

## **Introdução**

A ideia de legitimidade surge no discurso político da Europa Ocidental como palavra de ordem de forças contrarrevolucionárias. Ao governo do povo ou pelo povo, ao qual amiúde se referiam como tirania da maioria, reaccionários de Norte a Sul opunham a legitimidade das velhas linhagens monárquicas. Cedo, todavia, a ideia se desvinculou de tal origem. Ao longo do século XIX, brotam noções de legitimidade política com pontos de referência outros que não o sangue real: a legitimidade de uma classe social específica; de uma certa elite intelectual ou de um líder extraordinário; de uma dada nação, etnia ou raça; de uma missão civilizadora; entre outras. A multiplicação de acepções – não raras vezes opondo-se mútua e diametralmente – acaba por conferir ao conceito um sentido assaz lato. Por legitimidade passa a entender-se, com efeito, a alusão a um direito superior e incontestável, que por si só sustentaria e justificaria a vigência da autoridade política e a obediência generalizada que lhe é devida. Em *Economia e Sociedade*, Max Weber dá voz a esse entendimento abrangente do conceito, ao remeter o problema da legitimidade para a questão dos «fundamentos últimos da validade da dominação»<sup>1</sup>.

Por outro lado, a disseminação de noções alternativas de legitimidade política surge também como inequívoco indício de crise. Aliás, a mera emergência da questão como objecto de debate e contestação constitui *per se* sinal de perturbação fundamental. Em boa verdade, em tempos de normalidade, os princípios basilares da ordem política, longe de serem debatidos pública e abertamente, permanecem sob a espuma dos dias, orientando tacitamente a acção de indivíduos e grupos. Esta desocultação dos sustentáculos últimos da autoridade política, e o seu questionamento por múltiplas visões tantas vezes mutuamente exclusivas, é certamente produto da moderna dissolução dos marcadores de certeza tradicionais, escorados em concepções teocêntricas da existência humana. Mas ela resulta também de um soçobrar da moderna ilusão iluminista que por momentos se julgara capaz de fornecer alternativa igualmente estável e duradoura. A elucidação da crise europeia da legitimidade política força-nos, pois, a distinguir duas modernidades – uma modernidade primeva marcada pelo optimismo antropológico; uma

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<sup>1</sup> Max Weber, *Economy and Society*, Berkeley, Los Angeles e Londres, University of California Press, 1978, p. 953: «the ultimate grounds of the validity of a domination» (ênfase original omitida).

modernidade tardia, de contornos crepusculares, caracterizada pela crescente autorreflexividade – e a situá-la explicitamente na segunda.<sup>2</sup>

Como é evidente, a determinação dos marcos temporais que separam essas duas experiências europeias da modernidade encontra-se – e permanecerá – envolta em controvérsia. Talvez se possa afirmar, *grosso modo*, que a modernidade primeva se estende desde os alvares do Renascimento nas Cidades-Estado da Península Itálica até ao rescaldo das Revoluções Atlânticas na primeira metade do século XIX, enquanto a modernidade tardia principia com o recrudescimento dos nacionalismos e imperialismos em finais de oitocentos e atinge o ponto culminante nos horrores das Grandes Guerras do século XX e do Holocausto. Na história das ideias, autores como Nietzsche, Marx e Freud surgem, a esse respeito, muitas vezes como pensadores-charneira, enquanto um olhar mais sociológico situaria porventura a fronteira no momento, certamente difícil de determinar com precisão para cada experiência nacional, em que os processos motrizes da modernização – industrialização, urbanização e secularização – passaram de fenómenos marginais e embrionários, em contextos ainda predominantemente agrícolas e tradicionais, para o centro nevrálgico das sociedades europeias.

Ora, bem mais polémica ainda do que a escolha de balizas temporais capazes de cindir a experiência europeia da modernidade em duas fases distintas é, com toda a certeza, a avaliação do destino dessa mesma experiência após 1945. Se, na verdade, a interpretação da Segunda Grande Guerra e do Holocausto como apogeu das pulsões autodestrutivas da modernidade é hoje mais ou menos consensual, o mesmo não pode ser dito dos juízos acerca do panorama que lhes sucedeu. Fará sentido falar-se num retorno triunfal de visões progressistas e optimistas da modernidade, sob a forma demoliberal e capitalista ou comunista (esta última estilhaçando-se por completo em 1989)? Num esvaziamento do projecto moderno que dá origem a uma pós-modernidade de contornos indefinidos e indefiníveis? Ou estaremos antes perante reiterações e reformulações das tensões características da modernidade tardia?

Estas interrogações, é certo, extravasam em boa medida o escopo do presente trabalho, que se propõe estudar o pensamento de três teóricos da política na conjuntura

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<sup>2</sup> Para uma discussão matizada do conceito de modernidade, veja-se Shmuel N. Eisenstadt, *Múltiplas Modernidades*, Lisboa, Livros Horizonte, 2007, um brilhante ensaio que alerta para os perigos de um entendimento eurocêntrico ou estritamente ocidentalizado do fenómeno da modernização – e que simultaneamente constitui formidável refutação das teses do «fim da história» (Fukuyama) e do «choque de civilizações» (Huntington) que agitaram as ciências sociais na derradeira década do século XX.

crítica de entre-guerras, onde a reflexão em torno do problema da legitimidade assumiu contornos de radicalidade e urgência até então nunca vistos e desde então inigualados. Mas elas não podem deixar de iluminar, conquanto à distância, as nossas perguntas e respostas – porque os trilhos percorridos nesse auge da modernidade tardia não estão tão longe quanto à primeira vista possa parecer dos que ainda hoje calcamos.

### **1. A crise da democracia liberal na Europa de entre-guerras e o problema da legitimidade política na modernidade tardia**

As décadas que separam as duas Grandes Guerras do século passado são comumente interpretadas como período de crise da democracia liberal na Europa. A progressão das formas democráticas de governo no continente europeu encontra, então, um primeiro e duro revés. Se o colapso dos quatro grandes impérios continentais (alemão, austro-húngaro, russo e otomano) decorrente do conflito de 1914-18 se traduziu, num primeiro momento, numa vaga de democratização sem precedentes, cedo esse movimento começou a inverter-se. A grande maioria dos novos regimes na Europa Central e de Leste sucumbe, durante os anos 1920 e 1930, ao autoritarismo. No Sul do continente, a partir do triunfo do fascismo italiano em 1922, o cenário não é diferente. E mesmo nos baluartes europeus da democracia moderna – França e Reino Unido – surgem sinais de inquietude. O golpe no optimismo democrático dificilmente poderia ser mais profundo: afinal, o caminho para a democracia não era uma via de sentido único.

Mas a crise da democracia liberal na Europa de entre-guerras, bem para lá do regime democrático parlamentar em sentido estrito, foi também uma crise geral do liberalismo. Ou melhor: prolongou e exacerbou – na medida em que sugeria que a democratização do sistema político podia não ser capaz de a inverter – uma crise do liberalismo burguês que já se manifestava desde finais do século XIX, decorrente da emergência da política de massas e da crescente preponderância do movimento operário. A transição de oitocentos para novecentos marca o fim da «era de segurança»<sup>3</sup> da burguesia europeia, certamente irrestaurável após um conflito militar de grande escala que havia resultado, em todas as nações beligerantes, numa extensão brutal do poder do

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<sup>3</sup> Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe*, New Haven e Londres, Yale University Press, 2011, pp. 9-16.

Estado. O desafio às instituições basilares da ordem liberal-capitalista – parlamentarismo e mercado livre – persistia, agudizado, na Europa de entre-guerras, provocando entre as hostes burguesas um sentimento de «ansiedade de classe».<sup>4</sup>

É sobre esta dupla crise que o presente trabalho irá também reflectir, concentrando-se na produção teórica surgida no contexto cultural e intelectual da mais fatídica experiência democrática da época: a Alemanha de Weimar.

Construiremos, em torno de três autores – Max Weber (1864-1920), Hans Kelsen<sup>5</sup> (1881-1973) e Carl Schmitt (1888-1985) –, três modos distintos, ainda que não absolutamente incomensuráveis, de a compreender. Em termos sucintos, diríamos que os une, por um lado, uma insatisfação profunda com as premissas do liberalismo clássico, isto é, com um discurso legitimador do poder político com base numa concepção individualista e abstracta de direito natural e nas noções conexas de justiça e contrato. Curiosamente, por outro lado, essa recusa do paradigma liberal nos seus termos mais comuns não conduz, em nenhum deles, ao abraçar de uma das duas grandes correntes que, desde a segunda metade do século XIX, se assumiam, no espaço alemão e não só, como alternativas ao liberalismo: o socialismo marxista e um mais difuso corporativismo de índole conservadora que opunha ao individualismo dito mecanicista do pensamento ocidental uma concepção supostamente orgânica – e pretensamente *mais* germânica – da comunidade política. Nas obras de Weber, Kelsen e Schmitt encontramos, ainda que sob

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<sup>4</sup> Sobre «a linguagem da ansiedade de classe», ver Charles S. Maier, *Recasting Bourgeois Europe: Stabilization in France, Germany, and Italy in the Decade After World War I*, Princeton, Princeton University Press, 1988, pp. 22-39.

<sup>5</sup> Em termos estritos, o trabalho de Hans Kelsen remete mais directamente para Viena do que para Weimar, isto é, para o contexto específico da Áustria do pós-I Guerra, onde Kelsen foi figura de destaque. Afinal, a Constituição pós-imperial austríaca de 1920 resultou largamente do seu esboço, tendo o autor servido também como juiz no Tribunal Constitucional por aquela criado. No entanto, uma separação rígida entre as experiências alemã e austríaca no período entre-guerras parece-nos desprovida de sentido. A crise da democracia foi vivida e percebida de forma análoga em Weimar e Viena, tendo o regime democrático encontrado, em ambos os casos, o mesmo trágico desfecho, selado, no caso austríaco, em 1938 pelo *Anschluss* hitleriano. De resto, a influência de Kelsen – que, no início da década de 1930, se mudou (brevemente) de Viena para Colónia – cedo irradiou bem para além dos círculos vienenses. Na verdade, trata-se do mais proeminente teórico do Estado e do direito no espaço de língua alemã entre as duas grandes guerras do século passado – antes de se tornar, na sequência da emigração para os Estados Unidos em 1940, porventura no jurista-chave do século XX.

Sobre a centralidade de Kelsen no pensamento jurídico de Weimar, vide John P. McCormick, «Legal Theory and the Weimar Crisis of Law and Social Change», in Peter E. Gordon e John P. McCormick (Eds.), *Weimar Thought: A Contested Legacy*, Princeton, Princeton University Press, 2013, pp. 56-57.

pontos de vista muito diversos, momentos de crítica acutilante ao marxismo<sup>6</sup>, bem como a recusa, muitas vezes violenta, dos chavões do conservadorismo neocorporativista<sup>7</sup>.

Todavia, o que os separa ultrapassa largamente esta coincidência na rejeição dos principais horizontes ideológicos da época. A perspectiva que pretendemos explorar neste estudo é a de que Weber, Schmitt e Kelsen propõem leituras divergentes da crise da democracia liberal e de uma sua eventual superação. Em Weber, pensador oriundo de meios protestantes e burgueses e, nessa medida, próximo da tradição política liberal alemã, encontramos a tentativa de superar a asfixia da política – e da liberdade? – pela crescente racionalização e burocratização do Estado e das organizações políticas e sociais através de uma reinterpretação elitista, carismática e plebiscitária da democracia moderna. Em Kelsen, jurista de origem judaica com assumida simpatia pela social-democracia, deparamo-nos com um esforço de democratização das instituições políticas herdadas do liberalismo oitocentista, que as procura despir das suas roupagens ideológicas originárias e abrir à participação de outros grupos sociais, até então total ou parcialmente excluídos. Em Schmitt, finalmente, católico de origens humildes, descobrimos uma rejeição visceral do pensamento liberal nas suas múltiplas dimensões; rejeição que se aproxima circunstancialmente de várias linguagens distintas de crítica ao liberalismo – jogando, por exemplo, democracia contra liberalismo e legitimidade contra legalidade; evocando os mitos do nacionalismo; explorando noções de liderança política forte perante os impasses do governo parlamentar –, mas que remete, no seu âmago, para uma visão autoritária da política, de proveniência teológica.

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<sup>6</sup> Só a título de exemplo: no caso de Weber, a palestra sobre «Socialismo» proferida ante oficiais do exército austríaco em 1918 (Max Weber, «Socialism», in Max Weber, *Political Writings*, Cambridge, Cambridge University Press, 1994, pp. 272-303); em Kelsen, a crítica à teoria marxista do Estado, em polémica com o austro-marxista Max Adler (Hans Kelsen, *Sozialismus und Staat*, Segunda Edição Expandida, Leipzig, C. L. Hirschfeld, 1923); em Schmitt, a exposição das aporias do materialismo dialético e histórico (Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, Nona Edição, Berlim, Duncker & Humblot, 2010, pp. 63-77).

<sup>7</sup> Novamente sem pretensões de exaustividade, refira-se a agressividade retórica de Weber dirigida contra os proponentes de um retorno ao *Ständestaat* medieval nos escritos políticos do final da Grande Guerra (Max Weber, «Suffrage and Democracy in Germany», in Max Weber, *Political Writings*, pp. 85, 91 e 100); a recusa kelseniana das alternativas corporativistas à representação parlamentar (Hans Kelsen, *Vom Wesen und Wert der Demokratie*, Segunda Edição Retrabalhada, Tübingen, J. C. B. Mohr (Paul Siebeck), 1929, pp. 47-52); e o silêncio de Schmitt, apesar da sua clara simpatia pelo fascismo italiano, relativamente à doutrina do *Stato Corporativo* (Carl Schmitt, «Wesen und Werden des faschistischen Staates», in Carl Schmitt, *Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1923-1939*, Terceira Edição, Berlim, Duncker & Humblot, 1994, pp. 124-130).

Ora, conforme sugerido nas linhas inaugurais, através destes três modos distintos de concepção da crise da democracia liberal na Alemanha de entre-guerras propomos igualmente – e, porventura, sobretudo – uma reflexão geral sobre o problema da legitimidade política no contexto da modernidade tardia. Como vimos<sup>8</sup>, Max Weber definiu a questão da legitimidade como remetendo para os princípios últimos que sustentam a validade da ordem política, distinguindo em seguida três tipos ideais através dos quais se tornaria possível uma melhor compreensão das manifestações empíricas de dominação política legítima: um caracteristicamente moderno – a dominação de tipo legal-racional –, em que a obediência é devida não a pessoas concretas, mas a um conjunto abstracto de regras; outros dois, cujas origens se perdem nos confins do tempo, em que a autoridade é de tipo intrinsecamente pessoal, seja pela via da tradição ou do carisma.<sup>9</sup> Com efeito, o estudo do pensamento político não só de Weber, mas também de Kelsen e de Schmitt, dificilmente poderá passar ao lado das modernas categorias da racionalização e da secularização e dos processos de erosão das visões tradicionais e teocêntricas da existência que elas implicam.

Se a pré-modernidade no Ocidente fora cristã, a modernidade tentou emancipar-se da religião dominante buscando os seus fundamentos alhures. Procurou ancorá-los, fundamentalmente, numa razão humana concebida como auto-suficiente. No plano do pensamento político, a consequência maior foi a dissolução do nexa teológico-político. No contexto da Reforma, Thomas Hobbes surge, a este respeito, como um marco decisivo, na sua tentativa de fazer assentar a ordem política em bases puramente racionais, isto é, sem o apelo, até então imprescindível, ao plano da transcendência. O seu *Leviatã* constitui expressão máxima de um novo entendimento da representação política conducente à legitimação da soberania absoluta – e já não divinamente derivada – da monarquia. Porém, em termos simbólicos, é a Revolução Francesa que se assume como ponto de ruptura entre o Velho e o Novo.<sup>10</sup> Efectivamente, ela inaugura um século

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<sup>8</sup> *Supra*, n. 1.

<sup>9</sup> Weber, *Economy and Society*, pp. 953-954.

<sup>10</sup> Os revolucionários franceses procuraram efectivamente instaurar um novo tempo. Para eles, 1789 não era mais o ano 1789 depois de Cristo, mas o ano primeiro da Revolução. O tempo contado desde o nascimento do Filho de Deus era substituído pelo que anunciava o nascimento de um Novo Homem, liberto das amarras da autoridade religiosa e capaz de fundar, nos seus próprios termos, a ordem política. No entanto, resta saber se essa analogia entre o nascimento de Cristo e a Revolução, enquanto momentos instituintes de um novo tempo, não revela que a política, no preciso momento em que declara a sua emancipação da teologia, não deixa de incorporar no seu seio agora supostamente autonomizado, ainda que sob novas vestes, noções basilares da experiência teológica do universo.

marcado, na sua primeira metade, pelo optimismo antropológico e por projecções utópicas da humanidade num futuro de plena racionalidade e harmonia social. Confiança na razão; crença no progresso (científico, técnico e social); consagração de direitos inalienáveis e invioláveis, inscritos na própria natureza do ser humano – são estas as marcas e as promessas da Europa pós-revolucionária. Mas o longo século XIX (1789-1914) revelou, no seu decurso, o lado menos solar do progresso, bem como as ambivalências da razão. Os avanços da técnica industrial e da economia capitalista trouxeram consigo a miséria urbana, abrindo a ferida da questão social. A política liberal não tardou em sucumbir às tentações do imperialismo, também como forma de responder às pressões da democratização. A linguagem dos direitos, pese embora a sua universalidade, não extravasava as fronteiras geográficas de um continente que já há muito se havia abalançado colonialmente para além delas.

Em certo sentido, pois, a Europa que regressa das trincheiras em 1918 tem dificuldade em acreditar quer em Deus quer na Razão. Os «fundamentos últimos» da ordem política encontram-se em jogo, um pouco por todo o continente, mas sobretudo entre aqueles que regressam da frente de batalha para encontrar uma comunidade política em processo de refundação e reconstrução, como sucede na Alemanha.

Para Weber, pioneiro na consideração sociológica do problema da legitimidade do poder, o modo de dominação política característico da modernidade, de tipo legal-racional, corresponde à formalização, positivação e secularização do direito natural – cuja doutrina provém originariamente, sobretudo, das seitas protestantes –, levada a cabo pelo aparelho burocrático do Estado. A legalidade procedimental pela qual se legitima o Estado moderno constitui, assim, parte do casulo de ferro da modernidade Ocidental, que surge como consequência não-intencionada do ascetismo protestante. Ela integra-se, pois, numa dinâmica irresistível de racionalização e burocratização das relações humanas. Todavia, apesar da natureza inelutável de tal processo, a legalidade tem, aos olhos de Weber, limitações manifestas enquanto tipo predominante de dominação legítima. Na verdade, assim como a dominação de tipo tradicional, a legalidade deriva, em derradeira análise, a sua validade de um momento instituinte de ruptura que remete para o tipo-ideal da dominação carismática. O carisma, conceito de génese teológica, é para Weber, simultaneamente, o ponto de origem e o ponto focal da legitimidade política. A moderna democracia de massas exige, no seu entender, uma reinterpretação carismática: não só porque a crença na pura legalidade formal se revela inerentemente débil, mas também

para evitar a plena funcionarização da política, que excluiria a própria possibilidade de uma liderança responsável. A máquina racional-legal do Estado moderno precisa, segundo Weber, de se relegitimar regularmente por via da devoção popular a um líder carismático.

Hans Kelsen, pelo contrário, recusa a transcendência, ainda que parcial, do plano da legalidade ínsita na concepção weberiana de liderança política carismática. Para o pensador austríaco, não restam dúvidas de que toda a política, incluindo a democrática, implica liderança e subordinação, mas estas não transcendem os limites estritos do sistema legal em vigor, para o legitimar de modo exógeno. A democracia moderna encontra os seus fundamentos na sua própria legalidade, não alhures. Kelsen, dos três autores aqui estudados o que menos se afasta do ideal racionalista das Luzes, procura sedimentá-los recorrendo a uma analogia entre democracia e pensamento científico, contraposta à pretensa consanguinidade entre autocracia e metafísica. O último reduto da fundamentação da democracia é, pois, a ciência. Mas o ideal científico desposado por Kelsen não se baseia numa razão humana onipotente. Pelo contrário, o autor está bem ciente dos limites do entendimento humano e da impossibilidade do conhecimento absoluto, na esteira da tradição neokantiana. A ciência de que a democracia se aproxima adopta uma atitude crítica face aos seus próprios pressupostos e aos dados empíricos que constituem o seu objecto, reconhecendo a natureza relativa e transitória dos seus resultados. Como a ciência, a democracia recusa a própria possibilidade de acesso a uma verdade absoluta ou a valores absolutos, face aos quais só a obediência cega faria sentido. A sua marca é a do relativismo axiológico, de um pluralismo de valores e ideologias divergentes, potencialmente inconciliáveis e, porventura até, incomensuráveis, que se deixa acomodar provisoriamente pelo compromisso, mas jamais resolver definitivamente através da adopção integral de um dos pontos de vista em disputa. Num tempo de clivagens políticas fundas, o regime democrático só podia legitimar-se assumindo uma equidistância *científica* – relativista – face às paixões em jogo.

Finalmente, Carl Schmitt rejeita toda a aproximação da política a lógicas técnicas e científicas, bem como, apesar da aproximação circunstancial a dada altura, o modo de transcendência secular, por via do carisma pessoal do líder plebiscitário, veiculado por Weber. Como último grande pensador contra-revolucionário, Schmitt propõe-se recolocar a política e o direito firmemente na órbita da teologia cristã, da qual aqueles jamais lograram verdadeiramente libertar-se, uma vez que «[t]odos os conceitos



fundamentais da moderna teoria do Estado são conceitos teológicos secularizados.»<sup>11</sup> A visão schmittiana da secularização e da modernidade está isenta das ambivalências da leitura weberiana. Trata-se, para Schmitt, da narrativa de uma perda, de um afastamento do recto caminho, no extremo oposto, portanto, da mundividência científica de Kelsen. Só o cristianismo, com a sua verdade divinamente revelada, exigindo obediência incondicional, pode dotar a ordem política do Ocidente dos seus alicerces últimos. O conceito do político conduz, em Schmitt, à primazia do teológico como fundamento da autoridade.

Como podemos ver, a interpretação da crise da democracia liberal remete, nos nossos três autores, para mundivisões – e cosmovisões – contrastantes, que concebem o problema dos fundamentos da ordem política de forma diversa. Trata-se, é certo, de dois planos de reflexão distintos, situados em diferentes escalas de abstracção, mas que, no limite, se afiguram indissociáveis. Se, por um lado, é difícil imaginar que a crise de um dado regime possa sequer ser concebida na ausência de um pensamento, mais ou menos desenvolvido, sobre a questão geral da legitimidade política, por outro, tal reflexão de grau mais abstracto tende a ganhar particular acuidade em momentos históricos de desafio concreto à ordem existente. No presente trabalho, procurar-se-á sublinhar o nexo indissolúvel entre os dois planos, num esforço de síntese que restitua a este debate da Europa de entre-guerras, tantas vezes segmentado em obediência a intentos disciplinares mais imediatos – os teóricos da política e do direito concentrando-se, sobretudo, na crise dos regimes demoliberais; a filosofia e a teologia discutindo a questão geral dos fundamentos da ordem política legítima na modernidade –, a sua singular abrangência. Dedicando um capítulo autónomo a cada autor, procuraremos em cada um deles relacionar os dois planos de reflexão, sublinhando oposições e continuidades, paradoxos e ambivalências.

No que toca a Weber, o objectivo será ler os seus escritos políticos de 1917-1919, que desembocam na leitura plebiscitário-carismática da moderna democracia de massas, no contexto mais amplo da sua narrativa da modernidade como processo irreversível de racionalização, secularização e burocratização – ou, no termo propriamente weberiano,

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<sup>11</sup> Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, Nona Edição, Berlim, Duncker & Humblot, 2009, p. 43: «Alle prägnanten Begriffe der modernen Staatslehre sind säkularisierte theologische Begriffe.»

de «desencantamento do mundo»<sup>12</sup>. Relativamente a Kelsen, concentrar-nos-emos sobretudo na destrição das duas principais linhas argumentativas da sua defesa da democracia: uma primeira, rousseauiana na inspiração mas hobbesiana no resultado, que parte das ideias de liberdade e igualdade para chegar à necessidade do Estado como mecanismo de representação e de construção de uma vontade política colectiva; e uma segunda, assente no reconhecimento da irreduzível pluralidade e relatividade de valores e ideologias políticas, na qual as visões do mundo da ciência e da democracia se cruzam. No sempre polémico caso de Schmitt, enfim, tentaremos reconduzir a diversidade circunstancial da sua feroz crítica ao liberalismo, que trabalha argumentos e intuições provenientes de distintas tradições antiliberais, ao cerne teológico do seu pensamento político.

Antes, todavia, de nos lançarmos nesta empresa, impõem-se três momentos de clarificação histórica, metodológica e biobibliográfica, a desenvolver nas páginas que se seguem desta introdução. Em primeiro lugar, uma reflexão sobre a possibilidade e a pertinência de ler a história da Alemanha de Weimar, apesar – ou justamente por causa – das suas singularidades, como uma instância paradigmática de crise da modernidade tardia. Num segundo momento, uma discussão sobre as dificuldades com as quais se depara o estudo das ideias políticas nessa modernidade tardia. E, finalmente, uma revisão sucinta – e necessariamente incompleta – da inesgotável bibliografia secundária que, desde o seu tempo até aos dias de hoje, tem interpretado e discutido as obras de Weber, Kelsen e Schmitt, para que nela possamos situar a nossa perspectiva.

## **2. Weimar: das «peculiaridades da história alemã» à «crise da modernidade clássica» (e à «catástrofe alemã»)**

A historiografia alemã da segunda metade do século XX surge marcada por um intenso debate em torno da tese do *deutscher Sonderweg*, isto é, de uma pretensa

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<sup>12</sup> Max Weber, «The Social Psychology of the World Religions», in H. H. Gerth e C. Wright Mills (Eds.), *From Max Weber: Essays in Sociology*, Nova Iorque, Oxford University Press, 1947, p. 290: «the disenchantment of the world» (*die Entzauberung der Welt*). De acordo com Gerth e Wright Mills, «Introduction: The Man and his Work», in H. H. Gerth e C. Wright Mills (Eds.), *From Max Weber*, p. 51, Weber terá tomado a expressão de empréstimo a Friedrich Schiller.

excepcionalidade histórica no que toca ao itinerário alemão rumo à e na modernidade.<sup>13</sup> Tal debate sobre a natureza singular do caminho alemão para a modernidade não pôde deixar de influir nas interpretações históricas da República de Weimar, enquanto curto, mas decisivo, período dessa experiência.

Ora, a ideia de excepção – seja ela histórica ou de qualquer outra índole<sup>14</sup> – só faz sentido por oposição a uma instância concebida como normal. No caso da história alemã moderna, essa instância-padrão, relativamente à qual ela diferiria, são as experiências ocidentais – inglesa, francesa e, com as necessárias reservas, também norte-americana – de desenvolvimento político, económico, social e cultural na sequência de uma revolução burguesa, através da qual esta classe social em ascensão se assumira, em ruptura explícita com a aristocracia feudal, como estrato dirigente. No espaço alemão, a revolução burguesa fracassara em 1848-49, deixando o comando dos destinos políticos da nação, então ainda por unificar, nas mãos da elite agrária de um Estado eminentemente feudal (a Prússia).

Este desvio relativamente ao roteiro da revolução burguesa, sobre o qual o pensamento alemão, e especialmente o historiográfico, cedo começou a indagar, foi concebido durante longas décadas como uma diferença de valor positivo. Ainda na primeira metade do século XIX, o movimento nacional alemão, enformado pela experiência da “guerra de libertação” (*Befreiungskrieg*)<sup>15</sup> que terminou com os desígnios imperiais de Napoleão na Europa Central, apesar das aspirações abertamente revolucionárias de alguns dos seus sectores, pretendeu constituir-se como alternativa às ideias da Revolução Francesa. Depois da unificação, a elite intelectual do novo *Reich* aplicou muita da sua energia ao enaltecimento da peculiaridade e da supremacia da arquitectura institucional do Império Guilhermino, relevando uma complementaridade supostamente virtuosa entre monarquia, exército, burocracia, universidade, velhas elites

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<sup>13</sup> Para uma síntese crítica do debate, veja-se Helga Grebing, *Der ‘deutsche Sonderweg’ in Europa 1806-1945: Eine Kritik*, Estugarda, Kohlhammer, 1986.

<sup>14</sup> Veja-se, claro, o papel que essa ideia desempenha na célebre definição de soberania proposta por Carl Schmitt, *infra*, p. 159, nn. 418 e 419.

<sup>15</sup> Neste caso, como em tantos outros, a própria história do conceito é reveladora. As forças liberais cunharam, num primeiro momento, a expressão “guerra de liberdade” (*Freiheitskrieg*) para se referirem ao conflito com a França napoleónica, dotando-o assim de uma finalidade política mais abrangente do que a mera expulsão do invasor estrangeiro. Contudo, foi a alternativa conservadora de “guerra de libertação” (*Befreiungskrieg*), sublinhando estritamente a luta contra a hegemonia e ocupação francesas, que acabou por se impor tanto no discurso político como, ulteriormente, no historiográfico. *Vide* Otto Büsch, *Handbuch der preußischen Geschichte*, Vol. II, Berlim, Walter de Gruyter, 1992, p. 51.

agrárias e novas elites industriais – e, sobretudo, pondo a circular uma putativa oposição entre, por um lado, os valores “espirituais” ou “orgânicos” pelos quais se orientariam as instituições alemãs e, por outro, o “materialismo” e o “mecanicismo” que caracterizariam a experiência histórica a Ocidente.<sup>16</sup> Esta leitura da excepcionalidade alemã atingiu o seu ponto culminante no êxtase nacionalista do Verão de 1914, com toda uma nação a lançar-se entusiasticamente para a frente de combate.<sup>17</sup> A derrota de 1918, contudo, não lhe pôs cobro, tendo a ideologia da singularidade histórica alemã – e da sua missão civilizacional – persistido durante todo o período de Weimar, até finalmente ser conduzida ao extremo pelo movimento nacional-socialista.<sup>18</sup>

No pós-1945, o problema da excepcionalidade histórica alemã na modernidade é abordado exactamente pelo ângulo oposto. Ou seja: o desvio à norma passa a ser compreendido como falha ou, até mesmo, como aberração. Com a catástrofe do Terceiro Reich sendo concebida como o desfecho trágico da história da Alemanha moderna, impõe-se uma interpretação negativa da peculiaridade histórica alemã, que procura na singularidade do percurso alemão as raízes e causas do nazismo. A inversão valorativa na leitura da excepcionalidade alemã é acompanhada por uma ruptura com o paradigma historicista de Leopold von Ranke, que havia dominado a historiografia germânica até então. Opondo-se à abordagem compreensiva (*verstehend*) de Ranke, que tendia à naturalização dos eventos e a uma confluência do plano da positividade com o da normatividade, do que foi com o que deveria ter sido, uma nova geração de historiadores – encabeçada, entre outros, por Hans-Ulrich Wehler, Heinrich August Winkler e Jürgen Kocka; e secundada por pensadores como Jürgen Habermas – propunha-se olhar

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<sup>16</sup> É contra este discurso auto-complacente das elites intelectuais conservadoras que Weber dirige os seus remos mais mordazes nos escritos políticos dos derradeiros anos da Primeira Grande Guerra. Vide *supra*, n. 7.

<sup>17</sup> No fervor patriótico do início da Grande Guerra, chegou mesmo a conceber-se explicitamente as «ideias de 1914», resumidas na fórmula dever-ordem-justiça, como alternativa mundividencial à tríade liberdade-igualdade-fraternidade, isto é, às ideias de 1789. Veja-se o opúsculo do conservador germanófilo sueco Rudolf Kjellén, *Die Ideen von 1914: Eine weltgeschichtliche Perspektive*, Leipzig, Hirzel, 1915.

Note-se, todavia, que a inspiração para esse ideário provinha por vezes de fontes não imediatamente associáveis ao pensamento conservador e autoritário. Por exemplo, no que toca à ideia de dever, a grande referência era Immanuel Kant. Aliás, Frederick Beiser explica o declínio da tradição neokantiana no panorama filosófico de Weimar também pela sua associação à ideologia de apoio à Grande Guerra. Veja-se Frederick Beiser, «Weimar Philosophy and the Fate of Neo-Kantianism», in Peter E. Gordon e John P. McCormick (Eds.), *Weimar Thought*, pp. 116-117.

<sup>18</sup> Para uma análise crítica das leituras positivas – diríamos mesmo: do mito – da excepcionalidade histórica alemã na era moderna, ver Bernd Faulenbach, *Ideologie des deutschen Weges: die deutsche Geschichte in der Historiographie zwischen Kaiserreich und Nationalsozialismus*, Munique, Beck, 1980.

criticamente para o passado. Esta história crítica incorpora propósitos éticos e político-pedagógicos claros, que têm que ver com um trabalho de memória e de processamento e superação de uma história nacional traumática<sup>19</sup>, inteiramente compreensível no contexto do pós-Holocausto. No entanto, apesar dos seus muitos e inegáveis méritos, a inversão crítica das teses da singularidade histórica alemã não está isenta de impasses, os quais derivam, em larga medida, do seu fechamento teleológico: o Terceiro *Reich* como conclusão fatídica de um processo histórico; 1945 como hora zero (*Stunde Null*) de uma Alemanha – em rigor, até 1989, de uma das duas Alemanhas – agora plenamente integrada na tradição liberal-democrática da Europa Ocidental.

Nesta perspectiva, a ausência de uma revolução burguesa bem-sucedida na Alemanha é encarada como momento crucial – se não mesmo como génese – da cadeia causal que explica o falhanço da implementação de uma democracia liberal de tipo Ocidental em terras germânicas. Residiria aí a origem de uma nefasta disjunção entre o plano económico-industrial, com um crescimento particularmente intenso na transição de oitocentos para novecentos, e o plano das instituições e valores políticos, caracterizado pelo imobilismo. Em síntese, a burguesia alemã havia conquistado uma posição de destaque na vida económica da nação sem ter tido a necessidade de contestar as velhas elites agrárias e a sua forma de governo. Em vez das coligações sociais de base ampla – envolvendo o operariado industrial, sectores camponeses e pequenos artífices urbanos – que teriam marcado a dinâmica liberal-democrática a Ocidente, a burguesia alemã optara pela conciliação com o poder vigente, deixando-se feudalizar. E as velhas elites tradicionais não mais largaram as suas posições dirigentes (nem mesmo após a derrota militar na Primeira Grande Guerra), legando assim um cunho autoritário à trajectória alemã para a modernidade – e, na hora decisiva de 1933, conduzindo Hitler ao poder.<sup>20</sup>

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<sup>19</sup> O termo alemão, intraduzível com precisão, é *Vergangenheitsbewältigung* (*Vergangenheit* = passado; *Bewältigung* = enfrentamento, lidar com, superação, reconciliação).

<sup>20</sup> Esta é também, em traços gerais, a tese defendida por uma obra clássica da sociologia histórica comparada, publicada originalmente em 1966: Barrington Moore, *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World*, Boston, Beacon Press, 2003. Moore argumenta que o alinhamento dos interesses agrários e industriais «em torno de um programa de imperialismo e reacção teve resultados desastrosos para a democracia alemã» (p. 38). Contudo, a abrangência da perspectiva comparativa do autor, que lança um olhar bem para além das experiências Ocidentais de modernização, não faz o caso alemão – ao qual, de resto, não é dedicado capítulo autónomo, apesar de ser constantemente mobilizado para efeitos de comparação – aparecer como anomalia patológica. Bem pelo contrário, integra-o numa de três trajectórias alternativas/sucessivas para o mundo moderno. A par do Japão, a Alemanha teria seguido a via capitalista-reaccionária, que passa pelo estabelecimento de um regime autoritário conservador e culmina, em virtude de fortes pressões socioeconómicas, numa paradoxal ditadura modernizadora liderada pelas elites tradicionais. Tal trajectória distingue-se tanto das

No início da década de 1980, dois historiadores britânicos – David Blackbourn e Geoff Eley – despertaram o debate em torno desta releitura negativa da singularidade alemã na história moderna, questionando alguns dos seus pressupostos. Em primeiro lugar, chamaram a atenção para os problemas suscitados pelo erigir das experiências anglo-americana e francesa a modelos de desenvolvimento político ideal, relativamente aos quais a história alemã deixaria a desejar. A narrativa heroica da ascensão burguesa, em ruptura explícita com as elites tradicionais, estará porventura mais próxima do mito do que da realidade histórica, não sendo certamente subscrita pela generalidade dos historiadores das revoluções Ocidentais. De resto, o trabalho de Arno J. Mayer sobre «a persistência do Antigo Regime»<sup>21</sup> sugere que a feudalização da burguesia europeia não constituiu uma singularidade alemã. Em segundo lugar, Blackbourn e Eley problematizaram pertinentemente o nexos causal unidireccional que se supõe existir entre burguesia, liberalismo, parlamentarização e democratização. Por um lado, argumentam, a burguesia alemã pôde ascender socialmente sem reivindicar de forma clara, inequívoca e sonora um programa político liberal, mercê da sua influência na vida económica e associativa, a partir da qual consegue despoletar transformações sociais sem surgir abertamente na arena política como força autónoma. Por outro lado, mesmo quando adopta um programa liberal – e uma parte da burguesia alemã, mesmo depois da derrota de 1848-49, fê-lo –, o seu interesse pôde consistir estritamente em parlamentarização, sem democratização, tendo em conta as reservas suscitadas pelo crescimento do movimento operário (que, na Alemanha, se organizou assaz precocemente num partido de massas).<sup>22</sup>

À tese da revolução política burguesa falhada como não-evento primordial na revisão negativa do *Sonderweg* alemão, Blackbourn e Eley contrapõem a ideia de uma revolução burguesa em larga medida bem-sucedida, mas que triunfou discretamente e em esferas outras que não a política em sentido estrito. Para Blackbourn, o vigor do capitalismo industrial alemão nas décadas finais de oitocentos, assente na consolidação

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democracias capitalistas Ocidentais surgidas no seguimento das revoluções burguesas como, por outro lado, da alternativa ditatorial comunista, exemplificada por Rússia e China, onde o campesinato – e não a burguesia ou as elites agrárias – surge como o actor histórico central (pp. 413 e ss.).

<sup>21</sup> Arno J. Mayer, *The Persistence of the Old Regime: Europe to the Great War*, Nova Iorque, Pantheon, 1981.

<sup>22</sup> Para uma síntese dos argumentos de Blackbourn e Eley, incluindo respostas às reacções críticas suscitadas pelo seu trabalho na historiografia alemã, veja-se a introdução a David Blackbourn e Geoff Eley, *The Peculiarities of German History: Bourgeois Society and Politics in Nineteenth-Century Germany*, Oxford e Nova Iorque, Oxford University Press, 1984, pp. 1-35.

jurídica da propriedade privada, a par da vitalidade crescente da sociedade civil, representam uma transformação cujo sucesso se testemunhava, sobretudo, pela naturalidade com que era encarada.<sup>23</sup> Na esfera política, pelo contrário, as pretensões liberal-burguesas foram sempre fortemente contestadas. Com efeito, muitos conflitos socioeconómicos latentes encontram expressão no som e na fúria da arena política, à medida que os notáveis cedem o lugar às massas – consequência inevitável, ainda que porventura não-intencionada, da adopção do sufrágio universal masculino em 1871 – e que a agenda passa a ser crescentemente definida ora pelas exigências da classe trabalhadora, ora por um nacionalismo radical de extracção pequeno-burguesa.<sup>24</sup>

A crítica de Blackbourn e Eley, dois historiadores do período Guilhermino, à reelaboração pós-1945 das teses da excepcionalidade histórica alemã tem implicações profundas no que diz respeito à leitura da experiência de Weimar. Com efeito, ela ajuda-nos a libertá-la da narrativa teleológica que concebe o conturbado regime democrático essencialmente como antecâmara dos horrores nazis. Nas próprias palavras dos autores, um dos seus principais propósitos era o de «restaurar um sentido de contingência – ainda que não de acidente – à história alemã moderna», salvando-a da «tirania da visão retrospectiva»<sup>25</sup>. Detlev Peukert, autor daquela que é ainda hoje, apesar dos inúmeros volumes desde – e até – então publicados, a mais iluminadora das interpretações históricas da República de Weimar, situa-se na mesma linha ao sublinhar a injustiça que reside em avaliar Weimar unicamente à luz do seu trágico final.<sup>26</sup> Em suma, a história de Weimar deve ser lida nos seus próprios termos – e ao lançarmo-nos nesse intento cedo percebemos

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<sup>23</sup> David Blackbourn, «The Discreet Charm of the Bourgeoisie: Reappraising German History in the Nineteenth Century», in David Blackbourn e Geoff Eley, *The Peculiarities of German History*, pp. 176 e ss.

<sup>24</sup> *Ibid.*, pp. 238 e ss. Sublinhe-se, todavia, que a obsolescência da política de notáveis é um processo assaz distendido no tempo e que obedece a ritmos diferentes. Se é certo que, nos centros urbanos e em seu redor, ele avança imparavelmente nas décadas anteriores à Primeira Guerra, pelo contrário, no grande conjunto de pequenas cidades e zonas agrícolas onde ainda vivia a maioria da população alemã, a estocada decisiva nas elites políticas tradicionais dá-se, a partir de 1929-30, com a implosão das organizações políticas liberais e conservadoras e a deserção em massa das suas fileiras para o movimento nacional-socialista. Vide Detlev J. K. Peukert, *The Weimar Republic: The Crisis of Classical Modernity*, Harmondsworth, Allen Lane, 1991, pp. 230-236.

<sup>25</sup> Blackbourn e Eley, *The Peculiarities of German History*, p. 33: «One of our intentions was to try to restore a sense of contingency – although not of accident – to modern German history. That lay behind our concern to rescue Imperial Germany from the tyranny of hindsight.»

<sup>26</sup> Ver Detlev J. K. Peukert, *The Weimar Republic*, p. 275.

que o «sentido de contingência» que nela assoma pode revelar-se bem mais intenso do que aquele que Blackbourn e Eley quiseram recuperar para o *Reich* Guilhermino.

Em boa verdade, 1918 poderia ter sido – e até certo ponto foi mesmo – um ano zero, de recomeço assente em novos alicerces e projectando-se rumo a novos horizontes, análogo a 1945. Longe da imagem de uma aberração anacrónica por comparação com um suposto modelo ideal de modernização política, na República de Weimar deparamo-nos com desenvolvimentos que antecipam fases posteriores da experiência política na Europa Ocidental. Pela primeira vez na história europeia, um regime liberal-democrático tinha por base um compromisso onde a força eleitoral e o programa político de um partido operário eram centrais e imprescindíveis. Nunca até então a relação entre empregadores e sindicatos industriais havia adquirido semelhante enquadramento institucional, decorrente do acordo Stinnes-Legien de 1918. E também pela primeira vez uma república inscrevia o Estado de bem-estar social no seu ordenamento constitucional, para logo se deparar com as dificuldades da sua concretização em clima económico adverso.<sup>27</sup> No entanto, é na esfera sociocultural que a imagem de Weimar como laboratório de inovação é mais vincada. Como refere Peukert, não houve ideia de vanguarda que, nessa década e meia de história alemã, não tivesse sido formulada ou tentativamente posta em prática nos campos da criação artística, da produção intelectual, da ciência e da tecnologia. Porém, este mesmo florescer galopante da novidade encerrava em si sintomas de crise e impasse – e não deixou de suscitar, imediatamente, violentas reacções.<sup>28</sup>

A noção de crise, na sua ambiguidade – como momento de desorientação e incerteza, mas que não exclui a esperança na medida em que deixa possibilidades e escolhas futuras em aberto –, afigura-se assim mais frutífera para a leitura dos anos de Weimar do que a ideia de uma continuidade necessária, estabelecida retrospectivamente. Ainda na esteira de Peukert, importa entender o conceito de crise em sentido epocal lato, isto é, conforme indicado pelo subtítulo da sua história de Weimar, como «crise da modernidade clássica». Restringir o âmbito da crise aos desenvolvimentos políticos em sentido estrito, como o faz uma das mais recentes sínteses históricas ao pintar o retrato de uma república democrática sitiada pelo crescimento, nas suas margens, de forças

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<sup>27</sup> Sobre a expansão e crise do Estado social de Weimar, ver *ibid.*, pp. 129-146.

<sup>28</sup> *Ibid.*, p. 276. Uma das diferenças cruciais entre 1918 e 1945 é, sem dúvida, a ausência de uma situação de quase *tabula rasa* na primeira dessas datas. Em Weimar, a novidade surgia a cada esquina, é certo, mas a influência dos velhos legados persistia. Na ressaca do nazismo, pelo contrário, o anterior regime e tudo o que a ele estava associado haviam caído em absoluto descrédito.



extremistas<sup>29</sup>, revela-se redutor. A noção de «modernidade clássica» – ou, como preferimos, de modernidade tardia – permite ler conjuntamente as fracturas políticas, os paradoxos culturais e as tensões socioeconómicas da modernização. E, nessa luz, a experiência de Weimar, com as suas «peculiaridades»<sup>30</sup> e a sua peculiar intensidade (no que toca à oposição entre capital e trabalho, aos dramas da hiperinflação, aos efeitos da crise económica mundial, à alteração dos papéis de género, à fragilidade das coligações governamentais, à crítica cultural à “americanização” dos mundos do trabalho, do entretenimento e da arte, etc.), surge como instância paradigmática de uma crise geral da modernidade Ocidental.<sup>31</sup>

Na verdade, Peukert não foi o primeiro a propor uma leitura sincrónica das crises política e cultural de Weimar.<sup>32</sup> Já Peter Gay o havia feito num brilhante ensaio originalmente publicado em 1968.<sup>33</sup> E também a perspectiva deste autor se aproxima mais de uma noção ambivalente e indeterminada de crise do que da simples inserção numa grande narrativa de continuidade. Para Gay, o elemento de ruptura no ano de 1918 é indiscutível: em Weimar, velhas elites artísticas e intelectuais viram a sua hegemonia amplamente contestada pela vanguarda modernista; por novas formas de pensamento e expressão; e por uma democratização sem precedentes dos espaços públicos e culturais. O fosso entre o antes e o depois não podia ser negado, se os marginais do Império – o judeu e o socialista – surgiam, em alguns domínios<sup>34</sup>, como figuras de proa do novo *establishment* («*the outsider as insider*»). Mesmo que, na linguagem psicanalítica

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<sup>29</sup> Ernst Nolte, *Die Weimarer Republik: Demokratie zwischen Lenin und Hitler*, Munique, Herbig, 2006. De resto, pelo menos em termos de pura aritmética eleitoral, o crescimento das forças extremistas de esquerda e de direita só impossibilita a formação de uma coligação pró-republicana a partir de 1930-32. Até essa data, as causas da instabilidade governativa devem ser procuradas entre os próprios partidos do regime.

<sup>30</sup> Como é evidente, todas as histórias nacionais modernas têm as suas peculiaridades, que as afastam, em algum sentido, dos tipos-ideais abstractos que possam ser concebidos pelas teorias da modernização, por mais sofisticadas que estas últimas possam ser.

<sup>31</sup> Peukert, *The Weimar Republic*, p. xiii: «[T]o say that German society underwent a relatively normal version of the modernization process is in no sense to declare National Socialism, or the events that gave rise to it, innocuous. On the contrary, it provides a warning against the mistaken notion that there is anything innocuous about ‘normal’ industrial society as such.»

<sup>32</sup> Julgamos que o grande mérito deste autor reside em tê-la urdido ao mais imediato nexos entre as esferas do poder e da economia, conseguindo assim compor a ampla tela de uma «crise da modernidade clássica».

<sup>33</sup> Peter Gay, *Weimar Culture: The Outsider as Insider*, Nova Iorque e Londres, W. W. Norton & Company, 2001.

<sup>34</sup> Mas não em todos: sistema universitário, burocracia estatal e exército permaneceram largamente impermeáveis à mudança.

empregue por Gay na organização do seu ensaio, a «revolta dos filhos» tenha acabado por sucumbir à «vingança dos pais»<sup>35</sup>, esse resultado não estava determinado à partida e não é lícito que sufoque o olhar e o discurso sobre o passado. Na mais recente historiografia anglo-saxónica, o volume de Eric D. Weitz sobre a Alemanha de entre-guerras segue a intuição fundamental das crises de Weimar como momentos divididos entre a abertura das suas promessas e o fechamento da sua tragédia.<sup>36</sup>

No campo das ideias e do pensamento, onde o nosso objecto de estudo mais directamente se insere, as teses da peculiaridade histórica alemã, com a sua narrativa teleológica estrita culminando na ascensão de Hitler ao poder, assumiram roupagens distintas das interpretações históricas até agora discutidas. Mas o seu alcance é, em larga medida, o mesmo: à singularidade do percurso histórico alemão na modernidade corresponderia uma peculiar mente alemã, caracterizada pela persistência de ideias irracionalistas e niilistas, bem como de um forte pessimismo cultural.<sup>37</sup> Ora, a interpretação do pensamento de Weber, Kelsen e Schmitt no período de Weimar tem também sofrido de um enviesamento retrospectivo sob o ponto de vista do colapso de 1933 e dos horrores que se lhe seguiram. A mais importante obra sobre o pensamento político de Weber conclui que este, ainda que não intencionalmente, acabou por aplanar o caminho para o triunfo do totalitarismo na Alemanha.<sup>38</sup> Quanto a Kelsen, dos três aquele que aparenta situar-se mais longe de qualquer implicação no nazismo, é comum sustentar-se que o positivismo formalista da sua *Teoria Pura do Direito* se presta facilmente a apropriação por forças totalitárias, que assim logram consolidar juridicamente as suas atrocidades.<sup>39</sup> No que toca a Schmitt, a adesão ao partido nazi, a colaboração nas

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<sup>35</sup> *Ibid.*, pp 102-145. Curiosamente, só uma década mais tarde é que Peter Gay viria a dedicar-se ao estudo da vida e obra de Freud.

<sup>36</sup> Eric D. Weitz, *Weimar Germany: Promise and Tragedy*, Princeton e Oxford, Princeton University Press, 2007. Para uma síntese do incontável acervo bibliográfico sobre a história de Weimar, veja-se o curto ensaio com que termina esta obra, pp. 401-405.

<sup>37</sup> Refira-se aqui apenas duas das mais influentes obras desta linhagem, para a qual contribuíram sobretudo historiadores de origem alemã emigrados nos Estados Unidos: Fritz Stern, *The Politics of Cultural Despair: A Study in the Rise of the Germanic Ideology*, Berkeley, Los Angeles e Londres, University of California Press, 1961; Fritz K. Ringer, *The Decline of the German Mandarins: The German Academic Community, 1890-1933*, Cambridge, Mass., Harvard University Press, 1969.

<sup>38</sup> Wolfgang J. Mommsen, *Max Weber und die Deutsche Politik, 1890-1920*, Segunda Edição Expandida, Tübingen, J. C. B. Mohr (Paul Siebeck), 1974, pp. 435-437.

<sup>39</sup> Veja-se, por todos, Leo Strauss, *Natural Right and History*, Chicago e Londres, Chicago University Press, 1953, p. 4, n. 2.

primeiras iniciativas legislativas do regime de Hitler e os indecorosos excessos verbais antissemitas mobilizaram, natural e compreensivelmente, muitas atenções.<sup>40</sup>

No entanto, mais significativa que juízos individualizados sobre a relação do pensamento de cada um dos três autores com a ascensão do nazismo é a construção de uma narrativa de continuidade entre eles – para a qual contribuíram comentadores de diversa orientação político-ideológica – que de certo modo se propõe contar a história singular do colapso da razão alemã. Dois elementos da reflexão weberiana constituem o ponto de partida desta encarnação da teleologia negativa do *Sonderweg* no campo da interpretação do pensamento social e político: o conceito de ciência social axiologicamente neutra e a concepção carismático-plebiscitária da moderna democracia de massas. Por um lado, o conservador jusnaturalista Leo Strauss sublinha as implicações supostamente niilistas de uma ciência social indiferente às questões morais, da qual Weber seria o principal arauto e que havia encontrado na ciência jurídica de Kelsen poderosíssima manifestação.<sup>41</sup> Por outro lado, críticos próximos da Escola de Frankfurt, igualmente insatisfeitos com o pretenso vazio normativo da teoria weberiana<sup>42</sup>, não deixaram de sublinhar a afinidade, primeiramente divisada pelo historiador Wolfgang Mommsen<sup>43</sup>, entre uma das figuras de proa do liberalismo alemão ao longo da era imperial e o mais feroz crítico da democracia liberal durante a República de Weimar, com Jürgen Habermas a afirmar no final da sua intervenção no colóquio de Heidelberg que celebrava o centenário de Max Weber, em 1964, que Carl Schmitt era «discípulo legítimo» ou talvez até «filho natural» de Weber<sup>44</sup>.

Ora, a abordagem do presente trabalho, pelo contrário, rejeita esta narrativa de continuidade iluminada retrospectivamente pela experiência da «catástrofe alemã»<sup>45</sup>, esforçando-se por restituir às ideias políticas de Weber, Kelsen e Schmitt em Weimar um «sentido de contingência» e uma dimensão crítica. Em boa verdade, a partir do momento

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<sup>40</sup> Note-se que o primeiro biógrafo de Schmitt foi justamente um historiador – norte-americano – da Alemanha nazi: Joseph W. Bendersky, *Carl Schmitt: Theorist for the Reich*, Princeton, Princeton University Press, 1983.

<sup>41</sup> Ver Strauss, *Natural Right and History*, pp. 1-8 e, explicitamente sobre Weber, pp. 36-80.

<sup>42</sup> Vide, por exemplo, Max Horkheimer, *The Eclipse of Reason*, Nova Iorque, Continuum, 1974, p. 6.

<sup>43</sup> Mommsen, *Max Weber und die Deutsche Politik*, pp. 408-413.

<sup>44</sup> Jürgen Habermas, *Zur Logik der Sozialwissenschaften*, Quinta Edição Expandida, Frankfurt am Main, Suhrkamp, 1982, p. 85.

<sup>45</sup> Friedrich Meinecke, *Die deutsche Katastrophe: Betrachtungen und Erinnerungen*, Wiesbaden, E. Brockhaus, 1946.

em que não as remetamos necessariamente para o colapso de 1933, abre-se a possibilidade de relacioná-las, em olhar mais matizado, com diferentes instâncias da crise de Weimar. Seguindo uma periodização histórica em traços gerais consensual, pode ler-se os escritos políticos de Weber à luz do «trauma de nascimento» (Peter Gay) da república; a teoria democrática de Kelsen na óptica da precária estabilidade de 1924-29; e a crítica antiparlamentar de Schmitt sob a perspectiva da crise final de 1930-33. Por outro lado, a superação do marco histórico negativo de 1933-1945 – que não significa de modo algum, sublinhemo-lo, uma relativização dos seus horrores – permite também recuperar o potencial crítico dos três autores aqui considerados, que aliás nunca deixou de ser explorado por intérpretes menos interessados em leituras eminentemente históricas do pensamento político. Essa recuperação é de extrema importância, na medida em que o problema da legitimidade política na modernidade tardia, conforme sugeriremos nas linhas que se seguem, não se encontra acantonado num passado claramente determinável. Com efeito, trata-se de uma questão que, ora mais ora menos urgentemente, paira ainda no horizonte dos nossos dias.

### **3. Ideias políticas na modernidade tardia: desafios e abordagens**

O estudo do pensamento político da modernidade tardia coloca desafios delicados a quem a ele se dedica. É certo que alguns obstáculos podem ser evitados, mesmo que não ultrapassados, secundarizando-se a dimensão histórico-temporal das ideias. Pode discutir-se Weber, Kelsen e Schmitt numa perspectiva tendencialmente a-histórica, com as suas ideias sendo transpostas para o presente do intérprete e para as suas preocupações substantivas específicas, da mesma forma que se discute tantas vezes Platão, Tomás de Aquino, Hobbes ou outro qualquer grande nome do vasto cânone político-filosófico estabelecido, mais ou menos arbitrariamente, pela tradição académica. Verdade seja dita: muita bibliografia secundária de indiscutível relevo sobre os nossos três autores foi escrita com não mais do que um olhar marginal para o contexto histórico. Talvez exista mesmo, contrariamente ao que pressupõe o historiador do pensamento mais apegado ao seu *métier*, um fugidio valor intrínseco das ideias que não se deixe amarrar a uma determinada origem espacial e temporal, alimentando intercâmbios intelectuais através dos séculos e entre culturas e geografias. Em todo o caso, independentemente do que se possa pensar

sobre isso, o rumo seguido pela presente exposição deve já ter deixado bem claro que a dimensão histórica do problema é entendida como crucial, pelo que certos desafios não podem ser simplesmente ignorados. Se Weimar, mais do que uma etiqueta de ordenamento cronológico, deve ser entendido como instância de crise dos fundamentos político-intelectuais da modernidade tardia, importa procurar saber até onde o estudo histórico das ideias nos pode levar na sua elucidação – e a partir de onde, eventualmente, ele deixe de constituir hipótese viável.

O estudo do pensamento político numa perspectiva histórica foi fortemente impulsionado, na segunda metade do século passado, pela emergência da Escola de Cambridge, liderada por Quentin Skinner e J. G. A. Pocock. Esta corrente esforçou-se por traçar uma divisão de trabalho clara entre, por um lado, a história das ideias e, por outro, a filosofia. Enquanto o objecto desta última seria a coerência formal dos sistemas de pensamento, a abordagem histórica trataria a actividade intelectual do passado como um evento, como algo que «realmente aconteceu»<sup>46</sup>. Ora, tudo o que se possa dizer que «realmente aconteceu» ao nível do pensamento traduz-se, necessariamente, em linguagem. Logo, a história das ideias – incluindo a do pensamento político – define-se como o estudo das linguagens do passado, do modo como estas foram usadas, compreendidas e transformadas pelos seus falantes. Neste sentido, como refere Pocock, o método de investigação em história intelectual aproxima-se do processo de aprendizagem de uma língua estrangeira.<sup>47</sup> A analogia é iluminadora em dois aspectos. Em primeiro lugar, tal como quem aspira a dominar uma língua estrangeira, o historiador das ideias tem de aprender a operar num mundo de palavras e de significados que não é seu de origem, no qual não nasceu nem foi previamente socializado. Além disso, e em

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<sup>46</sup> J. G. A. Pocock, «Languages and Their Implications: The Transformation of the Study of Political Thought», in J. G. A. Pocock, *Politics, Language and Time: Essays on Political Thought and History*, Nova Iorque, Atheneum, 1973, pp. 6-7: «But even if the interpretation of a man's thought by historical means may be deployed in ways that are historically illegitimate, it follows even more clearly that interpretation by the philosopher, the political theorist, or – when he too enters the arena – the critic of literature should not be identified, or rather confounded, with interpretation by the historian. The statements made by any one of these practitioners are not historical statements; they are designed to produce, or elicit, formal relationships or empirically testable propositions, not with what *eigentlich* happened or – the special form which this takes in the history of thought – what *eigentlich* was meant.»

O germanismo constitui referência a Leopold von Ranke e ao seu princípio – no fundo, um truísmo no qual toda a profissão historiográfica, independentemente da orientação teórica ou metodológica, se revê – de que a história, no lugar de aspirar a julgar o passado, deve limitar-se a dar a ver o que *realmente* aconteceu (*wie es eigentlich gewesen*).

<sup>47</sup> Vide Pocock, «Languages and Their Implications», p. 28; também Efraim Podoksik, «How is modern intellectual history possible?», *European Political Science*, Vol. 9, Setembro de 2010, p. 307.

estreita relação com essa primeira condição, o investigador tem de ter em mente que proficiência no uso de linguagens do passado não equivale à exaustão de todo o seu potencial – saber falar uma língua estrangeira não significa que se possa dizer *tudo* nessa língua; o conhecimento produzido pelo estudo histórico das ideias é, pela sua própria natureza, parcial e selectivo.<sup>48</sup> Nessa medida, a metáfora avançada por Efraim Podoksik – de historiadores intelectuais como espiões linguísticos do tempo – revela-se particularmente feliz.<sup>49</sup>

Ora, os desafios que se colocam a um espião dependem largamente do objecto da espionagem. Pode, pois, especular-se, no domínio da história do pensamento, que certas épocas, ou que certas tradições intelectuais no seio de uma determinada época, se prestem mais facilmente à investigação, enquanto outras brindam o intérprete com dificuldades mais sérias. Os principais expoentes da Escola de Cambridge dedicaram-se, quase em exclusivo, ao estudo do pensamento político nos alvares da modernidade.<sup>50</sup> É lícito, pois, presumir que o seu sucesso foi, de algum modo e até certo ponto, facilitado pelas peculiaridades dessa época, e reflectir sobre os obstáculos que se possam levantar ao emprego da sua abordagem a outros períodos históricos.

No que toca ao pensamento político da modernidade tardia, surge imediatamente o problema da falta de distanciamento histórico. Porém, segundo Podoksik, esse não é o aspecto decisivo. Para este autor, as causas da tremenda dificuldade em escrever uma síntese abrangente do pensamento político do século XX residem na progressiva desintegração da linguagem política – e a história das ideias torna-se uma impossibilidade ante a decomposição da linguagem, que a torna gradualmente inapreensível. Tais processos de desagregação linguística estão ligados, entre outros factores, à democratização do discurso político, à concomitante heterogeneização das audiências dos textos políticos e ao sempre crescente fosso, tanto em termos de estilo como de conteúdo,

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<sup>48</sup> No limite, claro, todo o conhecimento o é. E a limitação, seguindo a analogia, estende-se aos próprios falantes maternos de uma dada língua: aprender português desde o berço não constitui condição suficiente para escrever poesia épica como Camões; e mesmo de um génio como Camões não se pode dizer que tenha esgotado, nem de perto nem de longe, o potencial semântico, pragmático e estético da língua portuguesa.

<sup>49</sup> Podoksik, «How is modern intellectual history possible?», p. 306.

<sup>50</sup> A grande referência são os dois tomos de Skinner sobre as fundações do pensamento político moderno no Renascimento e na Reforma: Quentin Skinner, *The Foundations of Modern Political Thought*, Dois Volumes, Cambridge, Cambridge University Press, 1978.

entre o discurso das elites intelectuais, por um lado, e o do grande público e dos seus activistas políticos, por outro.<sup>51</sup>

Ora, Podoksik crê que estas dificuldades ocasionadas pelos aparentemente irreversíveis processos de desintegração da linguagem política podem, até certo ponto, ser superadas, se o investigador lograr escrever a história do pensamento político tardo-moderno através da biografia intelectual de um autor que possa servir de guia à sua época – e cuja obra empreste à linguagem política tardo-moderna a unidade e coerência que manifestamente lhe faltam.<sup>52</sup> Coloca-se todavia a questão: será que existe algum autor que nos possa prestar esse precioso serviço de guia epocal? Em boa verdade, a modernidade não se limitou a alargar o fosso político-linguístico entre as elites intelectuais e o grande público. Além disso, importa também considerar a crescente diferenciação no seio das próprias elites. Nas palavras de Podoksik, a linguagem política sempre foi «um refinamento» da experiência política de uma dada sociedade «através da lente da sua classe letrada»<sup>53</sup>. Ora, a condição moderna caracteriza-se justamente também por divisões profundas entre essa mesma «classe letrada». O discurso político das vanguardas culturais e artísticas tem pouco em comum com o das elites económico-financeiras, que por sua vez difere largamente do de juristas proeminentes, especialistas técnico-científicos, doutrinários religiosos e por aí em diante até às próprias elites políticas *strictu senso*. Uma conversa em torno de temas e questões políticas, supondo que estes se deixem sequer definir mais ou menos consensualmente, entre as diferentes partes desta elite intelectual torna-se extremamente difícil, senão impossível, não porque redunde necessariamente em polémica insanável, mas porque tende a assumir os contornos de um diálogo de surdos, na medida em que os seus vocabulários específicos são, muitas vezes, incomensuráveis. Para servir o propósito de abrangência, o guia numa viagem pelas ideias políticas da modernidade tardia teria de ser um autor que, de algum modo, escapasse a este vórtice de especialização e fragmentação, ou cujo pensamento conseguisse cortar transversalmente por entre ele. Na medida em que um tal herói possa de todo ser encontrado, não seria exagero chamar-lhe ave rara.

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<sup>51</sup> Ver Podoksik, «How is modern intellectual history possible?», pp. 310-312.

<sup>52</sup> *Ibid.*, pp. 313-314. O modelo é aqui explicitamente a extensa biografia intelectual de Edward Gibbon publicada por J. G. A. Pocock a partir de 1999, que consiste numa abrangente introdução à história das ideias do iluminismo anglo-francófono do século XVIII: J. G. A. Pocock, *Barbarism and Religion*, Cinco Volumes, Cambridge, Cambridge University Press, 1999-2010.

<sup>53</sup> Podoksik, «How is modern intellectual history possible?», p. 312.

Em todo o caso, adoptar a vida e obra de um autor multifacetado, viajado e transdisciplinar como princípio organizador de um estudo, tão abrangente quanto possível, sobre as ideias políticas da modernidade tardia, ainda que possa albergar vantagens e benefícios práticos do ponto de vista da investigação e, sobretudo, da narração, dificilmente permitiria ao investigador ordenar o caos linguístico reinante. Ou só o lograria fazer de modo artificial, o que seria em si mesmo questionável do ponto de vista da sensibilidade disciplinar reivindicada pela própria Escola de Cambridge para a história das ideias. Se a experiência intelectual da modernidade tardia é marcada pela fragmentação da linguagem política – e não só da política –, será legítimo impor-lhe uma unidade biobibliográfica para salvar um algo vago ideal de abrangência e completude da história do pensamento? Se o que «realmente aconteceu» teve por palco um cenário de desagregação e confusão linguística, contá-lo sob o signo unitário de uma vida, ainda que profícuo na perspectiva da organização narrativa, não implica um risco sério de deturpação dos próprios eventos históricos?

Creemos, pela nossa parte, que o problema é mais fundo do que Podoksik supõe. A fragmentação da linguagem política que ele identifica como origem das dores de cabeça do historiador das ideias políticas tardo-modernas é, na verdade, consequência de uma causa primeira: a indeterminabilidade histórica da experiência da modernidade tardia. Por outras palavras, a história do pensamento desta modernidade revela-se, tão necessária quanto paradoxalmente, uma história do presente. Conhecemos os seus inícios, talvez estejamos algures a meio, mas o fim ainda não se perfila com clareza no horizonte. Enquanto, nos seus primórdios, narrados com inigualável erudição pela Escola de Cambridge, o pensamento político moderno se desenvolveu em alternativa ou por oposição à ordem teológico-política que se havia consolidado na Idade Média, e cujo soçobrar francês de 1789 pôde constituir marco simbólico de transição epocal, à medida que a modernidade se torna auto-reflexiva – e que começa a descobrir as suas próprias crises – dispersa-se em várias direcções à procura de respostas, sem rumo unívoco, mas jamais renegando essa condição de busca. Entretanto, é certo, outras datas surgiram com potencial de ruptura epocal – 1945 e o Holocausto como ponto culminante das perversões da modernidade; 1989 com o desmoronar da Rússia soviética a fazer surgir esperanças milenaristas do triunfo da democracia liberal como fim da história, ao mesmo tempo que, supostamente, anunciava o colapso de todas as grandes narrativas históricas –, mas nenhuma se impôs definindo um antes e um depois de forma tão clara como a Revolução



de 1789. No limite, mesmo os pensadores ditos pós-modernos continuam profundamente implicados nos dilemas da modernidade tardia, na medida em que não conseguem ou se recusam nomear esse outro, ainda desconhecido, que jaz além.

Em certo sentido, sim, trata-se de um problema de falta de distanciamento. Não é certo, porém, que ele seja remediável, num horizonte próximo, pela mera passagem do tempo. No início da década de 1970, Pocock fazia notar que, nas disciplinas de história das ideias políticas da Universidade de Cambridge, a designação “História do Pensamento Político” dava lugar, algures a partir do século XIX, a “Teorias do Estado Moderno”, revelando indesmentível incerteza quanto à própria natureza histórica do objecto leccionado.<sup>54</sup> Quatro décadas volvidas, Efraim Podoksik olha para os conteúdos curriculares da mesma instituição, relativos à história do pensamento político pós-1890, e sublinha a sua insatisfação face à ausência de uma canonização ampla e representativa, notando ainda que a questão, muito provavelmente, não se tornará menos problemática daí a 100 anos.<sup>55</sup> Em derradeira análise parece, pois, que a modernidade tardia confronta a história do pensamento político com os seus próprios limites disciplinares.

A via da biografia intelectual sugerida por Podoksik seria aquela em que as ideias políticas da modernidade tardia seriam tratadas de modo o mais análogo possível, e com idênticas ambições de abrangência, ao que a Escola de Cambridge logrou construir relativamente ao pensamento político desde o Renascimento até à Revolução Francesa. No entanto, a busca de coerência e unidade narrativas, assim como de abrangência epocal, tenderiam a obscurecer o sentido de crise da modernidade tardia, que constitui característica fundamental do período. O panorama político-intelectual desta modernidade não se deixa conduzir à unidade nem retratar na sua plenitude – porque se trata de um passado que prossegue e persegue, que ainda é presente.

#### **4. Weber, Kelsen e Schmitt: afinidades e divergências**

Porventura, dos autores de que nos ocupamos, Max Weber seria o que mais se aproximaria do – falando em termos propriamente weberianos – tipo-ideal de guia epocal

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<sup>54</sup> Vide Pocock, «Languages and Their Implications», p. 5.

<sup>55</sup> Podoksik, «How is modern intellectual history possible?», p. 310, n. 4.

procurado por Efraim Podoksik para cumprir a difícil tarefa de narrar a história do pensamento político na modernidade tardia. Com efeito, estamos a falar de um jurista de formação que ocupou uma cátedra em economia nacional e contribuiu decisivamente para a fundação e autonomização científica da sociologia alemã; de um homem viajado pela Europa e pelo Mundo, que aprendeu russo para poder seguir os relatos originais da Revolução de 1905 e que, já tarde no seu percurso intelectual, se dedicou ao estudo das religiões Orientais; de um cidadão com intervenção política activa, ainda que intermitente e de sucesso limitado, cuja voz foi escutada em momentos tão decisivos da história alemã do século XX como as negociações do Tratado de Versailles e o processo constituinte de 1919 – e tudo isso apesar de uma saúde mental frágil que o fez abdicar da carreira universitária à qual tão cedo havia acedido.<sup>56</sup>

No entanto, um olhar focado em Weber restringiria fortemente o escopo de uma análise da crise da democracia liberal e da legitimidade política na modernidade tardia. Quando muito, poderia guiar-nos pelos paradoxos do liberalismo tardio. Mas Weber foi sobretudo um homem da era imperial. Tendo morrido em 1920, pôde acompanhar apenas o «trauma de nascimento», e já não as dores de crescimento, da República de Weimar, apesar do seu profundo conhecimento dos mais precoces processos de democratização política britânica e norte-americana. Kelsen e Schmitt, pertencendo à geração seguinte que assistiu a toda a experiência de Weimar e ao seu ocaso, permitem justamente alargar o foco. Ainda que nelas não se deixem plenamente integrar – da mesma forma que é polémico apelidar Weber de liberal – o pensamento destes dois autores remete para as outras duas grandes tradições políticas da modernidade, com as suas respectivas noções de legitimidade e tensões intrínsecas: socialismo<sup>57</sup> (Kelsen) e conservadorismo (Schmitt).

Por outro lado, sendo Weber o mais antigo dos três, a sua obra constituiu em certos aspectos referência para os outros dois. A triangulação deu origem, como vimos acima, a uma narrativa de continuidade sob o ponto de vista retrospectivo da «catástrofe alemã»,

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<sup>56</sup> Vide a magistral biografia de Joachim Radkau, *Max Weber: Die Leidenschaft des Denkens*, Munique, Carl Hanser, 2013. Se é certo que esta obra se lê também com proveito como retrato de uma época conturbada de transição para a sociedade técnico-racional-industrial moderna, tal não se deve a qualquer intenção explícita ou implícita por parte do autor de abarcar o panorama geral de uma época do pensamento. Aliás, trata-se de uma biografia *tout court*, por vezes quase obsessivamente atenta aos detalhes da vida pessoal, não de uma biografia intelectual marcada pelo primado da obra sobre o homem. Mais: Radkau não procura jamais restituir unidade e coerência nem ao pensamento da época, nem ao de Weber. Pelo contrário, interessam-lhe sobretudo as relações de ambivalência irresolúvel entre uma obra rica, complexa e multifacetada e uma personalidade internamente fragmentada.

<sup>57</sup> É certo, sublinhe-se, na variante estritamente reformista, não revolucionária.

complemento, na história do pensamento político, da revisão negativa das teses do *Sonderweg* alemão. Ora, essa narrativa precisa, pelo menos, de ser matizada. Não duvidemos de que tanto Kelsen como Schmitt aprenderam muito com Weber. O jurista de Viena, na sua formação, passou por Heidelberg, onde participou nos seminários de Georg Jellinek, jurista próximo de Weber<sup>58</sup>, e entre as suas primeiras publicações contam-se um conjunto de recensões publicadas no *Archiv für Sozialwissenschaften und Sozialpolitik*, co-editado por Weber<sup>59</sup>. Schmitt, por seu turno, terá assistido, em Munique, às duas célebres palestras weberianas sobre a ciência e a política como vocações, participado nos seminários para jovens docentes que Weber dirigiu nessa mesma cidade, no seu fugaz regresso à carreira universitária, e inclusivamente conversado em privado com o autor em algumas ocasiões.<sup>60</sup> Apesar destas aproximações, todavia, as passagens nas obras de Kelsen e Schmitt que remetem explicitamente para Weber são, na sua maioria, de natureza crítica, com o esforço de demarcação a superar as ocasionais manifestações de débito intelectual.<sup>61</sup>

Neste contexto, falar em «filhos naturais» ou sequer em «discípulos legítimos» constitui manifesto exagero. Em boa verdade, como poderiam o normativista Kelsen e o decisionista Schmitt, polos diametralmente opostos do pensamento jurídico-político de Weimar<sup>62</sup>, descender de um mesmo progenitor intelectual? Uma resposta afirmativa

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<sup>58</sup> Sobre a relação entre Weber e Jellinek, e sobretudo sobre a importância da teoria social do Estado deste último na elaboração do conceito sociológico de Estado do primeiro, veja-se Stefan Breuer, *Georg Jellinek und Max Weber: von der sozialen zur soziologischen Staatslehre*, Baden-Baden, Nomos, 1999.

<sup>59</sup> Veja-se Hans Kelsen, *Werke*, Vol. 1, Matthias Jestaedt (Ed.), Tübingen, Mohr Siebeck, 2007, pp. 561-584.

<sup>60</sup> Ver Paul Noack, *Carl Schmitt: Eine Biographie*, Frankfurt am Main, Propyläen, 1993, pp. 41-42.

<sup>61</sup> Algumas dessas instâncias serão dissecadas, a seu tempo, no decorrer da nossa reflexão. Sobre a relação entre Weber e Kelsen, veja-se: Norberto Bobbio, «Max Weber e Hans Kelsen», in Norberto Bobbio, *Diritto e Potere: Saggi su Kelsen*, Nápoles, ESI, 1992, pp. 159-177; Weyma Lübke, *Legitimität kraft Legalität: Sinnverstehen und Institutionenanalyse bei Max Weber und seinen Kritikern*, Tübingen, Mohr Siebeck, 1991, pp. 25-65; Agostino Carrino, «Max Weber et Hans Kelsen», in Carlos-Miguel Herrera (Dir.), *Le droit, le politique autour de Max Weber, Hans Kelsen, Carl Schmitt*, Paris, L'Harmattan, 1995, pp. 185-203. Sobre Weber e Schmitt, vide: G. L. Ulmen, *Politischer Mehrwert: Eine Studie über Max Weber und Carl Schmitt*, Weinheim, VCH Acta Humaniora, 1991; Catherine Colliot-Thélène, «Carl Schmitt contre Max Weber: rationalité juridique et rationalité économique», in Herrera (Dir.), *Le droit, le politique*, pp. 205-227; Dana Villa, «The Legacy of Max Weber in Weimar Political and Social Theory», in Gordon e McCormick (Eds.), *Weimar Thought*, pp. 73-86.

<sup>62</sup> A rivalidade entre Kelsen e Schmitt é sobejamente conhecida. Partes importantes das suas obras foram escritas em resposta às teses do outro. O confronto terá atingido o auge nos anos da crise final de Weimar, com a polémica em torno do controlo da constitucionalidade (Carl Schmitt, *Der Hüter der Verfassung*, Tübingen, J. C. B. Mohr (Paul Siebeck), 1931; Hans Kelsen, «Wer soll der Hüter der Verfassung sein?», in Hans Klecatsky, René Marcic, Herbert Schambeck (Eds.), *Die Wiener rechtstheoretische Schule: Schriften von Hans Kelsen, Adolf Merkel, Alfred Verdross*, Vol. 2, Viena, Europa Verlag, 1968, pp. 1873-

poderia, é certo, apontar para a diversidade interna da própria obra de Weber. Enquanto Kelsen – mais precisamente: o Kelsen da *Teoria Pura* – estaria na linhagem do Weber metodologista que reclama para as ciências sociais uma estrita neutralidade axiológica concebida à imagem das ciências naturais, Schmitt seria o herdeiro radical dos elementos decisionistas da sociologia weberiana da dominação. No entanto, ainda que se possa aceitar esta bifurcação, não deixa de ser necessário prosseguir com cautela: mesmo lá onde as afinidades existem, as divergências tendem a acabar por ultrapassá-las. E o facto é que os comentadores que estabelecem linhas de sucessão entre Weber, por um lado, e Kelsen e Schmitt, por outro, o fazem sempre, em cada caso, entre o primeiro e *apenas* um dos segundos, nunca os dois. A colocação de ambos, simultaneamente, na linhagem sucessória implicaria que se postulasse a existência teórica de pelo menos dois Webers, levantando-se imediatamente o problema de saber qual dos “filhos” – e dos “pais” – o “legítimo” e qual o “ilegítimo”.

Na verdade, conhecemos apenas uma obra dedicada especificamente aos três autores aqui estudados – e trata-se não de um estudo monográfico, mas de uma recolha de ensaios apresentados por ocasião de um colóquio internacional decorrido em 1993 na Universidade de Paris X.<sup>63</sup> Na introdução a esse volume, Carlos-Miguel Herrera refere que o terreno comum de Weber, Kelsen e Schmitt é o da recusa do direito natural e o da denúncia da sua função ideológica de encobrimento da dimensão inerradicável do conflito e do horizonte inultrapassável da dominação do homem pelo homem. Se, para Kelsen, o levantar do véu jusnaturalista nos coloca ante a face de Górgona do Poder, segundo Schmitt, o direito natural não significa mais do que a soberania dos que a ele sabem apelar e que decidem do seu conteúdo e aplicação, enquanto, aos olhos de Weber, toda a vontade

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1922); o litígio entre o governo federado da Prússia e o governo do *Reich*, em 1932, onde estiveram em lados opostos da barricada continuando a batalha doutrinária (vide David Dyzenhaus, «Legal Theory in the Collapse of Weimar: Contemporary Lessons?», *The American Political Science Review*, Vol. 91, No. 1, Março de 1997, pp. 121-134); e, finalmente, a expulsão de Kelsen da Universidade de Colónia, em 1933, relativamente à qual Schmitt, colega na mesma instituição, recusou assinar a petição que se lhe opunha (ver Noack, *Carl Schmitt*, p. 185).

De entre a vastíssima bibliografia secundária consagrada à confrontação teórica entre Kelsen e Schmitt, deixem-se aqui apenas três referências, a título meramente exemplificativo, provenientes de contextos académicos distintos: Wolfgang Mantl, «Hans Kelsen und Carl Schmitt», *Rechtstheorie*, No. 4, Caderno Especial, 1982, pp. 185-199; Jean-François Kérvegan, «La critique schmittienne du normativisme kelsénien», in Herrera (Dir.), *Le droit, le politique*, pp. 229-241; David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar*, Oxford, Oxford University Press, 1999 (este último propondo o jurista social-democrata Hermann Heller como terceira via capaz de superar os principais dilemas do choque Schmitt-Kelsen).

<sup>63</sup> Herrera (Dir.), *Le droit, le politique*.

de suprimir em absoluto a dominação se esgota em utopia.<sup>64</sup> Esta rejeição abre necessariamente um espaço de tensão entre o seu pensamento e o do liberalismo clássico, assente justamente nas teorias contratualistas do direito natural, mas a simultânea recusa da própria possibilidade de uma transformação das relações de poder que possa resultar na eliminação da dominação do homem pelo homem coloca-os igualmente em diálogo crítico com a tradição socialista, incluindo o marxismo.

Ora, este campo comum de rejeição tanto das fundamentações jusnaturalistas como de horizontes de transformação social e política tidos como ilusórios – o socialismo, mormente na versão marxista, mas também, como notámos acima, o conservadorismo de inspiração neocorporativista – remete para a constelação crítica que constitui o cerne da nossa abordagem: a dupla crise da democracia liberal no período entre-guerras e o problema da legitimidade política na modernidade tardia. A afinidade relativa no diagnóstico da crise, todavia, não só dá lugar à extracção de consequências muito diversas, como advém de razões mundividenciais bem distintas. Os veredictos de Weber, Schmitt e Kelsen sobre a democracia moderna divergem e opõem-se, assim como as suas respectivas narrativas da modernidade. Analisando-os comparativamente, este trabalho poderá também contribuir subsidiariamente para uma reinterpretação do pensamento de cada um deles sob luzes menos exploradas na bibliografia secundária. No caso de Weber, movemo-nos na esteira dos que buscam os nexos entre a teoria sociológica e os escritos políticos do final da década de 1910<sup>65</sup>, rejeitando uma separação estrita entre o cientista social e o publicista político, mas interessa-nos menos a natureza estática de alguns dos conceitos fundamentais daquela – Estado, dominação, monopólio da violência física legítima – do que a dimensão dinâmico-temporal da narrativa da modernidade que ela veicula. No que toca a Kelsen, a nossa atenção centra-se não na exaustivamente debatida *Teoria Pura do Direito*, mas no seu pensamento democrático, bem menos explorado até à data<sup>66</sup>, procurando entender a defesa kelseniana da democracia parlamentar no contexto

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<sup>64</sup> Vide Carlos-Miguel Herrera, «Avant-propos», in Herrera, *Le droit, le politique*, pp. 8-9, nn. 2, 4 e 5.

<sup>65</sup> David Beetham, *Max Weber and the Theory of Modern Politics*, Segunda Edição, Cambridge, Polity Press, 1985; Joaquín Abellán, *Poder y Política en Max Weber*, Madrid, Biblioteca Nueva, 2004.

<sup>66</sup> O número especial de uma revista alemã de teoria jurídica co-editada originalmente pelo próprio Kelsen – Werner Krawietz, Ernst Topitsch e Peter Koller (Eds.), «Ideologiekritik und Demokratietheorie bei Hans Kelsen», *Rechtstheorie*, No. 4, caderno especial, 1982 –, bem como os ensaios do italiano Norberto Bobbio, *Diritto e Potere*, constituem ainda as obras de referência. A lacuna existente a este respeito na bibliografia anglo-saxónica foi só muito recentemente suprida por Sandrine Baume, *Hans Kelsen and the Case for Democracy*, Colchester, ECPR Press, 2012.

de uma visão do mundo crítico-relativista partilhada com uma certa concepção da ciência moderna. Relativamente a Schmitt, autor cujas ideias têm sido avidamente apropriadas por correntes que, à esquerda, pretendem construir uma crítica radical do liberalismo<sup>67</sup>, o esforço residirá sobretudo no sublinhar das raízes teológicas do seu pensamento e suas implicações, no limite, robustamente autoritárias.

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<sup>67</sup> Chantal Mouffe, *The Democratic Paradox*, Londres e Nova Iorque, Verso, 2005; Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt*, Nova Iorque, Cambridge University Press, 2008; Giorgio Agamben, *State of Exception*, Chicago e Londres, University of Chicago Press, 2005.

## **Introduction**

The idea of legitimacy appears in the political language of Western Europe as a counterrevolutionary watchword. Reactionaries from the North and from the South opposed to the government by the people, which they often coined as tyranny of the majority, the legitimacy of the old monarchic lineages. Soon enough, however, the idea became detached from such origin. Throughout the nineteenth century, notions of political legitimacy with reference points other than the royal blood blossomed. Quickly one began to hear about the legitimacy of a specific social class; of a certain intellectual elite or exceptional leader; of a nation, ethnic group or race; of a civilizing mission; amongst many others. Such multiplication of meanings, which not infrequently turned out to be, on closer inspection, mutually and diametrically opposed, made the term acquire a rather broad sense. Legitimacy, indeed, became the word used to designate the allusion to a higher and indisputable right which alone sustained and justified the validity of political authority. In *Economy and Society*, Max Weber voices this broad understanding of the concept, by referring the problem of legitimacy to the question of «the ultimate grounds of the validity of a domination»<sup>68</sup>.

But the spread of alternative notions of political legitimacy is also an unequivocal symptom of crisis. In fact, the emergence of the question of legitimacy as an object of debate and contestation constitutes in itself a sign of fundamental uneasiness. In normal conditions, indeed, the basic principles of the political order, far from being publicly and openly discussed, remain beneath the surface as they tacitly guide the actions of individuals and groups. The unraveling of the «ultimate grounds» of political authority and their questioning by several – frequently mutually exclusive – visions is, on the one hand, certainly the product of the modern dissolution of traditional markers of certainty, which were based upon theocentric conceptions of the human existence. Yet, on the other hand, it is also the result of the collapse of the modern rationalist illusion which, for a period, considered itself capable of furnishing an equally stable and equally lasting alternative. Thus, the study of the European crisis of political legitimacy compels us to distinguish two modernities – an early modernity marked by anthropologic optimism; a

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<sup>68</sup> Max Weber, *Economy and Society*, Berkeley, Los Angeles and London, University of California Press, p. 953 (emphasis elided).

late modernity, of much gloomier contours, characterized by mounting self-reflexivity – and to locate it explicitly in the latter.<sup>69</sup>

To be sure, the choice of the temporal markers separating these two European experiences of modernity is – and will surely remain – controversial. Perhaps it can be said, in admittedly rough terms, that the early modern era extends from the dawn of the Renaissance in the City-States of the Italian peninsula to the aftermath of the Atlantic Revolutions in the first half of the nineteenth century, whereas late modernity starts with the upsurge of nationalism and imperialism at the end of the nineteenth century and attains its tragic climax in the horrors of World War and the Holocaust. In the history of ideas, authors such as Nietzsche, Marx and Freud arise often in this regard as key transitional thinkers, whilst a sociological approach would likely place the frontier at the period when the driving processes of modernization – industrialization, urbanization and secularization – grew from marginal and embryonic phenomena, in still predominantly agricultural and traditional contexts, into central features of European societies.

Rather more polemical than the choice of temporal boundaries which might meaningfully divide the European experience of modernity in two distinct phases is, however, the assessment of the fate of such experience after 1945. If, indeed, the interpretation of World War Two and the Holocaust as the pinnacle of the self-destructive impulses of modernity is just about consensual, the same cannot be said regarding the judgments of the scenery that followed. Does it make sense to speak of a triumphant return of progressive and optimistic visions of modernity, be it under a liberal capitalist or communist guise (the latter completely shattered after 1989)? Would it be more appropriate to talk about an emptying of the modern project which gives rise to a post-modernity of undefined and indefinable contours? Or does one instead witness mere repetitions and reformulations of the characteristic tensions of late modernity?

These questions, of course, go well beyond the scope of the present study, which aims to consider the thought of three great political theorists in the interwar critical juncture, when the reflection on the issue of legitimacy was as radical, urgent and profound as ever before and ever since. But they cannot fail to shed some light, even if at

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<sup>69</sup> For a nuanced discussion of the concept of modernity, see Shmuel N. Eisenstadt, «Multiple Modernities», *Daedalus*, Vol. 129, No. 1, Winter 2000, pp. 1-29, a brilliant essay which warns against the dangers of a strictly Westernized understanding of modernization, whilst at the same time developing an outstanding rebuttal of the theses of «the end of history» (Fukuyama) and of «the clash of civilizations» (Huntington) which have stirred the waters in the social sciences at the close of the twentieth century.



a distance, onto one's questions and answers – because the trails traversed at the peak of late modernity are not as far as it might at first glance appear from the tortuous roads we travel today

### **1. The crisis of liberal democracy in interwar Europe and the problem of political legitimacy in late modernity**

The decades between the two World Wars of the last century are generally interpreted as the major period of crisis of liberal democracy in Europe. The expansion of democratic forms of government encounters there its first serious setback. If the collapse of the four great continental empires (German, Austro-Hungarian, Russian and Ottoman) in the aftermath of the 1914-18 military conflict originated, at first, an unprecedented wave of democratization, soon the movement began to be reversed. The vast majority of the new regimes in Central and Eastern Europe succumb, during the 1920s and the 1930s, to authoritarianism. In the South, since the triumph of Italian fascism in 1922, the scenario is no different. And even in the European strongholds of modern democracy – France and the UK – signs of apprehension start to arise. The blow to democratic optimism could scarcely have been more profound. After all, the road to democracy was not a one-way street.

But the crisis of liberal democracy in interwar Europe, far beyond parliamentary democracy in the strict sense, was also a general crisis of liberalism. Or, to be more precise, it prolonged and exacerbated – since it appeared to suggest that the mere democratization of the political system might not be able to reverse it – a crisis of bourgeois liberalism that had its roots in the late nineteenth century, as mass politics emerged and the labor movement gained both influence and confidence. The turn from the nineteenth to the twentieth century marks the end of the «age of security»<sup>70</sup> of the European bourgeoisie. An age that would surely not be revived after a large-scale conflict which inevitably meant, for all the nations involved, a brutal extension of State powers and prerogatives. The challenge to the fundamental institutions of the liberal-capitalist

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<sup>70</sup> Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe*, New Haven and London, Yale University Press, 2011, pp. 9-16.

system – parliament and the free market – not only persisted, but gained momentum in interwar Europe, spreading a sense of «class anxiety»<sup>71</sup> amongst bourgeois ranks.

Thus, the present work will also reflect upon this dual crisis. And it will do so by focusing on the theoretical production which emerged in the cultural and intellectual context of the most fateful democratic experience of the time: Weimar Germany.

Rereading the political thought of three crucial authors – Max Weber (1864-1920), Hans Kelsen<sup>72</sup> (1881-1973) and Carl Schmitt (1888-1985) –, one will discover three substantially different, though not wholly incommensurable, ways of understanding such a crisis. In a nutshell, one might say that these authors converge in a profound dissatisfaction with the basic assumptions of classical liberalism, based as they were upon an individualistic, abstract conception of natural law and the related notions of justice and contract. Interestingly enough, however, the refusal of the liberal paradigm in its classical terms does not lead any of the three authors to embrace either one of the two main currents which appeared at the time, in Germany and elsewhere, as major alternatives to liberalism: on the one hand, Marxian socialism and, on the other, a somewhat diffuse corporatism of conservative temper which opposed the alleged individualism and mechanicism of Western thought to a purportedly organic – and supposedly *more* Germanic – conception of the political community. In the works of Weber, Kelsen and Schmitt one encounters, albeit under diverse points of view, moments of acute critique to

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<sup>71</sup> On «the language of class anxiety», see Charles S. Maier, *Recasting Bourgeois Europe: Stabilization in France, Germany, and Italy in the Decade After World War I*, Princeton, Princeton University Press, 1988, pp. 22-39.

<sup>72</sup> Strictly speaking, Hans Kelsen's work refers much more directly to Vienna – and to the specific context of post-World War One Austria, where the author was undeniably a leading figure – rather than to Weimar. After all, the Austrian Republican Constitution of 1920 was drafted by Kelsen himself, and he also served as a judge in the newly created Constitutional Court. However, a stringent separation between the German and the Austrian experiences in the interwar period makes little sense. The crisis of democracy was perceived in very similar ways in Weimar and in Vienna. And the democratic system found in both instances the same tragic outcome, sealed in the Austrian case by Hitler's 1938 *Anschluss*. Moreover, the influence of Kelsen – who, in the early 1930s, moved briefly from Vienna to Cologne – soon radiated well beyond Viennese circles. In fact, the author was widely acknowledged as the most prominent theorist of law and the State in the German-speaking space between the two Great Wars, before turning, as a result of his emigration to the United States in 1940, into arguably the key jurist of the twentieth century.

On the centrality of Kelsen to the legal thought of Weimar, see John P. McCormick, «Legal Theory and the Weimar Crisis of Law and Social Change», in Peter E. Gordon and John P. McCormick (Eds.), *Weimar Thought: A Contested Legacy*, Princeton, Princeton University Press, 2013, pp. 56-57.

Marxism<sup>73</sup>, as well as the refusal, often in rather aggressive terms, of the buzzwords of neo-corporatist conservatism<sup>74</sup>.

However, what sets these authors apart largely surpasses such a coincidence in the rejection of the main ideological horizons of the time. The perspective which I intend to explore in this study is that Weber, Schmitt and Kelsen put forward divergent readings both of the crisis of liberal democracy and of its possible solutions. In Weber, a thinker coming from Protestant and bourgeois milieus and, to that extend, a representative of the mainstream German liberal political tradition, one comes across a desperate attempt to overcome the suffocation of politics – and of freedom? –, as a result of the unrelenting rationalization and bureaucratization of social and political organizations, through an elitist, charismatic and plebiscitary reinterpretation of modern democracy. As for Kelsen, a lawyer of Jewish origins with a professed sympathy for social democracy, one deals with an effort to democratize the political institutions inherited from nineteenth-century liberalism, an effort which seeks to divest them from their original ideological garments and to open them to the participation of hitherto partially or totally excluded social groups. At last, in Schmitt, a Catholic from modest petty bourgeois backgrounds, one discovers a visceral rejection of liberal thought in its multiple and widest dimensions; a rejection which comes circumstantially close to several different anti-liberal languages and traditions – for example: playing democracy against liberalism and legitimacy against legality; evoking the myths of nation and race; exploring notions of strong political leadership in the face of the impasses of parliamentary government –, but which, at its core, points to an authoritarian, theologically-inspired vision of politics.

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<sup>73</sup> For example: in Weber's case, the lecture on «Socialism» delivered before a group of Austrian army officers (Max Weber, «Socialism», in Max Weber, *Political Writings*, Cambridge, Cambridge University Press, 1994, pp. 272-303); in the case of Kelsen, the critique of Marxian theories of the State, developed in the context of a controversy with the Austro-Marxist Max Adler (Hans Kelsen, *Sozialismus und Staat*, Second Expanded Edition, Leipzig, C. L. Hirschfeld, 1923); regarding Schmitt, the exposure of the aporias of dialectical and historical materialism (Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, Ninth Edition, Berlin, Duncker & Humblot, 2010, pp. 63-77).

<sup>74</sup> See, for instance, Weber's aggressive rhetoric in the political writings from the last years of World War One targeted at the proponents of a return to an idealized vision of the medieval *Ständestaat* (Max Weber, «Suffrage and Democracy in Germany», in Max Weber, *Political Writings*, pp. 85, 91 and 100); Kelsen's rejection of the corporatist alternatives to parliamentary representation (Hans Kelsen, *Vom Wesen und Wert der Demokratie*, Second Revised Edition, Tübingen, J. C. B. Mohr (Paul Siebeck), 1929, pp. 47-52); and Schmitt's silence, despite his clear sympathy for Italian fascism, regarding the doctrine of the *Stato Corporativo* (Carl Schmitt, «Wesen und Werden des faschistischen Staates», in Carl Schmitt, *Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1923-1939*, Third Edition, Berlin, Duncker & Humblot, 1994, pp. 124-130).

As suggested in the inaugural lines of the present work, through these three distinct readings of the crisis of liberal democracy in interwar Germany I also aim – and above all, perhaps – at a broader reflection on the problem of political legitimacy in the late modern context. As seen above<sup>75</sup>, Max Weber defined the issue of legitimacy as pertaining to the fundamental principles which sustain the validity of the political order. Subsequently, he distinguished three so-called ideal types which could provide a better understanding of the empirical manifestations of legitimate political domination: a peculiarly modern one – legal-rational rule – in which obedience is due not to real persons, but to an abstract set of rules; and two others, whose origins are immemorial, where authority is of an inherently personal kind, either by way of tradition or charisma.<sup>76</sup> Indeed, the study not only of Weber’s political thought, but also of Kelsen’s and Schmitt’s, can hardly ignore the modern categories of rationalization and secularization and the erosion of the traditional and theocentric views of human existence which they imply.

If the pre-modern age in the West was Christian, modernity tried to emancipate itself from the dominant religion by seeking its foundations elsewhere. It ended up anchoring them in a supposedly self-sufficient human reason. In terms of political thought, the major consequence was the dissolution of the theological-political nexus. In the context of the Reformation, Thomas Hobbes arises in that regard as the decisive turning point, in his attempt to make the political order rest on purely rational grounds, with no recourse to transcendence. His Leviathan is the ultimate expression of a new understanding of political representation, which leads to the legitimation of the absolute – and no longer divinely derived – sovereignty of the monarchy. However, symbolically, it is the French Revolution which truly emerges as the event separating the Old and the New.<sup>77</sup> Indeed, it inaugurates a century marked, in its first half, by anthropological optimism and utopian projections of humanity into a future of complete rationality and

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<sup>75</sup> Fn. 68.

<sup>76</sup> Weber, *Economy and Society*, pp. 953-954.

<sup>77</sup> The French revolutionaries effectively tried to introduce a new time. For them, 1789 was not the year 1789 AD, but the first year of the Revolution. Time counted from the birth of the Son of God was replaced by a time which announced the birth of a New Man, freed from the shackles of religious authority and capable of establishing, on its own terms, the political order. However, the question is whether this analogy between the birth of Christ and the Revolution as events instituting a new era does not in itself reveal that the political, at the very moment in which it declares its liberation from theology, does not cease to incorporate within its now supposedly autonomous core, even if under new clothes, basic notions of the theological experience of the universe.

social harmony. Trust in reason; belief in progress (scientific, technical and social); consecration of inalienable and inviolable rights, inscribed in the very nature of the human being – these are the marks and the promises of post-revolutionary Europe. But the long nineteenth century (1789-1914) revealed, in its course, the dark side of progress, as well as the ambivalences of reason. The advances in industrial technique and in the capitalist economy brought with them urban poverty and the predicaments of the social question. Liberal politics quickly succumbed to the temptations of imperialism, as a way of dealing with the pressure of democratization. The language of rights, in spite of its claimed universality, did not stretch beyond European boundaries, though the continent had long ago started its overseas expansion and colonial adventures.

In a way, therefore, the continent that returns from the trenches in 1918 has trouble believing either in God or in Reason. The «ultimate grounds» of political order are at stake all over Europe, but in particular amongst those returning from the battlefields to find a political community in the process of reconstruction, as is the case in Germany.

For Weber, a pioneer in the sociological consideration of the issue of legitimacy, the intrinsically modern, legal-rational type of political domination is the product of the formalization and secularization of natural law – whose doctrine originally stems from the Protestant sects – carried out by the State bureaucracy. The procedural legality that legitimizes the modern State is hence part of the iron cage of Western modernity, which arises as an unintended consequence of Protestant asceticism. It must thus be integrated in the irresistible dynamic of rationalization and bureaucratization of ultimately all human relations. However, despite the inescapable nature of such a process, legality has, in Weber's eyes, manifest limitations as a prevailing type of legitimate domination. In the final analysis, legality, just as tradition, derives its validity from an instituting moment of rupture which belongs to the ideal type of charismatic domination. Charisma, a concept of theological origin, is for Weber, at the same time, the original and the focal point of political legitimacy. Modern mass democracy requires, in his view, a charismatic reinterpretation, not only because the belief in pure formal legality is inherently weak, but also to avoid a thorough bureaucratization of politics which would exclude the very possibility of responsible leadership. The rational-legal machine of the modern State needs, according to Weber, to be regularly re-legitimated by popular devotion to a charismatic leader.

Hans Kelsen, quite on the contrary, refuses the, albeit partial, transcendence of legality that is implied in the Weberian concept of charismatic political leadership. For the Austrian thinker, there is no doubt that all politics, including democratic politics, involves leadership and subordination. But leadership and subordination do not lie beyond the limits of the legal system, and they cannot legitimize it exogenously. Modern democracy has its foundations in its own legality, not elsewhere. Kelsen, from the three authors studied here the one who least moves away from the rationalist ideal of the Enlightenment, tries to settle such foundations through an analogy between democracy and scientific thinking, which is opposed to the alleged proximity between autocracy and metaphysics. Science is thus the ultimate stronghold of democracy. However, the scientific ideal espoused by Kelsen is not based upon an omnipotent human reason. In fact, the author is well aware of the limits of human understanding and of the impossibility of absolute knowledge, in the wake of neo-Kantian tradition. The science that democracy comes close to adopts a critical attitude towards its own assumptions and towards the empirical data that constitutes its object, recognizing the relative, transitory nature of its results. Like science, democracy must reject the very possibility of access to an absolute truth or to absolute values, in the presence of which only blind obedience would make sense. Its marks are axiological relativism and a pluralism of potentially irreconcilable and perhaps even incommensurable values and ideologies. A pluralism which might be provisionally accommodated via compromises, but never fully resolved through the integral adoption of one of the positions in dispute. At a time of profound social and political cleavages, the legitimacy of the democratic regime seemed to rest on a scientific and relativistic distance to the passions at stake.

Carl Schmitt, at last, vehemently rejects the conflation of politics with technical or scientific logics, just as he discards, in spite of a circumstantial rapprochement at some point, the sort of secular transcendence through the personal charisma of the plebiscitary leader theorized by Weber. As arguably the last great counterrevolutionary thinker, Schmitt aims to relocate law and politics firmly in the orbit of Christian theology, from which they had never actually managed to break free, since, as the author notoriously stated, «[a]ll significant concepts of the modern theory of the State are secularized

theological concepts.»<sup>78</sup> Schmitt's vision of secularism and modernity is exempt from the ambivalences of Weber's reading: it tells the story of a loss, of a retreat from the righteous path, and stands in the sharpest possible contrast to Kelsen's scientific worldview. Only Christianity, and the divine truth revealed by it, can provide the ultimate substance to the political order of the West. The concept of the political leads, in Carl Schmitt's thought, to the primacy of theology as the foundation of authority.

As one can see, the interpretation of the crisis of liberal democracy relates, in these three authors, to contrasting worldviews, which conceive the problem of the foundations of political authority in different, and sometimes opposite, terms. Of course, one deals here with two distinct levels of reflection, which assume diverse positions in a scale of abstraction. Ultimately, however, they are inseparable. On the one hand, it is difficult to imagine that the crisis of a given political system might even be reflected upon in the absence of more or less developed theories on the general issue of political legitimacy. On the other hand, theories of a more general and abstract nature tend to gain a peculiar acuteness in moments of concrete challenges to the existing political order. In this study, one will seek to emphasize the indissoluble link between the two levels of abstraction, in an effort of synthesis which aims to recast this interwar debate, which is so often segmented according to more immediate disciplinary interests – law and political science focusing mainly on the crisis of liberal-democratic regimes; philosophy and theology discussing the general question of the foundations of legitimate political authority in the modern context –, in its singularly broad scope. With a separate, autonomous chapter devoted to each author, I will try in every one of them to relate the two distinct levels of reflection with one another, calling the attention to contrasts and continuities, to ambivalences and paradoxes.

Regarding Weber, the main goal will be to read the political writings of 1917-1919, in which the plebiscitary-charismatic reading of modern mass democracy emerges, in the broader context of his narrative of modernity as an irreversible process of rationalization, secularization and bureaucratization – or, to use the author's inspired phrase, of «disenchantment of the world»<sup>79</sup>. In the case of Kelsen, the focus will be drawn

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<sup>78</sup> Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, Ninth Edition, Berlin, Duncker & Humblot, 2009, p. 43: «Alle prägnanten Begriffe der modernen Staatslehre sind säkularisierte theologische Begriffe.»

<sup>79</sup> Max Weber, «The Social Psychology of the World Religions», in H. H. Gerth and C. Wright Mills (Eds.), *From Max Weber: Essays in Sociology*, New York, Oxford University Press, 1947, p. 290: «the

to the distinction of the two main lines of reasoning of his defense of democracy: a first one, Rousseauian in its inspiration yet Hobbesian in its results, which departs from the ideas of freedom and equality to conclude for the necessity of the State as a mechanism of representation and as a way to construct a collective political will; a second one, driven by the recognition of the irreducible plurality and relativity of political values and ideologies, in which the worldviews of science and democracy intersect. Finally, in Schmitt's controversial case, I will try to bring back the circumstantial diversity of his fierce critique of liberalism, which draws on arguments and insights from various different anti-liberal traditions, to the theological core of his political thought.

Yet, before proceeding to such a task, three instances of historical, methodological and bio-bibliographical clarification are necessary. Thus, in the following lines, one will, firstly, reflect upon the possibility and the pertinence of reading the history of Weimar Germany, in spite – or rather because – of its singularities, as a paradigmatic occurrence of the crisis of late modernity. Secondly, one will discuss the difficulties faced by the study of political ideas in such a late modern context. And, thirdly, so as to better locate our own perspective, one will briefly review part of the virtually inexhaustible secondary literature which, from the author's times up until the present day, has interpreted and discussed the works of Weber, Kelsen and Schmitt.

## **2. Weimar: from «the peculiarities of German history» to «the crisis of classical modernity» (and to «the German catastrophe»)**

An intense debate over the thesis of the so-called *deutscher Sonderweg*, that is, over an alleged exceptionalism concerning the German route towards modernity, marks German historiography from the second half of the twentieth century.<sup>80</sup> And these discussions over the unique nature of Germany's path to modernity could not help but influence the historical interpretations of the Weimar Republic, as a short, albeit decisive, moment in such a peculiar trajectory.

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disenchantment of the world» (*die Entzauberung der Welt*). According to Gerth and Wright Mills, «Introduction: The Man and his Work», in H. H. Gerth and C. Wright Mills (Eds.), *From Max Weber*, p. 51, Weber might have borrowed the expression from Friedrich Schiller.

<sup>80</sup> For a critical synthesis of the debate, see Helga Grebing, *Der 'deutsche Sonderweg' in Europa 1806-1945: Eine Kritik*, Stuttgart, Kohlhammer, 1986.



Now, the idea of an exception – be it historical or of any other kind<sup>81</sup> – really only makes sense as opposed to an instance which is conceived as the norm. In the case of modern German history, the standard, normal instances, from which it supposedly differs, are the Western – British, French and, with some restrictions, also North American – experiences of political, economic, social and cultural development in the wake of a bourgeois revolution. In the German territories, however, the bourgeois revolution failed in 1848/49, thus leaving the nation’s political destiny essentially in the hands of the military and rural elite of an eminently feudal State (Prussia).

This detour from the standard script of bourgeois revolution soon turned into a major object of reflection by German thinkers, and especially by historians. For decades, the difference was interpreted in a positive light. In the first half of the nineteenth century, the German national movement, shaped by the experience of the “war of liberation” (*Befreiungskrieg*)<sup>82</sup> which put an end to Napoleon’s imperial ambitions in Central Europe, and despite the revolutionary aspirations of some of its sectors, thought of itself as an alternative to the perhaps too radical ideas of the French Revolution. After the unification, the intellectual elite of the new *Reich* spent a considerable amount of its energy praising both the uniqueness *and* the supremacy of the institutional design of the Wilhelmine Empire, emphasizing a purportedly virtuous complementarity between monarchy, army, bureaucracy, university, old agrarian and new industrial elites – and circulating a pretense opposition between, on the one hand, the “spiritual” and “organic” values that presided over the German institutions and, on the other, the alleged “materialism” and “mechanicism” which characterized the historical experience of the West.<sup>83</sup> This reading of German exceptionalism attained its heights in the nationalist intoxication of August

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<sup>81</sup> See, of course, the role such an idea plays in Carl Schmitt’s famous definition of sovereignty, below, p. 159, fns. 418 and 419.

<sup>82</sup> In this case, as in so many others, the history of the concept is in itself revealing. Liberal forces coined, at first, the expression “freedom war” (*Freiheitskrieg*) to refer to the conflict with Napoleonic France. Thus, they gave it a broader political purpose beyond the mere expulsion of a foreign invader. However, it was the conservative alternative “war of liberation” (*Befreiungskrieg*), strictly emphasizing the fight against French hegemony and occupation, which eventually prevailed both in the political and, thereafter, in the historiographical discourse. See Otto Büsch, *Handbuch der preußischen Geschichte*, Vol. II, Berlin, Walter de Gruyter, 1992, p. 51.

<sup>83</sup> It is precisely at such a self-indulgent discourse of the conservative intellectual elites that Weber targets his most scathing observations in the political writings of the last years of World War One. See above, fn. 74.

1914, when the enthusiasm of war seemed to embrace an entire nation.<sup>84</sup> The defeat of 1918, however, did not put an end to it, and the ideology of German historical peculiarity – and of its unique civilizational mission – persisted throughout Weimar until it was driven to new and unforeseen extremes by the Nazis.<sup>85</sup>

After 1945, the problem of German historical exceptionalism soon started to be approached from an opposite perspective. Meaning: the deviation from the norm was now interpreted as a failure or even as an outright aberration. With the catastrophe of the Third *Reich* being conceived as the tragic outcome of modern German history, there arises a negative reading of German exceptionalism, which searches the roots and causes of Nazism in the peculiarity of the German trajectory to modernity. Such a reversal in the evaluation of German historical exceptionalism is accompanied by a break with Leopold von Ranke's historicist paradigm, which had up until then dominated German historiography. In contrast to Ranke's approach, whose emphasis on *verstehen* tended to the naturalization of events and to the confluence of positivity and normativity, of what was and what should have been, a new generation of historians – led, among others, by Hans-Ulrich Wehler, Heinrich August Winkler and Jürgen Kocka; and backed by thinkers such as Jürgen Habermas – proposed to look critically at the past. This critical history involves clear – and quite understandably in the post-Holocaust context – ethical and political-pedagogical purposes, which are related to a deep concern with historical memory and with the processing and overcoming of a traumatic national history.<sup>86</sup> However, despite its many undeniable merits, the critical reversal of the theses of German historical exceptionalism is not without its impasses, which derive largely from its

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<sup>84</sup> In the patriotic fervor of the Great War, the «ideas of 1914», summed up in the formula duty-order-justice, were even explicitly conceived as an alternative to the French revolutionary triad liberty-equality-fraternity. See the pamphlet by the Swedish-German conservative Rudolf Kjellén, *Die Ideen von 1914: Eine weltgeschichtliche Perspektive*, Leipzig, Hirzel, 1915.

One must note, however, that the inspiration for these ideas came also from sources which one cannot all too readily assign to conservative and authoritarian traditions. For example, with regard to the idea of duty, the great reference was of course Immanuel Kant. In fact, Frederick Beiser has recently explained the decline of the neo-Kantian tradition in Weimar's philosophical panorama also as a consequence of its association with the ideology that supported the war. See Frederick Beiser, «Weimar Philosophy and the Fate of Neo-Kantianism», in Peter E. Gordon and John P. McCormick (Eds.), *Weimar Thought*, pp. 116-117.

<sup>85</sup> For a critical analysis of the positive readings of German historical exceptionalism, see Bernd Faulenbach, *Ideologie des deutschen Weges: die deutsche Geschichte in der Historiographie zwischen Kaiserreich und Nationalsozialismus*, Munich, Beck, 1980.

<sup>86</sup> The ultimately untranslatable German word is *Vergangenheitsbewältigung* (*Vergangenheit* = past; *Bewältigung* = overcoming).

teleological closure: the Third *Reich* as the fateful conclusion of a historical process; 1945 as the hour zero (*Stunde Null*) of a Germany – strictly speaking, until 1989, of one of the two Germanys – now fully integrated into the liberal-democratic tradition of Western Europe.

In this perspective, the absence of a successful bourgeois revolution in Germany is interpreted as the crucial moment – if not as the genesis – of the causal chain which explains the failure to implement and to consolidate a Western-type liberal democracy. There would indeed reside the origin of a malign disjuncture between the economic and industrial realms, with a particularly strong growth in the transition from the nineteenth to the twentieth century, and the sphere of institutions and political values, characterized by paralysis. In short, the German bourgeoisie won a prominent position in the economic life of the nation without having the need to challenge the old agrarian elites and their forms of government. Instead of the broad-based social coalitions – involving industrial workers, peasants and urban craftsmen – that marked the liberal-democratic dynamic in the West, the German bourgeoisie opted for the conciliation with the ruling powers, and let itself be feudalized to a certain extent. The traditional elites never actually dropped their leadership positions (not even after the military defeat in World War One), thus leaving an authoritarian imprint on the German path to modernity – and, of course, in the decisive moments of 1933, leading Hitler to power.<sup>87</sup>

In the early 1980s, two British historians – David Blackbourn and Geoff Eley – revived the debate around this negative reinterpretation of German exceptionalism in modern history. They did so by questioning some of its basic assumptions. Firstly, they drew attention to the problems raised by views which conceived the Anglo-American and

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<sup>87</sup> This is also, in broad strokes, the argument put forward by one of the great classics of comparative historical sociology, originally published in 1966: Barrington Moore, *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World*, Boston, Beacon Press, 2003. Moore argues that the alignment of agrarian and industrial interests «around a program of imperialism and reaction had disastrous results for German democracy» (p. 38). However, the scope of this author's comparative approach, which casts a glance far beyond Western experiences of modernization, does not make the German case – to which, besides, no separate chapter is dedicated, in spite of it being constantly mobilized for the sake of comparison – appear as a pathological anomaly. On the contrary, it integrates the German experience into one of three alternative/successive trajectories to the modern world. Alongside Japan, Germany would have followed the capitalist-reactionary route, which involved the establishment of a conservative, authoritarian regime and culminated, due to strong socio-economic pressures, in a paradoxical modernizing dictatorship led by the traditional elites. Such a path differs both from the Western capitalist democracies that emerged in the wake of bourgeois revolutions and, on the other hand, from the communist dictatorial alternative, exemplified by Russia and China, where the peasantry – and not the bourgeoisie or the agrarian elites – appeared as the key historical actor (see pp. 413 and ff.).

French experiences as ideal models of political development, in comparison to which Germany was found wanting. In truth, the heroic narrative of bourgeois emancipation in explicit rupture with the traditional elites is closer to the realm of mythology than to that of historical facts, and most historians of the Western revolutions would surely not subscribe to it. Besides, Arno J. Mayer's *The Persistence of the Old Regime* suggests that the feudalization of the bourgeoisie was not a German singularity, but rather a pan-European phenomenon. Secondly, Blackbourn and Eley pertinently problematize the unidirectional causal nexus that is supposed to exist between the rise of the bourgeoisie, the triumph of political liberalism, parliamentarization and democratization. On the one hand, they argue, the German bourgeoisie, thanks to its influence in the economy and in associative life, managed to rise socially without having to adopt a clearly and unambiguously liberal political agenda. The bourgeoisie, thus, triggered social change without appearing in the political arena as an independent political force. On the other hand, even when it adopted a liberal program – and a part of the German bourgeoisie, even after the disillusion of 1848-49, did adopt one –, its interest could consist strictly in parliamentarization, without democratization, given the anxieties activated by the relentless growth of the labor movement (which, in Germany, was soon organized in a mass political party).<sup>88</sup>

To the thesis of the failed bourgeois political revolution as the crucial non-event in the negative revision of the German *Sonderweg*, Blackbourn and Eley contrasted the notion of a largely successful bourgeois revolution, but which triumphed silently and in spheres other than politics in the strict sense. To Blackbourn, the strength of German industrial capitalism in the closing decades of the nineteenth century, based on the legal consolidation of private property, together with the growing vitality of civil society, were proof of a transformation whose success was attested by its tacit and frictionless acknowledgment by most contemporaries.<sup>89</sup> Rather differently, in the political sphere, liberal-bourgeois ambitions met strong opposition. Indeed, many latent socio-economic conflicts found expression in the sound and fury of the political arena, as the so-called

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<sup>88</sup> For a synthesis of Blackbourn's and Eley's arguments, including responses to the critical reactions to their work by a number of German historians, see the introduction to David Blackbourn and Geoff Eley, *The Peculiarities of German History: Bourgeois Society and Politics in Nineteenth-Century Germany*, Oxford and New York, Oxford University Press, 1984, pp. 1-35.

<sup>89</sup> David Blackbourn, «The Discreet Charm of the Bourgeoisie: Reappraising German History in the Nineteenth Century», in David Blackbourn and Geoff Eley, *The Peculiarities of German History*, pp. 176 and ff.

notables gave way to mass politics – an inevitable, though perhaps unintended, consequence of the adoption of male universal suffrage in 1871 – and the agenda became increasingly defined either by the demands of the working class or by a radical nationalism of petty-bourgeois extraction.<sup>90</sup>

Blackbourn's and Eley's critique of the post-1945 theses of German historical exceptionalism, although it refers mainly to the Wilhelmine period, has profound implications with regard to the reading of the Weimar experience. Indeed, it helps one cast aside the teleological narrative that views the troubled democratic experiment essentially as an antechamber to the Nazi horrors. As the authors tell us, one of their main purposes was «to try to restore a sense of contingency – although not of accident – to modern German history», rescuing it «from the tyranny of hindsight»<sup>91</sup>. Detlev Peukert, author of the most illuminating of the many historical interpretation of the Weimar Republic, follows the exact same intuition, when he emphasizes the injustice involved in the evaluation of Weimar solely in light of its tragic ending.<sup>92</sup> In sum, the history of Weimar should be read on its own terms – and in this endeavor one soon realizes that the «sense of contingency» it harbors is perhaps even more intense than that which Blackbourn and Eley sought to recover with regard to the Wilhelmine *Reich*.

Indeed, 1918 could have been – and to some extent it really was – a year zero similar to 1945, a new beginning based upon new foundations and opened to new horizons. Far from the image of an anachronistic aberration in comparison with supposedly ideal models of political modernization, in the Weimar Republic one sees developments that in fact anticipate later stages of political experience in Western Europe. For the first time in European history, a liberal-democratic regime rested on a compromise in which the electoral strength and the political program of a working-class party were central and indispensable elements. Never before had the relationship between industrial

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<sup>90</sup> *Ibid.*, pp. 238 and ff. It should be noted, however, that the obsolescence of the politics of local notables is a long-term process with significant temporal and territorial variations. It is true that in the urban centers and their suburbs the process was well on its way in the decades prior to World War One. Yet, in the large number of small towns and agricultural areas where the majority of the German population still lived, the death knell to the traditional political elites only sounded in 1929-30, with the implosion of the liberal and conservative political organizations and the mass desertion from their ranks to the Nazi movement. See Detlev J. K. Peukert, *The Weimar Republic: The Crisis of Classical Modernity*, Harmondsworth, Allen Lane, 1991, pp. 230-236.

<sup>91</sup> Blackbourn and Eley, *The Peculiarities of German History*, p. 33.

<sup>92</sup> See Detlev J. K. Peukert, *The Weimar Republic*, p. 275.

employers and workers' unions acquired such a comprehensive institutional framework as that which resulted from the Stinnes-Legien agreement of 1918. Also for the first time a republic inscribed the social welfare State in its constitutional order, and came across the predicaments of its implementation in an adverse economic climate.<sup>93</sup> Yet, it is in the socio-cultural sphere that Weimar's image as an innovation lab shines more brightly. As Peukert remarks, there was virtually no cutting-edge idea that was not formulated or tentatively implemented, in the fields of artistic creation, intellectual production, science and technology, during this decade and a half of German history. However, this same rampant flourishing of novelty contained its own symptoms of crisis and stalemate – and it immediately raised violent reactions.<sup>94</sup>

The idea of crisis, in its ambiguity – as a moment of disorientation and uncertainty, but which does not exclude hope in the sense that it leaves possibilities and choices open –, seems more fruitful for a reading of Weimar than the notion of a retrospectively established, necessary continuity. As Peukert suggests, one should understand the concept of crisis in a broad epochal sense, *i. e.*, as indicated by the subtitle of his study, as a «crisis of classical modernity». To confine the scope of crisis to political developments in the strictest sense, as does one of the latest historical syntheses<sup>95</sup>, would be a sign of short-sightedness. The notion of «classical modernity» – or, as I prefer, of late modernity – allows one to jointly read the political fractures, the cultural paradoxes and the socio-economic tensions of modernization. And in this light, the Weimar experience, with its peculiarities<sup>96</sup> and its peculiar intensity (concerning the opposition between capital and labor; the dramas of hyperinflation; the effects of the global economic crisis; the changing gender roles; the fragility of government coalitions; the cultural critique of the

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<sup>93</sup> On the expansion and crisis of Weimar's welfare State, see *ibid.*, pp. 129-146.

<sup>94</sup> *Ibid.*, p. 276. One of the crucial differences between 1918 and 1945 is undoubtedly the absence of a nearly *tabula rasa*-like situation in the first of these dates. In Weimar, novelty arose indeed at every turn, but the influence of the old legacies persisted. In the aftermath of Nazism, on the contrary, the previous regime and all that was somehow linked to it had fallen into utter disrepute.

<sup>95</sup> Ernst Nolte, *Die Weimarer Republik: Demokratie zwischen Lenin und Hitler*, Munich, Herbig, 2006. As the subtitle suggests, Nolte paints the picture of a democracy besieged by the rise of extremist forces. And yet, at least in terms of pure electoral arithmetic, the growth of the extremist forces on the left and on the right only hinders the formation of a pro-republican coalition from 1930-32 on. Until then, the causes of governmental instability must be found within the republican parties themselves.

<sup>96</sup> Of course, all modern national histories have their own peculiarities, which set them apart, in one way or the other, from the abstract ideal-types devised by modernization theories.

“Americanization” of the worlds of labor, entertainment and art; etc.), emerges as a paradigmatic instance of the general crisis of Western modernity.<sup>97</sup>

In fact, Peukert was not the first to propose a synchronic reading of both the political and the cultural crises of Weimar.<sup>98</sup> Indeed, Peter Gay had already advanced in that direction in a brilliant essay originally published in 1968.<sup>99</sup> The perspective of this author is also closer to an ambivalent and indeterminate sense of crisis than to the mere insertion of Weimar into a grand narrative of historical necessity. For Gay, the element of rupture in 1918 is indisputable: in Weimar, old artistic and intellectual elites saw their hegemony widely challenged by a modernist avant-garde, by new forms of thought and expression and by an unprecedented democratization of public and cultural spaces. The gap between past and present could not be denied, when those who stood at the fringes of Imperial society – the Jew and the socialist – emerged in some areas<sup>100</sup> as leading figures of the new establishment («the outsider as insider»). Even if, in the psychoanalytic language employed by Gay in the organization of his essay, «the revolt of the son» eventually succumbed to «the revenge of the father»<sup>101</sup>, this outcome was not determined from the outset, and it should not suffocate historical analysis and reflection. In the more recent Anglo-Saxon historiography, Eric D. Weitz’s volume follows Peukert’s and Gay’s footsteps, interpreting Weimar’s crises as moments torn between the openness of their promises and the closure of their ultimate tragedy.<sup>102</sup>

In the field of political thought, which constitutes the object of the present study, the thesis of a German historical peculiarity, with its strict teleological narrative

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<sup>97</sup> Peukert, *The Weimar Republic*, p. xiii: «[T]o say that German society underwent a relatively normal version of the modernization process is in no sense to declare National Socialism, or the events that gave rise to it, innocuous. On the contrary, it provides a warning against the mistaken notion that there is anything innocuous about ‘normal’ industrial society as such.»

<sup>98</sup> I think that this author’s greatest merit resides in having carefully woven the nexus between politics and culture to the more immediate link between the spheres of power and the economy, thereby composing a broad canvas of «the crisis of classical modernity».

<sup>99</sup> Peter Gay, *Weimar Culture: The Outsider as Insider*, New York and London, W. W. Norton & Company, 2001.

<sup>100</sup> But definitely not in all areas: the university system, the State bureaucracy and the army remained largely impermeable to change.

<sup>101</sup> *Ibid.*, pp 102-145. Interestingly enough, only a decade later would Peter Gay devote himself to the study of Freud’s life and work.

<sup>102</sup> Eric D. Weitz, *Weimar Germany: Promise and Tragedy*, Princeton and Oxford, Princeton University Press, 2007. For a synthesis of the uncountable bibliography on the history of Weimar, see the short essay in pp. 401-405.

culminating in Hitler's rise to power, took on different guises from the general historical interpretations discussed so far. But the basic intent is largely the same: to the peculiarity of Germany's trajectory to modernity would correspond a peculiar German mind, characterized by the persistence of irrationalist and nihilistic ideas, as well as by a strong cultural pessimism.<sup>103</sup> The interpretation of Weber's, Kelsen's and Schmitt's thought has also suffered from such a retrospective bias. The still most important work on Weber's political thought concludes that the author, albeit unintentionally, ended up paving the intellectual way for the triumph of totalitarianism in Germany.<sup>104</sup> As for Kelsen, certainly the author that appears to be farthest away from any involvement in the Nazi disaster, it has become common to argue that the formalist positivism of his *Pure Theory of Law* lends itself all too easily to appropriation by totalitarian forces, hence aiding them in the legal consolidation of their atrocities.<sup>105</sup> Regarding Schmitt, his entry to the Nazi party, the collaboration in the earliest legislative initiatives of Hitler's regime and some outrageous anti-Semitic outbursts have, quite understandably, drawn a lot of attention.<sup>106</sup>

However, more significant than the individualized judgments on the relation of each of the authors' thought with the rise of Nazism is the construction of narratives of continuity between them, to which commentators from diverse political and ideological orientation have contributed. In a way, such stories aim to narrate the collapse of German reason in the twentieth century. Two elements of Weber's reflections usually constitute the starting point of these incarnations of the negative teleology of the *Sonderweg* theses in the field of the interpretation of social and political thought: the notion of a value-free social science and the charismatic-plebiscitary conception of modern mass democracy. On the one hand, a conservative natural law theorist like Leo Strauss emphasizes the allegedly nihilistic implications of the type of social science heralded by Weber and supposedly practiced to the extreme by Kelsen – a social science which claimed to be

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<sup>103</sup> A brief reference to two of the most influential works in this lineage, written by German *émigrés* in the United States: Fritz Stern, *The Politics of Cultural Despair: A Study in the Rise of the Germanic Ideology*, Berkeley, Los Angeles and London, University of California Press, 1961; Fritz K. Ringer, *The Decline of the German Mandarins: The German Academic Community, 1890-1933*, Cambridge, Mass., Harvard University Press, 1969.

<sup>104</sup> Wolfgang J. Mommsen, *Max Weber und die Deutsche Politik, 1890-1920*, Second Expanded Edition, Tübingen, J. C. B. Mohr (Paul Siebeck), 1974, pp. 435-437.

<sup>105</sup> See, above all, Leo Strauss, *Natural Right and History*, Chicago and London, Chicago University Press, 1953, p. 4, n. 2.

<sup>106</sup> Schmitt's first biographer was precisely an American Nazi Germany historian: Joseph W. Bendersky, *Carl Schmitt: Theorist for the Reich*, Princeton, Princeton University Press, 1983.



indifferent to moral issues.<sup>107</sup> On the other hand, critics close to the Frankfurt School, also dissatisfied with the purported normative vacuum of Weber's theory<sup>108</sup>, stressed the affinity, first posited by Wolfgang Mommsen<sup>109</sup>, between one of the leading intellectual figures of German liberalism in the Imperial era and the fiercest critic of liberal democracy during the Weimar Republic, with Jürgen Habermas affirming at the end of his intervention in the Heidelberg colloquium which celebrated Max Weber's centenary, in 1964, that Carl Schmitt was a «legitimate disciple» or maybe even a «natural son» of Weber<sup>110</sup>.

The present work's approach, quite on the contrary, rejects this narrative of continuity told in the retrospective light of the experience of the «German catastrophe»<sup>111</sup>, as it strives to restore to Weber's, Kelsen's and Schmitt's political ideas not only a «sense of contingency», but also a critical dimension. Indeed, if one ceases to regard them in close connection to the 1933 collapse, the possibility arises of relating them, in a more nuanced perspective, to different moments of Weimar's crisis. Following a historical periodization which is by and large consensual, one could read Weber's political writings in light of the Weimar Republic's «trauma of birth» (Peter Gay); Kelsen's democratic theory in the context of the precarious stability of 1924-29; and Schmitt's anti-parliamentary critique from the perspective of the final 1930-33 crisis. On the other hand, by overcoming the negative historical landmark of 1933-45 – which, let us emphasize it, does not at all mean relativizing its horrors –, one more easily recovers the actual critical potential of the three authors, which of course has never ceased to be explored by commentators and interpreters less interested in eminently historical readings of political thought. Such a recovery is extremely important, in that the problem of political legitimacy in late modernity, as one will suggest in the lines that follow, is not stationed in a clearly ascertainable, definable past. As a matter of fact, it is an issue which, with varying degrees of urgency, still looms on today's horizon.

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<sup>107</sup> See Strauss, *Natural Right and History*, pp. 1-8 and, explicitly on Weber, pp. 36-80.

<sup>108</sup> See, for instance, Max Horkheimer, *The Eclipse of Reason*, New York, Continuum, 1974, p. 6.

<sup>109</sup> Mommsen, *Max Weber und die Deutsche Politik*, pp. 408-413.

<sup>110</sup> See Jürgen Habermas, *Zur Logik der Sozialwissenschaften*, Fifth Expanded Edition, Frankfurt am Main, Suhrkamp, 1982, p. 85.

<sup>111</sup> Friedrich Meinecke, *Die deutsche Katastrophe: Betrachtungen und Erinnerungen*, Wiesbaden, E. Brockhaus, 1946.

### 3. Political ideas in late modernity: challenges and approaches

The study of late modernity's political thought poses some delicate challenges to the interpreter. To be sure, some such obstacles might be avoided, even if not wholly overcome, by paying only little attention to the historical dimension of ideas. One can discuss Weber, Kelsen and Schmitt in an essentially ahistorical perspective, with their ideas being read in light of the specific substantive theoretical concerns of the interpreter, as one so often discusses Plato, Aquinas, Hobbes or any other big name of the political-philosophical canon established, more or less arbitrarily, by academic tradition. Truth be told, a good portion of important secondary bibliography on our three authors was written with no more than a marginal look at the historical context. Perhaps, contrary to what the more rigid intellectual historians might assume, there is indeed an elusive intrinsic value of ideas which prevents them from becoming tied to a particular spatial and temporal origin and feeds intellectual exchanges across centuries, cultures and geographies. In any case, regardless of what one may think about this, the perspective of the present work so far has probably made it quite clear that the historical dimension of the problem is treated as crucial. Hence, certain challenges cannot simply be ignored. If Weimar, more than a mere label for chronological ordering, should be understood as a paradigmatic instance of the crisis of political and intellectual foundations in late modernity, one must inquire how far the historical study of political ideas can take us in its elucidation.

The study of political thought from a historical perspective was strongly boosted in the second half of the twentieth century by the emergence of the so-called Cambridge School, led by Quentin Skinner and J. G. A. Pocock. This current endeavored to draw precise boundaries between the history of ideas, on the one hand, and philosophy, on the other. Whilst the object of the latter was the formal consistency of systems of thought, the historical approach treated the intellectual activity of the past as an event, as something that «*eigentlich* happened»<sup>112</sup>. Now, all that can be said to have «actually

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<sup>112</sup> J. G. A. Pocock, «Languages and Their Implications: The Transformation of the Study of Political Thought», in J. G. A. Pocock, *Politics, Language and Time: Essays on Political Thought and History*, New York, Atheneum, 1973, pp. 6-7: «But even if the interpretation of a man's thought by historical means may be deployed in ways that are historically illegitimate, it follows even more clearly that interpretation by the philosopher, the political theorist, or – when he too enters the arena – the critic of literature should not be identified, or rather confounded, with interpretation by the historian. The statements made by any one of

happened» in terms of thought necessarily translates into words and language. Thus, the history of ideas – including, and perhaps above all, of political ideas – is defined as the study of past languages, that is, of the way these were used, understood and transformed by their speakers. In this sense, as Pocock notes, the research method in intellectual history is quite similar to the process of learning a foreign language.<sup>113</sup> This analogy is illuminating in essentially two ways. First, just like anyone who aspires to master a foreign language, the historian of ideas must learn to operate in a world of words and meanings which is not his own, into which he was neither born nor previously socialized. In addition, and in close relationship with this first condition, the researcher must bear in mind that proficiency in the use of the languages of the past is not equivalent to the exhaustion of their full potential – to speak a foreign language does not actually mean you can say *everything* in that language; *mutatis mutandis*, the knowledge produced by the historical study of ideas is, by its very nature, partial and selective.<sup>114</sup> To that extent, the metaphor advanced by Efraim Podoksik – of intellectual historians as linguistic time spies – is a particularly happy one.<sup>115</sup>

Now, the challenges a spy has to face depend largely on who and what he is spying. It can therefore be speculated that certain epochs, and/or certain intellectual traditions within a given epoch, might be easier to study, whereas other present the interpreter with more serious difficulties. The main exponents of the Cambridge School have focused mostly on the study of early modern political thought.<sup>116</sup> Thus, one might ask whether its success was not somehow facilitated by the peculiarities of that epoch

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these practitioners are not historical statements; they are designed to produce, or elicit, formal relationships or empirically testable propositions, not with what *eigentlich* happened or – the special form which this takes in the history of thought – what *eigentlich* was meant.»

The German expression «*eigentlich*» is probably a reference to Leopold von Ranke and to his principle – basically, a truism to which all historiographical practitioners, regardless of theoretical or methodological orientation, adhere – that history, instead of aspiring to judge the past, should be limited to narrating the events as they actually happened (*wie es eigentlich gewesen*).

<sup>113</sup> See Pocock, «Languages and Their Implications», p. 28; also Efraim Podoksik, «How is modern intellectual history possible?», *European Political Science*, Vol. 9, September 2010, p. 307.

<sup>114</sup> Ultimately, of course, all knowledge is partial and selective. And such a limitation, continuing the analogy, extends to the native speakers of a given language themselves. Learning English from the cradle is not a sufficient condition to write drama like Shakespeare; and not even a genius like Shakespeare can be said to have – not even remotely – exhausted the semantic, pragmatic and aesthetic potential of the English language.

<sup>115</sup> Podoksik, «How is modern intellectual history possible?», p. 306.

<sup>116</sup> The greatest reference is perhaps Skinner's two-volume work on the foundations of modern political thought in the Renaissance and the Reformation: Quentin Skinner, *The Foundations of Modern Political Thought*, Two Vols., Cambridge, Cambridge University Press, 1978.

and, if so, what kind of obstacles might be raised to the employment of such an approach to other historical periods.

When it comes to the political thought of late modernity, the problem of a lack of historical distance immediately arises. Yet, according to Podoksik, this is not the decisive factor. For this author, the reasons for the tremendous difficulties in writing a comprehensive overview of political thought in the twentieth century lie in the progressive disintegration of political language – and intellectual history turns into an impossibility when language decomposes and becomes inapprehensible. These processes of linguistic breakdown are connected, among other aspects, with the democratization of political discourse, with the increasing heterogeneity of the audiences of political texts and with the ever-growing gap, both in terms of style and content, between the discourse of the intellectual elites, on the one hand, and that of the general public and its political activists on the other.<sup>117</sup>

Podoksik seems to believe that the difficulties posed by these processes of language-disintegration can to some extent be overcome, if the researcher is able to write the history of late modern political thought through the intellectual biography of an author who can serve as a guide to his age – and whose life and work lend to late modern political language the unity and coherence which it manifestly lacks.<sup>118</sup> But the question arises: where is such an author to be found? Indeed, modernity has not only widened the political-linguistic gap between the intellectual elites and the general public. Apart from that, one must also consider the growing differentiation amongst the intellectual elites themselves. In Podoksik's words, political language has always been «a refinement» of the political experience of a given society «through the lenses of its educated class»<sup>119</sup>. Yet, the modern condition is one in which the «educated class» is itself deeply divided. The political discourse of the cultural and artistic *avant-garde* has little in common with that of the economic and financial elites, which in turn is also utterly different from that of the leading jurists, scientific-technical experts or religious doctrinaires, and from that of the politicians in the strictest sense. A meaningful conversation around political issues,

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<sup>117</sup> See Podoksik, «How is modern intellectual history possible?», pp. 310-312.

<sup>118</sup> *Ibid.*, pp. 313-314. Podoksik's model is here explicitly Edward Gibbon's voluminous biography by J. G. A. Pocock, which constitutes a comprehensive introduction to the intellectual history of eighteenth-century Anglo-Francophone Enlightenment: J. G. A. Pocock, *Barbarism and Religion*, Five Vols., Cambridge, Cambridge University Press, 1999-2010.

<sup>119</sup> Podoksik, «How is modern intellectual history possible?», p. 312.

assuming that these might be more or less consensually defined, between the different parts of the intellectual elite becomes extremely difficult, if not impossible, not so much due to mutual opposition, but because their specific vocabularies are often incommensurable. In the interest of comprehensiveness, the guide to the political ideas of late modernity would, thus, have to be an author who somehow managed to escape from, or whose thought was able to cut through, such vortex of specialization and fragmentation. Insofar as such a hero can at all be found, it would certainly be no exaggeration to call him a *rara avis*.

In my opinion, to adopt the life and work of a multifaceted, well-traveled, transdisciplinary author as the organizing principle of a study of the political ideas of late modernity, even if it might prove to be advantageous from the practical points of view of research and, above all, narration, would hardly restore order to the reigning linguistic chaos. Or it would only do so artificially, which in itself would be highly questionable in the context of the methodological sensibility advocated by the Cambridge School. If the intellectual experience of late modernity is marked by the fragmentation of political language – and of language in general –, is it appropriate to impose on it a bio-bibliographical unity so as to save a somewhat vague ideal of the comprehensiveness of the history of thought? If what «*eigentlich* happened» took place in a scenario of linguistic confusion and disintegration, does not to narrate it from the unitary perspective of a biography imply a serious risk of distorting the historical events?

I do believe that the problem is deeper than Podoksik supposed. The fragmentation of political language which he identifies as the source of the researcher's headaches is actually the result or the effect of a fundamental condition: the historical indeterminacy of the late modern experience. In other words, the history of this modernity's thought emerges, necessarily and paradoxically, as a history of the present. One knows the origins, one might be standing somewhere in the middle of the story, but the ending does not yet appear clearly on the horizon. Whilst, in its earlier times, narrated with unparalleled erudition by the Cambridge School, modern political thought was developed as an alternative or in opposition to the theological-political order that had consolidated in the Middle Ages, and whose final revolutionary collapse in France 1789 served as a symbolic milestone of epochal transition, as modernity grew increasingly self-reflexive – and as it began to discover its own crises –, its political thought became scattered in multiple directions, in a seemingly never-ending quest for answers. In the meantime, of course,

other dates with a potential to designate epochal breaks have emerged. For instance, 1945 and the Holocaust as the climax of modernity's perversions; or 1989 and the breakdown of Soviet Russia raising millenarian hopes associated with a triumph of liberal-capitalist democracy which supposedly heralded the end of history, the collapse of all great historical narratives. None, however, imposed so definitely a before and an after as the Revolution of 1789 did. Ultimately, even self-styled post-modern thinkers remain deeply involved in the dilemmas of late modernity, since they cannot – or refuse to – name that other present/future which allegedly lies beyond modernity.

In a sense, yes, one faces a problem of lacking historical distance. However, it is far from certain that the mere passage of time will serve to correct it. In the early 1970s, Pocock noted that in the curricula of Cambridge's Faculty of History topics related with the history of political ideas changed their designation, when they referred to authors from somewhere in the nineteenth century onwards, from "History of Political Thought" to "Theories of the Modern State", thus revealing an undeniable uncertainty concerning the very historic nature of the subjects taught.<sup>120</sup> Four decades later, Efraim Podoksik surveys the curricular contents of the exact same institution, pertaining to the history of post-1890 political thought, and cannot hide his dissatisfaction with the absence of a broad and representative canonization – noting also in passing that the issue will most probably not become any less problematic in 100 years time.<sup>121</sup> In the final analysis, late modernity seems indeed to confront the history of political thought with its own disciplinary limits.

Podoksik's suggestion to capture a broad picture of late modern political thought through the intellectual biography of a particular, and particularly suited, author tries in essence to replicate what the Cambridge School managed to achieve in its study of political thought from the Renaissance to the French Revolution. However, such quest for unity, coherence and a wide epochal scope would ultimately obscure late modernity's intrinsic sense of crisis, which is a fundamental characteristic of the period. One simply cannot restore unity to the political and intellectual landscape of this modernity, nor can one probably depict it in its entirety. Because it is a past which extends to the present, which in some very meaningful ways is still the present.

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<sup>120</sup> See Pocock, «Languages and Their Implications», p. 5.

<sup>121</sup> Podoksik, «How is modern intellectual history possible?», p. 310, fn. 4.

#### 4. Weber, Kelsen and Schmitt: affinities and divergences

From the three authors which concern us in the present study, Max Weber would probably be the one to come closest to the – speaking in properly Weberian terms – ideal-type of epochal guide sought by Podoksik to fulfill the difficult task of narrating the history of late modern political thought. Indeed, Weber was a lawyer by academic formation who would hold a professorship in national economy and who would contribute decisively to the foundation and to the scientific autonomy of German sociology. He traveled Europe and the world, learned Russian in order to follow the original reports of the 1905 Revolution and, quite late in his intellectual journey, devoted himself to the study of Eastern religions. He had active, although intermittent (and with only limited success), political intervention, and his voice was heard in critical moments of twentieth-century German history such as the negotiations of the Versailles Treaty and the constituent process of 1919. And all this despite a fragile mental condition which made him give up the academic career to which he had so soon accessed.<sup>122</sup>

However, a perspective focused strictly on Weber would still strongly restrict the scope of an analysis of the crisis of liberal democracy and political legitimacy in late modernity. If anything, it could guide us through the paradoxes of late liberalism. But Weber was still essentially a man of the Imperial era. Having died in 1920, he could only accompany the «trauma of birth», and not the growing pains, of the Weimar Republic, despite his deep knowledge of earlier – British and American – processes of political democratization. Kelsen and Schmitt, who belong to the subsequent generation that witnessed the whole of the Weimar experience, including its demise, provide an extension of the analytic focus. Their thought, even if it cannot be fully absorbed by or integrated into them (just as it would be controversial to call Weber a liberal), relates to the other

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<sup>122</sup> See Joachim Radkau's masterful biography, *Max Weber: Die Leidenschaft des Denkens*, Munich, Carl Hanser, 2013. Even if this work might also be fruitfully read as a portrait of the troubled transition to a technical-rational-industrial society, the author's intention was neither explicitly nor implicitly to paint the big picture of an era of thought. In fact, this is a biography *tout court*, sometimes almost obsessively focused on the details of personal life, not an intellectual portrait marked by the primacy of the work over the man. And moreover, Radkau does not try to restore unity and coherence to Weber's thinking. On the contrary, he seems especially interested in exploring the relations of irresolvable ambivalence between a rich, dense and multifaceted work and an internally fragmented personality.

two main political traditions of modernity: socialism<sup>123</sup> (Kelsen) and conservatism (Schmitt).

On the other hand, Weber being the oldest of the three, his work emerged in certain respects as a reference to the other two. Such a triangulation led, as seen above, to the construction of a narrative of continuity under the retrospective point of view of the «German catastrophe», which constituted a complement, in the history of political thought, to the negative revision of the German *Sonderweg* theses. This narrative needs, at the very least, to be reconsidered in a much more nuanced light. There is no doubt that both Kelsen and Schmitt learned a lot from Weber. The Austrian jurist spent some time in Heidelberg as a doctoral student, participating in Georg Jellinek's (who was a close friend of Weber)<sup>124</sup> seminars. Amongst his first publications there is a set of book reviews published in the *Archiv für Sozialwissenschaften und Sozialpolitik*, co-edited by Weber.<sup>125</sup> Schmitt, in turn, was very likely in the audience when Weber delivered his two famous lectures on science and politics as vocations. He also participated in Weber's seminars for young professors, upon the latter's brief return to a university career, and appears to have talked in private with him on some occasions.<sup>126</sup> Yet, despite these proximities, the passages in the writings of both Kelsen and Schmitt which explicitly refer to Weber are, albeit for very different reasons, mostly critical in nature, with the effort of demarcation clearly surpassing the incidental manifestations of intellectual debt.<sup>127</sup>

In this context, to speak of «natural children» or even of «legitimate disciples» is in my view a plain exaggeration. In truth, how could the normativist Kelsen and the

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<sup>123</sup> In its reformist, non-revolutionary variant.

<sup>124</sup> On Weber and Jellinek, and above all on the importance of the latter's social theory of the State in the development of the former's sociological concept of State, see Stefan Breuer, *Georg Jellinek und Max Weber: von der sozialen zur soziologischen Staatslehre*, Baden-Baden, Nomos, 1999.

<sup>125</sup> See Hans Kelsen, *Werke*, Vol. 1, Matthias Jestaedt (Ed.), Tübingen, Mohr Siebeck, 2007, pp. 561-584.

<sup>126</sup> See Paul Noack, *Carl Schmitt: Eine Biographie*, Frankfurt am Main, Propyläen, 1993, pp. 41-42.

<sup>127</sup> Some of such instances will of course be dissected, in due time, in the course of this work. On the relationship between Weber and Kelsen, see Norberto Bobbio, «Max Weber e Hans Kelsen», in Norberto Bobbio, *Diritto e Potere: Saggi su Kelsen*, Naples, ESI, 1992, pp. 159-177; Weyma Lübke, *Legitimität kraft Legalität: Sinnverstehen und Institutionenanalyse bei Max Weber und seinen Kritikern*, Tübingen, Mohr Siebeck, 1991, pp. 25-65; Agostino Carrino, «Max Weber et Hans Kelsen», in Carlos-Miguel Herrera (Dir.), *Le droit, le politique autour de Max Weber, Hans Kelsen, Carl Schmitt*, Paris, L'Harmattan, 1995, pp. 185-203. On Weber and Schmitt, see G. L. Ulmen, *Politischer Mehrwert: Eine Studie über Max Weber und Carl Schmitt*, Weinheim, VCH Acta Humaniora, 1991; Catherine Colliot-Thélène, «Carl Schmitt contre Max Weber: rationalité juridique et rationalité économique», in Herrera (Dir.), *Le droit, le politique*, pp. 205-227; Dana Villa, «The Legacy of Max Weber in Weimar Political and Social Theory», in Gordon and McCormick (Eds.), *Weimar Thought*, pp. 73-86.



decisionist Schmitt, as main representatives of the two diametrically opposed poles of Weimar's legal and political thought<sup>128</sup>, descend from the same intellectual ancestor? An affirmative answer must, of course, point to the internal diversity of Weber's work. Whilst Kelsen – perhaps more precisely: Kelsen's *Pure Theory of Law* – would be indebted to the Weberian methodology which conceived the objectivity and value-neutrality of the social sciences in the image of the natural sciences, Schmitt would be the radical heir of the decisionistic elements of Weber's sociology of domination. However, albeit one might ultimately accept such a bifurcation, it is still necessary to proceed with caution: even where similarities do exist, differences tend eventually to overcome them. And the fact is that commentators who establish lineages of succession between Weber, on the one hand, and Kelsen and Schmitt, on the other, have always picked only one of the latter, never both simultaneously, as the former's heir. Indeed, to conceive a dual line of succession would imply postulating the theoretical existence of at least two Webers, and it would immediately raise the problem of knowing which of the “children” – and which of the “parents” – was the “legitimate” one.

In fact, to my knowledge there is only one critical work dedicated at the same time, and exclusively, to all the three authors considered here – and it is not a monographic study, but a collection of essays presented in an international conference held in 1993 in the University of Paris X.<sup>129</sup> In the introduction to this volume, Carlos-Miguel Herrera states that Weber, Kelsen and Schmitt share common ground in the

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<sup>128</sup> The rivalry between Kelsen and Schmitt has been exhaustively studied. Important parts of their respective works were written in explicit or implicit response to the arguments of the other. The confrontation reached its peak in the final years of Weimar, with the controversy around the guardian of the constitution (Carl Schmitt, *Der Hüter der Verfassung*, Tübingen, J. C. B. Mohr (Paul Siebeck), 1931; Hans Kelsen, «Wer soll der Hüter der Verfassung sein?», in Hans Klecatsky, René Marcic, Herbert Schambeck (Eds.), *Die Wiener rechtstheoretische Schule: Schriften von Hans Kelsen, Adolf Merkel, Alfred Verdross*, Vol. 2, Vienna, Europa Verlag, 1968, pp. 1873-1922); the legal dispute between the German federal government and Prussia, in 1932, where they resumed the doctrinal dispute in court (see David Dyzenhaus, «Legal Theory in the Collapse of Weimar: Contemporary Lessons?», *The American Political Science Review*, Vol. 91, No. 1, March 1997, pp. 121-134); and, finally, Kelsen's expulsion from the University of Cologne in 1933, against which Schmitt, then colleague in the same institution, refused to sign a petition (see Noack, *Carl Schmitt*, p. 185).

Amidst the immensely vast secondary literature devoted to the doctrinal confrontation between Kelsen and Schmitt, let us refer here, by way of example, three instances from different academic traditions: Wolfgang Mantl, «Hans Kelsen und Carl Schmitt», *Rechtstheorie*, No. 4, Special Issue, 1982, pp. 185-199; Jean-François Kérvegan, «La critique schmittienne du normativisme kelsénien», in Herrera (Dir.), *Le droit, le politique*, pp. 229-241; David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar*, Oxford, Oxford University Press, 1999 (this author sees the social-democratic jurist Hermann Heller as a third way capable of surmounting the main dilemmas of the Schmitt-Kelsen confrontation).

<sup>129</sup> Herrera (Dir.), *Le droit, le politique*.

refusal of natural law theory and in the exposure of the latter's ideological function, which is to conceal both the ineradicable dimension of conflict intrinsic to politics and the truly unsurpassable horizon of a domination of man by man. If, for Kelsen, to lift the veil of natural law reveals the hideous Gorgon face of power, according to Schmitt, natural right means nothing more than the sovereignty of those who know how to appeal to it and who decide on its content and application, whilst, in Weber's eyes, the desire to do away with domination is ultimately a utopia.<sup>130</sup> This rejection of natural law necessarily implies a tense relationship with the classic liberal tradition, which was precisely based upon the social contract theories of natural right philosophies. And yet, the simultaneous denial of the possibility of a transformation of power relations which might eventually result in an elimination of domination of man by man also places them in critical dialogue with all the socialist and Marxist traditions.

This common ground marked by the rejection of both natural law theory and alternative horizons of social and political transformation which are deemed utopian or deceptive – socialism, of course, especially in its Marxian version, but also, as noted above, a conservatism of romanticized neocorporatist leanings – brings us back to the critical constellation that is at the heart of our approach: the dual crisis of liberal democracy in the interwar period and the general problem of political legitimacy in late modernity. The relative affinity in the diagnosis of the crisis, however, not only gives rise to the extraction of very different consequences, but also stems from divergent worldviews. Weber's, Kelsen's and Schmitt's verdicts on modern democracy diverge just as much as their respective narratives of modernity. By comparing the latter and the former, the present work might also contribute to a reinterpretation of each author's thought under novel, rarely explored lights. Regarding Weber, one will surely be moving in the wake of those who stress the connections between his sociological theory and his political writings of the late 1910s<sup>131</sup>, refusing to strictly separate the social scientist and the political publicist. However, the interest will fall less upon the static, abstract dimension of some of his main sociological concepts than upon the dynamic nature of his narrative of modernity. In the case of Kelsen, the focus will not be on his *Pure Theory of*

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<sup>130</sup> See Carlos-Miguel Herrera, «Avant-propos», in Herrera (Dir.), *Le droit, le politique*, pp. 8-9, fns. 2, 4 and 5.

<sup>131</sup> David Beetham, *Max Weber and the Theory of Modern Politics*, Second Edition, Cambridge, Polity Press, 1985; Joaquín Abellán, *Poder y Política en Max Weber*, Madrid, Biblioteca Nueva, 2004.

Law, which has been thoroughly debated, but on his less-explored<sup>132</sup> democratic thought. One will try to understand Kelsen's defense of democracy in the context of a relativist worldview which appears to stem from a certain conception of modern science. Last but not least, when it comes to Schmitt, an author whose ideas have been eagerly appropriated lately by currents on the left which aim to further a radical critique of liberalism<sup>133</sup>, the effort will reside mainly in emphasizing the theological roots of his political thought and its ultimate, robustly authoritarian implications.

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<sup>132</sup> The special issue of a German legal theory journal, originally co-edited by Kelsen himself – Werner Krawietz, Ernst Topitsch and Peter Koller (Eds.), «Ideologiekritik und Demokratietheorie bei Hans Kelsen», *Rechtstheorie*, No. 4, 1982 – and Norberto Bobbio's essays (*Diritto e Potere*) are still the major references. The surprising – and rather unfortunate – void in the Anglo-Saxon literature in this regard was only recently filled by Sandrine Baume *Hans Kelsen and the Case for Democracy*, Colchester, ECPR Press, 2012.

<sup>133</sup> Chantal Mouffe, *The Democratic Paradox*, London and New York, Verso, 2005; Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt*, New York, Cambridge University Press, 2008; Giorgio Agamben, *State of Exception*, Chicago and London, University of Chicago Press, 2005.

## CHAPTER ONE

### Charismatic Leadership, the Crisis of Liberalism and the Iron Cage of Modernity

#### Max Weber

##### 1. From the shadow of Bismarck to the challenges of national political reconstruction: the ambivalences of a latter-day liberal

Max Weber was deeply immersed, both as a keen observer and as an active political participant, in the crisis of bourgeois liberalism in the late nineteenth and early twentieth centuries. Born into a politically engaged liberal household, he was a first-hand witness to the failure of German political liberalism in the second half of the nineteenth-century. As a teenager, Weber must have overheard the notes of disappointment and frustration of the national-liberal parliamentary opposition, whose members often met in his family's Berlin-Charlottenburg home, as it was crushed by Bismarck in the late 1870s. The legacy of *Reichskanzler* Bismarck would, indeed, become part of Weber's life-long political concerns. His attitude towards the "iron chancellor", however, was marked neither by the bitterness of the liberals who failed to further the cause of parliamentarism, nor by the enthusiasm of those who uncritically embraced militarism and monarchism in the euphoria of 1870. Max Weber was still a child when the Prussian armies triumphed in Königgrätz and Sedan; by the time he reached adulthood, the political atmosphere had sobered up, as the new *Reich* struggled with deep-seated social problems. To Weber, therefore, Bismarck was not a charismatic war leader; still, even if often disagreeing with the political course set by the *Kanzler*, he admired the astute statesman and his skillful mastering of power politics. In one of the most-quoted passages of his youth letters, however, Weber laments the adoption of male universal suffrage as «the fundamental mistake (...) of Bismarckian Caesarism»<sup>134</sup>, standing at the origin of a causal chain

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<sup>134</sup> Max Weber, *Jugendbriefe*, Marianne Weber (Ed.), Tübingen, J. C. B. Mohr (Paul Siebeck), 1936, p. 143 (to his uncle, the liberal historian Hermann Baumgarten): «Der Grundfehler ist doch wohl das

leading, first, to the electoral growth of the SPD, then, to the repressive measures of the anti-socialist legislation (*Sozialistengesetz*) and, ultimately, to the restriction of the civic and political freedoms which the liberals had conquered. Later, in his wartime political writings, Weber will come to evaluate the shortcomings of Bismarck's legacy in a different light. The problem was not so much the chancellor's speculation with the conservative instincts of the masses, which made him opt for the introduction of male universal suffrage, but his successful neutralization of the very same representative institution which was now elected by all the (male) citizens of the *Reich*. A parliament, like the German *Reichstag*, devoid of effective powers of control and real political responsibility, condemned to sterile protesting if it happened to disagree with the monarchic government, contributed decisively to the political immaturity of the German nation, which grew accustomed to leaving all serious political matters in the sole hands of Bismarck's genius. The direst consequences of Bismarck's restrained parliamentarism only began to show once the shrewd statesman was removed from office. Either bureaucratic rule by officials or the dilettantism of the Emperor himself<sup>135</sup> stepped in to fill the void: both to Weber's dismay. Beyond the «Greek gift»<sup>136</sup> of male universal suffrage, Bismarck's institutional design, whose purpose had been to cancel out alternative sources of political initiative, succumbed to «[t]he problem of succession» in the absence of «powerful representative bodies», which «has always been the Achilles heel of all purely Caesarist rule»<sup>137, 138</sup>.

Weber's reflection on Bismarck's legacy is interesting in several respects, but, above all, one cannot help notice how far it departs from standard liberal critiques of monarchic, viz. autocratic, governments. What bothers Weber about Bismarck is neither the chancellor's militarism nor his quest to concentrate power in his own hands. The superiority of Bismarck's political mind relative to that of his parliamentary foes is unquestionable, and Weber sees the triumph of the former over the latter as the natural, unavoidable outcome. The fundamental problem is that Bismarck deprived the Imperial

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Danaergeschenk des Bismarckschen Cäsarismus: das allgemeine Stimmrecht, der reinste Mord für die Gleichberechtigung aller *im wahren Sinne des Wortes*.»

Also quoted by Mommsen, *Max Weber und die Deutsche Politik*, p. 8; Radkau, *Max Weber*, p. 144.

<sup>135</sup> On Weber's profound personal hatred of Wilhelm II., see Radkau, *Max Weber*, pp. 493-499.

<sup>136</sup> See above, fn. 134.

<sup>137</sup> Weber, «Parliament and Government», pp. 227-28 (emphasis elided).

<sup>138</sup> On Bismarck's political legacy, see *ibid.*, pp. 135-145. For an interpretation of Weber's attitude towards the "iron chancellor", Radkau, *Max Weber*, pp. 142-145.

political system of the instruments which could have made it survive and succeed in the absence of an extraordinary political talent. Thus, as I shall explore in more detail below, Weber's constitutional reform proposals, which sought to raise the prerogatives of the *Reichstag*, are not really marked by a firm belief in the abstract political and moral supremacy of parliamentary rule, but rather by the recognition of certain key instrumental benefits of parliamentarism, among others in terms of guaranteeing political stability and in terms of the selection and training of political elites.

As with so many turn-of-the-century liberal intellectuals throughout Europe, and not only in Germany, the axiological references of Weber's political discourse drifted away from the themes of individual freedom, rights and parliamentary representation to crystallize around the idea of the nation and its specific historical mission. To be sure, the former themes were not totally eclipsed; yet Weber seemed to treat them as civilizational *acquis* of a by-gone age. The mixture of both debt and distance to the heritage of the Enlightenment and of classic political liberalism is clearly revealed in a letter to the philosopher Hermann Graf Keyserling (21/06/1911), where Weber wrote that one might very well smile at the «childishness» of the principles of the French Revolution, but one owes them «things without which life would become unbearable».<sup>139</sup> Later, he would maintain, in the same vein, that it was «a piece of crude self-deception to think that even the most conservative among us could carry on living at all today without these achievements from the age of the 'Rights of Man'».<sup>140</sup> But such «achievements», it appears, had come to stay, whilst the political urgencies that preoccupied not only Weber, but several of his liberal contemporaries, gravitated to the immediacies of the nation and its fate.<sup>141</sup> The proviso to the pamphlet «Parliament and Government in Germany under

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<sup>139</sup> Quoted by Radkau, *Max Weber*, p. 497.

<sup>140</sup> Weber, «Parliament and Government», p. 159. As indispensable as they might be, these «achievements» did not persuade Weber of the existence, presupposed by most philosophers of the Enlightenment – most notably of course, in the German context, by Kant –, of some sort of natural reason partaken by every individual human being. In a letter to his lover Mina Tobler from the Summer of 1915, quoted in Radkau, *Max Weber*, p. 544, the author mocks the «infinitely ignorant childish belief in the power of the rational» (translation mine).

<sup>141</sup> Weber's reflections on the «universal revival of "imperialist" capitalism» at the expense of free trade, driven by the expansive Nation-States, are rather illustrative of this shift. See Weber, *Economy and Society*, pp. 918-919: «In general and at all times, imperialist capitalism, especially colonial booty capitalism based on direct force and compulsory labor, has offered by far the greatest opportunities for profit. They have been greater by far than those normally open to industrial enterprises which worked for exports and which oriented themselves to peaceful trade with members of other polities.»

a New Political Order» is unambiguous concerning Weber's fundamental nationalist commitment:

«Anyone for whom the historical tasks of the German nation do not take *precedence*, as a matter of principle, over all questions of the *form* the state should assume (...) will not be opened to the arguments advanced here.»<sup>142</sup>

Indeed, the Nation-State was and remained, throughout his whole life, Weber's highest political ideal<sup>143</sup>, even if the degree of attachment to the national cause varied, in his writings, from the aggressively expansionist, social Darwinist, and imperialist rhetoric of the Freiburg inaugural lecture<sup>144</sup> (1895) to much soberer formulations on the concept of the nation, such as can be found in *Economy and Society*<sup>145</sup>. In fact, no greater blow than the defeat and humiliation of 1918 could be conceived to Weber's nationalist feelings. The imperial State which had politically unified the German nation and, despite all its shortcomings, proved capable until then of adapting to and containing both the aspirations of the bourgeoisie and the challenges of working-class politics crumbled as a direct result of its military wager in international power politics. The Great War of 1914-18, with its devastating *denouement*, inaugurated a critical juncture both in German

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For the liberal Weber, in historical perspective, «pacifist trade» between political communities is the contingent exception, whilst imperialism constitutes the general rule!

<sup>142</sup> Weber, «Parliament and Government», p. 130.

<sup>143</sup>For an interpretation of Weber's nationalism, see Mommsen, *Max Weber und die Deutsche Politik*, pp. 37-72.

<sup>144</sup> Max Weber, «The Nation State and Economic Policy», in Weber, *Political Writings*, p. 16: « We do not have peace and human happiness to hand down to our descendants, but rather the *eternal struggle* to preserve and raise the quality of our national species.»

<sup>145</sup> Weber, *Economy and Society*, pp. 921-926. It is unfortunate that the English translation has opted to elide the quotation marks – Weber, as anyone familiar with his writings must know, had a pronounced tendency to use quotation marks, even if not always consistently, for various purposes besides citation (irony, distance, emphasis, etc.) – around the word *Nation* in the title of this section. In this case, it seems that they are markers of distance, since it is a section – an unfinished fragment, by the way – where the author embarks on a detached, social-scientific (in the truest sense of Weberian value-free science) discussion of the idea of nation. Expressions of enthusiasm and personal political commitment, frequent in other instances of his work where the concept of nation is evoked, are wholly absent here. Weber recognizes the sheer impossibility of offering a definition of the concept which could be validated empirically, and places it within the sphere of values and emotions. He concludes with a remark on the specific predestination of intellectuals «to propagate the “*national*” idea» (here within quotation marks, as in the German edition, and, unlike it, also in italics): Weber, the scientist, can in fact be explored for a critique of Weber, the nationalist politician and public intellectual!

For the German edition, with quotation marks on the heading of the section, see Max Weber, *Wirtschaft und Gesellschaft*, Tübingen, J. C. B. Mohr (Paul Siebeck), 1922, pp. 627-630.

politics and in Max Weber's political thinking – national, social and political reconstruction, with all its inherent challenges (constitutional, economic and symbolic) was at stake.

In this chapter, I will revisit Weber's answers to the demands of such critical juncture, seeking to explore its sudden inflections and persisting ambivalences as illuminating instances of the crisis of liberalism in the age of mass politics, nationalism and imperialism, when the standard liberal understanding of legitimate political rule, based on the ideas of justice, reason and rights propagated by the Enlightenment, was the object of both external attacks and internal erosion. My aim is to show that the nuances and modulations of Weber's political writings in the last three years of his life – roughly coinciding with the «trauma of birth» of Weimar democracy –, which appear mainly in newspaper articles and pamphlets even if also surfacing in parts of the posthumously published *magnum opus Economy and Society*, communicate with the deepest tensions of Weber's thought. Far from being a self-contained episode of journalistic polemics marginal to his more substantial theoretical and social-scientific preoccupations, I argue that Weber's political writings from 1917-1920 constitute an indispensable interpretive key for a full understanding and appraisal both of the complexities of his social and political thought and of the predicaments of late modern liberalism.

In order to do so, I intend to proceed from the more abstract and theoretical claims of Weber's thought to the concrete historical setting of Germany in the duress of war and defeat. To begin with, I will briefly present and discuss some of the possibilities of making sense of Max Weber as a political thinker, arguing for the significance of his writings on German constitutional politics. Afterwards, I try to shed some light on the intrinsic tension of Weber's concept of politics, which seems to be torn between the contradictory claims of raw power, legitimacy and meaning; instrumental and value rationality; responsibility and conviction. Such tension will then be transposed to the specific quandaries of modernity, that is, to the inescapable fate of secularization, rationalization and bureaucratization of the Western world, in a section where I will seek to determine and underscore the centrality of the concept of charisma in Weber's understanding of the relationship between the singularity of the political sphere and the rise of the iron cage of modern life. From modernity in general to modern Germany in particular, I finally trace the evolution of Weber's constitutional reform proposals in the critical juncture of 1917-1919. An evolution which, through all its variations, seems to be decisively marked by the assumption that only a purely personal, individualistic version of charismatic



authority could both successfully prevail under the conditions of rationalized modern democracy and hope to salvage the noblest values of politics – devotion to one’s own cause, personal power and responsibility – from being thoroughly appropriated, and quashed, by the machine-like apparatuses of modern political organizations. As a consequence, Weber progressively abandoned the endorsement of the conventional institutional arrangements of parliamentarism and party politics in favor of the promises of a unitary, presidential pinnacle to the political system. The chapter concludes with some critical considerations on the paradoxes of Weberian politics – a liberal politics trying to set a new course amidst the general crisis of bourgeois liberalism, in the direst possible circumstances.

## **2. Weber as a political thinker**

Even if some of the more recent fields of academic knowledge in the humanities try to depict him as one of their founding fathers, in their quest to define disciplinary boundaries and lay secure intellectual foundations, few would actually dispute that Weber could also be regarded as a thinker in the more ancient tradition of philosophy or of the history of ideas. In that time-honored, canonized tradition every thinker is, in one instance or the other, marginally or primarily, a political thinker, to the extent that the themes of power, freedom, equality, oppression, the common good, etc., come up in their writings. And indeed, in most of Weber’s writings, some of these themes do take center stage.<sup>146</sup>

On the other hand, Weber, who briefly – and vainly – tried to pursue a political career of his own in the turbulent post-war period, was also actively involved throughout his life in the discussion of the political controversies that marked German public opinion, and most of his political writings are proof and a direct consequence of such involvement. They are certainly not, as Weber himself admits, products of “objective”, value-free scientific reasoning, but rather the expression of his «ultimate positions», which «cannot

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<sup>146</sup> Which of such somewhat arbitrarily established, but in the last resort inescapable, themes of the political-philosophical tradition predominate in Weber’s thought is certainly not irrelevant. For instance, liberal admirers of Weber must concede – and come to terms with the fact – that his sociology is fundamentally concerned with the issues of power and domination, in their concrete empirical manifestations, whilst the themes of freedom and rights, when they surface at all, are only marginally touched upon. For an interpretation of *Economy and Society* as, in essence, a work on the sociology of domination, see Julien Freund, *The Sociology of Max Weber*, New York, Pantheon Books, 1968, p. 218.

be decided by scientific means»<sup>147</sup>. It would, however, be a mistake to discard them on the grounds of their polemicist nature. On the one hand, because a substantial portion of the most studied works in the history of political thought were written from a partisan perspective, not from an ever-elusive, supposedly sealed-off realm of “pure” knowledge. And additionally, as Lawrence Scaff keenly notes, one risks «missing what is most important» about Weber by imposing an arbitrary divide between the scientist and the politician or the politically engaged publicist.<sup>148</sup>

Yet, even whilst accepting that one has to look at the whole range of Weber’s writings in order to fully capture him as a political thinker, doubts remain as to the relative importance of his works. From which parts of his bibliography should Weber’s political thought be predominantly derived and interpreted? Even if the answer points primarily – though, one hopes, not exclusively – to *Economy and Society*, the question would still need to be reformulated as follows: which sections of that colossal work should deserve the researcher’s special attention? The sociology of domination, with its key concepts and formal definitions? The comparative-historical analysis of world religions and civilizations, with its assessment of the singularity of modernity and secularization in the Christian West?<sup>149</sup> Or the writings which deal explicitly with the institutional dimension of politics and relate more directly to the political impasses of Weber’s time?

I believe that much can be gained by exploring the latter portion of his bibliography, particularly where it pertains to the dilemmas of German democracy in the turmoil of 1917-1920, and reading it against the background of his more general sociological categories, world-historical analyses and cultural concerns. Here, I disagree with Lawrence Scaff, who, whilst rejecting the pertinence of separating science from politics in the reading of Weber, nonetheless contends that his «actual comments» on the themes of «liberalism, democracy, and “constitutionalism” (...) are few, scattered, and fragmentary», and that «the very problem posed by “democracy” or a “liberal” politics as we have come to accept it in the late twentieth century (...) was simply not Weber’s

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<sup>147</sup> Max Weber, «Parliament and Government», p. 130.

<sup>148</sup> See Lawrence A. Scaff, *Fleeing the Iron Cage: Culture, Politics, and Modernity in the Thought of Max Weber*, Berkeley and Los Angeles, University of California Press, 1989, p. 4.

<sup>149</sup> Reinhard Bendix, *Max Weber: An Intellectual Portrait*, Berkeley, Los Angeles and London, University of California Press, 1977, the first comprehensive study of Weber’s work written in English, focuses mainly on the comparative dimension of Weber’s sociology of religion (pp. 83-281), in its effort to liberate the author from the reign of Talcott Parsons’ functionalist theory, which had decisively marked the reception of his *œuvre* in North America up until then.

starting point, nor even a part of his central concerns».<sup>150</sup> For Scaff, it seems, one should disregard or at least relativize the more explicit content of Weber's interventions in the German political debates of his time, which indeed deal predominantly with the issues of «liberalism, democracy, and “constitutionalism”», and focus instead on what they say or imply in relation to supposedly deeper cultural concerns – namely, as the author argues, to the problem of a rising «subjectivist culture».<sup>151</sup> Contrary to such perspective, other commentators have fittingly emphasized the relevance of Weber's political writings, which, according to David Beetham, not only «offer a coherent analysis of his contemporary society, and one that compels a reassessment of some of the distinctive themes of his sociology», but also «confront a set of problems of much wider significance than those of Wilhelmine Germany alone: the survival of liberal values in the era of advanced capitalism and bureaucratic organisation».<sup>152</sup> Differently from Beetham, however, who sees «Weber as belonging to an essentially liberal tradition»<sup>153</sup>, I shall stress the multiple tensions that permeate and complicate Weber's liberalism. Closer to Wolfgang Mommsen's massive work of historical research and critical interpretation<sup>154</sup>, I will present Weber as a theorist at the fringes of a liberalism in crisis – a position of the utmost complexity and ambiguity.

For now, let the search for the political thinker begin with the fundamental question of all political thought: What is politics for Weber?

### **3. The intrinsic duality of Weber's concept of politics**

The most systematic answer Weber formulated to that question appeared very late in his life, in the famous January 1919 Munich lecture on «The Profession and Vocation of Politics».<sup>155</sup> It starts with a conceptual restriction. Weber's aim is not to consider

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<sup>150</sup> Scaff, *Fleeing the Iron Cage*, pp. 153-154.

<sup>151</sup> See *ibid.*, pp. 152-185.

<sup>152</sup> David Beetham, *Max Weber and the Theory of Modern Politics*, p. 1.

<sup>153</sup> *Ibid.* And see particularly his section on «Parliament as Protector of Liberty», pp. 113-116. In my view, the protection of liberty or of the rule of law, which is substantially different from the mere guarantee of political stability and continuity, was not one of Weber's primary concerns when it came to the appraisal of parliamentarism.

<sup>154</sup> Mommsen, *Max Weber und die Deutsche Politik*.

<sup>155</sup> Max Weber, «The Profession and Vocation of Politics», in Weber, *Political Writings*, pp. 309-369. The English translation of the title by Ronald Speirs is more accurate, even if less catchy, than the alternative «Politics as a Vocation» (proposed by Hans H. Gerth's and C. Wright Mills' volume of translated essays,

politics in general, but rather to look at the specificity of modern politics, which has to do with «the leadership, or the exercise of influence on the leadership, of a *political* association, which today means a *state*»<sup>156</sup>. Modern politics as an autonomous domain of human action is thus circumscribed to the institutional sphere of the State. Indeed, as Andreas Kalyvas remarks, Weber «equated the state with the political in a way that the former successfully occupies the entire terrain of the latter».<sup>157</sup> Consequently, the nature of modern politics is to a large extent dependent on the peculiarity of the modern State, which is rooted in the use or threat of physical violence as its «specific *means*».<sup>158</sup> As Weber famously puts it, «a state is that human community which (successfully) lays claim to the *monopoly of legitimate physical violence* within a certain territory».<sup>159</sup> Having established the «intimate» connection between politics, the State and violence, Weber offers us the following definition:

«In our terms, then, ‘politics’ would mean striving for a share of power or for influence on the distribution of power, whether it be between states or between the groups of people contained within a state.»<sup>160</sup>

One cannot overlook the element of conflict that is constitutive of such a conception. Politics is a struggle to control or at least to influence the apparatus of the legitimate use of physical force, a struggle for power – either for power’s own sake or in order to further some specific material or ideal interests. The political order at any given point in time is hence seen as the crystallization of the supremacy of one of the power-

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*From Max Weber*), since the lecture deals both with the modern professional and the inner vocational dimension of politics. The German word *Beruf* conveys both meanings.

As a matter of fact, the lecture, which was given at the request of a student guild, was taken up rather hesitantly by Weber, and thus cannot be said to have corresponded to his main social-scientific concerns at the time. He was indeed inclined to decline the invitation, having changed his mind only when he found out that the organizers were planning to invite Kurt Eisner instead. Weber detested Eisner, the leader of the short-lived Bavarian Socialist Republic, whom he considered the ultimate example of the pernicious caste of romantic litterateurs involved in politics, with no sense of reality and a tendency to fall in love with their own demagogy. Weber just had to avoid having Eisner preach his revolutionary romanticism to the Munich students. Fortunately, by doing so, he ended up delivering one of the single most significant lectures in the history of political science and late modern political thought.

<sup>156</sup> Weber, «The Profession and Vocation of Politics», p. 310.

<sup>157</sup> Andreas Kalyvas, *Democracy and the Politics of the Extraordinary*, p. 29.

<sup>158</sup> Weber, «The Profession and Vocation of Politics», p. 310.

<sup>159</sup> *Ibid.*, pp. 310-311.

<sup>160</sup> *Ibid.*, p. 311.

seeking groups – or of a coalition between some of them – over the others. But that crystallization is only temporary, constantly subject to erosion, open to challenges from the other competitors in the political sphere. In other words, the struggle is, as such, ceaseless.<sup>161</sup>

This is the best-known and the more explicit side of Weber's concept of politics, which almost every student of the social sciences confronts at one stage or the other of his academic formation. It is a formal concept, devoid of substantive normative content, dominated by a purely instrumental rationality in its relation to «specific *means*», not *ends*. If such description exhausted Weber's view of politics, there would hardly be anything intricate or ambiguous about it, and he could be unproblematically fitted in the tradition of political realism dating back to Machiavelli. But there is more to it than that. The other, not so clearly articulated dimension of politics that simultaneously complicates and enriches the picture is alluded to in the realist-formalist view which has been just discussed. In actual fact, looking carefully at it, one notices a concept that can hardly be reduced to the pragmatics of raw power, conceived by Weber as the ability to impose one's will upon the behavior – and possibly against the resistance – of others.<sup>162</sup> That is the concept of legitimacy, which is crucial to the present work's own understanding of the predicament of late modern politics.

Weber defines the State's monopoly on physical violence as a legitimate one, that is, a monopoly recognized by the political subjects as valid and binding. Now, violence itself does not sustain such belief, it cannot produce its own consensually accepted validity. The *means* do not *per se* justify the whole system of domination. Any actual assertion of power by violent means, even if it aims – and precariously succeeds – to endure in time and start crystallizing into a form of domination<sup>163</sup>, may be differently

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<sup>161</sup> For other instances of Weber's understanding of politics as conflict and struggle for power, see: Max Weber, *Economy and Society*, p. 53 and p. 939 (in Weber's definition of party); «Parliament and Government», p. 154, fn. 1, p. 161. The Machiavellian, Nietzschean and social Darwinist underpinnings of such reading of politics have been emphasized by some commentators. See, for example, Raymond Aron, «Max Weber and Power-Politics», in Otto Stammer (Ed.), *Max Weber and Sociology Today*, Oxford, Basic Blackwell, 1971, pp. 83-100.

<sup>162</sup> Weber, *Economy and Society*, p. 926.

<sup>163</sup> The difference between power (*Macht*) and domination (*Herrschaft*) in Weber's sociology is a fine one. Broadly speaking, both concepts coincide in the general meaning of the capacity to impose one's will on others (see *ibid.*, p. 942 and previous fn.). In fact, Weber often uses them interchangeably and, in the same sense albeit much less frequently, he also employs the term hegemony (*Hegemonie*). But domination also «constitutes a special case of power» (*ibid.*, p. 941). In that restricted sense, which sets it apart both from the general concept of power and from the specific market-type of monopolistic power («which (...) has its source in a formally free interplay of interested parties»), Weber defines domination as follows:

evaluated from the point of view of legitimacy. Violence as such, even if mastered by the most astute power-politician, is never completely immune to the charge of illegitimacy, on whichever grounds. Indeed, for it to be legitimate, a substantial foundation has to be provided, upon which to lay the threat or the actual use of the means of violence. Weber's well-known ideal types of legitimate rule – charisma, tradition and legality – have precisely this foundational significance; they aim to designate, as noted in the introduction<sup>164</sup>, «the ultimate grounds of the validity of a domination». In a way, thus, they offer the substratum, the actual normative content from which domination must be derived, if its purpose is to be sustained legitimately. Because power and, particularly, domination do not exist in a vacuum, but rather in a concrete cultural setting, and the representations, ideas, values and practices of the latter bestow meaning on the former. As Kalyvas aptly notes, that is the case even with the modern rationalized form of legitimacy as legality, since it «is still conditional upon the belief that formal equality, impersonal rule, and abstract procedural fairness represent or embody deeper normative values».<sup>165</sup> Hence, in a broader sense, politics is inseparable from culture.<sup>166</sup> And, as Weber contended in one of his war-time political articles, power in its most comprehensive dimension, actual «world power (...) in the last analysis means the power to determine the character of culture in the future»<sup>167</sup>, and cannot thus be reduced to the simple marshalling of the apparatuses of violence.

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«To be more specific, *domination* will thus mean the situation in which the manifested will (*command*) of the *ruler* or rulers is meant to influence the conduct of one or more others (*the ruled*) and actually does influence it in such a way that their conduct to a socially relevant degree occurs *as if the ruled had made the content of the command the maxim of their conduct for its very own sake.*» (*Ibid.*, p. 946.) (Emphasis added to the last part of the sentence.)

Thus understood, one could argue that domination necessarily pertains to the domain of social structure, whilst power might merely refer to an isolated, easily reversible instance of social agency. To the status of a relation of power, domination seems to add the extra qualities of duration (the notion of *rule*, with its clear-cut distinction between *rulers* and *ruled*, and the reference to the «socially relevant degree» of the interaction are crucial here) and, most importantly, as the highlighted «*as if*» construction shows, internalization on the part of the dominated. This element of internalization explains why domination in the narrow sense, much more than the broad understanding of power, craves for legitimacy. Indeed, it cannot survive without it.

<sup>164</sup> See above, p. 31, fn. 68.

<sup>165</sup> Kalyvas, *Democracy and the Politics of the Extraordinary*, p. 50, fn. 21.

<sup>166</sup> Lawrence Scaff, as we have seen above, focuses strictly on this dimension of Weberian politics. It is as restricted a perspective as the alternative one-sided emphasis on the formal-realist definitions.

<sup>167</sup> Max Weber, «Between Two Laws», in Weber, *Political Writings*, p. 76.

This, as Raymond Geuss puts it, «wider»<sup>168</sup> dimension of the Weberian understanding of politics is certainly subterranean in a large number of his writings. But there can be no doubts regarding its presence. In the 1919 Munich lecture on politics as a vocation and as a profession, it surfaces to complicate the apparently straightforward relation between responsibility and conviction as alternative kernels of a political ethics. A superficial reading might suggest that there is an unambiguous opposition between the two. The ethics of responsibility, one would argue, is the appropriate for the politician, because he who plays with the instruments of violence must be ready to account for his actions. On the contrary, the ethics of conviction – an ethics of saints – would always prove to be politically dangerous, for it disregards the consequences of actions to focus solely on the pureness of intentions. And yet, in Weber's words, «[t]he mere 'power politician' (...) may give the impression of strength, but in fact his actions merely lead into emptiness and absurdity», because of his «superficial lack of concern for the *meaning* of human action».<sup>169</sup> Even if «the eventual outcome of political action frequently, indeed regularly, stands in a (...) paradoxical relation to its original, intended meaning»<sup>170</sup>, to live *for* politics, as opposed to the sheer self-interest of living *off* politics, requires a substantive cause:

«[S]ome kind of belief must always be *present*. Otherwise (and there can be no denying of this) even political achievements which, outwardly, are supremely successful will be cursed with the nullity of all mortal undertakings.»<sup>171</sup>

Hence, responsibility and conviction are not mutually exclusive. They must be reconciled somehow in an intrinsically tensional ethics of political action. And they reflect the ineradicable duality of Weber's concept of politics.

#### **4. Politics, charisma and the iron cage**

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<sup>168</sup> Raymond Geuss, *History and Illusion in Politics*, Cambridge, Cambridge University Press, 2001, p. 14.

<sup>169</sup> Weber, «The Profession and Vocation of Politics», p. 354.

<sup>170</sup> *Ibid.*, p. 355.

<sup>171</sup> *Ibid.*

How does this conceptual tension inhabiting Weber's understanding of politics operate in time? How does it translate into the author's properly historical discourse? Let us consider again the three pure types of legitimate rule. As social scientific ideal-types, of course, they are trans-historical categories which can have explanatory clout in various different social, cultural and temporal contexts. Nonetheless, in broad world historical terms, there is an implicit linearity to their succession. To sum it up rather crudely: it all starts with charisma, force of habit and precedent make tradition out of it, which in turn is rationalized to give rise to modern rational legality.<sup>172</sup> It is true that in *Economy and Society* – and both in its general conceptual exposition and in the chapter on the sociology of domination –, given the choice for a retrospective approach, charisma seems to rank behind rational-bureaucratic legality and traditional authority. In actual fact, however, as Edith Hanke keenly remarks, charisma is the original focal point of legitimate domination.<sup>173</sup>

In truth, only charisma possesses a legitimating force of its own, because of its direct intervention into the realm of symbols, representations, values and beliefs within which domination is exercised and with reference to which it must be justified. Only charisma can introduce change and novelty in that realm, question existing representations of reality, and propose alternative meanings and ideas. As Weber puts it, «charisma, in its most potent forms, disrupts rational rule as well as tradition altogether» and «is indeed the specifically creative revolutionary force of history».<sup>174</sup> In contrast, tradition and legality operate in a fixed, normalized cultural framework. They correspond to the solidification of shared meanings and representations, hence bestowing the system

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<sup>172</sup> This is, I reiterate, a very simplistic rendering. In fact, it is impossible to determine the historical priority of charisma or tradition. On the one hand, the very notion of a charismatic leader with its group of faithful followers presupposes the existence of an established tradition against which his new representations might be asserted; on the other, every tradition can in principle be brought back to a charismatic origin. One thing is for sure, though: the historical priority of both charisma and tradition relative to rational legality – but not necessarily to rationalization itself, whose traces one might also follow back to the beginnings of human social behavior (see below, pp. 74-75).

However, as Wolfgang Mommsen, *Max Weber: Gesellschaft, Politik und Geschichte*, Frankfurt, Suhrkamp, 1974, p. 128, argues, charisma is for Weber, at least logically, the original type of legitimate rule.

On Weber as a «developmental historian», see Wolfgang Schluchter, *The Rise of Western Rationalism: Max Weber's Developmental History*, Berkeley, Los Angeles and London, University of California Press, 1981.

<sup>173</sup> See Edith Hanke, «Max Webers "Herrschaftssoziologie": Eine werkgeschichtliche Studie», in Edith Hanke and Wolfgang J. Mommsen (Eds.), *Max Webers Herrschaftssoziologie*, Tübingen, Mohr Siebeck, 2001, p. 32.

<sup>174</sup> Weber, *Economy and Society*, p. 1117.



of rule with a merely derivative form of legitimacy. Expressions like «hereditary charisma», «routinized charisma» or «charisma of office», that is, where charisma meets either tradition or legality, convey precisely a mediated form of legitimacy, which has moved away from its original source. Charisma, thus, as the root of legitimacy, is essential to politics, particularly in its «wider» dimension. So, it is not surprising that, in the Munich lecture on the profession and vocation of politics, after briefly presenting the three ideal-types, Weber chooses to focus strictly on charisma.<sup>175</sup> However, as shall be seen, the survival of charisma in the increasingly rationalized and bureaucratized forms of modern politics is a problematic issue.

To further complicate the picture, it appears that, similarly to the concept of politics, there are also two versions of charisma in Weber's writings: a predominantly collective-communitarian and a strictly personal, individualistic one. Weber borrowed the concept of charisma from Rudolf Sohm's historical interpretation of Canon law<sup>176</sup>, with which he was probably first acquainted as Sohm's student in Strasbourg. The concept has, thus, a theological origin and, in that original sense, it points to a collective entity. Sohm, in fact, used it to describe the divine power that ruled the early Christian community, as opposed to the later legalistic and bureaucratic development of the Roman Church.<sup>177</sup> As Kalyvas notes, in Weber's pre-war studies on the sociology of religion, charisma and charismatic politics appear chiefly<sup>178</sup> in this collective-communitarian version, as religious movements struggling for the control of the cultural realm of representations, symbols, values and ideas that constitutes the ultimate source of political legitimacy. By contrast, in his later political writings, when Weber explicitly confronts the predicaments of modern mass politics, charisma reappears in strictly personalistic garments, with a

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<sup>175</sup> See Weber, «The Profession and Vocation of Politics», pp. 311-312.

<sup>176</sup> Rudolph Sohm, *Kirchenrecht*, Vol. 1, Leipzig, Duncker & Humblot, 1892.

<sup>177</sup> According to Weber, *Economy and Society*, p. 964, the Roman Catholic Church's decisive turn to bureaucratization can be traced back to the end of the thirteenth century.

<sup>178</sup> But not exclusively, since the intrinsically personal element of the innovative prophet is always present. Even if the leader and his following might fuse to form a cohesive group or, indeed, an ideologically/spiritually homogeneous community with a strong potential for transformative collective action, one must never forget that, for Weber, the fundamental appeal of charisma is personal authority stemming from a singularly gifted individual. Charisma might pervade a whole community, cement its unity and direct its action, but it remains primarily, in Weber's eyes, the quality of extraordinary personalities. Andreas Kalyvas, given his own specific theoretical concerns (see next fn.), neglects the centrality of the personal element in his reading of Weberian charisma.

strong emphasis on individual leadership.<sup>179</sup> How to account for such a shift? Here as elsewhere, for sure, there is no definitive, fully satisfying explanation, which would somehow help resolve – or at least mitigate – the intrinsic tensions of Weber’s thought. But if some understanding is to be gained, one certainly has to focus on the author’s narrative of modernity as an irresistible process of rationalization, secularization and bureaucratization.

As Karl Löwith has keenly argued, Weber’s sociology of religion<sup>180</sup>, where his predominantly collective-communitarian reading of charisma is located, can be conceived merely as part of the broader project of a «sociology of rationalism».<sup>181</sup> A project which, interestingly enough, as some of the more recent interpretations of Weber’s work have found out, has its earliest systematic manifestation in the author’s sociology of music, which demonstrates and dissects the process of rationalization underwent by music – by the musical substance itself, the key issue being the emergence of harmony, not by the social conditions surrounding musical production – in the Western world.<sup>182</sup> The origin of Weber’s rationalization-thesis in the rather unlikely domain of music is relevant for an accurate understanding of his concept of rationalism. Weber’s narrative of rationalization has scarcely anything to do with “rationalism” or “reason” as such concepts were understood – and sacralized – by the philosophers of the Enlightenment. There is no worship of reason in Weber’s thought.<sup>183</sup> Weberian rationalization does not stand for a grand achievement of mankind, for some sort of morally significant triumph over nature and instinct. Quite on the contrary, instead of leaning to the domains of purpose and meaning, it indicates purely instrumental proceduralism. Weber’s notion of

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<sup>179</sup> See Kalyvas, *Democracy and the Politics of the Extraordinary*, pp. 20-21. The author, in his quest for a radical democratic politics of the extraordinary, is mainly interested in recovering the collective dimension of charisma and its revolutionary potential in the struggles for cultural hegemony. His reflections, which are nonetheless illuminating in several respects, must be read, as he himself concedes, as a selective reconstruction of Weber’s thought.

<sup>180</sup> In the final analysis, of course, Weber’s sociology of religion is inseparable from his sociology of domination. And charisma is the fundamental concept connecting both.

<sup>181</sup> Karl Löwith, *Max Weber and Karl Marx*, London and New York, Routledge, 1993, p. 63: «Even the approach from the standpoint of the sociology of religion aims in the end to be nothing less than a contribution to the sociology of rationalism itself.»

<sup>182</sup> See Michael Sukale, *Max Weber: Leidenschaft und Disziplin*, Tübingen, Mohr Siebeck, 2002, p. 300; Radkau, *Max Weber*, pp. 540-545. As a great number of Weber’s writings, the essay on the rational and sociological foundations of music (probably completed in late 1912/early 1913), which also circulated in some editions as an appendix to *Economy and Society*, was only posthumously published: Max Weber, *Die rationalen und soziologischen Grundlagen der Musik*, Munich, DMV, 1921.

<sup>183</sup> For Weber’s distance to an optimistic faith in reason, see above, fn. 140.

rationalization refers essentially to rules, method, organization, repetition and routine. Thus understood, as Radkau notes, it becomes a ubiquitous process, with something of an instinctual drive to it, present to a certain degree in every instance of human socialization, «even in the magic rites of supposedly “primitive peoples”». Weber’s biographer even risks suggesting an affinity between the author’s concept of rationalization and that of psychoanalysis, that is, «as denoting a procedure which aims to provide an in itself irrational behavior with an – either visually, logically or morally – acceptable form.»<sup>184</sup> The point one must stress here is that every socially relevant human interaction, which, depending on the perspective of evaluation, might come across as perfectly rational or totally irrational with regard to its actual “substance”, can and will be the object of procedural rationalization as it becomes repeatedly performed.<sup>185</sup>

It is this quite broad and simultaneously strictly formal concept of rationalization that Weber employs both in the essay on «The Social Psychology of the World Religions» and in the passages of *Economy and Society* concerning «the social preconditions of hierocratic domination» and «the routinization of charisma» to describe the transformations of religious and political charismatic authority. One might briefly summarize the process as follows: The competing charismatic movements – religious and/or political –, in their fight for hegemony over the decisive realm of consensually shared and socially significant symbols, values and ideas, seek the support of as many followers as possible. In order to enlarge their social bases, they start rationalizing their doctrines, making them increasingly abstract and universalistic, so as to transcend both class and status barriers.<sup>186</sup> Once one of such movements attains supremacy, meaning: once its ethos becomes that of society as a whole, the drive towards rationalization proceeds to solidify domination into fixed practices and norms. As Weber avers:

«Charisma is a phenomenon typical of prophetic movements or of expansive political movements in their early stages. But as soon as domination is well

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<sup>184</sup> Radkau, *Max Weber*, p. 544: «Auch in der Rationalisierung steckt etwas Triebhaftes. Webers Rationalisierungsbegriff ist dem der Psychoanalyse verwandt, den dort 1908 Ernest Jones einführt: als Bezeichnung einer Prozedur, die einem an sich irrationalen Verhalten eine – ob optisch, logisch oder moralisch – akzeptable Form gibt.»

<sup>185</sup> As I shall argue in the following paragraphs, the process of rationalization might, in turn, also have an impact on – and ultimately transform – the perception of the “substance” itself.

<sup>186</sup> See Weber, *Economy and Society*, p. 1180.

established, and above all as soon as control over large masses of people exists, it gives way to the forces of everyday routine.»<sup>187</sup>

Now, according to Weber's *Protestant Ethic*, even if the author had not yet developed there his concept of charisma, is not the singularity of Western modernity precisely that its «forces of everyday routine» have emancipated themselves from their charismatic religious sources and taken a life and a logic of their own? Protestant asceticism might very well have substantially infused «the struggle to rationalize the world»<sup>188</sup> which underpins both modern capitalism and modern science, but given the overwhelming progress of rationalism, the transcendent substrate could eventually be discarded.<sup>189</sup> At this point, rationalization and secularization coincide, since the former, out of its own immanent logic, succeeds in emptying social relations from the sacred meanings that used to be attached to them. As a consequence, the struggle between charismatic religious-political movements recedes. For this reason, it is likely that Weber conceived them – the bearers of the predominantly collective-communitarian incarnation of charisma – as an essentially pre-modern phenomenon.

The process of secularization is, thus, not just about the social decline of religion. It also brings with it the erosion of the very realm of shared meaning on which the religious-political movements operated. When the spirit fully withdraws, the «iron cage» of Western modernity appears in its rawest nakedness, as an inescapable, perfectly rationalized, purely materialistic construct.<sup>190</sup> Within that cage, the very existence of politics in its «wider», cultural-charismatic conception is threatened, since there appears to be no room left for the assertion, based upon the fusion of select graced personalities

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<sup>187</sup> *Ibid.*, p. 252.

<sup>188</sup> Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, London and New York, Routledge, 1992, p. 64, n. 30 (on p. 181).

<sup>189</sup> For Weber's thesis of the disenchantment of the modern world, see Max Weber, «Science as a Vocation», in H. H. Gerth and C. Wright Mills (Ed.), *From Max Weber*, p. 139; and Weber, «The Social Psychology of the World Religions», p. 290.

<sup>190</sup> See the breathtaking *crescendo* in the conclusion of Weber's *Protestant Ethic*, pp. 123-124: «In Baxter's [an English Puritan theologian] view the care for external goods should only lie on the shoulders of the "saint like a light cloak, which can be thrown aside at any moment". But fate decreed that the cloak should become an iron cage. Since asceticism undertook to remodel the world and to work out its ideals in the world, material goods have gained an increasing and finally an inexorable power over the lives of men as at no previous period in history. To-day the spirit of religious asceticism – whether finally, who knows? – has escaped from the cage. But victorious capitalism, since it rests on mechanical foundations, needs its support no longer. The rosy blush of its laughing heir, the Enlightenment, seems also to be irretrievably fading, and the idea of duty in one's calling prowls about in our lives like the ghost of dead religious beliefs.»

with a devoted following, of overarching normative theories that aim to integrally transform and mold society according to their substantive principles. Therefore, the possibility of salvaging at least partially the charismatic dimension of politics<sup>191</sup> seems to be strictly reduced to the very few capable of rising above the pervasive «‘loss of soul’»<sup>192</sup> that characterizes modern life, *i. e.*, restricted to the extraordinary, creative personal potential of heroic leaders. Given the fragmentation of social life that marks the modern condition, the charismatic personality might be unable to merge with his followers into a consistent formation, with a holistic, all-encompassing worldview. But that does not seem to mean, for Weber, that there is no place for the charismatic leader in the modern world; that modernity actually succeeds in dispelling charisma altogether from its social and political reality. Granted: the modern charismatic leader will hardly be able to accede to the stature of a prophet<sup>193</sup>, the original model for the charismatic personality; he will certainly not – not anymore – be the driving force behind what one could call a process of comprehensive ideological/spiritual integration. However, personal charismatic qualities might still form the basis of political leadership in a stricter sense, to the extent that and whilst they succeed in winning over the trust – and Weber does not even shy away of employing the word «devotion» here too<sup>194</sup> – of the increasingly inarticulate modern masses.

Indeed, in the German critical juncture of 1917-1919, Weber’s constitutional reform proposals are basically aimed at enabling the affirmation of charismatic political leaders against the gloomy specters of mounting bureaucratization (first) and revolutionary political instability (later).

## **5. Charismatic politics in modern Germany (1917-1919)**

The two most important political studies that Weber wrote during the First World War deal chiefly with the issues of democratization («Suffrage and Democracy in

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<sup>191</sup> Religion and its specific charismatic appeal, for their part, might manage to survive the fragmentation of modern life and the consequent withdrawal to the private sphere – and, indeed, thrive in the domain of personal spiritual experience.

<sup>192</sup> Weber, «The Profession and Vocation of Politics», p. 350.

<sup>193</sup> Even if these might rise anew «at the end of this tremendous development». See Weber, *The Protestant Ethic*, p. 124.

<sup>194</sup> See Weber, «The Profession and Vocation of Politics», p. 311.

Germany») and parliamentarization («Parliament and Government in Germany under a New Political Order»), but they also touch upon one of the overarching categories of Weber's discourse on modernity, namely: bureaucratization – that form of rule which pushes rationalization to its limits. Having been written as pamphlets and/or newspaper articles, they were meant as interventions in the German wartime public debates, respectively, on the reform of the highly unequal Prussian three-tier electoral system and on the extension of parliamentary prerogatives and powers at the *Reich* level. Regarding democratization, universal suffrage was, in Weber's view, a necessary consequence of rational, modern mass politics. Contrary to what some «political litterateurs» argued – and Weber was particularly harsh on the so-called «amateurs», mainly conservative ones, who dreamed of romanticized neocorporative constitutional designs, but had no grasp of the specific social and economic conditions of modern politics<sup>195</sup> –, a return to an idealized “organic” conception of the medieval *Ständestaat* was completely out of the question, and mass democracy just had to be fully acknowledged.<sup>196</sup> It is, however, around the prospects of parliamentarism that Weber first concentrated his attempt to rescue the possibility of a charismatic politics in a context of seemingly irreversible rationalization of all spheres of life.

### 5.1. Weber's elitist parliamentarism and the case against bureaucratic rule

In «Parliament and Government in Germany under a New Political Order», Weber argues that modern politics and mass democracy tend inexorably to bureaucratic rule, whose impersonal apparatus he describes as a «living machine» which, together with the «dead machine» of industrial capitalism and with an equally unmatched technical superiority, threatens to erect «the housing of that future serfdom to which, perhaps, men

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<sup>195</sup> See Weber, «Suffrage and Democracy», pp. 85, 91 and 100.

<sup>196</sup> *Ibid.*, pp. 98-103. Weber puts forward several arguments in defense of universal suffrage, which he had now – considering its extension to the largest and most powerful German *Land* – ceased to regard as Bismarck's conservative Trojan horse (see above, fn. 134): 1. It was a political imperative to grant those who would carry the burden of post-war economic reconstruction that bare minimum of political influence over the shaping of the future of the German nation that only equal and universal suffrage could guarantee. 2. It was a command of basic decency and fairness to avoid putting the returning front soldiers electorally behind those who had stayed at home and, having been spared of experiencing the horrors of the battlefields, had also been able to maintain or even to improve both their economic condition and, as a consequence, their electoral status. 3. More broadly, equal and universal suffrage, resting upon the general category of the citizen of the State that also provided the basis for mass conscription, was part of the inescapable modern trend towards rationalization, bureaucratic rule and administrative simplification – it was certainly not a coincidence that such an electoral arrangement was gaining ground everywhere in Europe.

may have to submit powerlessly, just like the slaves in the ancient state of Egypt» – another Weberian variation on the legendary iron cage metaphor.<sup>197</sup> In fact, the ancient Egyptian State was, for Weber, the first historical model of bureaucracy, «although with strong patrimonial [traditional] elements», and in a revealing analogy he posits that the efficiency of the modern Western State officialdom could only be approximated «where the subjection of the officials to the lord is also personally absolute, *i. e.*, where slaves or employees treated like slaves are used for administration»<sup>198</sup>, as was the case in the Pharaonic State. The modern trend towards bureaucracy was not without its element of enslavement, though not, as in Antiquity, through bare physical coercion, but with the assistance of other, both more subtle and more efficient, inducements. The impending menace of such development, thus, made the author wonder:

«How is it *at all possible* to salvage any remnants of ‘individual’ freedom of movement *in any sense*, given this all-powerful trend towards bureaucratisation?»<sup>199</sup>

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<sup>197</sup> Weber, «Parliament and Government», p. 158 (emphasis elided). The most famous instance of the metaphor appears in the above-quoted (fn. 190) passage of *The Protestant Ethic*. For a critical evaluation of Talcott Parsons’s translation, see Peter Baehr, «The “Iron Cage” and the “Shell as Hard as Steel”: Parsons, Weber, and the Stahlhartes Gehäuse Metaphor in *The Protestant Ethic and the Spirit of Capitalism*», *History and Theory*, Vol. 40, No. 2, May 2001, pp. 153-169.

For Weber, a machine, whether living or dead, «is *congealed spirit*» («Parliament and Government», p. 158). Such rather curious term – *geronnenner Geist* in the original German –, as the editors of Weber’s *Political Writings* indicate, may be a reference either to Marx or to Simmel, who both used similar language. However, the conception of modernity in the static terms of gelation points exactly in the opposite direction of one of Marx’s most famous metaphors. Indeed, in *The Communist Manifesto*, Marx and Engels describe the social transformations led by the bourgeoisie as a process where «[a]ll that is solid melts into air», that is, as a constant, uninterrupted flux of change. On the contrary, the Weberian images of modernity – from the «iron cage» or the «shell as hard as steel» to the machine as «congealed spirit» to the «polar night of icy darkness» (see below, fn. 214) – are all haunted by the specter of a wholly petrified immobility. The course taken by the modern adventure more recently – with the growing de-materialization of social relations in the digital age, the contraction of space and time, the triumph of finance over industry, and so on – appears to be closer to the Marxian vision of liquidity than to Weber’s fear of ossification. See Zygmunt Bauman, *Liquid Modernity*, Cambridge, Polity Press, 2000, for an interesting discussion of *liquids* and *solids* in their relation to the modern condition (regrettably, however, Bauman fails to differentiate Marx from Weber along such lines).

<sup>198</sup> Weber, *Economy and Society*, p. 964 and p. 967.

<sup>199</sup> Weber, «Parliament and Government», p. 159. Joachim Radkau sees no reason for Weber’s horror of bureaucracy, which seems to have been anticipated and decisively fueled by his brother Alfred. The Webers, so he argues, ignored the reformist potential of the Prussian-German bureaucracy and greatly overestimated the dangers associated with the actually existing bureaucratic apparatus, which was meager by the standards of today: up until 1914 the German Imperial bureaucracy employed only about 2000 officials (the administration lay mostly still in the hands of the various federal States). The resonance of Weber’s critique of bureaucracy and bureaucratization is essentially explained by the later development of bureaucratic «machines», particularly, though not exclusively, in totalitarian regimes. See Radkau, *Max Weber*, pp. 478-483.

Apparently, the fundamental liberal concern with individual freedom emerges here quite clearly. As the war drew to a close, Weber's answer, too, seemed unequivocal: democratization and parliamentarization. On the one hand, as the author explains in «Suffrage and Democracy in Germany», only the voting slip offers those who are ordinarily the objects of bureaucratic administration the possibility of, however minimally, co-determining the shape of such rule. On the other, a strong and powerful parliament was needed to publicly control the otherwise obscure and secretive workings of the whole machinery of State administration. However, the mode of parliamentary control Weber envisaged went beyond the traditional – in his own words, «negative» and «antiquated»<sup>200</sup> – liberal priorities regarding the clear assurance of a certain sphere of freedom from State intervention. Indeed, what made the prospect of bureaucratization so frightening in Weber's eyes was not so much its potential disregard for individual rights, but rather the dark promise of an era of political petrification where rational-legal forms of rule would be wholly unchallengeable – indeed, in other words, the prospect of a complete evaporation of charismatic politics. Amongst the «remnants of 'individual' freedom of movement» Weber wished to rescue from the irresistible progress of bureaucracy ranked, foremost, the creative freedom of the political leader, which alone could catalyze political innovation and provide authority with a charismatic, personal grounding. In this sense, Weber conceived parliaments not primarily as instances which controlled the elected government's exercise of power, but rather as greenhouses of charismatic political leaders who should be capable of overcoming the «strict internal limits»<sup>201</sup> of bureaucratic domination.

According to Weber, the crucial distinction between the bureaucrat and the politician lay in the relationship with the dimension of social action which pertains to the public struggle for personal power. Ideally at least, and most often in practice as well, the bureaucrat is subtracted from such struggle. His work is done *in the office*, mostly behind closed doors. He acquires it through specialized training and performs it strictly within the boundaries of what is formally prescribed, obeying his superiors and commanding his

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But one can still argue, *pace* Radkau, that Weber had the merit of detecting – and critically considering – a crucial trend of social and political modernization in its historical germ.

<sup>200</sup> Weber, «Suffrage and Democracy», p. 106.

<sup>201</sup> Weber, «Parliament and Government», p. 159.



subordinates. When he takes care of official business, the bureaucrat stands under the aegis of «the principle of *sine ira ac studio*», meaning that his behavior should be untainted by «love, hatred, and all purely personal, irrational, and emotional elements which escape calculation».<sup>202</sup> Politics, on the contrary, cannot be reduced to such a pure realm of formalism, technical specialization and calculability, with no trace of subjective passions. The politician struggles for personal power – a power which is not legitimized *a priori* by the anonymous force of rational procedures – and also for the personal responsibility that comes with it. As noted in the discussion concerning the ethics of political action<sup>203</sup>, politics requires a personal commitment to a cause which necessarily breaks down the rigid distinction between public office and private life to which the bureaucrat is supposed to adhere. The reason why bureaucrats tend to fail when they step into the politicians' shoes – and that was, in Weber's eyes, the fundamental problem with German politics since Bismarck was removed from office – is the absence of the framework which organized and legitimized their actions *qua* bureaucrats. When he leaves the «living machine» that subtracted him from the public struggle for power, from a domain of competing passions and causes, the bureaucrat finds out that most of the qualities which made him a competent official are useless – or even disadvantageous – in the political arena. For Weber, hence, politics should be left to politicians, that is, to those who feel at home in the public struggle for personal power:

«The official should stand 'above the parties', which in truth means that he must remain outside the *struggle* for power of his own. The struggle for personal power and the acceptance of full *personal responsibility for one's cause (Sache)* which is the consequence of such power – this is the very element in which the politician (...) live[s] and breathe[s]»<sup>204</sup>

In the closing years of war, thus, Weber sees the extension of parliamentary powers, first and foremost, as a means to further the rise of true political leaders. A parliament devoid of political initiative and condemned to sterile protesting, such as the German *Reichstag*, and which therefore left effective power unchallenged and unchecked

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<sup>202</sup> Weber, *Economy and Society*, p. 975.

<sup>203</sup> See above, p. 71.

<sup>204</sup> Weber, «Parliament and Government», p. 161.

in the hands of the ever-growing State bureaucracy, hindered the rise of personalities endowed with the charismatic qualities of leadership. Only a «*working*» parliament, that is, one which had the right and the resources to continuously control the bureaucracy, could favor the emergence and the assertion of political leaders. These would be trained, above all, in intensive committee work – not so much in rhetorical performances before the plenary –, whose demands accentuated the need, welcomed by Weber, for the professionalization of parliamentary elites.<sup>205</sup>

However, was not that very turn to the professionalization of politics part of the broad specter of modern rationalization, which was of course not restricted to the rise of the administrative apparatus of the State? In fact, the professional parliamentarian was but the tip of the iceberg of the increasingly bureaucratized formations that dominated modern politics: the political parties. Structurally, these did not really differ, in terms of strict hierarchical organization, from the large capitalist company or the «living machine» of State administration.<sup>206</sup> If that was the case, however, wouldn't parliamentary government, whose fundamental function was to supervise the administrative apparatus, be reduced to the control of the higher ranks of the State bureaucracy by the higher ranks of party bureaucracies? According to Weber, even if it were so, there would still be an important difference between the pinnacle of an administrative apparatus and that of a – however bureaucratized – political party: the process of selection. Whereas the State official, as a rule, acquired its position through specialized training and the channels of rigorously defined procedures, the party leader had to prevail in the public struggle for personal power and responsibility, both within and outside his party. He had to vie for followers inside his party and for votes against the competing parties. In this process of self-assertion, he developed the charismatic qualities that characterized true political leadership. Once in a position of effective power, he would thus be able to control and

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<sup>205</sup> *Ibid.*, pp. 176-177 and pp. 190-191

<sup>206</sup> As Robert Michels, one of Max Weber's most gifted *protégés*, had demonstrated in his pre-war study of power relations within the SPD – *Zur Soziologie des Parteiwesens in der modernen Demokratie*, Leipzig, Werner Klinkhardt, 1911 –, and as Weber himself highlights in *Economy and Society*, pp. 939, 951, 971 and 984-985: «A political party, after all, exists for the very purpose of fighting for domination in the specific sense [see above, fn. 163], and it thus necessarily tends toward a strict hierarchical structure, however carefully it may be trying to hide this fact.» (On p. 951.)

Weber, it must be added, was also familiar with Mosei Ostrogorski's and James Bryce's turn-of-the-century works on the bureaucratization of, respectively, British and American political parties. See Abellán, *Poder y Política en Max Weber*, pp. 144-158.

For an analysis of Weber's relationship to Michels, see Radkau, *Max Weber*, pp. 338-344.

shed some light of publicity onto the workings of the State administration. And this was the admittedly limited sense in which democracy was at all possible in the context of mass politics: as public control of the State bureaucracy by the political representatives of those – the ordinary citizens – who are ruled by that very same bureaucracy.<sup>207</sup>

However, this rather minimalist definition of parliamentary-democratic government is only half the story. Indeed, it is the «negative» and «antiquated» side of the story.<sup>208</sup> The flipside is a rather unrestricted conception of the power of the political leader as such. As Mommsen rightly argues, Weber's parliamentarization program of 1917 was missing a keystone: the legal binding of the nomination and dismissal of the head of government to a parliamentary vote.<sup>209</sup> This was in part due to the strategic need to adapt his proposals to the intricacies of the German federal system, but it can hardly be explained away by that. More fundamentally, it marked a reversal of the traditional liberal priorities of parliamentary government. Weber's political horizon was not that of the old liberal preoccupation with controlling the power of the executive and securing spheres of freedom from governmental interference. For him, the primary point was to further the rise of charismatic leaders, not really to subject such leadership to the continuous and thorough control of the representative chamber.

Indeed, mass democracy, contrary to what one might expect, took the – according to Weber – unavoidably elitist dimension of politics to new extremes. On the one hand, of course, the significance of mass democracy lay in its extension of the realm of affirmation of the political leader. Whereas, in the context of classic liberal parliamentarism, the leader had to fight for recognition and power within a restricted circle of so-called notables, now he had to gain the trust and the belief of the masses. However, on the other hand, that extension of the base entailed a strong contraction of the top. The political elite was effectively reduced to the leading personalities of government exercising personal power, whilst the individual members of parliament were increasingly degraded to the role of passive followers, embedded into bureaucratized organizations. To Weber, democracy's historical successes, since Ancient Greece, had

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<sup>207</sup> See Weber, «Parliament and Government», pp. 160-161 and «Suffrage and Democracy», p. 126. For a critique of Weber's exaggerated belief in the virtues of publicity and public – meaning: parliamentary – control as an effective means of checking bureaucratic rule, see Mommsen, *Max Weber und die Deutsche Politik*, p. 184. This is indeed one of the few aspects in which Weber adheres closely to the standard, nineteenth-century liberal doctrine of parliamentary government.

<sup>208</sup> See above, fn. 200.

<sup>209</sup> Mommsen, *Max Weber und die Deutsche Politik*, pp. 196-205.

always been achieved at the cost of substantial concessions to the Caesaristic principle of leadership. Modern mass democracy was no exception, but rather a robust confirmation of this:

«For it is not the many-headed assembly of parliament as such that can ‘govern’ and ‘make’ policy. There is no question of this anywhere in the world, not even in England. The entire broad mass of the deputies functions *only* as a following of the leader or the small group of leaders who form the cabinet, and they obey them blindly *as long* as the leaders are successful. *That is how things should be*. The ‘principle of the small number’ (that is the superior political manoeuvrability of *small* leading groups) always rules political action. This element of ‘Caesarism’ is ineradicable (in *mass states*).»<sup>210</sup>

Weber’s concept of parliamentarism in the two final years of war is, thus, two-faced like the Roman god Janus. If, as a corrective to the progress of bureaucratic rule, Weber extolls the capacity of parliament to shed the light of publicity onto the workings of bureaucracy in a classically liberal fashion; on the other hand, however, he both describes and welcomes its subordination to the very same political leaders it is supposed to help create and select. Indeed, Weber’s cool analysis had clearly perceived that the ongoing development of mass industrial society, by transforming the political parties into bureaucratized, strictly hierarchical organizations, had already disintegrated the politics of notables (*Honoratiorenpolitik*) upon which the golden years of liberal parliamentarism had rested, in the middle of the nineteenth century. Parliaments could no longer be conceived as instances of discussion, deliberation and persuasion amongst independent personalities. They had become the *locus* of public party political struggle, where deputies, regardless of the constitutional provisions that called for – and formally protected – independence, voiced not their personal convictions, but «official declarations by the party which [were] being addressed to the country at large ‘through the window’». <sup>211</sup> Given such circumstances, the contraction of whom was conceived as political leader – from the member of parliament as such to the governmental elite that dominates the existing parliamentary majority and, through it but also beyond it, since

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<sup>210</sup> Weber, «Parliament and Government», p. 174. See also *Economy and Society*, p. 952 (on the «law of the small number») and pp. 961-962 (on democracy’s frequent transformation into Caesarism).

<sup>211</sup> Weber, «Parliament and Government», p. 170.

the new means of propaganda can easily amplify the elite's personal charismatic qualities, achieves the support of the masses – proved to be the necessary consequence of Weber's quest to rescue the possibility of a modern charismatic politics. A quest which, in the turbulent post-war context, will have him place most of his hopes outside the parliamentary realm.

## 5.2. Blunting the charismatic spearhead: revolutionary unrest and the promises of presidentialism

To gauge the precise contours of Weber's endeavor to salvage the possibility of a modern charismatic politics one must set them against the backdrop of the revolutionary wave that spread across Germany between late 1918 and early 1919, marking the «trauma of birth» (Peter Gay) of the Weimar Republic. Drawing on Andreas Kalyvas's insight<sup>212</sup>, we noted above that Weber's narrative of modernity appears to preclude the viability of the author's collective-communitarian understanding of charisma, which had permeated countless passages of his essays on the sociology of religion. A modern charismatic politics, so it seemed, could be grounded only on the personal appeal of a leader which relates to the masses strictly horizontally, in the sense that he tries to win over their support for his leadership ambitions without, however, aiming to merge with them into an ideologically homogeneous and potentially disruptive, revolutionary political movement. The rationalization and bureaucratization of politics, along with the disenchantment and fragmentation of modern life in general, supposedly erased the prospects of success for a charismatic movement seeking comprehensive social and political transformation. And yet, in October 1917, one such movement took control over a Continental empire.<sup>213</sup> By the end of 1918, soldiers' and workers' councils threatened to do just the same in Weber's own native German *Reich*. It is precisely in such revolutionary context – and instead of the arguably charismatic, even if irresponsible, revolutionary leader Kurt Eisner – that Weber gave his Munich lecture on the profession and vocation of politics. As the lecture drew to a close, the author called upon the

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<sup>212</sup> See pp. 73-74, fn. 179.

<sup>213</sup> Let us be reminded that Weber had a profound knowledge of the Russian situation. He had even learned Russian in order to follow the events of the 1905 revolution, an interest which resulted in a lengthy essay: Max Weber, «On the Situation of Constitutional Democracy in Russia», in Weber, *Political Writings*, pp. 29-74 (abridged). On Weber's mental journey to Russia, see Radkau, *Max Weber*, pp. 360-380.

members of the audience «who share in the intoxication (*Rausch*) which this revolution signifies» to look ten years ahead. What did Weber see in that not so distant future? The arrival of «an age of reaction», of a long «polar night of icy darkness and hardness».<sup>214</sup> The proper age of revolution, it appears, had been the age of liberal-bourgeois revolutions and enlightened rationalism – a by-gone age. Now that the universalistic discourse of human rights had been reduced to formalistic legal positivism; that «victorious capitalism» could do very well without the religious substrate that had infused it; and that bureaucratic rule advanced irresistibly, revolution held no promise of sustainable social and political change. As Weber argues in a passage of *Economy and Society* concerning the consequences of bureaucratic rule, revolution «in the sense of the forceful creation of entirely new formations of authority» becomes «more and more impossible». Indeed, «[t]he place of “revolutions” is under this process taken by *coups d’état*».<sup>215</sup> For Weber, hence, socialist revolution would eventually arouse only bitter reaction and probably endanger the – however disenchanted – *acquis* of the Enlightenment «without which life would become unbearable»<sup>216</sup>.

In the absence of revolutionary hopes – indeed, fearing the ultimate consequences of revolutionary enthusiasm –, the modern incarnation of charismatic politics necessarily implied a substantial compromise with the rationalized and bureaucratized institutions of mass democracy. Such an adjustment, in fact, had more to it than merely the discarding of the predominantly collective-communitarian version of charisma. In the end of a posthumously published essay on the three pure types of legitimate rule, Weber conceives democracy specifically as an anti-authoritarian reinterpretation of charisma.<sup>217</sup> The reinterpretation entails, essentially, a reversion of the original causal nexus of charisma: the power of the charismatic leader lies not anymore primarily in intrinsic exceptional qualities which *per se* command the devotion of the following – in the pure form of charismatic authority obedience is an obligation, not a choice –, but instead on the formal, meaning: electoral, recognition of the former by the latter. What used to be the effect of the charismatic appeal – popular recognition – now became the primary cause, the basis of legitimate democratic rule. Charismatic politics thus becomes embedded in the formal

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<sup>214</sup> Weber, «The Profession and Vocation of Politics», p. 368.

<sup>215</sup> Weber, *Economy and Society*, p. 989.

<sup>216</sup> See above, fn. 139.

<sup>217</sup> See Max Weber, «Die drei reinen Typen der legitimen Herrschaft», in Max Weber, *Gesammelte Aufsätze zur Wissenschaftslehre*, Seventh Edition, Tübingen, Mohr Siebeck, 1973, p. 487.

legal procedures of modern democracy. That these put a damper on the extraordinary innovative potential of charisma is of course undeniable. If charisma represents a rupture in the continuity of domination, it is by definition an ephemeral phenomenon, prone sooner than later to be the object of some form of routinization. The danger of the routinization implied in the electoral mechanisms of mass democracy is that of the full bureaucratization of politics. As Weber notes, the difference between an elected leader and an elected State official lies then solely on the meaning attached to the office and conveyed to both direct subordinates and voters, that is, on whether the person involved conceives himself purely as the mandatary of the people or assumes full responsibility for his actions in the pursuit of his own cause.<sup>218</sup> Ultimately, hence, what remains of charisma in the context of modern democratic politics is the personal commitment of the political leader to a cause and the unequivocal acceptance of responsibility for the actions undertaken in the service of such cause. The horizon of political innovation originally attached to idea of charisma dwindles significantly, since the actual direction and substance of the cause which the leader serves becomes largely irrelevant. A personal, non-bureaucratized dimension of politics is salvaged as long as the political leader sees himself as an independent actor, irrespective of whether he acts in the name of transformation or preservation. And indeed, in the revolutionary juncture following November 1918, Weber, even if sometimes claiming the opposite, will essentially search for charismatic leadership in pursuance of stability and permanence, not change.

When, in the final days of September 1918, General Ludendorff called for a parliamentary government to immediately negotiate peace, the liberal demand of parliamentarization, which the conservatives had been able to contain for nearly half a century, was fulfilled from night to day – and far beyond the modest scope that Weber had deemed achievable approximately one year before. Of course, the price to pay was high: the embryonic new republican regime would have to carry on its shoulders the burden of military defeat. Weber, like most of his contemporaries, was not expecting the Imperial State to crumble like a deck of cards within two months. And as that happened, in arguably his most intense period of political activity, he spoke against the acceleration of history that characterizes all great political upheavals, against what one could label – using the author's own conceptual categories – the charismatic revolutionary wave that spread across his nation.

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<sup>218</sup> *Ibid.*, p. 488.

The course of events, as Weber admits, had naturally overtaken the call for democratization and parliamentarization that had marked his earlier reform proposals. In November 1918, when the author published a series of articles in the pages of the *Frankfurter Zeitung* on the future constitutional configuration of the German polity<sup>219</sup>, the real political alternative, fought out in the streets of Berlin, opposed a Soviet-style democracy of soldiers' and workers' councils to some republican form of liberal-constitutional democracy. Notwithstanding, Weber starts by posing a question which history seemed to have already settled: parliamentary monarchy or republic? To understand this apparent anachronism, let us briefly return to the 1917 writings. There, in spite of all the uncertainties regarding future developments, Weber held one thing for sure: the position of the German dynasties, including of course the leading Prussian one, would come out of the war unchallenged.<sup>220</sup> This, he adds, was acknowledged even by some of the more radical members of the SPD, who did not dispute that parliamentary monarchy was the fittest constitutional model for Germany.

The monarchic head of State, far from being merely an institutional adornment, would play in Germany a decisive intermediary and moderating role – much more so than in the UK –, given the absence of a two-party system favoring the formation of stable parliamentary majorities. Indeed, Weber argued that a two-party system in the image of the Westminster model, with its liberal/conservative divide (by 1917, it should be noted, still based upon limited suffrage), was untenable in mass democratic, modern industrial States. The economic cleavage between the bourgeoisie and the proletariat, marked by the emergence of socialism as a new «gospel for the masses»<sup>221</sup>, had to find party political and parliamentary expression. To this general condition of modern industrial society – which the author rightly thought would also come to transform the British two-party system – one had to add, in Germany, the persistence of a confessional divide, with Catholicism being politically organized «as a minority protest party». In such context, at least four parties – liberals, conservatives, socialists and Catholics – would always have

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<sup>219</sup> I will refer to the comprised version of the articles, published in early 1919: Max Weber, «Deutschlands künftige Staatsform», in Max Weber, *Gesammelte politische Schriften*, Fifth Edition, Tübingen, J. C. B. Mohr (Paul Siebeck), 1988, pp. 448-483.

<sup>220</sup> See Weber, «Parliament and Government», p. 160: «The position of the German dynasties will still be intact at the end of the war, unless very great acts of folly are committed (...).» As it turned out, «very great acts of folly» were indeed committed!

<sup>221</sup> The approximation of socialism to a – though irretrievably hopeless in the modern context – charismatic religious movement is quite evident in this use of language.



to coexist. The crown's moderating influence between these conflicting forces would, thus, be of the utmost importance.<sup>222</sup>

Even if it was undeniable that Continental divine-right monarchy was, by then, ages away from the epoch of its genuine charisma, which stemmed essentially from military success, Weber was not prepared to let go of the derivative, traditionalized form of hereditary charisma. After all, it still seemed to provide an – albeit increasingly frail – source of charismatic-traditional legitimacy for the social and political order, which bureaucratized mass society could hardly do without. That is why, in the revolutionary month of November 1918, Weber still clings to the idea that parliamentary monarchy is the technically more adaptable and, as such, best suited constitutional arrangement for modern mass polities. This preference should be kept in mind both beyond the harsh accusations Weber directs at Wilhelm II<sup>223</sup>, whose hesitations and final desertion from Berlin he considers responsible for the disrepute of the monarchical institution, and beyond the immediate avowal of the republican State form. Significantly, in spite of the conversion to republicanism dictated by the force of the revolutionary circumstances, Weber leaves the door open for a return of the monarchy through a constituent or plebiscitary decision. At the dawn of the Weimar Republic, Max Weber was amongst the so-called *Vernunftrepublikaner* – republicans for circumstantial, practical reasons, not by conviction.<sup>224</sup>

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<sup>222</sup> See *ibid.*, p. 211. This brief reference to the formation of party systems is rather interesting from the point of view of later developments in political science – the so-called Duverger's "laws" –, which have posited a linear causal link between the independent variable of the electoral system and the dependent variable of the party system: simple majority results in a two-party system, whilst proportional representation and absolute majority – albeit the latter tending to a more flexible party structure – give rise to multiparty systems. Contrary to such "laws", however, the multiparty system of the Wilhelmine Empire grew out of a simple majority electoral arrangement. And, in turn, the pre-existence of such a multiparty system may have influenced the constitutional adoption of proportional representation in Weimar – of which Weber, as we shall see immediately below, was a fierce critic. Max Weber seemed to be intuitively aware that the causal nexus between the electoral system and the party system was circular rather than linear.

On the insufficiencies of Duverger's "laws" and on circular causality, see Dieter Nohlen, *Wahlrecht und Parteiensystem*, Opladen, Leske & Budrich, 2000, pp. 201-209 and 405-415.

<sup>223</sup> On the author's contempt for the *Kaiser*, see above, fn. 135.

<sup>224</sup> See Weber, «Deutschlands künftige Staatsform», pp. 449-455. Let us be reminded that, according to Mommsen, *Max Weber und die Deutsche Politik*, p. 326, Weber did not initially join the left-liberal German Democratic Party (DDP) because of the latter's unequivocal stance on the republican form of the new regime. One should also bear in mind that his post-war political writings are marked by a considerable amount of tactical calculation, as revealed in private correspondence quoted by Mommsen (*Max Weber und die Deutsche Politik*, p. 355) where Weber writes: «At this moment, everything one says *publicly* is naturally only "rebus sic stantibus", *not pour jamais!*» («Was man jetzt *öffentlich* sagt, ist natürlich stets 'rebus sic stantibus', *nicht pour jamais!*»). As *things stood*, Weber had to acknowledge the republic. In

This provisional farewell to the cherished model of constitutional monarchy must also be read in the light of Weber's increasing criticism of parliamentary and party politics. In the author's view, defeat discredited not only the monarchy, but also parliament and the party machines that controlled it. Weber's mistrust of party politics, it should be noted, was already present in «Parliament and Government», which was explicitly conceived, in its subtitle, as «a political critique of officialdom and the party system». There, however, Weber saw the parties «succumb[ing] to bureaucratisation *in much the same way* as the state apparatus»<sup>225</sup>, whilst in the post-war period of revolutionary turbulence, when Weber's appreciation for a rationally organized public administration as a counterweight to an emotionally overcharged politics of the streets increases significantly<sup>226</sup>, political parties take centre stage in the author's analysis, substituting the State administration as the main target of his critique. According to Weber, the elections to the constituent National Assembly, held in January 1919, constituted a clear proof of the insufficiency of party politics. As he saw it, the places on the electoral slates that should have been occupied by charismatic personalities with the potential to thrive as political leaders were instead given – by the professional politicians who dominated the party apparatuses – to «political shopkeepers»<sup>227</sup> with no inner vocation for politics. Such state of affairs was decisively favored by the system of proportional representation with closed lists, whose pernicious effects, according to Weber, were only beginning to show. In the immediate horizon stood a parliament of mere delegates of particular, mainly economic interests, incapable of fulfilling its task of training and selecting political leaders. Regarding parliamentarization, thus, the November revolution fully reversed Weber's priorities:

«Previously, when we had an authoritarian state, one had to argue for the power of the majority in parliament to be increased, so as to raise, at long last, the importance

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much the same way – meaning: without the irreversibility that a cursory reading might suggest – he also called for the de-militarization of Germany and the abandonment of imperialistic dreams.

<sup>225</sup> Weber, «Parliament and Government», p. 228 (emphasis added).

<sup>226</sup> In spite of the somber undertones that permeate most of Weber's lines on bureaucracy and bureaucratization, his stance on the latter is probably more ambivalent – yet again – than first appearances might suggest. Mommsen, *Max Weber und die Deutsche Politik*, p. 319, speaks of a «hate-love» relationship towards bureaucratization.

<sup>227</sup> Max Weber, «The President of the Reich», in Weber, *Political Writings*, p. 306. The original expression «politisch[e] Ladenhüter» (see Max Weber, «Der Reichspräsident», in Max Weber, *Gesammelte politische Schriften*, Fifth Edition, Tübingen, J. C. B. Mohr (Paul Siebeck), 1988, p. 499) is here oddly translated as «political 'shopminders'». I was, however, unable to find the word «shopminder» in any English dictionary.

and therefore the quality of parliament. The situation today is that all constitutional proposals have succumbed to crude, blind faith in the infallibility and omnipotence of the majority – of the majority in parliament, that is, not of the people. We have gone to the opposite, but equally undemocratic extreme.»<sup>228</sup>

As Wolfgang Mommsen argues, in this sudden reversal of pre-war political priorities Weber joined the mainstream liberal opinion, advocated also, among others, by Hugo Preuß.<sup>229</sup> Liberals, now that the monarchic head of State was missing, generally agreed that one had to tackle the danger of a so-called “parliamentarian absolutism” (*Parlamentsabsolutismus*). They did so by emphasizing the idea of the balance of powers. Robert Redslob’s distinction of «true» and «false» forms of parliamentary government, still elaborated within the context of imperial constitutionalism, provided them a key argumentative tool.<sup>230</sup> According to Redslob, the French system of the Third Republic, where the presidential head of State was elected by the two parliamentary chambers and thus deprived of underived democratic authority, constituted a degeneration of parliamentarianism, in the sense that it destroyed the equilibrium of powers in favor of unrestricted parliamentary rule. The English and the Belgium systems, by contrast, safeguarded the balance of powers through their crown/parliament dualism. *True* parliamentary government required two independent bearers of national sovereignty to check each other’s powers. For a republican Germany, this implied the need for a democratically elected president to stand on equal footing, as head of the executive, beside the legislative chamber. Government would then function as the necessary link between these two democratically elected organs. In essence, hence, the President would simply step in the vacant shoes of the *Kaiser*.<sup>231</sup>

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<sup>228</sup> Weber, «The President of the Reich», p. 307. On a more personal note, in a letter to Carl Petersen, leader of the DDP, from April 1920 – quoted by Mommsen, *Max Weber und die Deutsche Politik*, pp. 333-334 – , where he announces his withdrawal from party politics, Weber writes that to sit in parliament would be «neither an honor nor a pleasure». Weber’s anti-parties and anti-parliamentarian leanings may have been accentuated by the failure to impose his candidacy to the National Assembly, due to the obstruction of the local DDP party organization. On the epilogue of Weber’s political career, see Mommsen, *Max Weber und die Deutsche Politik*, pp. 329-331.

<sup>229</sup> Hugo Preuß, as State secretary of the interior, was in charge of presenting the first draft of the new republican Constitution.

<sup>230</sup> Robert Redslob, *Die parlamentarische Regierung in ihrer wahren und in ihrer unechten Form: Eine vergleichende Studie über die Verfassungen von England, Belgien, Ungarn, Schweden und Frankreich*, Tübingen, J. C. B. Mohr (Paul Siebeck), 1918.

<sup>231</sup> See Mommsen, *Max Weber und die Deutsche Politik*, pp. 371-378.

The substitution of the *Kaiser* by the President of the *Reich* was the focal point for the development and final crystallization of Max Weber's vision of a leadership democracy (*Führerdemokratie*). In the November 1918 series of articles in the *Frankfurter Zeitung*, when considering which particular form of republican head of State to adopt, Weber had already voiced the view that a president whose standing amongst the other constitutional bearers of sovereignty rested upon direct popular election would possess an utterly different sort of authority – an authority «of his own right» –, if compared with one elected by a parliamentary vote.<sup>232</sup> Still, such reasoning fitted pretty much within the standard liberal horizon of the balance of powers. In the article on «The President of the Reich», published in the *Berliner Börsenzeitung* on February 25 1919, the author goes a step further, conceiving the presidency as the *locus* of true democratic leadership, above parliament. To his social-democratic readers, Weber argues that «'dictatorship' of the masses demands a 'dictator', a *spokesman elected by the masses themselves* to whom they will subordinate themselves as long as he enjoys their trust».<sup>233</sup> Parliamentarism seemed, thus, to be facing its historical twilight at the expense of a plebiscitary understanding of democracy. Indeed, in a revealing analogy, Weber contends that just as the more intelligent monarchs had once voluntarily ceded their prerogatives to the emerging parliaments, these should now recognize the «Magna Charta of democracy»:

«A popularly elected president, as the head of the executive, of official patronage, and as the possessor of a delaying veto and the power to dissolve parliament and to consult the people, is the palladium of genuine democracy, which does not mean impotent self-abandonment to cliques but subordination to leaders one has chosen for oneself.»<sup>234</sup>

In «The Profession and Vocation of Politics», Weber sheds additional light on his model of «genuine democracy». According to him, parliaments, degraded to the condition of headquarters of a thoroughly bureaucratized, factional interest politics, had failed as

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<sup>232</sup> Weber, «Deutschlands künftige Staatsform», p. 469.

<sup>233</sup> Weber, «The President of the Reich», p. 305. Let us note that the term «dictator» - and even more so the German word for leader: *Führer* – did not yet possess the pejorative load that it carries nowadays. In the Munich lecture on politics, Weber refers to Gladstone as «the dictator of the electoral battlefield».

<sup>234</sup> *Ibid.*, p. 308.

instances of political leadership. In order to overcome such limitations, the presidential head of the executive had to rise above party and parliamentary cliques. Weber had no illusions about the consequences of such understanding of democracy: an enormous rift would open between creative activity at the top and sheer passivity at the bottom. So as to remain at the disposal of the leader as «a useful apparatus», the author argues, «the following has to obey blindly» and undergo a process of «spiritual proletarianisation». That price had to be paid, since:

«[T]he only choice lies between a leadership democracy with a ‘machine’ and democracy without a leader, which means rule by the ‘professional politician’ who has no vocation, the type of man who lacks precisely those inner, charismatic qualities which make a leader.»<sup>235</sup>

## **6. Leadership democracy or a desperate re-enchantment of liberal politics?**

Max Weber died in June 1920. His vision of leadership democracy – not one of his social-scientific, value-free ideal types, but, given the circumstances, his own subjective political ideal –, with its undeniably strong Caesaristic traits, stands thus as the culmination of his political thought. Wolfgang Mommsen, in still the most comprehensive analysis of Weberian politics, argues that Carl Schmitt’s theory of the plebiscitary legitimacy of the *Reichspräsident* as the true representative of the will of the people, expounded in the final crisis of the Weimar regime, constitutes a cogent, even if one-sided, development of Weber’s vision – and claims, more broadly, that Weber unintentionally paved the way to the rise of Nazi charismatic totalitarianism.<sup>236</sup>

The present work, however, is not really interested in approaching its authors’ thought retrospectively from the point of view of the «German catastrophe». Beyond the controversial unintended consequences of plebiscitary leadership democracy, there are, as I hope to have made clear throughout this exposition, other aspects of Weber’s political thought which are essential for an assessment of the crisis of political legitimacy in the

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<sup>235</sup> Weber, «The Profession and Vocation of Politics», p. 351. The English translation cannot convey the wit of the German word game: «‘Berufspolitiker’ ohne Beruf» (Max Weber, «Politik als Beruf», in Weber, *Gesammelte politische Schriften*, p. 544) meaning «‘professional politician’ who has no vocation» (*Beruf* can mean both profession and vocation).

<sup>236</sup> See Mommsen, *Max Weber und die Deutsche Politik*, pp. 408-413 and 435-437. More concerning the Weber-Schmitt affinity in Chapter Three, below, esp. pp. 180-184

turn of the nineteenth to the twentieth century, culminating in the turbulent interwar period.<sup>237</sup> Weber did not fear the transformation of leadership democracy into a new type of charismatic authoritarianism; an authoritarian re-interpretation of charisma was not part of the political horizon he could envision. But Weber's actual fears and anxieties are indeed crucial for an accurate interpretation of his thought. The singularity of Max Weber rests decisively on the fact that he was one of the first committed moderns to be self-reflective on and critical of modernity. Cultural critique was, in Weber's age, by and large a domain of conservatives and reactionaries, overcharged with traditionalist pessimism. Weber's narrative of modernity, on the contrary, paints a nuanced and ambivalent picture: neither the euphoria of reason and progress nor the oversimplified critique of the modern world as opposed to largely romanticized visions of a harmonious, pre-modern past. Weber had no doubts that the adventure of modernity was the peculiar destiny of the West. Yet he was also keenly aware that, for all its gains and promises, it embodied also an experience of loss – for which he used the inspired notion of disenchantment – and harbored its own specific, serious dangers. In spite of the professed axiological neutrality of Weber's sociology, the tones of fear, mistrust and critique that mark his analysis of modern bureaucratic rule, which contrast with the undercurrents of enthusiasm pervading the writings on the original charismatic source of legitimate domination, can hardly be overheard. There are probably numerous passages in Weber's work where the intrinsic tension of the modern condition becomes the object of reflection, but perhaps none is more elucidative for our purposes than the following:

«It is not accidental that our greatest art is intimate and not monumental, nor is it accidental that today only within the smallest and intimate circles, in personal human situations, in *pianissimo*, that something is pulsating that corresponds to the prophetic *pneuma*, which in former times swept through the great communities like a firebrand, welding them together.»<sup>238</sup>

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<sup>237</sup> In any case, there is some irony in the fact that someone with such a keen sense for the unintended consequences of ideas – no standard radar, for instance, would have captured the supposed implications of Protestant asceticism for modern capitalism – appeared to be fully unaware of possible transmutations of the notion of plebiscitary leadership democracy which, at least from the point of view of any a post-1945 observer, seem so very likely.

<sup>238</sup> Weber, «Science as a Vocation», p. 155.

The fragmentation of modern life brings with it an upsurge in private personal experience, a blossoming of the most intimate spheres of life – on which modern art thrives –, but at the cost of communitarian wholeness. Such an insight sheds more light on the dilemmas of Weber's political thought than it might at first appear. In his analysis of contemporary politics, Weber identified with remarkable precision, and earlier than most, the crisis of liberal institutions in the era of bureaucracy and mass politics. Such crisis, however, did not announce and would not be overcome by a revolutionary charismatic movement. The very possibility of a successful revolution seemed, according to Weber, to be dispelled from the modern political world. As a matter of fact, party bureaucracy in general «easily succeeds in th[e] castration of charisma».<sup>239</sup> Indeed, only in extraordinary circumstances can charisma rise above the organizational apparatuses of modern politics. But even as it does so, it lacks the powerful prophetic breadth of ancient incarnations and is unable to bridge the gap between «the smallest and intimate circles» at the top and the mass of occasional electoral followers at the base.

In *Economy and Society*, Weber posits that charisma «arises out of the *anxiety* and *enthusiasm* of an extraordinary situation».<sup>240</sup> Whilst enthusiasm indeed pulsates beneath Weber's supposedly value-free theorization of charisma, in the author's actual political experience of an «extraordinary situation», between late 1918 and 1920, it is trumped by anxiety. Joachim Radkau's brilliant biography portrays Weber as a man in search of salvation, a search which presides over his thought on religion and art. Politically, however, at least in the critical juncture of post-war Germany, it is not so much salvation, but a lost sense of security, shattered by «this carnival which is being graced with the proud name of a 'revolution'»<sup>241</sup>, which Weber longs for. In truth, the plebiscitarilly elected charismatic leader he views as the necessary cornerstone of the political system bears little from charisma as «the specifically creative revolutionary force of history»: neither does he challenge the existing structure of power, both material and cultural, nor does he try to advance new meanings and representations of reality. On the contrary, Weber locates the leader – particularly *qua Reichspräsident* – within an instituted constitutional reality, which he is supposed to help preserve. The leader is conceived as the last decider – more precisely, the last decider before the people, to whom he can

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<sup>239</sup> Weber, *Economy and Society*, p. 1132.

<sup>240</sup> *Ibid.*, p. 1117 (emphasis added).

<sup>241</sup> Weber, «The Profession and Vocation of Politics», p. 353.

appeal directly – within the constitutional system, trusted with the task of breaking through the latter’s own admitted shortcomings. The cause he «lives ‘for’» may give «his life *meaning and purpose*»<sup>242</sup>, but these are not to be extended to and shared with the spiritually proletarianized following, whom he merely tries to win over temporarily by controlling the political «machines» and exploiting the means of mass propaganda. In this sense, it is not surprising that personal conviction, albeit indispensable in Weber’s eyes, must be tempered in the politician’s own internal ethical constitution by a strong sense of proportion and of the objective limitations of political reality, lest it turn into romantic revolutionary «intoxication». Not without reason, Andreas Kalyvas views such blunted reenactment of charisma in the elitist model of leadership democracy as «de-charismatizing of charisma».<sup>243</sup>

Karl Löwith has argued that, whilst «Marx proposes a therapy», «Weber has only a ‘diagnosis’ to offer».<sup>244</sup> But maybe, as Jan-Werner Müller remarks<sup>245</sup>, beyond the diagnostician he was also a symptom – of a liberalism that recognizes its own crisis, faces the erosion of its legitimacy and anxiously tries to reinvent itself.

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<sup>242</sup> *Ibid.*, p. 318.

<sup>243</sup> Kalyvas, *Democracy and the Politics of the Extraordinary*, p. 74.

<sup>244</sup> Löwith, *Max Weber and Karl Marx*, p. 48.

<sup>245</sup> See Müller, *Contesting Democracy*, p. 26.



## CHAPTER TWO

### Within the Immanent Frame of Modernity: Representative Democracy as Relativistic Pluralism

#### Hans Kelsen

##### 1. Between the pure science of norms and the muddled reality of democratic politics

###### 1.1. From Weber to Kelsen: modernity, science and democracy

Hans Kelsen, unlike Max Weber, never embarked on an attempt to partially transcend the dilemmas of late modernity – and the crisis of political legitimacy that accompanied them – through originally *unmodern* concepts and ideas, such as charisma. The critical self-reflection on the modern condition that marks Weber's narrative of social development is largely absent from Kelsen's thought. To be sure, this is not to say that he ignored the signs of social, political and cultural crisis which were transforming the whole landscape of *fin-de-siècle* and early twentieth-century Europe. But he believed that whichever crisis, no matter how profound, must find its solution in the immanence of modernity's frame, with the help of its own intrinsic resources. Kelsen would never merely state – like Weber did, taking them for granted – that life would be unbearable *without* the achievements of the Enlightenment<sup>246</sup>; the latter – reason, science and progress, on the one hand; freedom, equality, fraternity and democracy, on the other – were indeed, to use Weber's language, the cause Kelsen chose to live *for*.<sup>247</sup>

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<sup>246</sup> See above, fn. 139.

<sup>247</sup> Agostino Carrino, «Max Weber et Hans Kelsen», p. 186, in an otherwise very rich comparative study of the two authors, refers to Weber as a «Neo-Kantian sociologist». In truth, however, Kelsen draws much more from Kantian philosophy than Weber ever did, in spite of the latter's proximity to some of the leading Neo-Kantians from Heidelberg (Heinrich Rickert and Emil Lask were frequent guests of the Sunday gatherings in Weber's riverside villa). Sandrine Baume, *Hans Kelsen and the Case for Democracy*, p. 5, quotes an in this respect revealing passage from Kelsen's first autobiographical essay (see below, fn. 256):

«Purity of method, indispensable to legal science, did not seem to me to be guaranteed by any philosopher as sharply as by Kant with his contrast between Is and Ought. Thus for me, Kantian philosophy was from the very outset the light that guided me.»

Notwithstanding such important difference in terms of the way they conceived and related to the modern condition, both Weber and Kelsen were men of science. Indeed, Weber first drew the attention of Kelsen precisely as a methodologist of the social sciences. In the preface to the first edition of his *Habilitationsschrift*<sup>248</sup>, where the basis for the pure theory of law is laid down, Kelsen refers to Weber's 1904 essay on the "objectivity" of knowledge in the social sciences<sup>249</sup> in order to distinguish his purely formal-normative treatment of the law from the scientific ambitions of sociology.<sup>250</sup> Kelsen's legal science, for sure, adheres closely to Weber's principle of the axiological neutrality of science – for him, too, judgments of value were intrinsically irrational and, thus, *unscientific* –, but whilst the latter announced the emergence of social science as a «science of reality»<sup>251</sup> (*Wirklichkeitswissenschaft*), the former advocates a science of norms (*Normwissenschaft*) resting on the strict Kantian divide between the "is" and the "ought". For Kelsen, «[t]he methodological contrast between sociology and jurisprudence is that between is and ought»<sup>252</sup>. Law, the object of juristic knowledge, should be treated as pertaining exclusively to the domain of "ought", as a self-contained system of norms which can be grasped irrespective of its effective implementation or consequences in the reality that "is".<sup>253</sup>

Such pure theory of law, which seeks to isolate its object from all empirical contamination, might seem totally oblivious to the issue of political legitimacy as Weber conceived it. If legitimacy has to do with the effective acceptance of a certain form of

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Weber, who was much more interested in the is than in the ought, would have never said something similar of himself.

<sup>248</sup> *Habilitation* is the degree that qualifies for a teaching position in the German university system.

<sup>249</sup> Max Weber, «Die „Objektivität“ sozialwissenschaftlicher und sozialpolitischer Erkenntnis», in Weber, *Gesammelte Aufsätze zur Wissenschaftslehre*, pp. 146-214. The essay has a strong programmatic nature, having been originally published when Weber, Werner Sombart and Edgar Jaffé took editorial control over the *Archiv für Sozialwissenschaften und Sozialpolitik*.

<sup>250</sup> See Hans Kelsen, *Hauptprobleme der Staatsrechtslehre*, Tübingen, J. C. B. Mohr (Paul Siebeck), 1911, p. IX.

<sup>251</sup> Weber, «Die „Objektivität“», p. 170: «Die Sozialwissenschaft, die wir treiben wollen, ist eine Wirklichkeitswissenschaft»

<sup>252</sup> Hans Kelsen, «Über Grenzen zwischen juristischer und soziologischer Methode», in Klecatsky, Marcic and Schambeck (Eds.), *Die Wiener rechtstheoretische Schule*, pp. 5-6: «Der methodologische Gegensatz zwischen Soziologie und Jurisprudenz (...) ist der zwischen Sein und Sollen.»

<sup>253</sup> After his *Habilitationsschrift*, Kelsen invested, during a whole decade, a substantial part of his intellectual and scientific energy in the effort to establish strict epistemological and methodological boundaries between legal science, on the one hand, and sociology or the cultural sciences, on the other. An investment which resulted in several articles and essays, and culminated in the book *Der soziologische und der juristische Staatsbegriff*, Tübingen, J. C. B. Mohr (Paul Siebeck), 1922.

domination by those who are subject to it, then it certainly designates an eminently empirical problem. A crisis of legitimacy, indeed, is usually the product of a tension between the normative *status quo* and a social reality which becomes increasingly disconnected from it. A formal-normative approach focusing exclusively on legality would, given its own premises, be utterly insensitive to such a crisis. Luckily for our purposes, however, Kelsen's thought is not exhausted by the methodological purity of his legal theory. His political thought – essentially, a defense of parliamentary democracy against recurring criticism from various quarters –, quite on the contrary, pays strong attention to the unavoidable, and unavoidably tensional, hiatus between the idea and the reality of democracy, between fundamental democratic principles and the ineradicable constraints to their practical application. In this sense, it does not shy away from considering the muddled actuality of democratic politics in interwar Central Europe.

And yet, the departure from the purely normative universe of law does not mean, for Kelsen's theory of democracy, a rupture with the horizon of modern science. Actually, as I will try to show, Kelsen's case for democracy rests on a conception of the world where science appears as the ultimate value. Whereas, for Weber, the axiological neutrality of science pointed also to the latter's intrinsic limits, that is, as Carrino sharply notes, to the fact that «no form of science might ever furnish the answer to question of the destiny of modern man»<sup>254</sup>, that very same principle does not seem to prevent Kelsen from turning science into a value and an end in itself. To be sure, a value marked by uncertainty, indeed, by a radical epistemological relativism which ends up providing common ground both to Kelsen's democratic thought and to his pure theory of law. Indeed, in the final analysis, the author tries to justify the legitimacy of modern democracy by deriving it from the essence of modern science.

The present chapter, hence, aims to reconstruct Kelsen's democratic theory as an attempt to overcome the crisis of political legitimacy in late modern Europe exclusively with the instruments that modernity itself had favored and created. Before outlining it in fuller detail, however, let us first, for the sake of context and comparison, turn briefly to Kelsen's biography and to the rather surprising lack of interest it has thus far generated amongst commentators and interpreters.

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<sup>254</sup> Carrino, «Max Weber et Hans Kelsen», p. 191: «pour Weber (...), aucune forme de science ne pourra fournir de réponse à la question du destin de l'homme moderne.»

## 1.2. An unexplored biography

Today, just as Max Weber and Carl Schmitt, Hans Kelsen is an intellectual icon. He has been universally acclaimed as the «jurist of the century»<sup>255</sup>; his work, even if perhaps without such a broad transdisciplinary appeal as Weber's and Schmitt's, also rises above strictly defined academic-departmental boundaries; and it, too, has spawned a secondary bibliography of critical studies that is virtually inscrutable in both its sheer amount and diversity of approaches.

Surprisingly enough, however, Kelsen's life has received comparatively little attention. Whilst the relationship between life and work constitutes a hot topic of research amongst both Schmitt and Weber scholars, the same cannot be said about Kelsen. The interest in Weber's biography – particularly, in his political biography – was inaugurated by Wolfgang Mommsen's controversial *Max Weber and German Politics* in the 1950s and it is still not exhausted today: Joachim Radkau has recently published a revised paperback edition of his massive and highly stimulating *Max Weber: Die Leidenschaft des Denkens* (2005). Schmitt's life, in turn, drew first the attention of an American Third Reich historian – Joseph W. Bendersky's *Carl Schmitt: Theorist for the Reich* (1983) – before the Germans stepped in: the latest addition to his biographical studies is Reinhard Mehring's voluminous *Carl Schmitt: Aufstieg und Fall* (2009). In sharp contrast, only one complete biography of Kelsen has been published to date – apart from the autobiographical fragments now included in the first volume of his *Werke*<sup>256</sup> –, written by a former student and assistant of his.<sup>257</sup>

The reason for this lack of interest in Kelsen's life – and in the relationship between his life and his work – is not easy to fathom. Kelsen's biography is as eventful as that of the two other authors discussed in the present work. In fact, it is probably richer in practical obstacles and external challenges, and more directly impacted by the course of Central European history, than that of Weber and Schmitt. Born in Prague, 11 October 1881, into a Jewish, German-speaking family of middle-class background, Kelsen moved

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<sup>255</sup> Ernst Topitsch, «Hans Kelsen – Demokrat und Philosoph», *Rechtstheorie*, No. 4, Special Issue, 1982, p. 11.

<sup>256</sup> See Hans Kelsen, «Selbstdarstellung» (1927) and «Autobiographie» (1947), in Hans Kelsen, *Werke*, Vol. 1, Matthias Jestaedt (Ed.), Tübingen, Mohr Siebeck, 2007, pp. 19-28, 30-91. Jestaedt's edition of Kelsen's complete works is still, for the most part, forthcoming. Only five out of a planned total of thirty volumes have been published so far.

<sup>257</sup> Rudolf Aladár Métall, *Hans Kelsen: Leben und Werk*, Vienna, Franz Deuticke, 1969.

to Vienna as a child, where he went on to pursue his academic studies in law. Shortly before being awarded his doctorate, he converted to Catholicism, so that his professorial ambitions would not be hindered by religious reasons in the Catholic-conservative Habsburg Empire. When World War One broke out, Kelsen was already an authority in the field of public law. During the conflict, he served as a legal adviser to the war minister and became associate professor at the University of Vienna. Yet, only after the collapse of the Empire did Kelsen reach the peak of his prominence in the Austrian society. In 1919, not only did he become full professor, but he was also responsible for the draft of the new Constitution of the Federal Republic, which was adopted a year after. In 1921, he was appointed to the Austrian Constitutional Court, an institution which had been one of the major innovations of his constitutional draft. During the 1920s, in the cultural hotspot of Vienna, Kelsen established contact with various famous intellectuals, such as Joseph Schumpeter, Ludwig von Mises, and the Austro-Marxists Otto Bauer, Karl Renner and Max Adler, among several others. However, as the decade drew to a close, the tide started to turn against him. With the rise of anti-Semitism, his Jewish ancestry became problematic once again, as he was targeted by the Christian Social Party in a major constitutional dispute over the right to divorce and remarriage. The Social Christians ended up having the upper hand, and Kelsen was removed from the Constitutional Court in 1930. The pressure that stemmed from such political attacks made him decide to move to the University of Cologne, where he met Carl Schmitt and entered into a dispute with him over the issue of the guardian of the Constitution. Yet, the Nazi seizure of power in 1933 resulted in Kelsen's dismissal.<sup>258</sup> He departed to Geneva, where he concentrated mainly in teaching and researching international law. For a brief period he also lectured in Prague, but there his family's religious origins proved again to be a source of controversy and personal attacks. Because he was convinced that Switzerland would eventually be drawn to the Second World War, Kelsen decided to move to the United States in 1940, where he finally settled.

Thus, if the lack of interest in Kelsen's biography cannot be explained by an absence of twists and turns in the story of his life, other factors must have contributed to it. One could consider, for instance, his voluntary withdrawal from partisan political engagement. In spite of his professed sympathy for social democracy, Kelsen chose to

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<sup>258</sup> Apparently, Carl Schmitt, by then already a member of the NSDAP, was involved in Kelsen's removal from the University of Cologne (see above, fn. 128).

remain politically neutral throughout his life. Indeed, political neutrality was a cherished value for him from early on, as his pre-World War One involvement in adult and workers' education shows.<sup>259</sup> In contradistinction, Weber, whilst certainly not the prime example of a party politician, was involved in party politics at several moments of his life, even if his political activity did not prove to be either extraordinarily successful or, indeed, decisive<sup>260</sup>; and Schmitt's "affair" with the Nazis<sup>261</sup>, if not his earlier political positions, certainly constitutes one of the burning topics of debate amongst scholars. However, involvement in militant politics can hardly be the yardstick to infer the relevance and interest of an intellectual's life, even in the case of those whose work deals quite directly with political matters. The reason for the neglect of Kelsen's biography must lie elsewhere.

In my opinion, the crucial factor lies in a certain dissonance between life and work. As we have seen, Kelsen's life was, from a personal, professional and political point of view, rather turbulent until he settled in America when he was already in his sixties. However, such turbulence seems to bear no relation with his work, which is characterized by a remarkable stability and appears to be the product of an early crystallization of the author's fundamental views. In fact, since his *Hauptprobleme der Staatsrechtslehre* (1911), Kelsen's work kept moving in a straight line, with no serious, substantial deviations, marked by a clear thematic divide between legal theory and political thought. Some have interpreted such stability as a sign of intellectual rigidity. For instance, Harold Laski, the British theorist of pluralism, refers to Kelsen's work as an «exercise in logic and not in life»<sup>262</sup>. Be that as it may: since, presumably, permanence and stability cannot

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<sup>259</sup> See Hans Kelsen, «Politische Weltanschauung und Erziehung» (1913), in Klecatsky, Marcic and Schambeck (Eds.), *Die Wiener rechtstheoretische Schule*, pp. 1501-1524. On Kelsen as a popular educator, see Tamara Ehs, «Erziehung zur Demokratie: Hans Kelsen als Volksbildner», in *Hans Kelsen: Leben – Werk – Wirksamkeit*, Schriftenreihe des Hans Kelsen-Instituts, Vol. 32, Vienna, Manzsche Verlags- und Universitätsbuchhandlung, 2009, pp. 81-95. Kelsen was involved in the *Volksheim*, one of the party-politically neutral adult educational institutions in the city of Vienna. Other such organizations, such as the Austro-Marxist *Arbeiterbildungsverein*, were clearly and admittedly partisan.

<sup>260</sup> Weber's advisory role in the drafting of the Weimar Constitution was surely not as significant as Kelsen's contribution to the Austrian Constitution of 1920 (for an analysis of Weber's role in the drafting process, see Mommsen, *Max Weber und die Deutsche Politik*, p. 391). Kelsen was not just an advisor, but the main drafter of the constitutional text. His role was perhaps identical to that of Hugo Preuß in Weimar constitutionalism, even if Kelsen did not serve as a minister or state secretary.

<sup>261</sup> For an informative account, though rather disappointing in terms of the actual critical dissection of Schmitt's work during the Nazi period, see Bernd Rüthers, *Carl Schmitt im Dritten Reich*, Munich, C. H. Beck, 1990.

<sup>262</sup> Harold Laski, *A Grammar of Politics*, quoted by Baume, *Hans Kelsen and the Case for Democracy*, p. XIII, fn. 13.

be the product of turbulence, scholars have tended to disregard the relationship between Kelsen's life and work, focusing solely on the latter. Kelsen's *œuvre* of course, despite the author's effort, is certainly not exempt from internal tensions, paradoxes and ambiguities. But these have not led scholars to the exploration of possibly fertile links between life, times and work, as has been the case in much research on Weber and Schmitt.<sup>263</sup>

In any case, the apparent absence of such seductive nexuses between personal experience and intellectual output should not lead us to an underestimation of Kelsen's thought – and, in particular, of his political theory. Kelsen's writings might not be as intrinsically dramatic as Schmitt's and Weber's. But his political thought, as I intend to show, is key to the comprehension of the drama of representative democracy in twentieth-century Europe.

### 1.3. Outlining Kelsen's democratic theory

As I will seek to establish in the following pages, Kelsen's whole worldview – and, as a part of it, his vision of politics and democracy –, contrary to Weber's and Schmitt's, adopts strictly the point of view of pure immanence. In his theory of democracy, there is no room for the transcendent rupture of either charismatic leadership or exceptional sovereign decision. Instead, democratic authority and democratic domination – democracy, in Kelsen's view too, is a form of domination (*Herrschaft*) – are immanently generated by the participation of the free and equal citizens of the State. His is, for sure, a theory that presupposes the existence of democratic institutions. The moment of popular foundation is not theorized by Kelsen: there is in his view no people as a not-yet-but-soon-to-be institutionalized power, with revolutionary, constituent potential.<sup>264</sup> In short: no people outside the democratic State.

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<sup>263</sup> See, for instance, Joachim Radkau's insistence on the nexus between Weber's personal experience (above all, the struggle to overcome his psychological breakdown at the turn of the century) and his scientific program: Radkau, *Max Weber*, pp. 318-319 (on the genesis of Weber's *Protestant Ethic*).

As for Schmitt, one needs only to bear in mind his urge to keep reacting and responding to the prevailing *Zeitgeist*, as the diversity of the alternatives to the «metaphysical system» of liberalism he came close to at some point so evidently shows.

<sup>264</sup> Kelsen's theory is, of course, a theory of *normal*, not *extraordinary*, politics. On this distinction, see Kalyvas, *Democracy and the Politics of the Extraordinary*, pp. 6-7.

In my reconstruction of Kelsen's political thought, I intend to distinguish the several strands of his theory of democracy and see how they interact with one another in the search for an immanent answer to the crisis of democratic legitimacy in late modern Europe. Unlike his legal theory, Kelsen's political thought is not primarily concerned with purity of method and the attempt to affirm and sustain the autonomy of law as a social-scientific discipline. Whilst, in Kelsen's legal-methodological reflections, the Kantian distinction of "ought" and "is" serves above all to draw rigid frontiers, in his political theory it resurfaces in, so to speak, much more ecumenical garments. The "ought" and the "is" of democracy, too, must be differentiated. Democracy, in fact, is both an ideology, a system of beliefs and representations, and a social, political and legal-institutional reality. Between such two dimensions there is necessarily a distance and a tension, but not a wholly unbridgeable gap. The idea of democracy must somehow infuse the real-existing democratic State institutions, even if these inevitably fall short of fully realizing the democratic ideology. Hence, the two first sections of this chapter will deal, respectively, with Kelsen's conception of democracy, apparently inspired by Rousseau, as deriving from the idea of freedom *qua* autonomy or self-determination, and with his concept of the State as the abstract expression, beyond the inevitable institutional plurality dictated by the requirements of the social division of labor, of the overarching unity of the legal system – a concept of the State which the author sought to rescue from theological pollution.

However, the breach separating these two poles of Kelsen's thought – the democratic ideology of freedom from the functional necessities of the State/legal order – seems a bit too wide to bridge. Consequently, whilst never explicitly discarding the idea of freedom, Kelsen puts forward a second ideological justification of democracy which proves to be more readily reconcilable both with his theory of the State and with his whole *Weltanschauung*: democracy as the expression of political relativism. The idea of relativism, of course, from the point of view of the classical early modern theories of the social contract, owes much more to Hobbes's skepticism than to Rousseau. But such departure from, in Kelsen's own words, «probably the most important theorist of democracy»<sup>265</sup> means effectively an approximation of the defense of democracy to his

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<sup>265</sup> Hans Kelsen, *Vom Wesen und Wert der Demokratie*, First Edition, Tübingen, J. C. B. Mohr (Paul Siebeck), 1920, p. 6: «Rousseau, vielleicht der bedeutendste Theoretiker der Demokratie» (emphasis elided).



own vision of truth and science. For the Austrian scholar, since the absolute is humanly unknowable, all hopes of attaining a transcendent point of view capable of dissolving the divergent political truths of this world, so as to demand universal obedience, should be abandoned in a democracy. Indeed, it is autocracies, as expressions of political absolutism, which seek to carry out such an impossibility, violently imposing their own political truth and repressing competing claims. The concept of political relativism allows Kelsen to construct, by and within the democratic State, not a one-dimensional people with a monolithic general will, but an internally divided, pluralistic people which arises out of the mechanisms of representative democracy (elections, parties and parliamentarism). Only compromise, that fragile product of the democratic political process, can transiently soothe the struggle of political beliefs, but without eradicating the latter's radical, constitutive pluralism. Kelsen's relativistic understanding of democracy, indeed, seems also to reflect that fleeting moment of relative stability of Central European democracies in the Golden Twenties: democracies which sought, if not to prosper, at least to survive amongst deep-seated economic and cultural cleavages without embracing any kind of robust conception of natural right.

Thus, the final sections of this chapter will focus, whenever appropriate drawing the contrast to the thoughts of Weber and Schmitt, on Kelsen's concept of democracy as political relativism, with an emphasis on three distinct dimensions: the institutional issues of party pluralism and the reform of parliamentarism; the dilemmas associated with the rise of avowedly authoritarian alternatives seeking to capture for themselves the instruments of the democratic State; the insertion of pluralist-relativist democracy into a comprehensive worldview marked by the resolute rejection of metaphysical transcendence.

## **2. In the wake of Rousseau? Freedom, equality and democracy**

Kelsen's theory of democracy was firstly laid out in *Vom Wesen und Wert der Demokratie*, originally published in 1920.<sup>266</sup> This study starts with an inquiry into the

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See also Hans Kelsen, *Vom Wesen und Wert der Demokratie*, Second Revised Edition, Tübingen, J. C. B. Mohr (Paul Siebeck), 1929, p. 6.

<sup>266</sup> A second, revised and substantially enlarged edition – unchanged, however, with respect to its central theses – was published in 1929. The 1929 edition is the object of most translations. But surprisingly enough, as Baume notes (*Hans Kelsen and the Case for Democracy*, p. XII), there is still no complete English translation of this important work. On the context and genesis of the 1920 edition – and, more generally,

core ideal values of democracy, those which, according to the author, must be grasped beneath the superficial – and often confusing – diversity of presumably democratic propaganda coming from all the latitudes of the political spectrum. Both freedom and equality appear to him as fundamental components of the democratic ideology. Yet priority is given to freedom. More accurately: to an idea of freedom which stems from the radicalism of Rousseau's political philosophy rather than from the liberal tradition which, faithful to the teachings of Montesquieu and Locke, would never conceive freedom in an explicit theoretical opposition to the law. Indeed, Kelsen locates the essence of democracy in a conception of freedom as the negation of society or, which for him means exactly the same thing, as an innate disposition to anarchy; in a supposedly natural instinct of each and every individual to rebel against the coercive injunctions of the social order, «against the torment of heteronomy»<sup>267</sup>. The elemental instinct of freedom is subsequently joined – and immediately modified – by that of equality. In Kelsen's theory, this happens when the freedom-seeking individual finds out that he is subjected to the will, not of an abstraction or a deity, but of his fellow men. The primordial call for freedom is hence rephrased as a protest against the legitimacy of domination of man over man: «He is a man like me, we are *equal*! So where lies his right to rule?»<sup>268</sup> The democratic ideal thus reveals its original refusal of transcendent hierarchies, and Kelsen quotes in that respect David Koigen's *Die Kultur der Demokratie* (1912), where the ideology of democracy is conceived as having grown from the struggle to humanize both the injunctions of natural usurpers of power and the utterances of supposedly divine rulers.<sup>269</sup> In short, for Kelsen, the synthesis of freedom and equality which marks the idea of democracy is the combination of two fundamental negations: the refusal of political authority *tout court* and, more precisely, of its exercise by men over other men. The first challenge of his democratic theory is to conciliate such a raw ideological material of radical negation with positive, actually existing democratic institutions.<sup>270</sup>

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on the formation of Kelsen as a political theorist –, see Sara Lagi, *El Pensamiento Político de Hans Kelsen (1911-1920): Los Orígenes de 'De la Esencia y Valor de la Democracia'*, Madrid, Biblioteca Nueva, 2007.

<sup>267</sup> Kelsen, *Vom Wesen und Wert der Demokratie*, First Ed., p. 4: «(...) der Protest gegen den fremden Willen, dem sich der eigene beugen muß, gegen die Qual der Heteronomie. Es ist die Natur selbst, die sich in der Forderung der *Freiheit* gegen die Gesellschaft aufbäumt.»

<sup>268</sup> *Ibid.*: «Er ist ein Mensch wie ich, wir sind *gleich*! Wo ist also sein Recht, mich zu beherrschen?»

<sup>269</sup> See *ibid.*, fn. 1.

<sup>270</sup> On Kelsen's concept of freedom, see Pasquale Pasquino, «Penser la démocratie: Kelsen à Weimar», in Herrera (Dir.), *Le droit, le politique*, pp. 125-126.

Kelsen's Rousseauian inspiration for the democratic ideas of freedom and equality comes certainly as a surprise to most informed readers. The streams of thought usually associated with the heritage of Rousseau's philosophy could not be more distant to Kelsen's main political and theoretical positions. The horizon of Kelsen's thought is hardly that of the elimination of political authority as such; indeed, democracy is for him a particular form of institutionalized domination. And his defense of democracy cannot be confounded with a praise of direct democracy either. Quite on the contrary, a really existing democracy is, in Kelsen's view, necessarily a representative, party-parliamentary one. But Kelsen's tribute to Rousseau is unexpected in yet another way. As Pasquino remarks, most theorists of democracy in Weimar saw the doctrines of the *Contrat Social* more as obstacles than as helpful means of thinking about democracy.<sup>271</sup> The most notable exception, besides Kelsen himself, was precisely his greatest intellectual adversary, Carl Schmitt.<sup>272</sup> However, this apparent proximity to the Rousseauian concepts of freedom and equality soon starts to wear away, as Kelsen attempts to close the gap between the idea of democracy and its institutional realities.

In truth, Kelsen's reflections on the synthesis of the two democratic principles are, from the outset, subtracted from the realm of purely abstract theoretical speculation to include considerations on empirical feasibility. According to him, «experience shows that if we want to remain equal in reality, we have to let ourselves be ruled»<sup>273</sup>. And

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<sup>271</sup> See *ibid.*, p. 122, fn. 9-10, for references to critiques of Rousseauian philosophy in the works of Hermann Heller and Erich Kaufmann, two leading democratic constitutional theorists in Weimar Germany.

In any case, Pasquino's praise of the richness of the debates on democracy in interwar Germany must not make us forget that authors such as Kelsen, Heller and Kaufmann belonged to a minority of academic jurists who stood up for democracy. In university circles, and particularly in law departments, rejection of democracy was predominant.

<sup>272</sup> Carl Schmitt, *Verfassungslehre*, Tenth Edition, Berlin, Duncker & Humblot, 2010, pp. 229-230, sees in Rousseau's theory «the strongest and most coherent expression of democratic thought»: «In der Lehre Rousseaus vom „Contrat social“ ist völlige Gleichartigkeit die eigentliche Grundlage seines Staates. (...) Der Staat beruht also nicht auf Vertrag, sondern auf Homogenität und Identität des Volkes mit sich selbst. Das ist der stärkste und konsequenteste Ausdruck demokratischen Denkens.»

It should be noted, however, that Schmitt, unlike Kelsen, theorized about democracy without being personally committed to the democratic ideal.

<sup>273</sup> Kelsen, *Vom Wesen und Wert der Demokratie*, First Ed., p. 5: «Allein die Erfahrung lehrt, daß wenn wir in der Wirklichkeit gleich bleiben wollen, wir uns beherrschen lassen müssen.»

Pasquale Pasquino, «Penser la démocratie», p. 126, keenly remarks that Kelsen's reference to the purported teachings of political experience is a bit too swift and rather unsatisfying from a theoretical point of view. And he concludes, in a somewhat scathing vein: «Rousseau's political unrealism is, without a shadow of a doubt, conceptually much more rigorous than the Kelsenian attempt to justify parliamentarism and party democracy (the *Parteienstaat*) – the true purpose of his defense of democracy – with the aid of Rousseau!» («L'irréalisme politique de Rousseau a sans doute beaucoup plus de rigueur conceptuelle que la tentative

requirements of practicality also seem to command a transformation of the idea of freedom which allows it to dissolve its own intrinsic, and seemingly irreducible, paradox. Freedom, indeed, constitutes, on the one hand, the common denominator of most political thought – and, according to Kelsen, of all specifically democratic thought. But on the other hand, in its utmost radicalism, the demand of individual freedom coincides with the anarchist negation of all social and political order. For a theory of institutionalized politics to become possible, that extreme must be avoided. In order to re-enter the realm of politics, so as to become political freedom proper, the type of unrestricted natural freedom which inexorably leads to anarchy must therefore undergo a transmutation that makes it overcome its purely *negative* dimension – the rejection of the objective, coercive will of the social order – and acquire a *positive* formulation. This transition entails a complete reversal of perspective:

«The immense significance of the idea of freedom in political ideology can only be explained by the extent to which it flows from a deep source in the human soul, from that primeval subversive instinct which places the individual *against* society. And yet, in an almost enigmatic self-deception, the idea of freedom becomes the mere expression of a particular position of the individual *within* society. The freedom of anarchy turns into the freedom of democracy.»<sup>274</sup>

Such change in the idea of freedom corresponds, in line with early modern social contract theories, to a leap from nature to society. However, the farewell to the deep-rooted freedom instincts of human nature does not seem to mean, for Kelsen, the embrace of an allegedly superior, more rational form of freedom. The Austrian lawyer does not depict the movement from nature to society, from natural to social or political freedom, as an ascent from instinct to reason. On the contrary, the transition seems to involve intellectual sacrifice: «self-deception» is the price to pay in order for freedom to turn into the hallmark of a social order. The whole process implies, eventually, the collectivization

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kelsénienne pour justifier le parlementarisme et la démocratie de partis, le *Parteienstaat* (le véritable objet de sa défense de la démocratie), et ce à l'aide de Rousseau!»)

<sup>274</sup> Kelsen, *Vom Wesen und Wert der Demokratie*, First Ed., pp. 5-6: «Die ungeheure, gar nicht überschätzbare Bedeutung, die gerade dem Freiheitsgedanken in der politischen Ideologie zukommt, ist nur erklärlich, sofern er aus einer letzten Quelle der menschlichen Seele, aus eben jenem staatsfeindlichen Urinstinkt entspringt, der das Individuum *gegen* die Gesellschaft stellt. Und doch wird in einer fast rätselhaften Selbsttäuschung dieser Freiheitsgedanke zum bloßen Ausdrucke für eine bestimmte Stellung des Individuums *in* der Gesellschaft. Aus der Freiheit der Anarchie wird die Freiheit der Demokratie.»

of the idea of freedom, a fundamental shift of focus from the individual to a construed collective subject: «[t]he irretrievable freedom of the individual gradually retreats to the background as the *freedom of the social collectivity* moves to the fore.»<sup>275</sup> Does such collectivization necessarily quash all hopes of individual freedom? Certainly not. In a democracy, the individual – *qua* citizen – participates in the formation of the collective will, and such participation is precisely the criterion which, in Kelsen's theory, sets democratic regimes apart from autocratic ones. But universal participation does not preclude the possibility of dissonance between the individual wills of some members and the general will which determines the content of the social order, to which ultimately all must submit. Indeed, absolute freedom lies beyond the achievable scope of a democratic order.

Of course, in theory, one could hope to reconcile both dimensions of freedom – individual and collective, natural and social – by making unanimity a precondition for the validity of the social order. If the latter is the product of a unanimous covenant, agreed to by all members of the community, the collective will stands in no opposition to any an individual will. But Kelsen's political realism makes him discard such a requirement. For him, the proximity of the principle of unanimity to the original democratic ideal of natural-individual freedom is of a purely speculative, a-historical kind. In the reality of social and political life, there is no state of nature that could be conceived as a ground-zero point of departure for the establishment of the political order. Each individual is born and raised within a given order, whose coercive injunctions might very well be perceived as contrary to his or her personal will. The actual point is never the *ex nihilo* foundation of the social order, but the maintenance or the change of content of the existing order. In historically situated conditions, the limitations of unanimity are quite obvious: the smallest minority could successfully block the will to change of the overwhelming majority. Thus, the majority principle emerges as the achievable compromise between an utterly individualistic call for freedom and the existence of a social order – it is, in Kelsen's thought, the cornerstone of democracy as political freedom.<sup>276</sup>

Freedom, once an individualistic value, becomes a synonym for the autonomy of a collective subject, as expressed through the will of the majority within the democratic

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<sup>275</sup> *Ibid.*, p. 10: « Die im Grunde genommen unrettbare Freiheit des Individuums tritt allmählich in den Hintergrund und die *Freiheit des sozialen Kollektivums* in den Vordergrund.»

<sup>276</sup> See *ibid.*, pp. 8-10, and also Hans Kelsen, *Allgemeine Staatslehre*, Berlin, Julius Springer, 1925, pp. 323-325.

State. The collectivized revision of the concept means, together with the abandonment of the illusion of absolute freedom, the acknowledgment of the inescapable fact of domination. The democratic will, as the expression of the objectively valid social order, is no mere piece of advice, but an imperative command. In fact, democracies also coerce, and they do so in a particularly intense way when they use the instruments of power to force the individual, *i. e.* citizen, to be free against his own personal will. To provide an illustration of this, Kelsen returns to Rousseau and to the powerful image of the word *freedom* written over prison doors and on the chains of the galley slaves in republican Geneva. More than a paradox, the Austrian scholar argued, the image symbolized democracy's radical transmutation of the idea of freedom.<sup>277</sup> A metamorphosis which, nevertheless, as the author had previously suggested, could not be easily digested by the natural democratic instinct:

«The protest against rule by my fellow men leads to a displacement of the subject of (...) domination: to the construction of the anonymous person of the State. Power proceeds from it, not from externally visible persons. A mysterious collective will and an almost mystical collective person become detached from the wills and the personalities of the individuals. This fictitious isolation takes place not so much in regard to the wills of the subjects, but rather with respect to the wills of those who actually exercise power and that now appear as mere organs of a hypostatized subject of rule. So, the veil of the personification of the State conceals the unbearable fact – for the democratic sensibility – of a domination of man over man.»<sup>278</sup>

Kelsen concludes the initial reflection on freedom in his major work on democracy with a reference to Rousseau as the «most brilliant portrayer»<sup>279</sup> of the democratic idea. But in that very same section the author leaves enough clues to allow one to question a

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<sup>277</sup> See Kelsen, *Vom Wesen und Wert der Demokratie*, First Ed., p. 12.

<sup>278</sup> *Ibid.*, p. 10: «Der Protest gegen die Herrschaft meinesgleichen führt im politischen Bewußtsein zu einer Verschiebung des Subjektes der – auch in der Demokratie unvermeidbaren – Herrschaft: zur Konstruktion der anonymen Person des Staates. Von ihr und nicht von äußerlich sichtbaren Menschen läßt man das Imperium ausgehen. Ein geheimnisvoller Gesamtwille und eine geradezu mystische Gesamtperson wird von den Willen und Persönlichkeiten der einzelnen losgelöst. Diese fiktive Isolierung vollzieht sich nicht so sehr gegenüber den Willen der Untertanen, als vielmehr gegenüber den Willen derjenigen Menschen, die die Herrschaft faktisch ausüben, und die nunmehr als bloße Organe eines hypostasierten Herrschaftssubjektes erscheinen. So verdeckt der Schleier der Staatspersonifikation das dem demokratischen Empfinden unerträgliche Faktum einer Herrschaft von Mensch über Mensch.»

<sup>279</sup> *Ibid.*, p. 12: «der geistreichste Schilderer der Demokratie»

smooth insertion in the Rousseauian lineages. His sense of the practical institutional requirements of political organization makes him discard the horizon of the eradication of domination and openly admit to the «self-deception» that is involved in the democratic ideology of freedom. Beyond that, still, there is the reference to the «mysterious collective will» of «an almost mystical collective person» called *the State*. Here, Kelsen's epistemological critique of hypostasis, of the mistaken assumption that there is a concrete substance or an underlying reality beneath each intricate abstraction (such as God or the State), emerges to truly complicate the purported affinity with Rousseau. For Kelsen, the State, the social or political order and the people as the unitary subject of democratic sovereignty are all ideal, abstract concepts with no real empirical existence, even if they might be fictitiously personified so as to facilitate reasoning. Quite on the contrary, Rousseau's personification of the people, the general will, is no mere figure of thought, in the sense that it most certainly appears to designate an empirically active entity. Indeed, Carl Schmitt saw the *Contrat Social* as the «strongest (...) expression of democratic thought» precisely because of its substantivist conception of popular rule.<sup>280</sup> Kelsen's unequivocal rupture with a substantivist approach to the theories of law and the State, which he conceives as a necessary modernization and secularization of the latter, marks, even if the author appears not see it as such, a definite departure from the Rousseauian orbit.

### **3. For a theory of the State free from theology: the triumph of function over substance and the (functional) necessity of representation**

For all his praise of Rousseau in the opening pages of *Vom Wesen und Wert der Demokratie*, Kelsen's conception of the democratic State – and the emphasis here shifts from the concept of democracy to that of the State – is markedly different from the Genevian philosopher's. Surely, the Austrian legal scholar readily admits that «*pure democracy is direct democracy*, where the sovereignty of the people does not require the medium of parliament to come into its own»<sup>281</sup>, and indeed he seems to favor the introduction of some of the instruments associated with direct democracy (referenda,

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<sup>280</sup> See above, fn. 272.

<sup>281</sup> Kelsen, *Vom Wesen und Wert der Demokratie*, First Ed., p. 14: «Die reine Demokratie ist die unmittelbare, bei der die Souveränität des Volkes nicht erst durch das Medium des Parlamentes zur Geltung kommt.»

popular initiatives) into the constitutional arrangements of modern representative democracies. However, from the perspective of Kelsen's theory of the State, Rousseau's refusal of representation merely denotes his hypostatized conception of the general will. It is only because Rousseau conceives the collective will as an empirically existing substance that he is unable to acknowledge the possibility of representation. As one of the most famous passages of the *Contrat Social* postulates, «the will cannot be represented: it is either one and the same, or it is another»<sup>282</sup>. Either the people itself rules or some other sovereign *person* – be it a monarch or a parliament – rules in its place: this is the simple Rousseauian alternative. Other important theorists of public law in pre-World War I Germany conceived the formation of the collective will in similar terms. Georg Jellinek, a close friend of Max Weber's<sup>283</sup> whose Heidelberg seminar Kelsen had attended in 1908, took Rousseau's reification of the collective will to naturalistic extremes, arguing that one cannot will for someone else just in the same way as one cannot eat or drink for another person.<sup>284</sup>

Kelsen's definition of the State in purely abstract terms as a system of norms, his identification of the State with the legal order<sup>285</sup>, allows him to circumvent Rousseau's alternative. As a complex, multilayered system of normative relations, where different organs fulfilling diverse functions coexist, the State can only fictitiously be conceived in the image of a person which is one with its own, indivisible will. In fact, contrary to a real person, the State can voice various kinds of wills – with varying degrees of abstraction or precision – over one and the same object, at the same time: a legislative will, an executive/administrative will, and a judicial will (to use the standard terms of the

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<sup>282</sup> Rousseau, *Du Contrat Social*, p. 228: «La Souveraineté ne peut être représentée, par la même raison qu'elle ne peut être aliénée ; elle consiste essentiellement dans la volonté générale, et la volonté ne se représente point : elle est la même, ou elle est autre.»

<sup>283</sup> See above, fn. 124.

<sup>284</sup> See Georg Jellinek, *Verfassungsänderung und Verfassungswandlung*, Berlin, O. Häring, 1906, p. 62: «Rousseau hatte ganz recht: man kann nicht für einen anderen wollen, so wenig, fügen wir hinzu, als man für ihn essen oder trinken kann.»

For a contrast between Kelsen's and Jellinek's conceptions of political representation, see the final notes of Kelsen's section on «the representative organ», in Kelsen, *Allgemeine Staatslehre*, pp. 409-410, which contain long quotations of Jellinek's own *Allgemeine Staatslehre*.

<sup>285</sup> See Kelsen, *Vom Wesen und Wert der Demokratie*, First Ed., p. 21: «die Erzeugung des Rechtes – oder was dasselbe ist: die Realisierung des Staates».



separation of powers). Given this multiplicity and the abstract nature of the State *qua* legal order, the notions of representation or delegation become indispensable.<sup>286</sup>

The significance of representation for the theory of the State was also highlighted by Carl Schmitt. But both approaches could scarcely be more radically dissimilar. Whilst Schmitt speaks of representation to refer to those who are able to publicly incarnate the political unity of a logically prior, empirically given people, Kelsen understands the concept in strictly abstract, normativistic terms, using it to refer to the relations between the different layers of the legal order. Schmitt draws a line between the higher dignity of political representation – for which he uses the originally Latin term *Repräsentation* – and the mere phenomenon of delegation that one often encounters in civil law – which he refers to as *Vertretung*.<sup>287</sup> Kelsen, for his part, rejects such a distinction of public and private law as he rejects the very dualism of State and law.<sup>288</sup> More fundamentally, indeed, he rejects – and tries to overcome – a substantivist theory of the State which he considers saturated by theological dilemmas and (pseudo-)solutions.<sup>289</sup>

In 1922/23, probably shortly after the publication of Carl Schmitt's *Political Theology*, Hans Kelsen published an important, though often overlooked, article called «God and the State»<sup>290</sup>, which seeks to investigate the analogies both between the two concepts and between the disciplines – theology and law – which study them. The article is divided in two distinct parts. In the first one, quoting Feuerbach, Durkheim and Freud, Kelsen explores the parallels between the social and the religious problems. According to

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<sup>286</sup> Kelsen, *Allgemeine Staatslehre*, p. 310. See also Kelsen, *Vom Wesen und Wert der Demokratie*, First Ed., p. 15, fn. 14, where his understanding of representation in the context of the theory of the State is condensed in a single sentence: «Jemand ist Organ des Staates, repräsentiert den Staat, weil seine Handlungen als solche des Staates „gelten“, d. h. auf Grund einer Norm dem Staate als der Einheit der Ordnung zugerechnet, auf die im Staate personifizierte Einheit des Normensystems bezogen werden.» («Someone is an organ of the State, represents the State, because his actions are “considered” those of the State, i. e. they are *imputed* on the basis of a norm to the State as the unity of the order; they are attributed to the unity of the normative system personified by the State.»)

<sup>287</sup> See Schmitt, *Verfassungslehre*, p. 210: «Was nur Privatsache und nur privaten Interessen dient, kann wohl vertreten werden; es kann seine Agenten, Anwälte und Exponenten finden, aber es wird nicht in einem spezifischen Sinne repräsentiert.»

<sup>288</sup> For the author's critique of juristic dualisms, see also Hans Kelsen, *Reine Rechtslehre*, Leipzig and Vienna, Franz Deuticke, 1934, pp. 39-61.

<sup>289</sup> On the contrast between Kelsen's and Schmitt's concepts of representation, see Pedro T. Magalhães, «O Problema da Representação e a Construção do Povo. Algumas Notas sobre a Atualidade do Debate Schmitt versus Kelsen», *Revista de História das Ideias*, Vol. 33, 2012, pp. 527-556.

<sup>290</sup> Hans Kelsen, «Gott und Staat», in Klecatsky, Marcic and Schambeck (Eds.), *Die Wiener rechtstheoretische Schule*, pp. 171-193. Carl Schmitt's *Politische Theologie*, p. 26, contains a reference to passages from Kelsen's *Der soziologische und der juristische Staatsbegriff* that probably anticipate the basic theses of «Gott und Staat».

him, society and the State appear to the individual much in the same way as God: as an authority which demands complete obedience. The unconditional subjection to a higher authority which characterizes the religious experience is, as Kelsen sees it, perfectly identical to the original subordination to the imperative injunctions of society.<sup>291</sup> The author praises the empirical sciences of sociology, biology and, above all, psychology<sup>292</sup> for having uncovered the fundamental affinity between the foundations of social and religious authority. A scientific revelation which sheds light on what was once concealed, exposing «the naked, naturally and causally determined movements of minds and

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<sup>291</sup> See *ibid.*, p. 174: «Denn die durch die Vorstellung Gottes vermittelte Gemeinschaft ist die Gesellschaft, und in der dem Individuum als überindividuelle, verbindende und normativ verpflichtende Autorität gegenüberstehenden Gesellschaft erkennt man leicht den gebietenden und verbotenden Gott. Das Wesen des religiösen Erlebens bildet ein soziales, das Wesen des sozialen Erlebens ein religiöses Moment.»

<sup>292</sup> The reading of Freud – especially of his group psychology – made Kelsen reflect upon the relationship between the theory of the State and psychoanalysis: Hans Kelsen, «The conception of the State and social psychology: with special reference to Freud's group theory», *International Journal of Psycho-Analysis*, vol. 5, 1924, pp. 1-38; Hans Kelsen, «Der Staatsbegriff und die Psychoanalyse», in Klecatsky, Marcic and Schambeck (Eds.), *Die Wiener rechtstheoretische Schule*, pp. 209-214. It is worth quoting the final sentences of the latter article (p. 214), both to see how Kelsen conceived the complementarity between his theory of the State and Freudian psychology and to grasp the broad reach of his scientific project of a pure theory of law and the State:

«Von einem erkenntniskritischen Standpunkte kommt es vor allem darauf an, die theologische Methode in den Geisteswissenschaften und speziell in den Sozialwissenschaften zu überwinden (...). Gerade in dieser Richtung aber leistet eine unschätzbare Vorarbeit die psychologische Analyse Freuds, indem sie aufs wirksamste die mit der ganzen Magie jahrhundertalter Worte ausgerüsteten Hypostasierungen Gottes, der Gesellschaft und des Staates in ihre individual-psychologischen Elemente auflöst.» («From an epistemological point of view it is particularly important to overcome the theological method in the humanities and especially in the social sciences (...). Freud's psychological analysis provides an invaluable preparatory work precisely in such direction. *It dissolves with supreme efficiency, in spite of their being equipped with the whole magic of centuries-old words, the hypostatizations of God, society and the State in their individual-psychological elements.*» (Emphasis in the original.))

F. R. Ankersmit, *Political Representation*, Stanford, Stanford University Press, 2002, pp. 60-88, in an erudite discussion of Freud, wholly ignores the Kelsenian approximation to the founder of psychoanalysis. But a reference to the Austrian legal scholar could have been quite interesting there, as it would have further densified Ankersmit's narrative. How could Kelsen, a fierce critic of natural law if there ever was one, show such an enormous amount of intellectual esteem for an author which Ankersmit interprets as «the last of the great natural law theorists» (p. 75)? The most plausible answer lies in Kelsen's strict adherence to the Kantian distinction between is and ought. *Contra* Ankersmit, Kelsen would probably argue that there is a fundamental difference between the normative ideological mystifications of classic natural law theory (Hobbes, Locke, Rousseau, and so on) and the actual causal laws of human nature uncovered by Freudian psychology. The gulf separating the domains of fact and norm also helps explain why Kelsen's political thought, in spite of his praise of Freud and in stark opposition to the prevailing intellectual mood in interwar Europe, shows virtually no traces of cultural despair. According to Ankersmit – and this is the conclusion of his essay on Freud –, «[p]sychology cannot but invite cultural pessimism» in political theory (p. 87). That does not happen in Kelsen's case, because his political thought is not directly derived, even if it is informed, by the knowledge of the causal laws of human psychology. Kelsen's tribute to Freud also serves to draw boundaries between the empirical sciences and the normative sciences; the former might provide «invaluable preparatory work» (Kelsen, «Der Staatsbegriff und die Psychoanalyse», p. 214), but they neither absorb nor determine the latter.

bodies»<sup>293</sup> behind the conceptual façades of God and the State. Empirical science helps see through the masks of religious and social actors, showing that «it is not God, who rewards and punishes; not the State, which condemns and goes to war», but instead «it is people who coerce other people, Mr. X who triumphs over Mr. Y (...)»<sup>294</sup>.

The second part of the article is, however, more significant for Kelsen's epistemological and methodological purposes than the reference to the, however much-admired, empirical exposure of raw domination beyond the legitimating ideological discourses of social and religious powers. After all, Kelsen was committed to the science of law as a purely normative and formal, not as an empirical, endeavor. Hence, he proceeds to argue that the theory of the State, in its own formal theoretical foundations, exhibits striking similarities with theology.<sup>295</sup> As one will thoroughly discuss below<sup>296</sup>, Carl Schmitt, in his *Political Theology*, would not disagree with such a diagnostic. But he would drastically differ on its evaluation. Whereas, for Schmitt, there is an indissoluble link between politics, law and theology which has to be acknowledged, for Kelsen the nexus must be broken so that a pure science of law and the State can emerge. According to the latter, from an epistemological point of view, the problem with the concepts of God and the State, as they are understood by the disciplines of theology and law, is that they are personifications unduly turned into reifications (or hypostatizations) of abstract notions of overarching unity:

«If the person called “the State”, created by juristic knowledge to illustrate the unity of the legal system, is hypostatized in the usual manner and contrasted to the law – whose unity such personification of the State merely expresses – as a distinct being, one faces quite the same problem or pseudo-problem as in theology. The latter can only persist as a discipline which differs from moral or natural science insofar as one holds to the transcendence of God over the world – this fundamental dogma of all theology –, to the existence of a supernatural, extra-earthly God. Similarly, indeed,

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<sup>293</sup> Kelsen, «Gott und Staat», p. 178: «Dieses Von-den-Masken Absehen, dieses durch die Masken hindurch die nackten, naturnotwendig, kausal bestimmten Bewegungen der Seelen und Körper sehen, das ist der Standpunkt der naturwissenschaftlich orientierten Psychologie und Biologie.»

<sup>294</sup> *Ibid.*, p. 177: «Zieht man den auf der politischen Schaubühne das religiöse oder soziale Spiel Tragierenden ihre Masken vom Gesicht, dann ist es nicht mehr Gott, der belohnt und straft, der Staat, der verurteilt und Krieg führt, dann sind es Menschen, die anderen Mensch[en] Zwang antun, ist es Herr X, der über Herrn Y triumphiert (...)»

<sup>295</sup> See *ibid.*, p. 179.

<sup>296</sup> Esp. pp. 163 and ff.

a doctrine of the State which differs from the theory of law is only possible as long as one believes in the transcendence of the State over the law, in the existence or rather in the sham existence of a meta-legal, extra-legal State.»<sup>297</sup>

The analogies between both reifications – of God and the State – are numerous, but they can all be brought back, from an epistemological perspective, to the duplication of the object of knowledge that is the result of every hypostatization. In broad but precise strokes, Kelsen draws the readers' attention to several of them, in an attempt to reveal the unfathomable contradictions they lead to. The transcendent uniqueness and omnipotence of the theological God bear the same logical structure as the sovereign State – and the same logical flaws. Are divine omnipotence and sovereignty, as the concepts seem to suggest, really absolute, or are they restricted to the foundational moment of the creation of the natural, moral and legal orders which they are supposed to transcend? Restriction is, of course, logically incompatible with absoluteness. A God which cannot alter the natural order it has created is no omnipotent creator, just as a State which cannot interfere in the legal order after it has established it can hardly claim to be truly sovereign. Theology and law seek to square a circle with formally equivalent theories, composed of two distinct instances. The first moment is that of voluntary submission to the created order. In theology, this happens when God takes human shape, with the scission between God, the almighty father, and his human son, which is bound to the laws of nature. Legal theory, in turn, postulates the principle of the voluntary commitment of the State to the legal order it has established, so as to explain the mysterious «metamorphosis of the State *qua* power into the State *qua* law»<sup>298</sup>. The second moment is that of exceptional transgression of the created order. The concept of the miracle, which designates a momentary, divinely imposed suspension of the laws of nature, allows theology to

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<sup>297</sup> Kelsen, «Gott und Staat», p. 181: «Wenn die von der Rechtserkenntnis zur Veranschaulichung der Einheit des Rechtssystems gebildete Person, genannt „Staat“, in der üblichen Weise hypostasiert und als ein besonderes Wesen dem Recht – dessen Einheitsausdruck diese Staatsperson nur ist – gegenübergestellt wird, so ist durchaus die gleiche Problem oder Scheinproblemlage gegeben, wie in der Theologie. Diese kann nur insoweit als eine von der Moral- oder Naturwissenschaft verschiedene Disziplin bestehen, als an der Transzendenz Gottes gegenüber der Welt – diesem Grunddogma aller Theologie –, an der Existenz eines supranaturalen, d. h. überweltlichen Gottes festgehalten wird; sowie ja auch eine von der Rechtslehre verschiedene Staatslehre nur möglich ist, solange man an die Transzendenz des Staates gegenüber dem Recht, an die Existenz oder besser gesagt an die Scheinexistenz eines metarechtlichen, überrechtlichen Staates glaubt.»

<sup>298</sup> *Ibid.*, p. 185: «Wie vollzieht sich nun diese, von den Kritikern des Selbstverpflichtungsdogmas stets als Mysterium bezeichnete Metamorphose des Staates als Macht zum Staat als Recht?»

reaffirm God's omnipotence and transcendence. And quite in its image – Schmitt's *Political Theology* being the ultimate, most explicit manifestation of this, even if Kelsen quite probably still ignored Schmitt's work when he wrote «God and the State» –, legal theory reasserts the sovereignty of the State by allowing it, in the presence of extraordinary circumstances, to step beyond – partially or totally annulling – the existing legal order.

Whilst, when he explores the kinship between the concepts of miracle and that of the state of exception, Carl Schmitt unmistakably signals that knowledge of law and politics must pay tribute to the theological knowledge of God, Kelsen appears overtly as an epistemological atheist<sup>299</sup>. The notion of a «legal miracle» is, for the Austrian scholar, a disparaging term which marks the intolerable submission of legal theory to theological methodology and seeks, ultimately, to masquerade sheer State illegality as legality, to explain – and legitimize – in supposedly legal terms what is legally inconceivable and, therefore, unexplainable.<sup>300</sup> In the context of the analogies between God and the State, between theology and the doctrine of the State, epistemological atheism might quite logically be paired with anarchism. But here Kelsen is careful enough to differentiate between an ethical-political anarchism which argues that there *should* be no State – an anarchism, of course, which Kelsen himself rejects – and an epistemological anarchism asserting that there *is* no State as an absolute, transcendent reality – but only as a personified mental construct which intends to designate the unity of the legal system.<sup>301</sup> Indeed, by reducing the concept of the State to that of the immanent, man-made legal order, Kelsen's pure theory of law claims, in a most revealing conclusion, to rise above theology to the level of a modern science:

«The concept of the State, as developed by the old legal and political theories, is – as the concept of God – epistemologically on par with the concept of the soul in older

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<sup>299</sup> See *ibid.*, pp. 191-192.

<sup>300</sup> *Ibid.*, p. 189: «Gerade darin, in diesem Hinausgehen über die Natur, in dieser Annahme einer von der Ordnung der Natur verschiedenen und von ihr unabhängigen übernatürlichen Ordnung des göttlichen Willens, liegt das charakteristische Moment der Theologie, darin besteht geradezu die theologische Methode. Es ist die Methode der Staatslehre, die (...) ganz ebenso das rechtlich-Unbegreifliche dennoch – rechtlich – begreiflich machen, das Rechtswunder glauben machen will, wie die Theologie das Naturwunder.»

<sup>301</sup> This is not to say, however, that epistemological atheism has no ethical-political consequences at all. Quite on the contrary, according to Kelsen, by equating the concept of the State with that of the ever alterable and historically contingent legal order, epistemological atheism carries a progressive and reformist impulse. See *ibid.*, pp. 192-193.

psychologic theories and the concept of force in ancient physics. One could refer to the person of the State equally well either as the legal soul or as the legal force. It is – like God, soul and force – a substance-concept. But since modern science strives to dissolve all substance into function, as it has long ago thrown overboard the concepts of soul and force, modern psychology became a theory of the soul – without soul; modern physics a theory of forces – without force.»<sup>302</sup>

The triumph of function over substance in Kelsen's pure theory of law and the State has important implications for his understanding of democracy. If democracy designates a specific form of State, then it must necessarily share the general functional features which characterize every State. Hence, a democratic State, too, is reduced to the democratic legal order, to the expression of the latter's systematic unity, to an abstract «point of imputation»<sup>303</sup> to which the actions of its agents or organs are attributed. Kelsen's general theory of the State, therefore, precludes the very possibility of direct democracy in a strict sense, for it characterizes the State as a complex of indirectness and intermediation. In fact, only representation or delegation might bridge the gap between the highest abstract «point of imputation» at the top – for instance, the democratic constitution – and the particular administrative or judicial decisions at the bottom. As Kelsen put it in an essay on the opposition between natural and positive law, «the unity of the dynamic system» of positive law – or, which is the same, of the State – «is the unity of a *compound of delegation*»<sup>304</sup>.

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<sup>302</sup> Ibid., p. 193: «Diese reine Rechtstheorie vom Staat, die den Begriff eines vom Recht verschiedenen Staates auflöst, ist eine Staatslehre – ohne Staat. Und so paradox das klingen mag – erst dadurch rückt die Rechts- und Staatstheorie aus dem Niveau der Theologie in die Linie der modernen Wissenschaft vor. Der Begriff des Staates, wie ihn die alte Staats- und Rechtslehre entwickelte, steht – wie der Begriff Gottes – erkenntnistheoretisch auf einer Stufe mit dem Begriff der Seele in der alten Psychologie, dem Begriff der Kraft in der alten Physik. Man kann die Staatsperson ebensowohl als die Rechtsseele wie als die Rechtskraft bezeichnen. Sie ist – wie Gott, Seele und Kraft – ein Substanzbegriff. Da die moderne Wissenschaft alle Substanz in Funktion aufzulösen strebt, den Begriff der Seele ebenso wie den der Kraft längst über Bord geworfen hat, ist die moderne Psychologie eine Seelenlehre – ohne Seele, die Physik eine Kraftlehre – ohne Kraft geworden.»

To be precise, of course, Kelsen is not really arguing that modern science discards those concepts altogether, but merely their understanding as transcendent realities. Modern legal theory, viz. his own pure theory of law, rejects a State which transcends the law, just as modern psychology disposes of a soul lying beyond the human mind-body complex and modern physics ignores a force exogenous to the physical world.

<sup>303</sup> Ibid., p. 187: «Das Problem des Staates erscheint als ein Zurechnungsproblem, der Staat als ein Zurechnungs-, ein spezifischer Beziehungspunkt, und die entscheidende Frage zielt auf das Zurechnungskriterium.»

<sup>304</sup> Hans Kelsen, «Naturrecht und positives Recht», in Klecatsky, Marcic and Schambeck (Eds.), *Die Wiener rechtstheoretische Schule*, p. 217: «Die Einheit des dynamischen Systems [des positiven Rechts] ist die Einheit eines *Delegationszusammenhanges*.» (Emphasis in the original.)

Thus, every democracy, being a State, is also necessarily a representative democracy. But nevertheless, Kelsen is suspicious of the theories of representation traditionally advocated by political thought and public law. Indeed, in sharp contrast to them, he constructs his own theory of political representation on the basis of the legal concept of delegation (*Stellvertretung*), which designates a state of affairs in which, by virtue of a positive norm to that effect, the will of the representative *counts* as the will of the represented. This is an exception, due mainly to spatial and temporal constraints, to the general rule that the expression of a will binds the one who voiced it, not some other entity. In truth, for some people – for example, children or the mentally ill – the exception constitutes the rule, since they can only voice a legally binding will through their representatives. In the overwhelming majority of cases, however, representation or delegation are the result of contract.<sup>305</sup>

Since political representation is supposed to follow these very same lines, in modern constitutional democracies, where parliament is usually said to represent the people, one should come across a positive norm stating that, as a general rule, the resolutions of the people have legislative status, complemented by yet another one allowing parliament to legislate instead of the people in strictly defined circumstances. But in no modern democracy is that the case. Quite on the contrary, modern constitutionalism places legislative power entirely in the hands of the – more or less democratically elected – parliament. The people is excluded from direct intervention in the legislative process, since all constitutional texts guarantee the independence of parliament and its members from the people. Indeed, the transition from the pre-modern courts to modern parliamentarism is decisively marked by the abolition of the imperative mandate. Therefore, according to Kelsen, to speak of representation of the people by parliament in modern democracies is nothing but an ideological «fiction» that stands in shrill contrast to the actual content of positive law. The relationship between the people and parliament is one of *creation* – in the sense that the people, understood of course as a normative construct (not as an empirical substance), creates parliament as the result of an electoral process –, not *representation*. Creation differs from representation because it does not imply subordination of the created organ to its creator: from the fact that parliament is elected – viz. created – by the people does not follow that the former has to voice and implement the will of the latter. In fact, the only will that the people, as a

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<sup>305</sup> See Kelsen, *Allgemeine Staatslehre*, pp. 311-312.

normative construct, has is expressed in the electoral act that decides over the composition of parliament, and it is as such untranslatable to specific instructions concerning the concrete norm-producing activity of the elected organ. Because creation entails no subordination, parliament cannot actually be said to represent the people.<sup>306</sup>

For Kelsen, the ideological purpose of «the fiction of representation of the people by parliament» is not hard to discern. The point is to sustain the illusion that the people, even if it is formally excluded from direct participation in the process of legislation, has not completely alienated its original legislative capacity, since parliament merely voices its will. One sought, thus, to legitimize parliamentary rule from the point of view of popular sovereignty and, by doing so, to dissolve the tensions which threatened to tear apart the difficult matrimony between liberalism and democracy. Surely, according to the author, such a discursive maneuver succeeded, at least for a while, in halting the pressure of the trend towards democracy. However, the mask could scarcely be worn for much longer, especially now that a pure theory of law had managed to expose as «fictions» both the theory of a parliament which represents the people and the doctrine of a mediated popular sovereignty. Kelsen's science, in spite of its abstract, formal and strictly normative object, seemed also to share the capacity, which the author had praised in the other, more empirically oriented social sciences, to see through tightly erected ideological façades.

Kelsen's understanding of representation *qua* delegation, according to which, in modern constitutional democracies, both the people and parliament, in their legally defined functions<sup>307</sup>, are representatives of the State in the sense that they are its agents or organs, points to an alternative justification of parliamentarism. Namely, it ends up offering a legitimization of parliamentarism from the perspective of the principle of the division of labor, which Kelsen views as the condition of all social progress. For him, indeed, modernity is unambiguously equated with progress. A firm conviction that not only makes him stand in the sharpest possible contrast to Carl Schmitt's reaction against modernity, with which one shall deal in detail below, but also sets him apart from the ambivalences of the Weberian disenchantment of the world.

To be sure, the reference to the stern requirements of the social division of labor might persuade certain apologists of modernity, but it is unlikely to convince those who

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<sup>306</sup> *Ibid.*, pp. 312-315.

<sup>307</sup> Which are, respectively, the function of electing the legislature and the legislative function proper.



adhere more rigorously to the democratic ideology of freedom. Let us be reminded, once more, that Kelsen's starting point had been the idea of natural and individual freedom. Such original idea, in the leap from the state of nature to that of society, turned into the collective freedom of the democratic community, resting on the principle of majority. But our author's theory of the State required yet another, deeper compromise to be made. Departing radically from Rousseau, whom Kelsen had deemed the greatest champion of democratic thought, the Austrian jurist ends up defending parliamentarism as a virtuous conciliation between the democratic participation of the citizens in the creation of the legal order to which they must submit and the progressive, even if necessarily exclusionary, socially differentiating principle of the division of labor. Kelsen underscored this point in various texts, particularly in the second half of the 1920s.<sup>308</sup> According to him, on the one hand, parliament fulfils a precise function within the State order, viz. the production of laws, of the general norms which constitute the very basis of the order itself. Both the singularity and the importance of such task virtually call for a specialized organ – parliament appears thus as the specific instrument of social technique for the creation of the fundamental elements of the legal order, indeed, as an inescapable demand of the «differentiating principle of division of labor»<sup>309</sup>. And on the other hand, parliament, if elected by universal suffrage, allows for a degree of free participation of the citizens in the creation of the social order and materializes to a certain, even if restricted, extent the principle of majority that is crucial to democracy.

Surveying Kelsen's apparent Rousseauism, Pasquino comes to the fitting conclusion that the latter «is, so to speak, dried up: at the end of the day, it appears as an empty shell, or as the armor of a nonexistent knight»<sup>310</sup>. Far away, however, from any Rousseauian inspiration – and indeed, as Pasquino also remarks<sup>311</sup>, much closer to Hobbes than to Rousseau –, Kelsen's political thought offers yet another, possibly more

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<sup>308</sup> See, above all, Hans Kelsen, «Das Problem des Parlamentarismus», in Klecatsky, Marcic and Schambeck (Eds.), *Die Wiener rechtstheoretische Schule*, pp. 1661-1687.

<sup>309</sup> Hans Kelsen, «Demokratie», in Klecatsky, Marcic and Schambeck (Eds.), *Die Wiener rechtstheoretische Schule*, p. 1750: «Der Parlamentarismus stellt sich somit als ein Kompromiß zwischen der demokratischen Tendenz der Freiheit und dem allen sozialtechnischen Fortschritt bedingenden Grundsatz differenzierender Arbeitsteilung dar.»

<sup>310</sup> Pasquino, «Penser la démocratie», p. 124 : «Dans les rouages de la logique kelsénienne (...), le rousseauisme est pour ainsi dire desséché: au bout du raisonnement, il nous apparaît comme une coquille vide, ou comme la cuirasse d'un chevalier inexistant ; la souveraineté populaire elle-même, comme la démocratie comme autogouvernement, est réduite, on le verra, à une masque totémique !» (Emphasis elided.)

<sup>311</sup> *Ibid.*, p. 128.

persuasive ideological vindication of democracy, which conceives it as the political expression of a fundamental relativist worldview. This second ideological argument does not fully replace the original idea of democratic freedom; it appears next to it, as a further reason to side by democracy. But, as one shall see in the following sections, it clearly appears to surpass the democratic freedom argument in at least two decisive aspects. Firstly, it allows Kelsen to bridge the very wide gap, left by his justification of democracy from the point of view of freedom, between democratic ideology and its institutional reality. Secondly, and perhaps more importantly, it brings democracy much closer to the author's own fundamental conceptions of truth and science.<sup>312</sup>

#### **4. Beyond Rousseau: relativism, party pluralism and the reform of parliamentarism**

The problem with Kelsen's argumentation for democracy from the point of view of freedom is that his own theory of the State, with its strict functional requirements, appears to deny the possibility of actually establishing political institutions fully deserving to be named democratic. The split between the ideology of democracy and its institutional reality, virtually unsurmountable, seems to demand a generous dosage of compromise. In truth, the acknowledgement of such a gap would not be problematic, if Kelsen adhered to a Marxian understanding of ideology as a false, infrastructurally determined belief. If that were the case, his legal-scientific theory of the State would have simply, and quite aptly, shredded the deceitful ideological mask of democracy, revealing its real, perhaps not-so-democratic face. However, Kelsen's conception of the relation between ideology and reality is more nuanced than that. As he sees it, the causal nexus connecting ideology to reality runs, or might run, in two different, opposite directions. Ideology, as the Marxian tradition argues, might surely be the distorting effect of certain material conditions. But it can also be, quite on the contrary, the cause of empirical consequences. Sometimes, indeed, «[i]t is ideology which determines reality»<sup>313</sup>.

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<sup>312</sup> The following comment, in Kelsen, *Vom Wesen und Wert der Demokratie*, Second Ed., p. 89, fn. 40, is most revealing in this respect: «Wenn ich mich für die Demokratie entscheide, geschieht es ausschließlich aus Gründen, die im letzten Kapitel dieser Arbeit entwickelt sind: aus der Beziehung der *demokratischen Staatsform* zu einer *relativistischen Weltanschauung*.» («If I opt for democracy, I do so solely for the reasons which are developed in the final chapter of this work, i. e. because of the relation of the *democratic form of government* to a *relativistic worldview*.») (Emphasis in the original.)

<sup>313</sup> Kelsen, «Demokratie», p. 1744: «Es ist die Ideologie, die die Wirklichkeit determiniert.»

In the particular case of democracy, however, ideology seems to determine little in reality. Kelsen must «admit that the distance between ideology and reality, and even between ideology and the maximum extent of its possibility of realization, is extraordinary»<sup>314</sup>. Nevertheless, the fact that the institutional reality of the democratic State falls short of the democratic ideal is not conceived by the author as an outright shortcoming. Democracy might be Kelsen's political ideal, but it is not – at least as a derivation of the idea of freedom – a wholly unimpeachable ideal. In truth, the technical requirements of State formation provide, according to the author, valuable corrections to the ideal, particularly to democracy's supposed «propensity to primitivism»<sup>315</sup>. The ideological justification of parliamentarism from the point of view of popular sovereignty, even if in blatant contrast to positive law, had managed for a while to «avoid an excessive surge of the democratic idea in political reality», which «would not have been without danger to social progress, for it would have necessarily been connected to an unnatural primitivization of political technology»<sup>316</sup>. On the other hand, in addition, the democratic call for a derivation of the power of all State organs from an immediate popular source re-appears in the suspicion towards, or in the rejection of, bureaucratic administration and justice. In this respect, Kelsen goes well beyond Weber in the sense that he not only recognizes, but unambiguously welcomes, the fact that modernization entails, next to increasing specialization, growing hierarchical and bureaucratic organization. Such

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Quite tellingly – let us bear in mind that this essay was the author's address to the Fifth German Sociology Congress, held in Vienna 1927 – Kelsen subsequently wonders, in light of the so-called «reality hunger» of most sociologists, if there is more to society than various layers of ideology, thus questioning the Weberian understanding of social science as *Wirklichkeitswissenschaft*. See p. 1745: «Angesichts des Realitätshungers vieler Soziologen ist vielleicht die Frage am Platze, ob es denn gar so verwunderlich wäre, wenn man feststellen müßte, daß es im Bereich des Sozialen eben nichts als Ideologien gibt, und daß der Vorstoß zur Realität (...) nur der Durchbruch aus dem Reich des Sozialen, als aus einem Bereich des Geistes, in den der Natur und der Naturgesetzlichkeit ist.» In fact, one could even go a step further and consider Kelsen's own dichotomy of society and nature, and nature itself as an object of human knowledge, ideological constructs.

<sup>314</sup> *Ibid.*, pp. 1748-1749: «(...) muß man zugeben, daß die Distanz zwischen Ideologie und Realität, ja sogar schon zwischen Ideologie und dem Maximum ihrer Realisierungsmöglichkeit außerordentlich ist.»

<sup>315</sup> Kelsen, *Allgemeine Staatslehre*, p. 365: «Tendenz zum Primitivismus».

<sup>316</sup> Kelsen, «Demokratie», p. 1750: «(...) eine exzessive Überspannung der demokratischen Idee in der politischen Wirklichkeit verhindert. Eine Überspannung, die nicht ohne Gefahr für den sozialen Fortschritt, weil notwendig mit einer unnatürlichen Primitivierung der politischen Technik verbunden gewesen wäre.»

The expression «unnatural primitivization» is rather odd in the context of Kelsen's reasoning, given his dichotomy of nature and society. If, for him, nature is the reign of primitive instincts and their strict causality, whilst society appears as the realm of human intellectual refinement and specialization, then it would make much more sense to speak of «unsocial primitivization», and even more so since democracy's «primitivism» is, in its origin, associated by Kelsen to the idea of *natural* freedom.

organization, in Kelsen's eyes, serves democracy to the extent that it is subordinated to the democratic legislature which produces the general norms that occupy the pinnacle of the State order. In this way, one prevents the subversion of the democracy of the whole system – or stemming from the top of such system – by an alternative, possibly contrary, democracy of parts of the State system.<sup>317</sup>

Even if the wide gap between the ideology and the reality of democracy is unavoidable, and even if it might prove to be beneficial to real-existing democratic institutions as a corrective to some perceived excesses of the democratic idea, it cannot help but be problematic from the perspective of the legitimacy of democracy. Since Kelsen does not discard ideology as a fraud, but on the contrary acknowledges its ability to persuade and motivate social actors and, thus, to transform social reality instead of merely reflecting it with distortion, he can hardly be satisfied with an ideology so far apart from democratic reality as the idea of freedom. Ideological adversaries of democracy, indeed, will only too gladly point to the discrepancy between the promises of ideology and the actual achievements of democratic States –and Kelsen has no alternative but to agree with them on that. The case is different, however, when it comes to his second ideological argument for democracy, which sees it as the political incarnation of a relativistic worldview. Here, indeed, ideology and reality will come much closer to each other.

The idea of relativism first emerges in the last section of *Vom Wesen und Wert der Demokratie*, where the author states that democracy,

«[b]ecause it weighs everyone's political will equally, must also respect each political belief and opinion (...) in equal measure. If one renounces to the knowledge of an absolute value, the opposite opinion must also be deemed possible. Relativism is therefore the conception of the world presupposed by the democratic idea.»<sup>318</sup>

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<sup>317</sup> On the issue of democracy and the separation of powers, see Kelsen, *Allgemeine Staatslehre*, pp. 361-368. The dispersion of power and competences to various instances of the State is, thus, not equivalent to the latter's fragmentation. Quite on the contrary, it serves the purpose of internal hierarchical organization and cohesion. Whilst moving away from the purportedly primitivistic monism of the old doctrines of popular sovereignty, Kelsen's theory of representation and delegation does not challenge – instead, it reinforces – the unity of the State as a self-contained system of norms.

<sup>318</sup> Kelsen, *Vom Wesen und Wert der Demokratie*, First Ed., p. 36: «Weil sie [die Demokratie] den politischen Willen jedermanns gleich einschätzt, muß sie auch jeden politischen Glauben, jede Politische Meinung, deren Ausdruck ja nur der politische Wille ist, gleichermaßen achten. Auch die gegenteilige Meinung muß man für möglich halten, wenn man auf die Erkenntnis eines absoluten Wertes verzichtet. Der

But actually, in the second edition of *Vom Wesen und Wert der Demokratie*, relativism is already implicit well before the conclusion, and in fruitful connection to the empirical reality of democratic States, when Kelsen sets out to explore in detail the democratic concept of the people, moving downwards the ladder of abstraction from the notion of an ideal totality to the politically active individuals and groups. In such quest for the real-existing people Kelsen encounters «one of the most important elements»<sup>319</sup> of democracy as it really works: the political parties.

From a strictly legal point of view, in the German and Austrian interwar contexts, political parties were purely voluntary – in that sense: *private* – associations of politically like-minded individuals, ignored by the constitutional texts.<sup>320</sup> However, their professed goal was to influence the course of *public* affairs, to have a say on the most relevant dispositions of the political order. Indeed, as Kelsen saw it, a significant part of the formation of the will of the political community took place within the parties, before it emerged in the parliamentary chambers. Thus, the attempts to constitutionally recognize the parties were perfectly understandable; they merely sought to give formal legal expression to the empirical fact that parties play an important part in the process of forming the legislative will of the democratic State. In fact, for Kelsen, the constitutional recognition of the political parties was the fundamental step in a democratic reform of parliamentarism, since «democracy is necessarily and inevitably a *State of parties*»<sup>321</sup>.

However, quite a number of important theorists of law and the State<sup>322</sup> opposed such a recognition, because they considered that the State, by its very nature, was irreconcilable with party pluralism. For Kelsen, such critique was in reality a poorly disguised opposition to democracy itself. Anti-parties doctrinaires, such as Heinrich

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Relativismus ist daher die Weltanschauung, die der demokratische Gedanke voraussetzt.» (Emphasis elided.)

<sup>319</sup> Hans Kelsen, *Vom Wesen und Wert der Demokratie*, Second Ed., p. 19.

<sup>320</sup> The word “party” appears only once in the Weimar Constitution, and in a pejorative sense, when Article 130 affirms that «officials serve the community, not a party» («Die Beamten sind Diener der Gesamtheit, nicht einer Partei»).

<sup>321</sup> Kelsen, *Vom Wesen und Wert der Demokratie*, Second Ed., p. 20: «Die Demokratie ist notwendig und unvermeidlich ein *Parteienstaat*.» (Emphasis in the original.)

<sup>322</sup> See *ibid.*, fns. 16-19. There, Kelsen deals explicitly with Heinrich Triepel’s speech on the Constitution and the political parties, held at the University of Berlin (*Die Staatsverfassung und die politischen Parteien*, Berlin, Preußische Druckerei- und Verlags-Aktiengesellschaft, 1927), but one can also read his argument as a reply to Schmitt’s critique of parties – to be explored in detail below, esp. p. 181 –, which basically follows the same line of reasoning as Triepel’s.

Triepel and Carl Schmitt, posited an absolute incompatibility between party pluralism, on the one hand, and the State as the embodiment of political unity, on the other. Political parties, as bearers of particular interests, divisive convictions and partial social identities, could not serve as the basis upon which to build an entity that was supposed to transcend internal differences, to speak in the name of an overarching common good. Yet, according to Kelsen – and here one finds the notion of relativism already in operation –, the *a priori* existence, above class, cultural or other fractures, of a discernible, unifying general interest was nothing but a meta-political, ideological illusion. If the legislative will of the democratic State should vocalize more than the beliefs and the interests of a single, dominant group, there was really no alternative other than to make it a product of the attainable compromises between rival – and possibly even incommensurable – interests and conceptions. The pluralistic construction of the politically active people through the political parties, which aggregate the citizenry along the most diverse lines of cleavage, renders the achievement of such compromises viable. By making the will of the State result from the attainable, ever-shifting compromises between divergent political positions, democracy as a *Parteienstaat* can dispose of the fiction of a neutral, supra-partisan and supposedly *organic* general will.<sup>323</sup>

To be sure, the redefinition of democracy as a State of parties has truly groundbreaking implications from the standpoint of the theories of political unity. As Diogo Pires Aurélio keenly remarks, popular sovereignty is thus re-configured in «intrinsically plural»<sup>324</sup> terms, which stand in sharp contrast to the speculative transcendence of natural diversity through social and political unity that had marked the origins and most of the development of the modern theories of the State in the social contract tradition. Indeed, in spite of all that sets them apart, both Hobbesian autocracy and Rousseauian democracy had sought to dissolve the radical pluralism of the state of nature by constructing the will of the social whole in the image of that of the individual, that is, as necessarily one with itself. The indivisible person of the sovereign – either identical with a *natural* person (monarchy) or in the form of a conglomerate (the demos) – thus superseded the multiplicity of conflicting wills which had held sway within the state of

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<sup>323</sup> See Kelsen, *Vom Wesen und Wert der Demokratie*, Second Ed., pp. 21-23.

<sup>324</sup> See Diogo Pires Aurélio, «O que representam os representantes do povo», in Diogo Pires Aurélio (Coord.), *Representação Política. Textos Clássicos*, Lisboa, Livros Horizonte, 2009, pp. 47-48. Quotation in p. 47: «O Estado de partidos, como a própria expressão indica, representa uma configuração intrinsecamente plural da soberania.»

nature. To Kelsen, however, as shown above, that was a personification likely to turn into a hypostatization. On the other hand, still, it is true that the liberal emphasis on parliamentary discussion amongst the representatives of the people had already contributed to the erosion of the monistic structure of the original modern conceptions of a collective will – but only superficially so. As Schmitt's analysis of liberalism's relative rationalism shows<sup>325</sup>, parliamentary dialectics had an essentially methodological purpose, since discussion was understood as a means to attain a certain «truth and correctness» and thereby to overcome the original plurality of opinions. Eventually, through parliamentary discussion, one should unravel an impartial, supra-partisan reason from which the common will could be consensually derived. Kelsenian democracy as a *State of parties* goes well beyond such superficial, and merely instrumental, pluralization. In fact, it completely relinquishes the quest for a consensus regarding a political truth, which would really be nothing more than an ideological delusion. Relative rationalism, with Kelsen, turns into relativism proper. The democratic State ceases to be defined in terms of a real, empirical unity – unity, indeed, persists only in the abstract, normative sphere – and becomes the product of the achievable compromises between the pluralistic forces that sociologically compose it. Instead of transcending it, the social contract mirrors the immanent pluralistic diversity of the empirical world.

This fusion of relativism and party pluralism has also major implications for Kelsen's proposals of institutional design. Firstly, it allows him to reach a justification of individual rights that is clearly distinct from that provided by natural law theory. Instead of grounding such rights on a conception of human nature, Kelsen sees them as constitutional dispositions protecting the minorities – the individual human being who finds no associates to defend his or her cause being the most vulnerable minority – against the abuses of the majority, safeguarding thus the pluralism of convictions, ideas and beliefs. Since a majority only makes sense next to a minority, the rights of the latter, and the possibility of it turning into a majority in the future course of events, must be guaranteed. In other words, there must be freedom of thought and speech, freedom of the press and freedom of association to ensure that all political persuasions have the chance to compete for the allegiance of a democratic majority.<sup>326</sup>

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<sup>325</sup> See below, p. 156.

<sup>326</sup> See Kelsen, *Vom Wesen und Wert der Demokratie*, Second Ed., pp. 53-55. Obviously, given such new justification, Kelsen's list of fundamental rights does not include the inviolability of private property. In fact, it is restricted to the rights which safeguard intellectual freedom.

Moreover, Kelsen also conceives the electoral system as an instrument to protect and strengthen the minorities, as his preference for proportional representation clearly indicates. Here, too, the guarantee of diversity and pluralism, crucial to a relativistic understanding of politics, triumphs over the simple operation of the majority principle. As a matter of fact, according to Kelsen, if majority rule were to be rigorously applied in the election of a parliamentary chamber, only the members of the electorally strongest party would win seats, thus rendering the whole parliamentary procedure meaningless. Effectively, in simple majority, first-past-the-post systems, only electoral geometry, *i. e.* the more or less arbitrary partition of the State's territory into several electoral districts, allows an opposition to access parliament at all. Yet such territorial fragmentation generally stands at odds with the constitutionally determined nature of the chamber, which is supposed to be elected by – and whose members are supposed to represent – the nation or the people *as a whole*. Even more problematically, the accidents of electoral geography in simple majority systems might easily convert a minority of votes into a majority of mandates, which, in turn, would most likely lead to legislative resolutions where the will of those elected only by a minority of votes decisively shapes the general will. For Kelsen, thus, proportional representation, as opposed to simple majority systems, by painting a much more accurate picture of the politically relevant divisions within the sociologically real people<sup>327</sup>, best creates the conditions for the operation of

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For a critique of Kelsen's grounding of individual rights, see Peter Koller, «Zu einigen Problemen der Rechtfertigung der Demokratie», *Rechtstheorie*, No. 4, Special Issue, 1982, pp. 323-325. Koller argues that Kelsen is unable to demonstrate why individual rights should impose restrictions on the majority principle, which Kelsen's original line of reasoning, departing from the idea of freedom, had deemed the central tenet of democracy. As Koller sees it, the defense of individual rights is a purely *ad hoc* addition to Kelsen's theoretical edifice, resting on the empirical observation that, in constitutional democracies, the majority seems not to exclude the protection of minorities. What Koller fails to see, in my view, is that Kelsen's justification of individual and minority rights implicitly derives from relativism, the author's second ideological line of reasoning in favor democracy. The problem here is, thus, that of a clash between Kelsen's alternative cases for democracy, which the author proves to be incapable of resolving. Why should the relativistic protection of diversity and pluralism prevail over the principle of majority that flows from the idea of democratic freedom? To this question, indeed, Kelsen provides no satisfying answer.

<sup>327</sup> On the relationship between the understanding of representation as descriptive exactness and the defense of PR electoral systems, see Hanna Fenichel Pitkin, *The Concept of Representation*, Berkeley, Los Angeles and London, University of California Press, 1967, pp. 60 and ff. Pitkin's only brief reference to Kelsen, however, points to the latter's concept of representation in the context of the theory of the State as an abstract system of norms, and appears in her discussion of the formalistic views of representation which starts with a reference to Max Weber (p. 39, fn. 1 (Weber); p. 42, fn. 13 (Kelsen)). Kelsen's endorsement of PR in terms of descriptive accurateness is, unfortunately, not mentioned by Pitkin, whose equation of Weberian and Kelsenian formalism also strikes me as highly questionable. Kelsen's formalism, as I see it, is that of a science of norms which seeks to avoid all extra-legal, empirical contamination, whilst Weber's supposed formalism is that of an eminently empirical *Wirklichkeitswissenschaft* which tries to completely shy away from judgments of value.



the majority principle in legislative decisions. Plus, since it brings the parliamentary strength of the minorities as close as it is democratically legitimate to that of the majority, proportional representation favors compromise over strict majoritarian imposition.<sup>328</sup>

The farthest-reaching theoretical consequence of proportional representation, of the demand that parliamentary mandates be distributed to parties – and in fact only secondarily to individual members of parties, in the case of closed lists – according to their relative electoral strength, is the abandonment of the idea of a monistically conceived people – already dealt with, in its general traits, above – as the creator of the legislative chamber. The chamber in its most plural guise, with all the political parties represented according to their share of the electorate, is the creation – and reflection – of an internally divided, intrinsically plural people. Parliamentarism ceases thus to be a moment of superficial pluralization in-between the aprioristically given unity of the people and the discovery, through discussion, of a consensually recognized common good. It becomes the reflection of the political diversity of the people and the arena where compromises between such rival political forces can be negotiated and adopted – compromises which do not pretend to come close to some fictitious supra-partisan truth; which, instead, merely involve an achievable approximation between the different political positions, most certainly mirroring each party's relative electoral strength. Whereas, for Carl Schmitt, as I will show below<sup>329</sup>, this transformation of parliamentarism sounds the death knell for the whole political system of liberalism, for Kelsen, it simply calls for a reform of its institutional design. The author's relativistic conception of democracy as a State of parties questions the pertinence of the independence of MPs from their electorate. If the objects of parliamentary negotiation are divergent, perhaps ultimately irreconcilable party-political programs, the individual parliamentarian ceases to be supposed to form a personal opinion which he or she submits to discussion. Quite differently, MPs are supposed to voice and defend their party's position the best way they can. Hence, each MP should be accountable to the party that sent him to the chamber. If it were so, the political parties could emerge as the instruments through which the pluralistically conceived people would permanently control its parliamentary representatives. The legal crystallization of this tie between the individual parliamentarian and the party-politically constituted people would, according to Kelsen,

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<sup>328</sup> See Kelsen, *Allgemeine Staatslehre*, pp. 346-350.

<sup>329</sup> See pp. 178 and ff.

reconcile the broad masses with the parliamentary principle. The principle of independence<sup>330</sup>, which in the author's view was one of the main causes for the pervasive distrust of the institution of parliament, was not an essential element of the parliamentary system, even if it was a crucial part of nineteenth-century liberal political ideology.<sup>331</sup>

## 5. Dilemmas of relativistic pluralism: the sinking ship of democracy circa 1932

Kelsen's understanding of party pluralism as the manifestation of the real-existing people in its indelible sociological diversity has, however, its own impasses. Indeed, it appears to place excessively high hopes in the political parties both as instruments for the self-organization – and, thus, self-determination – of the people and as an effective means for it to control its elected representatives. To be sure, Kelsen was well aware of Robert Michels's pioneer studies on the organization of mass political parties, and he did not dispute its major findings.<sup>332</sup> The inner life of political parties, even of those parties which professed a democratic ideology, showed an undeniable autocratic tendency. The oligarchies that sat on the top of the party machines discretionarily determined the party's course of action and left virtually no room for the democratic self-determination of the ordinary, individual party members. Actually, leaders could much more strongly assert themselves and impose their will in internal party politics than within the legal-constitutional constraints of a democratic State. Whilst in the inter-party parliamentary debates and negotiations the notion of a shared «discipline of State» (*Staatsdisziplin*) bore no significance – indeed, in Kelsen's view, it would ultimately mean the unacceptable imposition of a fictitious supra-partisan point of view set to ideologically dissolve political pluralism –, inside the party organizations «party discipline» (*Parteidisziplin*) ruled supreme. That being the case, did not Kelsen's reconceptualization of the parliamentary system along the lines of a democratic *Parteienstaat* redound in a mere transfer of rule by an aristocracy of notables to rule by an oligarchy of party leaders and their bureaucratized staffs, as Michels and Weber had already predicted? Would that

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<sup>330</sup> To Kelsen, the notion of a *free mandate* was a «contradictio in adjecto», since the concept of *mandate* denotes a specific – and necessarily restrictive – bond, not independence. See Kelsen, *Allgemeine Staatslehre*, p. 314.

<sup>331</sup> On the rejection of independence in the context of the reform of parliamentarism, see Kelsen, *Vom Wesen und Wert der Demokratie*, Second Ed., pp. 40-43.

<sup>332</sup> See *ibid.*, p. 23, fn. 20.

really reconcile the broad masses with the parliamentary system or would it merely shift the object of their suspicion from parliament to the political parties themselves?<sup>333</sup>

During the 1920s, Kelsen seemed to be at least moderately optimistic regarding the prospects of party pluralist democracy. Even whilst acknowledging the results of Michels's sociology of political parties, the Austrian scholar tended to believe that the oligarchic tendencies derived to a certain extent from the absence of legal and constitutional recognition of the parties as organs crucial to the formation of the democratic will. As he put it, «[t]he constitutional anchoring of the political parties also creates the possibility of democratizing the formation of the collective will *within this sphere*»<sup>334</sup>. However, instead of being a solution, this extension of the democratizing effort to the political parties themselves might be merely the reiteration of the problem. The relinquishment of a monistic conception of the people had led Kelsen to conceive party pluralism as the necessary instrument to democratize the parliamentary system. But when the reality of intra-party conditions was exposed in terms of strictly hierarchical, autocratic organization, one had yet again to shift the object of democratization *qua* pluralization: every opinion, every tendency, and every faction within the party should be equally respected and thus have an equal possibility to determine the party's course of action. Such democratizing effort can, of course, be even further extended, so as to demand that every tendency and faction within a party acknowledge its respective internal pluralism of opinions.<sup>335</sup>

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<sup>333</sup> For Kelsen's rendering of the sociological reality of intra-party relations, clearly indebted to Michels's *Soziologie des Parteiwesens*, see Kelsen, *Vom Wesen und Wert der Demokratie*, Second Ed., pp. 23-24.

<sup>334</sup> *Ibid.*, p. 23: «Die verfassungsmäßige Verankerung der politischen Parteien schafft auch die Möglichkeit, die Gemeinschaftswillensbildung *innerhalb dieser Sphäre* zu demokratisieren.» (Emphasis in the original.)

<sup>335</sup> The impetus of pluralism encounters its last conceivable station in the individual. Indeed, the individual, too, and not just supra-individual entities, might be pluralistically torn – and increasingly so under modern conditions – between diverse, overlapping, and possibly rival, personal allegiances. Should the individual pursue the material interests of social class, the ethical imperatives of religious affiliation, the cultural claims of nationality or ethnicity, the symbolic demands of sexual orientation? In such borderline case, the arithmetic principle of majority has, of course, no application – the individual cannot be internally democratized. Either he unequivocally favors one of his personal loyalties over the others or he chooses, on an *ad hoc* basis, which to follow and which to sacrifice. The last alternative, even if it might almost come close to schizophrenia, best suits a relativistic perspective, since it implies no unrestricted devotion to a value that would thus be made absolute. Relativism poses, hence, a constant challenge to personal identity.

Kelsen does never consider pluralism in this individualistic light. As far as the individual's personal will is concerned, Kelsen, informed by the findings of psychology and psychoanalysis, seems to believe in the strict causal determination of all human volition. He ignores the dilemmas of choice amongst competing personal political loyalties.

Ultimately, however, all such efforts must also come to recognize the gap between the ideology and the reality of democracy – a gap which the relativist-pluralist case for democracy had shortened, but could not wholly bridge. After all, for Kelsen, «social reality is domination and leadership»<sup>336</sup>, and democracy, all things considered, is just a particular form of social and political organization. What distinguishes it from the alternative, autocratic forms is that the democratic will and democratic leadership emerge from within the members of the democratic community through an electoral process. Kelsen employs the Weberian notion of autocephaly to describe the democratic process of leader selection.<sup>337</sup> But his proximity to Weber, whom Kelsen quotes approvingly more than once in his address to German sociologists, is restricted to the formal aspect of leadership creation. The Austrian scholar would never conceive democracy as a – however reinterpreted – form of charismatic domination. Charisma's irreducible tension between transcendence and immanence is rejected by Kelsen's vision of democracy, according to which the democratic leader is strictly immanent to the democratic community, whilst transcendence appears as a characteristic of autocracy. What is more, Kelsen sees the issue of leadership in a democracy as a purely rational problem<sup>338</sup>, and consequently as a possible object of further rationalization. In terms of the Weberian typology, he clearly views – and defends – democracy as a modern, legal-rational form of rule. Therefore, when he tells us that it is the political parties which constitute the politically active, real-existing people in a democracy, he is not really arguing that the modern democratic State, even as a *Parteienstaat*, is a mere passive replication of a self-generated social and political pluralism. Quite on the contrary, indeed, when Kelsen considers the prospects of democratizing the parties as a consequence of their legal and constitutional recognition, he certainly leaves the door open to the possibility of State interference in their internal organization. However, it is not a wide open door, as only the parties' formal structure, not their substantial political goals, might conceivably

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<sup>336</sup> Kelsen, «Demokratie», p. 1759: «soziale Realität ist Herrschaft und Führerschaft».

<sup>337</sup> See *ibid.*, p. 1762: «Durch die demokratische Wahl wird der Führer nicht nur von der sozialen Gemeinschaft der Geführten, er wird auch aus ihnen, aus ihrer Mitte heraus zur Führerstellung emporgehoben. Was Max Weber so treffend als Autokephalie bezeichnet, ist im hohen Maße für die reale Demokratie charakteristisch (...)» (Emphasis elided.)

On autocephaly as an organizational state of affairs where «the chief and his staff are selected according to the autonomous order of the organization itself, not, as in the case of heterocephaly, (...) appointed by outsiders», see Weber, *Economy and Society*, pp. 49-50.

<sup>338</sup> See Kelsen, «Demokratie», p. 1763: «Im System der demokratischen Ideologie steht das Problem der Führerreaktion im Mittelpunkt rationaler Erwägungen.»

become the object of State intervention. Kelsen's relativism does not allow for more than that, when it comes to the use of State prerogatives to target political parties which openly attack the democratic regime.

Such issue acquired increasing importance as the relative stability of the mid and late 1920s succumbed to the rise of political extremism in the early 1930s. What should democrats do to defend democracy? What can a democracy do to defend itself? Can dictatorial means be used to guarantee the survival of democracy, as it is threatened by ruthless enemies both on the right and on the left? In an article published in the German left-liberal press in 1932<sup>339</sup>, Hans Kelsen provides clear answers to these pressing questions. Clear as they may be, however, they are also filled with despondency and resignation, as the author watches the edifice of democracy crumble before his eyes.

The article begins with the eulogy of the Weimar Constitution as «the most democratic constitution in the world»<sup>340</sup>. Still, that did not seem to generate the enduring allegiance of the German people to it. No-other constitution was either so coldly disregarded or so hotly attacked by the very people that had adopted it than the Weimar Constitution. Democracy was losing ground to its rivals everywhere: in the political struggle of parties as well as in the ideological arena.<sup>341</sup> What can and shall a democrat do in such a situation? Kelsen's answer could scarcely be clearer: he or she must speak out against the «unjust accusations»<sup>342</sup> coming from the left and from the right. The ideological battle, unrolled in the supposedly neutral ground of public discussion, is the only available horizon for the defense of democracy, in a democratic State, against anti-democratic forces.

So, Kelsen proceeds to argue, as he had done on a number of occasions before, against both socialist and far right attacks on democracy. For our immediate purposes, however, the most interesting aspect of the article appears in its final considerations, when the author deals with an objection to democracy which one could formulate as a democrat. Indeed, democracy appears to be

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<sup>339</sup> Hans Kelsen, «Verteidigung der Demokratie», *Blätter der Staatspartei*, 2. Jahrgang, 1932, pp. 90-98.

<sup>340</sup> *Ibid.*, p. 91: «Denn sie [die Verfassung von Weimar] ist in der Tat die demokratischste Verfassung der Welt.»

<sup>341</sup> Not to speak, of course, of the bloody, physical struggle in the streets, which Kelsen appears to ignore.

<sup>342</sup> *Ibid.*, p. 92.

«the one form of government which least defends itself against its opponents. It seems to be the tragic fate of democracy that it must nourish its worst enemy from its own breast. To remain true to itself, it must tolerate even such a movement which intends to destroy democracy, it must grant it the same opportunities as any other political persuasion.»<sup>343</sup>

Should a democrat accept such a «tragic fate» and employ all his intellectual energies in the ideological struggle against democracy's legal and legitimate, even if radical and ruthless, opponents? Or should he instead call for a democracy that defends itself from such challengers – that defends itself, if needed, from the people that does not want it anymore; from a majority united around the will to destroy it? According to Kelsen, the answer is, again, unequivocal:

«A democracy that seeks to assert itself – if necessary, with violence – against the will of the majority has ceased to be a democracy. Popular rule cannot – and should not even try to – be maintained against the people. Whoever is for democracy must not allow himself to get entangled in the fateful contradiction of resorting to dictatorship, so as to save democracy.»<sup>344</sup>

Kelsen thus ends his 1932 «Defense of Democracy» on a gloomy note of resignation. In the beginning of the article, after having acknowledged the receding of democratic ideals and the ensuing advancement of dictatorial alternatives, Kelsen had compared the condition of the advocate of democracy to that of «a doctor at the bedside of a critically ill patient: one carries on with the treatment even when the prospect of keeping the patient alive has almost disappeared»<sup>345</sup>. In its final paragraph, an equally

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<sup>343</sup> *Ibid.*, pp. 97-98: «Sie [die Demokratie] ist diejenige Staatsform, die sich am wenigsten gegen ihre Gegner wehrt. Es scheint ihr tragisches Schicksal zu sein, daß sie auch ihren ärgsten Feind an ihrer eigenen Brust nähren muß. Bleibt sie sich selbst treu, muß sie auch eine auf Vernichtung der Demokratie gerichtete Bewegung dulden, muß sie ihr wie jeder anderen politischen Ueberzeugung die gleiche Entwicklungsmöglichkeit gewähren.»

<sup>344</sup> *Ibid.*, p. 98: «Eine Demokratie, die sich gegen den Willen der Mehrheit zu behaupten, gar mit Gewalt zu behaupten versucht, hat aufgehört, Demokratie zu sein. Eine Volksherrschaft kann nicht gegen das Volk bestehen bleiben. Und soll es auch gar nicht versuchen, d. h. wer für die Demokratie ist, darf sich nicht in den verhängnisvollen Widerspruch verstricken lassen und zur Diktatur greifen, um die Demokratie zu retten.» (Emphasis elided.)

<sup>345</sup> *Ibid.*, p. 92: «Ein Freund der Demokratie gleicht heute nur zu sehr einem Arzt am Bett eines Schwerkranken: man setzt die Behandlung noch fort, auch wenn die Aussicht, den Patienten am Leben zu erhalten, beinahe schon geschwunden ist.»

tragic metaphor is added: «One has to stay true to one's flag, even if the ship sinks»<sup>346</sup>. Radical, uncompromising opposition to democracy reveals the dilemma – in the truest sense of the word – of relativistic pluralism: one must accept a «tragic fate» if one wishes to avoid a «fateful contradiction».

## 6. Politics, science, and truth: Kelsen's *Weltanschauung*

It is likely that Kelsen could only accept this «tragic fate» – which was also his own personal fate, the rise of authoritarianism in Europe having forced him to leave four different countries before crossing the Atlantic Ocean at the age of sixty – because democracy as relativistic pluralism was the political expression of a fundamental, comprehensive worldview. Kelsen's politics, like Weber's and Schmitt's, deeply communicates with his answers to the ultimate questions of truth and knowledge.

The Austrian thinker was well aware of such connections, having dealt with them explicitly in several of his essays on democratic theory. Since his answers to the key philosophical questions crystallized rather early, the relationship between Kelsen's understanding of democratic politics and his overarching *Weltanschauung* remains constant throughout his work. As a matter of fact, as I shall note, some of the essays he wrote in English during the 1950s contain passages which are literally translated from much earlier – dating back to the early 1920s – German writings.

As I have already pointed out, the relationship between democracy and an all-encompassing conception of the world was first explored by Kelsen in the last section of the original edition of *Vom Wesen und Wert der Demokratie*, where the author affirms that «[r]elativism is (...) the conception of the world presupposed by the democratic idea»<sup>347</sup>. According to him, the relativity of the value of each political creed, and the impossibility of claiming for one's own political ideal, irrespective of own strongly one might subjectively be devoted to it, «absolute validity»<sup>348</sup>, compels a peremptory rejection of political absolutism – be that of a monarch, a caste of priests, a social class or a revolutionary *avant-garde*. In this context, Kelsen exposes with truly remarkable clarity what he views as the fundamental difference between a transcendent vision of

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<sup>346</sup> *Ibid.*, p. 98: «Man muß seiner Fahne treu bleiben, auch wenn das Schiff sinkt (...)»

<sup>347</sup> See above, fn. 312.

<sup>348</sup> Kelsen, *Vom Wesen und Wert der Demokratie*, First Ed. p. 37: «absolute Gültigkeit». (Emphasis elided.)

politics and its understanding in purely immanent terms – with democracy being, evidently, on the side of the latter. Whereas those whose political conviction stems from divine inspiration might legitimately feel that they have the right to impose their will upon a world of unbelievers, those who find merely earthly truths and human knowledge at their disposal can only justify social coercion – democratically – by the approval of the majority. To illustrate this point, and as a «tragic symbol of relativism and – democracy»<sup>349</sup>, Kelsen recounts an episode from the life of Jesus which is narrated in the Gospel of John (18:38). At Passover, Jesus is brought before Pilate and accused of pretending to be the Son of God and the King of the Jews. Pilate asks him, if he is really the King of the Jews. And Jesus answers: Yes, I am the King of the Jews and I came to this world to testify to the truth. To which Pilate replies: What is the truth? As he did not consider Jesus guilty of any crime, and since it was a custom to liberate a prisoner on the occasion of the Passover feast, the Roman turned to the people and asked: Shall I release the King of the Jews? No, the people shouted, we want Barabbas instead – who was a bandit. Kelsen concludes:

«Perhaps one might object, as a man of faith, as a political believer, that precisely this example speaks against democracy, rather than for it. And such objection must be accepted, though of course only on one condition: If the believers are as sure of their political truth – which, if necessary, must be enforced with blood and violence – as the Son of God.»<sup>350</sup>

The conditions of certainty, absolute or relative validity, are the key ideas here, which reveal the nexus between democracy and the problem of knowledge, the intimate connection between politics and epistemology. This link has already been briefly touched upon above<sup>351</sup>, and it will be further explored below<sup>352</sup> in the discussion of the

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<sup>349</sup> *Ibid.*: «tragische[s] Symbol des Relativismus und der – Demokratie.» Was Kelsen here, in 1920, already anticipating the «tragic fate» of democracy which he would witness in the 1930s?

<sup>350</sup> *Ibid.*, p. 38: «Vielleicht wird man, werden die Gläubigen, die politisch Gläubigen einwenden, daß gerade dieses Beispiel eher gegen als für die Demokratie spreche. Und diesen Einwand muß man gelten lassen; freilich nur unter einer Bedingung: Wenn die Gläubigen ihrer politischen Wahrheit, die, wenn nötig, auch mit blutiger Gewalt durchgesetzt werden muß, so gewiß sind, wie – der Sohn Gottes.»

The revised and enlarged 1929 version ends with exactly the same words. See Kelsen, *Vom Wesen und Wert der Demokratie*, Second Edition, p. 104.

<sup>351</sup> See p. 127.

<sup>352</sup> Pp. 154-157.



methodological dimension of parliamentarism and its transformation – or degeneration (so Carl Schmitt) – into a *Parteienstaat*. In his critical analysis of the historical and intellectual condition of parliamentarism, Schmitt conceives parliamentary discussion as the expression of a «relative rationalism» which fundamentally defines the liberal worldview, its «metaphysical system». The relativistic element consisted in the plurality of opinions, none of them *a priori* superior to the others, which were submitted to discussion. However, discussion was not an end in itself, nor the reflection of an internally fragmented people – the people, as it was supposed to be represented by the chamber, was one and indivisible –, but rather the means to attain a superior reason from which the common good could be derived. Rationalism still trumped relativism, so much so that some of the exponents of nineteenth-century liberal thought could define the power of the liberal – in contrast to the absolute – State in terms of an abstract «sovereignty of justice and reason».

Yet, when the realities of political life gradually turned parliamentary discussion and consensus into interparty negotiation and compromise, the primacy of reason was profoundly challenged. If there was no way to transcend the pluralism of parties and their respective conflicting positions, if one could only transitorily accommodate them, the illusion of a «sovereignty of justice and reason», of a «triumph of right over might» had to be relinquished – and relativistic pluralism fully acknowledged. To Carl Schmitt, however, relativism and party pluralism were merely the dying whisper of parliamentarism – and, by extension, of secular liberalism –, leading inexorably to the dismemberment of the modern State as the embodiment of political unity. For him, as one shall see below, relative rationalism would be replaced not by relativism, but by other alternatives. Kelsen, for his part, rejects both Schmitt's conception of relativistic party politics as the final stage before the collapse of the modern liberal State and the Schmittian alternatives to such breakdown. Instead, he endorses relativism as the philosophical outlook congenial to parliamentary, party-pluralist democracy. But what does Kelsen mean, precisely, when he speaks of relativism? How should one qualify his specific variant of relativism?

In his *Allgemeine Staatslehre*, in a section entitled «Form of Government and Worldview», Kelsen begins to shed some light on the matter. According to him, the belief that human knowledge can only access relative truths and, hence, relative values leads to

the «worldview of criticism and positivism»<sup>353</sup>, understood as that stream of philosophy and science for which human experience is the sole point of departure and which therefore rejects the assumption of absolute, transcendent, supra-human ideas and values. In the 1929 version of *Vom Wesen und Wert der Demokratie*, a long explanatory footnote is added to the conclusion, supplying further substance to such a claim: Kelsen's point is to demonstrate the inextricable link, in the history of philosophy and political ideas, between, on the one hand, a metaphysical worldview and autocracy, and, on the other, empiricism, relativism and democracy. In classical thought, metaphysicians such as Plato and Heraclitus advocated an autocratic politics, whilst the Sophists, with their empiricist and relativist philosophies of nature, stood for democracy. Subsequently, in medieval thought, the whole metaphysical edifice of scholastics proves to be inseparable from its autocratic construction of the political order. At the dawn of modern philosophy, whereas Spinoza, whose pantheism was understood as a turn from metaphysics to the empirical knowledge of nature, is a democrat; the metaphysician Leibniz, with his pre-established, divinely inspired harmony, coherently sides for autocracy.

The major point of controversy – and interest – in this historical-philosophical account is of course the location of Kant in Kelsen's dichotomy. The Austrian theorist rejects the view that Kant's idealism is opposed to positivism. According to him, «transcendental philosophy», which had shifted the theoretical focus from ontology to epistemology, from the nature of being to the conditions of possibility of its knowledge, «could only be correctly understood as a theory of experience»<sup>354</sup>. If consistently thought through, such philosophy of knowledge would translate into a relativist axiology and a democratic politics. However, in Kant's thought there seems to be no smooth transition between pure and practical reason. Instead, there appears to emerge an unbridgeable gap between the transcendental philosophy of pure reason and the metaphysically-oriented practical philosophy of ethics and politics. For Kelsen, who insists on the parallels between the problems of knowledge and power, this is a major incongruence. How can one coherently bring absolute truth and absolute value back into the ethical and political sphere, after one had already disposed of them in the realm of knowledge? If the object of knowledge is never fully apprehended by its human subject, who is *a priori* bound by

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<sup>353</sup> Kelsen, *Allgemeine Staatslehre*, p. 370: «Weltanschauung des Kritizismus und des Positivismus».

<sup>354</sup> Kelsen, *Vom Wesen und Wert der Demokratie*, Second Ed., p. 101, fn. 45: «Die Transzendentalphilosophie kann nur als Theorie der Erfahrung richtig verstanden werden.»

the limits of reason, by the conditions of possibility of human knowledge, how could one make a system of (human) ethics and politics rest on unconditional, absolute assumptions? The priority of form over substance in Kant's critique of pure reason must, according to Kelsen, have significant consequences for an understanding of society and politics. There is continuity, not a break, between pure and practical reason. Hence, Kelsen asks, was not Kant's insistence on the method – rather than on the object – of knowledge akin to «a political attitude which substitutes the question of the right content of the political order for the question of the *method* of formation of such order?»<sup>355</sup> Kelsenian democracy, thus, conceives itself as a coherent political follow-up to Kantian epistemology.

This affinity between the problems of knowledge and power, in general, and between Kantian epistemology and democracy, in particular, is most clearly stated in «Foundations of Democracy», Kelsen's most important essay on political theory written in post-World War II America:

«The main problem of political theory is the relationship between the subject and the object of domination; the main problem of epistemology is the relationship between the subject and the object of cognition. The process of domination is not so different from that of cognition by which the subject tries to be master of his object by bringing some order into the chaos of sensual perceptions (...).»<sup>356</sup>

In both processes, there are two clear alternatives concerning how to conceive the relationship between subject and object. In the case of domination: autocracy or democracy. When it comes to cognition: absolutism or relativism. Kelsen starts by focusing his attention on the latter process. According to him, «absolutism is the metaphysical view that there is an absolute reality, i. e., a reality that exists independently of human cognition», whilst «relativism (...) advocates the empirical doctrine that reality exists only within human cognition, and that, as the object of cognition, reality is relative to the knowing subject»<sup>357</sup>. Kant's epistemological priority of form over substance thus

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<sup>355</sup> *Ibid.*: «Drängt sich da nicht die Parallele zu einer politischen Einstellung auf, die an Stelle der Frage nach dem richtigen Inhalt der sozialen Ordnung die Frage nach dem *Weg*, nach der *Methode* der Erzeugung dieser Ordnung stellt?»

<sup>356</sup> Hans Kelsen, «Foundations of Democracy», *Ethics*, Vol. 66, No. 1, 1955, p. 15.

<sup>357</sup> *Ibid.*, p. 16.

forces one to view «the process of cognition as the creation of its object»<sup>358</sup>. In other words, the process of cognition, the formation of knowledge, completely shuts its doors to any possible transcendence of the limits of the human condition. It is a purely immanent process, where man appears as «the creator of his world, a world which is constituted in and by his knowledge»<sup>359</sup>. Absolutism, on the other hand, claims to access a realm which lies beyond the restrictions of human reason – an absolute reality from which absolute truth, absolute value and, in the last resort, absolute authority can be derived.

The notion that man is the creator of his epistemological world must, however, be significantly qualified. Indeed, it is not equivalent to pure arbitrariness: man does not create the world of his own knowledge in the same way as God is conceived as the omnipotent creator of the whole universe. The world of knowledge is not the product of unbounded human volition, but of aprioristically limited human cognition. It is bound by «the laws of rational cognition»<sup>360</sup>. These provide the common ground of the human experience, which first allows it to be intersubjectively shared. If a relativistic epistemology cannot guarantee the objective existence of the world beyond the limits of human cognition, it can still secure objectivity by conceiving all human beings, insofar as they are subjects of knowledge, as equals. In other words, rational cognition of reality is objective, and not merely an expression of subjective emotions, because the processes governing its formation are fundamentally identical in each and every individual human mind. According to Kelsen, this equality of men as knowing subjects, which is in several aspects – above all, its formal nature – analogous to the equality of all citizens in the democratic decision-making process, allows a relativistic epistemology to avoid two specific risks:

«The one is a *paradoxical solipsism*; that is, the assumption that the ego as the subject of knowledge is the only existent reality (...). Such an assumption would involve a relativistic epistemology in a self-contradiction. For if the ego is the only existent reality, it must be an absolute reality. Uncompromised solipsism, too, is philosophical absolutism. The other danger is a no less *paradoxical pluralism*. Since the world exists only in the knowledge of the subject according to this view, the ego is, so to speak, the center of his own world. If, however, the existence of

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<sup>358</sup> *Ibid.*, p. 17.

<sup>359</sup> *Ibid.*

<sup>360</sup> *Ibid.*, p. 18.

many egos must be admitted, the consequence seems to be inevitable that there are as many worlds as there are knowing subjects. Philosophical relativism deliberately avoids solipsism as well as pluralism.»<sup>361</sup>

Thus, the formal equality of all subjects under «the laws of rational cognition» conciliates the relativity of knowledge with its objectivity. But what about democracy *qua* political relativism? Does it face analogous perils? And if so, is it able to successfully avoid them?

In spite of the close affinity he posits between the theories of politics and knowledge, Kelsen does not stretch the parallel so far as to consider a possible analogy between the intrinsic dangers of a relativistic epistemology and the inherent risks of relativistic democracy. This strikes me as rather unfortunate, given that the parallel might reveal the limits of such affinity and the specificity of political relativism. I will therefore consciously run the risk here of pursuing the analogy beyond the point where Kelsen leaves it, in order to better seize the peculiarities of democracy as political relativism.

One might indeed argue that political relativism, too, involves the peril of relapse into a sort of solipsism. In fact, Kelsen's distinction between natural and social or political freedom points precisely to such a danger. Natural freedom, even if it constitutes the deepest root of democracy within the human soul, effectively exhausts itself in the solipsistic negation of society and politics – and, hence, also of democratic government. It represents, in Kelsen's words, an instinctive «reaction against [the] compulsion implied in any kind of social reality, the protest against a foreign will to which the own will should submit, the resistance against order, against the uneasiness of heteronomy; it is nature itself which in the quest of freedom rebels against society»<sup>362</sup>. It is in the name of such freedom that anarchists and political nihilists have always attacked democracy, as well as every other form of social authority. Relativist democracy avoids such a peril, because it rests not on a purely negative, natural freedom which rebels against society, but on the positive freedom which intends to create, in coordination with other fellow citizens, a certain social and political order. Social freedom, therefore, «must assume the meaning

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<sup>361</sup> *Ibid.*, p. 17 (emphasis added).

<sup>362</sup> *Ibid.*, p. 18. Almost literally translated from Kelsen, *Vom Wesen und Wert der Demokratie*, First Ed., p. 4: «die Reaktion gegen den aus dem gesellschaftlichen Zustande fließenden Zwang, der Protest gegen den fremden Willen, dem sich der eigene beugen muß, gegen die Qual der Heteronomie. Es ist die Natur selbst, die sich in der Forderung der *Freiheit* gegen die Gesellschaft aufbäumt.»

of a specific method of establishing social order, of a specific type of government»<sup>363</sup>, in other words, of democratic government.

On the other hand, such conception of freedom in positive and explicitly intersubjective terms also avoids an alternative, and perhaps more dangerous, manifestation of political solipsism. In truth, the latter might not just redound in a nihilistic negation of social order. The inflated ego, the «exaggerated egoconsciousness»<sup>364</sup>, which understands itself, epistemologically, as «the only existent reality», and politically, as the only conceivable lawmaker, might not just claim freedom from coercion, but also aim to impose its law on a reality which, in the final analysis, is conceived as a mere product of its own will. Much in the same way as, in the theory of knowledge, uncompromised solipsism reverts to philosophical absolutism – also labelled by Kelsen as «epistemological totalitarianism»<sup>365</sup> –, in the theory of politics, it threatens to turn into an overblown variant of autocracy, that of the totalitarian *Egocrat*.<sup>366</sup>

If relativistic democracy, quite like a coherent relativistic epistemology, is able to circumvent the dangers of solipsism – chiefly through the transformation of natural into social freedom –, the same cannot be said regarding the challenge of pluralism. Here the analogy between the problems of knowledge and power reaches its limits. Contrary to a relativistic epistemology, political relativism cannot dispose of the assumption that there may be as many political worlds – in the form of the most diverse and perhaps even incommensurable political ideals – as there are political subjects. In the realm of democratic politics, there is no equivalent to the «laws of rational cognition» which could provide a common ground of objectivity to the struggle of political persuasions. Politics

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<sup>363</sup> Kelsen, «Foundations of Democracy», p. 19.

<sup>364</sup> *Ibid.*, p. 27.

<sup>365</sup> *Ibid.*, p. 26.

<sup>366</sup> To be sure, Kelsen did not use the term *Egocrat*, which was coined by Aleksandr Solzhenitsyn as a reference to Stalin in his highly influential indictment of the Soviet system, *The Gulag Archipelago* – first published in the year of Kelsen's death (1973) – and subsequently developed by the French philosopher Claude Lefort in his critique of totalitarianism (see, for instance, Claude Lefort, «Staline et le stalinisme», in Claude Lefort, *L'Invention Démocratique*, Paris, Fayard, 1994, pp. 107-127). Yet, the term comes very close to the language of Kelsen, who, distinguishing between autocratic and democratic types of personality, posits that «[p]sychologically, political absolutism corresponds to a type of exaggerated egoconsciousness» (see above, fn. 364).

Moreover, in Kelsen's critical analysis of the Soviet system, one can notice that the author charges communism of falling into the dual trap of political solipsism as I have been interpreting it here, *i. e.*, of embracing anarchism in theory and totalitarianism in practice. A trap which, according to Kelsen, Western democracies have managed to dodge. See Hans Kelsen, *The Political Theory of Bolshevism*, Berkeley and Los Angeles, University of California Press, 1948, pp 1-2.

is mainly about volition, not cognition, and the human will is determined by a variety of heterogeneous and highly subjective factors which cannot be subsumed even to the lowest common denominator. As Kelsen himself admits, «the human mind is not completely dominated by reason»<sup>367</sup>, and hence there is no universally shared, objective criterion which could provide the basic guidelines for the formation of the collective will of the people. In politics, as well as in ethics, relativity cannot be reconciled with objectivity, and pluralism must be fully acknowledged. In the same way that axiological relativism «asserts that there are several moral orders quite different from one another, and that consequently a choice must be made among them»<sup>368</sup>, political relativism posits the existence of several disparate political views to which the individual might subscribe. For all of its rationalistic character, marked by the primacy of the general norm (legislation) over the individual act (administration), by the triumph of abstract and formal legality over substantive justice, and so on, democracy cannot exclude its irrationalist adversaries, if it wishes to remain truly democratic. The consequence is simple and clear, even if it might prove tragic: «not to force democracy upon those who prefer another form of government, to remain aware in the struggle for one's own political ideal that the opponents, too, may be fighting for an ideal»<sup>369</sup>. To remain true to itself, democracy cannot avoid – instead, it must embrace – radical political pluralism.

Indeed, only a divinity could vertically cut through the immanent frame of human politics in order to impose a hierarchy to the multitude of political beliefs. Therefore, Kelsen concludes the first section of his post-World War II «Foundations of Democracy» with the same reference to Pilate's plebiscite – which had seen Barabbas, the robber, victorious over Jesus – that had marked the conclusion of the two interwar editions of *Vom Wesen und Wert der Demokratie*:

«For those who believe in the son of God and king of the Jews as witness of the absolute truth, this plebiscite is certainly a strong argument against democracy. And this argument we political scientists must accept. But only under one condition: that we are as sure of our political truth, to be enforced, if necessary,

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<sup>367</sup> Kelsen, «Foundations of Democracy», p. 15.

<sup>368</sup> *Ibid.*, p. 39, fn. 70.

<sup>369</sup> *Ibid.*

with blood and tears – that we are as sure of our truth as was, of his truth, the son of God.»<sup>370</sup>

## 7. Democracy as a «fatherless society»

The triumph, in Kelsen's vision of democracy, of immanent relativistic pluralism over whichever form of political salvation through transcendence is sealed with another analogy between politics and a different realm of human endeavor. Actually, as suggested above in the discussion of Kelsen's «God and the State», there is not only fruitful communication between the problems of power and knowledge, but also between politics and psychology, the empirical science of the human mind. Indeed, «a typology of political and philosophical doctrines must finally result in a characterology»<sup>371</sup>. Accordingly, the dichotomies of democracy *versus* autocracy, relativism *versus* absolutism are further complemented with an opposition of two different types of personality. To democratic relativism corresponds the type of individual «whose desire for freedom is modified by his feeling of equality», thus «honor[ing] the claim of the *tu* to be also an ego», whilst autocratic absolutism relates to an «exaggerated egoconsciousness» which is incapable of «accepting equality as a social ideal» and, if its will to power cannot be realized, ends up identifying with – and strictly obeying – authority.<sup>372</sup>

But Kelsen's recourse to a psychological discourse does not merely serve the purpose of consubstantiating the democratic synthesis of freedom and equality. It also helps him conceive pluralist-relativistic democracy in terms of the final element of the trinity of the French Revolution: fraternity. According to him, psychology and psychoanalysis have shown that social authority is primarily imagined as paternal authority. This primeval experience of authority stood in the way of the assertion of the specifically democratic – fraternal – vision of the social order:

«Insofar as the father is the archetype of authority, because the original experience of all authority, democracy is, according to its idea, a fatherless society. It is

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<sup>370</sup> *Ibid.*, p. 39. See above, fn. 350.

<sup>371</sup> *Ibid.*, p. 15.

<sup>372</sup> *Ibid.*, pp. 26-27. See also Hans Kelsen, «Wissenschaft und Demokratie», *Neue Zürcher Zeitung*, February 23 1937, pp. 1-2.



intended to be a community of equals. Its principle is co-ordination; its most primitive form is a mother-right organization, where men living together are brothers, the sons of the same mother.»<sup>373</sup>

Yet, again, democratic fraternity did not entail the eclipse of social authority, but rather the idea that authority is not paternally imposed from without. Instead, it is created within, precisely by those who must submit to it. Democracy might be a fatherless, but is not an order-less or leaderless society. The fundamental difference, if compared to autocracy, is that that leadership is immanent, not transcendent, to the community, therefore being immediately responsible to it. However, leadership, whilst a natural condition of an autocratic, paternal community, always constitutes a problem for a fraternal political organization. The democratic creation of order and leadership has «a paradoxical privilege (...), a doubtful advantage (...) over autocracy»: «it may, by its own specific methods (...), abolish itself»<sup>374</sup>. Thus, the risk that brothers might revert to fathers and sons is simply ineradicable from democracy. As Hans Kelsen witnessed in interwar continental Europe, not few were committed to the restoration of – some form of – paternal authority.

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<sup>373</sup> Kelsen, «Foundations of Democracy», p. 31.

<sup>374</sup> *Ibid.*, p. 31.

## CHAPTER THREE

### The Politico-Theological Challenge of Liberalism and Modernity

#### Carl Schmitt

##### 1. «The enemy of liberalism» – and what else?

Carl Schmitt's relationship to liberalism and modernity is more much transparent and less nuanced than both Max Weber's and Hans Kelsen's. Whilst the ambivalence of Weber's thought, as I hope to have shown, ranges from his narrative of modernity to his liberal political options, and Kelsen, in spite of having been one of the last champions of a modernity firmly believing in the unbreakable bond of reason, science and progress, nevertheless opposed, criticized or sought to reform some of the central doctrines of political liberalism<sup>375</sup>, Carl Schmitt was a staunch, uncompromising – even if sometimes veiled – intellectual opponent both of the liberal political tradition, in particular, and of secular modernity, in general. Schmitt's opposition to liberalism is a well-known, tightly dissected topic in the secondary bibliography.<sup>376</sup> As a matter of fact, one commentator branded him «The Enemy of Liberalism»<sup>377</sup> in interwar Europe. Schmitt's critique of secular modernity, on the other hand, is a more subterranean issue, to which most interpreters have only more recently started paying due attention.

In this chapter, both dimensions of Schmitt's critique, which are of course ultimately inseparable, will be addressed. His is, to be sure, a penetrating critique. It is not without reason that especially his deconstruction both of the intellectual foundations

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<sup>375</sup> Erhard Mock, «Hans Kelsens Verhältnis zum Liberalismus», *Rechtstheorie*, No. 4, Special Issue, 1982, p. 440, speaks of Kelsen's «critical imprisonment» («*kritisches Verhaftetsein*») in the liberal political tradition. For a more extensive and detailed analysis of this relationship, see Carlos-Miguel Herrera, «Kelsen et le libéralisme», in Herrera (Dir.), *Le droit, le politique*, pp. 37-68.

<sup>376</sup> The titles of some of the most important volumes are revealing enough: John P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*, Cambridge, Cambridge University Press, 1997; David Dyzenhaus (Ed.), *Law as Politics: Carl Schmitt's Critique of Liberalism*, Durham, Duke University Press, 1998.

<sup>377</sup> Mark Lilla, «The Enemy of Liberalism», *The New York Review of Books*, Vol. 44, No. 8, May 15<sup>th</sup> 1997, available on-line at <http://www.nybooks.com/articles/archives/1997/may/15/the-enemy-of-liberalism/?insrc=toc> (last accessed on January 30, 2014).

and of the main political institutions of liberalism still reverberates today amongst various traditions of thought, be they conservative or left-radical, which take a critical stand towards the liberal order. However, precisely because of the piercing nature of Schmitt's critique, and so as to avoid the danger of being too hastily persuaded by its sharpness, it might prove fruitful to start the inquiry by searching for a positive formulation of Schmitt's political thought. Just as no demolition, by itself, erects a new and better building, astuteness and brilliance in an intellectual opposition do not necessarily translate into clear political and theoretical alternatives. And indeed, a significantly blurrier picture emerges, if one chooses to focus on Schmitt's horizons of transcendence of the modern – and secular – liberal political order. If the historical context of interwar Europe was fundamentally marked by the crisis of legitimacy of liberal-parliamentary democracy, then it is surely of great interest, regarding those who most categorically predicted and desired the collapse of the liberal edifice, to ask about their alternative prospects. If the foundations of parliamentarism had eroded and its principles become formalities devoid of real political significance, as Schmitt argues in *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, then what is next?<sup>378</sup>

Such question opens up a whole new dimension of complexity and ambiguity. If no-one would seriously question Schmitt's status as an «enemy of liberalism», few would agree on how to define him positively. Surely, there is an immense array of possibilities, and each of these could be sustained by summoning particular instances of his vast bibliography and providing seemingly persuasive and conclusive quotations: Schmitt as an exponent of political Catholicism<sup>379</sup>; as a theorist of democracy with a substantive conception of the people and its constituent power<sup>380</sup>; as a nationalist fascinated by the rise and by the promises of Italian fascism<sup>381</sup>; as the conservative advocate of a strong presidential solution to the crisis of Weimar democracy<sup>382</sup>? And these, in fact, are just

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<sup>378</sup> See Schmitt, *Die geistesgeschichtliche Lage*, p. 7.

<sup>379</sup> Carl Schmitt, *Römischer Katholizismus und politische Form*, Fifth Edition, Stuttgart, Klett-Cotta, 2008.

<sup>380</sup> Here the source would be mainly, though not exclusively, his constitutional law handbook: Schmitt, *Verfassungslehre*, especially pp. 221-252.

<sup>381</sup> See Carl Schmitt, «Die politische Theorie des Mythos», in Schmitt, *Positionen und Begriffe*, pp. 11-21 (which, albeit under a different title – «Irrationalistische Theorien unmittelbarer Gewaltanwendung» –, also constitutes the last chapter of Schmitt's *Die geistesgeschichtliche Lage*, pp. 77-90); Carl Schmitt, «Wesen und Werden des faschistischen Staates», in Schmitt, *Positionen und Begriffe*, pp. 124-130.

<sup>382</sup> Schmitt, *Der Hüter der Verfassung*; Carl Schmitt, *Legalität und Legitimität*, Munich and Leipzig, Duncker & Humblot, 1932.

some of the available alternatives, namely the ones that more saliently come up in his Weimar writings.<sup>383</sup> Is one of such alternatives more plausible and fertile than the others, in the sense that it could point to the core of Schmitt's endeavor? If so, which one? Or was Schmitt all of this in the course of little more than a decade? And if so, how to account for the bewildering shifts of orientation?

In what follows, inspired by Heinrich Meier's reading of Schmitt in light of the distinction between political theology and political philosophy<sup>384</sup>, I argue that the key for making sense of the puzzling plurality in the positive translations of Schmitt's challenge to liberalism lies in a substantive political void at the heart of his thought. In other words, there is indeed an underlying consistency beneath the superficial diversity of Schmittian alternatives to liberalism, but such unifying core, when it comes to the formulation of a political project in the late modern context, proves incapable of bearing fruit. The structural unity, in fact, is a political theology based upon the fundamental belief in divine truth as revealed by the holy scriptures of Christianity. Hence, Schmitt must be understood essentially as a religious political thinker. A religion based upon revelation seems, indeed, to crave for a political theology, in the sense that it entails a distinction, prone to have political consequences, between those who believe in the divine revelation of truth and those who do not, between those who obey the almighty God – and ultimate Lawgiver – and those who rebel against Him. Schmitt's concept of the political, grounded on the distinction between friend and enemy, but with an almost exclusive focus on the latter<sup>385</sup>, flows from the theological standpoint of truth as revelation.<sup>386</sup> The defense of the political, of the decision to fundamentally distinguish between friend and enemy – in the last resort, between believer and non-believer – is Schmitt's life-long battle. The earthly paradise promised by liberalism and modernity, marked by security, toleration,

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<sup>383</sup> A look beyond his Weimar works would immediately give rise to more possible characterizations: Schmitt as the Nazi «Theorist for the Reich» (Bendersky, *Carl Schmitt: Theorist for the Reich*); on the other extreme, as the laudatory analyst of the emergence of the modern partisan, in his informal war of resistance against the forces of imperialism (Carl Schmitt, *Theorie des Partisanen*, Seventh Edition, Berlin, Duncker & Humblot, 2010, a work which inspired European Maoists to discuss political theory with an ex-Nazi); as the self-styled last heir of the European legal tradition (Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft*, Tübingen, Internationaler Universitäts-Verlag, 1950)?

<sup>384</sup> Heinrich Meier, *Die Lehre Carl Schmitts: Vier Kapitel zur Unterscheidung Politischer Theologie und Politischer Philosophie*, Second Edition, Stuttgart and Weimar, J. B. Metzler, 2004.

<sup>385</sup> On the inferiority of friendship as opposed to the centrality of enmity in Schmitt's thought, see *ibid.*, pp. 86-88.

<sup>386</sup> One of Meier's chapters is tellingly entitled: «Revelation or Whoever is not with me is against me» («Offenbarung oder Wer nicht mit mir ist, der ist wider mich»). See *Ibid.*, p. 107.

«neutralizations and depoliticizations»<sup>387</sup> – his life-long enemy. Such purely negative stance, however, precludes him, as I will try to demonstrate, from sustaining a coherent political orientation alternative to liberalism. Except for atheist Marxism<sup>388</sup>, every breach in the late modern liberal building – and there were not few of them in the turbulent interwar years –, every political discourse that called for urgent, ultimate decisions and for an uncompromised departure from the «age of security»<sup>389</sup> was eagerly taken up by Schmitt – just to be abandoned as soon as a more promising variety surfaced, or if the circumstances deemed appropriate. There is virtually no doctrine promising to overcome the failings and shortcomings of liberalism that is not reflected, at one point or another, in Schmitt's interwar writings. Still, none of them points directly and unambiguously to the heart of his religiously determined political thought. For that theological core, as I will argue, ends up suffocating the political and becoming a politically empty space.<sup>390</sup>

My approach is threefold. Firstly, I go through the various layers and sources of Schmitt's refusal of liberalism and secular modernity, trying to grasp its underlying coherence. I start with Schmitt's early aesthetic rejection of Western capitalist civilization, move then to the systematic critique of the liberal-parliamentary State that the author undertook in his legal theory, before a first incursion into his opposition to liberalism as an ungodly denial of the political.

In a second moment, I will consider the baffling surface of the multiple languages of political opposition to the late modern liberal order that Schmitt, at one stage or the other, was keen to endorse. Two specific instances will deserve special attention. On the one hand, I will explore the author's fascination with Italian fascism and its mythical vision of the nation, so as to assess his apparent proximity to vitalist streams of social and political thought. On the other hand, I will focus on his advocacy of a – supposedly constitutional – authoritarian solution to the final crisis of Weimar democracy in the early

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<sup>387</sup> Carl Schmitt, «Das Zeitalter der Neutralisierungen und Entpolitisierungen», in Carl Schmitt, *Positionen und Begriffe*, pp. 138-150.

<sup>388</sup> Which Schmitt, because of its rationalism and scientific outlook as well as its appropriation and reinterpretation of the universalist concept of humanity, interprets as a derivative of liberalism.

<sup>389</sup> Carl Schmitt, *Theodor Däublers „Nordlicht“: Drei Studien über die Elemente, den Geist und die Aktualität des Werkes*, München, Georg Müller, 1916, p. 62: «das Zeitalter der Sekurität». Interestingly enough, this is precisely the term – though rectified by a bracketed «for some» – which Jan-Werner Müller, in his overview of twentieth-century political thought, uses to refer to the social and political context of the second half of the nineteenth century. See Müller, *Contesting Democracy*, p. 9.

<sup>390</sup> By following this line of reasoning, one is of course assuming that the author's thought should be predominantly derived from his *Politische Theologie* and from Carl Schmitt, *Der Begriff des Politischen*, Third Edition, Hamburg, Hanseatische Verlagsanstalt, 1933.

1930s. This last instance is particularly interesting for our purposes, since it presents Schmitt as an engaged constitutional lawyer at work, who, much like Weber and Kelsen in the earliest steps of the postwar German and Austrian republics, was trying to meet the critical demands of the hour. Like Weber and unlike Kelsen, Schmitt labored the distinction between mere State legality and effective political legitimacy, and came to place his hopes on the plebiscitary authority of the head of State, the *Reichspräsident*, whom he viewed as the ultimate guardian of the Constitution.<sup>391</sup> Yet, whereas for Weber, as I have argued, the 1917-1919 episode illuminates the innermost tensions of his political thought, in Schmitt's case the answer to the 1930-1933 crisis constitutes simply one of many abortive outbursts pointing towards a supersession of modern liberal politics.

Finally, I dive into the religious depths of Schmitt's thought. Drawing on Heinrich Meier and on my own reading of the *Concept of the Political*, I will try to elucidate the link between politics and theology in Schmitt's thought, arguing that the primacy of the latter leads merely to an unqualified affirmation of strong political authority. Schmitt's thought might easily merge with the most diverse varieties of authoritarianism, but it is doubtful that it can serve as a useful basis for a reinterpretation of modern – meaning: liberal and secular – democracy.

## **2. The layers of Schmitt's reaction against liberalism and modernity**

### **2.1. Aesthetic repudiation**

There are certainly many sources to Carl Schmitt's categorical rejection of liberal modernity. Yet a short biographical sketch of the author's social background provides an interesting point of departure. Indeed, in stark contrast to both Max Weber and Hans Kelsen, Schmitt appears as a representative of that rural part of Germany – a silent majority, so to speak, since most Germans, well into the twentieth century, still lived either in the countryside or in small provincial towns – which was markedly suspicious of the big city and its unrelenting rise. Weber, sure enough, was a member of the dominant urban classes, born into the *Berliner* Protestant political and intellectual elite of national liberalism. Kelsen's Jewish origins were to prove problematic, but in the last decades of

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<sup>391</sup> Carl Schmitt, *Der Hüter der Verfassung*. It is, of course, *this* Carl Schmitt, not primarily the political theologian, that Wolfgang Mommsen has in mind when he posits a continuity between Weber and Schmitt. See below, p. 184, fn. 483.

Imperial Austria one can accurately view him as an exponent of the assimilated Viennese cultural elite. Schmitt, on the other hand, born in the small Westphalian town of Plettenberg, descended from petty bourgeois Catholic parents. He was, thus, in his formative years, if not a complete outsider, at least the self-aware member of a minority, in a mostly Protestant *Kaiserreich* where the consequences of the *Kulturkampf* against the Catholic Church were still felt. In fact, one must bear in mind that the mainstream political currents of both conservatism and liberalism in Wilhelmine Germany were Protestant, whilst the Catholics were independently – and, to a large extent, defensively – organized in the Centre Party. Moreover, the psychologically demanding condition of being a gifted student from the province pursuing an academic career in the cosmopolitan urban centers of the German *Reich* might have contributed to a deeply ingrained attitude of distrust towards the predominant values of modern, rational, secular and capitalist society.<sup>392</sup>

As, however, such values were themselves in a profound crisis at the turn of the century, the young Schmitt, after leaving rural Westphalia, eagerly took part in the mood of artistic and aesthetic questioning and contestation which was flourishing throughout the more culturally active European cities. The encounter with the expressionist poet Theodor Däubler seems to have left deep marks. In 1916, Schmitt published an essay on Däubler's colossal epic poem, *Das Nordlicht*, which was unrestrained in its enthusiasm. Schmitt celebrated Däubler as having done nothing less than taken the German language to aesthetic completion, to the heights of its expressive and symbolic powers, beyond the sort of naturalistic degeneration which he decried.<sup>393</sup> Irrespective of the value of Schmitt's observations as literary criticism, for our purposes it is pertinent to inquire what they reveal and possibly anticipate about Schmitt himself and his political thought. In that sense, insights can be drawn especially from the last of his three *Nordlicht* studies, concerning the contemporary relevance of Däubler epos.

In a moment where Europe stood on the verge of «self-laceration», Däubler's poetry appeared as the opposite pole to «[t]his age which has called itself capitalist,

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<sup>392</sup> For more biographical details, see Paul Noack, *Carl Schmitt – Eine Biographie*, Berlin and Frankfurt, Propyläen, 1993. On the inner struggles of the young Schmitt, see Michael Dylan Rogers, «The Development of Carl Schmitt's Political Thought during the First World War», *Modern Intellectual History*, First View Article, 6, 2015, pp. 1-27, which emphasizes the dissonance between the content of Schmitt's personal diary entries and the claims made in his war-time legal articles.

<sup>393</sup> See Schmitt, *Theodor Däublers „Nordlicht“*, pp. 42-43.

mechanistic, relativistic, the age of exchange, technology, and organisation»<sup>394</sup>. Here, Schmitt seems to come close to the language of anxiety directed against modern rationalism that permeated the discourse of many turn-of-the-century intellectuals – Otto von Guericke and Ferdinand Tönnies, to name but two – who sought to formulate an alternative, supposedly organic social theory, rehabilitating medieval ideas and institutions. Unlike the latter, though, Schmitt does not oppose the mechanical to the natural or the organic. Much like Weber, in a way, but with an explicitly critical instead of a mostly analytic outlook, Schmitt focuses on the denial of the supernatural: the modern condition «allows neither secrets nor exuberance of the soul»<sup>395</sup>. Indeed, for Schmitt, too, the modern world appears as a truly disenchanted world. But Schmitt's point is not to diagnose such condition as an irreversible state of affairs, and come to grips with it. Quite on the contrary, he furiously denounces this reign of pure human immanence and exposes it as an inversion of the divine, transcendent order. In what is probably the most revealing passage of the *Nordlicht* interpretation, with the elements of his later political theology already fermenting, Schmitt's verdict about the modern age and its men emerges in all clarity:

«They want heaven on earth, heaven as the result of trade and industry, which should effectively exist here on earth, in Berlin, Paris or New York, a heaven with bathing facilities, automobiles and club chairs, whose holy book would be the timetable. They do not want a God of love and mercy. Having “made” so many astounding things, why should they not “make” a heavenly tower on earth. The ultimate and most important things had already been secularized. Law turned into power, fidelity into predictability, truth into generally recognized accuracy, beauty into good taste, Christianity into a pacifist organization. A pervasive reversal and falsification of values dominated the souls. A sublimely differentiated discrimination between usefulness and harmfulness took the place of the distinction between good and evil.»<sup>396</sup>

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<sup>394</sup> *Ibid.*, p. 59: «die europäische Welt sich selbst zerfleischt (...). Dies Zeitalter hat sich selbst als das kapitalistische, mechanistische, relativistische bezeichnet, als das Zeitalter des Verkehrs, der Technik, der Organisation.»

<sup>395</sup> *Ibid.*, p. 60: «keine Geheimnisse und keinen Überschwang der Seele gelten läßt».

<sup>396</sup> *Ibid.*, pp. 60-61: «Sie wollen den Himmel auf der Erde, den Himmel als Ergebnis von Handel und Industrie, der tatsächlich hier auf der Erde liegen soll, in Berlin, Paris oder New York, einen Himmel mit Badeeinrichtungen, Automobilen und Klubsesseln, dessen heiliges Buch der Fahrplan wäre. Sie wollen keinen Gott der Liebe und Gnade, sie hatten so viel Erstaunliches „gemacht“, warum sollten sie nicht den Turmbau eines irdischen Himmels „machen“. Die wichtigsten und letzten Dinge waren ja schon



Except for a possible, minor outlier – the dichotomy of law and power, which would commonly fit into a modern liberal worldview<sup>397</sup> –, one can diagnose in these strong words the crystallization of a robust rejection of modernity from an explicitly religious perspective. The various components of modern civilization – economics («trade and industry»), material well-being («a heaven with bathing facilities, automobiles and club chairs»), culture («good taste»), morality («usefulness and harmfulness») as exponents of a utilitarian, consequentialist ethical outlook), science (unlimited belief in technology, deemed capable of “making” «heaven on earth») – all stand under trial, exposed as parts of a total inversion of God’s rightful order. Secularization is, as such, conceived as a process of degeneration. And the «distinction between good and evil», even if still phrased in moral terms, anticipates the specifically political distinction between friend and enemy.<sup>398</sup>

The modern age is seen as nothing less than the work of the Antichrist, whose «mysterious power lies in the imitation of God»<sup>399</sup>. An imitation that «substitutes an intelligent foresight and orderliness for Providence», that «“makes” Providence as if it were any given institution»<sup>400</sup>. In 1916, nevertheless, one can still find compensation for the sway of such a godless age in the realm of aesthetic achievement. In Däubler’s poetry, «[t]he spirit triumphs over doubt; the last negation produces the overcoming of all relativity: transcendence»<sup>401</sup>. By contrast, three years later, such merely aesthetic horizon

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säkularisiert. Das Recht war zur Macht geworden, Treue zur Berechenbarkeit, Wahrheit zur allgemein anerkannten Richtigkeit, Schönheit zum guten Geschmack, das Christentum zu einer pazifistischen Organisation. Eine allgemeine Vertauschung und Fälschung der Werte beherrschte die Seelen. An die Stelle der Unterscheidung von gut und böse trat eine sublim differenzierte Nützlichkeit und Schädlichkeit.»

<sup>397</sup> And yet, one could argue that the tradition of political rationalism from which liberalism ultimately stems, dating back to Spinoza and Hobbes, might lead to an equation of right and might, law and power. On the other hand, Schmitt could also be referring to the de-sanctification of law undertaken by the legal positivists, which exposed power in its raw nakedness as the foundation of society.

<sup>398</sup> Meier, *Die Lehre Carl Schmitts*, pp. 14-15 and p. 27, points out that, in spite of Schmitt’s insistence on a strict separation between morality and politics, much of his thought, and possibly even «the proclamation of the “purely political”», is fueled by an acutely felt sense of moral indignation, and by the necessity of an ultimate moral decision amidst the contradictions that mark the human existence.

<sup>399</sup> Schmitt, *Theodor Däublers „Nordlicht“*, p. 62: «Seine geheimnisvolle Macht liegt in der Nachahmung Gottes».

<sup>400</sup> *Ibid.*: «Die Menschen, die sich von ihm [dem Antichrist] täuschen lassen, sehen nur den fabelhaften Effekt; die Natur scheint überwunden, das Zeitalter der Sekurität bricht an; für alles ist gesorgt, eine kluge Voraussicht und Planmäßigkeit ersetzt die Vorsehung; die Vorsehung „macht“ er, wie irgendeine Institution.»

<sup>401</sup> *Ibid.*, p. 70: «Der Geist besiegt den Zweifel; die letzte Negation ergibt die Überwindung aller Relativität, die Transzendenz.»

is found lacking. Schmitt's critique of political romanticism is directed just as much at the latter's fundamental indecision, which, mirroring bourgeois society in general, turns everything into an interesting, but endless, conversation, as it is at the insufficiencies of pure aestheticism:

«Neither religious nor moral nor political decisions, nor scientific terms are possible in the field of the purely aesthetic.»<sup>402</sup>

The pathway was, thus, open for the revelation of the political thinker – and for his affirmation of the decisiveness of the political.

## 2.2. Critique of the liberal-parliamentary State: insoluble contradictions

The turn away from the purely aesthetic was also a professional choice. In spite of some negligible experiments<sup>403</sup>, Schmitt did not become an artist or a literary critic. Instead, he pursued an academic career in the law departments of German universities. But the enemy, as one could see, had already been clearly identified. And he would now be dissected and attacked in its legal-institutional garments, *i. e.* those of the liberal-parliamentary State.

In this regard, Schmitt's methodological approach is characterized by the search for ineradicable contradictions, inexorably approaching a point of implosion<sup>404</sup>, between the principles which supposedly constituted the soul of the liberal State and their actual subversion in political reality. The line of reasoning is rather simple: Having been erected upon the substructures of certain theoretical premises, now that such foundations became increasingly at odds with the realities of political life, the liberal institutional edifice, by necessity, had to crumble.

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<sup>402</sup> Carl Schmitt, *Politische Romantik*, Sixth Edition, Berlin, Duncker & Humblot, 1998, p. 17: «Weder religiöse, noch moralische, noch politische Entscheidungen, noch wissenschaftliche Begriffe sind im Bereich des Nur-Ästhetischen möglich.» See also Schmitt, *Politische Theologie*, p. 40.

<sup>403</sup> Carl Schmitt (published under the expressionistic pseudonym „Johannes Negelius, mox Doctor“), *Schattenrisse*, Leipzig, Skiamacheten-Verlag, 1913; Carl Schmitt, «Die Buribunken», in *Summa*, Vol. 1, 1917/18, pp. 89-106. The former a series of portraits; the latter a metaphorical anecdote. Both with a satirical purpose, targeted at German progressives.

<sup>404</sup> The argument of historical necessity was, of course, not an exclusive of Marxists.

For Schmitt, liberal parliamentarism, as a mixed form of government resting upon a particular combination of the core political principles of identity and representation, stands somewhere in between the negation of monarchic absolutism (pure representation) and the unhampered acceptance of popular sovereignty (pure identity).<sup>405</sup> Such fragile position is revealed quite clearly by the ambiguity of the principle of election. In contrast to the divine right monarchies, the fact that parliaments are elected bodies appears to stress their democratic dimension, in the sense that it establishes a link between those who govern and those who are governed, pointing to the primacy of the latter over the former. On the other hand, however, the principle of election also has an aristocratic dimension, since the purpose of an election is to select the best, to place those who are elected *above* the electors.<sup>406</sup> The representative element of liberal parliamentarism, according to Schmitt, dwells precisely in this aristocratic understanding of the principle of election.

However, as Schmitt sees it, since the revolutionary wave of 1848 such aristocratic, representative dimension of liberal parliamentarism was challenged by the advance of the democratic principle of identity. If, from its inception, liberalism had been marked by a distinctively negative conception of the State's prerogatives, which stemmed from its historical mission of limiting and moderating the power of monarchic governments, now that the monarchy had practically vanished as a strong antagonist, the insufficiencies of such political horizon turned out to be quite evident. As regimes became increasingly parliamentarized, the elected assemblies could hardly continue to be conceived as mere bulwarks against the abuses of the king's government. They were exposed to being democratically denounced as instruments of the domination of the many by the few.

To such charges, Schmitt argues, liberals replied with the concept of a «sovereignty of justice and reason»<sup>407</sup>, in order to restore the legitimacy of the representative chambers. Parliamentarism was, thus, conceived as a method of rule capable of deriving legislation from the universal principles of justice and reason. How were these to be approximated in practice? Through the specifically parliamentary procedures of public discussion between the independent representatives of the nation as

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<sup>405</sup> See Carl Schmitt, *Verfassungslehre*, pp. 216-219.

<sup>406</sup> See *ibid.*, p. 239.

<sup>407</sup> *Ibid.*, p. 201: «Souveränität der Gerechtigkeit und Vernunft».

a whole. Indeed, publicity, discussion and independence were the fundamental tenets of liberal-parliamentary government. In this sense, public discussion, *contra* Kelsen, was not reducible to a process of negotiation and compromise between diverging interests. More than that, in Schmitt's words:

«Discussion means an exchange of views dominated by the purpose of either convincing the opponent, through rational argument, of a certain truth and correctness or letting oneself be convinced by truth and correctness.»<sup>408</sup>

Hence, public discussion has an epistemological reach, which, in Schmitt's view, defines liberalism as a «metaphysical system»<sup>409</sup>. If the exchange of rational arguments is understood as the appropriate method of bringing to light «truth and correctness», liberal parliamentarism finds itself clearly within a rationalist outlook. However, it is not a monistic, absolute rationalism, such as that from which Hobbes's and Rousseau's theories of the State derived. Rather differently, one is in the presence of a «relative rationalism» in which the emphasis is placed more on the procedural dynamics – the competition between rival opinions – than on their actual result. The latter is better understood as a contingent and temporary «correctness», subject to change in the never-ending dialectics of discussion, than as a categorical «truth». To Carl Schmitt, «relative rationalism» constitutes the «metaphysical» foundation of liberalism. It has its political-institutional manifestation in parliamentarism, whilst, in economics, it is most notably expressed by Adam Smith's concept of the invisible hand of the market: out of the free competition between rational opinions and material interests arise, respectively, the closest approximation to truth and justice and the maximum attainable prosperity.<sup>410</sup>

The key objective for liberals is, therefore, to ensure the triumph of law over power. What stems from the liberal system is neither a particular will nor a personal order, but rather abstract and general law approximating truth and justice. In this regard, one is still in the presence of a form of rationalism, not relativism. The multitude of opinions is dialogically led to the unity of the *Rechtsstaat*'s abstract law. There is and there must be

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<sup>408</sup> Schmitt, *Die geistesgeschichtliche Lage*, p. 9: «Diskussion bedeutet einen Meinungs Austausch, der von dem Zweck beherrscht ist, den Gegner mit rationalen Argumenten von einer Wahrheit und Richtigkeit zu überzeugen oder sich von der Wahrheit und Richtigkeit überzeugen zu lassen.»

<sup>409</sup> *Ibid.*, p. 45: «Es ist notwendig, den Liberalismus als konsequentes, umfassendes, metaphysisches System zu sehen.»

<sup>410</sup> *Ibid.*, pp. 45-46.

a general predisposition to eventually overcome disagreement and attain consensus, to dialectically discover the common good. The competing rational opinions are not and must not be irreconcilable or wholly incommensurable political positions.<sup>411</sup>

Now, and here Schmitt's diagnosis – though not the extracted consequences – does not differ significantly from Weber's and Kelsen's, had not the development of modern mass democracy already replaced that kind of liberal dissent leaning towards consensus by a clearly sharper sense of divergence and conflict? Instead of holding rational opinions to be submitted to discussion, did not the modern mass political parties express deep social, economic and religious cleavages and relate to each other, not as different views on a common enterprise, but as conflicting power blocs? Negotiation and *ad hoc* compromises had indeed taken the place of discussion and substantive consensus. The dialectical procedures of publicity and discussion between supposedly independent representatives of the nation as whole, so wrote Schmitt in the preface to the second edition of *Die geistesgeschichtliche Lage*, had become formalities devoid of real political significance.<sup>412</sup> The survival of parliamentarism could, for sure, as Schmitt admits, continue to rest artificially on reasons of pure expediency, or upon the highly questionable absence of alternatives presupposed by those whose answer to the crisis was asking back: «Parliamentarianism, what else?»<sup>413</sup>. However, for the German legal scholar, the contradiction between the fundamental principles of liberal parliamentarism and the development of modern mass democratic politics was both undeniable and unsolvable – and the dying whisper of the liberal *Rechtsstaat* would sound sooner than later.

### 2.3. Politico-theological foundations: liberalism and the denial of the political

The emphasis on the tension between liberal parliamentarism and democracy, between the core principles of the former and the actual historical development of the latter, must however be complemented by another, more profound source of opposition to liberalism and secular modernity. The picture, thus far, portrays the evolution from an early aesthetic repudiation of modern civilization to a penetrating critical analysis of the liberal State. Still, it would certainly be inadequate, if not entirely misguided, to view

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<sup>411</sup> See *ibid.*, pp. 50-63.

<sup>412</sup> See *ibid.*, pp. 10-11.

<sup>413</sup> *Ibid.*, p. 7.

Schmitt simply as the cool diagnostician of the contradictions of liberal democracy. To be sure, the soberness and the sharp lucidity of most of his writings on issues of immediate legal and political relevance may compel us to form such judgement. But so one would run the risk of either ignoring or underestimating the more subterranean streams of his thought.

In fact, another layer of Schmitt's challenge to secular modernity and its liberal politics emerges as soon as, instead of approaching him primarily as an engaged legal scholar taking part in the most urgent political controversies of his time, one chooses to focus on his broader interpretation of legal-political ideas and concepts. By doing so, the critique of the liberal-parliamentary State will appear under a new light, and the kernel of Schmitt's opposition to the modern liberal order may be more accurately approximated.

In 1922, Carl Schmitt published a short book on the concept of sovereignty which was significantly entitled *Political Theology*. Its four chapters are conceived as a sociology of that most crucial legal and political concept.<sup>414</sup> The reader of the first chapter, still unaware of where the argument will eventually lead him to, has good reasons to be puzzled by the choice of the title. Except for a brief appearance of God, the transcendent sovereign, as opposed to the people, viewed as the purely immanent subject of sovereignty<sup>415</sup>, and for the – though rather important – final citation of «a protestant theologian» (Kierkegaard) on the primacy of the exception over the universal<sup>416</sup> there does not seem to be that much theology involved in the discussion. Indeed, one commentator even argues that the work «opens with what seems almost to be an *internal critique* of liberal legalism»<sup>417</sup> (emphasis added). But that is, of course, only a somewhat deceptive appearance, suggested by Schmitt's comparatively moderate – in contrast with

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<sup>414</sup> See Schmitt, *Politische Theologie*, p. 47, where the author explicitly views his endeavor as a contribution to the «sociology of legal concepts» («Soziologie juristischer Begriffe»). However, as one will shortly see, it is much more a historical interpretation of the origins and the development of the concept of sovereignty, and a theoretical discussion of its ultimate meaning, than a sociology in today's commonly accepted understanding of the term.

<sup>415</sup> *Ibid.*, pp. 16-17: «Ob nur Gott souverän ist, das heißt derjenige, der in der irdischen Wirklichkeit widerspruchslos als sein Vertreter handelt, oder der Kaiser oder der Landesherr oder das Volk, das heißt diejenigen, die sich widerspruchslos mit dem Volk identifizieren dürfen, immer ist die Frage auf das Subjekt der Souveränität gerichtet, das heißt die Anwendung des Begriffes auf einen konkreten Tatbestand.»

<sup>416</sup> *Ibid.*, p. 21.

<sup>417</sup> Robert Howse, «From Legitimacy to Dictatorship – and Back Again: Leo Strauss's Critique of the Anti-Liberalism of Carl Schmitt», in Dyzenhaus (Ed.), *Law as Politics*, p. 60. Howse's interpretation of *Political Theology* and *The Concept of the Political* (pp. 60-69) differs in several respects from the one developed in the present chapter, but he, too, emphasizes the «nihilistic character of Schmitt's decisionism» (p. 64).

the polemical language of the following chapters –, scholarly discourse. His point, after all, seems to be merely the correction of standard early modern conceptions of sovereignty as the ultimate, indivisible and underivable source of political authority. In order to propose a more precise definition, Schmitt shifts the attention from the question *what is sovereignty?* to the more immediate *who holds sovereign power?*. Whereas the former pertains to a rather speculative, abstract realm, the latter can be definitely answered by political reality. The answer, however, will never be transparent in ordinary constitutional politics, as normativists like Kelsen, if they cared to descend the ladder of abstraction for the sake of empirical precision, would probably expect. Politics as usual does not reveal *who* has the last word, because no last word is needed when social and political relations unroll, without attrition, according to the existing norms. In contradistinction, light is shed upon the subject of sovereignty once normality is disturbed by the unforeseen emergence of the extraordinary – and by the state of emergency or exception it gives rise to. Contrary to Weber, who conceived State sovereignty as the monopoly of the legitimate use of the means of physical violence, Schmitt understands it as the monopoly of decision on the exception.<sup>418</sup> The decision on the exception, which reveals the true sovereign, has two consecutive components. Firstly, the sovereign decides on the very existence of a state of exception; subsequently, he must also decide what to do, which exceptional measures to adopt, in order to overcome it.<sup>419</sup> The significance of the state of exception, Schmitt argues as the text increasingly acquires more radical, anti-legalist tones, is that it affirms the decisional origin of all political and legal order. Indeed, it points to that primordial, supposedly unbounded decision which sustains the very possibility of stable rules and norms. The norm, contrary to what positivist jurisprudence seems to assume, does not produce and explain itself. Rather, it is the product of a decision

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<sup>418</sup> For the Schmittian definition of sovereignty as decision on the exception, see of course the notorious inaugural sentence of *Politische Theologie*, p. 13: «Souverän ist, wer über den Ausnahmezustand entscheidet.» («Sovereign is he who decides on the state of exception.»)

For the contrast with Weber's definition of State sovereignty, quite explicit even if Weber is not mentioned, see *ibid.*, p. 19: «Darin liegt das Wesen der staatlichen Souveränität, die also richtigerweise *nicht als Zwangs- oder Herrschaftsmonopol*, sondern als Entscheidungsmonopol juristisch zu definieren ist (...).» («Therein lies the essence of State sovereignty, which, from a legal point of view, one should correctly define *not as monopoly of coercion or domination*, but as a monopoly of decision (...).» (Emphasis added.)

<sup>419</sup> See *ibid.*, p. 14. McCormick has persuasively argued that the conflation of the two components of exceptional decisionism in *Political Theology* marks Schmitt's departure from the Ancient Roman republican concept of commissarial dictatorship, which he had endorsed in a previous work (*Die Diktatur*, 1921), to a much more radical, and potentially transformative and revolutionary, notion of sovereign dictatorship. See John P. McCormick, «The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers», in Dyzenhaus (Ed.), *Law as Politics*, esp. pp. 218-230.

and ultimately explained by the exception to its own validity. The exception, in fact, is both chronologically and logically prior to the norm, since it provides its grounds and sets its limits. As Schmitt puts it, before inviting Kierkegaard to speak on his behalf:

«Especially a philosophy of concrete life cannot withdraw from the exception and the extreme case, but must be to the highest degree interested in it. The exception can be more important to it than the rule, not out of a romantic lust for the irony of paradox, but with all the seriousness of an insight that goes deeper than the obvious generalizations stemming from what averagely and repeatedly occurs. The exception is more interesting than the normal case. The norm proves nothing, the exception proves everything: not only does it confirm the rule, but the rule itself can only derive its existence from the exception. In the exception the power of real life breaks through the crust of a mechanism rigidified by repetition.»<sup>420</sup>

The conceptual pair of decision and exception appears to have, for Schmitt, the same original instituting force as charisma had for Weber. Indeed, the concepts of decision, exception and charisma all refer to an extraordinary disruption of the normal continuity of rule. However, there is an important difference, which radicalizes Schmitt's notion of sovereignty, in a sort of foundational sense, far beyond Weber's concept of charisma. Whereas, for Weber, charismatic authority, though revolutionary in its purest understanding, is necessarily exercised with reference to a set of shared cultural representations and values, and charismatic struggles refer to the fight for hegemony over such symbolic realm from which political legitimacy must be derived, Schmitt's decision on the exception is oblivious of social and cultural context. In a way, for Schmitt, the primordial decision appears to be prior to – and possibly constitutive of – culture itself. According to him, the sovereign decision is not merely the political expression of the triumph of one ethos over its competitors, of the imposition of a new hegemonic, comprehensive worldview. More fundamentally, it is a precondition of *all* order. It creates order in the first place, out of anarchy, out of a political, but also presumably cultural and

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<sup>420</sup> Schmitt, *Politische Theologie*, p. 21: «Gerade eine Philosophie des konkreten Lebens darf sich vor der Ausnahme und vor dem extremen Falle nicht zurückziehen, sondern muß sich im höchsten Maße für ihn interessieren. Ihr kann die Ausnahme wichtiger sein als die Regel, nicht aus einer romantischen Ironie für das Paradoxe, sondern mit dem ganzen Ernst einer Einsicht, die tiefer geht als die klaren Generalisationen des durchschnittlich sich Wiederholenden. Die Ausnahme ist interessanter als der Normalfall. Das Normale beweist nichts, die Ausnahme beweist alles; sie bestätigt nicht nur die Regel, die Regel lebt überhaupt nur von der Ausnahme. In der Ausnahme durchbricht die Kraft des wirklichen Lebens die Kruste einer in Wiederholung erstarrten Mechanik.»



civilizational, void. For, in Schmitt's own words, «[t]here is no norm that would be applicable to chaos». Thus, in the first instance, «a normal situation must be *created*, and sovereign is the one who definitely decides whether such normal situation actually exists»<sup>421</sup> (emphasis added). Hence, whilst Weber's concept of charisma contained the duality – and the tension – between an eminently personal and a primarily collective version, Schmitt's concept of sovereignty bears no such tension: it is unequivocally personal. A decisionist theory of sovereignty is, by necessity, personalistic. The sovereign, if not a natural person, must be thought of as such, anthropomorphized.<sup>422</sup> Despite such crucial dissimilarities, there is still another point of convergence between Schmittian sovereignty and Weberian charisma, which resides in the openness of both conceptions to the transcendent. Even if de-theologized by Weber for the sake of both comparative historical world-civilizational and modern political analysis, the concept of charisma has religious roots which, in the last resort, cannot be ignored. Even if still phrased, in the first chapter of *Political Theology*, in a conceptual discussion that could be read within the strict disciplinary boundaries of an *agnostic* legal theory, Schmitt's glance at the transcendent is unmistakable when he gives Kierkegaard the word: «There are exceptions. If one cannot explain them, then neither can one explain the universal.»<sup>423</sup>

Schmitt's definition of sovereignty leaves, thus, the door open to transcendence. But it is not yet in the second chapter of *Political Theology* that he fully invites such dimension in. Before that moment comes, and paving the way to it, the author develops a legal methodological discussion aimed at asserting his own decisionist approach against neo-Kantian normativism – the main target being of course Hans Kelsen, the greatest enemy, as I hope to have shown above, of a jurisprudence tainted by theology. According to Schmitt, Kelsen's legal theory, based upon an interpretation of the Kantian distinction between is and ought as a strict disjunction of sociology and jurisprudence, cannot grasp the «fundamental problem of the concept of sovereignty», which is precisely «the

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<sup>421</sup> *Ibid.*, p. 19: «Es gibt keine Norm, die auf ein Chaos anwendbar wäre. (...) Es muß eine normale Situation *geschaffen werden*, und souverän ist derjenige, der definitiv darüber entscheidet, ob dieser normale Zustand wirklich herrscht.»

<sup>422</sup> This will become particularly evident in the second chapter of *Political Theology*, in Schmitt's discussion of Hobbes's. See *ibid.*, pp. 39-40. Kelsen, of course, would immediately identify here the problematic issue of personifications turning into hypostatizations.

<sup>423</sup> Søren Kierkegaard, «Repetition», in Søren Kierkegaard, *Repetition and Philosophical Crumbs*, Oxford and New York, Oxford University Press, 2009, p. 78. Quoted by Schmitt, *Political Theology*, p. 21: «[e]s gibt Ausnahmen. Kann man sie nicht erklären, so kann man auch das Allgemeine nicht erklären.»

combination of legal and factual highest power»<sup>424</sup>. The interpenetration of the normative and the empirical is something that Kelsenian legal positivism can neither understand nor admit. The latter's strict focus on the purely normative aspect of the law, uninfected by the convolutions of the empirical world, may allow it to proclaim the abstract epistemic unity of the legal system, but that has, for Schmitt, nothing to do with real legal and political unity. As Schmitt sees it, thus, it is the concreteness of the idea of sovereignty, its merging «of legal and factual» that leads Kelsen to refuse it; a refusal which the author of *Political Theology* interprets as «the old liberal negation of a State that transcends the law» and which also meant, according to him, an absolute disregard for «the actual problem of the realization of the law»<sup>425</sup>. Schmitt's point here is that a moment of decision, emanating from a flesh-and-bone decision-maker and ultimately underivable strictly from the content of the corresponding valid legal norm, is required for the law to actually exist. Thomas Hobbes is viewed as the classic representative of such a type of both decisionist and personalist legal reasoning, one of the few moderns who was able to understand, despite being a forerunner of a highly abstract and mathematized natural science, that «for the reality of legal life, it matters who decides»<sup>426</sup>.

However, for Schmitt, the concreteness of the concept of sovereignty does not merely require us to acknowledge the dimension of personal command that positivist jurisprudence sought to dispel from legal science. The concrete instance of sovereign

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<sup>424</sup> Schmitt, *Politische Theologie*, p. 26: «Die Verbindung von faktisch und rechtlich höchster Macht ist das Grundproblem des Souveränitätsbegriffes.»

<sup>425</sup> *Ibid.*, p. 29: «Kelsen löst das Problem des Souveränitätsbegriffs dadurch, daß er es negiert. Der Schluß seiner Deduktionen ist: „Der Souveränitätsbegriff muß radikal verdrängt werden“ (Problem der Souveränität, S. 320). In der Sache ist das die alte liberale Negierung des Staates gegenüber dem Recht und die Ignorierung des selbständigen Problems der Rechtsverwirklichung.»

The charge of abstract legalist alienation from the – more or less brutal – empirical realities of the law, which Schmitt directs at Kelsen, is however far from being uncontroversial. It surely cannot, as I have shown in the previous chapter, be arbitrarily extended from legal theory in a strict sense to Kelsen's social and political thought considered as a whole. Indeed, even in front of an audience of academic jurists, Kelsen stated, in the context of his critique of natural law, that those concerned with finding out what lies beyond positive law, and serves as its foundation, would encounter «neither the absolute truth of metaphysics nor the absolute justice of natural right. Whoever lifts the veil and does not close his eyes, will see the hideous Gorgon face of Power staring back at him.» See Kelsen, «Diskussionsrede zu den Berichten „Die Gleichheit vor dem Gesetz im Sinne des art. 109 der Reichsverfassung“», *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 1927, p. 55, quoted (and translated to French) by Herrera, «Avant-propos», p. 8, fn. 2: «La question du droit naturel est l'éternelle question de savoir ce qui se cache derrière le droit positif. Et celui qui cherche la réponse ne découvrira jamais, je le crains, ni la vérité absolue d'une métaphysique, ni la justice absolue d'un droit naturel. Celui qui soulève le voile et ne ferme pas les yeux, celui-là peut apercevoir la hideuse face de Gorgone du Pouvoir qui le fixe.»

<sup>426</sup> Schmitt, *Politische Theologie*, p. 40: «Es kommt für die Wirklichkeit des Rechtslebens darauf an, wer entscheidet.»

decision is not just a flesh-and-bone person – it is also a political authority existing in time. And when the concept of sovereignty acquires a temporality, when it is viewed from a preeminently historical perspective, its theological foundations finally appear in the most explicit terms. The third chapter of Schmitt's treatise, indeed, significantly bears the same title of the work as a whole.

Its first sentence is, once again, lapidary: «All significant concepts of the modern theory of the State are secularized theological concepts.»<sup>427</sup> Now, if that is so, the question one must pose straightaway is: From which theological category does the exception, the most crucial concept of Schmitt's definition of sovereignty, proceed? Answer: «The exception has for jurisprudence the same meaning as the miracle for theology.»<sup>428</sup> When Schmitt begins to sketch his narrative of secularization, the perceptive reader of course already knows, from what he was able to gather during the first two chapters, the author's fundamental standing on the issue. Schmitt is not a detached diagnostician of that modern phenomenon; he is one of the most furious – though often able to conceal the fury beneath an impressive veil of erudite language – late modern critics of secularization. Indeed, when he speaks against the modern repression of State sovereignty as decision on the exception – in favor of the primacy of the abstract norm –, he is simultaneously speaking against the retreat of an actively intervening God from the world:

«For the idea of the modern constitutional State triumphs together with deism, a theology and metaphysics that banishes the miracle from the world. This theology and metaphysics rejects both the direct divine intervention through an exceptional transgression of the laws of nature which is conveyed by the idea of a miracle and the direct intervention of the sovereign in a valid legal order. The rationalism of the Enlightenment dismissed the exception in every form.»<sup>429</sup>

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<sup>427</sup> *Ibid.*, p. 43: «Alle prägnanten Begriffe der modernen Staatslehre sind säkularisierte theologische Begriffe.»

<sup>428</sup> *Ibid.*: «Der Ausnahmezustand hat für die Jurisprudenz eine analoge Bedeutung wie das Wunder für die Theologie.»

<sup>429</sup> *Ibid.*: «Denn die Idee des modernen Rechtsstaates setzt sich mit dem Deismus durch, mit einer Theologie und Metaphysik, die das Wunder aus der Welt verweist und die im Begriff des Wunders enthaltene, durch einen unmittelbaren Eingriff eine Ausnahme statuierende Durchbrechung der Naturgesetze ebenso ablehnt wie den unmittelbaren Eingriff des Souveräns in die geltende Rechtsordnung. Der Rationalismus der Aufklärung verwarf den Ausnahmefall in jeder Form.»

In the context of such analogies between theology and the theory of the State, both the reference and the clear marking of a contrast to Kelsen, who focused on the same issue in the early 1920s, is unavoidable. Schmitt gives Kelsen credit for having recognized the «methodological affinity between theology and jurisprudence»<sup>430</sup>. However, the goals of the two scholars could scarcely be more mutually opposed. As argued in the previous chapter<sup>431</sup>, Kelsen essentially sought to liberate legal theory from the methods of theology, so as to make it rise to the epistemological level of the modern sciences of man and nature. Schmitt, quite on the contrary, wishes to assert that no legal or political theory is possible outside the orbit of a larger, all-encompassing metaphysical-theological conception of the world. According to him, Kelsen's thought, too, is based upon a precise metaphysics, not on a supposed rejection of metaphysics *tout court*. Namely, it rests upon «a metaphysics which equates the laws of nature and the laws of man»<sup>432</sup> and therefore dispels every form of exception – be it instituted by a divine or by a human sovereign – from its understanding of the world. Moreover, the Austrian scholar's exploitation of the parallels between theology and the theory of the State proves to be, in Schmitt's eyes, internally inconsistent, as it fails to satisfactorily derive its democratic result from the epistemological premises. For Schmitt, one will soon see, a more fruitful political use of theological analogies can be found in the Catholic counterrevolutionary doctrinaires.

On the other hand, it is also most interesting to note that Schmitt explicitly tries to distinguish his story of secularization from Weber's, even if instead of referring to the latter's account as it is developed in the writings on religion, he apparently derives it from the critique of Rudolf Stammler's philosophy of law and its purported overcoming of historical materialism.<sup>433</sup> In his critique of Stammler, according to Schmitt, Weber

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<sup>430</sup> *Ibid.*, p. 46: «Kelsen hat das Verdienst, seit 1920 mit dem ihm eigenen Akzent auf die methodische Verwandtschaft von Theologie und Jurisprudenz hingewiesen zu haben.»

<sup>431</sup> See above, pp. 115-118

<sup>432</sup> Schmitt, *Politische Theologie*, p. 46: «Denn seiner [Kelsens] rechtsstaatlichen Identifikation von Staat und Rechtsordnung liegt eine Metaphysik zugrunde, die Naturgesetzlichkeit und normative Gesetzlichkeit identifiziert. Sie ist aus einem ausschließlich naturwissenschaftlichen Denken entstanden, beruht auf der Verwerfung aller „Willkür“ und sucht jede Ausnahme aus dem Bereich des menschlichen Geistes zu verweisen.»

If previously Schmitt had deemed Kelsen incapable of grasping the nature of sovereignty due to his radical disjunction between jurisprudence and sociology, to the strict divide between the normative and the factual, now he accuses him of the opposite sin of conflating the empirical laws of nature with the legal norms adopted by human political communities!

<sup>433</sup> Weber's essay bears the title «R. Stämmers „Ueberwindung“ der materialistischen Geschichtsauffassung», in Max Weber, *Gesammelte Aufsätze zur Wissenschaftslehre*, Tübingen, J. C. B. Mohr (Paul Siebeck), 1922, pp. 291-359.

correctly asserted that «one can irrefutably confront a radical materialist philosophy of history with an equally radical spiritualist philosophy of history»<sup>434</sup>. But, as he further argues, both approaches lead to an unresolvable and, in the final analysis, absurd causal circularity:

«Both the spiritualist explanation of material processes and the materialist explanation of spiritual phenomena seek to identify relations of causality. They first set up a contrast between two spheres, before dissolving it into nothing by reducing one to the other. Such procedure must, by necessity, culminate in a caricature.»<sup>435</sup>

In contrast to Weber, but also of course to Marx, and ultimately to all that commonly passes for a social scientific approach, Schmitt proposes what he names a «radical conceptualization»<sup>436</sup>. What does it consist of? In my view, it is fundamentally constituted by a double rejection. Firstly, the refusal to deal with the material dimension of legal and political concepts. Schmitt, in spite of the adherence to «a philosophy of concrete life», seems to be solely interested in purely conceptual phenomena. Their translation to materiality – their material preconditions and effects – is irrelevant to him and ignored by him. And indeed it is not just that economic considerations – economics being a typically liberal field of inquiry which Schmitt loathed – are thus wholly excluded. At this point, in contrast to his subsequent *The Concept of the Political*, also the physical dimension, and particularly the possibility of physical violence, finds no entry to Schmitt's approach. Whereas Weber, in his realist-formalist vein, was keen to emphasize the «intimate» connection between the modern State and the legitimate use of the material means of physical coercion, Schmitt dislocates the intimacy to the relation between the concept of the modern State and the overall theological and metaphysical outlook of modernity. Secondly, but closely linked to this exclusion of material considerations from «a radical conceptualization», there is the strict denial to enter into a discourse of

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<sup>434</sup> *Ibid.*, p. 48: «man [könne] einer radikal materialistischen Geschichtsphilosophie unwiderleglich eine ebenso radikal spiritualistische Geschichtsphilosophie gegenüberstellen»

<sup>435</sup> *Ibid.*, pp. 48-49: «Die spiritualistische Erklärung materieller Vorgänge und die materialistische Erklärung geistiger Phänomene suchen beide ursächliche Zusammenhänge zu ermitteln. Sie stellen erst einen Gegensatz zweier Sphären auf und lösen dann, durch die Reduzierung des einen auf das andere, diesen Gegensatz wieder in ein Nichts auf, ein Verfahren, das mit methodischer Notwendigkeit zur Karikatur führen muß.»

<sup>436</sup> *Ibid.*, p. 50: «radikale Begrifflichkeit».

causation. For Weber, evidently, in spite of all the pitfalls that stand in its way and of which he was well aware as a methodologist, the elucidation of causal nexuses was a key part of his intellectual endeavor. Weber's narrative of rationalization and secularization is marked by the attempt to discern the multiple and complex relationships of causality between parallel developments in the spiritual, political and material realms. Schmitt, in turn, completely disregards causality to focus strictly on supposedly substantive correlations and identities between the political and the theological-metaphysical. That is why, even if he clings here to the term «sociology» – in an attempt not to betray the desire for concreteness manifested in the previous chapters? –, his approach is much better understood as theory and history of ideas, as his own words plainly show:

«The presupposition of this kind of sociology of juristic concepts is thus a radical conceptualization, that is, an approach that is consistently pushed to the metaphysical and the theological. The metaphysical image that a certain age forges of the world has the same structure as what that same epoch immediately perceives to be the appropriate form of its political organization. The determination of such an identity is the sociology of the concept of sovereignty.»<sup>437</sup>

In light of such an approach, the significance of relative rationalism as the metaphysical outlook of liberalism, previously discussed in the context of Schmitt's critique of the liberal-parliamentary State, acquires a whole new, broader dimension. Indeed, relative rationalism can thus be placed within a narrative of secularization whose fundamental trend is a move away from transcendence into immanence. If the seventeenth and the eighteenth centuries still held on to both the conception of God's transcendence vis-à-vis the world and the notion of the transcendence of the sovereign vis-à-vis the legal order, in the nineteenth century everything became increasingly dominated by notions of immanence. With Mankind taking God's place, the theory of the State either retreats to a formalistic positivism which shies away from all moral and political considerations or grounds all legitimate authority in the constituent power of the people, assuming an identity between those who govern and those who are governed. That such identity is an

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<sup>437</sup> *Ibid.*, pp. 50-51: «Voraussetzung dieser Art Soziologie juristischer Begriffe ist also eine radikale Begrifflichkeit, das heißt eine bis zum Metaphysischen und zum Theologischen weitergetriebene Konsequenz. Das metaphysische Bild, das sich ein bestimmtes Zeitalter von der Welt macht, hat dieselbe Struktur wie das, was ihr als Form ihrer politischen Organisation ohne weiteres einleuchtet. Die Feststellung einer solchen Identität ist die Soziologie des Souveränitätsbegriffes.»

ultimate impossibility in the sphere of political organization, since it would mean a complete abandonment of representation and, hence, of the decisional, personalistic moment in politics, does not make, for Schmitt, the ideological tendency any less powerful. Even if there will always be a distance between real, absolute identity and the results of the democratic procedures of identification, the move towards an ever more direct democracy – through such institutions and mechanisms as universal suffrage, proportional representation, referenda and citizens' initiatives, etc. – was well on its way.<sup>438</sup> In this inexorable movement of ideas, liberalism as relative rationalism constitutes an interim condition of paralysis and indecision. As Schmitt puts it in the last chapter of his treatise on sovereignty, where he seeks to rehabilitate the political theology of the counterrevolutionary theorists of the State – and particularly that of the Spaniard Donoso Cortés (1809-1853), whom he views as the modern spiritual heir of medieval Great Inquisitors:

«So the liberal bourgeoisie wants a God, but its God must not become active; it wants a monarch, but he must be powerless; it demands freedom and equality, but also that voting rights be limited to the propertied classes in order to secure the influence of education and property on legislation, as if education and property entitled its holders to oppress the poor and the uneducated; it abolishes the aristocracy of blood and family and yet permits the impertinent rule of the aristocracy of money, the stupidest and most ordinary form of aristocracy; it wants neither the sovereignty of the king nor that of the people. What does it actually want?»<sup>439</sup>

For Cortés, writing in the context of the revolutionary wave that swept Europe in 1848, the survival of such type of liberal theology was only possible for the brief period in which a decision on the fundamental question – Christ or Barabbas? – could be parliamentary postponed by appointing a commission of inquiry. But the apocalyptic

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<sup>438</sup> See Schmitt, *Die geistesgeschichtliche Lage*, pp. 30-31, 35-36.

<sup>439</sup> Schmitt, *Politische Theologie*, p. 64: «Die liberale Bourgeoisie will also einen Gott, aber er soll nicht aktiv werden können; sie will einen Monarchen, aber er soll ohnmächtig sein; sie verlangt Freiheit und Gleichheit und trotzdem Beschränkung des Wahlrechts auf die besitzenden Klassen, um Bildung und Besitz den nötigen Einfluß auf die Gesetzgebung zu sichern, als ob Bildung und Besitz ein Recht gäben, arme und ungebildete Menschen zu unterdrücken; sie schafft die Aristokratie des Blutes und der Familie ab und läßt doch die unverschämte Herrschaft der Geldaristokratie zu, die dümmste und ordinärste Form einer Aristokratie; sie will weder die Souveränität des Königs noch die des Volkes. Was will sie also eigentlich?»

final battle was relentlessly approaching, and it would oppose Catholicism to atheist Socialism, monotheistic authority to pantheistic anarchy, transcendence to immanence.<sup>440</sup>

However, even if Schmitt considers Cortés's diagnosis «the most striking aperçu on Continental liberalism», it surely cannot be «the last word on the whole issue»<sup>441</sup>. Cortés had written in the middle of the nineteenth century. Schmitt was writing in the first half of the twentieth. But the decisive battle had not yet arrived. Liberalism persisted – as a dying whisper, perhaps, but a very long one. How could such persistence of the interim be explained?

It seems that, beyond discussion and relative rationalism, Cortés was not able to grasp and expose the most pervasive mask of liberalism, which is simultaneously its most successful political strategy: the denial of the political itself. When he looks past Cortés to his own time, Schmitt asserts that:

«Today nothing is more modern than the struggle against the political. American financiers, industrial technicians, Marxist socialists, and anarcho-syndicalist revolutionaries unite around the demand that the unobjective rule of politics over the objectivity of economic life be eliminated. There should only be organizational-technical and economic-sociological tasks, but no more political problems. The prevailing type of economic-technical thinking is no longer capable of perceiving a political idea. The modern State seems to have indeed become what Max Weber sees in it: a huge apparatus.»<sup>442</sup>

Before the time for the decisive apocalyptic battle arrives, which Cortés considered so imminent, another powerful moment of neutralization intervenes. A purely instrumental, «economic-technical» rationality keeps even the purportedly fiercest opponents of the prevailing order moving in the liberal-capitalist orbit of the denial of the political. Here, Schmitt's narrative of secularization attains its own specific variation on

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<sup>440</sup> See *Ibid.*, pp. 63 and 66.

<sup>441</sup> *Ibid.*, p. 66: «Ich halte es nicht für das letzte Wort über den gesamten, aber wohl für das erstaunlichste Aperçu über den kontinentalen Liberalismus.»

<sup>442</sup> *Ibid.*, pp. 68-69: «Heute ist nichts moderner als der Kampf gegen das Politische. Amerikanische Finanzleute, industrielle Techniker, marxistische Sozialisten und anarcho-syndikalistische Revolutionäre vereinigen sich in der Forderung, daß die unsachliche Herrschaft der Politik über die Sachlichkeit des wirtschaftlichen Lebens beseitigt werden müsse. Es soll nur noch organisatorisch-technische und ökonomisch-soziologische Aufgaben, aber keine politischen Probleme mehr geben. Die heute herrschende Art ökonomisch-technischen Denkens vermag eine politische Idee gar nicht mehr zu perzipieren. Der moderne Staat scheint wirklich das geworden zu sein, was Max Weber in ihm sieht: ein großer Betrieb.»



Weberian disenchantment. Whereas, for Weber, disenchantment meant strictly – though accompanied by the gloom prospect of a broader evaporation of meaning – the retreat of the religious and the supernatural from the modern world, for Schmitt it *also* designates the refusal of the political. The miracle was abolished from the natural world and the exception suppressed from jurisprudence in the name of the rule of law, whilst a self-perpetuating discussion took the place of sovereign political decision-making, and eventually the very perception of a political idea became threatened by the progress of a purely objective, technical calculability. Yet, ultimately, the flight from the political is but an illusion, an ideological mask which claims to negate the inevitability of domination, of rule of men over men, substituting for it impersonal, technical administration.

After having developed his concept of the political, in three reformulations between 1927 and 1933<sup>443</sup>, Schmitt wrote the following in the foreword to the 1934 edition of *Political Theology*: «we know» now that «the decision on whether something is *unpolitical* is always a *political* decision»<sup>444</sup> (emphasis in the original). The political had, thus, to be reaffirmed in a context of increasingly depoliticized politics. More precisely, the latter had to be exposed as a particularly intense form of politics, which sought to perpetuate a specific form of domination by denying its very existence. But the question is: Can such negation of the – deceitful – liberal negation of politics give rise to positive political horizons stretching beyond liberalism?

### **3. The plurality of Schmittian alternatives to liberalism: from the vital promises of fascism to late-Weimar presidentialism**

No interpreter can afford to ignore the issue of Carl Schmitt's political sympathies. Not just for the more obviously controversial motives concerning his collaboration with Hitler's regime, but also for substantial, theoretical reasons. Perhaps an activist might be defined in strictly negative terms, by reference to the political regimes he opposed. Political thinkers, on the other hand, tend to invest an important portion of their intellectual resources in positive self-definitions, either standing for what is or

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<sup>443</sup> On Schmitt's *Begriff des Politischen* see below, pp. 184 and ff.

<sup>444</sup> Schmitt, *Politische Theologie*, p. 7: «Inzwischen haben wir das Politische als das Totale erkannt und wissen infolgedessen auch, daß die Entscheidung darüber, ob etwas *unpolitisch* ist, immer eine *politische* Entscheidung bedeutet, gleichgültig wer sie trifft und mit welchen Beweisgründen sie sich umkleidet.»

envisioning what could and ought to be. Schmitt is no exception. The «enemy of liberalism» also had his friends. Indeed, one can hardly avoid to be amazed by the different political sympathies Schmitt more or less openly expressed between the two World Wars. These changing – and, in the last resort, circumstantial – political friendships help us paint a more precise picture of the author's antagonism to liberal politics and secular modernity.

In this section, I will deal with two instances where Schmitt embraced political alternatives to liberalism. In a first moment, his flirtation with Italian fascism will deserve special attention. The point is not only to elucidate the possible links of such an affair to the basic tenets of the author's thought, but also to provide a more general contextualization. For the latter purposes, it will prove fruitful to read Schmitt's attraction to the fascist «myth» against the background of Georg Simmel's 1918 analysis of the crisis of modern culture. Subsequently, one will also explore Schmitt's advocacy of a presidential solution to the crisis of Weimar democracy in the years 1930-33. The writings explored in this second instance reveal the author in his more sober juristic garments and consider the prospect of transcending the predicaments of a disintegrating liberal parliamentary order supposedly within the scope of a democratic constitution. They will serve, thus, both for a comparison with Max Weber's positions during the previous (1917-1919) critical juncture in German politics and for an examination of Schmitt's understanding of the nature of modern mass democracy.

However, as will be argued in the following, concluding section, these instances cannot in and by themselves provide a last word on Schmitt's political thought. They are temporary approximations to specific political positions and languages which fail to consolidate into a robust, lasting self-definition. What they ultimately reflect is, perhaps, the fundamental impasse of Schmitt's theological vision of the political in a late modern, highly secularized context.

### 3.1. Fascism and the «Political Theory of the Myth»

Schmitt's famous 1923 essay on the crisis of parliamentary democracy, to which we have referred on quite a number of occasions above, does not exhaust itself in an incisive critique of the liberal-parliamentary, constitutional State. Actually, the dissection of the contradictions of liberal democracy takes center stage merely in the first part of the essay. The last two of its four chapters, which have comparatively received much less

attention by the critical literature, consider, in turn, political projects and ideologies seeking to transcend the shortcomings of liberalism. These are alternatives of an explicitly dictatorial nature, because dictatorship, whilst not at all necessarily antidemocratic, marked, as Schmitt had already stated in his revival of Donoso Cortés's radical reactionarism<sup>445</sup>, the fundamental opposition to the liberal principle of discussion and to the relative rationalist metaphysical outlook that underlay it. Amongst the various available alternatives, he concluded for the superiority of fascism and its self-confident assertion of nationalist political mythology.

In order to fully grasp such preference, one has to clarify Schmitt's proximity, at least in the early 1920s, to the philosophical currents which, through their emphasis on the immediacy of life<sup>446</sup>, had been challenging the rationalist, scientific and progressive outlook of the Enlightenment since the late nineteenth century. It is surely significant that, for Schmitt, «[e]specially a *philosophy of concrete life* must not withdraw from the exception and the extreme case»<sup>447</sup> (emphasis added), and that he concludes the first of his four chapters on the meaning of sovereignty by quoting Kierkegaard, one of the pioneers of religious existentialism. Schmitt's concept of sovereignty can also be read, in such light, as a vindication of «concrete life» against a torpid, ever-recurring, routinized normality. As such, it plays a part in the general cultural crisis of Enlightenment rationalism, not just of the specific variant of relative rationalism that, according to Schmitt, was peculiar to liberalism.

The sociologist and philosopher Georg Simmel, a good friend and intellectual companion of Max Weber's<sup>448</sup>, was perhaps the keenest contemporary diagnostician of that crisis. In one of his last writings, an essay on the conflict of modern culture written shortly before the end of World War One<sup>449</sup>, Simmel explores the tense relationship between culture, form and life in late modern European civilization. Culture, through which man surpasses its purely animal condition, is defined by Simmel as the field of

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<sup>445</sup> *Ibid.*, p. 67: «Diktatur ist der Gegensatz zur Diskussion.» For the last two chapters of Schmitt's critique of liberal parliamentarism, respectively, on dictatorship in Marxist thought and on irrationalist theories of direct action, see Schmitt, *Die geistesgeschichtliche Lage*, pp. 63-90.

<sup>446</sup> The concept of life pervaded philosophical thought from 1850 onwards, starting with Schopenhauer and continuing with Nietzsche.

<sup>447</sup> See above, fn. 420.

<sup>448</sup> On the Simmel-Weber connection, see Lawrence A. Scaff, *Fleeing the Iron Cage*, pp. 121-151.

<sup>449</sup> Georg Simmel, «Der Konflikt der modernen Kultur», in Georg Simmel, *Gesamtausgabe*, Vol. 16, Frankfurt am Main, Suhrkamp, 1999, pp. 181-207.

human creation *par excellence*. Human creation, in turn, always involves formal concretion of some sort, whose products – political constitutions, religious dogmas, works of art, technical inventions, etc. – bestow meaning and guidance upon life. Such consolidated forms of human creation, however, tend to affirm a timelessness which clashes with the very principle of the eternal mutability – birth, growth, decline and death – of life. Every religion conceives itself as *the* religion, every political constitution presupposes its own eternal validity, major technological achievements are perceived by their creators as decisive and fundamental, and so on. This is, of course, a necessary tension. Whilst, on the one hand, culture resides in the forms through which human life reveals its distinctively creative capacity in the first place, on the other hand, life necessarily flows beyond the constraints imposed by the existing cultural forms, thus contributing to the transformation of the latter – and, hence, making a history of culture possible. From such perspective, the Enlightenment should be understood as a period wherein, in the most diverse areas of human creation, the flux of life abandoned certain cultural forms – as seen here through the lenses of Weber, Kelsen and Schmitt, though with substantially diverse evaluations, mostly religious cultural forms –, rendering them obsolescent, so as to crystallize in other, different, new ones.<sup>450</sup>

For Simmel, however, the crisis of modern Enlightenment culture bore an unprecedented specificity, which one might describe as an over-determination of life. In other words, the crisis did not simply mean a transitional juncture where new cultural forms struggled to replace old ones as the appropriate shelters for human life. Quite differently, one seemed to be facing a rebellion of life «against form itself, against the principle of form»<sup>451</sup>. The actual point was, thus, to resolve the constitutive tension between life and form in favor of the unrestricted and immediate assertion of the former over the latter. An ultimately unattainable goal, of course, since life can only emerge in reality through form, but one that nevertheless marked the internal conflict of modern culture – and left a paradoxical imprint in it.

Simmel illustrated his diagnosis with examples from various spheres of human activity.<sup>452</sup> But politics, unfortunately, was left out of the analysis. In my view, the last

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<sup>450</sup> *Ibid.*, pp. 183-186.

<sup>451</sup> *Ibid.*, p. 185: «gegen die Form überhaupt, gegen das Prinzip der Form.»

<sup>452</sup> The expressionist rupture with the artistic canon; the emergence of a «new ethics» which, in the domain of gender relations, contested the institutions of marriage (and prostitution); the onset of a religious mysticism which, in its indeterminacy, negated the dogmatic fixation of traditional religions; and, above

two chapters of Schmitt's *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* can fruitfully be read in the light of Simmel's overall depiction of the crisis of modern culture, and complement it from the perspective of political ideas.

After having outlined the inexorable crisis of liberalism's relative rationalism, Schmitt proceeds his essay with a reflection on the problem of dictatorship in Marxist thought. Surely, it might at first sight seem unreasonable to look for vitalist impulses in Marx's so-called scientific socialism. After all, the scientific legitimation of a political project fits neatly into the Enlightenment paradigm of the subordination of life to the formalistic dictates of reason – and, as Schmitt notes, it almost invariably results in an educational dictatorship of the rationalist elites.<sup>453</sup> However, Marxism is not entirely reducible to a materialist reformulation of the Enlightenment's abstract rationalism. As Schmitt argues, its scientificity, rather than technically shape life in the image of knowledge, aims to reveal itself in the flow of time, emerging as a superior consciousness from the concrete historical experience. This was, so Schmitt, the fundamental lesson Marx learned from Hegel. Transporting Hegelian dialectics from the realm of contemplation to that of active life, the result is, indeed, still a rationalist dictatorship, but one of a much more intense nature than any enlightened despotism. The dictatorship of the proletariat – more precisely, of the intellectual *avant-garde* that represents the proletariat by acquiring its superior historical consciousness – does not really want to educate its dialectic opponent. As the absolute negation of the bourgeoisie, the proletariat's sole historical mission is to wipe it off the face of the earth. Therefore, according to Schmitt, once the moment of the final confrontation between bourgeoisie and proletariat is announced, Hegel's dialectics, which provided the intellectual foundation of Marxism, must retreat again to the sphere of contemplation, given its uselessness as a weapon in an actual, necessarily violent struggle. Hence, the room is set free for «a philosophy of concrete life» which, by subverting the Enlightenment's hierarchy of the subordination of instinct to reason, action to reflection, and the unconscious to consciousness, proves capable of mobilizing the courage to the use of

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all, the pragmatist challenge, be it in its utilitarian – according to William James's maxim: «truth is what works» – or Bergsonian spiritualist variant, of the autonomy of knowledge and science relative to life. See *Ibid.*, pp. 196-198 (with no direct references to James and Bergson, but few doubts remain as to whom Simmel might have had in mind).

<sup>453</sup> Schmitt, *Die geistesgeschichtliche Lage*, p. 66: «Das Resultat müßte, wie bei jedem Rationalismus, eine Diktatur der führenden Rationalisten sein.»

force and to the bloodshed it entails. This is the eruption of the vitalist moment in political thought.<sup>454</sup>

The last section of Schmitt's essay on the crisis of liberal parliamentarism addresses, thus, the irrationalist theories of direct, violent action. Even though the argument seems to follow naturally from the previous section on Marxism, the point is not merely to engage with a wider variety of left-radical opposition to liberalism. Instead, the horizon of alternatives ends up being abruptly extended to the other side of the political spectrum: to radical reactionarism, nationalism and fascism.

The kernel of Schmitt's reasoning stems from Georges Sorel's *Reflections on Violence*, which the author claims to have been the first to introduce to German-speaking scholarship.<sup>455</sup> According to Schmitt, by transposing, under the influence of Proudhon's and Bakunin's anarchism, the vitalist intuitionism of Bergson to the problems of social and political life, Sorel erected a mythical political theory which challenged absolute as well as relative rationalism. In the former, Sorel's mythical approach saw the danger of a uniformity which always sacrifices the multifaceted richness of life on the altar of abstraction; in the latter, the expression of a coward intellectualism leading to neutralizing and paralyzing compromises. For Sorel, the capacity for heroic action which triggers all historical transformation springs from the power of the myth. It is always a myth – be it the eternal glory sought by the ancient Greeks, the expectation of the Last Judgement by the primitive Christians or the virtue of the 1789 revolutionaries – which provides the energy and the courage for violence and martyrdom. According to Sorel, in the social conditions of modernity, the group that carries the myth is the proletariat, whose belief in the class struggle and in the insurrectionary potential of the general strike, far from being an invention of intellectuals with utopian tendencies, results from its own condition in the context of industrialization. The class struggle thus appears as an actual fight leading to a final decision, not as a dialectical category or as a slogan for parliamentary speeches and electioneering.<sup>456</sup>

In Schmitt's eyes, however, such a vitalist reading of the class struggle was betrayed by an inherent weakness. Indeed, it was a myth built on the ground of the opponents of mythology *tout court*, that is, in the rationalistic and mechanized terrain of

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<sup>454</sup> See *ibid.*, pp. 69-76.

<sup>455</sup> See Schmitt, «Die politische Theorie des Mythos», p. 11, fn.

<sup>456</sup> See Schmitt, *Die geistesgeschichtliche Lage*, pp. 78-83.

capitalist production. As such, it was a myth of limited vital depth, which significantly proved unable to shake the loyalty of most of the Western European proletariat to the social-democratic, reformist path. Moreover, in Russia, where the myth of the class struggle did in fact lead to successful revolutionary action, it received crucial vital inflows from other, deeper sources. Sorel himself, in his apology of Lenin, noted that proletarian violence in Russia had had at least the merit of *Moscovizing* the country, as a result of the annihilation of its Westernized Saint Petersburg aristocracy. This seems a strange compliment coming from a theoretician of international revolution. For Schmitt, it was equivalent to an admission of the superiority of the national myth – with all its diverse elements: notions of race, lineage and tribe; common language, territory, culture and traditions, etc. – over the class struggle. Indeed, in post-war Italy, where the two modern mythologies had just recently faced off, the national myth of fascism triumphed over communism. In sum, to Schmitt, even if «the political theory of the myth» had had its roots in anarcho-syndicalist thought, fascism carried it further with far greater intensity and effectiveness.<sup>457</sup>

Now that Schmitt's account of «the political theory of the myth» has been presented in the light of Simmel's broader «conflict of modern culture», a crucial question must be raised and, if possible, answered: Does Schmitt endorse the national myth of fascism, which he regards as superior to the communist class struggle, as the manifestation of a rebellion of life «against form itself, against the principle of form»? I believe he does not. Politically, to remain true to itself, such a rebellion could only consistently translate into the anarchist rejection of authority. But Schmitt's political theology was on the antipodes of that as much as it was aware of the affinities between anarchism and atheism. Carl Schmitt's approximation to a vitalist standpoint must therefore be qualified with further precision.

In actual fact, when Schmitt himself invokes such a proximity, he does not talk in general about a philosophy of life, but points more specifically to a «philosophy of *concrete* life» (emphasis added). For him, too, the moment of concretion, the embodiment of life in concrete, and concretely bounded, cultural forms was an inescapable necessity. Schmitt was definitely no enemy of form, neither in a general conceptual nor in a stricter legal and political sense. Quite on the contrary: his decisionism claims to do justice to the

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<sup>457</sup> See *ibid.*, pp. 85-90.

specificity of the legal and political – as opposed to the technical or the aesthetic – form.<sup>458</sup> For Schmitt, political (and legal) form was the product of a sovereign decision, upon which an edifice of clear authority, well-defined hierarchy and unchallenged order could be erected.<sup>459</sup> So, to return to the author's fascist attraction, it is true that the national myth may very well provide the vital strength and the enthusiasm, but the actual point is to make it «*concrete reality*», as Mussolini put it in one of his galvanized speeches.<sup>460</sup> Half a dozen years later, when reviewing a book on the nature and the development of the fascist State, Schmitt praises the latter, above all, for its resolute assumption of sovereign authority, for both its will and capacity to cut through the dilemmas and neutralizations of modern social pluralism and decide as a supreme third party.<sup>461</sup> The national myth is, therefore, only a means for attaining the higher purpose of restoring the dignity and the authority of the State. Schmitt solves the Simmelian tension between life and form unequivocally in favor of the latter. The national myth is instrumental to political form; its function is merely to breathe new life into it. Schmitt's nationalism, endorsed from the standpoint of a rather ambiguous approximation to «the political theory of the myth», is of a strictly subsidiary importance to his political horizon. The last paragraph of his essay on the crisis of liberal parliamentarism could not be more instructive in this respect:

«To be sure, the ideal risk of such irrationalities is large. The last, still existing remnants of unity and homogeneity are dissolved by the pluralism of an incalculable number of myths. For political theology, this is polytheism, just as every myth is polytheistic.»<sup>462</sup>

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<sup>458</sup> The discussion of the concept of form is probably the driest moment of *Political Theology*. See Schmitt, *Politische Theologie*, pp. 34-36.

<sup>459</sup> Schmitt's 1923 pamphlet *Römischer Katholizismus und politische Form* idealizes the Catholic Church precisely as an edifice of that sort, and in the preface to the second edition of *Politische Romantik* (1925) the author refers to the Church as a «marvelous structure of Christian order and discipline, doctrinal clarity, and precise morals» («Wunderbau christlicher Ordnung und Disziplin, dogmatischer Klarheit und präziser Moral» (p. 9)).

<sup>460</sup> Quoted in Schmitt, *Die geistesgeschichtliche Lage*, p. 89: «„Wir haben ein Mythos geschaffen, der Mythos ist ein Glaube, ein edler Enthusiasmus, er braucht keine Realität zu sein, er ist ein Antrieb und eine Hoffnung, Glaube und Mut. Unser Mythos ist die Nation, die große Nation, die wir zu einer *konkreten Realität* machen wollen.“» (Emphasis added.)

<sup>461</sup> Schmitt, «Wesen und Werden des faschistischen Staates», p. 128: «Der faschistische Staat entscheidet nicht als neutraler, sondern als höherer Dritter. Das ist seine Suprematie.»

<sup>462</sup> Schmitt, *Die geistesgeschichtliche Lage*, p. 89: «Freilich, die ideelle Gefahr derartiger Irrationalitäten ist groß. Letzte, wenigstens in einigen Resten noch bestehende Zusammengehörigkeiten werden aufgehoben in dem Pluralismus einer unabsehbaren Zahl von Mythen. Für die politische Theologie ist das Polytheismus, wie jeder Mythos polytheistisch ist.»



But Schmitt's deepest conviction – both religious and political – was surely not polytheistic. His political theology is monotheistic and it necessarily translates into a monistic structure of sovereign, unchallenged authority. Seen from this light, Schmitt's assertion of the political over against its liberal negation is not so much about vindicating the inherently conflictual nature of politics – as a swift reading of his friend-enemy dichotomy would suggest<sup>463</sup> –, but rather about affirming order, hierarchy and authority against the forces working to dissipate them.<sup>464</sup>

### 3.2. The presidential solution to the crisis of Weimar democracy (1930-1933)

The second instance of a Schmittian alternative seeking to surpass the alleged degenerative paralysis of the liberal State is, at the same time, both more *concrete* and, at least apparently, less *extreme* than the flirtation with fascist political mythology. In the late 1920s, Carl Schmitt was already a public law professor in Berlin. He could thus accompany the crisis of Weimar democracy, after the brief period of relative stabilization from 1923-1929, as a first-hand witness in the capital of the *Reich*. His writings from that critical period bear the marks of such increased analytic proximity. Whereas *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* had criticized the liberal-parliamentary State in rather broad, albeit brilliant, strokes, and had looked for an alternative in the generic promises and myths – not exactly in the achievements – of fascism, *Der Hüter der Verfassung* and *Legaliät und Legitimität* focused more specifically on the crisis of German parliamentary democracy and searched for alternate directions purportedly within the scope of the existing constitutional order. If fascism had

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<sup>463</sup> More on the distinction between friend and enemy as the fundamental criterion of the political in the interpretation of Schmitt's *Concept of the Political*, below, pp. 184 and ff.

<sup>464</sup> Here I disagree with Mika Ojakangas, *A Philosophy of Concrete Life: Carl Schmitt and the Political Thought of Late Modernity*, Second Edition, Bern, Peter Lang, 2006, who sees in the «philosophy of concrete life», reinterpreted as a «philosophy of the extreme» within a late modern strand ranging from Kierkegaard to Foucault, the systematic metaphysical core of Schmitt's thought. Granted that the element of *concreteness* points to a crucial dimension, the *philosophy of life*, however, seems to be merely an episode of secondary relevance. The *extremeness* to which Schmitt's thought points is neither *philosophical* nor to be found within the immanent flux of *life*. It is, as I argue below, the theological extreme of God's transcendent revelation, which establishes the inescapable alternative between belief/obedience and disbelief/rebellion.

emphasized – in Schmitt’s words, «with good reasons»<sup>465</sup> – its own revolutionary nature, Schmitt would, on the contrary, stress precisely the non-subversive intent of his proposed cure for the crisis of the Weimar State in the early 1930s. Indeed, the Schmittian treatment claimed not to imply an overthrow of the Weimar Constitution, but rather the development of the plebiscitary element it already contained.<sup>466</sup>

In Schmitt’s analysis of the German constitutional situation of the early 1930s, pluralism emerges as the fundamental problem. The phenomenon of pluralism is understood as the appropriation of the legislative apparatus of the State by competing social power blocs, with the aim of using it to further their own particular – not the State’s general – interests, thus turning parliament into the «theatrical scene of a pluralistic system»<sup>467</sup>. In order to grasp such a profound structural transformation, Schmitt proposes again, just as in the 1923 critique of parliamentarism, an approach based upon the contrast between the prevailing *de facto* state of affairs and the political and institutional ideas of nineteenth-century liberalism. According to Schmitt, the condition of parliamentarism in the nineteenth century had rested on the key distinction between the State, on the one hand, and society, on the other. In the light of such dualism, the legislative chamber faced the State, meaning: the monarchic government and its bureaucracy, as the representative of the general interest of society. The nineteenth-century State – in particular, the German *Obrigkeitsstaat* – was hence a dual construct grounded on an equilibrium between the opposing principles of a governmental/administrative State and a legislative State.<sup>468</sup> But such dualism had to vanish along with the monarchic State. If government proceeds strictly from and accounts solely to the legislative chamber, one can hardly continue

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<sup>465</sup> Schmitt, «Wesen und Werden des faschistischen Staates», p. 128: «Der Faschismus dagegen legt aus guten Gründen Wert darauf, revolutionär zu sein.»

<sup>466</sup> On the problem of an anti-liberal legal scholar writing within the context of a liberal constitutional order, which might induce a dosage of moderation in the expression of the author’s standpoint and an effort to write *in between the lines*, see Olivier Beaud, «L’art d’écrire chez un juriste: Carl Schmitt», in Carlos-Miguel Herrera (dir.), *Le droit, le politique*, pp. 15-36. The same issue is also considered in John P. McCormick’s introduction to the English translation of *Legalität und Legitimität*: John P. McCormick, «Identifying or Exploiting the Paradoxes of Constitutional Democracy? An Introduction to Carl Schmitt’s *Legality and Legitimacy*», in Carl Schmitt, *Legality and Legitimacy*, Durham and London, Duke University Press, 2004, pp. XIII-XLIII. McCormick argues – in my view, correctly – in favor of the thesis of a partisan exploitation, instead of a merely legal-“scientific” analysis, of the paradoxes of liberal democracy in Schmitt’s work.

<sup>467</sup> See Schmitt, *Der Hüter der Verfassung*, pp. 71-73. Quote from p. 73: «Schauplatz eines pluralistischen Systems.»

<sup>468</sup> On the distinction between types of State according to their center of gravity (legislation, government, administration, jurisdiction), see Schmitt, *Legalität und Legitimität*, pp. 7-19.

thinking in terms of a separation between State and society. Instead, in Schmitt's words, «the State becomes the “self-organization of society”»<sup>469</sup>. And since society is internally divided along the lines of various different cleavages – economic, cultural, confessional, and so on – the politically “self-organized” society became necessarily, just as Kelsen also noted in the 1929 revised edition of *Vom Wesen und Wert der Demokratie*, a State of parties (*Parteienstaat*). For both Kelsen and Schmitt, indeed, these modern parties had very little to do with the parties and factions of liberal-parliamentary discussion and persuasion. But the two authors diverged radically when it came to the evaluation of both their nature and potential. Whereas Kelsen, as I have shown above, saw them as the crucial elements of modern democracy, though in dire need of internal reform and formal constitutional recognition, Schmitt interpreted their emergence as evidence for the inexorable decline of the liberal-parliamentary State. For Schmitt, who was clearly also aware of Robert Michels's pioneer sociological studies, political parties were thoroughly bureaucratized and hierarchical, rigidly constructed organizations, with a standing army of paid functionaries as well as a system of parallel associations at their disposal for the purpose of tying together a specific intellectual, social and economic clientele. The introduction of proportional representation with closed lists was, according to the author, surely connected with such a development. Yet, the process of structural change ran deeper than that: it had neither been triggered by the legal adoption of proportional representation nor could it be reversed through a simple reform of the electoral system. The fundamental consequence of the whole process was the erosion of the liberal belief in parliamentary discussion as a means to attain unity out of plurality, to discover a supra-partisan, common will through the interplay of the various partisan opinions. In a context where rigid organizations took the place of free-floating opinions, the result of parliamentary methods was merely a reflection of the temporary hegemonic constellation of particular interests. The legislative will of the German parliamentary State was, thus, dependent on fragile, ever-changing majorities and provisional coalitions.<sup>470</sup> As Schmitt averred:

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<sup>469</sup> Schmitt, *Der Hüter der Verfassung*, p. 78: «Denn jetzt wird der Staat zur „Selbstorganisation der Gesellschaft.“»

<sup>470</sup> See *ibid.*, pp. 73-91.

«The rigid social connections, which today carry the pluralist State, turn parliament, where their exponents appear in the form of factions, into a mere reflection of the pluralistic division of the State itself. In this situation, how should a unity capable of dissolving and overcoming the stiff party and interest ties emerge?»<sup>471</sup>

The proximity of such an analysis to Max Weber's post-war presidentialist turn is quite evident. Both Weber and Schmitt voiced a critical appraisal of political parties and their bureaucracies, pointed to the pernicious effects of proportional representation on parliamentary methods and, more generally, identified an inescapable tension between liberal parliamentarism and modern mass democracy. From such perspective, there is undoubtedly a continuity between the two authors' political positions in the critical periods of 1917-1919 and 1930-1933, even if Schmitt's critique ultimately reveals a less nuanced, more radical nature than Weber's. Whereas the latter moved from a preoccupation with the insufficiencies of the governmental/bureaucratic, monarchic State in 1917, which he sought to correct with an increase of parliamentary prerogatives, to the realization of the weaknesses of the legislative-parliamentary State in 1919, which could only be countered through plebiscitary methods; the former confronted parliamentary and party politics, from the outset, in critical terms, due to his fundamental rejection of liberalism. Moreover, the temporal hiatus between the two critical junctures could only fuel the intensity of the critique. Whilst Weber had written in the constituent moment of German democratic parliamentarism, where the institutional setting was just being defined, a decade later Schmitt encountered an instituted reality which provided uncountable examples of the shortcomings of parliamentary government. There are at least three aspects in which Schmitt's radicalization of Weber's critique of party and parliamentary politics appears in full glow: the appraisal of political parties; the transmutation of the relationship between legality and legitimacy into an outright

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<sup>471</sup> *Ibid.*, p. 89: «Die festen sozialen Verbindungen, die heute Träger des pluralistischen Staates sind, machen aus dem Parlament, wo ihre Exponenten in Gestalt von Fraktionen erscheinen, ein bloßes Abbild der pluralistischen Aufteilung des Staates selbst. Woher soll bei dieser Sachlage die Einheit entstehen, in der die harten Partei- und Interessentenbindungen aufgehoben und verschmolzen sind?»

For a complement to this critical analysis of really existing party pluralism with a critique of the political theories of pluralism – namely, G. D. H. Cole's and Harold Laski's –, see Carl Schmitt, «Staatsethik und pluralistischer Staat», in Schmitt, *Positionen und Begriffe*, especially pp. 155-160.

conceptual opposition; and the advocacy of a presidential Head of State that not only stands above, but in fact eclipses parliament.

For all his criticism of party organizations and their bureaucracies of professional politicians living *off* politics, Weber never denied that political parties were an essential element of modern democratic mass politics. In his view, parties were voluntary organizations which, in the context of electoral competition, struggled for control (or influence over the use) of the State's apparatus of power, in order to further their material or ideal interests.<sup>472</sup> As such, they were a necessary part of every large electoral contest. Schmitt, on the contrary, conceived the State not in such formal-instrumental terms, but as substantive political unity. From that point of view, rigidly organized, mass-scale political parties appeared as the vehicles of the pluralist dissolution of the State. As he graphically put it in his rebuttal of British pluralist political theory, «the parties slaughter the mighty Leviathan and each cut out from his body their own piece of meat»<sup>473</sup>. Political parties are, for Schmitt, a poor surrogate of real political unity. They substitute the identity of the people with itself as a unitary political subject for an identification of parts of the people with themselves as opposing social and political power blocs. Hence, so Schmitt, in the context of modern mass politics it made little sense to hang on, as Weber still did, to the notion of parties as voluntary associations, based upon the free recruitment of supporters. This was merely a remnant of the – now obsolete – classical understanding of the liberal constitutional State. Instead of recruiting *freely*, what mass political parties were essentially doing was to actively enforce a total cohesion of their specific social bases, through instruments ranging from the apparently anodyne choir or sports club to the armed organizations of self-defense. The crisis of modern State had probably no better expression than the emergence, within itself, of such proto-States.<sup>474</sup>

If the legislative apparatus of the State was effectively in the hands of such organizations of *total partiality*, how could parliaments produce the norms which, by

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<sup>472</sup> For Weber's definition of political parties (and trade unions) as voluntary associations of militants oriented towards common purposes, see Weber, «Suffrage and Democracy in Germany», pp. 99-100.

<sup>473</sup> Schmitt, «Staatsethik und pluralistischer Staat», p. 152: «(...) schlachten die Parteien den mächtigen Leviathan und schneiden sich aus seinem Leibe jede ihr Stück Fleisch heraus.»

<sup>474</sup> See Schmitt, *Der Hüter der Verfassung*, pp. 83-84 (with an explicit departure from Weber's conception of the political party). When Schmitt speaks of the necessary abandonment of the conception of the political party as a voluntary association, he must surely be referring to it as an analytic category, not as a legal condition. In formal legal terms, of course, parties never ceased to be – at least in constitutional democracies – voluntary associations, since party affiliation was never made compulsory. In the reality of modern mass politics, however, for someone born and socialized into specific milieus, party membership was almost *naturally given*, instead of being the product of *free* personal deliberation and choice.

virtue of their abstract generality and formal rationality, were supposed to be consensually recognized as legitimately valid by all the citizens of the State? As I have pointed out in the discussion of Weber's ideal types of legitimate rule, legality's claim to political legitimacy was already considerably weak in the Weberian understanding, since it drifted away from the charismatic origin of all legitimate authority.<sup>475</sup> Schmitt, however, turns the shallow status of legitimacy *qua* legality into an irreconcilable conceptual opposition between legality and legitimacy. The belief in procedural fairness and in the rationality and justice of abstract norms is, for him, a historical contingency peculiar to liberal constitutionalism. It fades away with the obsolescence of the legislative *Rechtsstaat*, which was in reality being replaced by a potentially total State capable and willing to cross the – in the liberal perspective – strict boundaries between the political and the economic, the political and the moral-ideological-religious, the public and the private; a total State which, in short, negated the fundamental dichotomy of State and society.<sup>476</sup> The persistence of legality beyond its historical scope, when belief in its substantial claims had been reduced to formalistic positivism, could only hinder the affirmation of any sort of legitimacy, be it that of the king or of the people. If the fundamental logic of the Weimar Constitution had been the transfer of political legitimacy from the dynasties to the people, the legality of the parliamentary State, in Schmitt's view, actually stood in the way of that. That was, of course, nothing more than the concrete historical expression of the fragile general condition of bourgeois liberalism, torn between the negation of monarchic legitimacy and a full acceptance of popular sovereignty, which the author had already identified almost a decade earlier. Exploiting it in the political context of the Weimar Constitution, Schmitt proceeded to argue that a dissolution of the parliamentary institutions established by the constitutional text, far from being blatantly anti-constitutional, might be substantively required by the democratic spirit of the Constitution as a whole. Who was to see over that possible dissolution and incarnate the monistic principle of popular sovereignty and legitimacy? No-one other than the President of the

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<sup>475</sup> See above, pp. 72-73.

<sup>476</sup> Significantly, the section of *Der Hüter der Verfassung* referred to above, fn. 470, which bore the heading «Development of parliament into the theatrical scene of a pluralistic system» («Entwicklung des Parlaments zum Schauplatz eines pluralistischen Systems»), was published autonomously in 1931 under a suggestive alternative title: «The turn towards the total State». See Carl Schmitt, «Die Wendung zum totalen Staat», in Schmitt, *Positionen und Begriffe*, pp. 166-178.

*Reich*, as the bearer of the plebiscitary element which alone could rescue the Weimar regime from its own internal inconsistencies.<sup>477</sup>

Interestingly enough, whilst the scope of presidential prerogatives which made its way to the final version of the Weimar Constitution fell short from what Weber had deemed necessary (because Hugo Preuß's – the drafter's – thought was still deeply rooted in nineteenth-century ideas of a balance of powers), it could nevertheless be exploited by Schmitt to justify an interpretation of the Constitution's plebiscitary tendency which went far beyond Weberian prospects. Weber wanted a president which not only stood on equal footing, but also rose above the other State institutions as the true pinnacle of the political system, by virtue of his underived democratic legitimacy. Schmitt, in turn, wanted the president, as the bearer of such legitimacy, to supervise the dissolution of the other major political institution of the Weimar State, the *Reichstag*. In the last resort, he actually saw him as an extraordinary constitutional lawgiver, effecting a sort of constitutional revolution. Such reinterpretation, however, was carefully undertaken by the author. When he first speaks of the *Reichspräsident* as «the guardian of the Constitution» – and the expression «guardian of the Constitution» clearly reveals itself as an understatement once one realizes what Schmitt ended up really advocating –, Schmitt, much like Weber in the November 1918 series of articles for the *Frankfurter Zeitung*<sup>478</sup>, starts by pointing to the liberal doctrine of a neutral, moderating, and balancing power, most notably developed by Benjamin Constant in the first half of the nineteenth century.<sup>479</sup> He then proceeds, rejecting Weber's deep mistrust, with a rehabilitation of the German bureaucracy as an instance of an analogous type of neutrality and objectivity<sup>480</sup>, which nevertheless could only be grounded upon – and here quite in line with Weber in 1919 – a higher political decision stemming from the authority of the president as the one capable of «immediately connecting with the general political will of the German people»<sup>481</sup>. The point, however, is not just that the president represents the will of the people as a whole, but that he is *the only one* who can do so. He monopolizes it, since, given the transformation of modern

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<sup>477</sup> See Schmitt, *Legalität und Legitimität*, pp. 14-19.

<sup>478</sup> See Weber, «Deutschlands Künftige Staatsform», pp. 468-469.

<sup>479</sup> See Schmitt, *Der Hüter der Verfassung*, pp. 132-140.

<sup>480</sup> See *ibid.*, pp. 149-156.

<sup>481</sup> *Ibid.*, p. 159: «Die Verfassung sucht insbesondere der Autorität des Reichspräsidenten die Möglichkeit zu geben, sich unmittelbar mit diesem politischen Gesamtwillen des deutschen Volkes zu verbinden und eben dadurch als Hüter und Wahrer der verfassungsmäßigen Einheit und Ganzheit des deutschen Volkes zu handeln.» (Emphasis added.)

mass politics, plebiscitary legitimacy is the only consensually recognized system of validity remaining.<sup>482</sup> The neutral power of the plebiscitarilly legitimated president is radically reinterpreted as the power to neutralize parliamentary legality.

Wolfgang Mommsen has interpreted Schmitt's conception of the plebiscitary authority of the *Reichspräsident* as a coherent, albeit one-sided, development of Weber's notion of leadership democracy.<sup>483</sup> This, I think, cannot really be contested. But one must still bear in mind, considering both authors' political thought *in toto*, the distance between Weber's desperate and highly ambivalent attempt at a liberal-democratic politics of charismatic salvation and Schmitt's visceral critique of liberalism and modern secular politics. As I have argued elsewhere, the significant convergence of their political positions in the critical junctures at the beginning and in the end of the Weimar Republic resembles two mountain roads, departing rather far away from each other, which nevertheless intersect along the way – the intersection being neither wholly accidental nor strictly necessary.<sup>484</sup>

#### 4. The primacy of authority and the theological suffocation of the political

The two instances of Schmittian alternatives to liberal democracy which I have just discussed contribute to a more precise understanding of the author's vision of politics. But an assessment of Schmitt's ideas would always remain incomplete without a reading of his work on *The Concept of the Political* (*Der Begriff des Politischen*).

Between 1927 and 1933, Carl Schmitt developed, in three consecutive attempts, his *Concept of the Political*.<sup>485</sup> As in so many of his works, the inaugural sentence is simultaneously concise, crucial, and enigmatic: «The real political distinction is the

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<sup>482</sup> See Schmitt, *Legalität und Legitimität*, p. 93.

<sup>483</sup> See Mommsen, *Max Weber und die Deutsche Politik*, pp. 408-413.

<sup>484</sup> For my take on the endless controversy, inaugurated by Mommsen's seminal work, around the Weber-Schmitt affair, see Pedro T. Magalhães, «A Contingent Affinity: Max Weber, Carl Schmitt, and the Challenge of Modern Politics», *Journal of the History of Ideas*, forthcoming.

<sup>485</sup> In line with Heinrich Meier, *Die Lehre Carl Schmitts*, who has perceptively investigated the differences between the three different editions, I take the 1933 version as the definitive one. Hence, unless otherwise noted, I quote from there, even if the 1932 edition has not only been re-edited and reprinted by Duncker & Humblot ever since, but also served as the basis for George Schwab's English translation.

The first version appeared in 1927 as an article in the *Archiv für Sozialwissenschaft und Sozialpolitik*, and was partially reprinted in Schmitt, *Positionen und Begriffe*, pp. 75-83.



distinction between friend and enemy.»<sup>486</sup> The field of politics is, thus, apparently defined in basic conflictual terms. Weber, as we have seen, also conceived politics as struggle and conflict. Yet, here too, Schmitt radicalizes the concept far beyond the Weberian scope. Whereas Weber conflated the (modern) State and the political, Schmitt postulates a conceptual priority of the political relative to the State. The first sentence of the 1932 edition had been: «The concept of the State presupposes the concept of the political»<sup>487</sup>. In 1933, that presupposition does not even need to be reiterated, and Schmitt plunges right into the distinction between friend and enemy as the crucial criterion of the political. However, to use the phrase chosen by the author to characterize the methodology of his *Political Theology*, Schmitt's «radical conceptualization» is not restricted to the assumption of the theoretical precedence of the political vis-à-vis the State. Here, it has also to do with the proximity of the political to the extreme case of a decision over the life and death of human beings. Weber, in his 1919 lecture on the profession and vocation of politics, had averred that the relation between politics, the State and violence was particularly «intimate». Schmitt, who in *Political Theology* had still conceived such closeness in preeminently conceptual and non-material terms as a monopoly on the exception, now reinterprets it in all its physical intensity: the political relates to the ultimate possibility of the sacrifice of human life in the struggle against the enemy, to the eventuality of killing, or being killed by, the political opponent. It is not just about the legitimate control of the means of physical coercion, but quite concretely about the critical prospect of bloodshed. The political defined in terms of the opposition between friend and enemy is rooted in the prospect of ultimately being translated into the extreme case of war.<sup>488</sup>

Schmitt states in the introductory section of *The Concept of the Political* that his aim is to show the «autonomy and decisiveness»<sup>489</sup> of the political. Apparently, the «autonomy» has to do with the peculiarity of the political distinction between friend and enemy, which differs from the contrasts that characterize other spheres of human action, such as the moral opposition of good and evil, the aesthetic differentiation of beautiful

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<sup>486</sup> Carl Schmitt, *Der Begriff des Politischen*, p. 7: «Die eigentlich politische Unterscheidung ist die Unterscheidung von Freund und Feind».

<sup>487</sup> Carl Schmitt, *Der Begriff des Politischen*, Third Reprint of the 1932 Edition, Berlin, Duncker & Humblot, 1991, p. 20: «Der Begriff des Staates setzt den Begriff des Politischen voraus.»

<sup>488</sup> See Schmitt, *Der Begriff des Politischen*, pp. 15-19.

<sup>489</sup> *Ibid.*, p. 9: «Selbständigkeit und Maßgeblichkeit des politischen Gegensatzes».

and ugly, and so on. However, the political is not autonomous in the sense that it is one life sphere among others, one particular type of dichotomy next to others. Instead, the «autonomy» of the political must be understood in terms of its «decisiveness». The political opposition of friend and enemy designates the most fundamental form of a human opposition, because it can be radicalized to the point of a decision over life and death. To quote Schmitt:

«The political can draw its strength from different spheres of human life, from confessional, economic, moral and other oppositions; it does not denote a separate (...) subject area, but rather the *degree of intensity* of an association or dissociation of human beings (...).»<sup>490</sup>

Given such understanding of the political in terms of intensity, how should one make sense of Schmitt's quest to salvage it from the liberal «age of neutralizations and depoliticizations»? As far as the emergence of modern mass politics is concerned, at first sight it appears to pose a challenge to Schmitt's narrative of liberal dwindling as a story of «neutralizations and depoliticizations». Actually, the nature of modern party politics is much more intense in its conflictual drive than the politics of notables typical of nineteenth-century liberal parliamentarism. Mass politics, at the domestic level, seemed to be marked by strong (re)politicization, not by its contrary. The «*degree of intensity*», that is: the political dimension, of the various social clashes was on the rise rather than decreasing. For Schmitt, however, the problem pertained to the domain of friendship, not enmity. In other words, what was lacking was the «*degree of intensity*» required for the prior establishment of political unity. Because intensity is not just a distinctive feature of political dissociation, but also of political association. And the emergence of a political opposition, which is never a conflict between isolated, *private* individuals, can only be the product of some form of priorly constituted political unity. As Meier keenly puts it, «[t]he political «pops out» where two come together and unite against an enemy»<sup>491</sup>. The

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<sup>490</sup> *Ibid.*, p. 21: «Das Politische kann seine Kraft aus den verschiedenen Bereichen menschlichen Lebens ziehen, aus konfessionellen, wirtschaftlichen, moralischen und andern Gegensätzen; es bezeichnet kein eigenes (...) Sachgebiet, sondern den *Intensitätsgrad* einer Verbindung oder Unterscheidung von Menschen (...).» (Emphasis in the original.) On Schmitt's conception of the political as intensity rather autonomy, see Meier, *Die Lehre Carl Schmitts*, pp. 57-58.

<sup>491</sup> Meier, *Die Lehre Carl Schmitts*, p. 61: «Das Politische «springt heraus», wo zwei zusammenkommen und sich gegen einen Feind verbinden.»

essential point here is that the association must be as *intense* as the subsequent oppositions; it must be a *decisive* unity. According to Schmitt, the forces of modern pluralism fell short of that. They did not pass the test of the extreme case, which, if one assumes the perspective of domestic politics, was nothing less than civil war.<sup>492</sup> The social cleavages that dominated pluralist party politics might bear an intensity capable of preventing a war to be successfully waged, in the name of unity, against each of the parties' key interests and principles, but it was not strong enough to *decide* such a war unequivocally in favor of one of them.<sup>493</sup> As the author saw it, where party pluralism, with its fragile coalitions and compromises, flourished, political unity – in modern terms, the State – subsided. To Schmitt, the transition from Bismarck's *Kaiserrreich* to the Weimar Republic illustrated the insufficiencies of such pluralism: the internal enemies of the Imperial State, Catholics and socialists, outlived the monarchy, but when they had to step in its shoes, they could not create and sustain political unity, lingering on as mere «residues of *Kulturkampf* and socialist laws»<sup>494</sup> until the decision of 1933 finally put an end to their flaky party pluralist State.<sup>495</sup> The distinction between friend and enemy is the fundamental criterion of the political, but it is a distinction that must be grounded upon an unquestionable, commanding, supra-partisan decision. The intensity of the opposition is derived from the intensity of a priorly constituted order and unity. Without such order and unity, which, in the modern context, can only be established by the State as a supreme third party capable of overcoming pluralistic divisions, the political vanishes:

«The concept of the political has, however (...), pluralistic consequences, but not in the sense that within the same political unit a pluralism could take the place of the decisive friend-enemy grouping without thereby destroying, along with the unity, the political itself.»<sup>496</sup>

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<sup>492</sup> See Schmitt, *Der Begriff des Politischen*, pp. 14-15.

<sup>493</sup> *Ibid.*, p. 22.

<sup>494</sup> *Ibid.*, p. 25: «Residuen von Kulturkampf und Sozialistengesetz».

<sup>495</sup> The 1933 edition clearly adapted the text to the taste of the new Nazi power holders. See, for instance, the insertion on p. 14: «In einem pluralistischen, d. h. von einer Mehrzahl verschiedenartiger Parteien beherrschten Parteienstaat (wie es das Deutsche Reich von 1919-1932 war) wird das Wort „politisch“ gleichbedeutend mit „parteipolitisch“.» (Emphasis added.)

<sup>496</sup> *Ibid.*, pp. 27-28: «Aus dem Begriff des Politischen ergeben sich allerdings (...) pluralistische Konsequenzen, aber nicht in dem Sinne, daß innerhalb ein und derselben politischen Einheit an die Stelle der maßgebenden Freund- und Feindgruppierung ein Pluralismus treten könnte, ohne daß mit der Einheit auch das Politische selbst zerstört wäre.» The «pluralistic consequences» Schmitt has in mind point, of course, to a pluralism of States at the international level. See *ibid.*, pp. 35-41.

This is the reason why, as previously noted, Schmitt's alternatives to liberalism as anti-politics, to the «liberal critique of politics»<sup>497</sup>, different amongst each other as they might be, all seek to salvage the State as unchallengeable, final, decisive authority. Schmitt's concept of the political postulates the primacy of authority.

Heinrich Meier, contrary to the Schmittian renaissance amongst theorists of the contemporary left<sup>498</sup>, has grasped the consequences of Schmitt's vision of political unity and authority in great depth and detail. The understanding of the concept of the political in terms of intensity, rather than autonomy, which Meier traces through the successive revisions of Schmitt's text between 1927 and 1933, is conceived by him as a decisive move in the direction of the theological. And indeed, if one considers the 1933 version in its internal development, a similar movement takes place. In the first three sections of the text, up until the decisive statement of the primacy of intensity, Schmitt's reasoning could still be viewed in terms of a simple assertion of the autonomy of the political vis-à-vis other spheres of human action. Such introductory passages seem to locate the political predominantly in the realm of inter-State relations, as pertaining to the conflicts between peoples in the status of political unity. Yet, the door to domestic politics and to the corresponding extreme case of civil war had already been opened. And civil wars were then complemented, further emphasizing both the totality and the intensity of the political, with the holy wars of faith, which are «actions that can be based upon a particularly deep and authentic decision of enmity»<sup>499</sup>. When Schmitt finally searches for a manifestation of the political in its utmost intensity – in a section which develops the idea, already stated in the last chapter of the *Political Theology*<sup>500</sup>, that all political thought presupposes either the natural goodness or the natural evilness of the human condition, further arguing that the *truly political*, just as (Christian) theology assumes the original sinfulness of mankind, must choose the latter alternative, because enmity demands at least the possibility of a

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<sup>497</sup> *Ibid.*, p. 50: «Es gibt in folgedessen eine liberale Politik als polemischen Gegensatz gegen staatliche, kirchliche oder andere Beschränkungen der individuellen Freiheit (...), aber keine liberale Politik schlechthin, sondern immer nur eine *liberale Kritik der Politik*.» (Emphasis added.)

<sup>498</sup> For a critique of Schmitt's appropriation by contemporary left-wing thinkers, see the conclusions below, pp. 204-207.

<sup>499</sup> Schmitt, *Der Begriff des Politischen*, p. 30: «heilig[e] Kriege und Kreuzzüge sind Aktionen, die auf einer besonders echten und tiefen Feindentscheidung beruhen können.»

<sup>500</sup> See Schmitt, *Politische Theologie*, p. 61.

fundamental, constitutive evilness<sup>501</sup> – he ends up finding it in a war speech given by Oliver Cromwell:

«For the modern era, I see the most powerful eruption of such enmity – (...) even stronger than Lenin's crushing sentences against the bourgeois and Western capitalism – in Cromwell's struggle against Papist Spain. In the speech of 17 September 1656 (...), he says: "(...) *The conservation of that "namely our National Being" is first to be viewed with respect to those who seek to undo it, and so make it not to be.*" Let us therefore consider our enemies, *the Enemies to the very Being of these Nations* (...): "*Why, truly, your great Enemy is the Spaniard. He is a natural enemy. He is naturally so; he is naturally so throughout – by reason of that enmity that is in him against whatsoever is of God. Whatsoever is of God which is in you, or which may be in you.*" Then he repeats: the Spaniard is your enemy, his enmity is put into him by God; he is "*the natural enemy, the providential enemy*", whoever considers him an *accidental enemy* knows neither the Scriptures nor the works of God, who said, I will put enmity between thy seed and hers (Gen. III, 15) (...).»<sup>502</sup>

Political enmity is thus traced back to the divine command which, following Adam's original disobedience of the heavenly order, founded human history as a history of sinfulness and salvation. Enmity is a providential command – and, hence, «politics is the destiny»<sup>503</sup> – which has to be obeyed until God puts an end to history in the Last Judgment. It has to be obeyed even against one's own brothers, as the story of Abel and

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<sup>501</sup> See Schmitt, *Der Begriff des Politischen*, pp. 44-45: «Ein Theologe hört auf, Theologe zu sein, wenn er die Menschen nicht mehr für sündhaft oder erlösungsbedürftig hält und Erlöste von Nicht-Erlösten, Auserwählte von Nicht-Auserwählten nicht mehr unterscheidet (...). Weil nun die Sphäre des Politischen letzten Endes von der realen Möglichkeit eines Feindes bestimmt wird, können politische Vorstellungen und Gedankengänge nicht gut einen anthropologischen „Optimismus“ zum Ausgangspunkt nehmen. Sonst würden sie mit der Möglichkeit des Feindes auch jede spezifisch politische Konsequenz aufheben.»

<sup>502</sup> *Ibid.*, pp. 48-49: «Für die Neuzeit sehe ich den mächtigsten Ausbruch einer solchen Feindschaft – (...) stärker sogar als Lenins vernichtende Sätze gegen den Bourgeois und den westlichen Kapitalismus – in Cromwells Kampf gegen das papistische Spanien. In der Rede vom 17. September 1656 (...), sagt er: „(...) *The conservation of that „namely our National Being“ is first to be viewed with respect to those who seek to undo it, and so make it not to be.*“ Betrachten wir also unsere Feinde, *the Enemies to the very Being of these Nations* (...): „*Why, truly, your great Enemy is the Spaniard. He is a natural enemy. He is naturally so; he is naturally so throughout – by reason of that enmity that is in him against whatsoever is of God. Whatsoever is of God which is in you, or which may be in you.*“ Dann wiederholt er: Der Spanier ist euer Feind, seine *enmity is put into him by God*; er ist „*the natural enemy, the providential enemy*“, wer ihn für einen *accidental enemy* hält, kennt die Schrift und die Dinge Gottes nicht, der gesagt hat, ich will Feindschaft setzen zwischen Deinem Samen und ihrem Samen (Gen. III, 15) (...).»

<sup>503</sup> *Ibid.*, p. 21: «Die Politik ist das Schicksal.»

Cain, that primordial civil war, illustrates. This is the fundamental theological horizon of Schmitt's concept of the political – and the theological core which he wishes to rescue from the «neutralizations and depoliticizations» of liberalism, a doctrine of «illusion and fraud» that seeks to veil and dissolve natural-providential enmity through its false universalisms of morality and economic utility. *The Concept of the Political* finishes, thus, with a furious assault on «the complete inventory» of «liberal catechism» and on its «church father» Benjamin Constant.<sup>504</sup>

But that ultimate theological horizon suffocates every conceivable precise delineation of the political. The quest to affirm the political as the supreme, foundational imposition of a decision on who is friend and who is enemy, against liberal universalism and its «neutralizations», is in and by itself a much too general goal to be translated, in the late modern context at least, into any definite political program. It can and it has easily fused, as I hope to have shown, with various different authoritarian alternatives to liberalism, from the projects of Caesaristic presidentialism developed by desperate political and intellectual elites to the outright totalitarian and racist ideology of the Nazis. The void left by the theological escalation of Schmitt's political thought helps explain why his ideological sympathies shifted relentlessly, whilst his fundamental antipathy – and the possibility of defining him in strictly negative terms – remained constant. Even to describe him rather loosely as an authoritarian Statist would already be far too specific. Indeed, the modern State, as symbolized by Hobbes's Leviathan, is conceived by Schmitt as a mitigation of the intensity and totality of the political, since it essentially served to settle religious wars by politically neutralizing religion and setting up a divide between the public and the private, the official religion of the State and the tolerated, personal religious conviction of the individual. Its transcendence was merely legal, a product of human artifice, a mortal God eventually turned into a huge mechanical apparatus, short of the metaphysical transcendence that characterizes the political in its highest degree of intensity.<sup>505</sup> In the modern age, marked by rampant irreligiousness, it might the duty of

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<sup>504</sup> See *ibid.*, pp. 49-61. For a revealing instance of Schmitt's political-theological rage, see p. 56: «Constant ist ein Kirchenvater der gesamten liberalen Geistigkeit des 19. Jahrhunderts. Seine Abhandlung vom Jahre 1814 [«De l'esprit de conquête et de l'usurpation»] enthält schon das ganze geistige Arsenal dieses mit Illusion und Betrug angefüllten Säkulums.» (Emphasis added.)

Here I draw essentially on Meier, *Die Lehre Carl Schmitts*, pp. 93-102.

<sup>505</sup> This is the main point of Carl Schmitt's *Der Leviathan in der Staatslehre des Thomas Hobbes. Sinn und Fehlschlag eines politischen Symbols*, Second Edition (Günther Maschke), Cologne, Hohenheim, 1982, a work written shortly after the author's marginalization by the Nazis and which is sometimes interpreted – wrongly, in my view – as part of his supposed veiled resistance to the Nazi regime.

the believer, who has to act within a providentially designed human history, to affirm the State as a «fragment» of achievable order against both the degeneration of pluralism and the false promises of liberal universalism. As Schmitt put it, «a piece of concrete order is more valuable than the empty generalities of a false totality»<sup>506</sup>. The supreme authority of the State can thus accurately be seen as Schmitt's circumstantial friend in the context of modern politics. Yet it is but a shallow substitute for that higher order and authority that stems from the distinction between believers and heretics, between those who know (and obey) the truth as revealed by divine scripture and those who rebel against it. Like the counterrevolutionary Donoso Cortés, albeit perhaps with a more moderate sense of urgency, Schmitt seems also to await in expectation the final battle between Christians and atheists that will settle for good the salvation or the eternal condemnation of mankind. That apocalyptic battle would indeed correspond to the most intense, to the total manifestation of the political. In this sense, Schmitt's fight against liberalism could ultimately be interpreted as a struggle to remove a very powerful obstacle that the providential God has put in the way of such conclusion. Would it be the last obstacle? No-one can answer, and it would be a foolish sign of human presumptuousness to attempt to see through the inscrutable workings of divine Providence.<sup>507</sup>

As Hans Blumenberg has keenly noted in the context of his critique of Karl Löwith's thesis of the philosophy history as secularized Christian eschatology<sup>508</sup>, there is an unsolvable tension between the Christian God of the Last Judgment and the Christian God of Providence: «The eschatological God of the end of history cannot at the same time be the God who makes Himself known and credible in history as its caretaker.»<sup>509</sup> Schmitt's political thought seems, in the last resort, to be trapped within such tension. However, that is a purely theological dilemma – as it takes center stage at the heart of Schmitt's thought, it ends up submerging and dissipating the political as a distinct, autonomous realm of human action.

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On Schmitt's understanding of the transcendent deficit of the Hobbesian State, see also Meier, *Die Lehre Carl Schmitts*, pp. 163-177.

<sup>506</sup> Schmitt, «Staatsethik und pluralistischer Staat», p. 162: «In einer vom Gesetz des Pluralismus beherrschten geistigen Welt ist ein Stück konkreter Ordnung wertvoller als die leeren Allgemeinheiten einer falschen Totalität.»

<sup>507</sup> On Schmitt's Christian understanding of history, see Meier, *Die Lehre Carl Schmitts*, pp. 189 and ff.

<sup>508</sup> Karl Löwith, *Meaning in History: The Theological Implications of the Philosophy of History*, Chicago, University of Chicago Press, 1949.

<sup>509</sup> Hans Blumenberg, *The Legitimacy of the Modern Age*, Baskerville, MIT Press, 1985, p. 32.

## **Conclusions**

### **1. Political legitimacy torn between transcendence and immanence**

The three great authors whose thought has served as the main object of the present dissertation were fundamentally concerned, in the years standing in-between the two great wars of the twentieth century, with the problem of the «ultimate grounds» (Weber) which sustain the political order. The issue of legitimacy, for sure, arises with particular urgency in historical instances – such as Weimar – of crisis, revolution and transition. From a different angle, however, the urgency is also a legacy of one of modernity's decisive scissions: the separation of religion and politics.

A retrospective glance from the standpoint of a consolidated Western liberal democracy in the late twentieth or early twenty-first century might treat such crucial split as a *fait accompli* – and tell the story of a more or less smooth transfer of the ultimate source of political legitimacy from God to the People. Yet, to late modern thinkers such as Weber, Kelsen and Schmitt the matter was far from settled. Quite on the contrary, as the present work must by now have clearly shown, it was hotly contested.

The marriage between religion and politics in the Christian West<sup>510</sup> had surely been of mutual benefit. The political powers granted religious institutions not only access to the material riches of this world, but they also helped create tremendous opportunities for the global assertion of the Christian faith, especially after Europe's maritime expansion set in. The Christian religion, in turn, offered politics something less tangible, but equally significant. Namely: the inscription of the political order in a superior, divinely established order which transcended the empirical finiteness of all that is human. In other words, religion supplied the political order with a substrate of meaning – and a promise of duration beyond the biological life of rulers and ruled – that was crucial to the latter's legitimacy. The modern split of religion and politics meant, thus, a secularization of the ultimate foundations of the political order. The transcendent gesture seeking to

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<sup>510</sup> It was, indeed, a marriage rather than the full merger of religion and politics that characterized many non-Western cultural settings, because of the persisting institutional autonomy of the Catholic Church – and, later on, of many Protestant sects – relative to the political powers.



make the political and the divine orders coincide was replaced by an immanent movement which sought to ground the political order in its own – human and rational – terms.

Such replacement was highly tortuous and fraught with tension, as the ambivalences at the heart of Max Weber's political thought indicate. Weber interpreted the political philosophy of the Enlightenment, based upon the discourse of human rights, essentially as the secularization of religious natural right doctrines. Such thinking had had its golden age in the second half of the eighteenth and in the early nineteenth centuries, as it infused and legitimated political revolutions throughout Europe and in North America. But, as Weber's narrative of modernity tells us, its substantial axiological appeal increasingly wore off, in the process of being rationalized into mere legal positivism. The forces of modernity – rationalization, bureaucratization, specialization and, in the last resort, secularization – contributed to the erosion of the ultimate meaning of all human actions and, thus, also to a deep crisis of political legitimacy. The «disenchantment of the world» might certainly be interpreted as a liberation from old theological cosmologies, but to Weber it also definitely signaled the loss of a significant source of meaning to human life in all its spheres. The prospect of the rise of an «iron cage» (or «shell as hard as steel») that would incarcerate mankind in a world of routine, function and utility, deprived of an ultimate purpose, was amongst Max Weber's deep-seated fears.

Still, he was not the type of thinker prone to nurture false hopes or groundless illusions. To Weber, a disillusioned realist if there ever was one, the return to an idealized past free from the strictures of State bureaucracy and the capitalist economy was nothing but a romantic cradlesong that every serious observer had the duty to discard, if only for the very simple reason that pre-modern societies were actually filled with plenty of particularly harsh strictures of their own. Several, if not most, of the elements that combined to form the frightening panorama of the «iron cage» of modern life had to be acknowledged. Notwithstanding, there still seemed to be room left for the – however transient – eruption of sources of meaning capable of preventing the full closure of modernity's cage. In fact, the field of politics offered, in Weber's view, some of such precious promises. Modern politics, according to the author, was marked by the unstoppable growth of bureaucratic apparatuses both within the State and within the political parties. But their primacy could still be defied by charismatic leaders whose personal qualities allowed them to rise above, and command, both the spiritually proletarianized party staffs and, eventually, the whole machinery of public administration.

The concept of charisma, borrowed from Protestant theology, is Max Weber's key for the extraordinary rupture with the continuity of modern legal-rational, bureaucratic rule – and, more broadly, for the very problem of political legitimacy. Weber's transfer of charisma from the world of ancient religion to that of modern politics was, however, filled with thorny implications. On the one hand, to be sure, the idea of charisma was to a very large extent de-theologized. The charismatic political leader was not a prophet committed to spread the word of the one and only God, and thereby to transform the whole set of values and symbolic references of a given community, but, more modestly one might say, a man seeking to further a particular cause amongst diverse, either competing or non-mutually exclusive, alternatives. Instead of being devoted to a monotheistic deity, he took part in the insolubly pluralistic struggle of religious and secular gods that is so brilliantly outlined in «Science as a Vocation» as the trademark of the modern fragmented world. The god Weber personally wanted to serve, the great cause he desired to witness transcending the impositions and limitations of modernity's immanent logic, was certainly the nation. Irrespective of the cause served, however, in the modern context there seemed to be, according to the author and in spite of his own vision of the elitist turn of modern mass politics, no room for the unilateral assertion of a leader solely on account of the devotion commanded by the latter's intrinsic charismatic qualities. In the mass democracies Weber saw emerging, charisma was not only de-theologized, but also reinterpreted in anti-authoritarian terms which reversed its original causal nexus: (electoral) recognition by the mass of followers became the cause, not the consequence, of charisma.

Max Weber's modern charismatic leader appears, hence, as a creature divided between the conflicting demands of transcendence and immanence, between the uncompromising commitment to the grand cause(s) that might bestow upon the political order the ultimate meaning it so urgently craves for and the necessary reliance on the electorally constructed will of the people which, in the last resort, might deny a leader his charismatic status. The paradox of Weber's modern charismatic politics is one of the major symptoms of the crisis of liberalism – and of liberal narratives of political legitimacy – in late modernity.

To the unsolvable tension of Weber's charismatic dilemma Hans Kelsen replied with the effort to assert pluralist democracy stringently within modernity's immanent

frame, interpreting popular legitimacy as the formal democratic legality of a *Parteienstaat* and striving for a theory of law and the State free from theological contamination.

The problem of political legitimacy becomes, thus, in Kelsen's eyes, equivalent to that of democracy, *i. e.* to the construction of the people as the immanent source of legitimate authority. The Austrian scholar's quest for the demos claims to be decisively inspired by Rousseau in its reading of the ideas of freedom and equality. However, the Rousseauian connection soon begins to fade away, as Kelsen's deepest epistemological concerns move to the fore. The point is not only that the author rejects the utopian prospects of an actual elimination of the rule of man over man, considering democracy a form of *Herrschaft*. More significantly, in stark contrast to the Rousseauian tradition, Kelsen refuses to conceive the people in substantive terms as an empirically existing entity. To him, the people is and remains an abstract, normative construction, which can only fictitiously be personified.

But the Kelsenian break with a substantivistic – in the author's terminology: hypostatized – approach to the concept of the people does not merely indicate a move away from the footsteps of Rousseau. Perhaps more importantly, it marks the author's attempt to liberate the theories of law and the State from the intellectual horizon of theology, so as to make it attain the dimension of a truly modern science. Hans Kelsen appears explicitly as an epistemological atheist who wishes to expunge the knowledge of law and the State from theological (pseudo-)dilemmas and their (pseudo-)solutions. A modern man of science, Kelsen rejects both the notion of the natural miracle as a momentary suspension of the causal laws of nature imposed by the omnipotent God and the idea of a «legal miracle» which would affirm the sovereignty of the State by allowing it to transcend, in exceptional circumstances, the legal order it had created in the first place.

However, Kelsen's own understanding of the State as a complex compound of abstract normative relations, hierarchically organized as a system of delegation and representation, can ultimately do little to affirm democracy from the point of view of the ideas of freedom, equality and popular sovereignty. In fact, rather more modestly, in the mid-1920s he would end up defending parliamentary democracy as the achievable compromise between some degree of participation of the citizens in the creation of the political order and the inescapable requirements of the social division of labor, which he views as a necessary condition for progress. Yet, an additional argument of the utmost

significance, which not only draws democracy to the orbit of Kelsen's secularist and scientific *Weltanschauung* but also narrows the distance between its ideology and its institutional realities, is further supplied to such a frail case for the democratic State: the idea of democracy as the fundamental political expression of a relativistic understanding of truth and knowledge.

The idea of relativism, on the one hand, helps Kelsen conceive the people, as it really exists, in pluralistic terms, with the political parties emerging as the irreplaceable instruments of modern democracy and the attainment of a perfectly consensual, supra-partisan general will discarded as a sheer meta-political illusion. And on the other hand, above all, relativism connects Kelsen's democratic theory with his epistemology. Just as there is no absolute truth which transcends the limits of human cognition, there can also be no absolute, supra-human value from which absolute authority might be derived irrespective of the conflicting wills of the actual members of the political community. However, the lack of a substantive axiological foundation to democracy involves specific risks which the triumph of form and method over substance in the modern theory of knowledge was spared from. Modern science, of course, was always subject to being challenged by rival or alternative sources of meaning, truth and knowledge, even if its social prestige increased with every technological advance and cultural achievement it seemed to contribute to. Yet, boundaries were clearly marked and religious adversaries of science generally refused to enter the latter's realm just as much as the apologists of scientific modernity declined to play the game of religious transcendence. The case is different with the radical pluralism of relativistic democracy, which, so as not to become entangled in a «fateful contradiction», must not deny its most ruthless enemies access to its own instruments, that is, the chance to participate in the definition of the political order – and, ultimately, the possibility to abolish democracy through democratic means. The «fatherless society» of democracy, the fraternal order of immanent freedom, equality and pluralism, could never fully prevent the menace, to use Peter Gay's heading to the final act of the Weimar drama, of «the revenge of the father»<sup>511</sup>.

Carl Schmitt's critique of liberal democracy and secular modernity appears as one of the most radical attempts to reaffirm a vision of transcendent political authority in the late modern era. Schmitt's rejection of the capitalist economy and its liberal political order

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<sup>511</sup> See above, p. 47, fn. 101.

has several distinct layers, from an early literary-aesthetic condemnation of modern civilization to the astute exposure of the contradictions of the parliamentary State. But the fundamental core of the author's critique is located in his political theology, in the uncompromised assertion that the problem of the foundations of the political order must not leave the orbit of metaphysical-theological reasoning.

Schmitt's concept of sovereign political power is marked by the primacy of the exception over the norm. According to one of his most famous sentences, «[s]overeign is he who decides on the state of exception». Hence, only under extraordinary circumstances, in the context of a real emergency, can light be shed upon the true subject of sovereignty. On the other hand, such subject is necessarily made up of flesh and bone persons with the power of – theoretically at least – unbounded decision, thus irreducible to a system of abstract legality. Yet, what does this concept of sovereignty as decision on the exception have to do with a theological understanding of the problem of political legitimacy? In another decisive passage of *Political Theology*, the author affirms that «[a]ll significant concepts of the modern theory of the State are secularized theological concepts». Indeed, the legal and political idea of the exception *qua* revelation of the true sovereign is, so Schmitt, nothing but the secularization of the theological concept of miracle; the former plays in the theory of the State the same exact role as the latter does in theology. And modern liberal politics sought to chase away the exception from legal and political reasoning, in the name of the rule of law, just as much as modern science wholly discarded the idea of the miracle from its understanding of the natural order and its immanent laws. Given the conception of ultimate political authority in the image of transcendent divine authority, and the inextricable link he posits between political thought and theology, Schmitt comes to the conclusion that modern politics must be understood as a grand «struggle against the political».

Schmitt's critique of liberalism appears, in this sense, as the vindication of an authoritarian, transcendent and theologically-driven vision of the political. In the European late modern context, however, where religion waned as a driving force behind political projects, the author was unable to translate such a vision into a clearly delineated, positive political alternative. Protestant sects had historically been a spiritual source of capitalism and liberalism; the Lutheran deference to monarchic authority was a thing of the past, now that the Wilhelmine Empire had crumbled; and political Catholicism was compromising, in Germany and elsewhere, with the secular forces of parliamentarism and

democracy. To be sure, dreams of a robust authoritarianism set to overcome the crisis of the liberal State, even if of secular inspiration, flourished in the early twentieth century. And, indeed, Schmitt endorsed their ideas and languages in several instances. But he was never, in essence, a radical nationalist, in spite of the circumstantial attraction to the political mythology of fascism; nor was he strictly a conservative in search for a political stability which pluralistic democracy seemed unable to secure, even if his exploitation of the plebiscitary tendencies of the Weimar Constitution might suggest that. Schmitt's praise of fascism has less to do with nationalist enthusiasm – for him, in the last analysis, a derivative of pagan idolatry – than with the supposed restoration of the supreme authority of the State. And his vision of plebiscitary leadership does not testify to a legalist concern with stability, but rather to a deep hunger for unchallengeable order – a hunger which has profound religious sources.

That the State, as the modern embodiment of political order, has an undeniable transcendent deficit and appears, in itself, as a product of secularization, is something that Schmitt knew all along. But such «fragment» of achievable order was still worth fighting for, still worth vindicating against both the false universalist promises and the actual pluralist degeneration of secular liberalism. To the cause of Statist authoritarianism Schmitt could find many associates, but none actually shared his deepest theological concerns. The collaboration with the racist ideology of the Nazis expresses perhaps the unavoidable tragedy of the last great counterrevolutionary thinker.

## **2. Weber, Kelsen and Schmitt in post-1945 political thought**

The rise to power of the Nazis and their reign of horror from 1933 until 1945 had a profound impact on the subsequent reception of Max Weber's, Hans Kelsen's and Carl Schmitt's political ideas. In the present work, I have tried to avoid the retrospective bias of interpreting their pre-1933 intellectual output from the perspective of that pivotal – and most tragic – moment in late modern German history. An explicit attempt was made to place their thought in the precise context of Weimar's crisis of political legitimacy, which no-one could have known for sure that it would lead to totalitarian and racist dictatorship. But such an attempt is an exception to numerous, if not most, post-1945 considerations of their legacy. Indeed, their thought has been widely interpreted as having contributed –

though, of course, for very different reasons and with significant variations in terms of both the degree and the actual nature of the supposed contribution – to the intellectual currents that nourished the «German catastrophe».

West German political thought in the 1950s was marked by a renaissance of natural right theory, which sought to provide a robust philosophical foundation to the new liberal-democratic order. Such a rebirth was not only a reaction to the horrors of the recent past, but it also represented an alternative to – and a defense against – the materialist doctrines that dominated in the East. Weber, Kelsen and Schmitt, in spite of all that sets them apart – and I interpreted their political thought as different and, to a large extent, alternative takes on the crisis of political legitimacy in late modernity –, either took an explicitly critical stand towards natural right theories or seriously questioned their capacity to serve as the «ultimate grounds» which sustained the validity of the political order. Hence, it is perfectly understandable that their ideas were marginalized, or turned into a favorite object of critique, by the advocates of the resurgence of natural law.

Wolfgang Mommsen's colossal work on *Max Weber and German Politics* is, in a way, a typical product of the intellectual climate in West Germany *circa* 1950. Mommsen's fundamental objection to Max Weber's liberalism, to sum it up in admittedly blunt terms, is that the author ended up focusing too much on power and too little on rights. Weber was already envisioning a horizon past liberalism, when the political situation, in Mommsen's retrospective glance, actually called for a defense of the most basic liberal values. In that leap beyond the central tenets of political liberalism, Mommsen argues in the most controversial section of his book, Max Weber's name became associated with Carl Schmitt's. Of course, the author never argued that the latter's political thought, considered as a whole, was a continuation of the former's. Given the considerable differences, to which I have alluded throughout the present work, in terms of both authors' main substantive concerns, disciplinary approaches and ideological orientations, such an assumption would have made little sense. The scope of Mommsen's affinity thesis is narrower: it establishes a kinship between one particular instance of Weber's political thought – his vision of a plebiscitary-charismatic democracy, which consolidated between late 1918 and 1920 – and a specific moment of Schmitt's life-long opposition to liberal-parliamentary democracy – the exploitation of the plebiscitary legitimacy of the President of the *Reich* against the paralyzing legality of the parliamentary State in the final crisis of the Weimar Republic. Indeed, Mommsen argues

that Schmitt's theory of the plebiscitary legitimacy of the *Reichspräsident* as the true representative of the will of the German people, beyond the authority-dissolving pluralism of political parties, is a cogent, even if one-sided, development of Weber's demands during the first steps of Weimar democracy.

In spite of the restrictions and qualifications, Mommsen's charge has a broad historical reach. Quite evidently, the point is not just – and not mainly – to establish a momentary approximation between two rather different thinkers, but rather the assertion of a continuity between one of the leading intellectual figures of German liberalism in the turn of the nineteenth to the twentieth century and «the enemy of liberalism» who helped see through the demise of German democracy in the early 1930s. And with that assertion came the even broader claim that Weber, albeit unintentionally, paved the way to the rise of Nazi charismatic totalitarianism.

Mommsen's verdict was endorsed by a philosopher who would rise to the status of a leading public intellectual in the Bonn Republic, Jürgen Habermas, who saw in Schmitt a «natural son» of Weber. To be sure, Habermas, like other Frankfurt School thinkers, was less interested in the historical peculiarities of the development of Weber's political thought than in emphasizing what he conceived as its normative deficit: the exclusion of all moral and ethical considerations from politics. Interestingly enough, in not very different terms, conservative thinkers, such as Leo Strauss, have attacked the supposedly nihilistic implications of Weber's disenchantment-thesis and of his concept of a value-free social science. Hence, critics from both the left, the right and the liberal center have associated some central elements of Weber's thought to the rise of Weimar political radicalism. Indeed, in a historical-intellectual variation on the thesis of an anomalous German *Sonderweg* to modernity, Weber is regarded as a crucial station – the station of bourgeois collapse – on the road to the disintegration of the German mind which culminated in the hideous ideology of Nazism.<sup>512</sup>

The reasons for the stigmatization of Hans Kelsen's thought in the German – though not only in the German – post-1945 context are certainly less obvious, even if they are not wholly unfathomable. The shadow of Caesarism does not hang over his ideas, and

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<sup>512</sup> Quite understandably, Anglo-American commentators, such as David Beetham and Lawrence Scaff, have been far more sympathetic to the founder of German sociology. Lately, Dana Villa, «The Legacy of Max Weber in Weimar Political and Social Theory», p. 75, has even stated that «[t]he nihilism, decisionism, and radicalism that supposedly flows from Weber's "disillusioned" perspective is, if not a total fabrication, a kind of legend, one eminently worth dismantling.»



few thinkers were as steadfast as he was in the interwar defense of parliamentary democracy against authoritarian temptations from the left and from the right. But Kelsen was also an unfaltering critic of the idea of natural law, and the rise to hegemony of natural law theory after World War Two would not fail to regard him as having contributed by omission to the totalitarian calamities of the recent past. Because Kelsen's relativism rejects a robust conception of natural right which stands above the fragile, ever-changing compromises of democratic politics – this being supposedly the one and only bulwark protecting the citizens from sheer arbitrariness<sup>513</sup> –, partisans of natural law have deemed his relativistic theory of democracy an easy prey for, or even a useful instrument in the service of, totalitarian ambitions.<sup>514</sup> Still, Kelsen was not just a target for conservative advocates of natural law. Peter Koller's exposition of the problems in Kelsen's justification of democracy argues, from a progressive perspective, that a way out of Kelsen's impasses and shortcomings could be found in the highly abstract revisitation of the social contract theories of Rousseau and Kant – the two modern thinkers Kelsen most admired – that was being undertaken by John Rawls's *Theory of Justice* (and also by Habermas's reflections on communicative action and the ideal speech situation).<sup>515</sup>

In spite of such a pervasive renunciation to Kelsen's theory of democracy after 1945, the fact is that the Bonn Republic came to fulfill one the author's major demands during the interwar years: the constitutional anchoring of the political parties.<sup>516</sup> The *Parteienstaat* was now the *de jure* reality of parliamentary democracy, not just its *de facto* condition. However, the name that became associated with the new doctrine of the State of parties in Germany was that of Gerhard Leibholz, a public law theorist who served as a judge in Karlsruhe's Federal Constitutional Court from 1951 to 1971 – and who had

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<sup>513</sup> Moreover, Kelsen's legal theory would also refuse to deny the status of law to the positive norms dully issued by the authorities of autocratic States, irrespective of their actual content.

<sup>514</sup> See Leo Strauss, *Natural Right and History*, p. 4, fn. 2 (for the explicit reference to Kelsen) and pp. 5-6: «The contemporary rejection of natural right leads to nihilism – nay, it is identical with nihilism. (...) The inescapable practical consequence of nihilism is fanatical obscurantism.» Kelsen, who fought for a rational science of law and the State free from the methods of theology, ends up being charged of nihilism and fanatical obscurantism!

Such charges are, in my view, greatly exaggerated. After all, historical experience has abundantly shown, time and again, that natural right, too, can be quite easily co-opted by authoritarian forces – a whole new issue, however, far beyond the scope of the present exposition.

<sup>515</sup> See Koller, «Zu einigen Problemen der Rechtfertigung der Demokratie», pp. 327 and ff.

<sup>516</sup> Article 21 of Bonn's Basic Law: «Die Parteien wirken bei der politischen Willensbildung des Volkes mit.» («The parties are involved in the formation of the political will of the people.»)

been a critic both of Kelsen's positivist legal theory, in general, and of his understanding of the democratic *Parteienstaat*, in particular, during the interwar years.

Indeed, in the methodological introduction to his 1929 *Habilitationsschrift* on the concept of representation, Leibholz criticized Kelsen's legal theory for reducing dense concepts to mere technical terms.<sup>517</sup> Alternatively, the author claimed to derive the inspiration for his approach from Husserlian phenomenology, but in fact Leibholz's views on political representation are rather close to the ones developed in Carl Schmitt's *Verfassungslehre* and his other writings from the late 1920s and early 1930s.<sup>518</sup> Like Schmitt, Leibholz emphasized the dissonance between, on the one hand, a constitutional order that still proclaimed adherence to the fundamental principles of nineteenth-century liberal parliamentarism and, on the other hand, a political reality marked by the clash of mass party organizations. To the pressing question whether the Weimar Constitution should be revised in order to accommodate – and, of course, legitimize – the actual predominance of the parties in the whole political process, Leibholz, *contra* Kelsen, answered no. As he saw it, the mass political parties were a dangerous surrogate of direct democracy rather than the necessary instruments of modern representative democracy. In the horizon stood, not a democracy of the masses, but either a dictatorship of the party which, under charismatic leadership, managed to identify with the State as such and exclude the opposition<sup>519</sup> or, even worse, the dissolution of the modern State under the uncontrollable pressure of the social cleavages which the mass parties gave political expression to. Hence, the point of holding on to the basic tenets of the nineteenth-century liberal-parliamentary system, even if only in the normative sphere, was to contain a movement which was perceived, in the last resort, to be conducive to the destruction of both democracy and the State.<sup>520</sup>

In post-1945 West Germany, however, Gerhard Leibholz would become a theorist and an advocate of the State of parties chiefly – though with some not wholly irrelevant variations – along Kelsenian lines. He abandoned the notion of a fundamental incompatibility between the State as the embodiment of political unity and party

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<sup>517</sup> See Gerhard Leibholz, «Das Wesen der Repräsentation», in Gerhard Leibholz, *Die Repräsentation in der Demokratie*, Berlin and New York, Walter de Gruyter, 1973, pp. 14-16.

<sup>518</sup> Schmitt, *Verfassungslehre*, p. 208, makes a favorable reference to Leibholz's then forthcoming work.

<sup>519</sup> Leibholz saw an example of this in the rise of Italian fascism under Mussolini.

<sup>520</sup> See Leibholz, «Das Wesen der Repräsentation», pp. 122-123.

pluralism, and the people was now conceived by him as constituted by the political parties themselves, the only entities capable of making it actually have a say in the processes of political decision and will formation.<sup>521</sup> In a 1952 essay on the structural change of modern democracy, Leibholz echoes what Kelsen had written more than 20 years earlier, in the second version of *Vom Wesen und Wert der Demokratie*, when he refers to the «neo-romantic» anti-parties rhetoric as being dangerously anti-democratic, since it ignores the facts that there is no way back to the parliamentary system of nineteenth-century liberalism and that the only really-existing alternatives to the democratic *Parteienstaat* are those of Nazi-fascism and communism.<sup>522</sup>

Still, Leibholz's doctrine of the State of parties is, ultimately, only a mitigated version of Kelsen's, just as the Basic Law of the Federal Republic did only partially satisfy the requirements listed by Kelsen in the interwar years for a democratic reform of the parliamentary system. In fact, it is not just that there was no turn away from the principle of the independence of MPs to some legally recognized form of imperative mandates. More importantly, the extreme consequences of Kelsen's relativistic pluralism were avoided by a legal barrier to parties which aimed to interfere either with fundamental liberties or with the democratic order itself.<sup>523</sup> Such restriction allowed a new doctrine of the State of parties to flourish in the post-1945 intellectual climate of the revival of natural law, because it did not oppose the natural law partisans' claim to have some fundamental rights subtracted from the pluralistic – and relativistic – struggle of political parties.

From the three thinkers discussed in this work, Carl Schmitt emerges as the only one whose implication in Hitler's regime cannot be disputed. Schmitt did not contribute unintentionally or by omission to the rise of Nazi totalitarianism. He actually joined the NSDAP and collaborated actively, even if only for a relatively brief period (1933-1936), in the erection of the legal foundations of the Nazi State. Moreover, after 1945, contrary

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<sup>521</sup> See Gerhard Leibholz, «Der Gestaltwandel der Demokratie im 20. Jahrhundert», in Gerhard Leibholz, *Die Repräsentation in der Demokratie*, pp. 240-241; Gerhard Leibholz, «Volk und Partei im neuen deutschen Verfassungsrecht», in Gerhard Leibholz, *Strukturprobleme der modernen Demokratie*, Third Expanded Edition, Karlsruhe, C. F. Müller, p. 76.

<sup>522</sup> See Gerhard Leibholz, «Der Strukturwandel der modernen Demokratie», in Leibholz, *Strukturprobleme der modernen Demokratie*, p. 122.

<sup>523</sup> The second part of Article 21 of the Basic Law states that: «Parteien, die nach ihren Zielen oder nach dem Verhalten ihrer Anhänger darauf ausgehen, die freiheitliche demokratische Grundordnung zu beeinträchtigen oder zu beseitigen (...), sind verfassungswidrig.» («Parties which, by reason of their aims or because of the behavior of their adherents, seek to compromise or to eliminate basic liberties or the democratic order (...) are unconstitutional.»)

to many academics and intellectuals who had collaborated with the Nazis, Schmitt refused to be rehabilitated through an expression of repentance for the “sins” of the recent past. With a return to a university position out of the question, Schmitt retired to his small Westphalian hometown of Plettenberg, where he spent the rest of his days.

Forced, thus, to a sort of internal exile that could have been detrimental to the resonance of his work, it is rather amazing that the ideas of Schmitt’s radical anti-liberalism were so eagerly taken up by so many of those who, after 1945, remained unsatisfied with the achievements of the liberal order. And more surprising, still, is the fact that such ideas were widely explored, not just – and perhaps not mainly – by conservative or neoconservative thinkers, but by various diverse strands of left-wing thought.

As a matter of fact, the favorable reception of Schmitt’s work by theorists of the left predated World War Two and the Third *Reich*. The socialist constitutional theorist (and later political scientist) Otto Kirchheimer was known as Schmitt’s favorite pupil in the University of Bonn, where the former completed his doctoral dissertation in 1928.<sup>524</sup> Another thinker associated with the Frankfurt School, Walter Benjamin, is also supposed to have been «dangerously connected» – though not as directly as Kirchheimer – with Schmitt’s ideas in the interwar period.<sup>525</sup> After 1945, Schmitt’s critique of parliamentarism is supposed to have influenced Habermas’s early work on the structural change of the public sphere.<sup>526</sup> Beyond the Frankfurt School universe, the Maoist Joachim Schickel published a long interview with Schmitt where the latter developed his views on the partisan.<sup>527</sup> And beyond the German-speaking frontiers, René Capitant, a French lawyer and politician of Gaullism’s left-wing, seems to have drawn a lot from Schmitt for his constitutional theory.<sup>528</sup>

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<sup>524</sup> Indeed, the title of Schmitt’s 1932 *Legalität und Legitimität* seems to have been inspired by a homonymous article published that same year by Kirchheimer in the socialist journal *Die Gesellschaft*.

<sup>525</sup> Susanne Heil, *Gefährliche Beziehungen: Walter Benjamin und Carl Schmitt*, Stuttgart and Weimar, J. B. Metzler, 1996.

<sup>526</sup> Hartmuth Becker, *Die Parlamentarismuskritik bei Carl Schmitt und Jürgen Habermas*, Berlin, Duncker & Humblot, 1994.

For an overview of the Schmitt reception by the Frankfurt School, with some bold theses, see Ellen Kennedy, «Carl Schmitt and the Frankfurt School», *Telos*, No. 71, 1987 (spring issue), pp. 37-66.

<sup>527</sup> Joachim Schickel, *Gespräche mit Carl Schmitt*, Berlin, Merve, 1993.

<sup>528</sup> See Gwenaél Le Brazilec, *René Capitant, Carl Schmitt: crise et réforme du parlementarisme. De Weimar à la Cinquième République*, Paris, L’Harmattan, 1998.

Today, indeed, it is fair to say that Schmitt's ideas swarm the left's critique of the liberal order in the whole international scholarship. Given such pervasiveness, it is pertinent to formulate a word of caution regarding contemporary appropriations of Schmitt which seek guidance and inspiration to deal with the crisis of twenty-first-century democracy in some of his fundamental concepts, but ignore or at least neglect other, perhaps more subterranean and certainly more disturbing, dimensions of his thought. In spite of the undeniable sharpness of his critique of liberalism, Schmitt might not be the most advisable instance upon which to think about the possible transformations of contemporary democracy.

Chantal Mouffe, one of the main contributors to the Schmittian hype amongst left-leaning contemporary political theorists, misses Schmitt's robust authoritarianism when she proposes to reinvigorate contemporary democracies, which have stagnated supposedly due to a liberal politics of shallow consensus, through an injection of «the political». To be sure, Mouffe explicitly admits that she is «doing violence to Schmitt's questioning, since his main concern is not democratic participation but *political unity*»<sup>529</sup>. But can Schmitt's concept of the political be unproblematically severed from its substantial connection with the issues of political unity, State authority and political theology in order to serve the purposes of a regeneration of contemporary democracies? Quite probably not. Indeed, one can hardly fail to notice that Mouffe struggles with this problem when she tries to specify the scope of her appropriation of «the political». She evidently wishes to espouse a vision of politics as conflict and struggle, but at the same time she has to avoid the ultimate consequences of the extreme case – (civil) war –, and hence to mitigate the original intensity of Schmitt's concept of the political. Her agonistic model of democracy is based upon a somewhat contrived distinction between *agonism* and *antagonism*. The political opponent is not the radical antagonist, whom one could, in the last resort, engage in a battle for life and death, but a legitimate adversary with a recognized and inviolable right to existence. This, of course, presupposes that political unity is not problematic, that it is given in every contemporary democratic polity. One must, therefore, bear in mind the *double* injustice of Mouffe's appropriation of Schmitt's

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Interestingly enough, Wolfgang Mommsen, in the conclusion to his *Max Weber und die deutsche Politik*, also claims that the constitutional design of the French Fifth Republic, with its primacy of the presidency over parliament, comes closest to Weber's proposals at the dawn of the Weimar Republic.

<sup>529</sup> Mouffe, *The Democratic Paradox*, p. 36 (emphasis in the original).

concept of the political. Not only does it amount to a mitigation of the intensity of the political opposition – because the political adversary Mouffe has in mind is not an enemy in the Schmittian sense of the word –, but it also completely disregards, by treating it as given and settled, the problem of political association.

When Schmitt considers the nature of the enemy, he points towards a horizon that transcends the supposed dichotomy between agonism and antagonism. For Schmitt, «the enemy is not the competitor or the opponent in general», nor «the opposing player, the “antagonist” in the bloody struggle of the “agon”»<sup>530</sup>. War, the most radical expression of conflict, is not in itself a manifestation of the political; instead, as Schmitt argues with reference to a radiophonic discussion between Ernst Jünger (the pure “agonist”) and Paul Adams (who had a teleological understanding of war), it only acquires its political dimension when, beyond itself, it serves «the induction of rule, order and peace»<sup>531</sup>. In the final analysis, Mouffe wants political conflict to disturb an excessively consensual concretion «of rule, order and peace», but, since she does not draw revolutionary implications from her agonistic vision of democracy, she ends up having to sacrifice conflict for the sake of a presupposed, legitimate unity. She wishes, in fact, to avoid all the dangers of Schmitt’s concept of the political: both the danger of authoritarianism and the danger of revolution. In sum: Mouffe fails to adequately cope with the intensity of Schmitt’s concept of the political as she relates it to the predicaments of contemporary democracies. Maybe that is not totally her fault, but rather a sign that the ultimate theological horizon of Schmitt’s political thought can hardly be domesticated in the service of a constructive questioning of the liberal-democratic sensibility of our present age.

Another attempt to read Schmitt from a leftist perspective was recently undertaken by Andreas Kalyvas in his quest for a democratic politics of the extraordinary. Kalyvas sees Schmitt as a theorist of «the constituent power of the people» in its «rebellious and

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<sup>530</sup> Schmitt, *Der Begriff des Politischen*, p. 10: «Feind ist nicht der Konkurrent oder der Gegner im Allgemeinen. Feind ist auch nicht der Gegenspieler, der „Antagonist“ im blutigen Wettkampf des „Agon“.»

<sup>531</sup> *Ibid.*, fn. 1: «Der große metaphysische Gegensatz agonalen und politischen Denkens tritt in jeder tieferen Erörterung des Krieges zutage. Aus neuester Zeit möchte ich hier das großartige Streitgespräch zwischen Ernst Jünger und Paul Adams (Deutschland-Sender, 1. Februar 1933) nennen, das hoffentlich bald auch gedruckt zu lesen ist. Hier vertrat Ernst Jünger das agonale Prinzip („der Mensch ist nicht auf den Frieden angelegt“), während Paul Adams den Sinn des Krieges in der *Herbeiführung von Herrschaft, Ordnung und Frieden* sah.» (Emphasis added.)

insurgent force»<sup>532</sup>. His reading of Schmitt certainly appears to do less injustice to the intensity of «the political», even if it does not depart from nor focus on that decisive concept. In my view, it constitutes a stimulating construction of a hypothetically atheist Schmitt, who would conceive political unity as emerging immanently from below instead of being transcendently decided from up above, in an authoritarian fashion. But in any case, the contrast between Kalyvas's reading, on the one hand, and both the indelible authoritarian content of Schmitt's alternatives to liberalism and the theological foundations of the author's thought, on the other hand, could scarcely be stronger.

In spite of the attempt to read Schmitt in light of the issue of democratic, popular foundings, Kalyvas must silently admit that Schmitt offers no definition of the people. The concept of the people remains thoroughly vague in Schmitt's works. Most notably, it appears instrumentally in the definition of the State as political unity. Schmitt merely postulates the empirical existence of peoples, when he defines the State as a people in the status of political unity.<sup>533</sup> The «constituent power of the people» is, hence, a vague and elusive power, in need of concretion, that is, in Schmitt's view, of personal political representation. It is not a power of the people as such, but of those who can undisputedly claim to speak in its name. An approach that conceives of political sovereignty in terms of decision is, as I have shown above, necessarily personalistic – and the people, whatever it may be, is not an actual person. Kalyvas acknowledges this when he recognizes the centrality of the notion of representation in Schmitt's constitutional theory, and he also stresses its connection with the religious dimension of Schmitt's thought.<sup>534</sup> Yet, he does not pursue the theological implications to their ultimate consequences.

Schmitt's radical anti-liberalism points ultimately, as I have argued, to a metaphysical-theological transcendence of liberalism which has very little to say to the political sensibilities of the present. He is, hence, probably not the most advisable guide, if one is looking for answers to the political dilemmas of our very late – post? – modernity.

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<sup>532</sup> Kalyvas, *Democracy and the Politics of the Extraordinary*, pp. 10-11.

<sup>533</sup> See Schmitt, *Verfassungslehre*, p. 205.

<sup>534</sup> Kalyvas, *Democracy and the Politics of the Extraordinary*, pp. 146 and ff. For the crucial passages on representation, see Schmitt, *Verfassungslehre*, pp. 209-210.

### 3. On the crisis of political legitimacy in the twenty-first century

If Carl Schmitt's political theology appears to speak to us, citizens of the liberal democracies of the twenty-first century, as a relic of a by-gone age and its outdated dilemmas, does it not mean that the whole narrative of a late modern crisis of political legitimacy torn between the conflicting demands of transcendence and immanence, which I have sketched in the precedent pages, should be treated as a settled episode in the history of political ideas? If, indeed, as Claude Lefort concludes in an immensely rich essay on «The Permanence of the Theologico-Political?», modern democracy has largely succeeded in divorcing the theological and the political<sup>535</sup>, does it not mean, too, that both Max Weber's ambivalent quest for salvation through charismatic politics and Kelsen's combat to dispel theology altogether from the theories of law and the State, conceiving democracy in explicitly pluralist-relativistic terms, have only a reduced import to the discussion of the political impasses of the present? As much as one might be tempted to answer positively to these questions, let us beware of hastily formulating such a summary judgment.

In the aforementioned essay, Lefort shares some thoughts on the genealogy of the political sensibility akin to modern democracy. He locates its origin not in 1789, not in the revolutionary break with the *Ancien Régime*, but in the bourgeois spirit of the French July Monarchy (1830-1848), whose pragmatic politics sought a compromise between the two alternative principles of political legitimacy: monarchic and democratic, transcendent and immanent.<sup>536</sup> Carl Schmitt saw precisely in such a politics the typically liberal negation of the political, the expression of liberalism's refusal to opt for clear politico-theological alternatives – to either stand by the king or wholly accept the sovereignty of the people –, the manifestation of a paralyzing and deceitful indecision. In Schmitt's view, such state of affairs dragged on well into the interwar years, even if the actual great alternatives changed rather drastically with the generalized triumph of the democratic principle of legitimacy. The problem of political legitimacy was thus transferred to the

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<sup>535</sup> See Claude Lefort, «The Permanence of the Theologico-Political?», in Claude Lefort, *Democracy and Political Theory*, Minneapolis, University of Minnesota Press, 1988, p. 255.

<sup>536</sup> See Lefort, «The Permanence of the Theologico-Political?», pp. 214-15. Such so-called eclectic politics, devised by practically-oriented spirits, was deemed a «bastard philosophy» by the French thinkers of the first half of the nineteenth century who searched for the ultimate religious truth of the great political Revolution of 1789.



very definition of democracy. As Jan-Werner Müller has keenly argued in his recent *Contesting Democracy*, the history of political thought in the twentieth century is essentially the history of the controversy around the meaning of democracy, with the most diverse, and fiercely opposed, political ideologies proclaiming to carry the true concept of democracy and to voice the actual will of the people. In such context, the spirit of moderation and compromise – or, if one prefers to speak with Schmitt, of liberal-bourgeois indecision – also emerged in changed garments, as Kelsen’s pluralist-relativist vision of democracy so evidently shows. According to the Kelsenian understanding, there is no last word on the ultimate substantial meaning of democracy, because democracy is not about substance, not about realizing concretely definable political goals, but about form and procedure.<sup>537</sup> It is a form of government which allows the most diverse political alternatives the chance to participate in the formation of the legislative will of State – a will whose actual content will vary significantly, according to the preferences of the citizens, and which quite probably shall, in general, consist of a compromise between the major political alternatives. It is a form of government which, as Kelsen’s robust relativism holds, must leave the door open to its own abolition through democratic means, if the people so wishes.

This formal understanding of democracy managed, indeed, to outlive the totalitarian menaces from the left and from the right. It did so, to be sure, by significantly mitigating its own relativism. In a context marked by a strong resurgence of natural right theory, the basic features of the democratic system, comprising certain fundamental rights of the individual, were subtracted from the scope of the processes of democratic choice and treated as its irreplaceable foundations. When the ideological alternative of Soviet communism collapsed in the end of the twentieth century, a moment which some

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<sup>537</sup> It would, however, be inaccurate to conflate Kelsen’s formalism with other conceptions of democracy in terms of method, such as Schumpeter’s famous definition of democracy – which has become the standard in political science – as «that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.» (Joseph A. Schumpeter, *Capitalism, Socialism and Democracy*, London and New York, Routledge, 2003, p. 269.)

The difference between Kelsen’s and Schumpeter’s types of formalism is that the former refuses to exchange «the definition of democracy as government by the people» for «the definition as government established by competition» (Kelsen, «Foundations of Democracy», p. 84). According to Kelsen, Schumpeter turns a «secondary criterion» – the free electoral selection of political leaders – into the «primary» one. Indeed, Kelsen’s formalism is merely the expression that “the people” has no *a priori* existence, that it must first be constructed through democratic procedures and institutions. For him, thus, just as for the so-called classical theorists, democracy remains «government by the people», even if “the people” ceases to be understood as an empirically given unit and appears, ultimately, in a plural and internally divided – not in a monolithic – guise.

interpreted in quasi-millenarian terms as that of the end of history<sup>538</sup>, one could have thought, if one was prone to a certain naivety, that liberal democracy had solved the riddle of political legitimacy for good. But the fact is, however, that the problem simply acquired new shapes, as it had done before. The *locus* of the controversy moved from the contestation of the meaning of democracy, on which a consensus seems to have been attained, to the problem of the translation of basic democratic principles and fundamental rights to actual policy decisions. Even if one does neither question the standard understanding of the principles of democratic government nor challenge, in abstract, the typical formulations of civic, political and social rights, dissent is bound to reemerge around the application of principles to the concrete case, or when two rights, equally *fundamental* in abstract, appear to collide in practice. When that happens, legitimacy is once more at stake, the ultimate reasons to consent to authority become, again, the object of contestation.

The crisis of political legitimacy today, in Western Europe, is rather different from that of the interwar years. It is not the crisis of a democracy surrounded by strong ideological-mythological enemies, but, quite on the contrary, the crisis of a democracy which, in the absence of such radical antagonists, nevertheless struggles to correspond to the (conflicting) demands of its citizens and seems unable to encounter the kind of stability it appeared to enjoy when the shadow of Soviet communism was still projected from the East. In a way, the absence of alternative models of democracy deepens the sense of crisis, for it denies the hope, however elusive it might be, of a different future, and leaves the people paralyzed in the face of political developments which, as the last years under the aegis of austerity have all too frequently shown, are increasingly phrased in terms of stern inevitabilities and *faits accomplis*.

The deadlocks of contemporary democracy seem, thus, to call for a break with its closure to alternative horizons. Of course, as the history of the twentieth century has demonstrated, the risks involved in such a break are rather large. In truth, one might reasonably prefer the contemporary impasses to new mythological promises and expectations of transcendence or, even more so, to a return, in whichever guise, of the old ones. But is not the propensity to risk, when all the markers of certainty and their assurance of stability have vanished, a key feature of modernity? And should it, hence,

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<sup>538</sup> See Francis Fukuyama, *The End of History and the Last Man*, New York, Free Press, 1992.

not also be a driving force of the democratic sensibility? In the 1919 lecture on politics as a vocation, the ambivalent Weber seemed to be well aware of that ultimate modern necessity to risk. In spite of the recurring calls for a sense of proportion and responsibility, in spite of the condemnation of socialist revolutionary romanticism, and in spite of the famous image of politics as «slow (...) drilling through hard boards», Weber still has to admit «that what is possible would never have been achieved if, in this world, people had not repeatedly reached for the impossible»<sup>539</sup>.

Maybe democracy is not actually supposed to solve the problem of political legitimacy, and to provide permanence, protection, stability and certainty to more or less frightened human beings in an ever-changing world. On the contrary, perhaps the word *crisis* designates the normal status of a democracy; perhaps democracy is all about leaving the «ultimate grounds» for consenting to authority forever indeterminate. The fact that the theory of democracy is still expected – and, for the most part, still desperately tries – to provide answers and clear doubts, instead of raising questions and nurturing new uncertainties, is, to use Lefort's words, probably a sign of the «difficulty democracy has in reading its own story – and of the difficulty political or philosophical thought has in assuming, without making it a travesty, the tragedy of the modern condition»<sup>540</sup>. Weber, Kelsen and Schmitt struggled, in their peculiar ways, with that tragic condition, as we today, whether we want it or not, still do, too. Because democracy remains our unfinished story – and modernity our inescapable tragedy.

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<sup>539</sup> Weber, «The Profession and Vocation of Politics», p. 369.

<sup>540</sup> Lefort, «The Permanence of the Theologico-Political?», p. 255.

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