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Law and Power

Preface to a Non-prescriptivist Theory of Law

MASSIMO LA TORRE

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MASSIMO LA TORRE

BADIA FIESOLANA, SAN DOMENICO (FI)

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I – 50016 San Domenico (FI)
Italy

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TWO OPPOSING CONCEPTIONS

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law = expression of power
law = limit on power

1. *Preliminary*

In legal and political theory, two chief ways of understanding the relationship between law and power traditionally emerge. On the first conception, more widespread (particularly in the modern epoch), law is an expression of power, its instrument and emanation. On the second, less widespread, conception, law is the source of or prerequisite for or limit on power. This opposition is well perceived by many of the more aware writers on legal theory.

Hans Kelsen, for instance, in his *Der soziologische und der juristische Staatsbegriff*, considers a series of legal doctrines according to whether they posit the State as prerequisite (Voraussetzung) for law or vice versa. Norberto Bobbio, dealing specifically with the relation between the two concepts of power and law, said the following: "The general theories of law and State can be differentiated into two great categories according to whether they assert the primacy of power over norm, or conversely of norm over power"[1]. I shall seek below to illustrate some examples of these two divergent ways of conceiving the relationship between law and power. I make no claims to completeness or even adequacy in my treatment of the theme, aiming more to introduce arguments and lead up to considerations relevant for a critique of the prescriptivist conception of law. What interests me here is not so much a classification of ways of conceiving the relation between law and power as the

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[1] N. BOBBIO, *Kelsen e el potere giuridico,* in *Ricerche politiche*, ed. by M. Bovero, Il Saggiatore, Milan 1982, p. 3.

preliminaries for singling out one particular way of conceiving the phenomenon of law for discussion.

The point is not to solve a chicken-and-egg problem (which came first?), but to conceptualize a tension that is always present in legal experience: between the law's unavailability to or exploitation by the holders of political power, and by subjects capable of exercising pressures of various types, as holders of extralegal, material or psychological, force. All this obviously refers back to the structure of legal argumentation, and specifically to what is to be regarded as a legally valid argument. Accordingly, the question of the relationship between law and power is by no means otiose, or a matter of sterile academic exercises.

The opposition mentioned above between two views of the relationship between law and power runs through the whole history of political and legal thought. Classical Greek thought gives us illustrious examples of each conception. The Sophists' thought generally asserts that the law is a means for the stronger to dominate the weaker. Nonetheless, in *Gorgias* Plato makes Kallikles say that the positive laws are a creation of the weaker to neutralize the natural superiority of the stronger. Pericles, in Xenophon's *Memorabilia*, maintains that law is everything that the sovereign power has laid down as obligatory. And there is the well-known "argument of Thrasymachus" in the first book of Plato's *Republic*, making positive law coincide with the interest of the stronger.

The Sophists' "realistic" approach was opposed by Stoic thought, which instead generally upheld the primacy of law over power. This conception was taken over into Roman political and legal thought, largely influenced by Stoicism. A noted example is Cicero's work.

Aristotle, who like the Sophists upheld a realist conception and therefore took his distance from the Stoics' rationalistic natural-law approach, based political power, the constitution of a people, its *politeia*, on the existence of a body of laws. In a famous passage, the Stagirite says this: "Where the laws have no authority, there is no constitution. The law ought to be supreme over all, and the magistracies should judge of particulars, and only this should be considered a constitution"[2].

In the Middle Ages the opposition is represented in the form of the Thomist doctrine, for which the *lex aeterna* is eminently rational and not arbitrary will, on the one hand, and on the other in the forms of the highly

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[2] *Politics*, 1292a 32-35, ed. by S. Everson, English trans. by J. Barnes, Cambridge University Press, Cambridge 1988.

volontaristic Occamist doctrine for which the moral law is above any criterion of rationality and consists in the pure command of God. Occam holds that evil is nothing but conduct contrary to what one is obliged to comply with (the formula significantly taken up by Hobbes). Obviously, in both doctrines the relationship between law and power is reinterpreted in ethical and theological terms as the relation existing between the just (law in the ethical sense) and the divine activity (power in the theological sense).

According to St. Thomas, the just (which is the rational) in a certain sense preexists the divine power, or better, the divine will cannot wish anything but the just (rational). According to Occam, by contrast, the just is the product of the arbitrary divine will. The two formulas lead to two distinct outcomes. On the one hand it is asserted, as for instance Occam writes in his commentary on Peter Lombard's *Sentences*, that if God had prescribed theft and murder, the acts denoted by these terms would cease to be thefts and murders "quia ista nomina significant tales actus non absolute: sed connotando vel dando intelligere, quod faciens tales actus per praeceptum divinum obligatur ad oppositum"[3]. On the other hand, Gabriel Biel, taking up an expression of Gregory of Rimini's, maintains that an action which is just according to reason is so even if God does not wish it: "Nam si per impossibile Deus non esset, qui est ratio divina, aut ratio illa divina esset errans, adhuc si quis ageret contra rectam rationem angelicam, vel humanam, aut aliam aliquam, si qua esset, peccaret"[4].

As far as legal theory in the strict sense is concerned, the contrast in the Middle Ages is between a conception that picks up Ulpian's fragment in the Digest, *quod principi placuit legis habet vigorem*, and hence the imperial tradition of a power above its own law, and those theories that interpret the typically feudal need to limit the central power. The latter line of thought was particularly lively in England, given the particular historical and social situation in that country. Rudolph von Gneist, in his classic study on English administrative law, cites an old maxim of the English courts that is revelatory of the Anglo-Saxon way of understanding the relationship between law and power: "La loi est le plus haute inheritance, que le roy ad; car par la ley il meme et tautes ses sujets sont rules, et si la ley ne fuit, nul roy, et nul

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[3] Cited from the appendix to G. FASSO', *La legge della ragione*, Il Mulino, Bologna 1966, p. 276.

[4] G. FASSO', *op. cit.*, pp. 283-284.

inheritance sera"[5]. And Bracton, the great theorist of English medieval constitutionalism, asserted: "Ipse autem rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem"[6].

2. *The Law as Expression of Power. "Analytical Jurisprudence" and Legal Positivism*

One of the most authoritative upholders of the doctrine that law is based on power in the early modern period is Thomas Hobbes. He takes up the Occamist view that evil is equivalent to what is prohibited by God's will, and applies it to ethics and to law. The just and the unjust are for Hobbes exclusively determined by the commands or prohibitions of whoever holds supreme power in a community. "Accordingly", we read in De Cive, "it belongs to the same chief power to make some common rules for all men, and to declare them publicly, by which every man may know what may be called his, what another's, what just, what good, what evil; that is summarily, what is to be done, what to be avoided in our common course of life"[7].

The civil laws, which for Hobbes define the just and the unjust, are conceived of as commands of the supreme power. Thus, ethics is subordinated to the positive law, and this to political power. "Those rules and measures are usually called civil laws, or the laws of the city, as being the commands of him who hath the supreme power in the city. And the *civil laws* (what we may define them) are nothing else but or *laws of the State*, because they are the commands of whoever in the State holds the supreme power. And the civil laws (to define them) are nothing but the commands of him who hath the chief authority in the city, for direction of the future actions of his citizens"[8]. The definition given in *Leviathan* is not much different from the one in De Cive: "Civil Law, is to every Subject, those Rules, which the Commonwealth hath Commanded him, by Word, Writing, or other sufficient Sign of the Will, to make use of, for the Distinction of Right, and Wrong; that is to say,

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[5] See R. von GNEIST, *Englisches Verwaltungsrecht*, vol. 1, Springer, Berlin 1897, p. 454.

[6] H. BRACTON, *De legibus et consuetudinibus Angliae*, vol. 2, ed. by G.E. Woodbine, Harvard University Press, Cambridge 1968, p. 33.

[7] T. HOBBES, *De Cive*, VI, 9, in *Engliskh Works of Thomas Hobbes*, ed. by Sir William Molesworth, vol. 2, Scientia Verlag, Aalen 1966, p. 77.

[8] *Ibid.*, p 77.

of what is contrary, and what is not contrary, to the Rule"[9]. Similarly, in Behemoth we read: "Every law is a command that imposes doing, or abstaining from doing, something"[10].

This way of conceiving of the relationship between law and political power has two further effects as far as the theory of power is concerned. For saying that positive law, the *civil* law, is the command of the holder of supreme power means asserting a conception of that power as above the law it promulgates. "Above", in this context, means "not bound by". The power is not bound by the law it promulgates; it is above it. "Whence it is plain, that the city" we read in *De Cive*, "is not tied to the civil laws; for the civil laws are the laws of the city, by which, if she were engaged, she should be engaged to herself"[11]. "Whoever holds the supreme power is not bound by the civil laws (which would mean be bound by himself), nor obliged to any citizen"[12]. The same concept is expressed still more clearly in *Leviathan:* "The Sovereign of a Commonwealth, be it an assembly, or one Man, is not subject to the Civil Laws. For having power to make, and repeale Laws, he may when he pleaseth, free himself from that subjection, by repealing those Laws that trouble him, and making of new"[13].

Asserting the law as the command of a sovereign power has another effect on the idea of power adopted in drawing the distinction between it and law (and asserting its superiority). Power cannot, in this case, be seen as power of coercion, force or violence. If the law is command, this command, in order to be obeyed, cannot trust in respect for a body of norms (which would equally be commands), but only in the capacity to impose itself on its addressee, that is, in the force that accompanies it.

The Hobbesian doctrine was adopted almost *in toto* by legal positivism. The link with Hobbes is particularly direct, for obvious reasons, in John Austin, the founder of "analytical jurisprudence", the Anglo-Saxon, utilitarian and empiricist, version of the legal positivism that had taken over the European continent following the French revolution. The way from Hobbes to Austin goes via Blackstone, the author of the monumental *Commentaries* on the English laws, and via Bentham, who despite his enlightened

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9 T. HOBBES, *Leviathan*, Part II, Chap. XXVI, ed. by C.B. MacPherson, Penguin, Harmondsworth 1982, p. 312.

10 T. HOBBES, *Behemoth*, ed. by F. Tönnies, Frank Cass, London 1969, p. 50.

11 T. HOBBES, *De Cive*, VI, 14, cit., p. 83.

12 *Ibid.* See also *De Cive*, XIII, 4.

13 T. HOBBES, *Leviathan*, Part II, Chap. XXVI, *op. cit.*, p. 313.

background and political radicalism developed a vaguely "realistic" and positive conception of law. Blackstone, for instance, writes this: "The law, in its most general and comprehensive sense, signifies a rule of action .... And it is that rule of action, which is prescribed by some superior and which the inferior is bound to obey"[14]. And for Bentham, the law is "an assemblage of sings declarative of a volition conceived or adopted by the *sovereign* in a state, concerning the conduct to be observed in a certain *case* by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power"[15].

John Austin puts forward Hobbes' theory of law again, in its essential features. These may be reduced to four main assumptions: (a) the positive law is a command; (b) a command is the expression of a desire (to be accomplished by someone different from the issuer of the command), accompanied by the threat of some ill (or sanction) should the addressee of the command not wish to submit to the will (or desire) of the issuer; (c) law is the command of a political superior directed to a political inferior, or of a politically sovereign entity (which does not recognize above itself any higher authority); (d) sovereign power is not bound by its own laws (commands), it is *legibus solutus*.

Each of these assumptions is contained in Austin's best-known work, *The Province of Jurisprudence Determined* (1982). In this connection it should be recalled that the English lawyer distinguishes, as we know, between two chief types of law, those "properly" and "improperly" so called. Further distinguishing the laws into four categories: (1) divine laws, (2) positive laws, (3) rules of positive morality, (4) laws in a metaphorical sense, Austin states that only "the divine laws and the positive laws are properly so called"[16], since only "the laws proper, or properly so called, are commands"[17].

As far as the nature of the command is concerned, as an expression of will accompanied by the threat of a sanction, Austin asserts that "it is the power and purpose of inflicting a eventual evil ... which gives to the

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[14] W. BLACKSTONE, *Commentaries on the Laws of England*, A Facsimile of the First Edition of 1765-1769, vol 1, *Of the Rights of Persons* (1765), with an Introduction by S.N. Katz, The University of Chicago Press, Chicago and London 1979, p. 38.

[15] J. BENTHAM, *The Limits of Jurisprudence Defined*, Columbia, New York 1945, p. 88.

[16] J. AUSTIN, *The Province of Jurisprudence Determined*, ed. by W. E. Rumble, Cambridge U. P., Cambridge 1995, p. 10.

[17] *Ibid.*

expression of a wish the name of command"[18]. (Thus, the elements accompanying the command are for Austin above all desire, then the threat of sanction, and finally the manifestation of desire. "The ideas or notions comprehended by the term *command,*" writes Austin, "are the following. 1. The wish or desire conceived by a rational being, that another rational being shall do or forbear. 2. An evil to proceed from the former, and to be incurred by the latter, in case the latter comply not the wish. 3. An expression or intimation of the wish by words or other signs"[19].

But command is not enough for there to be law; the command must come from the sovereign power of an independent political community. In a general sense, Austin notes that the very concept of command refers to a relationship of superior to inferior. "It appears, then, that the term *superiority* (like the terms *duty* and sanctions) is implied by the term *command.* For superiority is the power of enforcing compliance with a wish: and the expression or intimation of a wish, with the power and the purpose of enforcing it, are the constituent elements of a command"[20]. The concept of "sovereign" is, however, more restricted than that of "political superior"; the sovereign power is that "political superior" which has no other "political superior" above it. In that case, the society over which the sovereign power is exercised will be called politically independent. "Unless habitual obedience be rendered by the bulk of its members, and be rendered by the bulk of is members to *one and the same* superior the given society is either in a state of nature, or is split into two or more independent political societies "[21].

Consequently, "every positive law, or every law simply and strictly called, is set, directly or circuitously by a sovereign person or body, to a member or members of the independent political society wherein that person o body is sovereign or supreme "[22]. But not every command emanating from the sovereign constitutes a law. This is the case only for a command that has as its object a *class* of actions (positive or negative), that is, is *general.* The "occasional" or "particular" command does not give us a rule of law. "But, a contra distinguished or opposed to an occasional or particular command, a law is a command wish obliges a person or persons, and obliges *generally* to

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18 *Ibid.*, p. 24.

19 *Ibid.*

20 *Ibid.*, p. 30.

21 *Ibid.*, p. 169. Emphasis in original.

22 *Ibid.*, p. 212.

acts or forbearances of a class"[23]. This is also a more or less explicit affirmation that the command, to be valid as law, must not be exhausted in a single moment, or be effective for a specific occasion, but must have duration in time.

Finally, there is the illimitability of the sovereign power, its position above the law it promulgates. "Now it follows from the essential difference of a positive law and from the nature of sovereignty and independent political society, that the power of a monarch properly so called, or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of legal limitation"[24]. For Austin, the sovereign may not only change the law at whim, but is in no way subordinate to the law while it is in force. "The immediate author of a law of the kind, or any of the sovereign successors to that immediate author, may abrogate the law at pleasure. And though the law not abrogated, the sovereign for the time being not constrained to observe it by a legal or political sanction. For if the sovereign for if the sovereign for the time being were legally bound to observe it, that present sovereign would be in a state of subjection to a higher or superior sovereign "[25].

In Austin's thought too, as in Hobbes', what underlies the view of a political power completely "different" from the law, and which it uses as its *instrumentum regni*, is the "realistic" conception of power as strength, force, violence. One passage in Austin is significant in this connection: "But taken with the meaning wherein here understand it, the term *superiority* signifies *might*: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes"[26].

The conception of law as expression of political power is common to the whole area of legal positivism. In Germany in particular, a great part of the legal doctrine of the Nineteenth century took up this conception, though with differing nuances. These varied essentially along a range of positions at the extremes of which were on one hand those who welcomed the assumption of the illimitability of sovereign power by legal means, and on the other those who instead theorized the so-called "self-limitation" of the State. However, both these positions concurred at the descriptive level in locating political power before and above the legal system. Good examples of these two

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23 *Ibid.*, p. 29.

24 *Ibid.*, p. 212.

25 *Ibid.*

26 *Ibid.*, p. 30. Emphasis in original.

different positions are, in the field of public law, Conrad Bornhak's and Georg Jellinek's respectively.

The thought of Bornhak (along with Max Seydel one of the exponents of the so-called *Herrschertheorie*[27]) largely follows the same theoretical path as Hobbes and Austin: the State is dominion, and law is the expression of that dominion, which is legally unlimited and unlimitable, since were it somehow limited or limitable it would cease to be dominion, that is, supreme power in a certain territorial area. "The State", writes Bornhak, "is dominion (*Herrschaft*). This means nothing other than that the State dominates, is the subject of dominion (*Subjekt der Herrschaft*). For the moment, there is no need to consider further how that dominion should or may be organized. Here it is sufficient to note that the State is the subject of dominion, and hence the starting point for all public law, founded on dominion ... The State's dominion is legally unlimited and unlimitable (*rechtlich unbeschränkt und unbeschränkbar*)"[28]. "For any limitation presupposes a force (*Macht*) that can limit the State and hence is superior to it. Such a superior power (*Gewalt*) is, however, irreconcilable with the independence conceptually (*begrifflich*) necessary to the State power (*Staatsgewalt*)"[29].

The Hobbesian inspiration becomes still clearer at the point where Bornhak asserts, in the footsteps of the English philosopher, that every State is automatically (conceptually) absolute, which, he clarifies, does not always correspond with practice, since sometimes the State does not have enough force to accomplish what is theoretically (legally) possible for it. "The State is accordingly absolute from intrinsic necessity, whatever be its constitutional form. The facts, however, may not correspond with this legal absolutism. The weakness of State power may prevent the State from doing what is legally permitted"[30]. It should however be said that for Bornhak, who does not, as we have said, accept legal limits to the State's power, political power may be subject to bounds of an ethical nature. "But", he writes, "even for the State which has no limits on its force, there exist the limits of the moral order (*der sittlichen Ordnung*), which it cannot cross with impunity"[31].

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27 See M. SEYDEL, *Grundzüge einer allgemeinen Staatslehre*, Stuber, Würzburg 1873, esp. pp. 1-18.

28 C. BORNHAK, *Allgemeine Staatslehre*, C. Heymann, Berlin 1896, p. 9.

29 *Ibid.*, p. 11.

30 *Ibid.*

31 *Ibid.*, pp. 11-12.

The doctrine of Georg Jellinek (not to be confused with his son Walter, like him an outstanding publicist) has greatly influenced theories of public law not only in the Germanic cultural area but also in Italy and France. Apart from Vittorio Emanuele Orlando in Italy, in France one other great public-law figure has taken up the lines of Jellinek's conception of law: Carré de Malberg. Jellinek's constitutional theory, as we know, is based on the concept of the State's self-obligation (*Selbstverpflichtung*); only through that self-limitation does it become a "State of Law". But the State is seen by Jellinek as at bottom once again an absolute sovereign power. It is in virtue of this absoluteness that the State power, in his view, creates the legal order. "But", writes Jellinek, "the supporter of the public legal order is the State itself, and in fact is exclusively the sovereign State the creator of its own order. Now the State, which determines itself and establishes its own order with full formal freedom, *is not subject to any higher power*"[32].

The State, according to Jellinek, becomes a legal order by itself setting a limit *de jure* on its own sovereignty, which *de facto* remains absolute. "It is only insofar as the State conceives itself as legally limited that it becomes a subject of rights. An agent which in no way is a subject of duties, constitutes a subject of power, not a subject of rights. The concept of right already contains that restriction"[33]. Since Jellinek maintains that every legal order is a relation among persons, and is thus an upholder of the so-called "relational theory" of law[34], the State, for this Austrian public lawyer, creates law only insofar as it acknowledges to others a subjectivity in some way an analogous (but not equal) to its own. "The State", writes Jellinek, "considered in itself, as de facto power, transforms itself by recognizing the personality of the subjects into a legally limited power. In this form its de facto power, established and limited by its own legal order, acquires the character of legal power; its interests take on the character of legal interests"[35].

As Léon Duguit notes[36], Jellinek's theory of the State's self-limitation has a precedent in the thought of Jhering as expressed in the latter *Der Zweck*

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32 G. JELLINEK, *System der subjektiven öffentlichen Rechten*, 2nd ed., Mohr, Tübingen 1919, p. 10.

33 *Ibid.*, p. 195.

34 On which see S. COTTA, *Prospettive filosofiche del diritto*, 3rd revised and amplified edition, Giappichelli, Turin 1979, pp. 48 ff.

35 G. JELLINEK, *System der subjektiven öffenlichen Rechten*, cit., p. 194.

36 See I. DUGUIT, *L'Etat, le droit objectif et la loi positive*, vol. 1, Fontemoing, Paris 1901, pp. 107 ff.

im Recht. For the idea of law that Jhering develops, particularly after moving away from his original positions (those of "Pandectistics"), is markedly in imperativist character*. He "identifies the norm with an imperative coming from the State power"[37]. He adds: "From this point of view, all law presents itself as the coercive system brought about by the State, as the coercive apparatus organized and directed by the State power"[38].

For Jhering, as for Austin, not every imperative emanating from State power is, however, a norm of law, but only those imperatives that have an abstract and general nature. "But not all the legal imperatives of State power", writes the German jurist, "are legal norms; indeed, we must distinguish between concrete and abstract imperatives, since only the latter are legal norms"[39]. Moreover, in Jhering's view, in order for law to reach its fullest expression, the legal norms (that is, the abstract imperatives of State power) must be valid bilaterally, that is, must also bind the State power. "In promulgating the legal norm, the State power may propose to bind through it only the addressees, but not itself, thus reserving the right to decide the individual case according to discretion. However, the State power may promulgate a norm in the intention - and even the explicit affirmation - that it wishes to bind itself too. Only in this way, if this assurance is actually respected, does law reach its perfect form: that is, the certainty that the norm laid down must necessarily be applied"[40]. The prescriptive nature of these last statements by Jhering is clear enough. This is why Carré de Malberg, while attributing scientific value to Jellinek's theory, stresses the essentially political intent, in his view, of this first elaboration by Jhering of the theory of the State's self-limitation[41].

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[37] R. von JHERING, *Der Zweck im Recht*, vol. 1 (1904), Georg Olms Verlag, Hidesheim, New York 1970, p. 260.

[38] *Ibid.*, p. 261.

[39] *Ibid.*, p. 263.

[40] *Ibid.*, pp. 263-264.

[41] See R. CARRE' DE MALBERG, *Contribution à la théorie générale de l'Etat*, vol. 1, Sirey, Paris 1920, pp. 231-232.

3. *The supremacy of the law.*
Natural law, constitutionalism, the rule of law

At the origins of the conception that sets law at the foundation of political power, just as for the opposite theory, we find, in the early modern period, the work of an English thinker. This time it is John Locke. In this philosopher's thought the relation between the phenomena of law and of politics is particularly articulated. (i) Firstly, we find in Locke the assertion of a natural law that governs all human actions, and hence also the actions of political power. "The law of nature", writes Locke "stands as an eternal rule to all men, *legislators* as well as others. The *rules* that they make for other men actions must, as well as their own and other men actions, be conformable to the law of nature, i.e. to the will of God, of which that is a declaration"[42].

(ii) As far as the positive laws are concerned, these for Locke mark the passage from the state of nature to civil society (political power is, for Locke, above all the power to make laws) and are expressions of the opinion and the will of the whole society. Were that not so, in the English philosopher's view, we would be in the presence no longer of a law but of an arbitrary act of power. "Nor can any edict of any body else, in what form soever conceived, or by what power soever backed, have the force and obligation of a *law*, which has not its *sanctions from* that *legislative* which the public has chosen and appointed. For without this the law could not have that, which is absolutely necessary to its being a *law the consent of the society*, over whom no body can have a power to make laws, but by their own consent, and by authority received by them"[43]. Locke cites Hooker, who in his *Laws of Ecclesiastical Polity* had maintained that "those, then, are not laws save what

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[42] J. LOCKE, *Second treatise on government*, XI, 136, in *Two Treatises of Government*, ed. by P. Laslett, Cambridge University Press, Cambridge 1988, p. 358. "What for Locke renders the state of nature unacceptable," writes Norberto Bobbio, "is not the fact that there are no laws (the state of nature is the one in which the natural laws prevail), but the fact that, when a natural law is violated, there is no suitable body to secure respect for it or punish the culprit" (N. BOBBIO, *Locke e il diritto naturale*, Giappichelli, Torino 1987, p. 210).

[43] J. LOCKE, *Second Treatise of Government*, XI, 134, cit., p. 356. Emphasis in original. On Locke's contractual theory there are interesting observations by P.KOLLER, *Neue Theorien des Sozialkontrakts*, Duncker & Humblot, Berlin 1987, pp. 19 ff.

the public approval has rendered such" and that "laws therefore humane, of what kind soever, are available by consent"[44].

(iii) Finally, in Locke's work there is the affirmation that political power must be exercised through law, this being understood as a formal, certain and public act. "Whatever form the common-wealth is under", he writes, "the ruling power ought to govern by *declared* and *received laws*, and not by extemporary dictates and undetermined resolutions"[45].

In the first of these different ways of thinking about the relationship between law and power, we are in the presence of a classical natural-law theory. In the second, we have before us a formulation that brings together elements of the democratic theory regarding the origin and exercise of political power with a highly prescriptive connotation, and hints at a "sociological" theory of power (anticipating Hume's ideas in the matter) for which power is founded (and not *must* be founded; the intent here is descriptive) on the consent of the associated. One may find grounds in this anticipation of sociological theory for upholding a different version of the relations between law and power, which overlaps the two terms; though not on the side of power (for which law is power) as some radical asserters of legal positivism maintain, but on the side of law (for which power is law), as may be derived from the anthropological studies that conceive society in terms of a normative system (the reference being to the work of scholars like Marcel Mauss, Claude Levy-Strauss, Marshall Sahlins).

The third way is a formulation that may be called "formal law", seeing in the form of the law as abstract, general, certain and public a barrier to the arbitrariness of power. One of the most convinced upholders of this mode of thought three centuries later was Franz Neumann. Locke does not, however, believe that the form of law as such is the sole and most effective guarantee against the excesses of political power.

In the English philosopher's thought, the law is strongly tied to the popular will and is never seen as a purely formal fact. The formalities associated with the law (its publicity, for instance) have, in Locke's view, the object of maintaining the contact between the rule and the popular will. In consequence it is the fact that the law derives from the people that is the guarantee of its legality, not mere respect for some procedures occurring exclusively within the political apparatus (as maintained in the doctrines of the *Rechtsstaat*): that is, in the fact that the political system does not, at

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[44] J. LOCKE, *Second Treatise on Government*, XI, 134, cit., p. 356.

[45] *Ibid.*, XI, 137, cit., p. 360. Emphasis in original.

institutional level, break off contact with society, but continues to be determined by it. For Locke, then, who affirms (descriptively and prescriptively) that law is the basis for power, "tyranny is the exercise of power beyond right"[46] and "there is tyranny when the governour, however intituled, makes not the law, but his will"[47].

It may, schematically, be said that in Locke the three principal variants of the theory setting the phenomenon of law before and above that of politics are present. (i) In the first, the law is essentially natural law. (ii) In the second, law is the fundamental law laid down by the popular will (constitution), to which all the other legal and political acts must conform. (iii) In the third variant, finally, law is a formal rule, characterized by generality, abstractness, certainty and publicity: general, as directed to the generality of citizens; abstract, as promulgated to regulate and sanction a case conceived in abstract terms and not a specific event (for instance, murder "in the abstract", not the murder of a plumber or of Mr. Smith "concretely"); *certain*, since the political power (a) cannot modify the norm at pleasure through a material act of will but can do so only by respecting definite procedures; (b) cannot itself evade respect for the norm, and must while it is in force observe and apply it; *public* insofar as the norm is made known to the generality of citizens through appropriate procedures, so that it is possible for every citizen to be aware of it (in which case alone, on this theory, the maxim *ignorantia legis non excusat* is justified). Of these three versions of the thesis of the superiority of law over power, particularly representative versions can be found in the theories of (i) William Godwin, (ii) Thomas Paine, and (iii) Franz Neumann.

Godwin, in his monumental *Enquiry concerning Political Justice*, criticizes, inter alia, the assumption, common to the absolutist and the democratic theories (to Hobbes and to Rousseau, for instance) that the sovereign's will is omnipotent. Against this conception, Godwin appeals to a natural law that finds its source in a space outwith manipulation by any human entity: this space, for Godwin, is reason. "It cannot be too strongly inculcated", he writes, "that societies and communities of men are in no case empowered to establish absurdity and injustice; that the voice of the people is not, as has sometimes been ridicuously asserted, "the voice of truth and of

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46 *Ibid.*, XVIII, 199, cit., p. 398.

47 *Ibid.*

God"; and that universal consent cannot convert the unjust to the just"[48]. "If an congregation of men", he continues, "agree universally to cut off their right hand, to shut their ears upon free enquiry, or to affirm two upon a particular occasion to be sixteen, in all these cases they are wrong, and ought unequivocally to be censured for usurping an authority that does not belong to them. They ought to be told, "gentlemen, you are not, as in the intoxication of power you have been led to imagine, omnipotent; there is a authority greater than yours, to which you are bound assiduously to conform yourselves"[49].

It follows in Godwin's view that the legislator (whoever this be) does not *produce* the law, but *interprets* it; it interprets a law given to it, and cannot create it. "The most crowed forum", he writes "or the most venerable senate, cannot make one proposition to be a rule of justice that was not substantially so previously to their decision. They can only interpret and announce that law which derives its real validity from a higher and less mutable authority"[50].

As we know, Thomas Paine's political theory is the expression of the ideological ferment that prepared and followed the two great democratic revolutions, the American and the French. Paine's theoretical thinking turns round the notion of constitution. For Paine, as for the American and French revolutionists, the constitution (seen as the product of the popular will) is the basis for political power, so that a power without constitution is declared undoubtedly illegal. "A constitution", writes Paine, "is not the act of a government, but of a people that constitutes a government; and a government without a constitution is power without a right"[51].

Paine distinguishes constituent power (which resides in the people) and constituted power (which is government). The constitution is the act whereby the people gives itself its own norms and establishes the powers of its representatives. These (who together form the government) cannot in any way modify the norms laid down in the constitution. "Every society and association that is established", he writes, "has first agreed upon a number of original articles, digested into form, which are its officers, whose powers and authorities are described in that Constitution, and the Government of that

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[48] W. GODWIN, *Enguiry Concerning Political Justice and Its Influence on Modern Morals and Happiness*, ed. by I. Kramnick, Penguin, Harmondsworth 1976, Book II, Chap. V., p. 196.

[49] *Ibid.*, p. 197.

[50] *Ibid.*

[51] T. PAINE, *Rights of Man*, Part II, Chap. IV, Everyman's Library, London 1969, p. 182.

society. Those officers, by whatever name they are called, have no authority to add to, alter, or abridge the original articles"[52].

The legal thought of Franz Neumann, a German social-democratic jurist, takes as its chief object the transformation of the functions of law first in the regime he terms "monopolistic capitalism" (which he believes he sees in Weimar Germany) and then in the National Socialist regime. In both regimes, but much more under Nazi dominion, Neumann points to the decline of the traditional, liberal and positive, conception of law. This is in his view marked by three chief features: (a) the formulation of the law must be general, (b) this generality must be specific, that is, must refer to definite facts and not to moral criteria as, in his view, is the case with the so-called *Generalklauseln*[53], (c) must not be retroactive[54]. Only in the presence of these requirements can one, for Neumann, speak of law in the proper sense.

Preliminarily, this jurist distinguishes between "technical norms" and "laws". The former are culturally indifferent, neutral, and proper to any social system that applies the division of labour. "Any society based on a division of labour will necessarily produce competencies, jurisdictions, regularities, which give the appearance of a functioning legal system .... But they are, in the words of my later teacher E. Mayer, "culturally indifferent rules" of a predominantly technical character. They may acquire political or economic relevance at any moment (for instance, traffic rules may play a considerable role in the economic struggle between the railroad and the automobile), but in normal cases they are culturally neutral"[55]. The technical norms, on this view, do not describe a juridical system, just because they do not constitute laws in the strict sense.

The laws should, for Neumann, be distinguished according to whether they are the exclusive product of the sovereign will, or else the combined product of that will and of reason. This gives us two notions of (objective) law, a "political" and a "rational" one. "Two notions of law", he writes, "must be distinguished, a political and a rational notion. In a political sense, law is

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52 *Ibid.*, p. 190.

53 On which see G. TEUBNER, *Standards und Direktiven in Generalklauseln*, Athenaeum, Frankfurt am Main 1971.

54 See F. NEUMANN, *The Chalenge in the Function of Law in Modern Society*, in F. NEUMANN, *The Democratic and the Authoritarian State*, ed. by H. Marcuse, The free Press, New York 1964, esp. pp. 29-30.

55 F. NEUMANN, *Behemoth. The Structure and Practice of National Socialism. 1933-1944,* Oxford University Press, New York 1944, p. 440.

every measure of a sovereign power, regardless of its form or content..... The law is then will and nothing else. The rational concept of law, on the other hand, is determined by its form and content, not by its origin. Not every act of the sovereign is law. Law in this sense is a norm, comprehensible by reason, open to theoretical understanding, and containing an ethical postulate, primarily that of equality. Law is reason and will"[56]. But for Neumann, only the "rational" type of law is law in the proper sense. Equally, for him, only the State of law is a State in the proper sense.

The law in the proper sense, endowed with its three characteristic features (mentioned above) that serve to make it "rational", thus constitutes, according to Neumann, a barrier, a limit, to the arbitrariness of sovereign power, just by virtue of its intrinsic rationality. "The rational law, at bottom, serves also to protect the weak"[57]. It should be stressed that here the rationality of law is identified with the formal structure of the norm that renders foreseeable and calculable both the consequences deriving from its transgression and the conduct required of members of society if they wish to secure a legally relevant end. "The reasonableness of law is no longer determined by the rationality of the society in which the law operates, as in Thomist natural law, but by its formal structure. The reasonableness thus becomes rationality, but a rationality which is formal and technical at the same time, that is, foreseeable and calculable"[58].

In consequence, the National Socialist regime, according to Neumann, cannot be defined as a "State" in the proper sense. In this connection the title he gives his book dedicated to the Hitler regime is significant: ***Behemoth***, which in the Hobbesian terminology adopted by Neumann is used, in

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[56] *Ibid.*, p. 440.

[57] *Ibid.*, p. 447.

[58] *Ibid.*, p. 441. It may be interesting to recall that this is the theoretical point round which a debate between Ernst Forsthoff and Wolfgang Abendroth turned in Federal Germany in the nineteen-sixties. The question at issue was how to found the legitimacy of the social State that was taking shape with the new German Federal constitution (Grundgesetz) of 1948. While Forsthoff trusted to the virtues of general, abstract law, holding that this had intrinsic legitimating potential, and accordingly recommended that the measures of the social State should be channelled into the forms of law in the formal-liberal sense, Abendroth turned, in order to find guarantees of the legitimacy of law, to the subjects and procedures for promulgating the law, not to its logical properties. In this connection see what Habermas has to say in *Law and Morality*, in *Tanner Lectures on Human Values*, vol. 8, University of Utah Press, Salt Lake City 1988, pp. 217 ff.

opposition to *Leviathan* (which indicates a politically and legally ordered system), to denote a situation of anarchy and illegality, and thus of arbitrariness, once the law is seen as the essential condition of social order and of protection of the individual against the excesses of political power. Accordingly, "If the general law is the basic form of right, if law is not only voluntas but also *ratio*, then we must deny the existence of law in the fascist state"[59]. Where the norm is a mere expression of political power, that is, is not clad in the general and abstract form that would make it a law, one cannot speak of a legal system. "Does such a system deserve the name of law?" wonders Neumann in connection with the Nazi system. "Yes, if law is merely the will of sovereign; definitely not, if law, unlike the sovereign's command, must be rational either in for or in content"[60].

4. *Power as expression of law. Léon Michoud and Hugo Krabbe*

As far as strictly legal, and specifically public-law, doctrines are concerned, it is not easy to find jurists who venture to assert the supremacy of law over what Germanic doctrine last century called *Herrschaft*[61]. It is

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59 F. NEUMANN, *op. ult. cit.*, p. 451. See also F. NEUMANN, *The Rule of Law. Political Theory and the Legal System in Modern Society*, Berg, Leamington Spa 1986, p. 298: "Law does not exist in Germany, because law is now exclusively a technique of transforming the political will of the Leader into constitutional reality. Law is nothing but an *arcanum dominationis*".

60 F. NEUMANN, *Behemoth*, cit., p. 458. On this position of Neumann's, see W. LUTHARDT, *Unrechtstaat oder Doppelstaat? Kritischtheoretische Reflektionen über die Struktur des Nationalsozialismus aus der Sicht demokratischer Sozialisten, in Recht, Rechtsphilosophie und Nationalsozialismus*, ed. by H. Rotthleuthner, Steiner, Wiesbaden 1983, pp. 197 ff.

61 In this connection, some notes by Hugo Krabbe are interesting: "The State's power, according to Mamenbrecher, is irresistible, untouchable, sacred; Otto Mayer speaks of the "unconditional dominance of State authority", of the "capacity of the State for legally predominating will"; Jellinek of the "unconditional assertion of its own will in relation to others"; Laband of dominion (*Herrschaft*) as the "specific privilege of the State"" (H. KRABBE, *Die moderne Staatsidee*, 2nd ed., Nijhoff, Den Haag 1919, p. 6. In this connection cf. also H. KRABBE, *Die Lehre der Rechtssouveränität. Beitrag zur Staatslehre*, Wolters, Groningen 1906, pp. 2-3).

particularly hard after the codifications and the birth of so-called legal positivism, which defined itself as the conception that posits the statute (act of State) as the sole form of law[62]. And it is still harder in German-speaking countries or Italy, the countries where legal positivism was cultivated, particularly as far as public law goes. So the two examples I have managed to find and will illustrate below of jurists that do not in their doctrinal thinking keep to the "realist" dogma[63] of legal positivism are presented, one of them by a French scholar, the other by a Dutch professor: Léon Michoud and Hugo Krabbe.

At the start of his treatment of "rights of public power belonging to the State", in the second volume of his work on legal personality[64], Michoud draws the distinction between the sovereignty of the prince or the people and sovereignty of the State[65], taking up an idea of Georg Jellinek's. "But the idea of the sovereignty of the prince", writes Michoud, "and that of the sovereignty of the people are political ideas, having as their consequence a certain distribution of powers in the body politic. The idea of sovereignty of the *State*, on the contrary, is an idea of a purely legal nature that may fit with any distribution of powers"[66]. The idea of "sovereignty of the State" does not imply any particular political constitution. "It is capable of fitting both with the concentration of powers in the hands of one man or an assembly, and with their separation among different bodies, some of which (like the king in certain monarchies, like voters with us) may even be regarded as having rights to being such bodies. In consequence, it does not exclude any form of

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62 A well-known example of this way of conceiving of the law is Vittorio Emanuele Orlando's: "In an advanced State, the chief source of law is the statute, that is, the declaration of a legal norm made with outward signs and endowed with absolute imperium by the competent authority of the State" (V.E. ORLANDO, *Principi di diritto costituzionale*, 5th ed., Barbera, Florence 1909, p. 50. Emphasis in original).

63 The "realism" that part of positive-law doctrine prides itself on being the bearer of refers not so much to the concept of "reality" as to that of "royalty", if it is true, as it is, that it amounts to reproposing the ancient maxim *rex facit legem.*

64 I. MICHOUD, *La théorie de la responsabilitè morale et son application au droit français*, 2nd ed., vol. 2, Librairie générale de droit et jurisprudence, Paris 1924.

65 On this point see the observations by Otto Hintze, in O. HINTZE, *Wesen und Wandlung des modernen Staats*, de Gruyter, Verlag der Akademie der Wissenschaften, Berlin 1931, p. 8-9.

66 I. MICHIOUD, *op. cit.*, pp. 53-54.

government; it is not a political theory in the proper sense of the term"[67]. The meaning of the idea of "sovereignty of the State" is, according to Michoud, that the sovereignty lies not in the hands of a particular holder, even be that the people, but in that of the national collectivity in general.

The consequence of the notion of sovereignty of the State is, in Michoud's view, that the holder of power does not exercise it on his own behalf but in the more general name and interest of the collectivity. This implies a limitation on the prerogatives of the holder of power, whoever that be. "In the theory of sovereignty of the State", he writes, "the limitation comes naturally from the idea that this holder exercises a power conferred on him solely in the interest of the collectivity, from which it follows that this exercise becomes illegitimate from the moment he loses sight of that interest. His right, however exalted and even unique, does not go beyond that"[68].

In any case, whoever (physical person, group or institution) exercises power, that is, issues laws, is not, for Michoud, anything but an *organ* of the national collectivity. The right to make laws that this organ has does not belong to it, but to the collectivity[69]. The organ is subordinate to that right, even if this is not accompanied by any specific sanction in the event of a breach. The fact that the organ of the national collectivity is *de facto* sovereign, in the sense that it does not have above it any other organ capable of imposing its own decisions, does not mean that this organ is also sovereign *de jure*.

At this point we must ask what content Michoud attributes to the notion of (objective) law. This does not, in his view, coincide with the law laid down by organs of the State. There is a law that precedes and is outside the action of the State. "The notion of law is, in fact", he writes, "by no means identical with the notion of *law promulgated by the organs of the State*. There were legal relations among men and rules for governing them before States were constituted, in primitive patriarchal societies, in groups like the clan and the horde. Even after the constitution of States, for long the law continued to be

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67 *Ibid.*, p. 54.

68 *Ibid.*, p. 55.

69 It is just to avoid these possible implications of the doctrine that conceives of legislative power as a mere "organ" of the State and hence, at least ideally, subordinate to it, that some Nazi legal doctrine decisively rules out the possibility of the Führer's being an "organ" (in the legal sense). In this connection, see what was written by one of the most radical Nazi jurists, R. HOEHN, *Rechtsgemeinschaft und Volksgemeinschaft*, Hanseatische Verlagsanstalt, Hamburg 1935, pp. 10-11, and pp. 75-77.

expressed in customs without State intervention. These two observations suffice to show that the idea of law is independent of the idea of State, and that the former is antecedent to the latter"[70]. Accordingly, since the law is prior and superior to the State, the role of the latter, that is, of the legislative power, is, for this French lawyer, chiefly that of registering the rules already operative in the social fabric.

Thus far, Michoud has theorized two types of limitation barring the full deployment of the action of political power. The first limit is in the impersonal nature of the holder of political power, the national collectivity. This is seen as obliging the material holder of power to act within the framework of the collectivity's interests. The first limit would, then, be the general interest, which should represent the aim of political action. The second limit, connected with the first, is given by the fact that the material holder of political power (king, elective assembly, or even popular meetings) is not also its legal bearer. This bearer is always, according to the French jurist, the collectivity as a whole. Accordingly, the organ that exercises the political power and promulgates the laws must express those norms and values that already prevail within the collectivity of which it is, thus, the "organ": the representative, the spokesman, the expression. This second limit, accordingly, lies in the relation of representation that exists between the collectivity and its organs.

Michoud further identifies a third limit, set by a natural law higher even than the norms expressed by the popular consciousness. This natural law, should it clash with the norms expressed by the social consciousness, would be imposed on it as hierarchically superior law. "We accept", writes the French jurist, "that above the very limit resulting from the social awareness of the group there is another limit, of an entirely ideal nature, namely that of natural law, and that this limit is imposed not only on the group's organs but even on the group itself should it decide otherwise through its organs"[71]. Like many thinkers who set law above political power, Michoud goes so far as accepting the right of resistance against those political actions, (those laws) issued in flagrant violation of right (the whole set of norms expressed by the social consciousness). "The theory we have formulated", he writes, "has the consequence of showing that the legislature de facto depends on the social

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70 I. MICHOUD, *op. cit.*, p. 56.

71 *Ibid.*, pp. 57-58.

group whose representative it is, and that the de facto resistance of that group may invalidate its decision"[72].

As said earlier, another legal doctrine that unties law from political power and makes the latter depend on the former is the dutchman Hugo Krabbe's. He counterposes to the theory of "State sovereignty" common to much of positive-law thought (Krabbe specifically cites in this connection Gerber, Laband, Georg Jellinek, and Otto Mayer) a theory of the "sovereignty of law". For the first, law is held to derive its origin from the original power attributed to the State. "The doctrine of the sovereignty of the State", writes the Dutch jurist, "derives every authority in the society, from the State. The state is the person with authority, the source of all power, a phenomenon of natural and original power. This point of view has the necessary consequence that the law too derives its authority from the State, and sometimes also its content"[73].

For the theory of the sovereignty of law that the Dutch jurist decidedly asserts, the relationship between law and State is posed the other way around from the theory of State sovereignty. It is no longer the power of the State, conceived of as original, that produces law, but the law that attributes power and authority to the State.

Not only is the power of the State, in Krabbe's view, in some way produced by law, but the law conditions and constantly upholds the activity of political power. Political power, that is, once "created" by the law, cannot free itself from it. The law upholds the State's activity, both through the ordinary laws and through laws specifically promulgated to regulate the action of State organs.

To affirm the thesis of the sovereignty of law, Krabbe starts from the theory of the *Rechtsstaat*, which however he regards as unsatisfactory. This theory recognizes as sovereign authority the power of law, but does not, according to Krabbe, draw from this the ultimate consequences, confining itself to maintaining that the State's activity coincides with laws without going further and asserting the subordination of the State to law[74].

The theories of the *Rechtsstaat* are unsatisfactory, in Krabbe's view, because they maintain what he calls the *Obrigkeitsidee*, that is, the idea of a sovereign political authority that draws its supremacy from sources different from that of law. For instance, he reproaches Georg Jellinek with not

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72 *Ibid.*, p. 57.

73 H. KRABBE, *Die Lehre der Rechtssouveränität*, cit., p. 5.

74 See H. KRABBE, *Die moderne Staatsidee*, cit., p. 2.

succeeding in freeing himself, in formulating his theses of the "self-limitation of the State", from the age-old tradition that sees the State's origins in personal power, the will of a sovereign (seen as a physical person, whether an individual or some other entity of mysterious origin). Krabbe, in short, accuses the public-law doctrine dominant at the time he wrote of not succeeding in overcoming the personalist conception of the State rooted in the ancient patrimonial States.

Krabbe several times asserts that his theory, far from being merely prescriptive, instead describes the actuality of contemporary legal phenomena. He seeks clearly to distinguish law and justice: "As in the doctrine of law, so also in the doctrine of the sovereignty of law the concepts of *law* and of *justice* should be carefully distinguished"[75]. His "doctrine of the sovereignty of law" is, according to him, founded on actually recording the developments of the modern shape of the State. The modern State can no longer, in his view, be identified with the figure, however preeminent, of a king, emperor, prince or sovereign, nor can political and legal action, in the modern State, be said to emanate from the will of a particular individual. The State is today impersonal, and as such, therefore, borne upon law. This is in particular due to the rise of the parliamentary State, since in a parliamentary system political will becomes abstract. Because of shifting majorities, it can no longer be attributed to particular individuals. "The will of the old historical subject of authority", Krabbe writes, "is no longer binding in itself; the assent of parliament is needed. In parliament, however, it is enough to have the assent of a changing majority, made up at one time of some persons, at other times others; accordingly, at least the exercise of the authority falling to parliament is no longer in the hands of particular persons"[76].

Consequently, in Krabbe's view, if the law (which is now a measure promulgated by parliament) can no longer be referred to a definite subject but instead to an entity whose composition is mutable, the norm becomes abstract and can no longer find its foundation in a manifestation of will. This new foundation of the law that takes over with the rise of the parliamentary regime derives, according to Krabbe, from the legal awareness of a people. The fact that parliament is elected means that this institution must be seen as the organ of the popular consciousness, so that the law finds its original source of production in that consciousness. "Thus there appears on the horizon" writes the Dutch jurist, "an entirely new foundation of the rule of

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75 *Ibid.*, p. 40.

76 *Ibid.*, p. 7.

the law. It is not the will of an authority, present only in the imagination, but the legal awareness of the people that attributes to the law its binding force; the *statute* is then valid only thanks to the *law* expressed in it"[77]. Krabbe, as we see, distinguishes very clearly between statute (*Gesetz*) and law (*Recht*). The former is promulgated by the legislator, the second is the product of the people's legal awareness. The two legal phenomena are not however individually independent: the statute is valid only insofar as it reflects the law, is an expression of it.

To further develop his concept of the phenomenon of law, Krabbe again starts from a critique of voluntarist theory. He identifies two principal modes of adherence to such theories: (a) one derives the validity of law from an original power of supremacy, what Krabbe calls *Obrigkeitsgewalt*, (b) the other from the will of those associated. Krabbe criticizes both of these theories: the former "because in reality there is no authority, no subject with the right to command"[78]; the second because it takes no account of the function of law, which is to direct the will of the associated, so that the law cannot coincide with their will. Krabbe does not accept this second theory "because the law, which aims to subject human will, cannot derive its validity from that very will"[79]. Moreover, both the voluntarist theories in one way or the other fail, according to the Dutch jurist, to lay the right stress on the element of law's objectivity. The theory that derives the validity of law from the will of individuals ends by expelling every element of objectivity from the concept of law. Instead, the theory that derives the validity of law from the will of the authority (*Obrigkeit*) obsessively rigidifies the objectivity of law, to such a point that it becomes totally independent of the popular feeling.

What, then, is the conception of law developed by Hugo Krabbe? This can be understood on the basis of the two assumptions necessary according to the Dutch jurist to make it possible to speak of the law's validity. The first is that the law owes its validity to a power that is outside human will and accordingly possesses an objectivity of its own in relation to that will. The law "owes its validity to a power that is objective in relation to that will"[80]. The second assumption is that the content of the norm is in relation with the spiritual nature of man, given that it is aimed at determining human conduct. For Krabbe, then, there are two further elements producing the validity of

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77 *Ibid.*, pp. 7-8. Emphasis in original.

78 *Ibid.*, p. 47.

79 *Ibid.*

80 *Ibid.*, p. 48.

law apart from the two assumptions just mentioned: a material and a formal one.

The material element consists in the fact that the law is an expression of the legal awareness of men: the "doctrine of the sovereignty of law", writes Krabbe, "rise from the field of autonomy. The bindingness of law is to be found in people's legal awareness (*im Rechtsbewußtsein der Menschen*)"[81]. The formal element consists in the law's intrinsic capacity as such to bind the individuals it is addressed to. "The bindingness of legal norms results from the fact that they are *legal* norms.... The bindingness does not need to be confered solely form the outside, nor would this be possible, since there does not exist any other source of power (*eine andere Gewaltsquelle*)"[82]. The definition of valid law given by Krabbe is accordingly as follows: "Valid law is, then, any general or particular norm, written or not, which is rooted (*wurzelt*) in the legal feeling or legal awareness of man"[83].

It follows from this conception that political power comes only through the mediation of law. The power of command is bound up with the capacity to produce law, but in such a way that it is the law that determines the command, not vice versa. "It follows from this", writes Krabbe, "that a binding command may be given only through the production of *law*. If the production of law is assigned to any person whatever, then, he contemporaneously receives the right to command, but always in the sense that the command issued is a consequence of the law that he (that person) produces. He does not separately hold the right of command, so that a norm could sometimes be binding and sometimes not. The norm he produces may command or forbid, but cannot, at pleasure, command and forbid, or else not command or forbid. It is in law and only in law that power (*Gewalt*) lies; and vice versa, a duty of obedience may be founded only upon law"[84].

If the law does not coincide with political power, it is then, according to Krabbe, conceivable for a measure of political power to be antilegal, that is, for a statute not to be law. "A statute which is not setted on this foundations (the legal feeling or awareness of people) is *not* law, it lacks validity, even if it is voluntarily or compulsory observed. There is also the possibility to recognize that there may be legal provisions which lack the character of being

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[81] H. KRABBE, *Die Lehre der Rechtssouveränität*, cit., p. 187.

[82] *Ibid.*, pp. 187-188. Emphasis in original.

[83] H. KRABBE, *Die moderne Staatsidee*, cit., p. 41.

[84] H. KRABBE, *Die Lehre der Rechtssouveränität*, cit., p. 188. Emphasis in original.

a legal norm"[85]. The element of coercion, the fact that a norm is de facto coercively imposed on the members of society, does not, according to Krabbe, tell us anything about its legal nature. The coercion serves only to *maintain* the norm, but cannot produce it, that is, attribute to it the value of the legal provision[86].

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85 H. KRABBE, *Die moderne Staatsidee*, cit., p. 50. Emphasis in original.

86 Cf. *ibid.*, p. 51.

CHAPTER TWO

EXCURSUS; THE MARXIST TRADITION

Summary: 1. Preliminary - 2. The founding fathers: Marx and Engels - 3. Law as form of exchange: Pasukanis - 4. Law as reflection of production relations: Stucka - 5. The law as will of the ruling class: Vysinskij - 6. Law, power and totalitarian regime.

1.*Preliminary*

The Marxist theory of law and State, spare as it is, or perhaps just because it is so, is able to offer us a "paradigm" of the strictest clarity in relation to the nexus between law and power of interest to us here. Thus, before going on to develop the central argument of these pages, I do not feel it out of place to devote a brief *excursus to* dealing with this tradition of thought. The intention of this chapter is, then, to draw a picture (summary, but I hope not superficial) of the Marxist (and in particular Soviet) way of thinking about the law, with special attention to the conception of the relation between law and power. In doing so, the first need is to go to the roots of this approach and examine its theoretical sources.

I shall therefore begin by briefly tracing a profile of Marx's thought on the theme of law. I shall then deal with the two greatest Soviet legal theoreticians in the period immediately following the 1917 October revolution: Stucka and Pasukanis. I shall go on to consider the evolution of Soviet legal thought in the work of Vysinskij, who well reflects the requirements of the Stalinist regime. At the end of this section, it will be possible to draw some initial conclusions on the question of relationship between the phenomenon of law and political power.

2. *The founding fathers: Marx and Engels*

One can certainly discuss whether Marx's thought was correctly interpreted by his Soviet epigones, and whether the German philosopher's hopes, his fundamental project for a new society, met with realization in the

constitution of the Soviet Union. It is in any case certain that it was to Marx and Engels that Lenin and his followers constantly referred. It is outside the task I have set myself to consider whether that reference was reliable.

In the work of Marx (and Engels, since I believe there are no fundamental points of divergence between the thought of these two[87]) we can pick out three main definitions of law. These are: (i) law as *form*, so that the legal phenomenon is necessarily abstraction, mediation, and hence "alienation"; (ii) law as *ideology*, on the one hand an essentially historical fact, an aspect of a certain economic development, a circumscribed area of the "superstructure", and on the other hand "illusion",[88] an ideological cover for relations of dominance and exploitation clad in the hypocritical garb of relations founded on criteria of justice; (iii) the law as *will*, that is, as political power of the ruling class[89], "the concentrated and organized violence of society"[90].

The first definition corresponds to the first stage (and central core) of Marx's thought, which draws on Hegel and Feuerbach, where the critique of bourgeois society centres on the concept of alienation (*Entfremdung*) and of reification (well expressed with the German verb *sich verdingen*, which means to hire oneself out and has as its root the word *Ding*, thing in English). On this conception, the law is in particular the form of the exchange between equivalents. The law becomes possible thanks to the separation between exchange value and use value, which is also an opposition between form and substance. This opposition is then redefined in sociological terms through the distinction between "society" (*Gesellschaft*) and "community" (*Gemeinschaft*)[91]. This conception of law is maintained in the works of the

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87 This is the opinion of the majority of specialists. See esp. H. ARENDT, *Between Past and Future. Six Exercises in Political Thought*, Viking Press, New York 1961, p. 21.

88 In this connection Marx speaks of "legal illusion" (see K. MARX, *Capital*, Book I, ed. by F. Engels, English trans. by S Moore and E. Aveling, Lawrence and Wishart, London 1977, 10th ed. p. 674).

89 These three definitions correspond to the three conceptions of law dominant in philosophical legal literature of the last two centuries: (i) law as *form*, (ii) as *history*, (iii) as *will*. In this connection see R. DE STEFANO, *Il problema del diritto non naturale*, Giuffrè, Milan 1955.

90 K. MARX, *Capital*, cit., p. 814.

91 See F. TÖNNIES, *Gemeinschaft und Gesellschaft. Grundbegriffe der reinen Soziologie*, facsimile reprint of the 8th edition of 1935, Wissenschaftliche Buchgesellschaft, Darmstadt 1972.

mature Marx, though mixed with elements drawn from British political economy (in particular Ricardo). "It is plain that commodities", writes Marx, "cannot go to market and make exchanges of their own account. In order that there objects may enter into relation with each other as commodities, their guardians must place themselves in relation to one another as persons whose will resides in those objects... [owners] They must therefore, mutually recognise in each other the rights of private proprietors. This juridical relation which thus expresses itself in a contract, whether such contract be part of a developed legal system or not, is a relation between two wills, and is but the reflex of the real economic relation between the two. "[92].

In this first definition the law is essentially *form*, abstract consideration of social relationships, which as such acts in relation to them with negative effects, constraining them within a single measure and hence paradoxically sanctioning the inequality. "Right by is very nature can consist only in the application of an equal standard; but unequal individuals (and they would not be different individual if they were not unequal) are measurable only by an equal standard in sofar they are brought under an equal point of view, are taken from one *definite* side only, for instance, in the present case, are regarded *only as workers*, and nothing more is seen in them, everything else being ignored"[93].

The second definition is at the very core of Marx's theory. As is well known, for Marx history is the product of relations of production, which determine the nature of the other spheres of human activity. "The first work which I undertook for solution of the doubts which assailed me was a critical review of the Hegelian philosophy of right. [...] My investigation led to the result that legal relations as well as forms of state are to be grasped neither

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[92] K. MARX, *Capital*, cit., p. 88.

[93] K. MARX, *Critique of the Gotha Programme*, Foreign Languages Publishing House, Moscow 1947, p. 25. Emphasis in original. Here Marx repeats (though with a critical accent) what was already asserted by Kantian jurists in order to justify the tension between the equality guaranteed by law and the permanent economic and social inequality. See e.g. F. von ZEILLER, *Das natürliche Privat-Recht*, Wappler und Beck, Wien 1808, paragraph 71: "Das Recht (...) ist bey allen das nähmliche; nur die Gegenstände (die Materie), worauf es angewendet wird, sind verschieden. Hierdurch kläret sich denn zugleich auf, warum bey dem gleichen (formellen) Urrechte und bey dem gleichen angebornen Rechte auf Rachen die (materiellen und) erworbenen Rechte verschieden sind; ja bey der unausweichlichen Verschiedenheit der Lagen und Verhältnisse, der mannigfaltigen geistigen und körperlichen Kräfte, vermittelst welcher Rechte erworben oder verloren werden, ungleich seyn müssen."

from themselves nor from the so-called general development of the human mind, but rather have their roots in the material conditions of life, the sum total of which Hegel, following the example of the Englishmen and Frenchmen of the eighteenth century, combines under the name of "civil society", that, however, the *anatomy of civil society is to be sought in political economy*"[94].

The relations of production, according to Marx, determine even the will of man. This however, loses its arbitrariness or indeterminacy and becomes a sort of reflex of the needs of production and of the development of the productive forces. "Right can never be higher than the economic structure of society and the cultural development conditioned by it"[95]. The law, according to this way of thinking, is located, along with politics, religion, art and cultural forms in general, in an area called by Marx *superstructure*, which is determined by the production relations, called the *structure*, of society. "The production of ideas, of representations, of consciousness, is at the first directly inter woven with the material activity and the material intercourse of men, the language of real life. Conceiving, thinking, the material intercourse of men, appear at this stage as the direct efflux of their material behaviour. The same applies to mental production ad expressed in the language of politics, laws, morality, religion, metaphysics, etc., of a people... [in consequence] morality, religion, metaphysics, all the rest of ideology and their corresponding forms of consciousness, thus no longer retain the semblance of independence"[96].

It is *history* that constitutes the reality of social life, but only as *economic* history, as the temporal succession of techniques and relations of production. "The law", writes our German philosopher again, "has no history of its own any more than religion has"[97].

Private law, on this view, is the outcome of the decline of the ancient forms of community. "Private law develops simultaneously with private property from the dissolution of the natural community"[98]. Public law, in

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[94] K. Marx, Preface to *A Contribution to the critique of political economy*, in *K. Marx: Selected Writings*, vol. 1, ed. by D. McLellan, Oxford U. P., Oxford 1977, p. 389. My emphasis.

[95] K. MARX, *Critique of the Gotha Programme*, cit., p. 25.

[96] K. MARX, F. ENGELS, *The German ideology*, in *K. Marx: Selected Writings*, cit., p. 164.

[97] *Ibid.*, p. 68.

[98] *Ibid.*, p. 67.

turn, for instance electoral law, is conceived of as devoid of independent validity, but as being dependent on and characterized by the economic structures it is the expression of. In consequence the law, legal norms, in order to change or to be changed are in need of reforms not so much as regards their content or the procedure for promulgating them as in relation to the underlying economic foundation. "An election is a political form, both in the smallest Russian commune and in the cooperatives (Artel). The character of the election does not depend on this description, but on the economic basis, the economic interrelation of the electors, and as soon as the functions have ceased to be political, then there exist (i) no governmental functions; (ii) the distribution of general functions has become a business matter which does not afford any room for domination; (iii) the election has none of its present political character"[99].

Nor can one think of eliminating political and legal forms before certain economic conditions are realized. "So long as the productive forces are still insufficiently developed to make competition superfluous, and therefore would give rise to competition over and over again, for so long the classes which are ruled would be wanting the impossible if they had the "will" to abolish competition and with the State and the law"[100].

The third definition of law mentioned above seeks to eliminate the distance between law and politics, and reduces the former to the figure of power: "Your jurisprudence is but the will of your class made into a law for all"[101].

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[99] K. MARX, *On Bakunin's Statism and Anarchy,* in *K. Marx: Selected Works*, cit., p. 563.

[100] K. MARX, F. ENGELS, *The German Ideology,* in *K. Marx: Selected Writings*, cit., p. 184.

[101] K. MARX, F. ENGELS, *The Communist Manifiesto*, in *K. Marx: Selected Writings*, cit., p. 234. On the prevailing lines in the tradition of Marxist studies in the field of law, see U. CERRONI, *La libertà dei moderni*, De Donato, Bari, 1973, pp. 112 ff. Cerroni identifies three "lines" in that tradition: (i) the one upholding the "social and economic conditioning" of law (attributable to, say, Kautsky and Renner); (ii) the one that "reduces law to economics" (attributable to Stucka and Pasukanis); (iii) the one that "reduces law to a norm or command" (attributable to Vysinskij). These three "lines" cannot, however, except for the last (Vysinskij's imperativism), be reduced to the three Marxian definitions of law just given. On the Marxian conception of law and its various facets, see U. CERRONI, *Marx e il diritto moderno*, now in U. CERRONI, *Marx e il diritto moderno*, 3rd revised and amplidied edition, Editori Riuniti, Rome 1972, pp. 101 ff.

According to this conception, the law is one of the many means the ruling class utilizes to keep itself in power. Among these means, the place of law is seen as particularly important, since to it is attributed the function of masking the proportion of violence inherent in the activity of the ruling class. Through law, that is, power succeeds in disguising itself in a mantle of legality, and hence to some extent of justice. On this view, law is ideology in the strict sense, as well as being so in the broad sense as an element of the superstructure. Law, that is, is ideology not only (a) as superstructure but also (b) as false consciousness.

It might be maintained that this last conception centred on the notion of will is in contradiction with the conception of law as superstructure, and hence as binding determination (result) of the relations of production, or better of the productive forces. But the contradiction is only apparent. The two conceptions are complementary with each other, and each refers to the other. The law is a superstructure, and the superstructures are made up eminently of psychological manifestations and of will. The relations of ruling classes (structure) determine the will of the ruling class (superstructure).

The will of the ruling class is not free. It is the necessary outcome of the dominant relations of production. It can only come about in the way it does. "The material life of individuals, which by no means depends merely on their "will", their mode of production an form of intercourse, which mutually determine each other -this is the real basis of the State and remains so at all the stages at which division of labour and private property are still necessary, quite independently of the will of individuals. The actual relations are in no way created by the State power; on the contrary they are the power creating it. The individuals who rule in these conditions, besides having to constitute their power in the form of the State, have to give their will, which is determined by these definite conditions, a universal expression as the will of the State, as law- an expression whose content is always determined by the relations of this class"[102]. "Hence the State does not exist owing to the ruling will, but the State which arises from the material mode of life of individuals has also the form of a ruling"[103].

In short, the contradiction breaks down as follows: the law has its origin, draws its substance, from the relations of production, and is manifested as will of the ruling class. This latter, the will, is nothing other than the (legal)

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102 K. MARX, F. ENGELS, *The German Ideology*, in *K. Marx: Selected Writings*, cit., p. 184.

103 *Ibid.*

form in which class interests (of the ruling class) emerging from the process of development of the productive forces are disguised.

These three conceptions ((a) law as *form*, (b) law as *ideology*, (c) law as *will* of the ruling class) present in Marx's thought were to be taken up respectively by the three most noted Soviet theoreticians of law: Pasukanis, Stucka and Vysinskij. We shall deal with them in the following section.

3. *The law as form of exchange: Pasukanis*

Of the three most noted Soviet theoreticians of law, Pasukanis is certainly the one who had the true stuff of a theorist, and developed a theory of law, however disputable one will find it, that is the outcome of reflection and is not devoid of originality. Stucka and Vysinskij, especially the latter, were more propagandists. Pasukanis can instead be recognized as having the rank of thinker.

Pasukanis takes up Marx's first conception of law, that is, he develops the most radical critique Marx gave of the phenomenon of law. This to a certain extent reflects the political climate in which he was writing; the Leninist revolutionary period, when revolutionary fervour was still ablaze. In practice, Pasukanis's conception of law leads to the decisive negation of law as an element of the classless society, and thus takes shape in the assertion that the persistence of the phenomenon of law even in post-revolutionary society reflects the survival of bourgeois elements, of still living elements of the defeated capitalist society. This conception is obviously reflected politically in an extremist programme as regards the path the new society should follow towards the full realization of socialism. It also meant hastening the tempo of transition to the so-called stage of communism and thus making the period of transition to communism less unstable and as short as possible.

But what concept of law does Pasukanis give us? He regards the basic element of capitalist society as being the exchange of equivalents, and sees the law as the form of such exchange. All legal concepts are explained by Pasukanis through the key notion of exchange of commodities. For instance, the concept of "legal subject" is explained with the rise of the figure of the capitalist owner, who for his deals needs a broad sphere of autonomy. For the first time in human history, according to Pasukanis, the individual is presented as independent of society, as an abstract subject. It is on this figure that, in his view, the concept of legal subject is based. It is on buying and

selling, the exchange of goods between capitalist owners, that the concept of legal relation is based.

Pasukanis writes in reply to Stucka's criticisms: "I have indeed maintain, that the relations between commodities producers generate the most highly developed, most universal, and most consummate legal mediation, and hence that every general theory of law, and every "pure jurisprudence" is a one-side description, abstracted form all other conditions, of the relation between people who appear in the market as commodity owners"[104]. Pasukanis is obsessed by the idea of exchange and of commodities. It is round these concepts that he constructs the whole of social reality. The economy itself, which for a good Marxist is the privileged social sphere, is for the Soviet jurist constructed on the basis of exchange. For "the economy only beings to be differentiated as a distinct sphere of relations with the emergence of exchange. So long as there are no relations determined by value, it is difficult to distinguish economic from the remaining totality of life's activities together with which it forms a synthetic whole"[105].

We reach the acme when Pasukanis explains the existence and categories of penal law through this devilish phenomenon of exchange. This accursed phenomenon has broken the natural wholeness of the organic community in which the individual as such did not appear except as an appendix of the whole, and has given rise to the subject, the individual, who is, for Pasukanis, as such the synonym of owner or of capitalist.

Let us, then, see how Pasukanis articulates his theory in the specific field of penal law. (i) Crime is a species of the genus exchange. "Felony can be seen as a particular variant of circulation, in which the exchange relation, that is the contractual relation, is determined retrospectively, after arbitrary action by one of the parties"[106].

(ii) The criminal law is a species of the form of bourgeois society; its content comes from the exchange of equivalents. "Hence, criminal law ... becomes a constituent part of the legal superstructure. The materialisation of this exchange relation in criminal law is one aspect of the constitutional state as the embodiment of the ideal form of transactions between independent and equal commodity producers meeting in the market"[107].

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[104] E.V. PASUKANIS, *Law and Marxism. A General Theory*, English trans. by B. Einhorn, Billing and Sons Ltd. Worcester 1989, p. 44.

[105] *Ibid.*, p. 57.

[106] *Ibid.*, p. 168.

[107] *Ibid.*, p. 176.

(iii) The criminal trial is a form parallel to the form of the contract, in which the parties are the public prosecutor and the accused. "This split, whereby state power appears not only in the role of plaintiff (public prosecutor), but also in the role of judge, illustrates that the criminal case as a legal form is inseparable from the figure of the injured party demanding "satisfaction", and accordingly form the more general form of the legal transaction"[108].

(iv) Criminal codes are nothing but the general conditions of the exchange relationship (contract) between State and criminal[109].

In short, the State's relationship with the criminal is a relation of exchange, not a relation of subjection of the criminal to the State. "In a word, the State sets up its relation with the offender remain throughout well within the framework of fair trading. In this precisely lie the so-called guarantees of criminal proceedings"[110].

Pasukanis's theory of law suffers from the chronic affliction of Marxist historiography: loss of the capacity to understand and explain reality. For if everything, every phenomenon, is related to a single feature, a single cause, a single "noumenon" (exchange, production relations), what distinguishes one phenomenon from another is lost. Everything is equal to everything else, and the whole is nothing but that unique "noumenon" (exchange, production relations). Thus in Marxist historiography, where the history of political thought is to be explained, and it is stated that, let us say, Hobbes is the ideologue of the bourgeoisie, and then that Locke is the ideologue of the

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108 *Ibid.*, p. 177.

109 Cf. *ibid.*, p. 183.

110 *Ibid.* The theory of the "contractual matrix" of criminal law was taken up in Italy several years ago by Dario Melossi and Massimo Pavarini (see D. MELOSSI, *Introduzione all'edizione italiana*, in G. RUSCHE, O. KIRCHHEIMER, *Pena e struttura sociale*, Italian trans. by D. Melossi e M. Pavarini, Il Mulino, Bologna 1978, pp. 15-17, nota 23, e M. PAVARINI, *L'invenzione penitenziaria: l'esperienza degli Stati Uniti d'America nella prima metà del XIX secolo*, in D. MELOSSI, M. PAVARINI, *Carcere e fabbrica. Alle origini del sistema penitenziario*, 2nd. ed., Il Mulino, Bologna 1979, p. 243). Against it, however, see I. FERRAJOLI, D. ZOLO, *Marxismo e questione criminale*, in I. FERRAJOLI, D. ZOLO, *Democrazia autoritaria e capitalismo maturo*, Feltrinelli, Milan 1978, pp. 201 ff. In this connection see the brief but effective considerations by F. CORDERO, *Gli osservanti. Fenomenologia delle norme*, Giuffrè Milano 1967, p. 636 ss.; see also R. GUASTINI, *La "teoria generale del diritto" in URSS. Dalla coscienza giuridica rivoluzionaria alla legalità socialista*, in "Materiali per una storia della cultura giuridica", 1971.

bourgeoisie, and then that Rousseau is the ideologue of the bourgeoisie and so forth, there is a consequent absence of distinction between Hobbes, Locke and Rousseau. Thus, Hobbes equals Locke equals Rousseau. Equally, in the area of the theory of law, if law is exchange, if penalty is exchange, if trial is exchange, and if codes are exchange, what we have is crime equals penalty equals the trial equals the codes. Everything is equal to everything else, and everything is equal to exchange.

4. *Law as reflection of production of relations: Stucka*

From the theoretical viewpoint Stucka's work is less interesting. His best-known book, *The revolutionary function of law and State* (1921), is largely a history of political and legal institutions, with particular attention to the economic structures of each historical epoch. While Pasukanis sought to move within the theory of law, albeit to deny it, the specifically legal dimension escapes Stucka.

Nonetheless, his definition centring round the concept of "class interest" prepares the way, as Umberto Cerroni acutely noted[111], for Vysinskij's normativism and statism. The formula adopted by Stucka is the same one published in the "Guiding Principles of Criminal Law of the RSFSR" (1919) and is as follows: "The law is a system (or order) of social relations corresponding with the interests of the ruling class and protected by the organized form of that class"[112]. As we see, this definition refers to the Marxian conception of law as reflection of production relations, and more specifically reflection of the interest of the class that is dominant within the given historical mode of production.

This definition, apparently economistic, is farther from Pasukanis's than from Vysinskij's voluntarism. This is for two main reasons. (a) In its formulation, the definition refers explicitly to the aspect of the State as the constitutive element of the phenomenon of law. The class interest that makes up the phenomenon of law does so as far as it is "protected by the organized force of that class". (b) Stucka connects the phenomenon of law to the

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111 U. CERRONI, *Introduzione*, in AA.VV., *Teorie sovietiche del diritto*, ed. by U. Cerroni, cit., p. XXXIII.

112 Vedi P.I. STUCKA, *Prefazione alla prima edizione*, in P.I. STUCKA, *La funzione rivoluzionaria del diritto e dello Stato e altri scritti*, Italian trans. by U. CERRONI, Einaudi, Torino 1967, p. 7, and Introduction by U. CERRONI, P. XVI.

production relations and to class interest in general, not to a particular relation of production or a particular class interest. This in a sense affirms the timelessness, the "eternity", of the phenomenon of law, its presence in every historical epoch, and hence also in socialist society.

While on the first point (a) there is no unbridgeable gap with Pasukanis, on the second (b) the conflict is open. Stucka thus accuses Pasukanis of recognizing the existence of law only in bourgeois society[113] and conversely Pasukanis reproaches Stucka with denying the possibility of communism, that is, a society without State or exchange (that is, without law).

While Stucka, and then especially Vysinskij, endeavour to constitute a socialist law, Pasukanis denounces this attempt as contradictory, at least from a strictly Marxist viewpoint. "Marx", he writes, "conceives of the transition to developed communism not as a transition to new forms of law, but as a withering away of the legal form as such, as a liberation from that heritage of the bourgeois epoch which is fated to outlive the bourgeoisie itself"[114]. For Pasukanis "law" and "communism" are irreconcilable terms. The transition to communism in his view involves the progressive extinction of law, not the elaboration of a new law, a socialist law. For Pasukanis the law is in fact, as we saw earlier, irremediably bound up with the exchange of goods, that is, with what he regards as the distinctive phenomenon of bourgeois society.

Replying to those who seek to construct a "proletarian law", Pasukanis writes: "In raising a demand for new general concepts specific to proletarian law, this line appears to be revolutionary par excellence. In reality, however, this tendency proclaims the immortality of the legal form, in that it strives to wrench this form from the particular historical conditions which had helped bring it to full fruition, and to present it as capable of permanent renewal. The withering away of certain categories of bourgeois law (the categories as such, not this or that precept) in no way implies their replacement by new categories of proletarian law, just as the withering away of the categories of value, capital, profit and so forth in the transition to fully-developed socialism will not mean the emergence of new proletarian categories of value, capital and so on. The withering away of the categories of bourgeois law will, under these conditions, mean the withering away of law altogether, that is to say the disappearance of the juridical factor from social relations"[115].

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113 Cfr. E.V. PASUKANIS, *Preface* to *Law and Marxism. A General Theory*, cit., p. 44.

114 *Ibid.*, p. 63.

115 *Ibid.*, p. 61.

The political implications of Pasukanis's position are clear: communism is to be constructed by weakening, not strengthening, the legal and State machinery. This conception could not help clashing with the process of development of the socialist State, which was very far from "withering away". In particular, Pasukanis's theory was unacceptable for Stalinism, which asserted that the State would "wither away" only once it had reached its maximum extension and power.

5. *The law as will of the ruling class: Vysinskij*

Vysinskij was the complete opposite of a scholar. It was he who, as Procurator General of the USSR, between 1935 and 1939, represented the prosecution in the trials that served Stalin in imposing and legitimizing his terror regime and ridding himself of all competitors for power. Accordingly, there is none better than this sombre figure of the accuser to portray the Stalinist conception of law. The relevance of this jurist (a term that ill befits Vysinskij's work) lies, then, not so much in the originality of his thought as in the consistency with which he managed, in the specific area of theory of law, to give a voice to the lucid madness of Stalin, the "Egocrat" as Solzhenitsyn calls him[116].

Vysinskij's doctrine breaks down essentially into two general assertions. (i) Socialism has been realized and the exploitation of man by man abolished in the State that emerged from the October 1917 revolution, consolidated under Stalin's leadership. "On the basis of the doctrine of Marx-Engels-Lenin-Stalin a new society has been constructed, the socialist society, and new, socialist social relations, free of exploitation, crises, unemployment, poverty and the oppression of the popular masses have been sanctioned and consolidated"[117]. Thus he hymns "Stalin's luminous epoch of flourishing socialism"[118].

(ii) Socialism does not rule out either the legal form or the state form. This assertion could have been shared by Marx (who says as much in his

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116 The term is used by Solzhenitsyn in his monumental *Gulag Archipelago*. On the "egocrat", see the fine pages by C. LEFORT, *Un homme en trop. Réflexions sur "Archipel du Goulag"*, 2nd ed., Seuil, Paris 1986, pp. 57 ff.

117 A.J. VYSINSKIJ, *Problemi del diritto e dello Stato in Marx*, in *Teorie sovietiche del diritto*, ed. by U. Cerroni, cit., p. 242.

118 *Ibid.*

Critique of the Gotha Programme) and by Lenin[119]. But for both Marx and Lenin -- though more for the former than for the latter -- law in socialist society is a residue from the past capitalist regime, a sign (and product) of the immaturity of the phase of socialism (still following the principle "to each according to his work") in comparison with the final stage of communism (in which law withers away along with the State), a brand of incompleteness in the process of liberation of man. Lenin, for instance, writes that "it cannot be believed without falling into utopia that as soon as capitalism is overthrown men will learn from one day to the next to work for society *without any legal norm*; moreover, the abolition of capitalism *does not immediately give* the economic requirements for *such* a change. And there are no other norms than those of "bourgeois law""[120].

Vysinskij, though always basing himself on Lenin and Marx, shifts the point where the stress is placed in their theories. While Marx and Lenin see the law as a contradictory element in a socialist society, instead tolerating it more as a necessity (a necessary evil), Vysinskij turns this position on its head and speaks of law in socialist society as an element not only necessary but also positive and constructive. The law of socialism in Marx and Lenin is "bourgeois law"; in Vysinskij it becomes *socialist* law, which has remote formal parallels with bourgeois law. He writes in this connection: "It is utopian to believe in the possibility of doing without law in the first stage of communism, the dictatorship of the proletariat. Law is still necessary. The law of the transition period is different in principle from "bourgeois law", even if it does have something in common with it by virtue of historical origin or historical development (as stressed particularly by Marx and Lenin in speaking of the law of the transition period as still "bourgeois" law), and performs a great creative and organisational function. It is already a new law: law of a transition period, socialist law generated by the proletarian dictatorship"[121].

On the other hand, to justify the persistence and growth of the legal form and the thesis of the positiveness of this phenomenon, Vysinskij refers to

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119 "Consequently" writes Lenin, "for a certain time not only bourgeois right, but even the bourgeoir state remains under communins, without the bourgeoise" (V.I. LENIN, *State and Revolution. The marxist Doctrine of the State and the Tasks of the Proletariat in Revolution*, in *V. I. Lenin. Selected Works*, vol 2, ed. by J. Finenberg, Martin Lawrence Limited, London 1936, p. 90).

120 Quoted in A. J. VYSINSKIJ, *Problemi del diritto e dello Stato in Marx*, cit., p. 253.

121 *Ibid.*

Stalin's theory of "capitalist encirclement" and "socialism in one country". Stalin, to justify the persistence of the State apparatus and its by no means declining vitality in a socialist regime, had maintained that the thesis of the withering away of the State was bound up in Marx and Engels with the conception of a world-wide revolution, but since instead the socialist system had been set up in one country only, which was therefore surrounded by hostile regimes, it was absolutely, vitally, necessary to endow socialist society with an extremely powerful apparatus of defence against external and internal enemies. And this defence apparatus could be guaranteed only by a vast, efficient State organization[122]. "So long as the socialist state is surrounded by capitalist states, it will remain a true state. The last phase of communism: the stateless society, cannot be expected until world revolution has destroyed, at least, most of the capitalist states"[123]. Kelsen comments: "Thus the ultimate goal of communism seems to be transferred to so distant a future that it is hardly worth while to examine seriously the question whether a stateless society is rally possible"[124].

Vysinskij, accordingly, combats both the strictly orthodox (Stucka) and the radical (Pasukanis) Marxist tendencies, to affirm the value of socialist legality. On this, before going on to Vysinskij's critiques of Stucka and Pasukanis, I wish briefly to dwell. When Vysinskij speaks of socialist legality, he does not mean that the dictatorship of the proletariat is limited by law, but only that this dictatorship uses the specific instrument of law (understood in Marx's sense of organized violence). "The dictatorship of the proletariat", writes the Soviet jurist, "accomplishes the tasks of proletarian revolution also by aid of law and of measures defined by law, through administrative and legal organs. *The dictatorship of the proletariat is a power not limited by any law*, but by creating its own laws, it takes advantage thereof"[125]. This passage of Vysinskij's seems to me particularly important as proving that a legal positivist conception of law (which the Soviet judge's one is, at least in its primitive imperativistic form) does not per se contain a theory of the *limits* of law, and is indeed perfectly (both theoretically and historically) compatible with a radically instrumental view of legal norms.

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122 In this connection see H. KELSEN, *The Political Theory of Bolshevism. A Critical Analysis*, University of California Press, Berkeley, Los Angeles 1949, pp. 23-35.

123 *Ibid.*, p. 33.

124 *Ibid.*, p. 34.

125 A.J. VYSINSKIJ, *Problemi del diritto e dello Stato in Marx*, cit., p. 255. My emphasis.

Let us, then, come to the criticisms Vysinskij makes of Stucka and Pasukanis. Stucka is criticized as bearer of an economist vision that eliminates (or reduces) the voluntarist and normativist element of law, an element which according to Vysinskij is instead the one that characterizes the phenomenon of law. "Stucka maintains... that legal relations are production relations themselves, and that accordingly the law is the form of these relations"[126].

Vysinskij exalts the superstructural nature of law, not in Stucka's sense affirming that the superstructure depends on the structure, but instead by placing major emphasis on the assertion that the superstructure is different from the structure, that it does not coincide with it, and accordingly in relation to it enjoys heightened independence. The conclusion is as follows: "This conception of law", writes Vysinskij in connection with Stucka's theory, "clearly contradicts Marxism, according to which law is the will of the ruling class raised into law, according to which law is one of the superstructures that are constituted above the production relations that form society's economic structure"[127]. Even if legal relations depend on economic ones, that does not mean that the former have to be identified with the latter: "He says that 'the production relations of individuals... must equally be expressed as political and legal relations'. But it does not follow that an equals sign can be placed between one and the other, as P.I. Stucka does"[128].

The critique of Stucka is not merely doctrinal, but has major political significance. Stucka supported the orthodox thesis of the bourgeois nature of law in socialist society. Consequently, for him too, law in socialist society ought instead of intensifying to have progressively withered away. The difference between Stucka and Pasukanis lies ultimately in their differing conceptions of the pace of that withering away: Pasukanis is more radical than Stucka, seeming indeed to disallow the possibility of combining law with socialism, even in its initial form. Stucka instead believes that this combination is possible, but only for an initial phase. The transition to "communism", for him too, will mean the death of law. But this death must already be prepared now: "socialist law", that is, is a law that is preparing to disappear, that gives itself forms in which this withering away is in some way already foreshadowed. Vysinskij rails against this, against Stucka's thesis that the Soviet codes are some sort of "concession to bourgeois law"[129].

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126 *Ibid.*, p. 259.

127 *Ibid.*

128 *Ibid.*, p. 264.

129 See ibid., p. 265.

Against Pasukanis, Vysinskij is even more violent; on him he showers epithets like "spy", "saboteur", "traitor". On the other hand, it should not be forgotten that Pasukanis disappeared, probably shot, in the course of the bloody Stalinist purgees. Pasukanis was fought because of the radicalism of his doctrine, which, more decisively than Stucka's, asserts the intrinsically bourgeois nature of law. For Pasukanis, as we saw above, the phenomenon of law corresponds essentially with the bourgeois stage of historical development, so that he clearly rules out the possibility of speaking of "socialist law". This doctrine clearly fits in with the needs of Stalin's regime, which poses no longer the problem of the withering away of the State but of its strengthening, its legitimation as a socialist regime and the legitimation of a so strengthened State. Pasukanis's doctrine was, in short, a barrier to the evergrowing statism of Stalin's dictatorship.

Here we come to the core of the Stalinist theory of law. It can be broken down into three fundamental propositions: (i) Law is not a phenomenon corresponding exclusively with bourgeois society, but is instead present in *every* class society. "To every epoch of class society there corresponds its law"[130].

(ii) Law is the will of the ruling class. "The law is a set of rules of human conduct established by the State power as power of the class that rules society, as well as of usages and rules of coexistence sanctioned by the State power and coercively implemented with the aid of the State apparatus in order to protect, consolidate and develop the relations and the order that are advantageous for and favourable to the ruling class"[131].

(iii) The transition to communism, accordingly, does not rule out either the form of law or the State form. "As a means of control by society, as a means of regulating social relations, as a method and means of protecting the interests of socialist society and the rights and interests of citizens, Soviet law performs a *gigantic social function*, which the Soviet State cannot, until its total withering away, do without"[132].

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130 *Ibid.*, p. 282.

131 *Ibid.*, p. 283.

132 *Ibid.*, p. 286. My emphasis.

6. *Law, power and totalitarian regime*

It is interesting to ask why such a totally arbitrary regime as Stalin's insisted so much on setting up "socialist legality" and on reaffirming the role of the norm and of the legal system in the context of socialist society. This question arises particularly if Stalin's legal thought is compared to contemporary Nazi legal thought. The former reaffirms the role of law and State, the latter on the contrary exalts "the movement" and the *Volksgemeinschaft*. Paradoxically, Nazi legal thought is more radical than Stalinist, as regards the question of law and State[133].

Nonetheless, I do not believe that fundamental differences can be found between the two legal systems as far as the view of the relation between law and political power goes. In both the law was understood (and above all practised) as will of the absolute power of the Egocrat. The difference in the respective legal doctrines, which fitted broadly similar phenomena, is primarily to be explained by reference to the major ideological obstacles in each regime's path to arbitrariness. In one case (Nazism) there is the theory of the *Rechtsstaat*, meaning that it was necessary to fight a formalist conception that set law and State above society and politics (the conception of which Hans Kelsen was the greatest representative).

In the other case (Stalinism) there was the theory of the withering away of law, so the need was to fight an economist, antiformalist conception that set law and State in a subordinate position vis-à-vis the interests prevailing in society. Moreover, as far as Stalinism is concerned, there were grounds of a practical, not solely ideological, nature militating in favour of adopting law as an instrument of socialist society (fundamentally the needs of establishing and organizing a regime that had till then been in a situation of continuing precariousness). Indeed, the major difference between the two theories and the corresponding systems lies in the radical antiuniversalism (racism) of National-Socialist legal thought and law, which has no equivalent in Soviet thought and legal practice.

The fact is, that, whatever Franz Neumann may say[134], the law as such rarely constitutes a defence against the abuses of power. Undoubtedly the law may constitute a limit on the arbitrariness of power, but only when it is in

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133 On this point see G. FASSO', *Storia della filosofia del diritto*, vol. 3, *Ottocento e Novecento*, Il Mulino, Bologna 1970, pp. 379 ff.

134 See e.g. F. NEUMANN, *The Rule of law. Political Theory and the Legal System in Modern Society*, Berg, Leamington Spa 1986, pp. 25 ff.

some way untied from command by the powerful, when its source of production lies outside the range of autonomy of the political power. What I mean by this is that law can constitute a limit on power because of its source, not because of its formal structure.

The formal structure of law may act in different ways. It may, for instance, act like the law of the liberal State, which is general and abstract, but it may also be a *privilegium*, an *ad hoc* measure. And *privilegium* has every right to be called law, and one cannot, as Neumann does, attribute the quality of law only to the parliamentary law of liberal States between the late eighteenth and the mid-twentieth century. On the other hand, the general law has covered up so many abuses of power that it will be hard to see it as being a barrier as such to the spread of political power. I do, however, admit that general abstract law cannot be reconciled with a regime of totalitarian type, and in any case with a type of political regime that has lost the sense of distinction between State and society (as is, by the way, in part the corporative, clientelist State of our days in Europe and in Italy). But the fact that law of liberal type cannot be reconciled with regimes of totalitarian type does not mean that it has a limit on political power, that it as it were contains within itself an active principle of resistance to power. This irreconcilability between parliamentary law and totalitarian regime means more simply that the totalitarian regime is different from the liberal regime, and cannot accordingly receive its legal institutions from the latter. The law can be a limit to power, if this limit is indeed present in society, and the law confers formal expression on it. But the law as a mere formal expression cannot limit material force, just as a phantom cannot oppose a being of flesh and blood.

The law, as a formal structure regulating individual social behaviour, is not necessarily a limit on the action of power. It may be said that formalization and the institutionalization of a prescription, hinder the powerful from continually laying down different norms, and condition their very action. That is true. It is equally true that political power is always subject to some sort of norm which in the social imagination, sets up that power. Otherwise, it is the physical power of the bandit compelling us to stand and deliver. But the law *is not command*, the law is norm[135]. It may be

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135 In this connection see H.L.A. HART, *The Concept of Law*, Clarendon, Oxford 1961. See also H.L.A. HART, *Positivism and the Separation of Law and Morals*, now in Id.., *Essays in Jurisprudence and Philosophy*, Clarendon, Oxford 1988, p. 59: "The situation which the simple trilogy of command, sanction, and sovereign avails to describe, if you take notions at all precisely, is like that of a gunman saying to his victim, 'Give me your money or your

manifested through a command, attribute normative value to a command, but it cannot be identified with it, because the command does not function (apart from the hypothesis of physical threat) without a normative referent. Political power cannot be supported solely on physical force; it needs "voluntary service", and this is possible thanks to adoption of a cultural and normative system that makes this political power the centre of social life. Formalization as law is, accordingly, inseparable from political power: all political power needs law, a normative system, that fixes it in the social imagination[136]. If this is so, it cannot at all be said that law constitutes a limit on law, because *power is law*.

Given that law is not necessarily a limit on power, perhaps we can understand the reason for the insistence and fervour with which Vysinskij fought for the implantation of "socialist legality". The reason is that the law gives *continuity* and *stability* to the will of the ruling group. "Why is stability of the laws necessary? It is necessary because it strengthens the solidity of State discipline, multiplies the forces of socialism by mobilizing them and guiding them against the forces hostile to socialism"[137]. Note that here by law Vysinskij intends not parliamentary law, but something including the decrees of the Supreme Soviet (*ukazy*), government ordinances (*postanovlenya*) and provisions with specific content (*rasporaheniya*). By law he means all the formal acts of political power (legislative and executive).

The law is necessary to the new socialist regime since it serves to organize it, structure it, and definitively legitimize it. The law organizes not only society, but above all that society's political power that promulgates the law. Through law it is rationalized and perpetuated. This is stated explicitly in

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life'. The only difference is that in the case of a legal system the gunman says it to a large number of people who are accustomed to the racket and habitually surrender to it. Law surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion". See S. COTTA, *Giustificazione e obbligatorietà delle norme*, Giuffrè, Milan 1981, p. 16. All this will be dealt with more fully in the next section.

136 There are important ideas in this connection from the Swedish philosopher Axel Hägerström. See e.g. his critique of the thesis defended by Salmond, that the logical prerequisite of constitutional law is the power de facto held by the State (see A. HÄGERSTRÖM, *Ar gällande rätt uttryck av vilja?*, now in A. HÄGERSTRÖM;, *Inquiries into the Nature of Law and Morals*, ed. by K. Olivecrona, English trans. by C.D. Broad, Almqvist & Wiksell, Stockholm 1953, pp. 31-35). In this connection see E. PATTARO, *Il realismo giuridico scandinavo*, I. Axel Hägerström, CLUEB, Bologna 1975, pp. 87 ff.

137 A.J. VYSINSKIJ, *Problemi del diritto e dello Stato in Marx*, cit., p. 285.

the following passage from Vysinskij: "The complexity of social relations in the transition period does not permit even to think that it is possible always and in all circumstances to accomplish the tasks of repression solely through direct administrative repression, with the aid of extraordinary and exceptional measures and methods. As the experience of socialist revolution in the USSR has shown, the proletarian dictatorship operates in this sphere through legal instruments too"[138].

The trajectory of Marxist thought on law thus concludes in Vysinskij by asserting the law as the will of power. Marxism, in this field, becomes an exaggerated legal positivism that "bourgeois" jurists themselves would find it hard to share. Economism leads to voluntarism, and one moves from the withering away of the State to its hypertrophy. All this is no doubt made possible by the uncontrollable logic of the Hegelian-Marxian dialectic. A good example of this is the following passage: "Marx and Engels have shown that the development of human society is subject to laws of its own, independent of the will of men; but at the same time it is men themselves and nothing but men that create their own history"[139].

Law, on the Leninist-Stalinist view, will wither away when citizens have learnt to fulfil their social duties without coercion, that is, when they have so internalized the norms of Soviet law that they adjust to them spontaneously and automatically[140]. Until that date, in the period of transition to communism, the working masses must "strengthen their Soviet State to the maximum"[141]. For as Vysinskij concludes, "the withering away of the State will come about not through the weakening of the State power, but through its maximum strengthening"[142].

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138 *Ibid.*, p. 283, my emphasis. The law is thus reduced to "pure" politics: see in this connection U. CERRONI, *Il pensiero giuridico sovietico*, Editori Riuniti, Rome 1969, p. 101. Czeslaw Milosz is accordingly correct to write that the Soviet system is one "in which law exists exclusively as a party tool, and in which the sole criterion of human action is effectiveness" (C.MILOSZ, *The Captive Mind*, English trans. by I. Zielonko, Alfred Knopf, New York 1953, p. 31).

139 A.J. VYSINSKIJ, *Problemi del diritto e dello Stato in Marx*, cit., p. 270.

140 "In fact, indeed, even Lenin ultimately said that not *freedom* but *compulsion* is the means that will produce the psychological requirement -- habit -- for the anarchical society of communism" (H. KELSEN, *Sozialismus und Staat*, Winer Volksbuchhandlung, Wien 1965, p. 114. Emphasis in original).

141 A.J. VYSINSKIJ, *Problemi del diritto e dello Stato in Marx*, cit., p. 295.

142 *Ibid.*, p. 296.

CHAPTER THREE

THE NORMATIVIST SOLUTION

Summary: 1. Preliminary - 2. Power conceived of as Law. Hans Kelsen - 3. Law, Command, Norm - 4. Normative order, political power, dominion - 5. Autonomy, Heteronomy, Ideology

1. *Preliminary*

The way out of the dilemma traditionally afflicting the theory of law between (i) radical "realism" subordinating the reasons of law to the requirements of power, or else reducing the validity of norms to their "facticity" and (ii) radical "normativism" that cages the violence political power uses in a web of rules, or else excludes the relevance of consideration of the "effectiveness" of norms, seems to be the one suggested by those who in a certain way and a certain sense interpret the one phenomenon (power) in terms of the other (law), or even vice versa. For this "third" way the two terms of the opposition are seen as ultimately equivalent or homologous. The opposition turns out on this view to be as it were the effect of an optical illusion: law and power are no longer anything but two faces of the same phenomenon, only artificially separated, and played off one against the other.

The relation between law and power may be developed at both a descriptive level and an eminently normative level. In the first case what interests us is the *reality* of phenomena, and their corresponding conceptualization. Whoever takes this level will pursue sociological research, or else attempt a structural analysis of normative systems from a viewpoint of legal theory. In the second case what is of interest is the *foundation*, the *justification* or the *axiological validity* of these phenomena. Here a more properly philosophical view will prevail, and considerations of eminently ethical nature cannot be escaped. In the first case one deals with questions like "is political power a social entity independent from or prior to forms of legal regulation, or to social norms actually in force?", or like: "are legal norms in some sense constitutive of political power?". In the second case one will ask questions like: "is it just for the law to be in the sway of political power?", or "what are the reasons that justify obedience to political power?". In this

chapter, as in the two foregoing ones, the level I intend to advance on is the former, specifically from a viewpoint of legal theory. One cannot however be unaware that the two types of research are mutually interdependent. The "third way" between radical realism and radical normativism will therefore be considered while maintaining a considerable distance from moral philosophy.

2. *Power conceived of as law. Hans Kelsen*

As we know, Kelsen superimposed and identified the two concepts of law (legal order) and of State. In so doing he started from his distinction between *Sein* und *Sollen*. The State, like the law, is, in Kelsen's view, located in the area of *Sollen*. "The 'ought' terminology", writes Kelsen, "thus guarantees the purity of the science dealing with the State (or with law) as one with an object distinct from nature"[143]. In this connection, Kelsen criticizes Georg Jellinek's so-called *Zwei-Seiten-Theorie*. Jellinek, in his monumental *Allgemeine Staatslehre*, had distinguished the doctrine of the State into a "social doctrine" (whose methodology is closer to that of the empirical sciences) and a "legal doctrine" (understood as "normative" science), considering that the same object (the State) can be studied both from the normative viewpoint (typical of the legal sciences) and from the causal one (typical of the natural sciences)[144].

By contrast with Jellinek, Kelsen instead considers that the essence of the State is purely normative. For the State, argues Kelsen, does not exist as a natural entity: "The State is not a visible or tangible body"[145]. It is manifested through human behaviour that is regarded as actions of the State, or "attributed" to the State. But what does it mean that behaviour is "attributed" to the State, that is, to an entity that is not present in the physical world? Firstly, it is possible to attribute behaviour to a subject - asserts Kelsen - only where there are norms that constitute those attributions. For

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143 H. KELSEN, *Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht*, 2nd ed., Mohr, Tübingen 1928, p. 77.

144 See G. JELLINEK, *Allgemeine Staatslehre*, Haering, Berlin 1900, pp. 9 ff. pp. 25 ff. and pp. 47 ff. Jellinek nonetheless distinguishes the social sciences from the natural sciences by argueing that the former are, as it were, individualizing (ibid., pp. 25-27).

145 H. KELSEN, *General Theory of Law and the State*, English trans. by A. Wedgerg, Harvard University Press, Cambridge-Massachusetts 1945, p. 191.

attribution is a quite different operation from the empirical observation of an event through which one may assert some causal chain.

Attributing behaviour means attributing it to a particular subject not by asserting or describing a particular causal chain, but according to a system of norms[146]. Attribution is accordingly an eminently juridical operation. "To impute a human action to the State" writes Kelsen, "as to an invisible person, is to relate a human action as the action of a State organ to the unity of the order which stipulates this action. The State as a person is nothing but the personification of this unity"[147]. The State, accordingly, in Kelsen's view, is a *purely* legal concept, or as Kelsen puts it, "there is no sociological concept of the State different from the concept of legal order"[148].

However, asserting that the essence of the State is normative does not, for Kelsen, mean eliminating the element of coercion from it. In connection with his conception of the State, Kelsen stresses that it follows in the wake of the dominant doctrine, the Gerber-Laband-Jellinek line that sees the State essentially as a coercive apparatus[149]. The Austrian jurist clarifies, however, that his theory differs from traditional doctrine because in the former the element of coercion is considered not in its material aspect, but as a specific content of the normative order. The State is therefore, for the "pure theory", a system of norms that have as their content coercion (a sanction): "The State is a coercive order. For the specifically "political" element of this organization consists in the coercion excercised by man againts man, regulated by this order"[150].

Kelsen rejects the conception that sets the sovereign above the legal order, in both the German *Herrschertheorie* version and the English-speaking one of *Analytical Jurisprudence*[151]. This rejection goes hand in hand with that of the imperativist conception of law that sees it as a mere command or political decision. "The fact that one man *dominates* others, that is, that one's

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146 In this connection see E. PATTARO, *Lineamenti di teoria del diritto*, CLUEB, Bologna 1985.

147 H. KELSEN, *op. ult. cit.*, p. 192.

148 *Ibid.*

149 See *ibid.*

150 H. KELSEN, *The Pure Theory of Law*, English trans. by M. Knight, University of California Press, Berkely and Los Angeles, 1967, p. 286

151 On the differences, as far as the conception of the State is concerned, between "pure theory" and "analytical theory of law", see H. KELSEN, *Pure Theory of Law and Analytical Jurisprudence*, in "Harvard Law Review", 1941.

will becomes the reason for the other's will, cannot characterize the State; instead, what does is the fact that there is a stable order according to which one must command and the other must obey. Only this order establishes (*begründet*) the unity of the many relations of dominance that present themselves to a merely empirical observation"[152].

[153]The conception that sees the aspect of dominance or the figure of the sovereign as a characteristic feature of the State reproduces in Kelsen's view the confusion between the two distinct levels of *Sein* and *Sollen*. The coercive element, typical of the State, cannot be grasped outside the normative level, on the level of "being", as Austin does. His conception of the sovereign, writes Kelsen, "is sociological or political"[154], but should be assigned to the area of *Sollen*, as constituting the typical content of the norms of the legal system. "In the conceptual definition of the State", writes Kelsen, "it is important that the aspect of coercion (*Zwangsmoment*) be grasped in this unequivocal determinacy; as content of the normative order, and not be substituted - as the dominant doctrine that slips over onto the level of being (*die in die Seinsebene ausgleitende herrschende Lehre*) tends to do - by the unclear aspect of "dominion" (Herrschaft) in the sense of a motivation"[155].

It may be said that Kelsen assigns the State, the political order *par excellence*, to the level of law, because he is moved by the requirement for coherence of his theoretical construction, centered round the rigid distinction between "is" and "ought", where the "ought" involved, as far as law is concerned, is quite distinct from the ethical or political one, and is the "specific being of law"[156]. If we were to conceive of the State and law as distinct entities, one entirely material, at a natural and social level and accordingly governed by laws of causal type (in Kelsen nature and society are often identified, specifically as regards the type of law that governs what happens in them[157]), and the other instead entirely normative and located

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152 H. KELSEN, *Der soziologische und juristische Staatsbegriff*, cit., p. 83. Emphasis in original.
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154 H. KELSEN, *The Pure Theory of Law and Analitical Jurisprudence*, "Harward Law Review", 55, 1941, p. 64.

155 H. KELSEN, *Der soziologische und juristische Staatsbegriff*, cit., p. 83.

156 *Ibid.*, p. 80.

157 It is not sufficiently clear whether for Kelsen the social dimension ought to be assimilated to the natural, causal one, and hence sociology to an empirical causal science. Even if he often seems decisively to assert this assimilation, there are nonetheless places in his work

exclusively on a legal level, we should be compelled - as is, say Georg Jellinek -to split legal knowledge in two. This is because by accepting the distinction between State and law founded on ontological bases, we would make law derive from an ontological level that is foreign to it, given that the object of our consideration is positive State law, that is, the law issued or produced by the State[158].

But if the source of law, (here the State) is something outside it, if *Sollen* refers for its existence to *Sein*, then the normative level and the natural-social level cannot be distinguished with the clearness Kelsen proposes. If the State (conceived of as a natural and social entity) produces law (a normative entity), the phenomenon of law cannot be isolated exclusively in the area of *Sollen*, and on the other hand the knowledge of law cannot come solely as a normative science, but also (and above all) as a social or natural (causal) science. One could then no longer maintain the "purity" of legal method and science (that is, its normative methodological monism). In consideration of all this, Kelsen's conclusion is that "law can come only from law (*Recht kann nur aus Recht werden*)" and hence that "the State must be conceived of as a legal order"[159].

The criticism that Kelsen develops against, say, the theses of Krabbe, who also tends more or less to identify the phenomena of law and sovereignty, is based just on the fact that the Dutch jurist still maintains the distinction between State and law, and by so doing falls into a theory of the State that is full of internal contradictions. "Although" writes Kelsen of Hugo Krabbe, "he subsequently expanded this thesis into the formula 'that the authority of the State is nothing other than the authority of the law', he nonetheless maintains that the State has an independent existence in relation to the law; he is accordingly precluded from seeing the identity of the State order and the legal order -which alone allows a non-contradictory theory of the State-"[160]. While Krabbe postulates the identity of State and law as a political ideal to which reality may possibly not correspond, for Kelsen the identity of State and law is a factual datum, always present in the history of legal and political

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in which society is seen as a normative dimension, a world of *Sollen* and not of *Sein*, and in consequence social science is conceived of as a normative science. See e.g. H. KELSEN, *Der Staat als Integration. Eine prinzipielle Auseinandersetzung*, Springer, Wien 1930, pp. 6-7.

158 On this, cf. H. KELSEN, *Vorrede zur zweiten Auflage*, in H. KELSEN, *Der soziologische und juristische Staatsbegriff*, cit., p. V.

159 H. KELSEN, *Der soziologische und juristische Staatsbegriff*, cit., p. 133.

160 *Ibid.*, p. 185.

formations. According to Kelsen, the limit of Krabbe's theory lies chiefly in the fact that he (Krabbe) conceives "the identification of State and law not as a logical and epistemological problem, but as a political postulate, which may either be realized or not in the historical process"[161].

Kelsen's conception that identifies State and law on the level of the normative order seems to bring about the reduction of political power to a legal phenomenon, to the norm, and hence -- as Noberto Bobbio maintains -- to giving expression in the context of the general theory of law to the ancient ideal of government by laws (by contrast with government by men) or of the State based on rule of law (in contrast with the State's right). Bobbio draws an opposition between the legal positivist tradition on the one hand and the doctrine of the rule of law on the other. "The two limiting concepts", writes Bobbio "of legal positivism and the rule-of-law doctrine respectively are the *summa potestas* or sovereignty and the fundamental norm"[162]. The two concepts of "sovereignty" and "fundamental norm" both have the function of closing the "system". However, one ("sovereignty"), according to Bobbio, serves to close a system founded on the supremacy of power over law, while the other (Kelsen's *Grundnorm*) serves the symmetrically opposite purpose of closing a system founded on the supremacy of law over power.

I doubt that the "fundamental norm" in the *Pure Theory of Law* is outside of and opposed to the legal, positivist tradition. I further believe that as far as Kelsen's doctrine is concerned, one ought to speak not so much of reducing power to law but the other way round, the reduction of law to power. Consider Kelsen's critique of the theory of the *Rechtsstaat* and the so-called *Selbstverpflichtungslehre*. The Austrian jurist maintains that from a strictly legal viewpoint it is meaningless to raise the problem that occupies Georg Jellinek's work, and in general theoreticians of the State based on rule of law, of whether or not there is a norm that binds the activity of the sovereign or the State organs. In fact, according to Kelsen, who here again develops with extreme consistency typical theories of legal positivism, the norm is *per se* always binding, since otherwise one could not call it a norm. Where it is possible for the sovereign or the organ not to keep to the preexisting norm, one must then regard as being in force a norm that so regulates the modification of norms, that is, attributes to the sovereign or the organ the power to amend the preexisting norm[163].

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161 *Ibid.*

162 N. BOBBIO, *Dal potere al diritto e viceversa*, in "Rivista di filosofia", 1981, p. 356.

163 See H. KELSEN, *op. ult. cit.*, p. 186.

According to Kelsen, it is not possible to conceive of a State not bound by its own order (that is, the law), since this order is, for the Austrian jurist, the State itself. Thus the compound "*Rechtsstaat*" is pleonastic, since every State is as such a "Rechtsstaat". "There cannot therefore be", writes Kelsen, "any State not bound by its own order, free in relation to it, sofar the idea of a State bound by its order, freed from hypostatization, has a meaning, because the State is this order itself, cannot *be* anything but *order*, and the idea of a State liberated from "its" order is a contradiction in terms. Since then this order can be only the legal order, no State is conceivable other than the Rechtsstaat, and the word *Rechstaat* is a pleonasm"[164].

From the viewpoint of legal positivism, which recognizes the legal character of the valid norm whatever be its content, and that validity is connected with respect for certain formalities and the fact that the norm is issued by a given subject (sovereign or organ), even a despotic regime may be a "State of law". "As negation of the State of law", writes Kelsen, "is specifically considered the absolute monarchy, despotism. Even this has a specific order, and is conceivable only as a specific order. The rule that coercion is to be exercised only when commanded by the despot and in the way he wants is just as much a rule of *law* as the one that coercion is to be exercised whenever decided by the popular assembly and in the way it wants. Both are, from the viewpoint of the concept of positive law, *equivalent* original hypotheses"[165].

In this connection, to understand the meaning of Kelsen's operation of identification of State and law better, it is needful to mention the way Kelsen resolves the question of a "wrongful act of State". Kelsen, as we know, denies that there can be any such thing as a wrongful act of State (*Staatsunrecht*). The State, which is nothing but the personification of law, can according to the Austrian jurist never have attributed to it a wrongful act, because of the fact that "the subject of the wrongful act (*das Unrechtssubjekt*) can never be at the same time the subject of law (*das Rechtssubjekt*)"[166].

In my view, what lies behind Kelsen's consistently normativistic construction is not the ideal of the supremacy of the norm over power, but more the recognition of every power, insofar as it exercises effective coercive

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164 *Ibid.*, p. 187. My emphasis.

165 *Ibid.* My emphasis.

166 *Ibid.*, p. 136.

action over its subjects, as a legal order[167]. This is because the content of the basic norm is not, for Kelsen, as we know, a behaviour of the members of society (which is instead the object of the secondary norm derived by arguing *a contrario* from the primary one), but a sanction, that is, a coercive act of the State. In Kelsen's doctrine the sanction does not lie *outside* the legal order that lays down behaviour by the members of society, it does not have the subsidiary function of ensuring compliance with the prescribed conduct, and is not the object of the norms commonly called "secondary", as is the case for the traditional doctrine. For Kelsen the sanction is to be located within the primary legal norm, since, as we have said, in Kelsen's system the former (sanction) is the object of the latter (norm). In this way the scope of intervention by the State, conceived of as the apparatus of coercion, is located within the area of law. "Thus", writes Kelsen, "it is theoretically unacceptable to identify, apart from an order containing norms that provide for the sanction, a system of legal norms that lay down the human conduct that avoid the sanction, and assert the former as the coercive apparatus of the State and the latter as the law in the proper and strict sense"[168].

In Kelsen's definition of the law as a *Zwangsordnung*, what qualifies the law as such is not so much the normative element (the *Ordnung*) as the element of force, of coercion (the *Zwang*). "What distinguishes the legal order from all the other social orders", writes the Austrian jurist, "is the fact that it regulates human behaviour through a specific technique. If we ignore this specific element of law, if we do not conceive of the law as a specific social technique, if we define the law simply as order or organization, and not as a *coercive* order (or organization), then we lose the possibility of distinguishing law from other social phenomena, we identify law with society"[169]. On this point, on the intrinsically coercive nature of law, Kelsen develops his critique of the thesis of Eugen Ehrlich, who maintained that coerciveness is not an essential feature of law, while nonetheless maintaining the normative nature of the phenomenon of law[170].

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167 "Political power", writes Kelsen, "is the efficacy of the coercive order recognized as law" (H. KELSEN, *General Theory of Law and the State*, cit., p. 191). But who is the author of this recognition? And what does "recognition" mean in this context? One might well ask. And supposing an order were effective irrespective of its "recognition" on the part of the great mass of members of society?

168 H. KELSEN, *Der soziologische und juristische Staatsbegriff*, cit., p. 88.

169 H. KELSEN, *General Theory of Law and the State*, cit., p. 26. My emphasis.

170 On this see *ibid.*, pp. 24-28.

Summarizing, we may say that Kelsen's doctrine of the identity of law (legal order) and State (political power) is possible through two parallel processes of superposition of two concepts. There is a first superposition of "law" and "State" on the level of "law": the State is conceived of as an order, as a set of norms, that is, as a phenomenon of law (right). The two concepts (State and law) are both brought within the category of normative phenomena, which is, in Kelsen's view, the one typical of law. "As soon as the State is recognized as a unity of order (*Ordnungseinheit*), as a norm, there is", writes Kelsen, "no possibility of counterposing it as association (*Verband*) to law as norm. State and law both fall within the same category of normative order"[171].

However, were the identity of State and law to come about solely through their both being normative phenomena, they could not be distinguished from other phenomena which while being normative are not, according to Kelsen, legal[172]. In the last analysis, they would end up being confused with society which is also an order of human behaviour. What distinguishes law from other normative phenomena (like ethics or religion for instance) is, according to Kelsen, the fact that the law has as its object an act of force, the sanction, coercion.

At the level of coercion (typical of the State), comes the second superposition of the concepts of State and law made by Kelsen. The concepts are identified because both denote orders that rest on the use of force, on the specific "social technique" that coercion is. It is only at this level, the one that according to Kelsen qualifies the phenomenon of law as such (distinguishing it from other normative phenomena), the level of power (or force, or coercion), that the final identification of the two concepts comes about. This is explicitly stated in Kelsen's work, and in this connection he acknowledges his debt to traditional legal doctrines. "And if the essence of legal norm", he writes, "is seem in its coercive nature, then law and the State are in the same way coercive orders in sense of a system of coercive"[173]. It does not accordingly seem to me overventuresome to conclude that the identification of law and State made by Kelsen comes about on the side of the State (or of political power). In this sense, it may perhaps be said that Kelsen's doctrine is a variant of the traditional theses that subordinate the phenomenon of law to the activity of power.

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171 H. KELSEN, *Der soziologische und juristische Staatsbegriff*, cit., pp. 86-87.

172 See H. KELSEN, *General Theory of the Law and the State*, cit., p. 28.

173 H. KELSEN, *Der soziologische und juristische Staatsbegriff*, cit., p. 87.

Note that for Kelsen the State is not a particular type of legal order, a species of the genus "law". The State, in Kelsen's theory, is the legal order *par excellence*, is the same thing as the legal order. According to Kelsen the two concepts of State and of legal order totally coincide and are interchangeable. Obviously, in asserting this thesis, Kelsen has to face an objection that might seem unsurmountable: where is the State in a society which though possessing a legal system does not display any institution characterized by the monopoly of power that Kelsen assumes as the distinctive feature of the State? The Austrian jurist, to overcome this objection, is compelled to apply even to so-called primitive societies a conceptual grid modelled on the figure of the modern State, in particular the concept of "organ", obviously at the cost of some forcing. For instance, according to Kelsen, in a society in which the principle of privat vendetta applies, the "avenger" is acting as "organ" of society itself. "In the primitive society the legal order in principle delegates the act of coercion to the very person who has been hurt in his interests (protected by law). He then acts as the 'organ' of the coercive order (blood vendetta)"[174]. Thus, an injured person taking revenge in primitive society is seen as the organ of a coercive apparatus which is already State and differs from the modern State only in respect of the greater specialization of tasks present in the latter.

3. *Law, command, norm*

Which of the two classical conceptions of the relations between law and power is more satisfactory? The one that reduces the law to an instrument of power, or the other that sees the law as an entity that precedes and in some sense determines political phenomena? One must indeed say that usually both conceptions are set on different levels: the former is generally presented as a descriptive theory of a state of things as it is, and the second instead as a prescriptive theory of a state of things as they ought to be. However, at the level of description of actual reality, both conceptions are in my view unsatisfactory. The first, the conception that sets law before and above political power, errs too much by "idealism". The other, the conception that sets political power before and above law, errs too much by "realism". For the one presupposes an entirely ideal entity that actually can at least limit the material activity of power and its deployment of force. The other ultimately

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174 *Ibid.*, p. 90.

reduces the political relation to a mere power relation, a command/obedience relation mostly modelled according to a cause/effect dynamics.

Let us briefly consider the theory of law as limit to or prerequisite of power. This ends up by maintaining that the norm as such, the form of law, has the capacity to set an arduous if not insurmountable obstacle to the sovereign's arbitrariness. The idealism of this conception is evident, since it considers that a material force can be limited or arrested in its movements by something (the law), conceived of in absolutely abstract terms (in the least abstract case as procedural form; in the most abstract case as "justice").

Those who like Franz Neumann maintain that the law (as form of law) bars the way to arbitrariness of political power and in essence reproposes the theory of the State's "self-limitation" should be reminded of two things. On the one hand that the political power can always formalize its own will, and its own arbitrariness. As Rodolfo De Stefano writes, "by contrast with the common injustice repressed by the laws, political injustice is essentially legalized injustice". "As supreme legislator, even the most unjust tyrant or most authoritarian despot is, when he wishes, able to respect the limit of strict legality"[175].

On the other hand, speaking of the State's "self-limitation" means relying on the benevolence of the sovereign himself, who can and will (but might also not wish to) put certain limits to his own power. Moreover, this theory is infected by a conceptual circularity it cannot manage to get out of. The law (understood as positive law) is, it is asserted, a limit on the activity of the State itself, so that the passive subject of the limitation is also its active subject. This vicious circle, as Bertrand de Jouvenel stresses, is set up at the point when the law is identified with the positive law, and the latter with the law promulgated by the State. "We are now going round in a vicious circle! Political authority should be just; it needs, that is to say, to act in conformity with the law. But the epitome of the rules given out by political authority itself. Therefore the authority which makes laws is, by definition, always just". "Laws are the only source of the law. Therefore, whatever is in a law is law, and there can be no remedy against the laws. Accept it, and to seek in

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175 Both quotations from R. DE STEFANO, *L'accettazione della legge*, Parallelo 38, Reggio Calabria 1977, p. 76.

law a bulwark against power becomes pure illusion. The law is, as the jurists put it, "positive""[176].

The theory of the State's "self-limitation" can get out of the vicious circle by laying down the distinction between the law and statute. This operation can have two outcomes. The first is to presuppose an ideal law above the law of the State. This is the natural-law outcome recommended by de Jouvenel, who however certainly cannot escape the error of idealism, considering that this ideal law is "presupposed" and not laid down (however that might come about).

The second way out might be to get rid of the legal positivist principle of the unity and uniqueness of the legal order (in a given territory). One might then consider need for or the existence of several legal systems that mutually influence (and limit) each other. But these other (objective) systems different from the State's, if they are neither "ideal" or "natural", are accordingly "laid down". And if they are laid down, this is (not always intentionally or deliberately[177] by some social group that is outwith State control, by some other institution. That means that the second way out of the distinction between law and statute consists in the pluralist conception of society, that is, a conception that sees (or hopes to) several powers operating within the social space. In this sense, then, the theory that asserts that the law sets limits to the activity of political power (specifically the State) ends up with a theory asserting the need for or existence of a plurality of powers mutually limiting and balancing each other, and asserts the unavoidable nexus between law and power, not their separateness from each other as two totally distinct entities.

Let us now consider the conception that makes law subservient to power. This too makes a separation of the normative level (law) from the material one (power). In some imperativist versions, the normative plan is denied and resolved into the material one of force. These are in general the ones that interpret the law as the political superior's command to the political inferior. This very reduction of the normative level to the material one constitutes the extreme example of what I earlier called the "error" of overrealism. This consists in explicitly or implicitly placing the social and typically human

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[176] Bot quotations from B. de JOUVENEL, *On Power*, English trans. by J.F. Huntington, Beacon Press, Boston 1969, 3rd. ed., the first from pp. 302-303, the second from p. 303.

[177] On this point see F.A. HAYEK, *The Results of Human Action but not of Human Design*, in F.A. HAYEK, *Studies in Philosophy, Politics and Economics*, Routledge & Kegan Paul, London 1967, pp. 96 ff.

reality on the same level as physical phenomena, and in applying to the world of social and human phenomena the model of causal explanation typical for the physical sciences. Social phenomena, on this view, are regarded as the outcome of the action of a series of physical forces connected with each other through binding relations of cause and effect. Thus, the command is held to be the cause, and obedience to the command the effect. Or better, the cause is seen as consisting in the threat of sanction that accompanies the command (explicitly or implicitly), and obedience to result from fear of the penalty that is the effect of the threat. This is broadly the pattern employed by Bentham and John Austin. In more recent times, to justify this model, recourse has been had to an anthropology based on the model of Pavlovian-Skinnerian learning through stimulus and response.

Moreover, this conception that defines the law as command and accordingly as a relation taking place essentially between two or more individuals, in any case as an *interpersonal* relation, is compelled to presuppose a society consisting only of interindividual relations, voluntary and coercive, and accordingly an atomized space, a sort of "exploded diagram", which is very far from the reality of social formations, which are instead characterized by the *impersonality* of their fundamental and constitutive relations (consider only the language of a society, which cannot be defined as a "convention", if by this is meant a voluntary, conscious agreement among a definite number of parties[178] still less as a unilateral decision[179]).

The imperativist conceptions, Austin's for instance, by assuming a society consisting only of more or less personal relations, ignore the specific dimensions of society (the specifically social one of the phenomena of collective life), and build their theses on a void. Against imperativism one may further adduce the criticisms traditionally made of voluntarist theories of the phenomenon of law. How is it possible for the law to apply even after the death of the person whose will it is held to be? Is it possible for the legislator to want that conduct permanently? How is it possible to apply law even to

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178 In this connection I would refer to K. R. POPPER, *On the Theory of Objective Mind*, in K. R. POPPER, *Objective Knowledge. An Evolutionary Approach*, Rev. ed., Clarendon, Oxford 1986, pp. 159-160.

179 As we know, this is Humpty Dumpty's conception (see L. CARROL., *Through the Looking Glass and what Alice Found There*, Dent, London 1979, p. 79); for a critique see F. FLEW, *Thinking about Thinking. (Or, Do I sincerely want to be right)* 5th ed., Flamingo, Glasgow 1985, pp. 76-77.

those who do not know it or understand it and are incapable of understanding it, as the principle *ignorantia legis non excusat* asserts? How is it possible still to speak of will in the psychological sense in relation to measures issued by collective deliberative bodies like parliamentary assemblies, or even the central committee of a party, where the decision results from a majority combination of the various individual wills?

However, not just imperativist theories (meaning those that define law as command) but also those theories that in general speak of law as an expression of power (even though defining the law as norm or rule) in my view run into the "error" of overrealism. For these theories this error is the outcome of the conception that force produces law, even if the two phenomena are not made to coincide. For these theoreticians (Marx and Soviet jurists, for instance) the law is one of the many *instrumenta regni* that political power uses to impose itself and perpetuate itself within the social body. For them too, then, the distinction between legal activity and political activity diminishes to the point of disappearing: legal activity is always political activity. This is effectively put by Max Stirner: "The State practices 'violence', and it calls its violence 'law'; that of the individual, 'crime" conduct is expression of its power, of its violence, 'crime'"[180].

What objections can be raised against this way of understanding the law, which sees it as the product or expression of power? Some have been mentioned. It seems to me that the two following should attentively be considered: (a) on the one hand, this conception does not take account of the normal unfolding of life in a society, and correspondingly of situations of aggression on the social bond, (b) on the other, it does not take account of one fact, which the wisdom of the ancient Romans caught in the *maxim nemo ad facere cogi potest.*

Whoever maintains that the law is an expression of power is unable to draw a qualitative distinction between the act of a bandit ordering an unfortunate to hand over his purse, and the norm prescribing that anyone who steals will be punished by imprisonment of between three and seven years. If anything, a quantitative distinction is drawn in terms of the quantity, duration

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180 M. STIRNER, *The Ego and Its Own*, ed. by D. Leopold, Cambridge U. P., Cambridge 1995, p. 176. Stirner has a drastically voluntaristic and imperativistic conception of law. He certainly reduces law to command: "People are at pains to distinguish *law* from arbitrary *orders*, from an ordinance: the former comes from a duty entitled athority. But a law over humane action (ethical law, state law, etc) is always a *declaration of will*, and so an order". (M. STIRNER, *The Ego and Its Own*, cit., p. 174).

and legitimacy of the power that the agent (bandit or state functionary) is able to deploy. This means that the distinguishing criterion between legal commands and non-legal commands is made to lie in the effectiveness, duration and legitimacy of the coercion exercised over a particular subject. A legal act would then be an effective, lasting and legitimate coercive act. Violence nonetheless remains the "core" of the act. Here, however, imperativist legal thought reveals its distance from common sense, for which the difference between an act of violence and a norm, between the highwayman and the ordinary citizen, is immediate and intuitive.

It might be objected that the parallel is not to be drawn between the citizen and the highwayman, but between the highwayman and the State official, as imperativist theories in general do. I believe instead that the two subjects to be compared are not the robber and the policeman, an operation that suits those who see the law as command (but isolated from the general context of social behaviour). The comparison in my view should be drawn between those who conform, in compliance with the norms of a given community, and those who instead break these norms by violently attacking the social normality. In other words, the opposition between the highwayman and the man in the street refers to the one between peace and war. Those who maintain that the law is command and that it is essentially an arbitrary and violent act, or that the law is political and that politics is violence, cannot distinguish - within a given social group - a state of peace from a state of war. If anything, peace will be seen by them as an appendix to war, or else war as an appendix to peace, the only difference between the two states consisting in the fact that in war the violence is declared and explicit, while in peace the violence is masked by law. Karl von Clausewitz brings out this way of thinking with his famous phrase that "war is merely the continuation of policy by other means"[181]. War is seen by the Prussian general as a continuation of politics by other means, and the mirror image of this is Lenin's inverted version of the proposition: politics as continuation of war by other means.

On this point of view that strictly links war and politics - which is one of the outcomes of the conception of power as violence - peace and war are in some sense interchangeable conditions, since both of these states are seen as the terrain of politics, which is conceived of essentially as a manifestation of violence. This amounts to maintaining that it is violence and force that govern the life of man and of society. Here once again the imperativist viewpoint, or

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181 K. von CLAUSEWITZ, *On War*, English trans. by M. Howard and P. Paret, Princenton University Press, New Jersey 1976, p. 87.

"realism" (in the sense of "political realism") betrays its remoteness from common sense, for which peace and war are quite distinct conditions. On the other hand, it shows a deep misunderstanding of the mechanism that holds society together. War (and in particularly civil war) is the greatest possible antisocial manifestation, the mortal struggle among men in place of the communication and exchange that constitute the normal nature of the social bond. This coincides with peace, security, order, without which life in contact becomes impossible, and the individual existence becomes precarious.

It is not true, as the imperativist theorists manage to maintain (think of Marx, Lenin or Stirner), that peace and war are equivalent. Peace is the absence of war. This means that society (which can only exist if its members are at peace with each other) is governed by the absence of violence, or its limitation[182]. But if this is so, then the law cannot be conceived of in terms of command (or, which amounts to the same thing, as an arbitrary and violent act). This clearly emerges in a legal phenomenon that in my view remains the fundamental one once one stops arguing in the narrow terms of legal positivism and recognizes as the area in which the phenomenon of law is manifested the whole territory of society, not just the area of typical institutional mechanisms of the State (courtrooms, bureaucrats' offices, jails and barracks). This phenomenon, still fundamental today for the functioning of the legal order, is custom. It lies at the very core of society: the social bond is in fact largely not voluntary, but customary. How, then, can an extremely voluntarist and constructivist[183] theory like imperativism manage to explain, without climbing walls and engaging in byzantinism, the phenomenon of custom and its "constitutive" action in relation to the legal order? Custom is mostly taken as the "habit of obedience", a habit that can obviously be referred to a command one is brought "customarily" to obey. This *habit of obedience* to which Bentham and Austin in particular refer is not by itself a source of law (which remains command). This *habit* explains only the reason why the command is usually obeyed; a reason identified not in recognition of the command's legitimacy but in an unreflective attitude of obedience created over centuries of threats and depravations associated with executing the orders of a political superior. More than a "reason" there is instead a "ground", where the first (the reason) is presented with a propositional

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182 On war as antithesis of law and in general on the possible relations between war and law, cf. N. BOBBIO, *Diritto e guerra*, now in N. BOBBIO, *Il problema della guerra e le vie della pace*, Il Mulino, Bologna 1979, pp. 97 ff.

183 Cf. F. A. HAYEK, *Rechtsordnung und Handelsordnung*, Müller, Karlsruhe 1967.

content and comes to form part of practical reasoning, while the second (the ground) is not presented as a statement (though it can always be expressed as such) and instead constitutes more an element in some causal chain.

The other objection, in my view decisive, against an imperativist conception of law is the one that may be summarized in the Latin maxim *nemo ad facere cogi potest*: no one can be constrained to do something. If this is so, obedience to a command is always to some extent voluntary. But if obedience is not a mechanical fact, not a mere *pati*, and instead requires a share of will and awareness, this means that the effectiveness of the command, but also and particularly the possibility of the command's being conceived as such by its addressee, depend on some form, however minimal, of "consent" by the latter. And they also bring his moral responsibility into place.

It is no mere chance that some analytical reconstructions of the concept of power base it not so much on the possibility of getting something done as on that of stopping something being done. For instance, according to Felix Oppenheim, a thinker of a neopositivist background whom we might assign to the realistic tendency in conceptions of power, the latter is, as far as power exercised over third parties is concerned, eminently *power to stop something being done*. "To have power", he writes, "is to be capable of exercizing power, that is, to be able to subject others to one's control or to limit their freedom"[184]. And the American philosopher consequently gives the following definition of power: "Y exercises power over X with respect to his not doing *x* if X does not or cannot do *x* or would be penalized if he did as a result of some power act *y* of Y"[185]. Power here is seen eminently as negative power, power to prevent an action, or as punitive power, power to inflict a sanction, but not as positive power, power to bring about conduct.

Whoever commands, in my view, presupposes a form of "consent" from the subject to whom the command is addressed. This "consent" is exercised on at least two points. (i) Firstly, obedience to the command is, as we have said, a voluntary act, not a mere *pati*, or a submission to absolute compulsion (as that of natural laws might be). (ii) Secondly, the subject consents to a *particular individual's* producing the command. Otherwise that particular statement, through which the command is expressed, would be perceived as something different, as the request for a favour, say, or as advice, or else as a threat. Think, for instance, of the statement "the door needs to be shut", which if

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184 F.E. OPPENHEIM, *Dimensions of Freedom*, St. Martin Press, New York 1961, p. 100.

185 *Ibid.*, p. 91.

uttered by a subject in the context of a group consisting of several individuals is perceived as a command only by those members of the group who recognize the utterer's authority to give them commands. By the others the statement is perceived as the non-imperative expression of a necessity or desire. This second point is very well grasped by one Nazi theorist of law, Ernst Forsthoff, who in his book *Der totale Staat*, a prefiguration of the totalitarian regime of National Socialism, nonetheless refuses to fully adopt the decisionist theory of law, arguing as follows. "Any command, however", Forsthoff writes, "presupposes a higher rank that confers legitimacy on the command, irrespective of the personal qualities of the superior. A non-commissioned officer commands not because he is necessarily the bravest soldier (though he ought to be), but in virtue of the rank he holds"[186]. (44) The issuing of a command is thus according to Forsthoff not founded on nothing, or on mere physical superiority, but on some preexisting normative order.

It is interesting to note that even in one of the most tenacious upholders of the imperativist theory we can find, and not even between the lines, an awareness of the consensual basis on which command rests. On the point of voluntariness as a requirement for obedience, it may be recalled that Hobbes clearly distinguishes *pati*, which is involuntary and necessarily submitting to coercive action manifested, for instance, in an execution, when the condemned person suffers death, and *facere* (or *non facere*), which is in any case a voluntary act even when it constitutes the object of a command that is obeyed. "When a thief hath broken the laws", writes Hobbes, "and according to the law is therefore executed, can any man understand that this suffering of his is in obedience to the law? Every law is a command *to do*, or *to forbear*: neither of these is fulfilled by suffering. If any suffering can be called obedience, it must be such as is voluntary; for no involuntary action can be counted a submission to the law"[187].

On the second point, the recognition of the authority of the issuer of the command by his addressee, it may be recalled that for Hobbes not every command constitutes a law, but only a command coming from whoever the command's addressee has previously recognized as having the authority to command. "And the first it is manifest, that law in general, is not counsel, but command; but only of him, whose command is addressed to one formerly

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186 E. FORSTHOFF, *Der totale Staat*, 2nd ed., Hanseatische Verlagsanstalt, Hamburg 1933, p. 34.

187 T. HOBBES, *Behemoth*, cit., p. 50.

obliged to obey him"[188]. Here I feel the theory of law as a set of commands refers to a normativist view of the phenomenon of law. Hobbes asserts that not every command constitutes a legal provision, but only a command issued by a person to whom the command's addressee is already previously bound. The command is accordingly law if there is "something" outside it that qualifies as law the relationship between "addressee" and "commander", that is, "something" that makes the addressee of the command recognize the latter as law, and obey it. This "something", outside the command and preceding it, can only be given by a norm or a set of norms.

The conviction that command is at the origin of law, that is of "ought", has been defined by Neil MacCormick as the "imperativist fallacy". What leads MacCormick to this conclusion is above all the fact, similar to the one mentioned above by Hobbes, that in order to constitute a legal provision the command has to presuppose "something" outside it. We shall here summarize MacCormick's arguments in this connection.

A command falls within the category of acts through which a person A intends a person B to carry out action X. For this category includes other acts than command, like advice, prayer or request. In all these cases the linguistic utterance may be the same (say, "do not smoke"), so we cannot from this alone deduce the actual nature of the act, whether it is, say, a command, advice or request. This leads MacCormick to maintain that the feature that makes a linguistic utterance a command does not lie in that utterance, or is not deducible from the structure or mood (the imperative, say) of the utterance. The feature that makes an utterance a command is outside the utterance itself. This amounts to saying that the command is a command because it presupposes "something" that is not a command. "What is next required", MacCormick goes on, "is to find the element which distinguishes order and commands from other acts, such as requests, which also involve the intention to be understood as intending to get the addressee to do some act. The key to this is the fact that somebody who commands is necessarily calling for *obedience* on the part of his addressee, whereas to make a request is to appeal to the kindness of courtesy of the other. To "call for obedience", in the sense here intended, involves asserting one's superiority or another. There are certain relationships, relationships of superiority and inferiority, which may exist between persons, such that the inferior is in one sense or another required to comply with the expressed wishes of other in relation to his conduct. One person is properly said to obey another if he complies with the

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188 T. HOBBES, *Leviathan*, cit., Part. I, Ch. XXVI, p. 312.

other's expressed wishes, willingly or unwillingly, in recognition that he is required to do so in virtue of their relationship"[189].

The "key" then, to understanding the difference between commands and acts like requests or prayers lies in the relation existing between utterer and addressee of the linguistic statement in question. In order for there to be command, and not for instance advice, there has to be a relation of superiority between the two subjects. "Commanding", writes MacCormick, "is only appropriate in a context of superiority, whereas requesting is appropriate (though not only appropriate) between people who acknowledge each other as equals, provided that they are on friendly or at least courteous terms with each other"[190]. This superiority may, according to MacCormick, be based either on physical force or on a body of rules shared by utterer and addressee of the linguistic statement, who attributes superiority (in a social rather than physical sense) to the utterer. Nonetheless, according to MacCormick - though in contradiction with what he had said above - a command is possible even in a context in which there is no relation of superiority at all between utterer and addressee of the linguistic statement considered. This would, say, be the case where someone sitting at a restaurant table said to another, sitting at another table, "pass me the salt". This is less true between Italians. An Italian would in fact be unlikely to use the second person singular of the imperative in order to approach a stranger (in Italian) in the situation described above. An Italian would use the polite form ("could you give me the salt?", or "would you give me the salt?", "could you pass me the salt?"), probably accompanied by a "please"; which in itself reveals, I feel, that we are in the presence not of a command, but of a request.

MacCormick, then, considers that in order for there to be a command the qualifying feature is above all the utterer's intention and *then* the context in which the utterance is made (the relation between utterer and addressee). "Our conclusion", writes MacCormick, "calls of the amendment of Bentham's definition ("a parole expression of the will of a superior is a command"); a command is an utterance which the speaker intends his addressee to take as expressing a will that the addressee do some act in recognition of the speaker's superiority"[191]. But MacCormick immediately adds: "A command

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189 D.N. MACCORMICK, *Legal Obligation and the Imperative Fallacy*, in *Oxford Essays in Jurisprudence*, Second Series, ed. by A.W.B. Simpson, Clarendon, Oxford 1973, p. 106.

190 *Ibid.*

191 *Ibid.*, p. 108. My emphasis.

is sincere and appropriate ("felicitous") only is the commander does wish to get the deed done and only if he is in fact superior to his addressee in respect of the act commanded"[192]. A command is thus "fortunate" (using John Langshaw Austin's terminology[193]) only if the utterer is de facto in a position of superiority in relation to the addressee. The utterer's intention accordingly does not tell us whether we are in the presence of a genuine command or, say, the expression of an egocentric or simply impolite person (in this connection consider the example of the salt mentioned above).

Not every utterance of what "ought to be" is a command, but only one implying a relationship of superiority between utterer and addressee: this is MacCormick's conclusion. This conclusion might be flanked by another: the command is not one based on a relation of physical superiority, but only one based on a relation of social superiority. But one is socially superior because the norms of a society assign a certain rank. The (political) command accordingly refers to a normative system in force.

If the command (at least a political one) presupposes in order to be operative a norm or body of norms, then the following conclusion may be drawn. (i) The law (the norm) cannot be derived from a command or, as Neil MacCormick writes, "'ought' is no more derivable from "shall" that from "is" "[194]. (ii) The political command, far from being a manifestation of material force, is overwhelmingly a normative phenomenon, that is, legal *lato sensu*. Political power, the power to determine the social conduct of a community, cannot in consequence be defined as the power of command, still less as mere de facto power. It is so intimately bound up with normative phenomena that it can be explained only in terms of norms. But if political power can be explained only as being fixed by norms, it becomes impossible to explain the norms as the product of power. Accordingly, any theory seeking to define law as expression or manifestation or instrument of power (whether political or merely physical) is revealed as fallacious.

4. *Normative order, political power, dominion*

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192 *Ibid.*, pp. 108-109.

193 Cfr. J.L. AUSTIN, *How to do Things with Words*, 2nd ed., ed. by J.O. Urmson and M. Sbisà, Oxford University Press, Oxford 1982, pp. 12 ff.

194 D.N. MACCORMICK, *op. ult. cit.*, p. 112.

A more correct way, in my view, of expressing the relation between law and power is the one that seeks to identify the two terms. In Kelsen, as we saw earlier, this identification comes about more at the level of power (seen as force and coercion) than at the normative level. Nonetheless, Kelsen's thoughts on the matter offer very interesting hints that may lead us to different conclusions from the one the Austrian jurist reaches. For he strongly brings out the psychological aspect in the dynamics of political phenomena.

In spite of his political "realism", Kelsen, when he describes the manifestation of political phenomena, always stresses that it is individuals' psychological representations that are the motor or raw material that keeps political power going. In 1922, in words he was to repeat almost verbatim twenty years later in the *General Theory of Law and State*, Kelsen wrote: "One tends to say that the 'State' is guns and bayonets, means of production etc. This is, however, to forget that all these are only inanimate, indifferent things, and only the use made of them by men is decisive. Machines and machine guns come into consideration in the social context only in connection with human actions. The rule or norm for these human actions is the ultimate decisive instance on which all that depends"[195].

Political power, according to Kelsen, is not a thing, a material entity, nor a relation of merely physical forces. "Any 'power' (*Macht*) does not lie in the existence of these things, of this scaffold or these 'machine guns', but *only and exclusively* in the fact that the men that use the scaffolds and machine guns may be motivated by norms that are valid for them and that in their entirety, as a coercive order, constitute the State or the law. But if all the social 'power' lies in the motivating force (*in der motivierenden Kraft*) of certain normative representations (*Normvorstellungen*), then it is simply senseless to represent the State as power lying 'behind' the legal norms in order to make them effective"[196]. According to Kelsen mere force cannot in itself constitute

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[195] H. KELSEN, *Der soziologische und juristische Staatsbegriff*, cit., p. 89. Cfr. H. KELSEN, *General Theory of Law and State*, English trans. by A. Wedberg, Russell & Russell, New York 1973, pp. 190-191: ""Power" is not prisons and electric chairs, machine guns and cannons; "power" is not any kind of substance or entity hidden behind the social order. Political power is the efficacy of the coercive order recognized as law".

[196] *Ibid*. My emphasis. Kelsen could thus have subscribed to the following considerations by Cornelius Castoriadis: "Behind the monopoly of legitimate violence lies the monopoly of the legitimate word; the latter is in turn constituted by the monopoly of valid meaning. The master of meaning reigns over the master of violence. The voice of violence can

a political order. This is in his view fundamentally an idea, the representation of an order. Men who occupy public offices, he adds, are seen as "organs" of a collectivity, or of a generally valid coercive order. Were that not so, and the subject accordingly fell under men who held public power not as "organs" of a system but as holders of power through violence and thus fell under not a system but men, in that case one could not speak of a State but only of a situation of naked violence. Kelsen's conclusion is that the State, the political order, is nothing other than an idea, the *representation* of an order[197].

However, this conception of political and legal phenomena, which would seem to be entirely concentrated on recognition of the normative aspect of social phenomena, makes a twofold concession in an imperativist and realist direction. One strong concession to voluntarist and imperativist conceptions is made by the Austrian jurist when he asserts that the norm is the meaning of an act of will[198], essentially sharing Dubislav's thesis that "there is no imperative without imperator" (*kein Imperativ ohne Imperator*)[199]. There is a concession to a form of "political realism" when Kelsen specifies that the object of the legal norm is the sanction, and thus identifies normative order and coercive order, *Gesamtheit* and *Zwangsordnung*.

Against the voluntarist theses of the "mature" Kelsen one may however raise most of the objections often brought against imperativism[200]. However,

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ring out only in the havoc of the collapse of the edifice of instituted meanings. And in order for violence to intervene, it is further necessary for the word -- the injunction of existing power -- to conserve its power over 'groups of armed men'. The fourth company of the Pavlovsky regiment, his majesty's bodyguard, and the Semenovsky regiment were the most solid pillars of the Tsar's throne -- until those days of 26 and 27 February 1917 when they fraternized with the crowd and turned their arms against their officers. The world's most powerful army will not protect you if it is not loyal to you -- and the ultimate foundation of its loyalty is the imaginary belief in your imaginary legitimacy" (C. CASTORIADIS, *Pouvoir, politique, autonomie*, in C. CASTORIADIS, *Le monde morcelé*, Seuil, Paris 1990, p. 123).

197 On the importance of the psychological element in the area of legal phenomena, Kelsen lingers again in speaking of the reasons for compliance with norms. Cf. e.g. H. KELSEN, *The Pure Theory of Law*, cit., pp. 31-32

198 Cf. H. KELSEN, *op. ult. cit.*, pp. 3 ff.

199 In this connection see O. WEINBERGER, *Der Begriff der Sanktion und seine Rolle in der Normenlogik. Grundprobleme der deontischen Logik*, ed. by H. LENK, Verlag Dokumentation, Pullach bei München 1974, p. 105.

200 There is criticism of voluntarism by the "early" Kelsen: see H. KELSEN, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*, 2nd ed.,

criticisms in the legal philosophical literature of the theory setting the phenomenon of coercion and sanction at the centre of law are less frequent. Here I am concerned not so much with recalling that there are a considerable quantity of legal norms that do not provide for sanctions or are not accompanied by sanctions, as to point out that treating an event as a sanction cannot be done independently of one or more norms that attribute to that event the quality of being a sanction. "Human behaviour", writes Kelsen, "can be considered as a delict only if a positive legal norm attaches a sanction as a consequence to his behaviour as a condition"[201]. From this assumption it seems possible to derive the position that the sanction, as coercive act, is something that is such irrespective of the fact of its being described as a sanction and of its attribution by a norm to a particular piece of conduct treated per se (irrespective of the sanction) as wrongful. The sanction would in this view take the shape of *any* coercive act provided for by the State and associated with some human behaviour, which would become "wrongful" only in virtue of that attribution.

As we know, for Kelsen behaviour is "wrongful" not as being violation of conduct prescribed by a norm, but only as being the condition for application of a sanction. In this particular theory of legal norms, there is first of all the sanction and then the wrongful behaviour, which is wrongful insofar as it is against it that the sanction is directed. The sanction cannot accordingly be defined as the harm laid down for the case of non- compliance with conduct prescribed by a norm, since here the conduct prescribed by the norm is derived *a contrario* from the conduct that constitutes the condition for application of the sanction. The sanction is an event that is to be described as such (as sanction) irrespective of breach of a precept. In the traditional doctrine for which the distinction between primary norm (that prescribes a certain conduct) and secondary norm (that prescribes a sanction) applies, the sanction can be defined as the harm associated with a wrongful act where the wrongful conduct comes about as violation of the prescribed conduct and can be defined and ascertained irrespective of its being associated with a sanction, even in the paradoxical case that no sanction is associated with it. In Kelsen's doctrine, by contrast, it is the definition of wrongfulness that it depends on attribution of a sanction to a particular conduct (which is then wrongful). In

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Mohr, Tübingen 1923, pp. 97 ff. and pp. 189 ff. For some traditional arguments against voluntarist theories see e.g. A. FALZEA, *Introduzione alle scienze giuridiche*, Part I, *Il concetto di diritto*, Giuffré, Milano 1975, p. 96.

201 H. KELSEN, *General Theory of Law and the State*, cit., p. 53.

short, while in the traditional doctrine the definition of an act as a sanction depends on the norm that attributes a particular harm to an event already treated as wrongful, in Kelsen's doctrine the definition of an act as a sanction depends not so much on a norm as on the intrinsic nature of the act, that is, its coercive nature. This emerges clearly from, say, Kelsen's distinction between "autonomous norms" and "non-autonomous norms".

Kelsen further recognizes within an order the existence of norms that do not provide for any sanction, but he terms them "non- autonomous" norms and links them to some norm that does lay down a sanction. "If a legal system, such as a statute passed by parliament", writes the Austrian jurist, "contains one norm that prescribes a non observance of the first, then the first norm is not an independent norm, but fundamentally tied to the second"[202]. But if there are different types of norms -- and this seems here to be recognized by Kelsen -- and not all of them provide for a sanction, how can we manage to recognize a particular act as a sanction, unless by recourse to features extrinsic to the fact that this act is prescribed by a norm? The sanction, in order to be recognized as such, cannot here make reference to a normative criterion, but only to a material or empirical criterion. On this view, then, it will be possible to describe an act as a sanction irrespective of the existence of a norm or of a normative order. Or again, utilizing a terminology Kelsen does not, one might then say that the sanction is a "crude fact", not an "institutional fact"[203]. This, however, leads to paradoxical consequences, unacceptable to any jurist, and moreover encroaches on the "purity" of legal science advocated by Kelsen.

Consider the following norm x, valid and effective in many modern legal orders: "anyone with an income must pay the State a certain sum of money in proportion to that income". It is certain that paying the sum of money to the State constitutes harm to those who must do so. It is also certain that the norm x considered has a similar structure to the norm y of equal validity and effectiveness in many modern legal orders, "whoever parks a car in front of an entry marked 'carriageway' must pay the State a sum of money". From norm Y, however, it follows that it is forbidden to park a car before an entry

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202 H. KELSEN, *The Pure Theory of Law*, cit., p. 55. This centrality of sanction in Kelsen's legal theory makes Mauro Barberis say that "the pure theory seems merely to develop and refine themes from Austin" (M. BARBERIS, *Il diritto come discorso e come comportamento. Trenta lezioni di filosofia del diritto*, Giappichelli, Torino 1990, p. 184).

203 On this distinction, cf. J. SEARLE, *Speech Acts. An Essay in the Philosophy of Language*, Cambridge University Press, Cambridge 1969.

marked "carriageway". Yet both types of conduct ((i) having an income and (ii) parking a car before an entry marked "carriageway") are associated with the same outcome, paying the State a certain sum of money. However, the outcome is the same only if regarded from an "external" viewpoint as "crude fact", but no longer if regarded from an internal viewpoint, as an "institutional fact". With reference to the normative order the payment of money to the State, is in the case of norm x a tax, and only in the case of norm y a *sanction* (a fine). A coercive act, which in itself from the "external" viewpoint is only a "crude fact", may from the "internal" viewpoint act as an "institutional fact", in very different and indeed opposite ways. Consider the crude fact of a person's being chained, which may constitute arrest or kidnapping, or violent death for one human being caused by another, which may be either capital punishment or murder.

The conclusions to draw at this point are two: (a) it is not possible to define the concept of sanction by purely empirical criteria; (b) the concept of sanction refers to a norm of conduct the breach of which is the condition for the sanction[204]. The legal norm cannot accordingly be defined in terms of the (through the) sanction; on the contrary, it is the sanction that can be defined only in terms of the (through the) norm.

Moreover, if we conceive of the sanction in purely material or empirical terms, as for instance a harm or damage of an economic or physical or even moral nature, and we assume that the object of the legal norms is exclusively, or even only mainly, the inflicting of such damage or harm, the definition of the norm and ascertainment of its existence will depend on extranormative elements (material or empirical). This amounts to maintaining that legal science as normative knowledge (whatever that means) is not sufficient to itself, and requires subsidiary elements of empirical knowledge. If however this conclusion is accepted, one can no longer defend the thesis, so dear to the Austrian jurist, of the "purity" of legal science.

However, despite the limits and the imperativist and "realistic" concessions in Kelsen's doctrine, it seems to me that in order to understand the relation between law and power and ultimately explain these two phenomena, the path taken by Kelsen, namely identifying the two phenomena, is the one to pursue to the end. With one warning: to avoid the doctrine of coerciveness as the characteristic feature of the phenomenon of law, and not to isolate law within the walls of the construction, in any case historically recent, of the State.

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204 Cf. O. WEINBERGER, *op. ult. cit.*, p. 93 and p. 108.

Taking the viewpoint of anthropology, which has most dealt with the existing relation between nature and society, or as it is often put, between nature and "culture", society turns out to be not an entity of a physical nature, "crude facts", but the product of the collective representations of the individuals making up the society, that is, a set of "institutional facts"[205]. Thanks to language and its capacity for evoking that which is not present to the senses through the relation of meaning, man becomes an *animal symbolicum*[206]. Human conduct is no longer constituted through a chain of stimuli and responses and by conditioned reflex, but filters instincts and the stimuli arriving from the senses through the symbolic screen consisting of language, its concepts and the meanings rooted in it. Consider, for instance, the elementary (but not exclusively "crude") fact that food, before being eaten by man, is in general cooked, by contrast with what happens among animals, and cooked differently by each society. Human behaviour, if the "culturalist" theory is accepted, is not determined purely mechanically or instinctively, but also symbolically. But "symbolically determined" is, I feel, equivalent to "normatively determined". The symbol does not determine with causal binding force, but through a system of references, meanings, that may also be ignored.

Without going too far into the area of anthropology or human ethnology, it might, after due consideration, be maintained that typically human conduct has at least two features: (a) it is in some sense free of instinctual determination, (b) it is intentional. This brings about a considerable indeterminacy in the trajectories of human action, certainly more than with animal behaviour. This indeterminacy obviously makes the human being's response to the various situations he has to respond to and the constitution of his own trajectory of action harder. This indeterminacy is coped with by creating preconstituted models of action and ideas of action. In order to act, man, once instinctual determination has weakened, needs rules of conduct. These are in turn based on *ideas* of conduct. That means on conceptions of the way man ought to act, on *Weltanschauungen*. Man, that is, acts in accordance with what he thinks is the way he acts (or ought to). Human action is thus determined by rules of conduct that correspond to certain concepts (not only of action, but also concerning the very "being" of the subject). The Sicilian

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205 Cf. D.N. MACCORMICK, *Law as Institutional Fact*, in D.N. MACCORMICK, O. WEINBERGER, *An Institutional Theory of Law*, Reidel, Dordrecht 1985.

206 Cf. E. CASSIRER, *Essay on Man. An Introduction to a Philosophy of Human Culture*, Doubleday Anchor Books, Garden City, N.Y. 1953, p. 44.

peasant killed his adulterous wife because there was an "unwritten" social rule prescribing the punishment of death for betrayal, and this rule was founded on a certain image and "concept" of being a man" (specifically the so-called "man of honour").

As Antony Flew writes, "there is an enormously large number of kinds of behaviours in which the possession of certain concepts is a presupposition of the performance: these concepts are thus integral to performances of these kinds. "[207]. This obviously applies not to all human conduct, but only to typically human (and social) conduct. In this sense, then, the norm (or symbol) is constitutive of social being. If this is so, at a basic level law (understood in the broadest sense as system of rules) and society coincide. This had in any case been seen (though immediately rejected) by Kelsen in his polemic against Eugen Ehrlich, when he accused the latter of dissolving the difference between legal order and social order by denying that coerciveness is the characteristic feature of law. On the other hand for Kelsen - with some hesitations[208] - law and society are both "orders of human conduct" and hence normative phenomena[209].

When, however, I say that, starting from the assumption of the symbolic nature of human behaviour, it may be asserted that law and society coincide, I

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[207] A. FLEW, *Thinking about Social Thinking. The Philosophy of the Social Sciences*, Blackwell, Oxford 1985, pp. 24-25.

[208] Sometimes Kelsen seems to equate the sphere of society with that of nature, regarding only legal phenomena as normative ones. Cf. e.g. the last section of the first chapter in H. KELSEN, *Reiner Rechtslehre,* Deuticke, Wien 1934, p. 9: "Indem man das Recht als Norm bestimmt und die Rechtswissenschaft (die eine von der Funktion der rechtssetzenden und rechtsanwendenden Organe verschiedene Funktion ist) auf die Erkenntnis von Normen beschränkt, grenzt man das Recht gegen die Natur und die Rechtswissenschaft als Normwissenschaft gegen alle anderen Wissenschaften ab, die auf kausal-gesetzliche Erklärung natürlicher Vorgänge abzielen". See also H. KELSEN, *The Pure Theroy of Law*, cit., p. 89: "Psychology, ethnology, history, sociology are disciplines that gave human behaviour as their object so far as it is determined by causal laws, which means, so far as it occurs in the realm of nature or natural reality". For the Austrian jurist sociology, then, does not have any different epistemological status from that attributed to the natural sciences. On the other hand, however, Kelsen introduces the category of "normative social sciences", among which he includes ethics, theology and legal science, but not sociology.

[209] See, e.g. H. KELSEN, *Causality and Imputations*, in ID., *The Pure Theory of Law*, cit., pp. 76 ff., where Kelsen seems to adopt the thesis that upholds that "the dualism of nature as causal order and society as normative order".

mean something different from what Kelsen maintains when he brings down to the same category of "order" law and society. Firstly, when I speak of law, at this point of my argument, I mean the general symbolic network that constitutes as "typically human" the behaviour of man, and so I use the term "law" in a very general sense, equivalent to that of "normative phenomenon". On the other hand, when I say that society is constituted through a network of symbols (norms), I am not yet thinking of the particular order of a society (its political and legal institutions), but of the basic fact of its existence, of its possibility of existence, of an original "normative stratum", which results essentially from language. On this first "state", or thanks to this first constitutive normative level, it is possible to construct a social order in the strict sense, of customs, usages, habits and principles that are socially shared.

But if social conduct rests on norms (linguistic first of all, and socially in the strict sense thereafter), there cannot be a phenomenon of political power that does not rest on such norms. In this sense, law (understood as a normative phenomenon in the broad sense) and political power (understood as running a community's affairs) end up coinciding. However, there remains on the one hand to define what is law in the strict sense, and on the other to draw the distinction between the intrinsically political nature of the social order (to which I have related the concept of political power) and the phenomena of political hierarchy that I propose to define as *dominion*.

To explain the formation of *dominion*, which in general takes shape in a series of relations between political superior and political inferior, I can no longer refer to situations of purely physical constraint, once the thesis of the normative nature of the social being is accepted. I believe that there is dominion where the "institutional norms" (in the strict sense) - a third "stratum" after the "primary" one of language and the "secondary" one of social customs - which explicitly and formally regulate social conduct (and thus constitute law in the strict sense) are hypostatized and outwith the disposal of the members of society.

As far as the basic norms of being in society (language) and that of the social order (customs) go, it should be said that these norms are always the product of man, and therefore to a certain extent arbitrary and haphazard, and never the result of objective forces (whatever might be a supposed consistent nature of man, or internal dynamics of living systems and social systems). However, it is clear that these norms, though being a product of

human activity, are so unconsciously or unawarely. They are, as Hayek says following the result of human action but not of human design[210].

Society as social being and as order is by no means, contrary to what some natural-law proponents supposed, the result of a *pactum unionis*, that is, a conscious, voluntary decision by the members of that society. In this connection, I find Hume's position more convincing: he, though not denying that the consent of the members plays a certain part in the constitution and maintenance of the social order, stresses the largely spontaneous nature of human associations and notes that force is frequently at the origin of the various political regimes.

In Hume's thought two conceptions of political power overlap. One recognizes the role played by consensus and opinion and connects with these the effectiveness of coercive acts of authority and the stability of the political order; the other instead sets force at the basis of the phenomenon of law. "The force", writes Hume, "which now prevails, and which is founded on fleets and armies, is plainly political, and derived from authority, the effect of established government. A man's natural force consists only in the vigour of his limbs, and the firmness of his courage; which could never subject multitudes to the command of one. Nothing but their own consent, and their sense of the advantages resulting from peace and order, could have had that influence"[211]. Recall also his well-known statement: "It is, therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as to the most free and most popular"[212].

As we know, Hume identifies two chief types of opinion: (a) opinion of interest and (b) opinion of right. The latter is in turn distinguished into (i) opinion of right to power and (ii) opinion of right to property. The first type of opinion, that of *interest*, consists in the sense of the general advantage which is reached from government. It comes down to a prudential calculation. *The opinion of right to power* is the conviction that the holders of power in the prevailing political regime have a right to hold that power.

However, to the contractualists who maintain not only the "historical" hypothesis of the "original contract", that civil society arose from an agreement among its members, but also the theoretical hypothesis of the

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210 See F.A. HAYEK, *The Results of Human Action but not of Human Design*, cit.

211 D. HUME, *Essays Moral Political and Literary*, ed. by H. Green and T. H. Grose, vol. 1, Longmans, Green and Co., London 1882, p. 445.

212 *Ibid.*, p. 110.

contract as justificatory foundation of the prevailing political system, Hume objects that nowhere does political power justify what it does in virtue of a contractual relation between subject and sovereign. "But would these reasoners look abroad into the world", writes Hume, "they would meet with nothing that, in the least, corresponds to their ideas, or can warrant so refined and philosophical a system. On the contrary, we find everywhere princes who claim their subjects as their property, and assert their independent right of sovereignty, from conquest or succession. We find also everywhere subjects who acknowledge this right in their prince, and suppose themselves born under obligations of obedience to a certain sovereign, as much as under the ties of reference and duty to certain parents. These connections are always conceived to be equally independent of our consent, in Persia and China, in France and Spain, and even in Holland and England, wherever the doctrines above mentioned have not been carefully inculcated"[213].

But even the hypothesis of the "original contract" is, according to Hume, unsatisfactory. "Almost all the governments which exist at present, or of which there remains any record in history, have been founded originally, either on usurpation or conquest, or both, without any pretence of a fair consent or voluntary subjection of the people"[214]. Behind this last statement by Hume, in clear contradiction with the opinion previously expressed by him that it is opinion that constitutes political power, there is, I believe, a pessimistic view of history: "the face of the earth is continually changing", he writes, "by the increase of small kingdoms into great empires, by the dissolution of great empires into smaller kingdoms, by the planting of colonies, by the migration of tribes. Is there anything discoverable in all these events but force and violence? Where is the mutual agreement or voluntary association so much talked of?"[215].

To Hume's criticisms of contractualism, its supporters might however reply by referring to a distinction very dear to the Scottish philosopher: between "is" and "ought". The contractualist might reply to Hume's criticisms that his doctrine is purely normative, is made up of prescriptive statements, whereas Hume's realism is a descriptive theory, a sociological theory *ante litteram*. The contractualist's intention, contrary to Hume's, is not to *explain*

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213 *Ibid.*, p. 446.

214 *Ibid.*, p. 447.

215 *Ibid.*

but to *justify* a certain political regime[216]. However, Hume's "realistic" theory might be opposed by the arguments developed by the "normativist" Hume, in particular the one that holds that the force involved in the formation of political regimes is not the physical force of an individual but the organized force of a group, which in order to constitute itself needs its members to share common principles and rules.

Hume in fact distinguishes consent from what he, as we have seen, calls "opinion". "Suppose again", he writes, "their native king restored, by means of an army, which he levies in foreign countries: they receive him with joy and exultation, and show plainly with what reluctance they have submitted to any other yoke. I may now ask, upon what foundations the prince's title stands? Not on popular consent surely: for though the people willingly acquiesce in his authority, they never imagine that their consent made him sovereign. They consent, because they apprehend him to be already by birth their legitimate sovereign"[217]. What, then, determines the obedience of the subject is not pure and simple consent in itself constituting the foundation of sovereignty, but the opinion that that particular sovereign is legitimate, because certain rules and principles are shared regarding the formation of sovereign power, in this case regarding the succession of the legitimate prince. To be sure, in this case too there is consent, but it is not the absolutely original consent of the contractualists, the sole source of which is reason, but a consent motivated by the recognition of certain common principles, opinions and rules. These are, for Hume, largely the product of custom and usage to which time has attributed the sanction of "justice"; they are, to use Hayek's expression, the product of human action but not of human "design".

Society is indeed the outcome of processes largely outwith human will, which yet have their roots in the minds and actions of individuals. At the institutional level, the typically legal and political one of norms laid down to regulate the affairs of the members of the given social group, there may be two possibilities. (i) The first is that the "institutional" norms too are the *unconscious* result of the activity of the group's members. In this case, which is in general that of the so-called primitive societies, these norms are in themselves, as not being subject to argument since there is no awareness of their existence as human rules (and not as divine or natural laws) - hypostatized, so that the intrinsic political nature of society becomes

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216 In this connection see P. KOLLER, *Neue Theorien des Sozialkontrakts*, cit., pp. 12 ff.

217 D. HUME, *op. ult. cit.*, p. 453

"dominion". (ii) The second is that these norms be *consciously* laid down by the members. In order here for there to be a situation of "dominion" (that is, ultimately, of subjection, of a "political inferior" to a "political superior"), it is not so much the content of the norms that has to be considered as their relation with the members. If these are subject to discussion and modification, if, that is, the community maintains its control over its creations, there is nothing but the maintenance of the collective cause, that is, politics in its most genuine sense. Otherwise, if the community cannot discuss nor expressly amend its norms, then we have, adapting the Marxian terminology, *alienation*, whereby the product of man (in this case not a manufacture but a norm) is removed from his power of disposal (in this case not to "use", but to discussion and the amendment of this human product). This is what in my view constitutes the political phenomenon I have called "dominion". The "dominion", accordingly, far from being the "producer" of the legal norms (as "political realism" asserts), is their "product", where, for various reasons, these norms are regarded as not subject to discussion or amendment by the community.

Paradoxically in relation to the traditional terminology[218], if "government of laws" is considered as opposed to "government of men", as a political system in which the norms are always in any case outside the awareness and will of the members, then this "government by laws" amounts to a situation of political oppression and not a regime of liberty. "Government of men", in turn, if conceived of as a political system in which the norms are always "at the disposal" of the members to change them, that is, can always be criticized and discussed by them, would then constitute not a despotic regime, but the "open society" whose possibility we have begun to envisage only with "modernity".

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218 Cf. Norberto Bobbio, *La Teoria dello Stato e del potere*, in AA.VV., *Max Weber e l'analisi del mondo moderno*, Einaudi, Torino 1981, p. 236. The traditional political theory made the equation good government equals impersonal power and bad government equals personal power. "Personal power par excellence" writes Bobbio, "is the tyrant's" (ibid.) yet the entirely modern experience of bureaucratic and totalitarian regimes seems to refute the thesis that the impersonality of power is a characteristic of free political regimes. Hannah Arendt very appropriately defines the bureaucratic political form (which is very far from constituting a model of free society) as "the rule of nobody" (H. ARENDT, *Eichmann in Jerusalem. A Report on the Banality of Evil*, Penguin, Harmondsworth 1983, p. 289).

5. *Autonomy heteronomy, ideology*

While Franz Neumann's theory is more a doctrine of the rationality of the general law and of the State based on rule of law, Thomas Paine's is one of the most significant expressions of modern constitutionalism, that is, the conception that lays down the principle of the primacy of laws or the law over political power. Law, on this conception, is a limit on the exercise of power. For constitutionalism "a political power is 'limited' when the activity characteristic of it, that of issuing commands in the form of norms whose effectiveness is ultimately based on coercion, is in turn regulated by higher norms that lay down bounds as to what can be imposed by power through coercive norms"[219]. In this case one of two things must be true: either the higher norms that "limit" political power are the expression of another power (in contradiction with the theory that conceives of the modern State as an entity holding the monopoly of political power); or else these higher laws are in some way an expression of the same power that they limit (and this is the well-known theory of Georg Jellinek and others of the State's "self-limitation"). But in this last case the self-limitation (which may cohabit with a conception of the State as monopoly of force) is in any case exposed to the arbitrariness of political power. What guarantees do we have that the power that "limits itself" may not stop wanting to do so? Were those "higher norms" postulated as endowed with different qualities from those promulgated by political power, that is, were they seen as the dictates of reason, nature or God, or - in a legal formalist conception - an intrinsic guarantee associated with their general and abstract nature, these conceptions would find it hard to escape the accusation of being idealistic. The higher norm that limits the political power, in order to be effective, must have behind it some power that desires it and brings it into being. It is then not so much the norm in itself that limits political power as another power that is to some extent counterposed to the first and constitutes a counterweight and a brake on it. It was from such considerations that the theory of separation of powers took shape, which saw as the limit to political power its fragmentation, not the law considered abstractly.

But what is the "higher norm" to be founded on? For some the solution is contractualism. Among these is Michelangelo Bovero. "If it is not possible to make a norm attributing legitimate power derive from another power which

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219 M. BOVERO, *Introduzione*, in AA.VV., *Ricerche politiche*, ed. by M. Bovero, Il Saggiatore, Milan 1982, p. XXI.

is not de facto power", writes Bovero, "I cannot see any other way to keep to the superiority of the norm over legitimate power, than to consider the obligation of obedience contained in the norm as the result of the members' own will.... This brings us back to the contractualist view"[220].

The relation between "higher" norm and power calls for some further reflection. At the basic level of social structure, power and norm coincide. They coincide because the typically human (social) behaviour is not in itself natural, the necessary product of naturally (by nature) determined instincts and needs. Typically human behaviour is largely "symbolically" (which amounts to saying "normatively") based. In this very general sense, all social behaviour is legal (normative), and law and society coincide. Political power is accordingly norm, as being based upon this diffused network of norms that society itself is. In essence one obeys because the culture of a given society lays down that one ought to obey or simply because there is no other way to enjoy certain areas of action. In this very general sense power and law coincide, because both are expressions of being in society.

But there is a further normative level, the one of positive law (of law in force in virtue of written or customary norms), which constitutes the "institutional" level of a society. It is only here that the question of a distinction between norm (law) and political power is actually posed and has meaning. But the distinction (or else the non-distinction) between (positive) law and (political) power is not a distinction of fact; it is a normative, or better *symbolic* distinction, which has its origin at the first, normative level of society. This (its members) construct(s) its/their own institutions by *thinking them*, not in an idealistic sense, note, but by positing the cultural-symbolic referents of which these institutions are largely made up. Thus, for instance, a society may conceive of its own political power as untied from any limit (or norm), or else may conceive the opposite: political power limited by a norm that is superior to it. In fact, though, at the original normative level, power is always limited, since it cannot be constituted except within the norms that a society gives itself. (Even where political power takes as its objective a *tabula rasa* of the previous society, it is always from the society that it derives, from its customs, from its culture, from its language, however strong and radical its rejection of these). The subsequent limitation of power at institutional level cannot be a *de facto* matter. Power will be limited and law will be superior to it if it is symbolically constructed as limited by and *inferior* to law. But it cannot be constructed (symbolically, or by symbols) as *unlimited*. This

220 *Ibid.*, p. XXV.

construction will obviously be the more effective in one sense or another the more consistent it is in relation to its objectives, and the more it is endowed with material means (of social force) to guarantee itself against possible attacks. The norm-power relation at institutional level is accordingly not a "datum", but a problem that has to be continually faced and solved by the members. This solution may come unconsciously as the undesired result of intentional acts, or else, where the problem is known to society, may come in some conscious fashion.

At the original, basic level, of society, every social structure is autonomous, that is, gives itself its own norms, since the social rules are very probably not reflections of universal laws of nature or reason or of divinely determined will. This primordial "autonomy", this "autonomy" in the most general sense, may not be reflected at an institutional level and correspond with "autonomy" in the strict sense. (I define "autonomy in the strict sense" as a situation in which the institutional rules are the conscious, voluntary product of the members of the society). Here the most rigid "heteronomy" may apply. But in any case it applies on the basis of the underlying "autonomy", however paradoxical that may seem. Even if men obey a dictator and their life depends on the will of one or of few, it cannot be said that this position is governed by extrahuman rules. The concept of "autonomy" in the most general sense used here is equivalent to that of "positive law" *lato sensu*, that is, to law laid down by man[221]. Even in the case where men obey a tyrant, they continue nonetheless, quite unconsciously and spontaneously, to give themselves their norms of conduct.

In fact, when we speak of a norm distinct from political power, this norm does not exist. What instead exists is a normative conception of the institutional level that prescribes a separate norm and power. In reality these are strictly connected in the sense that political power is erected on a preceding normative basis and is in turn an issuer of norms. The normative conception sets, as far as the "secondary" level of social norms at which the political and legal system are found is concerned, the division between legal system and political system, between law and power. This does not mean that this division is imaginary. It is instead real, has very concrete effects on the life of the members of the society, but is a "construction", a symbolic function in relation to the social reality given by the inextricable relationship of norms

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221 In this connection, cf. M. LA TORRE, *Anarchismo, giusnaturalismo e positivismo giuridico*, in "Archivio giuridico 'F. Serafini'", 1989, n. 4, pp. 133 ff.

and possibilities of action. This division is the content of *some* of the social norms laid down at the level we have called "institutional".

Here a further problem arises, that of the so-called "ideologies". The term "ideology" can be assigned at least three meanings, the first drawn from ordinary language, and the other two from the tradition of Marxist thought: (i) "ideology" as a body of ideas, as a theory or doctrine, (ii) "ideology" as an area distinct from that of material reality, that is, as ideal reality or also, using Marxist terminology, as "superstructure"; (iii) "ideology" as "false consciousness", as a *Weltanschauung* that does not correspond with actual reality or gives a distorted image of it, in general serving the consolidation of particular interests. It is on this last meaning of the term that I wish briefly to dwell here. I maintained earlier that the institutions of a society are constituted by its members through a largely shared normative conception. The obvious objection to this point is as follows. Many political regimes have (and still do) spread a conception of themselves that does not correspond with the actual reality. For instance, National Socialism asserted that it assured the effective participation of the *Volksgenossen* in running the *Volksgemeinschaft*, but we all know that *de facto* the decisions were concentrated in a restricted handful of *leaders* of the Nazi party, the NSDAP. How, then, can this disparity (between the conception one has, or is presented with, of one's own institutions and the actual reality of those institutions) be reconciled with the thesis that the institutions are constructed in virtue of the idea one has of them?

My reply to this quite legitimate objection can be summarized in the following propositions. (i) Not all the representations (conceptions) of institutions are ideological. (ii) No ideology (as mere "false consciousness") is a conception that is constitutive of institutions. (iii) A normative conception is ideological (in the sense just mentioned of "false consciousness") if and only if it does not fit the actual functioning of the institution concerned. (iv) The constitutive normative conception of the given institutions is the one that fits the actual functioning of the institutions.

To distinguish ideology (as "false consciousness") from the fundamental normative conception of a society, it suffices to consider whether certain postulates do or not fit with the actual social reality of the society. For instance, when the 1936 Soviet constitution proclaimed certain rights of citizens like those of association, assembly etc., then in order to establish whether those proclamations were "ideological" or instead elements of the fundamental normative conception of the Soviet Union, it was sufficient to go

and look whether Soviet citizens could actually (without incurring penalties) freely meet and associate. Once, however, the "ideological" nature of this proclamation had been established, the further conclusion to be drawn is not the one common to so many thinkers with a functionalist, realist approach (from Marx to Pareto to Lundstedt) that the reality of the institutions in question is based solely on purely material forces and hence that any normative conception is always just ideology (or even -- as in the case of Marx and Lundstedt -- that law itself is ideology). In order validly to reach such conclusions one would have to insert a further premise, namely that human actions are governed exclusively by material needs and instincts. If one does not share that position, and instead holds that man acts in accordance with his ideas of action, according to values of action that always to some extent presuppose types (ideas) of action[222], then the above-mentioned conclusions are not argumentatively justified. This does not mean excluding needs from the vast spectrum of determinants of human actions, but only holding that these are either accompanied by other determinants hinging on deliberations, or else come to form part of the latter as premises of some practical reasoning. But to do this, to be presented as the premises of an argument, these needs have to take on a propositional content, that is, become part of the semantic content of judgements and propositions[223]. Accordingly, the capacity for such needs to determine human action passes first and foremost through the understanding and interpretation of the semantic content of the statements they are expressed in, and then through the deliberative operation within which these statements are fitted.

If in Stalin's Russia the 1936 constitution was waste paper, mere "ideology", this does not authorize us to deny that there was any other normative conception that was *de facto* constitutive of the functioning of the Stalinist Soviet institutions, which is not even too hard to find, being Marxism-Leninism as "invented" by none other than Stalin himself. Equally, in a so-called primitive society, in which the prevailing social conception maintains that the office of shaman is open to all and it is instead found this office is always held by members of a given family, one should not confine oneself to asserting that this conception is mere "ideology" and reach the conclusion that the society is accordingly based only on the force of events or the functions of the social group. It should instead be said that the true

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222 Cf. D. FARIAS, *Per una definizione scientificamente utile di ideologia*, in ID., *Saggi di filosofia politica*, Giuffrè, Milan 1977, pp. 313 ff.

223 Cf. C.S. NINO, *La validez del derecho*, Astrea, Buenos Aires 1985, Chap. VII.

internal viewpoint of the primitive society in question is not the one that the post of shaman is open to all, but the one for which it is reserved to those belonging to a given family to which particular qualities and a special *status* are attributed. Certainly, it might very well be that a family, against the generally shared social conception that lays down that the post of shaman is accessible to all, succeeds through fraud or force in monopolizing the position of shaman for a certain period of time. But this situation will have one of two developments: either that family's monopoly will be consolidated, that is, recognized by the collectivity (and then come to form part of the normative social conception); or else it will become attenuated and, failing to impose itself further and become a social norm, become overturned by the reaffirmation of the previous social norm that proclaimed free access to the post of shaman for all members of the society. In any case, access to the post of shaman will not be explicable in terms of "material" relations, of "functions", foreign to the symbolic and cultural (and hence normative) constitutions of that given society.

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