law, he thinks, should surely be accessible at all times and to everyone… " yet, "'how does it happen that for all these many years no one but myself has ever begged for admittance?'… 'No one else could ever be admitted here, since this gate was made only for you.'"[452] The law to which the man from the country has no access should be general, however, the uniqueness of the usually opened door confronts him with this irreconcilable relation of the general and the singular. Moreover, this aporia that turns the access to the law into a constant deferment -law is prohibition and prohibited- is not just what the narrative of *Before the Law* is about, but it is the very idea of literature itself. According to Derrida, the "(t)he text guards itself, maintains itself-like the law, speaking only of itself, that is to say, of its non-identity with itself. It neither arrives nor lets anyone arrive. It is the law, makes the law and leaves the reader before the law."[453]

In being before the text (or the law) trying to read and understand it we forge a contact with it. Yet, the text as well as the law remains inaccessible to us. Their origin maintains itself in suspension. There is no hermeneutical effort that allows such entrance. To interpret the text (or the law) is always an incomplete enterprise insofar as interpretation does not grant full access to it. For it places us, invariably, before it, notwithstanding hermeneutics give us the sensation of going through. What seems anguishing or dramatic for the man from the country, Joseph K., the doorkeeper, the priest and for us readers, that is, the impossibility of having full access to the text or the law is, on the other hand, what guarantees its singularity. I refer here to singularity in the

---

[452] Franz Kafka, "Before the Law," 03-04.

[453] Derrida, *Acts of Literature*, 211.

sense of that which makes the text (or the law) original (attached to its origin or beginning, no derivative, authentic, unique). And it is precisely this: the text or the law is singular as far as it is inaccessible, ungraspable, the object of no possible experience. And it seems just to respect this singularity to which the text (or the law) is entitled. The singularity of the text (or the law), that which identifies it, marks it as such, pronounces the law that protects it and renders it impenetrable: the law of the law.

"What if the law, without being itself transfixed by literature, shared the same conditions of its possibility with the literary object?" [454] If law and literature share the same conditions of possibility it means that the origin of law is also that of literature, which is, after all, a non-origin. A story as a kind of relation is "linked to the law that it relates, appearing, in so doing, before the law, which appears before it." [455] Accordingly, law should not bring up any story unless it is without history and origin. As Derrida asserts, this is the law of the laws – moral, judicial, political, natural etc. "What remains concealed and invisible in each law is thus presumably the law itself, that which makes laws of theses laws, the being-law of these laws."[456] Thus, law appears and interferes but detached from any origin, that is, "(i)t appears as something that does not appear as such in the course of a history. At all events it cannot be constituted by some history that might give rise to any story."[457]

As we can see, the origin of the law is not an event but it is not pure fiction either. It is neither history nor fantasy but the law; the law of the laws and this is the aporia of

[454] Derrida, *Acts of literature*, 191.

[455] Derrida, *Acts of literature*, 191.

[456] Derrida, *Acts of literature*, 192.

[457] Derrida, *Acts of literature*, 194.

law. "The aporia of law occupies the middle ground between reality and fiction, opening up the distinction, but always already exceeding its terms. [458] An aporia is, then, this *non-chemin* which we cannot experience, this impossible in its possibility and possible as its impossibility.

As I said before, the aporia is also the law of literature. It is within it that literature identifies its source of writing. For instance, the non-origin of the origin of the law appears as the content of *Before the Law* as well as the event of the text. The non-advent of the law is the advent of a text. Then, law and literature come together in this impossibility of the account of the origin of law.[459]

As I have already pointed out, the very characteristic of law is to be universal[460], that is, accessible to everyone and at all times but, essentially, it is not. It is then impossible to accede directly to the law, which is never immediately at hand. In Derrida words, "the very universality of the law exceeds all finite boundaries and thus carries this risk".[461] To the universality of law there is the singularity engendered by its enforceability. To the universality of a literary text – of what it narrates -there is its singular status as one and the only one (author-ity), copyrights etc).

Our access to the text is never immediate. It is like going into those strange tunnels where one's experiences are buried waiting to be revived nevertheless they

---

[458] Beardsworth, *Derrida and the political*, 34-35.

[459] Beardsworth, *Derrida and the political*, 34-35.

[460] As Derrida points out, Kant's moral law and the respect it calls for is due only to the moral law itself "which never shows itself but it is the only cause of that respect". Derrida is also concerned with the "as if" of the categorical imperative which, according to him, "enables us to reconcile practical reason with historical teleology and with the possibility of unlimited progress". Derrida, *Acts of literature,* 190.

[461] Derrida, *Acts of Literature,* 196.

remain as hidden in their origin. Fiction of narration as well as fiction as narration is the (non)origin of literature. The non-origin of the literary text (or the law) does not diminish the necessity of what it tells (its law). Therefore, in order to reach the law and stand before it, face to face with respect, or to introduce oneself to it and into it the story becomes the impossible story of the impossible.[462]

The access to the law (and literature) is always a mediated access as we cannot reach it but only have relation with the law's representatives who are at the same time its interrupters and its emissaries. "We must remain ignorant of who or what or where the law is, we must not know who it is or what it is, where and how it presents itself, whence it comes and whence it speaks. This is what *must* be before the *must o*f the law."[463] According to Derrida, to be before the law is to be a subject of the law in appearing before it but what can either mean to not have access to the law, to be outside the law (an outlaw). He/she is neither under the law nor in the law. He/she is both, a subject of the law and an outlaw.

This is the law of the law, the process of a law whose subject it is here and there. After all, we do not know what the law is, who it is, and where it is. "It is a thing, a person, a discourse, a voice, a document, or simply nothing that incessantly defers access to itself, thus forbidding itself in order to become something or someone. ...This nullification gives birth to the law, before as before and before as behind." [464]

---

[462] Derrida, *Acts of Literature*, 199-200.

[463] Derrida, *Acts of Literature*, 204.

[464] Derrida, *Acts of Literature*, 208-9.

Considering that an experience is a traversal, a movement of passage and so a possibility, to think law and literature as an aporia means that we can never have a full experience of them. In fact, it is the same impossibility we face regarding justice.

In the very beginning of this essay I mentioned the inscription that appears before the United the States of America Supreme Court, which says: "equal justice under law". The US Supreme Court or probably all Supreme Courts' conviction is that law does grant equal justice. If, on the one hand, this is the Supreme Court's firm opinion or belief to mitigate the rule of law original sin, on the other hand, this is the action of being found guilty: conviction. Supreme Court's firm belief on the law under which equality and justice can be accomplished is, paradoxically, what condemns them to play a conservative role in a world of inequalities. In other words, to affirm 'equal justice under law' amounts to say that there is no justice beyond the law. And, if there is no justice beyond the law, there is no justice all.

5.IV. the end(ing): death

> "I am not appealing for any man's verdict, I am only imparting knowledge, I am only making a report. To you honored members of the Academy, I have only made a report".[465]

To bring an essay to an end is to acknowledge, just like in a trial (judgement), that a whole exhausting process has preceded it. Many things have been said, others have been passed in silence and based on both of them, sounds and silence, a sentence is pronounced. The content of the sentence, the decision, is the outcome of who listened such sounds and silence. *Before the law* (or *the Trial*) and this dissertation (n)either ends

[465] Kafka, "A Report to Academy", *Complete Stories* (New York: Schocken Books, 1971), 259.

in the man's from the country and K.'s silent death (n)or in one's (mine) writing on it . For this reason, trials (judgements) and dissertations can be so controversial. Looking from this point of view a distressing, indignant sensation of injustice arises. Then, we forge instruments or rather, languages, to deal with the suffering and indignation that they (trials, judgements, dissertations) produce. Such languages are not to get rid of them but simply to deal with them in a certain way. To deconstruct *Before the Law* (and *the Trial*) is the language (attitude) I chose. As Sam Weber nicely puts it, "(i)f language and, in particular, literary language did not constantly hurl itself eagerly at its death, it would not be possible, since it is this movement toward its impossibility that is its nature and its foundation; it is this movement that, by anticipating its nothingness, determines its potential to be this nothingness without actualizing it."[466]

Joseph K. dies *like a dog*, after a parody of justice, executed by two men and without knowing the reason why he was arrested. His death is the end of a trial that never took place, the final sentence to the question of law and justice and the end of the narrative. Kafka's writing, the content of his writings and my writing about it end with Joseph K.'s or the countryman's death: death is the end. Blanchot says: "(d)eath alone allows me to grasp what I want to attain; it exists in words as the only way they can have meaning. Without death everything would sink into absurdity and nothingness."[467] In his D*iaries*, on December 13, 1914 Kafka refers to what he had told Max, that is, "I shall lie very contentedly on my deathbed, provided the pain isn't too great. …(T)he best things I have written have their basis in this capacity of mine to meet death with contentment. All these fine and convincing passages always deal with the fact that someone is dying, that it

[466] Blanchot, *The work of Fire,* 20.
[467] Blanchot, *The Work of Fire*, 324.

is hard for him to do, that it seems unjust to him, or at least harsh, and the reader is moved by this, or at least he should be. But for me, who believe that I shall be able to lie contentedly on my deathbed, such scenes are secretly a game; indeed, in the death enacted I rejoice in my own death, hence calculatingly exploit the attention that the reader concentrates on death, have a much clearer understanding of it that he, of whom I suppose that he will loudly lament on his deathbed, and for these reason my lament is as perfect as can be, nor does it suddenly break off, as is likely to be the case with a real lament, but dies beautifully and purely away."[468] Death places us before the end as the closure, the shutting down and in this case, Joseph K.'s or the countryman's death would be simply unjust; the annihilation of any possibility: of justice, of writing and of finishing this essay.

Seen from the point of view of its concreteness, that is, as the end(ing) of any possibility, death would amount, in any case, to indignation and injustice. Yet, from the point of view of its indeterminacy, of what cannot be mastered, death is not the point beyond which a thing does not continue, but it is, instead, a thing one seeks to attain, a purpose, that for which one or a thing exists.[469]

We may think either the death of the man from the country and Joseph K.'s or the end of Kafka's story and of this dissertation (their 'period') from this second situation where death does not amount to an ending but, instead, it is the end, it is that which one seeks to attain. For the writer (Kafka), it is the possibility for him to keep writing as for his characters it is the possibility to experience the impossibility of justice and for me to

---

[468] Kafka, *The Diaries,* 321. December, 13th, 1914.

[469] "The ending that we have in view when we speak of death, does not signify a being-at-an-end of Da-sein, but rather a *being toward the end* of this being." Heidegger, *Being and Time*, 228.

come to an end with my writing. Blanchot nicely says that literature is that moment when "'life endures death and maintains itself in it' in order to gain from death the possibility of speaking and the truth of speech."[470] Making reference to Blanchot's reading of Kafka's *Diaries,* Critchley also nicely says that "the writer's (and the philosopher's) relation with death is self-deceptive; it is a relation with what is believed to be a possibility, containing the possibility of meaningful fulfillment, but which is revealed to be an impossibility."[471] Blanchot and Critchley's remarks on death confront us with a situation of aporia. Kafka anticipates this paradoxical feeling towards death, in that passage extracted from his *Diaries,* when he says: "the best things I have written have their basis in this capacity of mine to meet death with contentment".

To meet death with contentment or rather the ending of this dissertation is what, paradoxically, makes possible to think ahead; not in terms of transcendence, but in terms of a time to come that cannot be but the transformation (revolution) of the present. That this 'time to come', this future is always indeterminate and ungraspable we do know. That it is in itself and in its violence indecipherable we also do know. But when action takes place and the future takes the form of present continuous, it (action) finds its motivation in the call for justice**.**

---

[470] Blanchot, *The Work of Fire*, 322.

[471] Critchley, *Very Little…Almost Nothing*, 74.

Bibliography

Agamben, Giorgio. *Homo Sacer*. *Sovereign Power and Bare Life.* Trans. Daniel Heller-Roazen. Stanford: Stanford University Press, 1998.

_____. *Means without End.* Trans. Vicenzo Binetti and Cesare Casarino. Minneapolis and London: University of Minnesota Press, 2000.

Arendt, Hannah. *Between Past and Future*. New York: Penguin Books,1993.

Aristotle, *The Complete Works.* Vol. I & II. Edited by Jonathan Barnes. Princeton, New Jersey: Princeton University Press, 1984.

Augustine, *The City of God.* Trans. G. G. Walsh, D. B. Zema, G. Monahan and D. J. Honan. New York, London, Toronto, Sydney, Auckland: Image Book Double Day, 1958.

Baracchi, Claudia. *Of Myth, Life and War in Plato's Republic*. Blommington and Indianapolis: Indiana University Press, 2002.

Barnett, Stuart (Ed.). *Hegel After Derrida*. New York and London: Routledge, 1998.

Beardsworth, Richard. *Derrida and the Political*. London and New York: Routledge, 1996.

Bendersky, Joseph W. *Carl Schmitt. Theorist for the Reich.* Princeton: Princeton University Press, 1983.

Benjamin, Walter. *Illuminations.* Trans. Harry Zohn. New York: Schocken Books, 1969.

Berlin, Isaiah. *Four Essays on Liberty.* London, Oxford, New York: Oxford University Press, 1970.

Bernstein, Richard. *The New Constellation. The Ethical-Political Horizons of Modernity/Postmodernity.* Cambridge, Mass.: The MIT Press, 1995.

Blanchot, Maurice. *Friendship.* Trans. Elizabeth Rottenberg. Stanford: Stanford Univrsity Press, 1997.

_____. *The Space of Literature*. Trans. Ann Smock. Lincoln and London: Nebraska University Press, 1982.

_____. *The Work of Fire*. Trans. Charlotte Mandell. Stanford: Stanford University Press, 1995.

Bloom, Harold. *The Western Canon*. New York : Harcourt Brace & Company, 1994.

Binder, Guyora and Weisberg, Robert. *Literary Criticisms of Law.* Pinceton, NJ: Princeton University Press, 2000.

Bodin, Jean. *The Six Books on The Commonwealth.* Tans. M.J. Tooley. Oxford: Basil Blackwell Oxford, 1955. [http://www.constitution.org/bodin/bodin_.htm]

Caputo, John. (ed.) *Deconstruction in a Nutshell. Conversation with Jacques Derrida.* New York: Fordham University Press, 1997.

Chauí, Marilena. Laços do desejo. *A Ética.* São Paulo : Cia das Letras, 1990.

Cohen, Marshall (Ed.). *Ronald Dworkin and Contemporary Jurisprudence.* Totowa, NJ: Rowman & Allnheld, 1983.

Connolly, William E.. *Political Theory & Modernity.* Ithaca and London: Cornell University Press, 1993.

Constituição da República Federativa Brasileira, São Paulo: Saraiva, 2004.

Cornell, Drucilla. *Beyond Accommodation*. Lanham, Boulder, New York and Oxford: Rowman and Littlefield Publishers Inc., 1999.

_____. *Just Cause. Freedom, Identity and Rights.* Lanham, Boulder, New York and Oxford: Rowman and Littlefield Publishers Inc., 2000.

_____. *The Philosophy of the Limit*. New York, London: Routledge, 1992.

_____. Violence of the Masquerade. *Cardozo law Review.* Vol. 11, number 5-6, july/aug. 1990:1046.

Critchley, Simon. *The Ethics of Deconstruction.* Derrida and Levinas. Edinburgh: Edinburgh University Press, 1999.

_____. *Ethics, Politics and Subjectivity.* London and New York: Verso, 1999.

_____. *Very Little… Almost Nothing.* London and New York: Routledge, 1997.

De Cusa, Nicholas. *Learned Ignorance*. Trans.Jasper Hopkins. Minneapolis: Banning Press, 1996.

Deleuze, Gilles, and Guattari, Felix. *Kafka*: *Toward a Minor Literature.* Trans. Dana Polan. Minneapolis and London: Minnesota University Press, 1986.

Derrida, Jacques. *Acts of Literature.* Edited by Derek Attridge. New York and London: Routledge, 1992.

_____. *Aporias.* Trans. Thomas Dutoit. Stanford, Cal.: Stanford University Press, 1993.

_____. *Du Droit à la philosophie.* Paris : Éditions Galilée, 1990.

_____. *Dissemination*. Trans. Barbara Johnson. Chicago and London: University of Chicago Press and Athlone Press, 1981.

_____."Force of Law: the Mystical Foundation of Authority," *Cardozo Law Review* 11: 5-6 (July/August) 1990.

_____. *Given Time: I. Counterfeit Money*. Trans. Peggy Kamuf. Chicago and London: University of ChicagoPress, 1994.

_____. *Margins of Philosophy.* Trans. Alan Bass. Chicago: University of Chicago Press, 1986.

_____. *Monolinguism of the Other or The Prosthesis of Origin.* Trans. Patrick Mensah.Stanford, Cal.: Stanford University Press, 1998.

_____. *Politiques de l'Amitié.* Paris: Galilée*,* 1994.

_____. Remarks on Deconstruction and Pragmatism. In: Mouffe, Chantal. *Pragmatism and Deconstruction.* New York and London : Routledge, 1996. (ver páginas)

_____. *Writing and Difference.* Trans. Alan Bass. Chicago: Chicago University Press, 1978.

Dyzenhaus, David (Ed.). *Law as Politics.* Durham and London: Duke University Press, 1998.

Dworkin, Ronald. *A Matter of Principle*. Cambridge, Mass.: Harvard University Press, 1985.
_____. *Freedom's Law.* Cambridge, Mass.: Harvard University Press, 1996.

_____. *Law's Empire***.** London: Fontana Press, 1986.

_____. *Sovereign Virtue*. Cambridge, Mass. and London: Harvard University Press, 2000.

_____. *Taking Rights Seriously.* Cambridge, Mass. : Harvard University Press, 1982.

Fish, Stanley. *Doing What Comes Naturally*. *Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*. Durham and London: Duke University Press, 1989.

_____. *Professional Correctness*. Cambridge, Mass. and London: Harvard University Press, 1995.

Fraser, Nancy. *Unruly Practices.* Minneapolis: University of Minnesota Press, 1989.

Guest, Stephen (ed.). *Positivism Today.* Dartmouth: Aldershot, England, 1996.

_____. *Ronald Dworkin*. Stanford, California: Stanford University Press, 1991.

_____. Two Strands in Hart's Concept of Law. In: Guest, Stephen (ed.) *Positivism Today.* Dartmouth: Aldershot, England, 1996.

Habermas, Jürgen. *Between Facts and Norms*. Trans. William Rehg. Cambridge, Mass.: The MIT Press, 1996.

_____. *The Inclusion of the Other.* Edited by Ciaran Cronin and Pablo De Greiff. Cambridge, Mass.: The MIT Press, 1999.

_____. *The Theory of Communicative Action.* Vol. I and II.Trans. Thomas McCarthy. Cambridge, UK: Polity Press, 1995.

Hamacher, Werner. *Premises.* Trans. Peter Fenves. Stanford, California: Stanford University Press, 1999.

Harris, J. W. *Legal Philosophies.* London: Butterworths, 1997.

Hart, Hebert L. A.. *The Concept of Law*. Oxford: Clarendon Press, 1972.

_____ *Essays on Bentham.* Oxford: Clarendon Press, 1982.

Hegel, G.W.F. *Phenomenology of Spirit*. Trans. A.V. Miller. Oxford: Oxford University Press, 1977.

_____. *Science of Logic*, Trans. A.V. Miller. Atlantic Highlands, NJ: Humanities Paperback Library, 1996.

_____. *Wissenchaft der Logik*, *Logik I-II*.. Frankfurt am Main: Suhrkamp, 1996.

_____. *Encyclopadie der Philosophischen Wissenchaftern*. Verlag Von Felix Meiner : Leipiz, 1949.

_____. *The Encyclopaedia Logic*, Trans. T. F. Gerates, W. A. Suchting, H. S. Harris. Indianapolis and Cambridge: Hackett, 1996.

Heidegger, Martin. *Being and Time.* Trans. Joan Stambaugh. Albany: State University of New York Press, 1996.

_____. *Hegel's Phenomenology of Spirit.* Trans. Parvis Emad and Kenneth Maly. Bloomington and Indianapolis: Indiana University Press, 1994.

Held, David. *Prospects for Democracy*. Stanford, Cal.: Stanford University Press, 1993.

Heller, Agnes. *A Theory of Modernity*. Malden, Mass. and Oxford: Blackwell, 1999.

_____. *Além da Justiça.* Trad. Savannah Hartmann. Rio de Janeiro: Civilização Brasileira, 1998.

_____. *Beyond Justice.* Oxford, UK: Blackwell, 1990.

_____. *Ethics of Personality.* Oxford, UK and Cambridge, Mass.: Blackwell, 1996.

_____. *The Time is Out of Joint*. Lanham, Boulder, New York, Oxford: Rowman & Littlefield Publishers, Inc., 2002.

Hirst, Paul. Carl Schmitt's Decisionism. In: Mouffe, Chantal (ed). *The Challenge of Carl Schmitt*. London, New York: Verso, 1999. (ver pags.)

Hobbes, Thomas. *Leviathan or the Matter, Forme and Power of a Commonwealth Ecclesisticall and Civil*. New York: Touchstone Book, 1997.

Kafka, Franz. *Gesammelte Werke*. European Union: Eurobuch, 1998.

_____. *The Complete Stories*. Edited by Nahun N. Glatzer. New York: Schocken Books, 1971.

_____. *The Diaries.*Trans. Joseph Kresh (1910-13) and Martin Greenberg with the cooperation of Hannah Arendt (1914-23). New York: Schocken Books, 1976.

_____. *The Trial*. Trans. Willa and Edwin Muir. New York: Schocken Books, 1992.

Kelsen, Hans. *Quien Deve Ser el Defensor de la Constitución?* Trad. Roberto J. Brie. Madrid: Tecnos, 1995.

_____. *Reine Rechtslehre.* Wien: Verlag Franz Deuticke, 1960.

_____. *Teoria Pura do Direito.* Trad. João B. Machado. Coimbra: Armenio Amado Editor, 1979.

Kennedy, Duncan. *Adjudication and Legislation (fin de siècle)*. Cambridge, Mass. And London : Harvard University Press, 1997.

_____. Form and Substance in Private Law Adjudication. *Harvard Law Review* 89, 1976, p. 1688 ff.

Kojève, Alexandre. *Introduction to the Reading of Hegel.* Trans. James H. Nichols Jr. Ithaca and London: Cornell University Press, 1969.

Laclau, Ernesto. *Emancipations*, New York and London: Verso, 1996.

Laclau, Ernesto and Mouffe, Chantal. *Hegemony and Socialist Strategy.* London and New York: Verso, 1996.

Lefort, Claude. *A Invenção Democrática.* Trad. Isabel Loureiro. São Paulo: Brasiliense, 1987.

_____. *As Formas da História.* Trad. Luis Roberto S. Fortes e Marilena de S. Chauí. São Paulo: Brasiliense, 1990.

Levinas, Emmanuel. *Entre-Nous: On the Thinking-of-the-Other.* Trans. Michael B. Smith and Barbara Harshav. New York: Columbia University Press, 1998.

Machiavelli, Niccolò. *The Prince.* Trans. W. K. Marriott, Chicago, London, Toronto: William Benton Publisher, Encyclopedia Britannica, INC, 1952.

MacCormick, Neil. *An Institutional Theory of Law.* Dordrecht, Boston, Lancaster, Tokyo: D. Reidel Publishing Company, 1986.

Mandelbaum, Enrique. *Franz Kafka: um judaismo na ponte do impossível*. São Paulo: Perspectiva, 2003.

Minow, Martha. *Making All the Difference.* Ithaca and London: Cornell University Press, 1990.

Mouffe, Chantal (Ed.). *Deconstruction and Pragmatism*. London, New York: Routledge, 1996.

_____. *The Challenge of Carl Schmitt.* London, New York: Verso, 1999.

_____. *The Democratic Paradox*. London, New York: Verso, 2000.

Nancy, Jean-Luc. The Surprise of the Event. In: Barnett, Stuart (ed.) *Hegel After Derrida*. New York and London: Routledge, 1998.

Negri, Antonio and Michael Hardt. *Império.* Rio de Janeiro e São Paulo: Record, 2002.

_____. *Il Potere Costituente*. *Saggio sulle alternative del moderno.* Roma: Manifestolibri, 2002.

Nietzsche, Friedrich. *Beyond Good and Evil.* Trans. Walter Kaufmann, New York: Vintage, 1989.

Nikulin, Dmitri. Mikhail Bakhtin: A Theory of Dialogue. *Constellation*s 5, 1998.

Nussbaum, Martha. *Love's Knowledge*. New York and Oxford: Oxford University Press, 1990.

_____. *Poetic Justice. The Literary Imagination and Public Life.* Boston: Beacon Press, 1995.

Pinkard, Terry. *Hegel's Dialectic.* Philadelphia: Temple University Press, 1988.

Posner, Richard. *Law and Literature.* Cambridge, Mass., and London: Harvard University Press, 1998.

Raz, Joseph (Ed.). *Authorithy.* New York: New York University Press, 1990.

Ricoeur, Paul. *Oneself as Another*. Trans. Kathleen Blamey. Chicago, London: The University of Chicago Press, 1992.

Rosenfeld, Michel, and Arato, Andrew. *Habermas on Law and Democracy: Critical Exchanges.* Berkley, Los Angeles, London: University of California Press, 1998.

Rosenfeld, Michel ed. *Constitutionalism, Identity, Difference, and Legitimacy.* Durham and London: Duke University Press, 1994.

_____. *Just Interpretations. Law Between Ethics and Politics.* Berkeley, Los Angeles and London: University of California Press, 1998.

Ross, Alf. *Sobre el Derecho y la Justicia.* Trad. Genario Carrió. Buenos Aires: Editorial Buenos Aires, 1963.

Sandel, Michael J. *Democracy's Discontent.* Oxford, UK and Cambridge, Mass.: The Belknap Press of Harvard University Press, 1996.

Satner, Eric L.. *On the Psychotheology of Everyday Life.* Chicago and London: The University of Chicago Press, 2001.

Schmitt, Carl. *Der Wert des Staates und die Bedeutung des Einzelnen.* Tübingen, 1914.

_____. *La Defensa de la Constitución.* Trad. Manuel Sanchez Sarto. Madrid: Tecnos, 1998.

_____. *Teoria de la Constitucíon.* Trad. Francisco Ayala. Madrid: Alianza Editorial, 1992.

_____. *The concept of the Political.* Trans. Georg Schwab. Chicago and London: Chicago University Press. 1996.

_____. *The Crisis of Parliamentary Democracy*. Trans. Ellen Kennedy. Cambridge, Mass. and London: The MIT Press, 2000.

_____. *The Nomos of the Earth*. *In the International Law of the Jus Publicum Europaeum*. NY: Telos Press, 2003.

_____. *Théologie Politique.*Trad. Jean-Louis Schlegel. Ëditions Galllimard: Paris, 1988.

Scholem, Gershom ed.. *The Correspondence of Walter Benjamin and Gershom Scholem 1932-1940.* Trans. Gary Smith and Andre Lefevre, New York: Schocken, 1989.

Scheuerman, William E. *Carl Schmitt*. *The End of the Law.* Lanham, Boulder, New York and Oxford: Rowman and Littlefield Publishers Inc., 1999.

Shakespeare, William. *Hamlet*. New York: Signet Classic, 1982.

Sieyès, Emmanuel-Joseph. *A Constituinte Burguesa. Qu'est-ce que le Tiers État?* Rio de Janeiro: Lumen Iuris, 2000.

Sypher, Wylie. *The Ethic of Time*. New York: A Continuum Book, 1976.

Taylor, Charles. *Hegel.* Cambridge, UK: Cambridge University Press, 1997.

Trend, Richard (ed). *Radical Democracy: Identity, Citizenship and the State.* New York, London: routledge, 1996.

Warnke, Georgia. *Justice and Interpretation.* Cambridge, Mass.: The MIT Press, 1993.

Weber, Samuel. In the Name of the Law. Deconstruction and the possibility of justice. *Cardozo Law Review*, Vol. 11, number 5-6, july/aug. 1990, p. 1515-1516.

_____. *Institution and Interpretation.* Minneapolis: University of Minnesota Press, 1987.

Zizek, Slavoj. Carl Schmitt in the Age of Post-Politics. In: Mouffe, Chantal. *The Challenge of Carl Schmitt*. London, New York: Verso, 1999.

_____. *Eles não Sabem o que Fazem.* Rio de Janeiro: Jorge Zahar Editor, 1992.