Jürgen Habermas and Carl Schmitt in the paradigm of modernity

For a critique of the modern law

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Dedicatória

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Abstract

In the centre of this work is the possibility to think and criticize modernity and modern law. In its background stands the history of The Socialist Federal Republic of Yugoslavia, where the violence and exclusion allow us to grasp clearly the loss of particular reason. With the work of Hegel the word modern is put in the focus, while oeuvre of Jürgen Habermas brings another goal and possibility for the modern world – the intersubjectivity. This work follows Habermas's arguments and it is on the ground of their shortcoming where the critique of modernity arises. The world is social, but can the modern world grasp the intersubjective nature of our societies? I chose to frame the critique of Habermas's project around the concept of modern law using the theory of Carl Schmitt, who challenges the concepts of liberal democracy, legitimacy, and legality, leaving the possibility to think an alternative to the mass democracies, like the agonistic model of Chantal Mouffe.

Key words: modernity, modern law, critique, Habermas, Schmitt, Yugoslavia.

Resumo

No centro deste trabalho é a possibilidade de pensar e criticar a modernidade e o direito moderno. Em seu fundo está a História da República Federativa Socialista da Jugoslávia, onde a violência e a exclusão nos permitem compreender claramente a perda de uma racionalidade particular.

Com o trabalho de Hegel, o moderno é colocado em foco, enquanto a obra de Jürgen Habermas traz outro objetivo e outra possibilidade para o mundo moderno - a intersubjetividade. Seguindo os argumentos de Habermas chegamos até o mundo, que é social. Porém, a pergunta que surge é se esse mundo moderno pode compreender a natureza intersubjetiva de nossas sociedades. Eu escolhi enquadrar a crítica do projeto de Habermas em torno do conceito de lei moderna usando a teoria de Carl Schmitt, que desafia os conceitos de democracia liberal, legitimidade e legalidade, deixando a possibilidade de pensar uma alternativa às democracias de massa, como o modelo agonista de Chantal Mouffe.

Palavras-chave: modernidade, direito moderno, crítica, Habermas, Schmitt, Jugoslávia.

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For J and M

Caminante, no hay camino,
se hace camino al andar.
Al andar se hace el camino,
y al volver la vista atrás
se ve la senda que nunca
se ha de volver a pisar.

Antonio Machado

Introduction

How many people live today in a language that is not their own?

Gilles Deleuze and Félix Guattari, *Kafka: Toward a minor literature*

I

The 20th century has been many times called a century of traumas due to the violent events that shaped its history. Colonization, slavery, apartheid, world wars, ethnic wars, undoubtedly left a great deal of trauma to the ones who experienced it, while the ones who have read, watched or heard about it were left with a huge gap in understanding the course of the events. Art represents the field where these traumatic feelings find their expression in the most free and pure manner. However, artists usually find their expression only after a traumatic event occurred. There are many books about the war in Bosnia, and a significant number of films and many songs whose sources can be found in that war and in the world that the war had left behind. Artistic expression in the case of this war, as after any other violent experience, was the first to speak in the name of the "traumatic unspeakable."[1] This was the consequence of the shock that people were left with after the violent collapse of their state, after a terrible conflict, faced with an uncertain future, when maintaining a minimum of 'modern human dignity' was impossible for many of them. That shock was so big and traumatizing that it left a heavy silence not only in official particular histories but, more importantly, among the people, and this silence exists even today.

When Oleg Kulik, in the performance "Mad dog or last taboo guarder by alone Cerber," went on his knees, angry and ready to bite, his metamorphosis was in the name of the "traumatic unspeakable" left after the shock of the collapse of the Soviet Union. There were no words to express the traumatic experience, only an artistic expression of the critique of the collapsed culture. "Mad dog" is full of aggression, violence and rage that make him crave for irrational, for the destruction in the name of a lost identity. This is exactly how I see the social and ethnical conflicts that have remained in the Balkans after the war in Bosnia – latent, silent, and ready to be triggered outside of artistic expression, in law and politics.

Thinking about "traumatized modernity" is what impels this paper. When I talk about

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[1] I borrow this expression from the essay of Everlyn Nicodemus "Modernity as a Mad Dog: On art and trauma" published in "Over here: International perspectives on art and culture," edited by Gerardo Mosquera and Jean Fisher, (258-78), 2004, New York: New museum of contemporary art.

the Socialist Federal Republic of Yugoslavia, I talk about the country in which I was born, the communist country that existed in Europe whose legal framework was politically abused in order to protect particular political interests. When the shock of the collapsed communist regime and brutal killings had passed, another brutality was put on the Serbian people – nationalism that has turned the entire Serbian reality and politics into a national myth guided by the interests of political elites. Consequently, there was another aggression of "mad dogs," this time in Kosovo, bringing in a new – yet so familiar violence, which finally completed the form of what we can call the modern Serbian, or perhaps the Balkan tragedy. Tragedy because there was not then, as there is not now, a dialogue or recognition between ethnicities that once lived together. And as Miroslav Milović says, without this dialogue the future is uncertain in the whole region. For him, the discussion about the "perspectives and conditions of the modern world" and asking "does it still make sense to be modern"[2] starts with Hegel and his "synthesis of the idea of a modern constituent subject." This paper shares that idea, and choses to define and observe modernity through the philosophy of Hegel. Moreover, one of the goals of the first, 'introductory chapter,' is to show that the 'modern world' is still very Hegelian. In other chapters, I tend to seek alternatives to modern subjectivism, rationality and normativity, more precisely, the alternatives that enable re-thinking of "the notions that the white Western world "owns" modernity and that Others should stick to their original cultural traditions."[3] That is, alternatives that can challenge the meaning of history as an arena of domination of the European normativity and rationality. Only in this way countries such as Brazil and Serbia can have their particular social and political existence, and particular reason.

II

After this brief introduction, I start my theoretical journey from Hegel's theory, which in my opinion represents the most suitable entrance hall to what I call modernity in this paper. In this regard, Milović's claim that "the modern world is a Hegelian delirium" finds its reason here. By reflecting on the most important features of his legal and political theory, I bring Hegel to the concept he was waiting for his whole life – the modern world. On the way of understanding the dialectics of the modern state, I touch upon Hegel's philosophy of tragedy, which "significantly contributes to the birth of speculative thinking that directly links tragedy

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[2] Milović, Zajednica razlike, p.7. [This book was originally published in Spanish language – C*omunidad de la diferencia*, 2004, Granada: Universidad de Granada. Available portuguese translation – *Comunidade da diferença*, 2004, Rio grande do sul: Unijuí. This work uses the Serbian translation.]
[3] Nicodemus, Modernity as a Mad Dog: On art and trauma, p.272.

with politics, strongly emphasizing that it is only aesthetic act capable of closing philosophical circle."[4] Moreover, the questions I tend to answer in this chapter are: why did Hegel decide to finish his book on legal theory with aesthetic questions and with "heroes to find states," and are those "heroes of history" a priori tragic?

Hegel finds the appearance of the reason in modernity in the historical moment of the French Revolution. Thus, this reason is revealed to the world in the law. On its historical journey, the law needs to *become known* in order to see its determinacy and reach its self-consciousness. It cannot be based on instinct (like laws among animals), nor solely on customs [*Sitten*], drives and feelings (like the law of barbarians). Only through the discipline of being apprehended does it become capable of universality.[5] However, his philosophy of modernity never reaches the intersubjective nature of our social existing, a project that another philosopher of modernity, Jürgen Habermas, dedicates his work to.

In the second chapter, I closely approach the theory of communicative action and the critical social theory found in the work of Habermas. The structure of this chapter aims to show the three periods that I observe in his oeuvre: firstly, the rise of the critical mind that reflects upon Habermas's earliest creative period, associated with the student protests and the so-called Frankfurt circle. During these years, the philosopher was also active in the academic group that was responsible for the publication of the Yugoslav magazine *Praxis*, and his writings about the social-democracy were widely discussed in the meetings of the '*Praxis* circle.' The books we can give prominence to, in this period, are: "Structural changes in the public sphere," "Toward a Rational Society," "Technology and Science as Ideology," "Knowledge and Interest."

After distancing himself from the student movements and following a more Marxist reading of the social future, Habermas makes a so-called linguistic turn that will mark his career and allow his theory to be discussed nowadays as a social theory. *Theorie das Kommunikativen Handels* (the first edition of both volumes was published in 1981) is his major work, and the social, anthropological, historical, linguistic – among other analyses that he brings together in this book are, without question, a premise of his social, political and legal theory. Moreover, "The theory of communicative action" represents the link, symbiosis, between certain ideas from his early works (such as the public sphere, legitimacy, social development, etc.) and the works written after the publication of *Faktizität und Geltung* in 1992. Additionally, before

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[4] Jovanov, Hegelovo pravo naroda, p.45.
[5] Hegel, PR, §211.

publishing "Between Facts and Norms," works such as "The philosophical discourse of modernity" or "Postmetaphysical Thinking" were the heralds of the idea of modernity he continues to protect. Finally, "Between facts and norms" is Habermas's response to the historical and political strivings happening around him, and it is with this book that he brings the theory of communicative action to the structures of law and democracy via his theory of discourse.

However, in regard to the critical and reflexive potential offered by *Faktizität und Geltung*, we can talk about "the dusk of his critical mind," when the night almost covered his previous bright and clear critique of the capitalism and technology. After this book, many of his works were the subject of numerous critical voices, thus works as "The inclusion of the other," "The Postnational Constellation: Political Essays," "Truth and Justification," etc., are to some degree the answers to these critiques. Finally, the latest and still ongoing 'phase' or, perhaps better said, 'focus' are his writings about the European union, its constitution, sovereignty to come, its critique and its historical chance to save the modern project and keep itself alive. Moreover, they mark Habermas as the "official philosopher of the European Union," even though, just like Hannah Arendt, he does not particularly fancy being called just a philosopher, and as in Arendt's case, he would rather choose to be referred to as a sociologist. His activity in matters considering the Union shows that Habermas is angry and wants to get his message out.[6] His outering makes him vulnerable to criticism, especially to that coming from fellow philosophers, and defines him as a thinker of his time, as the "last European." More importantly, it sheds light on the limits of his renewed belief that intersubjectivity can be grasped in the rationality of the modern law.

In order to provoke Habermas's project of rationality, in the third chapter I analyze the work of another German author – Carl Schmitt. Although Schmitt was a jurist and his area of expertise was law, his political theory is at the center of his legal theory. That is why, on the path of discovering the political, I decide to focus on the concepts of law and legality. Regarding the former, I conclude that in the basis of the law, as Schmitt sees it, is the conflict arising from the political relationship between friend and enemy, the only relationship able to grasp the complicated structure of human nature and human society that are marked by the antagonist relations and views towards their future. The argument of legality, on the other hand,

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[6] Georg Diez, Habermas, the Last European: A Philosopher's Mission to Save the EU in Spiegel magazine, Nov.2011. Available on http://www.spiegel.de/international/europe/habermas-the-last-european-a-philosopher-s-mission-to-save-the-eu-a-799237.html [last accessed on 30/07/2017]

can be observed only through its relation and degree of fair connection with the legitimacy.

Schmitt was highly influenced by the turbulent period in which he lived, the period of two great wars, changes in the world order and complete destruction. With this in mind, before reconstructing the main ideas of his theory, I build a personal and historical background that is, in my opinion, crucial for reading and understanding of Schmitt's works. This background presents his psychoanalytic picture seen in his relationship with his parents, religion, and finally, his relationship towards himself. The portrait I reach after this analysis helps me to observe how parts of his oeuvre are related to the exact moments of his life, which in return can bring me closer to answering the question that many authors, including Habermas, have asked: how can an intellectual, like Schmitt, end up defending the Nazi regime?

In the second part of the third chapter, I take a long and dangerous road of defining his concept of the political; a road that has many curves, and takes many turns, but somehow always comes to the same point – the inevitable political destiny of every man and woman, and of every society. The dialectics of the political is deeply rooted in the philosophical and anthropological arguments, and it corresponds to the way Schmitt observes human nature, which I would place somewhere in between Machiavelli's and Hobbesian political realism, and Aristotle's *zoon poltikon*. How to avoid a complete neutralization of the political, where only legality will continue to exist and legitimacy would be defined under the rules of that legality, and not vice versa – that is what Schmitt tends to answer.

Similar to the last point in the chapter dedicated to Habermas, in the last part of the third chapter, I bring Schmitt to the theory of democracy, because only then, in combination with his critique of positive law, the full power of Schmitt's critical mind gets gathered in his writings on liberal democracy. That is why I prefer to observe Schmitt as a critical thinker more than a conservative thinker. According to him, by following the liberal logic of reaching consensus, we equalize the existing differences that become neutralized, and thus depoliticized via modern law. Schmitt's reading of the European history and his interpretation through changes in the domain are based on the claim that "Europeans sought a neutral domain in which there would be no conflict and they could reach common agreement through the debates and exchanges of opinion."[7] This neutral domain is where the law depoliticizes the social sphere, keeping the status quo, and thus disables the true nature of the political to emerge.

Furthermore, modern states ask for a normal state of affairs for the law to exist and operate. For Schmitt, this defined and prescribed 'normality' says nothing about the world we

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[7] Schmitt, The age of neutralization and depoliticization in The concept of the political, p.89.

live in. On the other hand, the *Ausnahmezustand* is a constitutional moment when the law ceases, and when a true sovereign gets defined by the law while occupying a space outside the law. This is the main paradox that promises Schmitt a part in contemporary legal and political debates, inspiring a wide range of authors today such as Giorgio Agamben and Chantal Mouffe, in the same way he was once inspired Walter Benjamin. In the constitutional debate between Schmitt and Hans Kelsen, on the questions about who is the protector of the Weimar Constitution, and who is the sovereign in the Weimar Republic, Schmitt answers in his definition of the state of exception. Even though it is law that defines the sovereign, the engine of that notion starts within the decision. Thus, in "Constitutional theory," Schmitt writes: "A constitutional *contract* or a constitutional agreement does not *establish* the political unity. It presupposes the unity. It is not the "covenant" on which the local community or the commons rests."[8] This thought flows into "Legitimacy and Legality," where the focus is put on a stronger critique of the German *Rechsstaat* and its empty concept of legality that left no room for the legitimacy and the political to develop. And this is the course Chantal Mouffe takes when criticizing liberalism and the deliberative model of democracy.

III

In the first part of the fourth chapter, I return to the motive of this paper. I put the political and legal analysis of the violent disintegration of Yugoslavia (the Socialist Federal Republic of Yugoslavia) in the legal and political framework based on the writings of Zoran Đinđić. There are many other authors involved in this subject, but in my opinion, it is exactly in Đinđić's reflections on Yugoslavia where a secret symbiosis can be found between Hegel and Schmitt, and ultimately, the openness for what we could call the "Yugoslavian intersubjectivity." Đinđić makes three important claims about Yugoslavia, which in turn bring the thesis on the Yugoslavian unfinished statehood:[9] that it was never a state, it was never a federation in its full meaning, and it was never a legal state.

After these analyses, I consider the political and legal debate, prior to the Constitution of 1974, as the threshold of nationalism that will take over the communist reason, after the death of President Tito. I hold that this constitution represented an attempt to think about alternatives to the ongoing socialism, and it represented the link between law and politics in the context of the war that marked the end of Yugoslavia. However, it did not manage to protect

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[8] Schmitt, Constitutional theory, p.113.
[9] Philosopher Zoran Đinđić (who is later going to pursue a political carrier as the first democratic prime minister of Serbia) develops this thesis in his book "Yugoslavia as an unfinished state" (original title: *Jugoslavija kao nedovršena država*), which was published in 1988, just a few years before the beginning of the war in Bosnia, and 15 years before his assassination in March 2003.

the state and its people from the war, and it was used by the political elites of its six socialist republics. Thus, there are two arguments about modernity that we can derive from observing these pre-war events in Yugoslavia: the legal basis of the country seen in its constitution was not sufficient to prevent the conflict; and the violence between ethnicities in the war in Bosnia. This violence gets its even greater historical relevance when it reappears in the war in Kosovo, and also in its mythological existence in the countries of the Balkan Peninsula, where it is still present in political and legal arguments. In other words, Yugoslavia, in my opinion, besides provoking the concepts of intersubjectivity and antagonisms, reveals a violent connection between law and politics, strongly linking violence and modernity in the "modern mind."

From this context on Yugoslavia, I bring up two questions: why there was no national consensus about the federal future in Yugoslavia, a consensus that could have been based on the country's constitution? And secondly: why the antagonistic nature of different nationalities in Yugoslavia did not manage to come to a different democracy, more precisely, to the agonistic model of democracy inspired by Schmitt's political theory? These questions directly involve the theories of Habermas and Schmitt, and relate to the particular and universal character of Yugoslav history. What is even more important is that, while answering these questions, I come to the notion of violence as a modern remnant that Habermas does not know what to do with, and Schmitt does not know how to separate from his dogmatism of decisionism.

Thus, following the final parts of this paper, I come back to modernity, whose bases and rationality are both theoretically and practically virtually destroyed. This is when I employ the theory of Chantal Mouffe that opens the door to observe the possibility of reforming liberal democracy under the logic of pluralism and what she calls 'agonisms.' These, according to her, would break the dogmatism of European rationality and normativity, and offer a democratic system that will finally be able to grasp the political in all its particular and essential character. The trouble with deliberative democracy and with liberalism (which Habermas's latest theory finally represents) is that they try to evade, or even have fear of the political. Their moralism invites intransigence, their rationalism denigrates the passions, their quest for consensus denies the tendency to antagonism, and their search for final answers flies in the face of value pluralism.[10] That is why, the gap that I find in Habermas's theory, I try to fill with Mouffe's (re)interpretation of Schmitt's ideas, and by presenting her model of agonistic democracy, to criticize these German authors.

The fall of Yugoslavia is therefore just one example coming from the world history, in

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[10] Mouffe, The Democratic Paradox, p. 25.

this case. Like many others, it reveals not only the violence, but the exclusive power of the modern mind oriented towards unification or, as Habermas calls it, the principle "U". It is not only by prevailing against something particular that universal claims its legitimacy. It is also by defining and demonizing its enemies, defined as the enemies of humanity. Under the tenet of these very Schmittian concepts, Habermas sees nationalism as perhaps the worst enemy of cosmopolitanism, post-modernity as the enemy of modernity, but oddly enough he does not ask for the disappearance of national state which remains to be the carrier of the legal and democratic changes. Therefore, the sacrifice of nationalism is not part of the tragic destiny of the national state, but the condition for a questionable intersubjective mind that the modern law needs to recognise.

Chapter I

1.1 Hegel – a platonic realist and absolute idealist

The first premise this study is based upon is that the modern world embraced Hegel's philosophy in its pure, non-critical point of existence. Milović's reflection upon the present world as the "actual, global world [that] is a Hegelian delirium,"[11] is perhaps just one of the possible conclusions about the modernity, but certainly the premise this work is going to follow to its last points. In order to show this, I will deconstruct certain dialectical relations between main ideas of his theory, which are rooted in the speculative method of his deeper philosophy. Reading his main works, a connection can be observed, as everything is fitting in that organic system of thoughts and ideas that gave birth to the theory of modernity. Therefore, I will reflect upon the concepts of *spirit*, freedom and history in Hegel's philosophy in order to show how he comes to the modernity using the development of his ontological philosophy. The question that arises from the analysis of this part of the work is how modern and different our world is today compared to the world Hegel wrote about?

Hegel confronts positivism, reconstructing the dialectical structure of the world.[12] However, while conceptualizing his legal philosophy, he captured the moving dialectics of speculative mind within the concept of state, to such a degree that the sources for the self-critical arguments are very hard to trace back in the "Philosophy of Right." With the political finality in the modern state, and the legal finality in the modern law, doors to the critique are shut. This is the second premise that will also be introduced using some of the Hegel's conclusions. The concept of the modern and legal fetishism can be caught in the legal net of violence and exclusion. The latter I employ in the last chapter (when I go back to the tragic dialectics of Yugoslavia) as the criteria for a critique of modernity and modern law, in order to halt the constant reproduction of the old, and look for the new.

What Hegel firstly remarked on the human nature and human world is their antagonistic feature that is standing both between human beings and their natural surroundings, and between one form of a human life and another. This antagonism is seen in the first acts of appropriation, mostly through private property and work.[13] The world that Hegel lived in and studied was an abyss where humans felt like being thrown into, away from justice, freedom and God. His

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[11] Milović, Zajednica razlike, p.11.
[12] Milović, Emancipação como reflexão: Habermas, p.1.
[13] Appropriation as the starting point of our historical and human existence is the idea that Carl Schmitt also develops in his work "The *Nomos* of the Earth." See Chapter Three, pp.45 ff.

philosophy represents the search for a way out of the world where individuals did not exist as free subjects that can decide upon their lives. In addition, the political scene of the Kingdom of Prussia was a scene of complete depoliticization and slavery whose only purpose was to prevent people from reaching freedom. However, aside from the dark diagnosis of the society, he was of the opinion that the same cause that made us fall into the state of injustice and unfreedom is what could bring us out of there and that is – the knowledge. Regarding this idea, Marcuse wrote:

Thinking, however, varies among individuals, and the resulting diversity of individual opinions cannot provide a guiding principle for the common organization of life. Unless man possesses concepts and principles of thought that denote universally valid conditions and norms, his thought cannot claim to govern reality. In line with the tradition of Western philosophy, Hegel believes that such objective concepts and principles exist. Their totality he calls reason.[14]

This Hegelian reason wants to find "universally valid condition" and overcome the abyss, to bring hope and victory in what is called the modern world. The French Revolution, according to him, managed to recognize the mind in the world, and put it at the core of the system of rights, giving it a practical force and positive features. Hegel needs institutionalized rights in order to bring reason to state institutions,[15] reason that is supposed to be double recognized: between the state and the people, and among the people themselves. Thus, Hegel's theory of recognition is supposed to overcome limits of the 'contract theory,'[16] most specifically the limits it shows when related to a necessary legitimacy that is reachable only through the theory of recognition. Furthermore, it is only by the reciprocal recognition that the dialectic of the lord and slave can be broken. Hegel needs this story to show specifically human existence as a way into the world of humans. A slave does not belong to a specifically human world since he works in order to satisfy the desires of his lord, and not his own. In other words, his existence and work is established on someone else's idea in which he becomes a commodity. Because he chooses a bare life over death, he is merely an extension of the master. However, the paradox of slavery is in the fact that there is no mutual recognition between the slave and the master. The fear from death makes the slave to accept its recognition as a bare

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[14] Marcuse, Reason and Revolution - Hegel and the rise of social theory, p.7. [In following Marcuse, Reason and Revolution]

[15] This is the same way Habermas bridges the gap between his communicated, argumentative reason, and the institutions that he needs in order to secure conditions for the communicative action. Albeit, unlike Hegel, he sees the possibility of those institutions outside of the state, in the realm of the international or cosmopolitan constitution. See Chapter Two.

[16] See PR, §258, pp.275-81.

commodity, a thing, a property of the master. But this means that the recognition the master receives from the slave is uncertain and deficient at best. Moreover, the master despises the slave as unessential and holds his recognition to be unreliable, unsubstantial and worthless. And yet the master is dependent on such "worthless" recognition.[17] It is this paradox that Hegel's philosophy of right tends to break, and it is via theory of recognition that he approaches the law as the necessary condition for the double recognition, giving the social base for one's definition. Being-recognized (*Anerkannstein*) means that the individual exists now as a 'universal individual', and that it is intersubjectively and reciprocally recognized member of 'We'. As a member of 'We', he exists by the right of recognition. Recognition is the right to have rights.[18]

However, despite the strong accent on the principle of the double recognition, the more mature Hegel will be mostly focused on emphasizing the idea of state as the necessary condition for our freedom, and as such, his theory of the state remains immune to the changes in the reason. In this way, Hegel closes his dialectics in the authority of law and state. He brings the modernity back to the abyss of alienation in a social sphere and irrationality in a legal sphere, two features we can find in the present world. This 'caesura' in the exposition, Hegel found in the Prussian monarchy, when the externalization of the state law into the realm of the international law meant returning to the state of nature and dialectics of war and peace, when each state was protecting its ethical *pathos* and sovereignty. In this situation, there is no room for the speculative mind or critique, only for surviving.

In what follows, I will bring Hegel to the French Revolution by firstly presenting the main characters of his philosophy, in order to observe them both independently and as related one to another, which will allow me to give them their proper examples and possible definitions. Therefore, this chapter starts with the concept of *Geist*. A short exposé is made about this concept, with a note for the reader that this research is not focused on Hegel's phenomenology of spirit, and that the usage of the latter is strictly limited to providing a general understanding of Hegel's system of philosophy. That is why many of its aspects and features are not embraced in this work. The concept of *spirit* is firstly seen through the social labor, and then through the concept of freedom, a lighthouse of Hegelian philosophy. Freedom is what dialectics is all about, and through it, the particularities can embrace universal in all its features and potentials. That is how we come to the history that I observe through Hegel's philosophy

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[17] William, Hegel's Ethics of Recognition, p.63.
[18] *Ibid*., p.101.

of tragedy. I chose the latter as a center point in explaining the development of state and process of history, since, in my opinion, tragedy is a motive that appears in very early Hegel's works, marks his modern state, and ends with the world spirit to which he returns in order to finish *Rechtsphilosophie.* I will bring his fixation with the heroine Antigone to the level of the political-legal critique, as I come closer to the discussion about the relation between Hegel and the French Revolution. This relation will be approached by employing his legal theory, the concept of the 'abstract right,' and by revisiting the motives of sacrifice and necessity for a change, the main motives from his philosophy of tragedy. In this way I overcome the contradictory relation between revolution and Hegel. Moreover, like this, certain Hegel's limitations and different readings of his concepts shall be examined.

By separating modern from ancient tragedy, Hegel in some way defines modernity as a tragedy within its impossibility to reach the universal freedom, and therefore, to perish in its particular nature. Furthermore, the modern tragedy is seen as a depoliticized structure where characters do not act by reason of ethical *pathos*, but only by following their own passions and external circumstances. Thus, "Antigone", seen as a tragedy of law, presents one of the modern consequences found in the gap between legal and social. This is a strong critique of modernity – a critique that will reemerge in the last chapter of this work – that can also be seen as an even stronger argument against Hegel himself. His unwillingness to let the concept of national state into fair dialectics, with possibility of its sacrifice, shows the same fear he originally had regarding the French Revolution. Moreover, it shows a closure of a moving and never-ending speculative dialectics, into what can be called the ideology of the state, where abstract right, world spirit and history serve as a coil where injustice, irrationality, and violence get to be justified.

1.2 Main claims about *spirit*

It is interesting to note the story behind the first printing of the "Phenomenology of Spirit."[19] After Hegel took the last parts of PS to the printing office in January of 1807, already by the end of March the material was ready to be taken to bookbinders. Unexpectedly, when the bookbinding had already begun, Hegel decides to change the subtitle of his book. Bellow the original title, *System of Science*, was a name and surname of the author followed by *First*

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[19] In the following text abbreviated as PS or *Phenomenology*.

part, Phenomenology of Spirit. On the next page, there was another title, which is actually the title of the book – *The Science of the Experience of Consciousness*. By Hegel's intervention, this title was replaced with *Science of the Phenomenology of Spirit*.[20] This resulted in the PS being sold under three different titles – one without Hegel's change, the other one that was a modified version, and the third that included two titles. In addition to all the confusion, this gave the impression that Hegel himself was not sure what *Phenomenology* was supposed to be – was it an introduction to his system of science or was it already a science? Even though this study will not delve into a long and in-depth discussion about the position of PS in his other works, especially in the "Science of Logic," it is interesting to note that from the very beginning of his project of making the system of science, the PS was moving from inside to outside, from introduction to conclusion; however, the essential character of his system was never put in doubt.

Therefore, the endeavor to grasp and define Hegel's concept of *spirit* separately is a limited way of understanding his oeuvre and his philosophy, since all his ideas and concepts are intertwined, sharing and influencing each other's destiny. Besides this observation, in the following text, I will use subheadings as a guide through the Hegelian world while I attempt to find different angles to approach the concept of *spirit* as closely as possible. Consequently, during this process, I will define and reflect upon other notions that are given in the subheadings.

1.2.1 *Spirit* as a social labor

To begin with, the following is the first claim about the concept of *spirit*: it can be seen as "a general consciousness, a single "mind" common to all men". (…) *"Geist"* is the hallmark of a theory of self-identity – a theory in which *I* am something other than a *person*.[21] Many authors have tried to bring this notion closer to the other, and by doing so, to reference to it as an object or even to identify it with another notion. Some consider the *spirit* as being realized, and therefore able to be grasped in the social labor. In the economic and philosophical manuscripts of young Marx, discovered in 1932, this was recognized for the first time:

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[20] More about this see Friedrich Nicolin, Zum Titelproblem der Phänomenologie des Geistes, in Hegelstudien 4, 1967, pp.114-123.
[21] Solomon, From Hegel to Existentialism, p.3.

The outstanding achievement of Hegel's *Phenomenology* – the dialectic of negativity as the moving and creating principle – is, first, that Hegel grasps the self-creation of a man as a process, the objectification as a loss of the object, as alienation and transcendence of this alienation, and as a result, he grasps the nature of *labor* and conceives the objective man (true man, because he is real) as the result of his *own labor*.[22]

Furthermore, the labor that Marx refers to is not any kind of labor, like for example a manual labor. It is a specific social labor that comes from the nature of society that in turn represents the essence of the concept of *spirit*. By affirming and developing the concept of labor in Hegel's philosophy, Marx at the same time tries to separate it from the specific Hegelian metaphysics. A labor without metaphysics may be, briefly put, the consequence that Marx is trying to take from Hegel's philosophy.[23]

The social actors through their labor, together with the idea and understanding of their community, state and world history, are able to reproduce their lives and create something objective and universal, something above each of them and independent from them – something called society. In order to understand this labor as an idea that has its self-awareness, we have to start from the natural world, because labor comes from nature, just like the *spirit*. While reflecting on the natural world, Hegel poses two questions – is philosophy a way to overcome nature, and can humans indeed separate themselves from the natural world? This is where the question about the natural desires arises, and when we need to think about all living beings in order to deduce what belongs specifically to humans. Can animals have self-consciousness and can they overcome their natural desires? These are one of the first questions Hegel asks on his way of defining freedom. For Milović, the exclusive characteristic of the animals is the part of a "bad or spurious infinity" (German *schlecte Unendlichkeit*).[24] The process of dialectics cannot rest upon spurious infinities that need to be replaced by a more universal concept. Animals do not dominate the nature, and thus the question about the realization of freedom stays unanswered, as a question of the realization of a specific human world. (…) That is why Hegel says that the realization of desires is not bound to the natural

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[22] Marx, Economic and Philosophical Manuscripts, translation in Fromm, Marx's concept of Man, p.145.

[23] Milović, Zajednica razlike, p.16.

[24] Contrary to *schlechte Unendlichkeit,* Hegel employs the concept of the true infinity, which is accessible by reason and is at the core of his speculative engine, bringing the concepts of absolute idea and absolute spirit to the criticism of the traditional metaphysics and of Kant's relation between theology and morality. More on this subject see G.W.F. Hegel, *Wissenchaft der Logik* (English translation by A.V. Miller: Hegel's Science of Logic); Robert R. Williams – Hegel's Concept of the True Infinite; A.W. Moore, The Infinite; Stephen Houlgate, The Opening of Hegel's Logic: From Being to Infinity.

world (…) but to the social, intersubjective world.[25] Therefore, if the act of overcoming natural desires depends on a satisfaction bound to the objects, we remain in the natural world, the world of animals. Guided by these desires, the subject is performing a destruction of the *other*, in order to confirm its subjectivity. However, after destroying it, the desire and idea of the *other* prevail as they are still necessary for the self-defining of the subject. As a consequence, the subject will have to create another *other* to be destroyed.

Desire and self-certainty obtained in its gratification, are conditioned by the object, for self-certainty comes from superseding this other: in order that this supersession can take place, there must be this other. Thus self-consciousness, by its negative relation to the object, is unable to supersede it; it is really because of that relation that it produces the object again, and the desire as well.[26]

The true satisfaction needs to come from the fulfillment of desires that come from the social world in which they are connected to other desires and other subjects. At this point we can see Hegel's critique of capitalism that always enchains desires to some objects, and by doing so, the satisfaction of those desires stays in the world of objects, in other words, stays in the animal world.[27]

At the end of the "Science of Logic," Hegel finds the idea capable of externalizing itself in the nature and coming back to find its subjectivity, in order to become aware of its existence and place, to become the world spirit at the moment when the spiritual shows itself to the world. The same path physical labor needs to take to become recognized as a social labor. For this social labor "is that process in which consciousness makes itself into a thing, in order thereby to form itself into its own proper form [*sich zu sich selbst bilden*], and finally, as the offspring of bourgeois society, to divest itself of its servile guise."[28] In the process of gaining self-consciousness that leads to a modern society, this moment of separation of physical from social labor is a crucial point in understanding the difference between the animal and the human world, and the difference between the particular and the universal.

Finally, a great admirer and expert on Hegel's philosophy, Adorno will summarize the above mentioned as following:

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[25] Milović, *op. cit.*, p.15.
[26] Hegel, PS, §175, p.109.
[27] Idea borrowed from Milović, *op. cit.*, p.15.
[28] Habermas, Theory and practice, p.128.

If one were permitted to speculate about Hegel's speculation, one might surmise that the extension of spirit to become totality is the inversion of the recognition that spirit is precisely not an isolated principle, not some self-sufficient substance, but rather a moment of social labor, the moment that is separate from physical labor.[29]

However, the labor is not the *spirit,* since the latter can exist without the former. Hegel reflects upon this in a clarification that no one can directly step into other worlds from the world shaped by labor. This is his distinction with Marx who saw the labor as an absolute category that is able to move directly through different social horizons. Therefore, social labor will stay a field where the objective spirit can show itself to the world.

1.2.2 Dialectics of *spirit* as dialectics of freedom

The particular for Hegel does not have any historical value; it cannot answer the needs and explain entirety and it is always depending on it. This is not in any way canceling the individuality, but for Hegel the questions of reason are philosophical questions. It is in the philosophical concept of freedom and free will, where Hegel finds a feature that makes us different from the other animals, with which we continue to share the natural part of our living being's souls. Thus, the cornerstone of Hegel's philosophy is found in the principle of freedom.

Freedom is capable of reducing the premises for establishing the speculative dialectic due to its own nature that corresponds to the movement of the *spirit*, its tendency towards the universal, where the final reconciliation is possible only under the flag of freedom. The system is viewed as organic, springing from these particular special moments by the force of their sense of totality that already resides in each of them. The concept of the system implies the identity of subject and object, which has developed into a sole and conclusive absolute, and the truth of the system collapses when that identity collapses. But this identity, a full reconciliation through spirit in a world which is in reality antagonistic is a mere assertion.[30] Therefore, thinking about absolute and universal, and their truth, enabled Hegel to penetrate from his time into the future of the system's logic.

Maintaining a speculative mind open to new questions is the most important instrument

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[29] Adorno, Hegel – three studies, p.23.
[30] *Ibid.*, p.29.

towards the *reason* which has to be presented in the critical mind. What is speculative in Hegelian thought is the ability of self-critique, the reflection about itself where oneself becomes the object of reflection that observes and criticizes; and afterwards, returns to being the subject, bringing self-consciousness that one was lacking on the way of defining oneself in a bigger picture and grasping the continuity of time before and after them. By studying and overcoming the nature, the *spirit* becomes self-conscious of its freedom, and in addition, freedom gets realized in the *spirit*. Everyone can be free, and to become free is possible only in a society where your freedom is being observed and recognized by other members. Therefore, the self-consciousness of freedom is only possible when the idea of freedom is externalized from the subject of that idea, by being carefully considered and enriched with awareness and knowledge; and then, brought back as the object, and thus becoming a free subject due to its self-consciousness. This process of self-reflection is possible only in the *spirit* that can grasp the dynamics and antagonisms of the subjects. Like this, the *spirit* is essentially active and productive, and moreover, it is an unqualified and absolute concept that does not belong to the sphere of particular objects. There is nothing particular about the *spirit*, as there is nothing particular about freedom that exists as a possibility and a task for each individual, however its borders are not drawn in the particularity of those who search for it – it is quite the opposite, they are drawn in their universality.

Accordingly, the relation between the particular and the universal can be regarded as the engine of Hegel's moving dialectical method. The constant negation of both particular and universal corresponds to the dialectics of self-consciousness and freedom, and it is essential for the critical mind. History is based on this antagonistic relation, and a just *idea* in the world can prove its eternity in history, which we will see later in the example of the state and its dialectics of becoming and disappearing. This negativity, which is at the center of speculative dialectics, is the "force of the subject to move, to create itself from itself."[31] Therefore, it can be observed as a process of reaching self-consciousness and becoming a subject that can define itself in the world by carrying its subjectivity as the only necessary condition. When a subject is guided by desires, it sees itself separated from the *other*, and only by its negation it can confirm its place in the world. In order to become truly conscious, the subject needs to reach out and see the other self-consciousness, not as an opposite to his or her world, but as a part of the shared world. Only then a self-conscious subject can refer to the *other* as a part of the subject, and

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[31] Jovanov, Hegelovo pravo naroda, p.158.

only then the conditions are met to have "the 'I' that is 'We' and the 'We' that is 'I'."[32]

1.2.3 Freedom as a chance for particular to become universal

Hegel criticizes Kant for setting a discussion on freedom in our limited interior, and for failing to see it in the political space. Contrary to Kant, Hegel sees freedom in the French Revolution, where both mind and freedom got realized in the real world, and moreover, it is the revolution that showed the mind to the world – it is a point in time when the world became guided by the mind. Despite this critique, Hegel continues with Kant's argument that the answer to the questions of freedom cannot be found in theory but in practice.[33] This is a very important moment in the history of philosophy; a moment when it decided to tear its dogmatic-theoretical veil and admit the importance of practical discussion, praxis, as a part of human nature and means of its own realization in the modern world. Freedom is the one that sheds the light on the path of our dignity and recognition in modernity.

Hegel recognizes freedom only when a certain 'particularity' is overcome and subjects act 'universally' or 'objectively,' according to the 'concept' of the will. (PR, §23) Moreover, freedom cannot be separated from the mind; it is in constellation with it and it is not an act that makes us free, but rather a proper action that is free from external influences and forces. As such, it is closely connected to the notions of mind, universality and mediation.

(a) Adorno says that "freedom and reason are nonsense without one another."[34] When we talk about freedom we talk with our mind, and our will is the product of that conversation, and as such, it is recognized as free in its substance. Freedom is 'being with oneself in an other' since it "is possible only to the extent that we act rationally, and in circumstances where the objects of our action are in harmony with our reason."[35]

(b) Hegel puts the antinomy of general and particular in the bourgeois society, along with the reason's imperative, at the center of his argument concerning false freedom in civil society where individuals are without real freedom, and "the [unfree] individual who, in the midst of universal unfreedom, behaves as though he were already free and universal."[36] Freedom needs to overcome 'particularity' and act 'universally and objectively' and this corresponds to the

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[32] Hegel, PS, §177, p.110.
[33] See Milović, Zajednica razlike, p.12-3.
[34] Adorno, Hegel – three studies, p.44.
[35] Hegel, PR, Editor's Introduction, p.xii.
[36] Adorno, op. cit., p.46.

first condition of reason. Thus, the impossibility of particular to overcome the universal is at the core of the bourgeois society which is trying to give a final definition and interpretation of destiny using the particularities of its own existence. As such, the s*pirit* cannot realize itself as a project of correspondence of oneself with the *other*, but it can only exist as part of the particular dialectics in the antagonistic system.

(c) Additionally, Hegel is of the opinion that there is nothing in this world that is not mediated (German *vennittelt*), nothing that does not contain a reflection of its existence. Therefore, in order to understand his notion of freedom, we have to keep in our minds his postulates about the symbiosis of particular and general, and of the universal mediation between all things that are available in our objective life, to which freedom and empire need to correspond. For him, even the "[i]mmediacy itself is essentially mediated."[37] The principle of mediation is the search for universal laws that are incorporated in the principle of experience, the principle which in the process of learning allows us to incorporate it into one unity with certainty. Like this, "[i]mmediacy of knowledge is so far from excluding mediation, that the two things are linked together – immediate knowledge being actually the product of mediated knowledge."[38] As freedom needs to reach the moment of experience in order to be recognized in an objective world, that world depends on the principle of mediation that is inseparable from immediacy.

1.2.4 Truth and freedom

According to Hegel, I am free when I identify myself with the institutions of my community, feeling as part of them and feeling them to be part of me. However, Hegel would deny such feelings with the ability to constitute freedom unless they are a "certainty based on *truth*."[39] Truth as such cannot be something touchable. Hegel refers to it as a dialectic process for itself, as its own self-movement, the coincidence of the object with itself. Therefore, an untrue, bad object "does not correspond to its concept."[40] In order to partially grasp the truth as the opposite to untruth, we need to be able to prescribe to the former the ability to grasp the subjective moment of self-consciousness, to separate those subjective reflective moments of truth that can reconcile "the injustice that the operating subjectivity does to immanent truth in

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[37] Hegel cited in Adorno, Hegel – three studies, p.57.
[38] *Ibid.*, p.59.
[39] Hegel, PR, Editor's Introduction, p.xxvi.
[40] Hegel, Lectures on natural right and political science, p.276.

merely supposing and positing as true something that is never wholly true."[41] Therefore, untruth is the subjective, particular moment of truth.

Furthermore, by using the idea of objective truth to strengthen the subjective mind is the only way to see the true possibility of a free subject. The truth as such lies at the core of the institutional framework and must be objectively found, separated from illusions and ideologies, or otherwise produced, untrue institutions and state cannot protect freedom for people. That is why Hegel is aware "that in the modern world, people cannot be free in his sense unless social institutions provide considerable scope and protection for arbitrary freedom."[42] These institutions need to be a mirror and a guardian of our new image as individuals and modern subjects which in return gives meaning to our lives and to the goals we chose freely and rationally.

Therefore, being free and existing as a free subject can be understood through the ends we set for ourselves. *Subjective freedom*, or free will, is reflected in a process where we identify ourselves according to specific individual ends that are not submitted to the ethical testing and have no moral qualities whatsoever. One can chose its end as bad or good, without any concern. Contrary to this kind of freedom stands *objective* or *moral freedom* where the ends that subjects are following are held to be good, i.e. socially good, and accordingly, the subject can be seen as entirely free man or woman. True freedom implies that we are pursuing ends that are higher than ourselves, that are universal and belong to the world of ethics. Only those who feel free and have opportunities to pursue their goals are the subjects that can act on the universal plan of the social, with their ends belonging to the universal and ethical, above the particular, and can consequently become "oneself in an other." The absolutely universal end, Hegel sees in the state. (PR, §256) Thus human actions gain universal, cosmopolitan significance not through their relation to abstract moral principles, but only in so far as they are the actions of someone culturally and historically situated, and give existence to the ethical life of a determinate people at a given stage of its history. If I want to see my actions in their universal historical significance, I must regard myself as the child of my age and people, and my deeds as the expression of the principle embodied in my state and my time.[43]

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[41]Adorno, Hegel – three studies, p.37.
[42] Hegel, PR, Translator's Introduction, p.xiii.
[43] Hegel, PR, Editor's Introduction, p.xxv.

1.2.5 Geist in the world history

Man is a thinking being. His reason enables him to recognize his own potentialities and those of his world. He is thus not at the mercy of the facts that surround him, but is capable of subjecting them to a higher standard, that of reason. If he follows its lead, he will arrive at certain conceptions that disclose reason to be antagonistic to the existing state of affairs. He may find that history is a constant struggle for freedom.[44]

The platform that the *spirit* and its dialectics is both creating and revealing to the World Spirit is history. Thus, the *spirit* has to be analyzed through history, as the World Spirit is a historical form of the *absolute*, and in history it shows itself as the Individuality of the *spirit*. Furthermore, corresponding to the nature of the *spirit*, history can only deal with the reason, and Hegel saw the state as the realization of that reason. On the way of becoming universal, the particular has to use negation and destruction in order to become aware of its historical position and to build up its position related to other historical subjects. Negating means canceling existence, as the only way to observe finality of a particular form within the continuity of the general idea. In this process, the one that is canceled continues to exist in its interior. Hegel sees speculative dialectic only in the history, because only through historical self-consciousness *spirit* goes inside of himself [*Insichgehen/Er-innerung*] and this represents the closure of the formation of the absolute spirit: "He [*spirit*] has no more content in front of him (...), but it is a unity of objective spirit and its idea as the truth."[45] He knows that he knows, and that is what he needs to be free.

The world spirit is; but it is not a spirit. It is the very negativity, rather, which Hegel shifted from the spirit's shoulders upon the shoulders of the ones who must obey it, the ones whose defeat doubles the verdict that the difference between them and objectivity is what is untrue and evil. The world spirit becomes independent vis-à-vis the individual acts from which so-called spiritual evolutions too are synthesized, as is the real total movement of society; and it becomes independent vis-à-vis the living subjects of those acts.[46]

Historicism is one of the strongest critiques that can be given to Hegel's philosophical

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[44] Marcuse, Reason and Revolution, p.6.
[45] Jovanov, Hegelovo parvo naroda, p.193.
[46] Adorno, Negative dialectics, p.304.

system. When criticizing Hegel and perhaps his best spokesman, Bruno Bauer, Marx reflects upon the following statement: "What would be the purpose of history if its task were not precisely to prove these, the simplest of all truths (such as the movement of the earth round the sun)?"[47] It can be deduced from this that history is a truth that can only be followed, as an objective existing above. According to Marx, in Hegel's history, men serve the objective spirit, living only in order to maintain its existence. Additionally, the *spirit*, on its way of reaching self-consciousness and freedom, marks history as a higher instance that can justify, include or exclude, create or destroy. That is why history, like truth, becomes a person apart, a metaphysical subject of which real human individuals are but the bearers.[48] In the reading of Hegel, history becomes a *divine dialectics,* a metaphysics that in the chapter about "State" in the PR will be used in order to defend his premises that he used for building the modern state.

With its dialectic of war and peace, history accepts victims in the name of a further dialectical *development* of the *reason*. Seen like this, history becomes the perfect soil for growing modern capitalistic relations and its consequences, as an accumulation of capital and constant urge for enrichment. In order for history to escape from the clutches of objective, given and divine, Marx had famously said:

History does nothing, does not 'possess vast wealth,' does not 'fight battles'! It is man, rather, the real, living man who does all that, who does possess and fight; it is not 'history' that uses man as a means to pursue its ends, as if it were a person apart. History is nothing but the activity of man pursuing his ends.[49]

After that, Marx gives his final critique of Hegel:

Thus, for Hegel, all that has happened and is still happening is just what is happening in his own mind. Thus the philosophy of history is nothing but the history of philosophy, of his own philosophy. There is no longer a "history according to the order in time," there is only "the sequence of ideas in the understanding." He thinks he is constructing the world by the movement of thought, whereas he is merely reconstructing systematically and classifying by the absolute method of thoughts which are in the minds of all.[50]

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[47] Marx, The holy family, p.105.
[48] *Ibid.*, p.107.
[49] Marx cited in Adorno, Negative Dialectics, p.304.
[50] Marx, Poverty of philosophy, p.48.

1.3 History as a dialectics of tragedy

[A]ll historical knowledge is knowledge of the present, that such knowledge obtains its light and intensity from the present and in the most profound sense only serves the present, because all spirit is only spirit of the present.[51] This "world of becoming" as the only real world puts the change in the center of the dialectical and historical process of the *spirit*, as universalism can be seen contrary to presentism. That is why Hegel saw the world history "as a development of the spirit's consciousness of its own freedom and of the consequent realization of this freedom,"[52] and as Marcuse clearly says: "He made philosophy a concrete historical factor and drew history into philosophy."[53] History is the field where the *absolute* shows itself, and what we call "historical epochs" embrace this process.

Hegel recognized the French Revolution as the prevailing point in the history of freedom, even though the 'new world' did not come as a product of the Revolution, but as a philosophical consequence of German idealism. Therefore, the dialectic of *spirit* that I have tried to embrace above shows itself in the dialectic of state which is part of the philosophy of history. This dialectics is speculative, and its speculative nature Hegel found first in aesthetic expression, namely in tragedy. The philosophical consideration of tragic thought significantly contributes to the birth of speculative thinking which directly links the tragedy with the political, strongly emphasizing that it is only an aesthetic act that is capable of closing the philosophical system.[54]

Hölderlin said that philosophy can be described as a hospital for miserable poets like he was. Hegel would disagree with that, since for him the poetry is a cry of a beautiful soul that needs to be overcome, and that can only be done through philosophy. For this reason Hegel was originally inspired by tragic themes, and his knowledge came from an artistic expression typical for the old Greek people; he used to justify and reflect upon the dialectics of spirit in world history and the history of states. The conflict between the two values is not a conflict between good and bad. A falling hero is not the one who holds ugly or bad costume and, therefore, whose destiny is to die. Similar to history, in the tragedy the 'first big fall', the 'fall of polis' represented an important motive for the philosophers of tragedy in 1800s. What is the political-legal value of the tragedy in modern time is what Hegel among others tries to find out.

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[51] Schmitt, The age of neutralizations and depoliticizations in Concept of Political, p.80.
[52] Adorno, Tri studije o Hegelu, Afterword to Serbian edition, p.145.
[53] Marcuse, Reason and Revolution, p.16.
[54] Jovanov, Hegelovo pravo naroda, p.45.

His philosophy of tragedy can enter into the discussion about modernity as the product of the dialectics of world spirit (which follows from the above mentioned), which is the case in the discussion about the *legal*. That is why his "Philosophy of Right" ends with a part about the world history, showing that states and their dialectics must have knowledge of their tragic destiny in order to observe the *absolute* in their epoch. Why did he choose to finish his book on legal theory with aesthetic questions and with "heroes to find states," and are those "heroes of history" a priori tragic, are the two main questions that I will approach in what follows. I will firstly (a) reflect on Hegel's revival and understanding of tragedy as an aesthetic form that can answer some philosophical questions; and (b) I will argue whether the moment of tragic sacrifice of the hero will be a decisive factor in his dialectics of state and law.

1.3.2 Aesthetic before and after philosophy

The notions of *tragedy* and *sacrifice* have a big importance in understanding early Hegel thoughts. He examines these questions in the chapter five of "Phenomenology of Spirit" where he observes ethical action and character partly by using the analyses of "Antigone." Additionally, he will analyze Socrates as a tragic hero in the Introduction of his "Lectures on the History of Philosophy," and in "Lectures on the Philosophy of History" he envisages a tragic hero of world history who shapes it without being aware of doing so. The most important source of Hegel's aesthetic theory are his "Lectures on Fine Art" that were published posthumously by his student Gustav Hotho and are based on Hegel's lecture notes and student's transcription of the lectures he held in Heidelberg and Berlin in the period from 1818-1829. Last but not least, Hegel renews the aesthetic question in the "Philosophy of Right", which can be seen in the fact of incorporating the philosophy of history in the last paragraphs of the PR.

In the early years of studies, Hegel was inspired in a great deal by the works of F.W.J. Schelling and Friedrich Hölderlin,[55] his roommates from the university days in Tübingen. The philosopher and lyric poet were most certainly one of the biggest influences on Hegel in his

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[55] In addition to them, the work of the poet Friedrich Schiller also left an important influence on Hegel's philosophy. Schiller was focused on aesthetic answers to philosophical questions, where the 'beautiful' is the only one that can unite the mind and passions of people, so they can form their society based on mind and freedom. More about Schiller's main ideas see "On the art of tragedy" [*Über die tragische Kunst*], 1972. For more insight about the influence Schiller's theory had on Hegel see Michael H. Hoffheimer, The Influence of Schiller's Theory of Nature on Hegel's Philosophical Development, Journal of the History of Ideas, Vol. 46, No. 2, 1985, pp. 231-244.

Jena period.[56] Schelling's writings about the Greek tragedy and its antagonistic nature made an impact on Hegel's dialectics. "Since Aristotle, there has been a poetics of tragedy. Only since Schelling has there been a philosophy of the tragic."[57] Schelling in his philosophy of tragedy was always coming back to the question "why a tragic hero willingly submits to his or hers tragic destiny?" as a question about the confrontation of human freedom with the power of an objective world. For him, freedom gets recognized in the loss of freedom:

"The essence of *tragedy* is thus an actual and objective conflict between freedom in the subject on the one hand, and necessity on the other, a conflict that does not end such that one or the other succumbs, but rather such that both are manifested in perfect indifference as simultaneously victorious and vanquished."[58]

Therefore, it is not every 'misfortune' that can be defined as tragic, but only "the highest possible misfortune: by fate to become guilty without genuine guilt."[59] The reading of tragedy as the conflict between subjective and objective that was used for reaching the equilibrium between justice and humanity, and that is what that inspires Hegel to think about the possibility of freedom after the conflict, after the voluntary tragic fall of the hero. From this fall and after the conflict, freedom manages to confirm itself as the "supreme necessity," and it is in tragedy where Schelling observes that "[f]reedom cannot exist as mere particularity. This is possible only insofar as it elevates itself to universality, and thus comes to an agreement with necessity concerning the consequences of guilt."[60] Moreover, human mind is tragic in its constant fight with the destiny and objective power that rules above it (first the nature, later the state) and when its forces are used, the idea of the absolute spirit can continue existing only in artistic expression.[61] In what it follows, three points about tragedy and Hegel will be presented.

(1) Within the speculative negation or historical destruction where something is confirmed to be part of an objective world, Hegel follows the 'logic' of the tragic fall. As Hölderlin points out, from the philosophical point of view, the most interesting feature of the tragedy is not the aesthetic moment as it is in literature, but a **paradox**, and that is why the "meaning of tragedy

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[56] More about Hegel's biography, and the influence on his philosophy see Georg Lukács, The young Hegel (Merlin Press, 1975); Terry Pinkard, Hegel: A biography (Cambridge University Press, 2000); Hegel's Development I: Toward the Sunlight (1770–1801), (Oxford University Press, 1972); H.S. Harris, Hegel's Development II: Night Thoughts (Jena 1801–1806), (Oxford University Press, 1983).

[57] Szondi, An Essay on the tragic, p.1.

[58] Schelling, The philosophy of art, p.251.

[59] *Ibid.*, p.252.

[60] *Ibid.*, p.254.

[61] For further reading on artistic expression that cancels myth and recognizes the divine, see Walter Benjamin essay, Two Poems by Hölderlin.

is easiest to understand by paradox."[62] This paradox is seen in the fact that by losing something particular, something can be possessed, like in the case of freedom in Schelling's reading of tragedy. In a renewed inquiry of the Greek tragedy in 1800s, freedom will be a central point, and the game of having and losing freedom is seen as a tragic game. Theories of tragedy are not simply alternate means of philosophical inquiry; they represent a particular and crucially important perspective of the central problem: *the historical nature of human freedom*.[63] As for Hegel, history is a process of self-realization of the idea of freedom in the world spirit, the paradox of destruction and construction is exactly what he needed for his early philosophy, and what he used in his final works. Moreover, it can be equally claimed that his philosophy of tragedy is the consequence and the lodestar of the *absolute* self-realization in history. Simply put, the death of the particular is a tragic death, but a necessary one, so that the universal can be shown and stop being hidden in its limitation as the particular identity.

(2) When tragic hero is confronted with the natural world, his tragic destiny is not seen as something aesthetically bad or ugly, nor are his values wrong in the first place. Hegel saw tragedy happening between two positions where the hero takes one side that is **equally justified** as the other, but both sides fail to see the validity of the other position, so the conflict can be resolved only by the fall of the hero. In the best tragedies, the conflict has to be equal, and that is clear in his [Hegel's] interpretation of the Sophocles "Antigone," and many times it is indeed the collision of two goods, which is the "most dramatic and most powerful."[64] In the LA, Hegel writes about the tragic story of the heroine Antigone:

Everything in this tragedy is logical; the public law of the state is set in conflict over against inner family love and duty to a brother; the woman, Antigone, has the family interest as her 'pathos', Creon, the man, has the welfare of the community as his. Polynices [Antigone's brother], at war with his native city, had fallen before the gates of Thebes, and Creon, the ruler, in a publicly proclaimed law threatened with death anyone who gave this enemy of the city the honour of burial. But this command, which concerned only the public weal, Antigone could not accept; as sister, in the piety of her love for her brother, she fulfils the holy duty of burial. In doing so she appeals to the law of the gods; but the gods whom she worships are the underworld gods of Hades (...), the inner gods of feeling, love, and kinship, not the daylight

[62] Hölderlin, *Der Tod des Empedokles*, Aufsatze, p.274 as cited in Jovanov, Hegelovo pravo naroda.
[63] Billings, Genealogy of the tragic Greek Tragedy and German Philosophy, p.6.
[64] Roche, Introduction to Hegel's theory of tragedy, p.15.

gods of free self-conscious national and political life.[65]

Among the readers of Hegel's oeuvre, his "obsession" with Antigone has generated intense discussions about the chapter five in the PS. The two main views are placed between the hidden metaphors of his interpretation of "Antigone." One where the heroine represents the modern value of individuality that could not be seen nor grasped in the Greek polis; and the other in which Hegel is seen as an admirer of Creon because of his own political philosophy and "semi-worshiping of the state."[66] In my opinion, Hegel did not observe the ancient tragedy through the tragic destiny of a hero or heroine, but rather as a conflict of two ethical pathoses. The tragic occurs in the impossibility of both Antigone and Creon to observe the justice in each other. Both of them shared the particular "ethical lives,"[67] and both were tragic to the extent of not being able to see the universal and to understand the rightness of the other position. Their conflict is a story about the Greek polis, and why it had to disappear in history. The Greek ethical world collapsed because it had insufficient space for "the individual."[68] Individuals were not recognized in its relational identity, but only in the roles that were given to them. The person was yet to become self-realized in history, and the tragedy is a consequence of this process that cannot be avoided. This is perhaps the same reason for the tragic fall of communism in Yugoslavia.

(3) The conflict of two equally just values and the tragic fate of this relation always have to be **rational** since there is no justification for keeping one-sided positions. The particularity, which is hamartia (error or flaw) of the heroine, has to be defeated in order for the *absolute* to show itself in the consciousness of the audience. On the path of finding a rational "catharsis" we have to reach **reconciliation** as the ethical end. Reconciliation [*Versöhnung*] is in the center of speculative dialectics of Hegel, since it is "returning of the spirit to itself."[69] Additionally, there is no reconciliation without a victim; "reconciliation is there, even in the midst of strife, and all things that are parted find one another again."[70]

These are two main mantras that had greatly influenced the early Hegel's

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[65] Hegel, Lectures on Fine Art, Vol.1, p.464.

[66] Term borrowed from Stern, Hegel and the *Phenomenology of Spirit*, ff. 139-145.

[67] The term 'ethical life' is the common used English translation of the German term *Sittlichkeit*, which derives from *Sitte* that means 'custom.' Hegel made a difference between *Sittlichkeit* and *Moralität* (morality), which he associated with Kant, and saw as an individualistic ethic, arrived at by reason and conscience (cf. PR: §33, p. 63 and §150, p. 195).

[68] Stern, Hegel and the *Phenomenology of Spirit*, p.142.

[69] Jovanov, Hegelovo pravo naroda, p.169.

[70] Hölderlin, Hyperion and selected poems, p.133.

phenomenology of spirit. The historical epoch itself – in order to resolve, hence reconcile, the existing contradictions and distinctions – is searching for final 'individuality' and its sacrifice *on the way* where the *one*, i.e. the *absolute*, *shows* itself in time and in the objectivity of the world.[71] This sacrifice does not represent the victim of the *absolute*, but rather a victim of the given time, of the political.[72] Hegel does not talk about legitimacy and its relation to the norms; however, he will, for example, give a strong critique of revolutionary attempts at realizing absolute freedom that was not firstly recognized as a part of the self-consciousness of immature reality in society. A sacrifice is needed on the path of purifying society, and since the particular always tends to be universal, its destiny is tragic, because it cannot escape the consciousness of necessity for the *absolute* incorporated in customs.

1.3.3 Hegel's tragedy in the focus of his political-legal theory

When reading the Sophocles's tragedy "Antigone," it can be concluded that the fall of the heroine was a tragic sacrifice that was a part of the sacrifice of the polis. A 'happy society,' as Hegel calls it, is not a goal to be pursued, but rather its fall needs to be embraced and analyzed in the history of the world spirit. Does that mean that Antigone had to be killed in order to shed light on limitations of polis that failed to continue on being universal? If it is so, we can say with certainty that those limitations are legal-political, since the given conflict was between the norms coming from the political power made by the state authority, and the norms coming from the society that "weren't made now or yesterday" because "they live for all time."[73] The Antigone's claim puts drama in the center of legal discussion focused around the conflicts between the divine law of Antigone and the natural law of Creon. In the book "Antigone's Claim," Judith Butler observes the impossibility of the potential of Antigone's written law in the play, since it would require a script and therefore could not continue to be only spoken. However, in order for a law to be universal, it is not possible to be written, it has to be kept in its unwritten form. At this point Butler sees the paradox that Antigone, the dramatic character, makes in order to rhetorically comply with the Creon's legality.[74] The conflict then happens between the drama and the law, where the first is seen in written, and the second in

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[71] Jovanov, *op. cit.*, p.48.
[72] At this point, influence of Hölderlin on Hegelian early philosophy of tragedy is massive. See Hölderlin, Anmerkungen zur Antigona, Samitliche Werke.
[73] Sophocles, Antigone, np.
[74] Butler, Antigone's claim, p.7-8.

unwritten law, and for the audience Antigone remains a theatrical character that can only use speech acts. From a legal-theoretical point of view, the dogmatic status of rules is one of the main issues in *Antigone*.[75] The heroine appears to question the power of law, claiming the power to 'her law.' By doing so, she is asking who the author of law is. In her tragic discourse, she defines Creon as an absolute sovereign who has the power not only over the written law, but also over the unwritten law of the social world that Antigone stands for.[76]

Therefore, the clash that happens in "Antigone" can also be found between the legal and social sphere in the historical moment of development of the polis, where the social sphere gets sacrificed, and thus becomes the constitutive part of the fall of the polis. The divine laws of Antigone are political laws that protect and establish the public sphere, that understand the language of community and keep it together throughout political processes. Antigone fights for another kind of justice, and thereby "*Antigone* is the tragedy of law."[77] This claim is related to the process of separation of the public and private sphere, which both Hegel and Hannah Arendt observed as one of the causes of the fall of the Greek polis. In that sense, the architecture of law played an important role in this tragic fall. For Hegel, the polis was sacrificed due to its development (that he finds in the development of private property, and the separation of civil society from the state), same as many other concepts that were not truly universal ideas, and for that they had to suffer a tragic destiny in order to cast a light on the future *absolute* that shall come in history.

Spirit is the *ethical life* of a nation in so far as it is the *immediate truth* – the individual that is a world. It must advance to the consciousness of what it is immediately, **must leave behind it the beauty of ethical life**, [emphasis added] and by passing through a series of shapes attain to a knowledge of itself. These shapes, however, are distinguished from the previous ones by the fact that they are real Spirits, actualities in the strict meaning of the word, and instead of being shapes merely of consciousness, are shapes of a world.[78]

That is why in the PR Hegel analyzes to a great extent the tensions between the family and the

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[75] Tindemans, *Antigone* and Law: Legal Theory and the ambiguities of performance in interrogating Antigone in Postmodern Philosophy and Criticism, p.186.

[76] If we observe this conflict from legal-philosophical perspective, Aristotle's claim that equity lies beyond the written law, casts a light on somewhat different interpretation of the tragic drama. See Aristotle's quotes of Sophocles, and his distinction between written and unwritten law in *Art of Rhetorics*.

[77] Sjöholm, Naked Life; Arendt and the exile at Colonus in interrogating Antigone in postmodern Philosophy and Criticism, p.55.

[78] Hegel, PS, §441, p.265.

state, and between human and divine law, which he supposedly resolved in the modern state. After explaining how an abstract personality reveals its own incompleteness, he goes on to show in the successive parts of the PR how an abstract person comes to its full stature. In this process, the first stage is called abstract right, the second, morality, and the third, the social system.[79]

Hegel used his political-legal reading of "Antigone" for his historical project, as a bond of the world spirit to the destinies of the social world that leaves only the consequences to be analyzed. Hegel is fascinated by Sophocles' play because in it the institutions of the family and the state, which are otherwise justified, come into tragic conflict in the persona of Creon and Antigone.[80] However, Hegel did observe the concept of sacrifice and equal conflict between two just values, but he failed to see that Antigone's fall cannot be covered up by the historical fall of the polis due to its 'ethical life,' because that fall was a fall of the social confronted with the legal violence. Antigone dies for the political community, she represents a social sphere that has its laws (which are unwritten), and that get expelled from any discussion in the written law. She dies for Athens, a polis that was characterized by a more tolerant policy than Thebes, and her claim is not for *Sittlichkeit*, as Hegel would see it, but rather for the pre-political community, for a social future of polis.

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[79] The most significant idea in the first part is that of property, which Hegel regards not as so much external matter, separable from the owner of it, but as the owner's outer self. (…) With regard to freedom, the point is that in full ownership my liberty becomes something higher and better. (Dyde, Hegel's Conception of Freedom, p.658) That is why in order to understand his concept of freedom we have to understand what does civil society means to him, in relation to the access to free property.

[80] Williams, Hegel's ethics of recognition, p.221.

1.4 Dialectical process of the modern state

"CALM STATE" --→ "GENERAL STATE"
                                    Negativity
Bestehen Staat   STATE AS AN IDEA

- SOVEREIGN DECISION   Externalizing
- "BEGINNING OF THE WHOLE"   of the State
                                                               (External law)

                                    Exclusion
"THE OTHER" <----------------------------- "INDIVIDUAL STATE"
                                                               STATE AS A PRESENCE
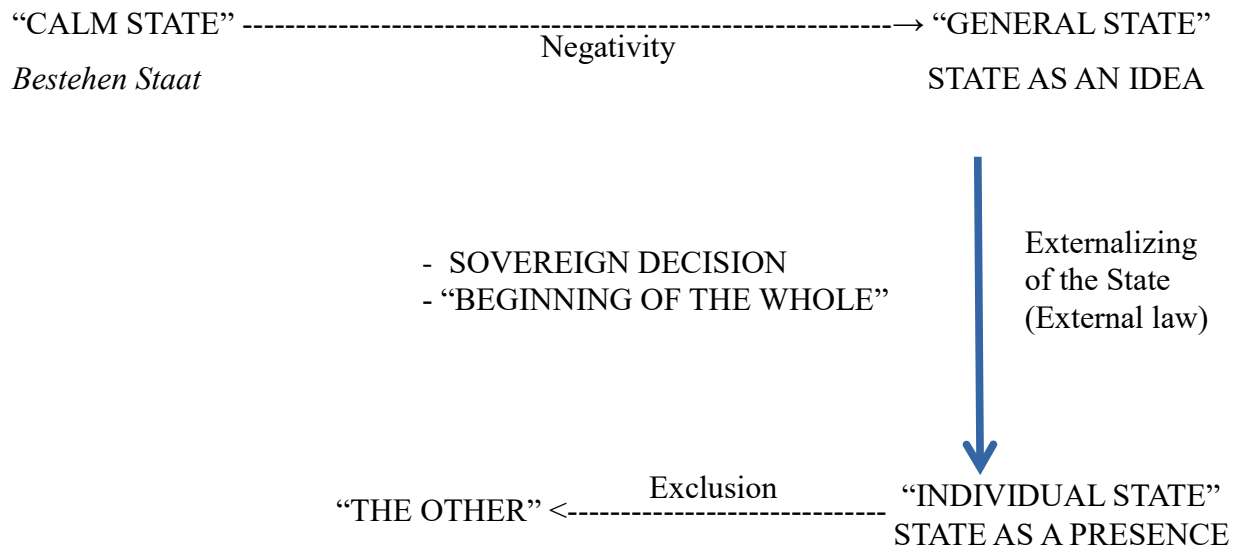
Figure 1

According to Hegel we fear the power of an ethical substance that has been violated as a result of collision, and we sympathize with the tragic hero who, despite having transgressed the absolute, also in a sense upholds the absolute.[81] By making their sacrifice, heroes, on the transition from one paradigm to another, as it was the case with the French Revolution, leave tragedy in history as a possibility for the future. Hegel claimed that the modern world is distinguished for having achieved reconciliation (*Versöhnung*) between the individual and the social-political structure in which she participates.[82] At this point, I will focus on some aspects of the dialectics of the modern state that are important for further understanding of tragic modernity.

In the *Figure 1*, I show how a "Calm State" becomes an "Individual State" that has its historical presence, meaning that it is historically recognized by other states. On the way of becoming an Individual, the state has its own dialectics based on the dialectics of *spirit*. We can divide that dialectics in two parts, where the first part is the horizontal part of *Figure 1* (from "Calm State" to "General State"), and the second is vertical (from "General State" to "Individual State"). In PR §353, Hegel gives four principles of the "dialectics of spirit" or "principles of the four world-historic kingdoms" that, for the purpose of our path towards a

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[81] Roche, Introduction to Hegel's Theory of Tragedy, p.14.
[82] Shikiar, Notes on Hegel's Conception of Reconciliation, p.1.

modern state, can be used as corresponding to the first part of the dialectics of state:

1. Immediate revelation – the spirit has as its principle the shape of the substantial spirit as the identity in which individuality [*Einzelheit*] is submerged in its essence, and in which it does not yet have legitimacy for itself.
2. The substantial spirit is aware of itself – the spirit is the positive content, and also at the same time the living form which is in its nature self-referred, i.e. beautiful ethical individuality [*Individualität*].
3. Abstract universality – the self-absorption of this knowing being-for-itself to the point of abstract universality; it thereby becomes the infinite opposite of the objective world which has at the same time likewise been abandoned by the spirit.
4. The spirit which has returned from the infinite opposition – the transformation of this spiritual opposition in such a way that the spirit attains its truth and concrete essence in its own inwardness, and becomes at home in and reconciled with the objective world; the spirit produces and knows its own truth as thought and as a world of legal actuality.

1.4.1 The inner-dialectic

The first stage in the dialectics of state is an inner process happening between *inner-self* and *outer-self,* it is an *internal* externalization of an idea that gets to be seen in the world spirit. This gives the basis to the speculative dialectics, which is the most interesting part of Hegel's philosophy for this paper. The possibility for a subject to become the object of its Self, to observe, criticize, and in this way, to obtain a necessary self-consciousness, gives the Subject a never-ending possibility to create, define, and perform dialectics, and finally to redefine its nature. By outering oneself, we enrich the Subject with reason, because the speculative dialectics is dialectics of mind and reason. Furthermore, this process is also giving non-limited capacities for speculative critique, as a possibility for interpretation of subject's position in the World, and through the process of speculative interpretation, the *reason* outers itself to the objective world.

The most important process for this dialectics, which is necessary for reaching self-consciousness, is negativity. Only through the possibility to negate the existence, to get out of yourself to the outerself, it is possible to find the necessary objectification, so that when returning to the self, the subject obtains an 'organic unity' which is "the unity of a self-identical

relating-to-self and pure negativity."[83] When returning and making the 'organic unity,' for a state that wants to experience the "beginning of the whole", a sovereign decision is needed. Hegel incorporates the decision of sovereign in this most important part of dialectics not in order to develop his theory of sovereignty, but instead to bind free will to the concept of state, because he sees free will as the most suitable soil for the tree of freedom to grow. Free will has its own dialectics that it has to follow, and its peculiar development leads to the sovereign and his decision in which the free will has to be seen and confirmed. In this decision individual state expresses its will and that is the "big difference between old and modern world."[84] However, he does not see this decision as an objective argument, since only the law holds this required objectivity. The sovereign's individuality, even though he or she is bound to the concrete world content, is necessary for the state in order to reach its direct existence, "so that the determination of naturalness is inherent in its very concept."[85] To understand this argument a little better, the three substantial elements of the political state according to Hegel are: (a) legislative power to determine and establish the universal; (b) executive power to unite particular spheres and individual cases under the universal, and (c) juridical power that with its subjectivity gives the ultimate decision of the will. He called this power also the power of a sovereign "in which the different powers are united in an individual unity which is thus the apex and beginning of the whole."[86]

With a sovereign decision and by its process of coming into reality (which is an integral part of a self-sacrifice of the particular), state becomes aware of its own limits and its transitory nature. In that self-sacrifice of individual for the infinity of the *idea* and transience of the *form* (…) of the state, we find, according to Hegel, the strength of existence of a state that does not allow that its own established unity shatters due to 'fear before dying.'[87] In this concept it can be seen how Hegel is using his philosophy of tragedy in order to overcome fear and pity as main influences of tragic drama on audience according to Aristotle. This readiness for sacrifice is what makes an individual state true and real in history. If we reflect back to Antigone, we can see the truthfulness of her act in her awareness of the fall of the polis.

The state is actuality of substantive *will*, an actuality which it possesses in the particular *self-consciousness* when this has been raised to its universality; as such, it is the *rational* for and in

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[83] Hegel, PS §291, p.175.
[84] See Jovanov, Hegelovo pravo naroda, ff. pp. 152-154.
[85] Hegel, PR, §280, p.321.
[86] See PR §272-273.
[87] Jovanov, *op. cit.*, p.157.

itself. This substantial unity is an absolute and unmoved end in itself, and in it, freedom enters into its highest right, just as this ultimate end possesses the highest right in relation to individuals [*die Einzelnen*], whose *highest duty* is to be members of the state.[88]

1.4.2 The external dialectic

The second part of the dialectical process of modern state is the *external* externalization of itself, when a state steps out using its external law. This is a decisive step for a state that wants to become a historic state, to be present and seen by other sovereign states. This stepping out of its internal law brings upon two phenomena: the first is exclusion, and the second is a state of nature. In order to be seen as *Eins*, the state has to exclude another *Eins* from itself, and follow the logic of plurality of many *Eins*. An individual state "is an *exclusive* unit which accordingly has relations with *others*."[89] To be *one*, we have to exclude ourselves from the *other*, and moreover, our sovereignty needs to be brought outside, where it can be seen and recognized by the other states. In the PS, when talking about the process when 'thinkhood' becomes a Thought, Hegel refers to the exclusion as part of this process: "The One is the *moment of negation*; it is itself quite simply a relation of self to self and it excludes an other."[90] The existing 'external environment' Hegel sees as a *state of nature*, where the dialectics of war and peace are its only engine. The state of nature is the fight for recognition and survival, and that is part of violent dialectics of international relations where the absolute spirit preforms its law on the State, as a part of the process of self-consciousness of freedom. Jovanov, in his book "Hegel's International Law: Historicity of *spirit* and the Limits of Law" (German translation: *Hegels Volkerrecht: Die Geschichtlichkeit des Geistes und die Grenzen des Rechts*), will see this 'stepping out' of the state as a *transgression,* because the internal law of sovereign state gets overcome by its cancellation in exterior.[91] Thus, recognition is possible just in a conflict, as each individual state has its own *Sitten der Nationen*.[92] Hegel did not limit commonness

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[88] Hegel, *op. cit.*, §258, p.275.
[89] Hegel, PR, §271, p.304.
[90] Hegel, PS, §114, p.69.
[91] Jovanov sees paragraph 320 in "Philosophy of Right" as a 'caesura in exposure,' where everything that was forbidden in internal law gets allowed in external law. See Jovanov, Hegelovo pravo naroda, pp.155-164.
[92] That is why the search for a window towards the "right of people", towards his "European family" is not so easy to find, but certainly not impossible with a more careful reading. Hegel wont equalize customs of nation with national borders as "man worths because is a man, and not because its Jew, Catholic, Protestant, German, Italian etc." For him, integration needs to be done in common legislature, customs, and education of the national states, and it is possible, as he saw in the notion of "European family".

nationally, but he relativized and historicized it through the philosophy and the historicity of the absolute spirit.[93] Therefore, historicism is one of the biggest *hamartia* of his philosophy of modern state.

1.5 The Great Revolution and the rising change in the world

When young Hegel together with the like-minded young Jacobins friends from the Tübingen University heard about the events in France, he was thrilled and excited about the thought that a philosophical idea can be used to make a new world. During their secret meetings they were sharing smuggled revolutionary magazines from France, reading and translating Rousseau, and hoping how the revolution will knock on the doors of the German monarchy. During this pre-Jena period, young Hegel was fascinated with the possibility to derive the mind from the subject and construct the world under its rules. However, with the rise of the terror and Robespierre's support of the violence, young Jacobins saw how the subjective mind had failed and their faith in the connection between revolution and philosophy was put under a serious question. No matter how pessimistically they have received the news about the political failure of the ideas of the Revolution, their work was not going to leave or stray from the path of German idealism. "Reason and freedom remain our principles," Hegel writes to Schelling in 1795.[94] Experience has shown that there is no guarantee of morality in the individual will, and that philosophy cannot take over the competency of the revolutionary awareness.[95] Therefore, their job is not to question the ideal premises of the Revolution; the departure point was according to the mind, the outcome was not; instead, they need to answer why it happened in such a way.

In 1797, Hegel leaves Tübingen and goes to Frankfurt, and the Jacobin club from the university days becomes the "Association of Spirit" formed by its most prominent members Hölderlin, Schelling, Sinclair, and Hegel. The small "association" marks a very important bibliographical and theoretical period for Hegel, mostly because of the written fragment *Das älteste Systemprogramm des deutschen Idealismus*. This fragment was found written in Hegel's handwriting, and it represents a critique of German idealism and an idea for its future basis

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[93] Jovanov, Hegelovo pravo naroda, p.183.
[94] *Briefe von und an Hegel*, p.18 as cited in Đinđić, Subjektivnost i nasilje, p.27. On the other hand, Marcuse cites this statement dating from 1793. See Marcuse, Reason and Revolution: Hegel and the rise of the social theory, p.11.
[95] Đinđić, Subjektivnost i nasilje, pp.29-30.

according to the association. What young philosophers had learned from the experience of the Revolution was that the world should be organised under the rules of the aesthetical, as an expression of art. As such expression, it cannot be captured in the idea of the state, because the state is something mechanical, and there can be no idea about it.

"'I shall demonstrate that, just as there is no idea of a machine, there is no idea of the State, for the State is something mechanical. Only that which is an object of freedom may be called an idea. We must, therefore, transcend the State. For every State is bound to treat free men as cogs in a machine. And this is precisely what it should not do; hence, the State must perish."[96]

"The oldest systematic program of German idealism" continues with the enlightenment idea of connecting people with philosophy as its practical goal. This utopia of the new world marks the philosophical youth of Hegel. From the moment he believed in an artistic creation of a world where there is no room for the state, and in the fact that the revolution can bring upon that world, Hegel took a difficult path of oblivion in order to reach the concept of state as the realization of freedom. Such a state, a modern state, is what is *to come* in the Hegelian thought, and this 'modern' appears after the French Revolution. Even though the Revolution happened in France, for Hegel, a true revolution was already happening in the philosophy of German idealism. As Marcuse writes:

German idealism has been called the theory of the French Revolution. This does not imply that Kant, Fichte, Schelling, and Hegel furnished a theoretical interpretation of the French Revolution, but that they wrote their philosophy largely as a response to the challenge from France to reorganize the state and society on a rational basis, so that social and political institutions might accord with the freedom and interest of the individual. Despite their bitter criticism of the Terror, the German idealists unanimously welcomed the revolution, calling it the dawn of a new era, and they all linked their basic philosophical principles to the ideals that it advanced.[97]

In his later thoughts about the Revolution, as the ones coming from the "Lectures on Fine Art," Hegel puts emphasis on shift in the paradigm by using tragedy as a distinguishing

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[96] In "The Oldest Systematic Program of German Idealism" as cited in Marcuse, Reason and Revolution, p.12.
[97] Marcuse, Reason and Revolution, p.3.

moment when the norms need to be changed, that is, when one norm is pushed aside and another comes into being.[98] This shift in paradigm as a consequence of the collision between two norms that can be observed in many ancient tragedies, is part of the speculative dialectics of spirit, and Hegel was most certainly influenced by it when re-thinking the French Revolution as a movement of the old world towards the new world. Therefore, I will use certain conclusions and aspects of Hegel's aesthetic philosophy and the philosophy of tragic to bring mature Hegel back to the French Revolution. In the process of doing so, I will employ his *Rechtsphilosophie*, the politico-legal theory that he built throughout his many lectures about the philosophy of right.[99] Even though the complexity of publishing this book involved many misunderstandings and changes, especially in its preface, the idea of writing a book that can be used as a political-legal guideline (as Hegel would call it, *Staatspädagogik*) is maintained in its every edition. *Rechtsphilosophie* is a book that follows Hegel's philosophy of spirit and history, and through the concepts of ethical life and abstract right he develops the concept of a modern state which he finally binds to the substantial will:

The state is the actuality of the substantial *will*, an actuality which it possesses in the particular *self-consciousness* when this has been raised to its universality; as such, it is the *rational* in and for itself. This substantial unity is an absolute and unmoved end in itself, and in it, freedom enters into its highest right, just as this ultimate end possesses the highest right in relation to individuals [*die Einzelnen*], whose *highest duty* is to be members of the state. (PR, §258)

So far, we have seen that subjective freedom is, according to Hegel, one-sided freedom; that it is not rational, since the "rationality, viewed abstractly, consists in the thorough unity of universality and individuality." (PR, §258) Therefore, the general will has to have two lives: one in itself, and the other realized in history. This principle also stands valid for the modern state that managed to embody the reason and realize its freedom in the legal form. That is why, the best approach in getting closer to the 'new world' as a consequence of the great revolution is through the field of political-legal theory. Thus, in the following text, I will focus on the

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[98] For more about the 'shift of norms' and clash of values see work of German dramatist Friedrich Hebbel.
[99] Hegel lectured on the topics in the "Philosophy of Right" seven times: (1) Heidelberg, 1817-1818. Transcription: P. Wannenmann. (2) Berlin, 1818-1819. Transcription: C. G. Homeyer. By this time Hegel probably had completed a manuscript version of the PR, when the sudden imposition of censorship caused him to withdraw and revise. (3) Berlin, 1819-1820. Transcription: anonymous. The PR was completed in 1820 and appeared early in 1821. (4) Berlin, 1821-1822. Transcription: None extant. (5) Berlin, 1822-1823. Transcription: H. G. Hotho. (6) Berlin, 1824-1825. Transcription: K. G. von Griesheim. (7) Berlin, 1831. Transcription: David Friedrich Strauss. (Hegel had barely begun this series of lectures on PR when he was stricken with cholera and died on 14th November 1831).

concept of abstract right, as the realized absolute freedom and will in the world spirit, and also on Hegel's ambivalent relation to the French Revolution.

1.5.1 About the science of right

In the process of reading the "Philosophy of Right" and understanding the legal arguments that are coming from Hegel, the science of *Rechts* is described as a part of philosophy. In the introduction to the PR, there is the following statement: "The science of right is *a part of philosophy*. It has therefore to develop the *Idea*, which is the reason within an object [*Gegenstand*], out of the concept; or what comes to the same thing, it must observe the proper immanent development of the thing [*Sache*] itself."[100] Bearing in mind that the Idea is a unity of existence [*Dasein*][101] and the concept is a 'unity of body and soul', for Hegel, a positive science of right cannot grasp the Idea. It can only "state what is right [*Rechtetls*], i.e. what the particular legal determinations are." (PR, §2) Its conception and realization are inseparable in the legal sphere, and Hegel sees the need for defining the concept fully, or otherwise some mistakes may be expected in praxis, since theory should always precede the practice. Hence, any definition should contain only universal features which are recognizable through philosophy.

Furthermore, "[n]atural law or philosophical right is different from positive right, but it would be a grave misunderstanding to distort this difference into an opposition or antagonism; on the contrary, their relation is like that between Institutes and Pandects."[102] In Hegel's view, legal norms need to have double approval, not only in the history of some nation, but also in philosophy as a whole, in order to truly belong to the universal reason.

If the determination of the norm is based on the existence of some other norm previously established, then such a norm bears no relation to the philosophical approach – unless the development from historical grounds is confused with the development from the concept, and the significance of historical explanation and justification is extended to include the justification which is *valid in and for itself*.[103]

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[100] Hegel, PR, §2, p.26.
[101] In German language there are two words for existence: *Dasein* and *Existenz*.
[102] Hegel, *op. cit.*, §3, p.29.
[103] *Ibid*.

Those laws that have their value only as a part of a historic moment, and they prove themselves to be positive only through circumstances, are transient.

Therefore, "to whittle the universal down not only to the particular but to the individual case is the chief function of the purely positive in law."[104] The most obvious and difficult question that arises from this statement is: how can that universal be defined in modernity? The answer needs to be looked for in the connections between his legal-political philosophy and the philosophy of spirit. Hegel grounds his PR by setting in front of the legal structures the task of achieving a type of universalism that is being asked for in the theory. We have seen that the *spirit* needs to have all the universalistic features; one cannot explain it, nor understand it, by using particular knowledge. At this point, we go back to the argument given earlier, saying that to constitute something as universal means to think. If we add to this the urge towards the objective spirit as the goal of each person and of a society as a whole, we will create a platform where a *legal thought* can be directly deduced to the philosophical reasoning of thinking-capable subjects who are the creators of their own destiny. That is why Hegel had indeed brought his metaphysics to his political theory, where *Geist* is not a public will or freedom per se, but rather that objective, untouchable that blows the winds into the sails of history.

To sum up, the process of giving a form to an individual will (read: norm) means recognizing it in the law, i.e. positivizing it. Hegel sees this mainly in the example of private property and possession, as the decisive features that made the transition from the state of nature to the state of civil society possible. For him, the family, the community, and the people (*Volk*) of one state-nation, are the basic units of a social organization. In the first step, subjects unite through the kinship system and form families. Later, with the development of private property, in this case the property of one family, the fight for their 'right' with other families begins. The only way to survive is by merging into one nation, whereby people chose to be called *Volk*. In this development, private property was a particular will of individuals who were belonging to families, and it was not brought by a new positive law, it was recognized in it. My will is a rational will; it has validity, and this validity should be recognized by others. Here is the point at which my subjectivity and that of others must be put aside, and the will must attain security, stability, and objectivity which form alone can give it.[105] The right that is fulfilled with objective will becomes universal in abstract right that holds its name due to the fact it was abstracted from the particular use of one's right. Its main feature is the freedom that needs to

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[104] *Ibid.,* note to §214.
[105] *Ibid.*, §217, p.250.

be protected by legal institutions. These institutions of the positivized universal principle of free will and reason Hegel found in the French Revolution that brought the legal institutions of the modern world which are able to protect the abstract right. Likewise, the subjective freedom and self-sufficient particularity is recognized in the law, which stands for social in its modern development. In the words of Williams:

Hegel shows here that the concept of right is a determination, not of the individual subjective will, but of the universal will. This universal will is not merely a formal conception, but one that arises out of and expresses the doubled relation of reciprocal recognition. In such reciprocal recognition, the human being ceases to be a mere individual and becomes recognized as an end in himself. He does not cease to be an individual, but his individuality and freedom count as an `in itself`.[106]

As Hegel's dialectics are primarily a negative dialectics, every concept his philosophy reaches has to be negated and canceled in order to be confirmed on another level of definition. Negation and returning to oneself are the main features of speculative dialectics allowing the revolution to produce an absolute, true freedom, "and with this freedom the previously alienated Spirit has completely returned into itself, has abandoned this region of culture and passes on to another region, the region of the moral consciousness."[107] Further in the PS, Hegel clearly says: "[F]rom this inner revolution there emerges the actual revolution of the actual world, the new shape of consciousness, *absolute freedom*."[108] Thus, the consciousness of absolute freedom is a pure moral will, that is both individual and universal, and it gets its form in the positive law.

1.5.2 The French Revolution and the reason

Hegel's main tool in speculative philosophy is a pure negative thought – the *reason*. Positive right gets its positive elements through a particular character of the nation (ethical life) that corresponds to its stage of historical development.[109] On its historical journey, the law needs to *become known* in order to see its determinacy and reach its self-consciousness. It

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[106] Williams, Hegel's ethics of recognition, p.101.
[107] Hegel, PS, §486, p.296.
[108] *Ibid.*, §582, p.356.
[109] Kant, for example, saw the French Revolution as a stage in the process of legal evolution.

cannot be based on an instinct (like laws among animals), nor solely on customs [*Sitten*], drives and feelings (like the law of barbarians). Only through the discipline of being apprehended does it become capable of universality.[110] Knowledge that was once the reason for people's exclusion from paradise can be used for their salvation. On the theoretical level, Hegel reveals the *reason* in the legal theory of the French Revolution and Napoleon's government, yet he could not easily find it on the practical level of the revolutionaries. His discussion with Fries (Hegel's fellow professor from Jena) in the Preface of PR casts some light on this problematic relation. His (un)famous statement "What is rational is actual; and what is actual is rational" was a part of Hegel's attack on Fries for his participation in the Wartburg Festival, and his role in student fraternities (German *Burschenschaft*). Fries, on the other hand, replied to this critique with the famous metaphor: "Hegel's metaphysical mushroom has grown not in the gardens of science but on the dunghill of servility."[111] Although many authors find this fight between two colleagues as a valid argument for Hegel's defense of the status quo and Prussian authorities and establishment, they fail to see that "[t]he differences between Hegel and Fries were more philosophical than political, and more personal than philosophical."[112]

Through all six lectures on the PR, it can be observed that Hegel made different statements on the relation between actualities and the mind, and that by focusing on only one of those is not possible in order to understand this part of his philosophy. At his first lecture on PR in Heidelberg, 1817-1818, he said: "What is reasonable, must happen."[113] From the transcription by Johann Rudolf Ringier, of his Berlin lectures held between 1819 and 1820, published in 2000, we can read: "What is rational is actual and vice versa, but not in the particular or individual case, which can be confused."[114] Referring to the *spirit* in the PS Hegel writes: "The spiritual alone is the *actual*; it is essence, or that which has *being in itself*; it is that which *relates itself to itself* and is *determinate*, it is *other being* and *being-for-self*, and in this determinateness, or in its self-externality, abides within itself; in other words, it is *in and for itself*."[115]

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[110] Hegel, PR, §211, p.243.

[111] Fries, Letter from 6th January 1821 in *Hegel in Berichten seiner Zeitgenossen*, p. 221.

[112] Hegel, PR, note 12, p.387. From his critique of the events that followed the Wartburg Festival of October 1817, Hegel's focus is mainly aimed at criticizing Freis, even though many other colleagues, students, family members, and friends were also involved in those events. Furthermore, even the philosophical critique that Hegel provides against Freis's philosophy is at least inconsistent in some aspects, since they were not that distant in the world of philosophy as they were on a personal level. For a very good reflexion upon the Wartburg Festival, see Ed. Notes 11-12 in the Preface to PR.

[113] German translation: *Was vernünftig ist, muß geschehen*. Hegel, PR-Wannenmann (1983), p.157. As cited in Jovanov, Hegelovo pravo naroda, p.62.

[114] Hegel, PR-Ringier (2000), p.8. As cited in Jovanov, Hegelovo pravo naroda, p.62.

[115] Hegel, PS, p.14.

The philosophical relation between the world of being and the present world, and the way Hegel saw it, is not going to be explained in this paper. The above mentioned quotes that consider some aspects of this relation were made in order to show that his 'actuality' of thought is heavily burdened by his historical-theoretical presentation "which is fundamental in the same extent for Hegel's institutional-theoretical presentation."[116] The state is the rational mind that managed to be realized in objective reality, in actuality. That mind can come to its historical realization if it is *necessary*, not because of its priori rational existence. For this reason, despite numerous critiques,[117] in Hegel's dialectics there is a room for a change if it is necessary and by that rational. Engels observed this very well:

In 1789, the French monarchy had become so unreal, that is to say, so robbed of all necessity, so irrational, that it had to be destroyed by the Great Revolution, of which Hegel always speaks with the greatest enthusiasm. In this case, therefore, the monarchy was the unreal and the revolution the real. And so, in the course of development, all that was previously real becomes unreal, loses it necessity, its right of existence, its rationality. And in the place of moribund reality comes a new, viable reality — peacefully if the old has enough intelligence to go to its death without a struggle; forcibly if it resists this necessity. Thus the Hegelian proposition turns into its opposite through Hegelian dialectics itself: All that is real in the sphere of human history, becomes irrational in the process of time, is therefore irrational by its very destination, is tainted beforehand with irrationality, and everything which is rational in the minds of men is destined to become real, however much it may contradict existing apparent reality. In accordance with all the rules of the Hegelian method of thought, the proposition of the rationality of everything which is real resolves itself into the other proposition: All that exists deserves to perish.[118]

This change had its heralds in a theory, before happening in front of Hegel's eyes and before marking his thinking about modernity. The French Revolution produces the perfect theory that got its realization in practice, exactly what Hegel needed for his political-legal philosophy. When there is an ongoing contradiction between *real* life and *lived* life (nature and the existing state of life), there is a tendency towards a shift. However, a shift is possible only when "existing life has lost all its power and worth, when it has become something purely

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[116] Jovanov, Hegelovo parvo naroda, p.62.
[117] Haym in the book "Lectures On Hegel and his Time" makes a strong critique of Hegel's legal-political philosophy, saying that it represents "the scientific dwelling of the spirit of Prussian restoration" (p.359), providing "the absolute formula" to "political conservatism, quietism and optimism"(p.365).
[118] Engels, Ludwig Feuerbach and the end of classical German Philosophy, part I.

negative; (….) [when] theory can prove such a negative character, (…) then the theory itself gains practical force."[119] Hegel had already seen this gap in the classic heroes and heroines of Greek tragedies, and he was aware of the force and violence that such shift causes in history:

That is the position of heroes in world history generally; through them a new world dawns. This new principle is in contradiction with the previous one, appears as destructive; the heroes appear, therefore, as violent, **transgressing laws** [emphasis added]. Individually, they are vanquished; but this principle persists; if in a different form, and buries the present.[120]

Therefore, the path towards a true revolution is the path of transgressive laws and destruction, yet the one that needs to be taken in order to arrive to the new world that claims its necessity in the tragic destiny of the heroes that herald such a shift. In the words of Marx, "Theory will be realized in a people only in so far as it is the realization of their needs."[121] This gap between 'wanted' and 'lived' is a game where actions of negativity and history are deciding which one will be sacrificed: "In the cold conviction that a change is necessary, they [people] should not be afraid to scrutinise every detail; the victim of injustice must demand the removal of whatever injustice they discover, and the unjust possessor must freely give up what he possesses."[122] Motives from his philosophy of tragedy reappear in Hegel's political-legal writings, and the revolution is grasped not as caesura or a break in development, but as a part of the dialectic of state which is determined by the processes of negativity and history.

On the other hand, Habermas does not see much of the 'revolution' in Hegel's understanding of the same, since for him, in order to justify the revolutionaries, Hegel had to bound the revolution to "the beating heart of the *world spirit* [emphasis added],"[123] to that *objective* that is found in the historical development and dialectics of spirit, and to the *evolution* of reason that is realized by the development of self-consciousness of freedom. Thus, Habermas rightly observes the problem of "certain consequences of the relation of theory and praxis"[124] that Hegel's philosophical thinking about the revolution brought about. Hegel himself was aware of metaphysics as a 'diamond-net' that we use to comprehend the world and the occurrences in that world, and we "shall only master it if we make it the object of our

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[119] Habermas, Theory and practice, p.129.
[120] Hegel cited in Roche, Tragedy and Comedy: a systematic study and a critique of Hegel, SUNY Series in Hegelian Studies, author's translation, p.53.
[121] Marx, Critique of Hegel's 'Philosophy of Right', p.138.
[122] Hegel's Political Writings, p.3.
[123] Habermas, *op. cit.*, p.121.
[124] *Ibid.*, p.128.

knowledge."[125] Further reading of the same paragraph shows that the knowledge that can take us out of 'diamond-net' of metaphysics, is the knowledge of the *spirit* and that "[a]ll revolutions, whether in the sciences or world history, occur merely because spirit has changed its categories in order to understand and examine what belongs to it, in order to possess and grasp itself in a truer, deeper, more intimate and unified manner."[126] At this point, Habermas's ghost of objective spirit that flies over Hegel's relation with the French Revolution is sustained in the absolute submission of the revolution to the experience and knowledge of the spirit.

However, I cannot agree with Habermas's conclusion that Hegel sees revolution through the dialectics of theory and practice, and that he ultimately abandons the latter because of "the intimation that this becoming-practical of theory, once liberated from the abstractions of the understanding (…) will still bear the stigma of revolution within its heart."[127] Furthermore, Habermas puts the objective spirit as the 'idealist' product of the subject spirit:

[W]hat is the relation between the two forms of integrating action contexts, one that takes effect, so to speak, with the consciousness of actors and in present as a lifeworld background, whereas the other silently penetrates right through actors' orientations? In his *Philosophy of Right* Hegel resolved this problem through an idealist transition from subjective to objective spirit.[128]

Although one can object to Hegel's political philosophy for being burdened with an objective-historical development that allows the *spirit* to fly above humanity, the dialectics of state seen through his philosophy of tragedy and history are the cornerstones of his thinking about revolution, and not only dialectics of theory and practice as Habermas claims. The intimation from the revolutionary action is not sustained from the standpoint of Hegel's speculative philosophy, because, aside from its obvious negative aspects, it has a strong positive element seen in his fear from the state of nature that we ought to depart from, and not fall into. On the other hand, "[t]he social state (…) is the condition in which right alone has its actuality: what is to be restricted and sacrificed is just the wilfulness and violence of the state of nature."[129] That is why the gap between 'rational' and 'lived' has to be overcome, guided by the dialectics of the world spirit and reasoning itself; and, if the revolution is on a way of overthrowing such

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[125] Hegel, EN, §246Z.
[126] *Ibid.*, §246Z.
[127] Habermas, Theory and practice, p.131.
[128] Habermas, The theory of communicative action, Vol.2, p.202.
[129] Hegel, EN, §502.

an antagonistic relation, then it will be recognised in the World History the way it happened with the French Revolution. In my opinion, Hegel did not fear the revolution as much as he feared the terror and destruction brought by the revolutionary activities that he had witnessed first-hand.[130]

1.5.3 Hegel's modern world and its limits

Given that there is a clear difference between the ancient and the modern world, the ancient Greek tragic dramas are also differentiated from the modern ones. In the ancient tragedy, characters get completely identified with the substantive powers, and their individual characteristics represent an *ethical pathos*, bringing just ideas that rule human life, and the conflict happens on the lines of those equally justified ethical pathoses. In the classic modern tragedy, from the very beginning characters are being created with an accent on their *subjectivity* that does not embody any ethical pathos, and a conflict occurs within them, where their passions together with the external circumstances bring upon collisions of different actions. These collisions among actions and characters occur "not because of any substantial justification but because they are what they are once and for all."[131] That is why a modern tragedy, for example, does not have the need for choirs, the 'essential emphasis' that physically and symbolically frames the action in old dramas; in the modern tragic drama personas stand alone, without the background, as another proof of their complacent will. Hegel looks at the difference between tragic and modern dramas as the difference between ancient and modern times. In "Hamlet," for example, the death of the king does not carry within itself a meaning of the fall of a particular ethical value, but it is rather an event of the death of the hero's father. Hamlet will not die for the ethical pathos, but for his own passions, and as a consequence of external influences on his personality. On the other hand, I have shown how Hegel's heroine Antigone dies for that social pathos, for her 'unwritten law', just like her father had died in the name of refugees and the protection of Athens. In his aesthetic philosophy, Hegel has already defined the most important features of modernity as an organic system that develops its own philosophy, which is tragic in its core, in the same way that modern heroes die in their own name, for their own values, depoliticized and detached from the shared ethical pathos.

In the PR, he reaffirms his theory of recognition through the institution of sovereign

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[130] In the above mentioned event on Wartburg Festival, many 'non-German' books were burned as a part of fight for 'German unity'. Same things were happening during the French Revolution when many historical buildings and other cultural heritage had been destroyed in the name of a new epoch.

[131] Hegel, Aesthetics: Lectures on Fine Art, p.1226.

that is necessary to obtain an immediate individuality [*Einzelheit*], as a requisite recognition from the citizens, because "the objective aspect is solely the concern of the law, to which the monarch merely has to add his subjective 'I will'."[132] In this way, the state can be based on double recognition, a term that opens Hegel for the future development, and which socially conditions the *spirit*. The recognition is a window to the social defence of his theory, giving a social touch to the notions of will and freedom. However, the PR leaves an obvious paradox between theory and practice, as it claims that any attempt to extend the freedom to all mankind is not possible by political and legal means, with the latter being based on the revolutionary violence, while the law of the world spirit is based upon more permanent violence. This claim removes the unwritten, social aspect from the fight for a different future. One of the strongest critiques of Hegel's theory of recognition is given in the thesis of repressed intersubjectivity by Michael Theunissen.[133] Intersubjectivity that is given through the recognised abstract life is supressed by the absolute spirit that becomes the objective spirit, and replaces the ethical substance. In this way, the metaphysical argument prevails over social and legal, because intersubjectivity is connected to the self-consciousness of the substance. "The connection proceeds in two stages: Initially Hegel transfers every relation between persons into a relation of substance to these persons; he then interprets the allegedly primitive relation as a relation of substance to itself. Accordingly, the independence of the persons disappear, which Hegel consistently accidentalizes."[134] As another consequence of the repressed intersubjectivity, Theunissen marks Hegel's shifting into the ancient and abandoning the modernity, because the true individual cannot exist while having the metaphysical spirit flying above it, that supresses his individuality, as it "removes all intersubjectivity from the basis of ethical reality."[135]

The first claim strongly connects Hegel's notion of recognition solely to the abstract right and private property that is indeed undermining the process of recognition within *Geist* itself. Regarding this, I strongly agree with Williams's defence of Hegel who "by no means restricts recognition to abstract right and property but clearly indicates that the concept of recognition is the general structure of ethical life, including not only all the virtues but also his account of institutions-family, civil society, and state."[136] Being that ancient and modern are mutually exclusive, and considering that Hegel's aim was to define himself according to one

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[132] Hegel, PR, §280, p.323.
[133] Theunissen presents this conclusion in the essay *The Repressed Intersubjectivity in Hegel's Philosophy of Right*, published in *Hegel and Legal Theory*, Drucilla Cornell, et al., ed., (1991), 3-64.
[134] Theunissen, The Repressed Intersubjectivity in Hegel's Philosophy of Right, p.12.
[135] *Ibid.*, p.12.
[136] Williams, Hegel's ethics of recognition, p.17

or the other, placing him in the 'box' of the ancient, instead of the modern is reflecting a limited understanding of this philosopher. Thus, "Theunissen's reading of Hegel is seriously flawed, not only because he inconsistently identifies Hegel's position but also because he conceives it in terms of alternatives that Hegel rejects or seeks to mediate."[137]

1.5.4 In the cage of state and history

All things considered, the two critical points of Hegel's philosophy may be described in two words: state and history. The 'guilty one' for both of these is the *spirit* that some authors see as a pure ideological creation.[138] I have reflected upon these critiques on more than a couple of occasions, and I will not go any further into them. More important critique for this research is related to the following: (a) the loss of the negative character of speculative dialectics, as it was becoming more involved in political matters; and (b) the notion of sacrifice that becomes exclusive to the social (ethical) and moral sphere. Adorno reads Hegel's PR guided by *legal criticism*, describing the notion 'legal' as a medium in which bad is disguised as good, and it prevails because of its objectivity. Even so, he will acknowledge its capacity to protect the reproduction of life, and note that without it a society would resemble the Third Reich. But he does not stay blind in front of the 'fright' that legal brings. This smooth conspiracy between fear and legal provides Hegel with the rational necessity he needed while developing the ideology of Abstract right, because this right took the task of the most unnecessary condition in the antagonistic world of his time. His principle of negativity failed to grasp the meaning of law as the notion built upon force and irrationality, and failed to observe the subject and the object of law separately. Adorno recognized this in his negative dialectics, which may be even *more negative* than Hegel's:

Law is the primal phenomenon of irrational rationality. In law the formal principle of equivalence becomes the norm; (…) it becomes the myth that survives amidst an only seemingly demythologized mankind. For the sake of an unbroken systematic, the legal norms cut short what is not covered, every specific experience that has not been shaped in advance; and then they raise the instrumental rationality to the rank of a second reality *sui generis*.[139]

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[137] *Ibid*., p. 18.
[138] See Adorno, Hegel – three studies, ff.19.
[139] Adorno, Negative dialectics, p. 309.

That is why, in its closing points, this paper will return to the arguments of legal critique, because, in my opinion, any change in legal theory has to start with negation of law and its instrumental rationality as the only way of humanizing it.

Hegel's works are complex and significantly influenced by his historical epoch and the conclusions and suggestions that seem conservative today were quite progressive in his time. He did not view Germany of that time as a rational state, nor as a state at all at some points, and his political philosophy, that was supposed to be based on speculative philosophy, was a contribution not only to an obvious ideology of state, but also to the modern critique. Hegel was destroyed by his own experience and idealism,[140] but one still needs to keep in mind that "Hegel simply cannot be understood rigorously."[141] Although Hegel's theory was put forward as a rational defense of modern state, his true legacy belongs rather to the critics of modern society, because he could see how modern institutions remain far away from some people, producing poverty and alienation. Against liberal orthodoxy, Hegel asserts the vital necessity for modern humanity of concrete social situatedness and integration. He reminds us that, without this the formal freedom to make arbitrary choices and express our subjectivity leads in the direction of alienation rather than self-actualization.[142] With his theory, he was fighting against feudalism and the poverty it was producing; moreover, he was always fighting for truly free subjects that can embrace their freedom not only through the vocabulary of a positive law, but as a constitutive part of their experience and *reason*.

The basic tendency of Hegel's social thought is to undermine modern society's liberal self-interpretation; to the extent that its institutions have been shaped by this interpretation, its tendency is even to criticize those institutions themselves. (…)This provides the basis for an indictment of any society which tries to call itself 'free' even though it fails to offer its members any rationally credible sense of collective purpose, leaves them cynically discontented with and alienated from its political institutions, deprives them of a socially structured sense of self-identity, and condemns many of them to lives of poverty, frustration and alienation.[143]

He was calling for catharsis of his presence, and for these purposes he went back to search for

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[140] Adorno, Hegel – three studies, ff.79.
[141] *Ibid.*, p.95.
[142] PR, Editor's Introduction, p.xxix.
[143] *Ibid.*, p.xxviii.

the tragic motives in his World History that he will use to finish his PR.

The dialectic and historical moment of sacrifice seem to owe their existence solely to the social and moral sphere. Hegel closed his dialectics in modernity, in a system he described as 'coming from heaven' in which the world spirit can realize its absolute freedom. When he uses the Greek tragedy to show the reasons for the fall of the polis and its ethical life, in the process of legitimizing this fall, he is putting the accent on the sacrifice of tragic hero. In this sense, his theory resembles a religious ideology even more (even though it is known that he despised the same) in the sense of reflecting upon the notion of sacrifice as a liberating one. The first question to bring up is: why did he choose an ancient tragedy to depict a modern phenomenon?

The two main tragedies that come under Hegel's examination, like many other philosophers of tragedy, are *Oedipus Tyrannus* and *Antigone,* both written by Sophocles, and both focused around the political and legal violence. Consequently, the period when the interest in the tragedy got renewed, in 1800s as an answer to the post-French Revolution system, corresponds to this kind of violence. The theory of tragedy continues with the questioning of authority and social constitution that became urgent during the events in France. Consciously or unconsciously, tragedy came to be seen as a figure for the aporias of social transformation that the Revolution had revealed.[144] Since, according to Hegel, violence is always bound to the political, the philosophy that he used in the name of legal discourse "got the task of *justifying* the application of law in the modern state, of justifying the violence as a disguised moment of daily exercise of rights within the state."[145] Hegel summarizes this violence in the picture of the sacrifice of a tragic hero, where the end of a "happy society" is the final fall. If his theory was openly pessimistic about the chance of the political embracing the world of freedom (even though that political for him was always limited to the national state) then he made a decision in the name of the finality of his philosophy, in which he chooses to sacrifice people rather than the concept of state. If the polis got substituted by other form of organization, historically and logically, the modern national state can also be sacrificed in the name of a higher stage of the development of reason. It can become 'unnecessary' for the actuality of life. The potential for such an outcome in Hegel's philosophy cannot be clearly seen, as in the one coming from Kant, for instance. Hegel talks about 'European family', but only from the aspect of the integration due to similar cultures and legal traditions, with no room for a new concept of integration. If

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[144] Billings, Genealogy of the Tragic: Greek Tragedy and German Philosophy, p.10.
[145] Jovanov, Hegelovo pravo naroda, p.167.

reconciliation requires a sacrifice, can modern law take the role of a victim? Furthermore, can national states truly negate themselves by becoming conscious of their particularity, and take their tragic fall in the name of the future? This is the second and final question for Hegel. Finally, as Jovanov concludes: "(…) [F]inal result of Hegel's *Philosophy of Right* remained hidden in the dialectical tension, and (that) this classic book finds its *telos* (…) in the fact that the form of modern state becomes conscious of its establishment, certainty, finality and temporality."[146]

1.6 Conclusion to the chapter

The aim of this chapter was to present the main points of Hegel's philosophy that shaped his understanding of modernity and modern state. It is in the above defined way that I treat the concept of modernity in this paper, and it is on those premises I present the history of the Socialist Federal Republic of Yugoslavia. The tragic dialectics of this communist country that led to its violent disintegration will serve as a historical, political and legal case that in my opinion has the capacity to challenge and question some conclusions about modernity found in the theory of communicative action of Habermas, and in Schmitt's concept of the political. That is why the following chapter deals with another philosophy of modernity offered by Habermas, as another attempt to reconcile the dialectic between the particular and the universal.

Robert Williams in the book "Hegel's ethics of recognition" says that he wants "to examine the Philosophy of Right as a phenomenology of intersubjective freedom."[147] Thus, the intersubjectively mediated freedom is revealed in the PR and Hegel's concept of recognition, the 'right to have rights.' However, later in the same book, Williams will distance his above mentioned project from the interpretation of the social world as the intersubjective phenomenology.

Hegel's logical method is to proceed from concepts that are abstract, simple, and immediate to concepts that are mediated and concrete. (…) While this method may have been intellectually satisfying to Hegel, it creates certain problems for his interpreters, particularly for those who seek to understand the Philosophy of Right as a phenomenology of intersubjectivity, a social phenomenology of social institutions. Above all it is crucial to avoid the fallacy of misplaced

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[146] *Ibid.*, p.150.
[147] Williams, Hegel's ethics of recognition, p.133.

concreteness, of mistaking an abstraction for the whole. Hegel seeks to counter such a fallacy, but his efforts have not prevented some interpreters from falling into this trap.[148]

The world that Hegel observes is the modern world in all its characteristics, but the crucial project of Hegel's phenomenology is the right of individuals to have subjective freedom, to be self-sufficient subjects with their individual subjectivity – a project that is finally realized in the Universal Declaration of Human Rights. Hegel does not get to the word intersubjectivity. Under the same token, modernity does not know what to do with this word, and like Milović observes, it remains "the articulation of the social subjectivity and of the capitalism."

Author that puts that word in the center of his philosophy is Jürgen Habermas. He observes Hegel's concept of recognition as an ambiguous thought, which was first shared and then dismissed between the young and the mature Hegel. On one hand, Habermas is of the opinion that the recognition in Hegel's philosophy is the first step in canceling the subjective-centred philosophy and the metaphysics of subjectivity. It is in the mutual and social recognition where we can find the basis for the intersubjective, communicative freedom. In other words, he "believes that the concept of recognition of the early Hegel presents a *counterdiscourse against the philosophy of the subject* constitutive of modernity."[149] However, in the post-Jena period of Hegel's philosophy, Habermas sees the principle of absolute idealism that is based on self-reflective monological subjectivity that ends in using the force and excluding the *other*. Like this, the critique of subjectivity presented in the philosophy of spirit and in the philosophy of right, according to Habermas, was possible "only within the framework of the philosophy of the subject."[150] However, relying on the conclusions of Hegel's idea of double recognition, Habermas has surely indebted his theory of communicative action, because, as the following chapter will show, social and legal recognition are essential for a reason oriented towards understanding.

Schmitt, on the other hand, uses reciprocal recognition between friend and enemy to define the concept of the political. The engine of the political is in that recognition and the struggle between them can be observed through the definition of the political. Likewise, Alexandre Kojève grounds the concept of recognition between slave and master in the concept of the struggle. However, in Schmitt's definition of the political, struggle is not the objective of the political, but rather a condition for its most universal defining. It is only within the

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[148] *Ibid.*, p.229.
[149] *Ibid.*, p.14.
[150] Habermas cited in Williams, Hegel's Ethics of Recognition, p.14.

recognition of human and political aspects of the enemy that we can trigger an open political process. Thus, "[r]ecognition in Schmitt requires abstracting from a whole series of substantial (ethical, religious, economic, etc.) characteristics of the enemy, in order to relate to him in a purely political way."[151] Recognition of the enemy, not demonization and neutralization, lies at the core of Schmitt's political and legal ideas. Albeit, the antagonistic relation between friends and enemies is narrowing the chances of the liberal democracy. Therefore, Chantal Mouffe's (re)interpretation and opening of this relation with the political adversaries, joint with the critique of liberalism, can point out a new perspective from which the consequences of the fall of communist Yugoslavia, and of the ongoing democratic detachment, can be observed.

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[151] Lievens, Carl Schmitt's Metapolitics, note 13, p.30.

Chapter II

2.1 Introduction to the chapter

"One can still hear the echoes of the old revolutionary slogans in what he says: "The Europe of citizens that we must build needs the forces of fraternity, of mutual aid and solidarity, so that the weak, the needy, and the unemployed are also able to accept the European Community as an advance over existing conditions. This appeal for the promotion of fraternity, connected with the idea of citizenship, must be the central message of the celebration of the two-hundredth anniversary of the French Revolution.""[152]

The power of a critical mind is enormous and most desirable in the modern times when it is difficult to find a certain pervasive social critique, and when it is preferable to recycle and mend the modern concepts and ideas rather than challenge them. Our societies clearly show their pathologies, and one of the authors who is working hard on them is Jürgen Habermas. Although the apparent decline of the critical power of his theory has occurred in philosopher's recent writings, one cannot reduce the potential of the project of the intersubjective world to his latest writings. The intersubjective mind and its reflexive reason are what are finally bound in Habermas's philosophy of knowledge and communicative action. However, the illusion of pure theory grasped in the unity of knowledge and interest has brought his philosophy of law and democracy to the scope of strategic action that lacks the radicalization of the critique of modern reason. The path from more Hegelian to the pure Kantian project, from Marx to the liberal concept of deliberative democracy, from criticism of technology to its marginalization, from the absolute of non-violence to justified violence – are part of Habermas's dialectics and, what is more important for this paper, they represent the bridge his philosophy has built towards the modern legal theory. However, the idea of instersubjectivelly organised society remains the strongest pillar to be respected in reading his oeuvre, the pillar that perhaps still offers an argument for the new world, if, of course, we manage to provide a radical critique of the modern one.

Modern thought begins with the affirmation of subjectivism. Nevertheless, this affirmation indicates the dominance of the general structure of subjectivity over particular. Therefore, world history can be understood as a scene of domination. This domination has all

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[152] Habermas, Between Facts and Norms (BFN), p.466.

the European characteristics, and it was brought by a historical change in European rationalization. That is why, in the Introduction to *Die Protestantische Ethik und der Geist des Kapitalismus,* Max Weber first asks why the cultural phenomenon that became universal was created only in the Western societies. The answer to this question he finds in the ethics of Protestantism, which manages to connect "modern economic ethos with the rational ethics of ascetic Protestantism."[153] This rationalization is based on the instrumental and strategic rationality, and therefore it is a pathology. Habermas also deals with this rationalization that from its beginnings explores the ways to dominate, but he does so in order to show that it still has the emancipatory potential that can be seen in its capacity to produce a different reason oriented towards understanding, in which communicative instead of dominating reason arises.

Furthermore, towards his theory of democracy, Habermas shows the shortcomings of both republican and liberal models of law and politics, and offers a deliberative model of law and democracy, formulated through the theory of discourse. This model can also overcome the problem of the relation between popular sovereignty and human rights. A golden ratio is what Habermas always looks for, avoiding both extreme points that threaten to produce tyranny of majority or disable democratic process of joint decision-making. Instead of these absolutizations, the cooperation between individuals and their mutual acceptance is what his philosophy of language and the theory of the communicative action are searching for. According to the main Habermas's standpoint, popular sovereignty and human rights can be found in the inner connection if the political autonomy of individuals is not applied only through general law, but in the communicative modus of discursive formation of opinion and will. The legitimacy of the law does not exclusively rely on individual rights (according to liberal interpretation) nor on virtuous state of sovereign people, but on the communicative mediation, [and] on discourse principle of law.[154] By showing the discontent between the liberal and republican model of law, Habermas reflects upon his thesis of 'co-originality' that goes hand in hand with a dualism between facticity and validity, where the moral as the inner feature, is too weak and needs its institutionalization in existing legal frame.[155]

For a legal analysis, the book "Between facts and norms" is perhaps the most important because of the 'shift' towards a more normative theory of society. According to his earlier

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[153] Weber, Protestanska etika i duh kapitalizma, [Original title: *Die Protestantische Ethik und der Geist des Kapitalismus*], p.19.
[154] Reese-Schäfer, Jürgen Habermas i deliberativna demokracija, [Jürgen Habermas and deliberative democracy], p.9.
[155] This is linked to the distinction between moral and democratic principles. See Habermas, BFN, p.108

writings on the discourse ethics, Habermas saw the discursive principle of law as an ethical principle superior to the law. In BFN, he makes a distinction between moral and law to which discursive ethics precedes. By adding rationality to discursive theory as its central standpoint, and as the feature of social participants that are entering in communication on lifeworld level, "rational discourse" becomes the tool used by actors in their discussions on law, moral or norms. Finally, "rational discourse" should include *any* attempt to reach an understanding over problematic validity claims insofar as this takes place under conditions of communication that enable the free processing of topics and contributions, information and reasons in the public space constituted by illocutionary obligations.[156] These institutionally recognized rational capacities of social actors have led to the idea of deliberative democracy as the only one that can grasp and lead the communicative relations within rational discourses. Although in BFN Habermas argues that "sovereignty and human rights go hand in hand" (where on one side self-government serves to protect individual rights, and on the other those rights provide the necessary conditions for exercising popular sovereignty), he will choose the idea of deliberative democracy as a way out of democratic and legitimacy crisis.

This chapter tends to reconstruct and follow the path Habermas has taken to come to a theoretical frame that can be derived from the BFN, where the focus on internal and external tensions in legal theory and the nature of deliberative democracy as a solution to overcoming some of these tensions are introduced. The chapter is organized in a way to provide a reader with a certain introduction to Habermas's legal theory, to which we have to come following his theoretical steps. Using the chronological presentation, authors tends to cast the light on the particular metamorphosis Habermas's critical approach experienced in the '90s, when the sharpness of his critical approach got calmer in his discursive theory. Therefore, after the linguistic turn in his respective theory in the '70s, we can observe a more moderate and less critical theory in terms of his political and legal conclusions. Another important tool used in this chapter is constant referencing of Habermas's ideas to other authors, many of whom are his previous or current colleagues and students. In my opinion, it is very difficult to read his works without having a certain insight about the work of the authors he relates to. The two volumes of "The theory of communicative action" (TCA) are an obvious example of this need. Finally, when we reach the doors of BFN, and ultimately of the deliberative democracy, it will be possible to make a certain synthesis with the previous parts of the chapter, and put these ideas before the modern law. However, the "trial" of the modern law will take place in the last

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[156] Habermas, BFN, pp.107-8.

chapter, and in addition, some of Habermas's limitations will be shown in a more critical tone. Even though Habermas knew very well to criticize technology and mechanization of the world and reason, his idea of a modern law was built inside of another machine that fails to reflect upon any other reason other than its own, and thus can end in protecting the violence and irrationality, as another "remarkable piece of apparatus"[157] that Kafka simply called – the law. To criticize any machine or apparatus, we need to dissemble it into pieces and reflect on each of them, as far as the connections between them are concerned – the project that this chapter and this paper tend to initiate. Finally, as Kafka's apparatus needed an explorer to break the opacity of the machine's operation, this work will employ one of the greatest critical minds of liberalism – Carl Schmitt, and to some extent Chantal Mouffe who can deconstruct the anti-political character of Habermas's theory, and highlight its hidden antagonisms.

2.2 The rise of the critical mind

2.2.1 From the freedom of bourgeois public sphere to the instrumentalized liberal public sphere

One of the common conclusions of Schmitt and Habermas was "that the people is a concept that "becomes present only in the public sphere"."[158] Moreover, the work that first put Habermas in the academic attention was "The structural transformation of the public sphere" (*Strukturwandel der Öffentlichkeit*), his *Habilitationsschrift*,[159] a postdoctoral dissertation, published in 1962, eight years after completing his doctoral dissertation. This work proved to be very important in understanding his more mature writing, and even though the first English translation came to light after about three decades (in 1989), many authors find the roots of "Between facts and norms" and "The theory of the communicative action" in it.

Strukturwandel der Öffentlichkeit carefully examines the historical genesis of the public sphere and its structural changes throughout the contemporary era. What he calls *Bürgerliche Öffentlichkeit* (in English "the bourgeois public sphere" is used as a suitable translation) began to appear in the 18th century as the realm between the civil society and the state. In the Hellenic times, *oikos* was reserved for private matters of the household, which was a self-governing

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[157] See Kafka, In the penal settlement in Metamorphosis, Vintage Kafka, pp.151-181.
[158] Introduction to Schmitt, Constitutional theory (CT), p.42.
[159] It is interesting that, as a condition for the professor shift at the university, Habermas's habilitation was rejected by Adorno and Horkheimer. Two years after the rejection, Habermas will return on the request of Adorno and take over Horhkeimer's chair in philosophy and sociology.

realm by the head of the family. Only in the public sphere is freedom and permanence possible as part of competition among equals. Unlike the old Greek concept of the public sphere, Roman law did not recognize a private law that allows and recognizes the public sphere in which private people can enter. The public sphere was constituted in discussion (*lexis*), which could also assume the forms of consultation and of sitting in the court of law, as well as in common action (*praxis*), be it the waging of war or competition in athletic games.[160]

In the 18th century, a space between the private realm and the state power emerges, a space called the bourgeois public sphere. Like in Old Greece, this sphere has its *lexis* and *praxis*, seen in the organs of information and political debates. These were found in the literary and political journalism, reading societies, salons and coffeehouses, basically all places created by a society where people could share their public opinion, their needs and point of view, and most importantly, where they could express their critical standpoint about the world around them. This public sphere created in public salons and literary clubs, represented a certain system of free process of sharing ideas, without any domination over the process itself, and therefore, can be considered as a certain realm of freedom and permanence.

In the 19th century we can see the beginning of the 'liberal public sphere'. The system of sharing ideas from the previous century becomes an empty concept where ideas are suffocated to the level of commodity. The so-called 'refeudalization' of the bourgeois public sphere was established on the destruction of the holy separation between society and state. Habermas sees two simultaneous actions whose dialectics allowed a new, liberal public sphere to arise: the "societalization" of the state, and "stateification" of society, which is reflected in the transfer of public functions to private corporate bodies and the extension of public authority over sectors of the private realm. Both processes supported each other as they go hand in hand. By opening their processes towards political influence, private interests at the same time opened the back door for the state to enter into the private realm. Subsequently, in the name of legal, social and security protection, the liberal state had the perfect position to merge the social and state level to the required political level, which was carefully executed in new projects of human rights at the end of the 19th century.

The intervention of state authority in the private realm was mostly done through the law. The new interventionism of the waning nineteenth century was embraced by a state that in virtue of the constitutionalization (…) of a political public sphere tended to adopt the

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[160] Habermas, The structural transformation of the public sphere, p.3.

interests of civil society as its own.[161] Moreover, the expansion of the public service sector has allowed the state to administrate many aspects of the private sphere, as its interests moved outside of its borders. The administration of private life has never existed in this extent until the liberal concept of state and law. Furthermore, "[t]hrough law and regulation the state intervened deeply in the sphere of commodity exchange and social labor because the competing interests of the societal forces translated themselves into a political dynamism and, mediated by state interventionism, reacted back on their own sphere."[162]

The newly formed, repoliticized, social sphere in the social welfare state was marked by the merging of private and public. This is best seen in the private law that served as a means of the capitalistic public law. With the state's "flight" out of the public law, with the transfer of tasks of public administration to enterprises, institutions, corporations, and semiofficial agencies under private law, the flipside of the "publification" of private law also became apparent: the privatization of public law.[163] Legal developments in the late 18th century brought the concept of human rights and freedom to the center of state attention, where it was treated as a "holy grail" under the protection of the state. The following century brought a certain shift in the concept of human rights and liberties. They still remained the universal concepts of liberal states, but besides providing their guarantees, the state policy of protecting certain corporation interests turned states into pests of the human rights project. This happens when the law got its role to protect the rights and liberties of citizens from the interests of their states, which had become increasingly economic interests of large corporations.

The public sphere in these situations mutates into the object of mass consumption and corporate interests. Rational discussions of public matters that were once freely held in a protected and separate private sphere are now lost in the amalgam of private and public interest under the rules of a growing consumer society where separation from the critical mind is noticed. This shift "from a culture-debating (*kulturräsonierend*) to a culture-consuming public"[164] is the way in which the bourgeois sphere from "the world of letters was replaced by the pseudo-public or sham-private world of culture consumption."[165] Instead of providing a place for communicative interaction and criticism, the public sphere has become another instrument prone to be controlled.

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[161] *Ibid.*, p.142.
[162] *Ibid.*, p.148.
[163] *Ibid.*, p.151.
[164] *Ibid.*, pp. 159ff.
[165] *Ibid.*, p.160.

The work of Habermas on the change of the public sphere gave an important historical argument to the Frankfurt social circle, and even more, put our German philosopher on the stage of most important critical writings. Many ideas of his further work, as we will see in what follows, can be traced to the ideas explored in "The structural transformation of the public sphere." For example, his detailed and lengthy description of the 18th century *salons*, literary clubs and coffeehouses can be interpreted as a certain introduction to the theory of communicative action. The merging of private and public life can be read as a herald of the upcoming uncoupling and colonization of the lifeworld. More importantly, the role of law and room dedicated to legal theory is most certainly reappearing in their original form in BFN.

On the other hand, it may be interesting to think which idea from the book of young Habermas will disappear in his later works. When he refers to the moment of degradation of the bourgeois public sphere, we cannot fail to notice a certain exaltation of reasonable discussions of citizens of the 18th century who reminded him of this "political" character in the Greek sense.[166] The historical 'fall' of the manifestation of reason among people in a public discussion provoked two emotions in Habermas's writings: first, more fearless critical tone that penetrated the liberal theory and came to the core of its ideological character that acts in the name of humanity, a word taken away from its subject; and second, a certain melancholy for the lost potential of an independent public sphere that can be saved today only through the modern law. In the recent Habermas's writings (more precisely, those coming after *Faktizität und Geltung*), these two emotions are almost completely abolished. His critical tone has lost its general character and has focused on certain problems of modern states, and on its way it has excluded a wide range of other phenomena that become 'bordering' concepts. Finally, the longing for the old times completely disappears in his theory of modernity, where the previously posed problems become a consequence of a universal history, and not just modernity.

2.2.2 Towards the critique of technique – protest as the expression of democracy

When Habermas returned to Frankfurt in 1964, the student protests that he openly supported were coming to their peak point in Germany. Those last years of the 1960s were very important in understanding the further development in his career. At the beginning, he was supporting the ongoing student protests that primarily focused on the reform of the higher

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[166] *Ibid.*, p.160.

education, but in their background they were asking for the abolition of technocratic education and technocratic society that had started to replace politicians with the so-called experts. Habermas was closely involved in the activities of student organizations,[167] and he saw their activities as the path to the democratization of the German society that can express its awareness and criticism about the world around it. He recognized the protests as an opportunity to open a discussion on the origins of the German education system in the 20th century as the "[s]tudent discontent has causes inside and outside the university. Within the university the malaise has been growing for two decades (…). The German university emerged from the defeat of the Nazi regime with increased autonomy in self-government."[168] This call for a break-up with the Nazi heritage that managed to survive in the German academia bothered Habermas from his student days. A famous example is his open letter to Heidegger in 1953 considering the content of the published lectures of the professor whom Habermas had admired the most at that time.[169] In the aforementioned lectures in 1935, the glorification of the national-socialism was again presented, and the "problem of the fascist intelligentsia" took place on the stage of the public university where Heidegger posed himself not as the philosopher, but as "the political influence that emanated from him."[170]

On June 2nd, 1967, the Berlin University student Benno Ohnesorg was killed by a police officer near the *Deutsche Oper* in a protest against the state visit of the Shah of Iran. After this unfortunate event, the hitherto peaceful protest will change its rhetoric. Students have found themselves opposed to the state that clearly expressed its power by using pure violence against its citizens. Voices for a turn towards more violent demonstrations in response to Ohnesorg's murder got louder at the conference that followed his funeral in Hannover. Only four professors were invited to speak at this conference, and Habermas was one of them. His speech at first confirmed his support for the student movement.

It was and still is the task of the student opposition in the Federal Republic to compensate for the lack of a theoretical perspective, the lack of critical awareness of cover-ups and branding of others as heretics, the lack of radicalism in the interpretation and implementation of our social and democratic constitution, the lack of foresight and **imagination** [emphasis added] –

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[167] See Specter, Habermas: An intellectual biography, pp.87-92; Müller-Doohm, Habermas: A biography, Chapter V, Thinking with the protest movement against the protest movement.
[168] Habermas, Towards a rational society, p.21.
[169] More about this subject see Habermas, Martin Heidegger: On the publication of the lectures of 1935 in Richard Wollin, The Heidegger controversy: a critical reader, pp.186-98.
[170] Habermas, Martin Heidegger: On the publication of the lectures of 1935, p.190.

to compensate for these deficiencies.[171]

However, it was exactly at this conference where his close relationship with left-wing student organisations will cease to exist and when he will famously use the slogan "left-wing fascism"[172] in order to describe the call for even more violent action. Afterwards, Habermas's departure from these movements was obvious and he became one of the central figures of criticism among students.[173] His departure from the leftist critical mind, towards a more internal liberal critique, apparent in the years that were to come, when the 'imagination' he referred to earlier began to fade away from his academic focus. Perhaps the two images of Hegel – as the young student active in the university circles in Tübingen, marked by the state officials as revolutionary and perhaps even dangerous young man; and the other of the older, professor Hegel, in Berlin who radically criticized student protests, are the images Habermas will leave with regard to his relation to the student protests and to the idea of the social revolution in general.

The main problem of liberal capitalism of the 19th century Habermas found in the technocratization of society. "[O]ne could still maintain that the sciences entered the conduct of life through two separate channels: through the technical exploitation of scientific information and through the processes of individual education and culture during academic study."[174] Although in this period he began observing inability of university students to implement the necessary changes with all of Marxian meanings, his thesis on criticism of the technique will remain for some time, and ultimately through the criticism of new rationality and technical reason, it will lead him to the communicative reason which will become the cornerstone of his philosophy.

2.2.3 Origins of Habermas's critical arguments

"[U]topias are no longer utopias because
they can realistically be achieved today. It is thus important to consider what
could be, alternative and better modes of social organization, even though,

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[171] Habermas, Protestbewegung und Hochschulreform, p.141.
[172] One decade after this conference, Habermas admits in the letter to Erich Fried (a West German poet) that his reaction on Rudi Dutschke speech was 'a bit out of place', even though he remains critical towards Dutschke's suggestions. See Habermas, Protestbewegung und Hochschulreform, Brief an Erich Fried, pp.149-51.
[173] See for example the book *Die Linke antwortet Jürgen Habermas* ("The left answers Jürgen Habermas") – 1969, written by many of his associates and students as a response to their professor's shift in providing a support to student organizations.
[174] Habermas, Toward a rational society, p.54.

unlike then, such reflections are on the back burner today."

Herbert Marcuse[175]

Habermas's critique of the liberal public sphere was followed by a deeper and more precise critique of technical rationality. This critique was based mainly on the work of his colleague, and another author of the Frankfurt Institute, Herbert Marcuse. The members of the so-called Frankfurt circle were in some way divided in providing a general type of social critique; while Adorno and Horkheimer focused on the dialectics of enlightenment, Marcuse was mainly responsible for the reconstruction of Hegel's theory, and writings about revolution. His book "Reason and revolution" develops a certain different position towards the revolution, which can be seen as a product of the change he made when joining the Frankfurt circle in exile. Besides this different approach to Hegel and Marx, he will also go through political changes, when he abandons the radical concepts of the "catastrophic total revolution" and replaces them with terms such as "liberation" and "transformation." Part of this toning down of his revolutionary language was dictated by the Institute's decision to adopt "Aesopian language" while in exile in order to disguise their politics. Even though Habermas could never been seen as a revolutionist, on the contrary, as we shall see, his philosophy is based on the idea of the evolution of modernity. However, Marcuse's writings were very influential on his early activity as part of the Institute.

Once Habermas said to Marcuse: "You always avoid to give a clear answer," to what Marcuse replied: "Of course, that is my life instinct."[176] This is how Marcuse saw the human nature after discovering Freud who made an inevitable influence on the work of the Frankfurt school, and instincts theory became a new way to join philosophical, psychological and social arguments. Marcuse was not the only one embracing a new psychoanalytic approach in order to question and deduce what is human in humans; Habermas was also influenced by Freud's conclusions. Psychoanalysis is relevant to us as the only tangible example of a science incorporating methodical self-reflection. The birth of psychoanalysis opens the possibility of arriving at the dimension that positivism closed off, and of doing so in a methodological manner that arises out of the logic of inquiry.[177] Moreover, "[t]he starting point of psychoanalytic theory is the experience of resistance, that is the blocking force that stands in the way of the free and

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[175] Marcuse, Towards a critical theory of society, Foreword, p.vii.
[176] Original in Spanish: 'Habermas: Usted siemper se escurra.' Habermas, Conversaciones con Herbert Marcuse, p.58.
[177] Habermas, Knowledge and human interests, p.214.

public communication of repressed contents."[178]

However, Habermas will conclude what the dialectical movement of ego is lacking and it "is the movement of reflection, which transforms one state into another – which transforms one state the pathological state of compulsion and self-deception into the state of superseded conflict and reconciliation with ex-communicated language."[179] In other words, it does not reach the intersubjective core of its existence.

2.2.4 Marcuse's one-dimensional modern world

Marcuse believed that the theory needs to show people their way towards freedom and transformation in the late capitalism. His theory is a critical approach to the 'one-dimensional' reality and capitalist metaphysics, where the gap between human possibilities and their reality is becoming deeper and wider. Habermas will use these insights, as well as Marcuse's more philosophical critique of technology and modernity, to criticize Weber's concept of rationality. In the book *Technik und Wissenschaft als Ideologie*, originally published in 1968, Habermas dedicates a great part to Marcuse,[180] beginning with Marcuse's critique of Weber's project of rationality and ending with criticizing both Marcuse and Weber. In the following, I will reflect on the critical argumentation arising from Habermas's Frankfurt circle years, when the critique of modernity is primarily focused on the critique of technology and rationality that emerged from the technological development. In order to embrace some arguments Habermas developed during his work for the Frankfurt circle, I decided to confront and complement them with the critical theory of Marcuse. I find their critique of technical reason and Weber's instrumental reason very intertwined, and although they take different turns in their respective theories, a mere recognition of the 'enemy' and the ways of justifying its existence in the late capitalism is what, to some degree, bounds these two authors much more than it is recognized in the academic circles.

In his critique of technological development, Marcuse observes that the modern rationality, as the product of a new process of rationalization, was far from capable of creating

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[178] *Ibid.*, p.229.
[179] *Ibid.*, p.245.
[180] English translation of this book is found in "Towards a rational society," where the sixth Chapter – Technology and Science as "Ideology" was dedicated to Marcuse. "For Herbert Marcuse on his seventieth birthday, July 19,1968"

a rational society with its potential of critical mind. He "wants to show through the example of Weber that the evolution of modern society in the framework of state-regulated capitalism cannot be conceptualized if liberal capitalism has not been analyzed adequately."[181] Therefore, he asks for a return to the theory, in order to define a new type of capitalism, since it was obvious that Marx's analysis of capitalism could no longer be used. His criticism of Weber is that, disregarding this Marxian insight, he upholds the abstract concept of rationalization, which not only fails to express the specific class content of the adaptation of the institutional framework to the developing systems of purposive-rational action, but also conceals it. This new type of world reason is at the core of rationality of political domination, justified by the invented rationality of science and technology. For Marcuse, this rationality stays out of the social scope, incapable of being questioned and criticized, and by disabling its speculative potential, the possibility of its legitimation is also taken away. Marcuse is convinced that what Weber called "rationalization" realizes not rationality as such but rather, in the name of rationality, a specific form of unacknowledged political domination.[182]

A new type of rationality can be observed with three main features: objective, progressive and operational. The reason aims to enclose everyone in the system, "and to repel those which are irreconcilable with the system."[183] As such, it gets developed and nursed in the institutions of bureaucracy and becomes a unique administrative rationality. The more rational, productive, technical, and total the repressive administration of society becomes, the more unimaginable the means and ways by which the administered individuals might break their servitude and seize their own liberation.[184] This is the doomed destiny of highly differentiated societies, where the social sphere gets reduced and rationalized as part of the administrative frame. This modern phenomenon is what Weber called social pathology, and Habermas as the colonization of the lifeworld.

The newly established one-dimensional reality uses freedom and liberty in order to reestablish the existing "reason" due to false needs and administrative dependence. [T]o impose Reason upon an entire society is a paradoxical and scandalous idea – although one might dispute the righteousness of a society which ridicules this idea while making its own population into objects of total administration.[185] That paradox can also be found in Weber's writings and Habermas describes it as following:

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[181] Habermas, Toward a rational society, p.100.
[182] *Ibid.*, p.82.
[183] Marcuse, One-dimensional man, p.13-4.
[184] *Ibid.*, p.16.
[185] *Ibid.*, p.16.

The paradox, however, is that the rationalization of the lifeworld simultaneously gave rise to *both* the systemically induced reification of the lifeworld *and* the utopian perspective from which capitalist modernization has always appeared with the stain of dissolving traditional life-forms without salvaging their communicative substance.[186]

This type of total administration makes us dependent to it, as the only string that protects us from anarchy. The given *status quo* is a safe-zone, and the rule of law no matter how restricted it is safer and better than rule above or without the law. The system thus tends toward both total administration and total dependence on administration by ruling public and private managements, strengthening the preestablished harmony between the interest of the big public and private corporations and that of their customers and servants.[187] People themselves keep the system going and they enable its reproduction. They create a "defense society" that constantly continues to fight for its rights and freedoms that modern law does not protect as it should, because without understanding the social world and its antagonistic nature, it puts calculations over social reality and rationality. This world of "unfreedom" is embroidered with the new mode of domination that finds its legitimation in the new form of rationality. Thus, as Habermas confirmed, Marcuse is "the first to make the "political content of technical reason" the analytical point of departure for a theory of advanced capitalist society."[188]

2.2.5 Legitimation from 'above' and from 'bottom'

In order to justify the existence and function of the technical reason, a system needs to have more legitimation links. These links penetrate into the body of society like nerves and, with the practicality of the information woven inside of each, they go from one subsystem to another, where their capacities are strengthened by the correspondence with the demands of the rationalization of the political system. Therefore, their ways can be viewed from 'above' and from 'bottom.' The rationalization from 'bottom' occurs when the new modes of production are introduced, and it is rather the process of adaptation that occurs in various subsystems, like in the organization of labor and trade, the network of transportation, information and

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[186] Habermas, The theory of communicative action (TCA), Vol.2, p.329.
[187] Marcuse, One-dimensional man, p.36.
[188] Habermas, Toward a rational society, p.85.

communication, the institutions of private law, and the state bureaucracy. During this process there is a demand for subordination to the new instrumental or strategic rationalization that has become a dominant one in the new system of production and which pushes the traditional systems towards the inviolable change under the forthcoming impulse of modernity. As time passes, this rationalization penetrates deeper into the society, in the school and health systems, into families, and everywhere where interaction based on communicative reason can be replaced by the instrumental and technical reason. That is precisely what Habermas saw in the German education system during the 1960s, as society was becoming more and more a substructure of modernity and its compulsive reason.

Simultaneously with the rationalization from 'bottom', we can observe the ongoing process that comes from 'above'. This is the process of 'secularization' in Weber's terminology, and it is aimed against certain religious ideas and mythological interpretations of traditional societies. It was shown in the previous chapter that the new rationalization found its nest in the protestant ethics in which the values of rationality, labor and wealth were merged with Christian notions of god, paradise and fate. Aside from this aspect of secularization, in the renewed call for legitimacy from bellow, Habermas sees the rise of the first ideologies in the restricted sense. They replace the traditional legitimations of power by appearing in the cloak of modern science and by deriving their justification from the critique of ideology. Ideologies are coeval with the criticism of ideology. In this sense there can be no pre-bourgeois "ideologies."[189]

In this case, the modern science assumes the role of necessary singularity in order to overcome a traditional mode of thinking. Even though science was developing quite independently and only had an indirect influence on technology, at the end of 19th century, carried by the winds of progress and development, they became one phenomenon. Modern science, based on its objective form, and not on the subjective intentions of scientists, was perfect for the process of legitimation of technological development and the changes it imposed. When it comes to the phenomenon coming from 'bellow', Habermas and Marcuse agree that both science and technology have a social responsibility and they need to be prone to social criticism. The new modes of production 'no longer function as the basis of a critique of prevailing legitimations in the interest of political enlightenment, but become instead the basis of legitimation. This is what Marcuse conceives of as world-historically new.'[190]

A new mode of economic legitimacy becomes the only way to justify the technological

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[189] *Ibid.*, p.99.
[190] *Ibid.*, p.84.

development and its necessity based on the technical reason. This reason is the one that enables further, specifically modern, political domination. For Marcuse, this 'domination perpetuates and extends itself not only through technology but *as* technology, and the latter provides the great legitimation of the expanding political power, which absorbs all spheres of culture.'[191] For Habermas, on the other hand, a problem prevails in the submission of the interaction and communicative reason. If the new science is governed by the technological development, their impact on society and certain social issues is obviously tremendous. Regardless, the questions of science and future course of technological development have been put outside of the public debate, left to be administered to the fraction that has access to certain information and means of production. In either way, the justification of technology and its instrumental reason has never been part of a larger social debate and is closed to social critique due to the already established position of the social engine of reasonable development. We will refer to this position once again in the last chapter, but from a slightly different angle offered by Benjamin's critique of modern development.

What can be concluded from the above is that Weber's rationalization can be understood in the processes of 'adaptation' and 'secularization', which Habermas translates as the rationalization from 'above' and from 'bottom'. They are triggered by new modes of production that in turn change not only a traditional way of production, but also impose a new form of instrumental and strategic reason that is expanding under the logic of destroying the interaction and conditions for communicative reason. If we underline this conclusion under Marcuse's premise on political domination, we will most certainly come to the conclusion that the modern reason wants and manages to abolish any social criticism, closing itself in the circle of limited ideology where everything is justified by the form and the social necessity of development. In the words of Marcuse:

For this unfreedom appears neither as irrational nor as political, but rather as submission to the technical apparatus which enlarges the comforts of life and increases the productivity of labor. Technological rationality thus protects rather than cancels the legitimacy of domination, and the instrumentalist horizon of reason opens on a rationally totalitarian society.[192]

What Habermas takes from Marcuse's diagnosis of society is firstly the critique of the new

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[191] Marcuse, One-dimensional man, p.162.
[192] *Ibid.*, p.162.

reason that enables him to criticize Weber's project of rationality. We have seen how he follows many of Marcuse's arguments in order to support his derived conclusions about the instrumental reason. The submission of the communicative reason and the closure of technology and science out of social scope is where Habermas's focus will remain in his future work. From his writings on the critique of technology, two words are kept: legitimation and communication. Consequently, the answer he finds will be set in the conditions of the modern law, specifically in the project of human rights and liberties, and in the new form of communication that will, like a nervous system, provoke reflex and change in the "defense society," and bring a new legal language that will be able to speak in the name of the only reason that can be both philosophically and socially justified – the communicative one.

Above we have made a brief presentation of Habermas's interest in technical development in some of his earlier works. I am of the opinion that the complex path of theoretical development that this author is still offering to us is oriented towards providing a multidisciplinary social critique that can embrace the new reason. This idea was first rooted in Habermas critique of the technical reason and "its apologetic serviceability, [where] "rationality" is weakened as a critical standard and degraded to a corrective *within* the system: what can still be said is, at best, that society is "poorly programmed.""[193] The next step in this chapter will be focused on the theory of communicative action, which will finally lead us to the pathology of the modern world and the possibility of its overcoming.

2.3 Towards the communicative reason

After Adorno's death in 1969, and after distancing himself from the student protests, in a somewhat different academic climate, Habermas decided to leave Frankfurt and dedicate the opportunity to move forward to a more complete critique of theory of society. His critical theory had to be an interdisciplinary social theory, and whatever its course was, it had to pass the democratic test. In his 'transition' works that precede the publication of "The theory of communicative action," Habermas worked hard to connect the concept of ordinary communication and the reflexivity that is capable of presenting a certain form of knowledge, which in turn has the capacity to criticize the growing positivist philosophy and hermeneutic historicism. In "Knowledge and human interest" (German edition of 1968; English edition,

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[193] Habermas, Toward a rational society, 83-4.

1971), he takes into account Freud's psychoanalytic conclusions that he applies to human communication and its speculative potential. The dialectic of general and individual made possible in the intersubjectivity of talking and acting can also make use of the accompanying flow of spontaneous expressions of bodily movements and gestures and correct itself by means of them.[194] In order for language to express the intersubjectivity, it is not enough to have a 'pure language,' but also the corporal gestures that finally with the interaction can induce knowledge from the act of communication. Only in combination with the gestures, the ordinary language can interpret itself, and "[w]ithout the supplement of non-verbal objectivations, natural language remains fragmentary."[195] Basically, with the non-verbal corporal communication, the language is able to express itself and reach the level of self-interpretation where it raises above the fragmentary level to the speculative level of inner reflection.

Social systems and their crises

Apart from the influence of psychoanalysis, Habermas will come under a great influence of linguistics too, and this is what is described as his so-called 'linguistic turn.' But before publishing his major work on communicative action, Habermas will ask what can be the best approach of talking about the post-capitalistic societies, where the modes of production and economic domination are not enough to describe the social reality. He is searching for the level of analysis at which the connection between normative structures and steering problems becomes palpable, and he finds it in a historically oriented analysis of social systems. In the path of this complex analysis, he chooses to begin with the notion of crisis, the social level where the historical change from early to late capitalism is seen more clearly.

Crises in social systems are not created through accidental changes in the environment, but through structurally inherent system-imperatives that are incompatible and cannot be hierarchically integrated.[196] Therefore, Marx's analysis of the crises in early capitalist societies cannot be applied for the late capitalist societies. The history of social theory since Marx might be understood as the unmixing of two paradigms that could no longer be integrated into a two-level concept of society that connects system and lifeworld.[197] The cause of a certain crisis is no longer found in the reaction to the change from the outside environment that surrounds

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[194] Habermas, Knowledge and human interest, p.168.
[195] *Ibid.*, p.169.
[196] Habermas, Legitimation crisis, p.2.
[197] Habermas, TCA, Vol.2, p.202.

social systems. Social systems in the late capitalism are highly differentiated and they have developed capacities to cope with very complex environment by altering their values or certain system elements in order to adapt to the changed conditions. However, in the process of adaptation, their identity becomes obscured, and this is the level at which a new type of crisis appears. The experience of the crisis can be both system and subjective. According to the first, social systems also have identities that they can lose, and Habermas finds the example of this in a rupture some system falls into after their traditional structures disappear. The subjective definition of crisis, on the other hand, is based on the argument that only members of a society can experience these structural alternations that can interfere with their social identity. Nevertheless, the crisis is always a loss of the identity that is connected with steering problems. Social subjects are not fully aware of those problems, but they create 'secondary problems that do affect consciousness in a specific way – precisely in such a way as to endanger social integration.'[198]

2.3.1 The specific nature of communicative action

In TCA, Habermas presents the solution for the lost reason of modernity and moving towards the reconstructive social theory. This solution is marked by the replacement of the practical reason with the communicative reason, which is based on communicative action briefly described above. The following are three main points of difference between these two reasons. Firstly, Habermas wants to define a new communicative reason in view of its linguistic medium, and not according to individuals or some other macrosubjects, such as the state or society. This opens the door for more system understanding of the world, the idea he has already tested in his *Technik und Wissenschaft als Ideologie* when he wrote about Weber's subsystems. This linguistic medium enables a communicative reason by allowing people's interactions to come together and form specific life structures. This rationality is inscribed in the linguistic telos of mutual understanding and forms an ensemble of conditions that both enable and limit.[199] Secondly, as will be fully explained later in the chapter, the communicative action, based on the linguistic medium (just like a strategic action) is oriented towards its goal – the understanding. However, while in the case of the practical reason based on the strategic action, the goals are successfully or unsuccessfully realized due to the competence of the

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[198] Habermas, Legitimation crisis, p.4.
[199] Habermas, BFN, p.4.

calculated action, the goal of the communicative action defined as reaching understanding, 'can critically turn against its own results and thus *transcend* itself.'[200] Finally, the given tension between ideas and reality, as the prime motivator of any action, manages to be 'understood' in the facticity of linguistically structured new forms of life. Although these forms of life can reach a wide range of validity claims, they cannot manage practical tasks per se. Normativity in terms of obligatory orientation of action does not coincide with communicative rationality. Normativity and communicative rationality *intersect* with one another where the justification of moral insights is concerned.[201] However, these insights have a normative character only if and when the degree actors in the communication commit themselves to certain prescriptions. Unlike the participants in action that bring upon a certain form of practical reason, in the case of a communicative action, a certain idealization is required, and consensus is actually possible only if the participants are ready to accept the obligations that are coming from it. The question is: how to come to these reasons from the critical social theory? Furthermore, the important question that Habermas and Marcuse regard as the central one is: how does a new 'Reason' justify itself on the level of social reality?

2.3.2 Work vs. interaction

Habermas justly observes that if the new rationalization is indeed the political domination that takes its 'Reason' from the technical development, then the concept of *interaction* is taken away from the political domain, and our society is left only with the instrumental and strategic action. For him, there is a significant difference between work and interaction, and in this distinction is the origin of the difference between traditional and modern society.

Work is a type of purposive-rational action in which 'the conduct of rational choices is governed by *strategies* based on analytic knowledge.'[202] This kind of knowledge is based on the deductions from the existing value systems and decision-making procedures, and at its core one can observe three types of actions: purposive-rational, instrumental and strategic action. The Instrumental action governs itself by the technical rules, deciding whether some action is appropriate or inappropriate due to relation with the given conditions in reality. The strategic

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[200] *Ibid.*, p.4.
[201] *Ibid.*, p.5.
[202] Habermas, Toward a rational society, p.92.

action is guided by the correct evaluation, in other words by the calculation of possible choices, while the purposive-rational action helps us to achieve pre-established goals in given conditions.

Interaction, on the other hand, is what Habermas calls *communicative* action, and is based on *symbolic* interaction. The binding character of consensual norms is used to govern these types of actions, while the produced social norms are imposed through sanctions. While the validity of technical rules and strategies depends on empirically true or analytically correct propositions, the validity of social norms is grounded only in the **intersubjectivity** [emphasis added] of the mutual understanding of intentions and secured by the general recognition of obligations.[203] In the case of the communicative action, the behavior that does not correspond to the consensual norms is going to be declared as deviant behavior, while in the case of a strategic action we can observe the so-called incompetent behavior which in relation towards the achievement of certain goals means a failure or lack of success.

If work is the feature of traditional societies and is based on instrumental and strategic action, then the goal is to overcome it in the project of modernity that can base itself upon interaction and within it communicative action. The central problem of Habermas's thought has been to demonstrate that an exclusively instrumental or strategic understanding of rationality is somehow inadequate.[204] Indeed, Habermas dedicates a great deal of time and space to show that instrumental and strategic action are in their essence 'teleological,' and in many ways not good for social development. Therefore, the social systems can be defined according to its dominant rational action oriented to some goal, where we have communication on the one hand, and instrumental and strategic actions on the other. The traditional societies perpetuate themselves until the subsystems of rational action oriented towards an end, remain within the existing limits of legitimacy.[205] Habermas finds that Weber is the first to give scientific social reflections on rational action in the modern world. However, in his opinion, Weber's finds the rationality of action mostly in the instrumental action that is teleological. In what follows, I will show how Habermas overcomes this one-sidedness in the typology of social action.

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[203] *Ibid.*, p.92.
[204] White, The recent work of Jürgen Habermas, p.25.
[205] Milović, Filosofia da comunicação, p.22.

2.3.4 Two types of action

There are two main types of social action according to Habermas: (a) action oriented to success, and (b) action oriented toward reaching understanding. In connection with these basic modes of action, we can later examine instrumental and strategic action (which belong to actions oriented to success), communicative action (which belongs to actions oriented toward reaching understanding), and we can also observe normative and dramaturgical action that Habermas does not develop to a high degree, but that they are "limit cases."[206] All of these actions are rational to some degree which can be defined as the possibility to defend their arguments against criticism, better said, in their characteristic validity claims. Also, every social action is used by social actors in their relation with the "formal world-views" in which the validity claims are rooted. In these 'world-views' validity claims are related to social actions in a conceptual and necessary way. In other words, every social action has its corresponding validity claim depending on its goal orientation. Therefore, the validity claims of instrumental and strategic action are truth and effectiveness; when it comes to normative actions, those are rightness and sincerity, whereas authenticity belongs to dramaturgical action. The communicative action is the only one that has the power to reduce all the above mentioned validity claims.

How do social subjects orient their action only to certain validity claims which are later used to derive a certain type of knowledge? This is regulated by the conceptual frame of 'world-views' that serves as a coordinating system for social actors. Habermas has adopted a three-world concept, and each of them has a corresponding validity claim that provides a rational framework assumed by the social actors. Instrumental and strategic action presupposes only an *objective world* where something is defined by the pre-existing states of affairs or the ones that can be brought, and where statement is true. Normative action relates to the *social world* of legitimately ordered relations, where something is obligatory and statement is right with respect to the existing norms which are legitimate with respect to values. Finally, validity claims of dramaturgical action come from a *subjective world* that is internal to the subject composed of "the totality of the experiences of the speaker to which he has privileged access."[207] In this world, subjected experiences, desires and feelings are truthfully expressed. What is interesting is that this world is conceptualised from components coming from both objective and social

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[206] Habermas, TCA, Vol.1, pp. 95, 258.
[207] *Ibid.*, p.100.

world. When participating in communicative action, social actors are potentially referring to all three worlds and their validity claims.

In modernity, social actors conceive each of these worlds, and through the communicative action they reflect upon them. When social actors use their language, they always seek to reach an understanding in terms of their plans that they can realize only through a direct action inside some of the three worlds. According to Habermas, during this process, they are always faced with two choices: to understand or to success. In the case of the former they promise their commitment to consent, while in the case of the latter they search to make an influence, interest or arbitrary choice. Therefore, as another strong dualism that Habermas's theory tends to insist upon, we can limit ourselves in talking about the strategic and the communicative action that stand on the opposite sides of social rationality. The prevailing of the latter happens in the lifeworld, which is the only one that can reconcile the three worlds with the communicative action in modernity.

SPEECH ACT	VALIDITY CLAIM	WORLD	KNOWLEDGE
Propositional (from a third-person perspective) **perlocutionary acts**	Claims of empirical validity	Objective (Science)	Cognitive-instrumental
Illocutionary (addressed to 'you' in plural, to others)	Claims of normative rightness and legitimacy regarding shared norms and group relations	Social (Morality/Law)	Moral-practical (social, normative, moral/legal, interpersonal, relating to justice, solidarity)
Expressive (from an 'I' perspective; self-expressive) **locutionary acts**	Claims to sincerity, authenticity and truthfulness	Subjective (Art)	Aesthetic-expressive (subjective, dramaturgical, oriented to agreement on taste, aesthetic harmony and individual autonomy/authenticity)

Figure 2

We have seen above that the difference between work and interaction, which is based

on the goal orientation, can be observed as a criterion for separating traditional from modern society, in the case of social actions the conclusions are not so clear. In TCA, we can read that the 'types of action are differentiated by their orientation and not according to whether they are goal oriented.'[208] In other words, all types of action must be rooted in a certain form of teleological structure that involves the communicative action. For Habermas, on the way of differentiating one social action from the other, the realization of their goals according to consent or influence is far more important than their goal orientation. These differentiations that enable the transition from traditional to modern society, from sacred to profane, from irrational to rational society, happen within the realm of the lifeworld where the integration of his triadic triptych is possible in 'a non-reified, communicative practice of everyday life.'[209] In what follows, we will come closer to his dual model of the modern world, where only on the plan of lifeworld is possible to reach the intersubjective reason.

2.3.5 Naïve and reflective levels of the speech

The feature of being oriented to understanding is not connected only to the communicative action. In the same way, not all linguistically mediated actions will manage to reach understanding, or what Habermas likes to call the "inherent telos" of human communication. Theoretical commitments thus compel him to demonstrate that these other sorts of interaction are "parasitic" on the "original mode of language use" (i.e., those oriented toward reaching understanding)."[210] It was explained earlier why young Habermas had chosen communication as the basis of what would become his multidisciplinary critical theory. The reason was that only ordinary language has the ability to be reflexive and self-aware, and thus to produce a certain type of knowledge. In his later writings, this aspect of everyday communication loses its reflective character which will become reserved for discourse.

There are two intertwined types of communicative action: everyday communicative practice, and discourse or argument. On the level of former, participants involved in everyday communication discuss their positions in the world. This process of mutual interpretation remains largely implicit, transpiring against the assumed backdrop of common "cultural

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[208] Johnson, Habermas on communicative and strategic action in Political Theory, 19(2), (181-201), 1991, p.185.
[209] Habermas, Questions and counterquestions, p.210.
[210] Johnson, *op. cit.*, p.188.

tradition" that encompasses what Habermas calls the "lifeworld."[211] On the level of discourse or argument, implicit validity claims are openly thematized and discussed. This means that participants in a discursive communicative action are not only in direct relation with the world around them, but also in reflective relation. This in return means that the possibility to derive rationality from the communicative action is reserved for reflectively reaching understanding. In the words of Habermas, "the concept of communicative rationality (…) can be adequately explicated only in terms of a theory of argumentation."[212] That is why even though he praises the communicative over the strategic action, one has to remain careful when reading some of his works, since the use of the adjective 'communicative' can often be misleading. The practical discourse for Habermas "is a demanding form of argumentative formation of will" that is possible due to the reflexive nature of discourse, what Habermas calls the "idealistic assumptions." On the other hand, it is possible to reach the practical discourse "as a process of communication,"[213] which in turn enriches the speech act with the possibility of achieving intersubjectivity.

Moreover, the separation between argumentative and non-argumentative communication goes hand in hand with his progressive philosophy of history that sees societies moving from the traditional to the post-traditional level. It is finally on the post-traditional stage of the development where Habermas finds a new type of justice based on the communication reason. He also criticizes both critical theory and post-structuralism for not seeing the emancipatory capacities of this reason in modernity. However, if this emancipation and social integration takes place on the level of the new reason that is always intersubjective, the communicative action has to be the medium rather than the means of forming a consensus. Diane Coole sees this as an argument "that the narrative/formal reconstruction Habermas unfolds posits too sharp a break between modernity and premodernity."[214] With too strong and violent separation in his progressive theory of reason, he performs obvious violence against the pre-modern, pre-discursive and finally pre-political reason. Habermas largely ignores the non-systematic, non-discursive processes of power and politics that continue to circulate within the lifeworld even in modernity.[215] The question of the "Other" or, better said, of the violence and the exclusion of it from the modern discourse is put under the tenets of universality and rational

[211] *Ibid.*, p.186.
[212] Habermas, TCA, Vol.1, p.18.
[213] Habermas, Comentários a ética do discurso, p.17.
[214] Coole, Habermas and the question of alterity in Habermas and unfinished project of modernity, eds. D'Entrèves and Benhabib, (221-45), p.226.
[215] *Ibid.*, p.227.

reflection, and Habermas decides to ignore it whenever possible or to reduce it to questions of art and religion that belong to the discourse ethics, and are therefore depoliticized. That is why this "Other" seen in the relation between the body and the mind, conscious and unconscious, senses and desires, imagination and intuition, finally defined as the latent alterity, in the practical discourse of modernity, many times is classified simply as irrational. This very important question will be discussed again in the last chapter where the notions of violence and exclusion within Habermas's discursive theory will re-emerge on the plan of modernity and modern law that "close up the fissures from which alterity might leak, while modernity is itself defined by its exclusion or transcendence."[216]

2.4 Definitions of the lifeworld and System

In the second volume of TCA, Habermas continues his project of finding the communicative reason, and this part of his long journey starts with Mead's symbolism and Durkheim paradox, comes back to Weber and Parsons, and finds its way to the final diagnosis of modern society. Like the first volume, the second book of TCA is also written remarkably, providing analysis and inputs on many other social aspects, demonstrating Habermas's ability to wonder around multidisciplinary studies, but without losing his focus. In what follows, I will focus on concepts of lifeworld (LW) and System,[217] following their background as guidelines, because it is the only way to truly understand the colonization thesis that brings Habermas's focus back to the legal theory.

2.4.1 Development according to System and social integration

Before we move deeper into Habermas's dualism of the System and the life-world, and how their relation is the one that actually causes the ongoing legitimation crisis, I would like to present his historically oriented analysis of the social systems using his graphic that covers above mentioned classes of crisis, and social and system integration.

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[216] *Ibid.*, p.232.
[217] In what follows, I will refer to Habermas's concept of system with capitalised S. Every other usage of this word is not necessarily connected to his world's dual-model concept.

SOCIAL FORMATIONS	PRINCIPLE OF ORGANIZATION	SOCIAL AND SYSTEM INTEGRATION	TYPE OF CRISIS
PRIMITIVE	kinship relations : primary roles (age, sex)	no differentiation between social and system integration	externally induced identity crisis
TRADITIONAL	political class rule: state power and socio-economic classes	functional differentiation between social and system integration	internally determined identity crisis
LIBERAL-CAPITALIST	unpolitical class rule: wage labor and capital	system integrative economic system also takes over socially integrative tasks	system crisis

Figure 3[218]

As can be seen on the *Figure 3*, the primitive society, the only one that is not a class society, has no distinction between social and system integration. On this preconventional level, morality is based on the kinship relations where the communication produces both validity claims and reality of the social system. With the class society, a perfect interpretation of the world around them through the language gets lost. The functional differentiation between the system and the social integration begins and brings the first identity crisis. On the last, post-conventional level, we can see that the unpolitical rule allows economic systems to take over the tasks of social integration, and therefore we can talk about the system crisis, the deepest one with the most severe consequences for societies.

On the path of developing his communicative theory and finding the communicative reason in the modern societies, Habermas follows the structure of social systems due to system theory. To begin with, he defines three universal properties of social systems:[219]

a) Adaptation – the interaction between social systems and their environment takes place in production and socialization through the **medium of language** (utterances that admit the truth), and the **norms** that have the need for justification (discursive validity claims

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[218] This figure "Illustration of social principles of organisation," can be found in Habermas, Legitimation crisis, p.24.
[219] Habermas, Legitimation crisis, p.8.

– *Geltungsansprüche*).

b) Variations and changes in the goal values of social systems – the latter are changeable by the state forces of production and by the degree of system autonomy. The former also do not depend on the active subjects, because they are limited by a logic of development of world-views [*Weltbilder*].

c) Development of a society – depends on the institutionally permitted learning capacity, 'in particular by whether theoretical-technical and practical questions are differentiated, and whether discursive learning processes can take place.'

According to the social systems theory, different social systems develop due to their power of *autopoesis*. This biological concept, when applied in the social science, remains with its basic meaning – systems that are autopoetic can (re)produce themselves because of the elements they possess. Even though Habermas adopts many aspects of this theory, when he deals with the question of social and system integration, he uses the combination of arguments from the systems theory and the arguments borrowed from Weber, because after the process of adaptation (which can, as shown above, provoke a system or social crises) social systems experience the ongoing process of integration. Perhaps this is even easier to observe by briefly considering Parson's social theory.

In TCA 2, Habermas deduces certain conclusions regarding the types of social actions from Parson's AGIL acronym, where **A** stands for adaptation (cognitive symbolization); **G** equals the goal attainment (expressive symbolization); **I** stands for integration (moral evaluative symbolization), and **L** comes from social system latency (constitutive symbolization). The way he uses this acronym is in the figure bellow.

Private sphere	LW
A	**G**
Public sphere	System

Symbolic context of society.
Symbolic reproduction.

Material context of society.
Material reproduction.

I	L
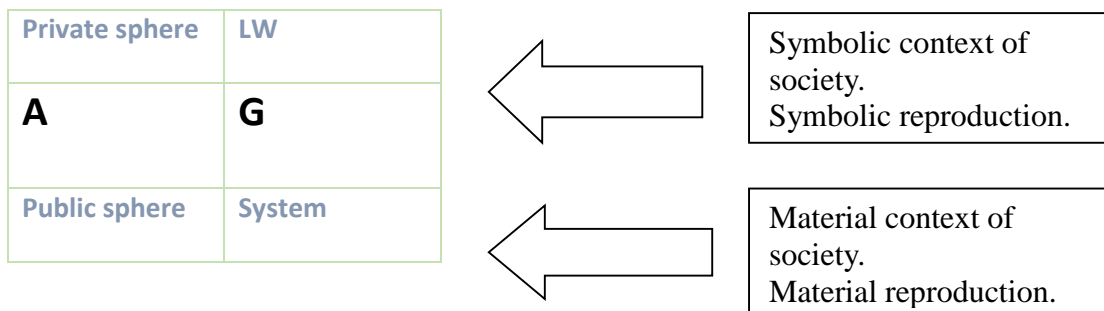
<div align="right">Figure 4</div>

Thus, in the part of Figure 3 showing the symbolic reproduction of society, we employ the concept of social integration, while in the part corresponding to the material context of society we are dealing with the social integration. In the case of the former, systems of institutions, in which speaking and acting subjects are socially connected in producing the normative structures (values and institutions), are established, and on that level, social systems are defined as *life-worlds.* On the level of the system integration, we can find the specific steering performances of a self-regulated *System.* Here, the emphasis is on the events and states that the system is experiencing in the process of maintaining its borders and its existence in relation to its complex and instable environment. And the most important aspect of this dualism is that it can be grasped and answered only on the empirical level.[220]

2.4.2 Durkheim's two-level social development

Another valuable resource for Habermas's input coming from the social sciences is Durkheim's two-level theory of the social development. On the way of explaining the transition from archaic societies to modern societies, Durkheim adopts a moment of solidarity, he especially observes the difference between the mechanical solidarity in segmentally differentiated societies that transforms into the organic solidarity in functionally differentiated societies. Correspondingly, "[c]ollective consciousness is constitutive for archaic societies whereas in modern societies the life-context is constituted by the division of labour."[221] What accompanies the 'transition' of solidarity is the development of the 'social partner,' and the development of the labor division, meaning that even the organic form of solidarity needs to be rooted in values and norms. However, these moral rules stem from the division of labor that, following Durkheim's argument, can show its dysfunctional character due to the lack of normative regulations: "If the division of labor does not produce solidarity (…) it is because the relations of the organs are not regulated, they are in a state of anomie."[222] The same anomie

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[220] See Habermas, TCA, Vol. 2, p.312.
[221] *Ibid.*, p.114-5.
[222] Durkheim, Division of Labour, p.368 cited in Habermas, TCA vol.2, p.117.

as a sense of confusion and rootlessness, according to Durkheim, can provoke a type of suicide.[223] The contradiction of these claims makes Habermas to talk about Durkheim's paradox. When the differentiation of social systems is not followed by the growth of an independent moral structure that can carry the process of social integration, Durkheim's distinction between normal and anomic division of labor does not provide the answer to the paradox he is caught in. However, Habermas agrees with Durkheim's theory of social development that needs to imply both System and LW differentiation. However, Durkheim's social theory remains "somewhat metaphorical" because it does not "discover how the collective consciousness is communicated, via illocutionary forces, not to institutions but to individuals."[224]

Thus, Habermas's theory of uncoupling is based upon Durkheim's two-level theory of social development that corresponds to Habermas's two-level integration. The idea is to follow the rise of more complex social and economic systems, like the ones coming from modernity, and of the inner relations. In order to achieve a balanced integration of social and functional reality, the levels of development that one part of the system reaches, need to correspond to the levels in other. In the transition from traditional to modern societies, what is needed is a situation where "the lifeworld is sufficiently rationalized, above all if law and morality have reached a corresponding stage of development."[225] Hence, the social integration is directly related to the development of law and morality. Habermas gives three stages in the development of their relation: at the first level, moral and law are not separated, they begin and end in the other, like in the archaic societies (pre-conventional level); the second level occurs when the separation triggered by the processes of differentiation emerges, at a higher level of world development (conventional level); and, at the last stage, morality becomes deinstitutionalised and anchored only in the personal systems or social actors, as an internal control of behaviour (post-conventional level). The law, on the other hand, becomes the external force "to such an extent that modern law becomes an institution detached from the ethical motivations of the legal person and depends upon abstract obedience of the law. This development is part of the structural differentiation of the lifeworld."[226] In the modern world, with the processes of

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[223] See Durkheim, Suicide, Chapter five: Anomic Suicide.
[224] Habermas, *op. cit.*, p.60.
"Durkheim circumscribes his problem by distinguishing the technical rules that underline instrumental actions from the moral rules or norms that determine the consensual action of participants in interaction." (Habermas, TCA, Vol. 2, p.47)
[225] *Ibid.*, p.173
[226] *Ibid.*, p.174.

modernization, the uncoupling is reinforced with a new differentiation of the Systems that does not correspond to the levels of rationalization in the lifeworlds. The two levels begin to develop independently from each other, and Habermas will build his modern society critique over this idea of social reality. In other words, the institutionalization of the new mechanisms arising from the System differentiation, need to be introduced by the changes in the moral-legal framework of the institutional domain. And how does the lifeworld rationalize itself? This brings us back to the theory of communicative action. The lifeworld becomes rational in the communicative processes inside the given discourse, using validity claims from the three worlds and the power of intersubjective knowledge which is a by-product of communication oriented towards understanding between the social actors.

By distinguishing the two levels of society (System and lifeworld), as described above, we can observe two models of integration – system and social. The system integration for the actor is beyond his or her spectrum, because it is based on the functional coordination of the actor's activity outcome, because for him or her, the social dynamics is the product of social consensual reproduction by communicative action. The actor is not part of the symbolic reproduction of societies, and that is why the whole dynamic start to look like a systematic stabilization or, better said, functional-rational acting, where the actor loses aspects of intersubjectivity and communicative rationality.[227] The goal of the theory of communicative action is to make a synthesis between these two-level societies within the three-world model, where the energy of intersubjective rationalization and its communicative reason would spread across lifeworld and its discourse like fire.

Finally, if we observe everything through the two-level system that Habermas adopts, we can also embrace two approaches to one social reality: one that actors share, a social approach, and the other which is the structural-functionalist approach that happens via the System. In the case of their development, the differentiation in one reality needs to be followed by a suitable rationalization in the lifeworld. For the main modern pathology presented in the uncoupling claim, the differentiation in the System is too fast and too big for the lifeworld, which fails to incorporate the actions and phenomenon that come from the System into its rational structures. This in turn produces a gap in the legitimacy, the most important issue of modern societies.

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[227] Ivković, Habermasova koncepcija sistemske kolonizacije sveta života (“Habermas's Concept of Systemic Colonization of Lifeworld”), *Sociologija*, Vol. LII (2010), N° 1, (1-22), p.8.

2.4.3 The Lifeworld

A society that is formed in the context of a commonly experienced world 'which in a certain sense merges into the dimension of the lifeworld, is omnipresent; to put this another way: it reproduces itself as a whole in every single interaction.'[228] On the other hand, with unequal development at the system and social level, the more System gets developed, the more lifeworld gets provincial and suppressed. In the situation of an ongoing uncoupling, the social idea should be brought to its original ideas, to its beginnings, when the new mechanisms adopted by the System, need to find a way to anchor their meaning in LW via family status, the authority of the office, personal values, etc. If the new mechanisms cannot find their rationalization in their LW, the two parts of social reality will not correspond to one another, and social pathologies will arise.

Since '[t]he lifeworld is constitutive mutual understanding where speaker and hearer come to an understanding from out of their common lifeworld about something in the objective, social and subjective worlds,'[229] it is at the level of lifeworld where the reconciliation between the two parts of society is happening, by the means of communicative action. At this point, I will present the lifeworld using the two levels of analyses.[230] According to the first understanding, the social integration of modern societies is made by the communicative action. On this level, the lifeworld is related to the three worlds explained above. This means that subjects in the lifeworld orient their actions towards mutual understanding based on their common definitions of situations. Seen like this, the notion of the lifeworld is like macrostucture, as the totality of social reality in which the three worlds (objective, normative and subjective) are connected and reinterpreted by communication and culture stocks. In TCA 2, Habermas demonstrates this virtue of the lifeworld by using the example of communicative action between two workers at the constructing site, where the older worker gives an order to the younger worker. In this communicative relation, Habermas will say, we can see the spatio-temporal dimension of communication, and we can also notice the normative framework in the given situation. Thus, in this everyday communicative situation, as in any other, communicative action in the lifeworld is always connected to the three worlds and the

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[228] Habermas, TCA, Vol. 2, p.157.
[229] *Ibid.*, p.126.
[230] See Ivković, Habermasova koncepcija sistemske kolonizacije sveta života.

common definitions that actors bring from these worlds; for example, the age difference between the two social actors, the place where the conversation takes place, the hierarchical relationship between them, etc.

The second is a phenomenological level, and at it the lifeworld is seen as a framework for mutual understanding. Used as a phenomenon, the lifeworld can explain those spatio-temporal and social organizations. In the same example of the older and younger worker, by making some changes in the story, by adding new information, Habermas wants to show that the lifeworld is a moving structure that starts to move in the event of a change. At this point he introduces Husserl's concept of 'horizon'. When these changes occur, one actor will have to redefine the situation by using the new definitions or arguments that the other actor made in their communicative relation. This redefinition of the communicative situation is based on the suppositions of commonality in respect to the objective, social and each other's own subjective world. Still, what plays the main role in such situations is the knowledge that comes from the cultural stocks. These stocks make the relation between actors already pre-interpreted, and that is why, when the shift happens, we can redefine the situation due to this pre-interpretation. According to Habermas, we can never find ourselves in a void, even if we go out of the horizon, because the culture stocks are "always already" familiar.

However, the power of the LW is really focused in the concept of intersubjectivity. For Habermas, people are living beings who live in the public domain, but only with social skills they become persons. Therefore, the human mind is always intersubjective, and all its ways lead towards intersubjective production of "*Ich*". Habermas takes the latter from G.H. Mead 'ideal social roles' that are based on the processes in which a subject who has the power to make moral decisions succeeds in placing themselves in the position of the other subjects influenced by the particular legal or moral norm. This is the "moral point of view," according to which "all free and equal individuals in question take part, in a cooperative search for truth, in which the only thing that matters is the strength of the best argument."[231] This is one of the conditions of the *Ich* which is produced intersubjectively or communicatively. Therefore, the processes of subjectification of reflexive development that empowers subjects to think both individually and collectively, to feel that their 'definition' in the given world is at the same time part of a script to define that world, and that definition always stems from the society. In addition, only in the lifeworld, as a level of coexistence, the reason is already implicit in

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[231] Habermas, Comentários a ética do discurso, p.17.

intersubjective communication.

2.4.4 Different possibilities for the dual-model society

Habermas chooses the theory of law to carry out the project of publically deliberated sovereignty. He finds the normative theory of justice at risk of recognizing some solid political events, while the sociological theory can easily be suspected (*blamed)* for its positivism. In "Between facts and norms" he will use the interdisciplinary model again and a more integrative approach to overcome the shortcomings of these two theories. On this journey, he moves away from some of his theoretical fathers, and in order to keep the project of communicative reason still in life, he will have to make a unique turn in his theoretical path. This finally brings him to the legal theory as the solution to the pathologies of the modern world which, according to Habermas, still has something to tell us.

We have seen how the lifeworld and the System compose the two levels of Habermas's social analysis of the modern world, where the post-capitalistic period began to accelerate the processes of differentiation, bringing in the new institutions and relations that challenge the levels of rationalization in the lifeworld. In the figures bellow, the three main options will be summarized as three scenarios, each presenting a different scenario of the relation between social and system integration, in order to define the exact position of the law in the sphere of communicative action.

 (1) Naturally, we should start with the ideal situation presented in the *Figure 5.* The system and the LW are one, their cooperation is constant and instant, and there is no exact line where one starts and the other ends. The decisions and agreements from the LW immediately become part of the System, and vice versa, with complete openness and elasticity. The economy in this relation would stand outside of the circles, and law and politics would stem from a unique social reality, as the extended arm of that reality, maintaining the social relations possible and active. This model can be understood as homogeneous, characteristic of pre-modern societies, such as the societies organized by kinship and tribal hierarchized societies, which due to their simplicity and incapacity cannot comprehend certain complex modern relations.
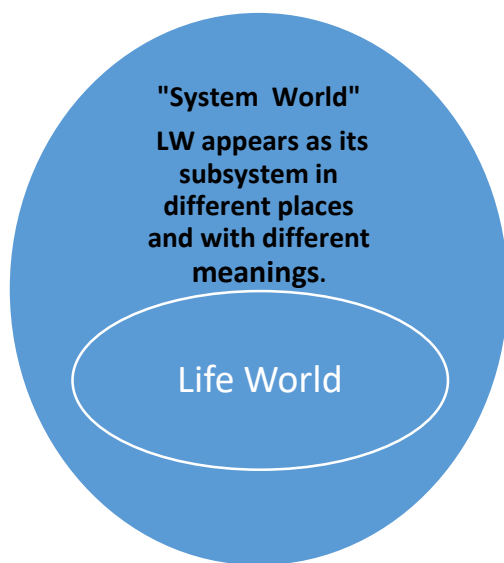
Figure 6 – Colonized modern society   *Figure 5* - The pre-modern society
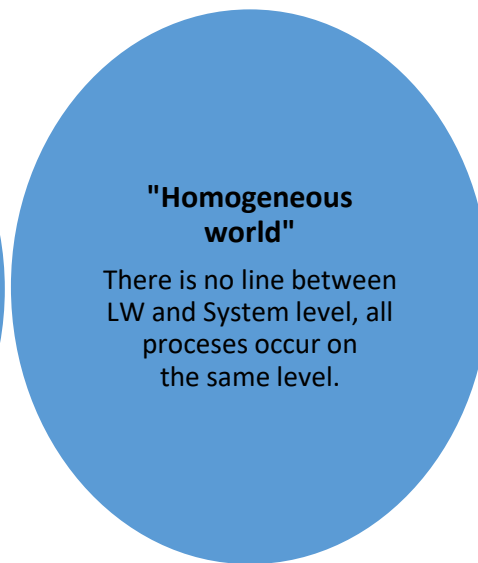
 (2) Unlike the homogeneous world, in the *Figure 6* we can see the complete colonization of LW, in the sense that it is still already included in the System, and its existing depends on the System where it moves and changes its nature. In this scenario LW really does not exist. It represents a unique social valve, a part of the System that is channeling and processing social feelings, memories and discussions into a systematically predefined structure. As mentioned above, '[i]t is not only qua system and qua lifeworld that they are differentiated; they get differentiated from one another at the same time.'[232] So, this scenario represents the possible future of the modern project, the complete colonization of LW, and the improbability of any social integration that can trigger a further process of rationalization.

(3) Finally, the third option is found in one offered alternative that can be used to overcome these actual shortcomings in the second scenario. Therefore, the figure bellow shows Habermas's solution for the ongoing uncoupling of System and LW that are happening in modern societies. The solution is in the two-way communication where both parts are capable of processing and understanding problems that come from each other's subsystems.

Modern

Law

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232 Habermas, TCA, Vol. 2, p.153.

Lifeworld is making an exchange with System according to the equal dual-model relation.

- Objective world

- Subjective world

- Social world

System is standing beside Lifeworld, incapable of understanding its common language.

- Money subsystem

- Power subsystem
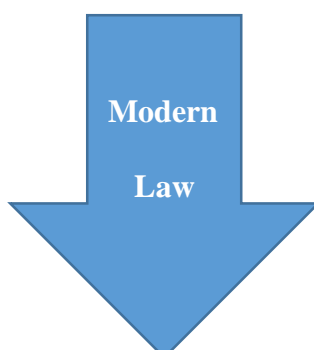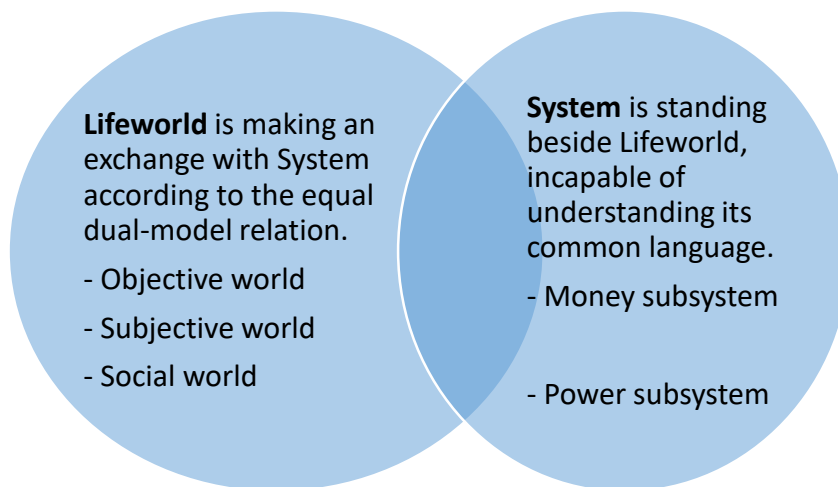
Figure 7 - Modern law as a mediator between two worlds

The modern law is considered to be a unique medium which can enable equal and free communicative flow and, moreover, which can establish the conditions and institutions for democratic procedures of discourse theory. Furthermore, modern law will, using its own procedures, give stimulus to the rational capacities of communicative actors who are motivated by an action oriented towards reaching understanding, the communicative action, in the process of reaching consent. The legitimacy flow would be large in this case, and any decision could be traced to the subjects and confirmed in their rational capacities. The system and the LW with each other's subsystems would be able to fully understand each other for the first time, and the modern law would make this happen. Money and administration would remain the basis for social integration, but on the other hand, solidarity would prevail because of the shared values and joint decision-making, and all three would be enveloped in legitimacy as a guarantee of their persistent holding.

On the way of explaining the origin and position of the sociology of law and the philosophy of justice in his legal theory, Habermas uses the development of natural and rational law as an integral part of the bourgeois society, in order to reach the argument for his theory of uncoupling in modern societies, with Hegel and Marx as his critical milestones. He depicts the transformation in the civil society as next:

Having begun as an ensemble of *authorizing* conditions that made freedom possible (...) it became an *anonymous* system independent of the intentions of unconsciously sociated

individuals, a system that followed its own logic and subjected society as a while to the economically decoded imperatives of its self-stabilization.[233]

In this situation, the forces of a highly differentiated social reality become too complex and too 'big' to be embraced by the natural law. This law was the property of "the political "superstructure" resting on the economic basis of a society in which the rule of one social class over other classes was exercised in the nonpolitical form of the private disposition over the means of production."[234] That is why Marx's analysis of the early capitalist societies becomes a "frozen world of reified social relations," and is incapable of offering answers to the new modes of production and new levels of system and social differentiation in the late capitalism.

2.5 Legal force of a social medium – towards the discourse theory of law

Certain subsystems tend to show a lack of opportunities for direct communication and to meet only on a horizontal level where they observe and balance each other by adjusting to the mutual environment from which they cannot escape. As for certain subsystems, the approach of social systems theory to the role or significance of the law represents an extreme devaluation, 'as the most rigorous version of a theory that assigns law a marginal position (…) and neutralizes the phenomenon of legal validity by describing things objectivistically.'[235] What Habermas seeks in his legal theory is to give back to law the important social role that it had lost in the social development, and to use its inner logic to solve some social problems.

[T]he generalized role of the citizen gets neutralized and for it the welfare state also pays in the coin of use values that come to citizens as clients of welfare-state bureaucracies. "Clients" are customers who enjoy the rewards of the welfare state; the client role is a companion piece that makes political participation that has been evaporated into an abstraction and robbed of its effectiveness acceptable.[236]

In the social systems theory, the law keeps its marginal positions; it loses normative connotations and has its own language that prevents communication with the social actors. More importantly, in the process of objectification, the law becomes a system capable of

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[233] Habermas, BFN, p.45.
[234] *Ibid.*, p.45.
[235] *Ibid.*, p.48.
[236] Habermas, TCA, Vol.2, p.350.

reproducing and maintaining itself, where its communication is still separate from the social meaning and social integrative processes. In the words of Habermas, it refers to the "self-organization of a legal community" capable of dealing only with the induced problem, without the means to "deal with problems that burden society *as whole*." Legal norms and legal acts thereby lose all connection with the supposition of rationally motivated processes of reaching understanding within an association of legal consociates.[237]

Viewed by the systems theory, societies consist of different subsystems that try to communicate among themselves, using their *specialized* communication that is unique and common at the same time.[238] While having an interaction through the communication that is peerless to each subsystem they integrate more, and thus unconsciously create a common social communication. This dual facing of communication between the broken social subsystems, leaves each of them their own language, which ultimately prevents them from understanding each other, something that Habermas cannot agree with, because the language employed in the discursive communication is multilingual and capable of understanding problems formulated in a foreign language. In BFN he will find this language in an ordinary language 'that, circulating through all spheres of society, has a reflexive structure of the kind that enables translations from all the code.'[239] This is another example of the Habermas's language problem that was discussed above.

Under these assumptions, the law then functions as a hinge between the system and the lifeworld, a function that is incompatible with the idea that the legal system, withdrawing into its own shell, autopoietically encapsulates itself.[240] The two-way communication between the system and lifeworld is intertwined to such a degree that it does not leave any independent subsystem on its margins. The modern law should connect and bypass these two horizons and using its means and its typical rationality, which come from its form and language, manage to surpass the communication breaks and problems on both levels of reality. What interrupts this relation are the steering media of money and power, because they do not understand the ordinary language. They are based on the instrumental and strategic action, and their language

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[237] Habermas, BFN, p.50.

[238] "Any legal act is at the same time – *uno actu* – an event of general social communication. One and the *same* [i.e., similar, *gleiche*] communicative event is linked to two different social discourses - specialized (and institutionalized) legal discourse and diffuse general communication. Interference between law and other social discourses does not mean that they merge into a multi-dimensional superdiscourse, nor does it imply that information is "exchanged" between them." Teubner cited in Habermas, BFN, pp.53-4.

[239] *Ibid.,* p.54.

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

is deprived of the communicative reason, leaving it to function in the name of administration and detached economy. In such a situation, the modern law thus functions as the "transformer" that first guarantees that the socially integrating network of communication stretched across society as a whole hold together.[241]

2.5.1 Modern law and justice

Legal questions are questions of justice and moral, and they are developed in the social world via validity claims of normative rightness and legitimacy regarding shared norms and group relations. These questions Habermas develops in his theory of discourse. With the *Diskursethik* he tries to employ the concept of justice as the product of the argumentative formation of the will "which must guarantee only the general presuppositions of communication, the correction (or justice) of all possible normative consensus under these conditions."[242] At this point he follows the argument of the philosophy of justice of John Rawls, according to which the public conception of justice that refers to the free and equal persons with two moral powers (the sense of justice and the conception of good), within the state of congruence of the right and good, and carried by the overlapping consensus, gives a strong argument for the process of social integration in the modern liberal environment. The 'reflective equilibrium' of this theory belongs to "the well-ordered society, so as to carry out the thought-experiment of an ideal theory of justice which ultimately meets non ideal needs and capacities."[243] Habermas nevertheless argues that "[t]he basic institutions of such a society must be set up according to a scheme that deserves the rationally motivated assent of all citizens because it can be grounded in justice as fairness."[244] Thus, "the question of justice of the social can be understood only if the social institutions are not regarded as fatefully pre-determined sizes, but rather as something that can be *shaped*, *changed* and *improved*."[245] On the other hand, Habermas observes the social theory of law by Niklas Luhmann, and his deliberative theory of law is meant to stand between Rawls's and Luhmann's theories, overcoming their shortcomings. The normative theory of justice is exposed to the danger of not taking the hard facts of political reality seriously enough. The sociological theory of law, on the other hand,

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[241] *Ibid.,* p.56.
[242] Habermas, Comentários a ética do discurso, p.17.
[243] Oliveira, Rawl's normative conception of the person: A Kantian reinterpretation in Veritas, 52(1), 2007 (171-183), p.172.
[244] Habermas, BFN, p.57.
[245] Madung, Politik und Gewalt, pp.73-4..

tends to be positive. The two approaches, according to Habermas, shorten legal understanding.[246]

The other side of the practical discourse is coined in the fact that subjects are capable of placing themselves into the precarious position of other members of the society who are damaged by some norms. This is when subjects act intersubjectively, in accordance with their capacity of solidarity with other social members. Only through the communicative process, when they share the ideal roles with other members of society, individuals can answer their moral and ethical questions. Kant on the other hand, claims that there is only one thing that is unconditionally good – the good will. Moral goodness, the moral value of an action, is *constituted* in the fact of being 'willed' for the sake of and in conformity with the moral law. And that is the main question for Kant's ethics – what is a right and just action? The concept of 'general will' that can grasp the will of all people in the definition of well-being is the Hegelian concept which was examined in the first chapter. For Habermas, going between Hegel's general will and Kant's universal reason, is how he finds the place where the general will formed by the moral reasons meets and merges with the argumentative reason.

In the realm of formal ethics, following Kant's theory, Habermas formulates two principles: firstly, *the principle "D"* whose starting point is in the claim that all people are capable of finding moral and answering some moral questions. At this level of deconstruction, he replaces Kant's categorical imperative with the argumentation that gives the conditions for the general consent of all members who participate in the practical discourse. The 'more' important communicative action, viewed as sharing of arguments rooted in the triadic system of worlds and validity claims, activates the rational capacities of participants who produce the norms that may call into question a certain validity, but only if all participants are voluntarily involved in the argumentation by the principles of consent (which is basically defined by the conditions of the ideal speech situation). This is how we get to *the principle "U"* where it is possible to derive all the norms from the general compliance of those norms, in order to satisfy the interest of each person in the joint process of argumentation whose consequences in the practical discourse need to be voluntarily accepted by all participants of that discourse. Therefore, a consensus that we are reaching for, on the level of argumentation, depends on the "yes" or "no" of each individual and forms their capability to overcome their egocentric orientations that bring the latent possibility of the conflicts.

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[246] *Ibid.*, p.102.

2.5.2 Diskursethik

When searching for the rational choices, we look for them among different objectives (the question of what we need to do) that we define according to the existing preferences we have; or among the different possibilities of action (the question of what we want to do) that is determined by the means-goal relation. In the pragmatic discourse, we are looking for the techniques and strategies we can employ, while in the empirical discourse we are able to associate our empirical knowledge with certain goals or preferences and evaluate the consequences of our decisions. The pragmatic question "What do I need to do?" is not a question of moral for Habermas, because the questions of personal decisions have to be brought to the question "What is what I want to be?" which is a question of identity. This question concerns the way one sees oneself, and how one would like to be seen by other people and is directly related to the question of ethics – "What is a good life?" So, the questions of ethics are always questions of the *internal* telos of my life, my history, my preferences and goals. However, on the discursive level where the argumentative steps have to be "comprehensible from the intersubjective point of view,"[247] when we act in order to become the person we want to be, we are simultaneously questioning the world, seeking its validity and reorganizing its goals. In other words, in order to produce a conscious life that can make the difference between violence and reason, we need to employ the *anterior/previous* telos.

The *Diskursethik* abandons Kant's concept of two worlds, one we are able to reach in our understanding, and the phenomenological one, and puts the dialogue, instead of Kantian monologue, at the heart of its argumentation. It is on the post-conventional level where a society reaches the reflexive and discursive level, when its members begin to re-evaluate the rules, and where they are able to define their "I" and social "I," answering the question of identity through the intersubjective reason.

"It is only from the communicative presuppositions of a universal scope discourse in which all the possible involved individuals can take part and assume a hypothetical and argumentative attitude towards the pretensions of validity of norms and of modes of conduct that became problematic, which constitutes the higher level of intersubjectivity relative to an interlocking

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[247] Habermas, Comentários à ética do discurso, p.111.

of the individual perspective with the perspective of all."[248]

The idea of self-determination of social participants, which can understand their decisions and needs, is at the core of democratic ideas, and it needs to be transferred from the moral theory to the philosophy of law, because "The unity of practical reason can only be an unequivocal reality at the level of a network of forms of communication and public practices, in which the rational fomentation of the collective will has gained an institutional consistency."[249] In this way, Habermas employs the idea of the deliberative democracy that can be considered as an attempt to implement the discourse ethics in the political practice, using the institution of the modern law as the carrier of the deliberative institutions. Consequently, a discursive or deliberative model replaces the contract model: the legal community constitutes itself not by a way of a social contract but on the basis of a discursively achieved agreement.[250] This approach, as will be shown later in this paper, is used as a basis for his procedural theory of democracy in which participants do not aim to achieve justice, but rather a "good life" that belongs to the domain of ethics. Finally, when it comes to the discourse theory of law, Habermas tries to show the internal connection between the idea of human rights and popular sovereignty, and with the help of the discourse principle of law to overcome the contradiction between liberal and republican legal approaches. Habermas, therefore, argues that private and public autonomy *occur equally*.[251] The co-originality of private and public autonomy is necessary for the project of legitimization of law, and it is in the theory of discourse where the citizens are considered to be both creators and addressees of their rights. Thus, "[t]he substance of human rights then resides in the formal conditions for the legal institutionalization of those discursive processes of opinion- and will-formation in which the sovereignty of the people assumes a binding character."[252] In this way, Habermas's concept of modern law hovers between natural and positivist arguments, and his reading of the system of rights that does not belong to either moral or ethical reading of popular sovereignty takes him to the practical discourse of the deliberative model of democracy, where the above mentioned reconciliation can be achieved through the law because it is law that "compensates for the functional weaknesses of a morality that, from the observer perspective, frequently delivers cognitively indeterminate and motivationally unstable results. This complementary relation, however, by no means implies that law enjoys

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[248] *Ibid.*, p.112.
[249] *Ibid.*, p.117.
[250] Habermas, BFN, p.449.
[251] Madung, Politik und Gewalt, p.103.
[252] Habermas, *op. cit.*, 104.

moral neutrality."[253] Because, even though his grounding points considering law are found in the theory of discourse, it is necessary for discourse to be able to act permanently, which is possible only through institutionalization. In this symbiosis, principles of discourse are grasped by democratic principles, and the law operates in direction of forming a constitutional democratic state.

2.6 From the discourse theory to the deliberative politics

With the strict separation of communicative and strategic action, Habermas ends with the apparent glorification of the former action, insisting on its supremacy and social importance that the latter cannot reach. While, on the other hand, it is at least very hard to sharply separate a concept of the political from the instrumental and strategic action. Even though action motivated by egoism is expected from individuals, there is a shared world that encloses the "we-identity" into common social reality shaped in the practical discourse, "[a]nd what for the individual is a particular life project, for an organized community is the idea of the commonweal."[254] For example, feelings of offense, guilt, indignation and the like, can become part of this discourse, when their implicit judgment that acts like proposition in individual's moral acting, becomes explicit in the value judgment. Habermas acknowledges the existence of latent conflicts between the individuals involved in the ethical discourse, because they start with different preferences and values, looking egoistically after their interests, being guided by the strategic action of behavior. However, he concludes that only if there is a radical change in perspectives and attitudes, it is not possible for participants to conceive the interpersonal conflict as a moral problem. For him, "[c]onceived as intersubjectivity, the objectivity of value judgments is always indexed to particular communities. But in questions of posttraditional justice, evaluative standards come into play that transcend the context of existing communities."[255] In other words, when principle "D" meets the principle "U" on the pragmatic level of values and norms, these moral judgments that can be universally recognized are considered as the "right" judgments.

The justification of norms in a discourse that is always part of the lifeworld is the way in which Habermas connects the communication between participants with the normative

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[253] Habermas, BFN, 452-3.
[254] Habermas, Truth and justification, p.232.
[255] *Ibid.*, p.229.

structure of their society. This connection is first seen in the moral judgment meaning that something is morally right when it is universally recognized, and to become universal it needs to be communicated in the practical and ethical discourse where the rationally motivated recognition happens. This goes hand in hand with the assumption that comes from the theory of communicative action that people can always communicate their differences, and even if we disagree, we have to communicate to come to that agreement. In order to deal with the criteria of pluralism and social diversity and show how the universal can become recognized in both theoretical and practical world that becomes a communicated world, Habermas turns again to his discourse theory that is the cornerstone of the connection between the two reasons, and the bridge to the normative aspect of his philosophy, because it allows him to build a concept of democracy on argumentative reason. In other words, democracy is a precondition for the reconciliation of pluralism of legitimate world views, where "conflicts of justice can be resolved only if the disputing parties agree to create an inclusive We-perspective by mutual perspective-taking."[256]

Therefore, the path from discourse argumentative exchange to creating the concept of deliberation needs to be established by certain rules and institutions. These come to life in democracy under the tenet of legal norms that have the responsibility of taking the communicative reason to its core. In what follows, I will bring Habermas's discourse theory to the deliberative model of democracy, bound within a deliberated constitution. The practical appearance of this proposal is best seen in his numerous writings on the future of the European Union, and that is why, at the very end, I will reflect upon some of his conclusions regarding the EU. First, I will follow his conditions of the ideal speech act in order to understand two main conditions of deliberation: equality and rationalization; afterwards, I will define the process of deliberation as a specific way of communication, which brings the argumentation to the last phase – deliberative politics in modern democracy and its transformation of modern law as the answer for the ongoing uncoupling.

2.6.1 Equality and human rights

The difference between everyday communication and argumentative communication, as two types of linguistically mediated social interaction was presented above. The latter and its validity claims belong to the discourse, while the former surprisingly many times disappears

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[256] *Ibid.*, p.235.

from Habermas's horizon, although his first steps into the philosophy of language had more respect and plans in that regard. Before one steps onto the path towards understanding the way one subject comes to the communicative reason, one has to reflect upon what Habermas calls the ideal speech situation as the main pillar of his philosophy of language. He defines four basic conditions for the so-called ideal speech situation:

(a) publicity and inclusiveness: no one who could make a relevant contribution with regard to a controversial validity claim must be excluded; (b) equal rights to engage in communication: everyone must have the same opportunity to discuss the matter at hand; (c) exclusion of deception and illusion: participants have to mean what they say; and (d) absence of coercion: communication must be free from restrictions that prevent the better argument from being raised or from determining the outcome of the discussion.[257]

The conditions (a), (b) and (d) refer to the concept of equality. One needs to enjoy the full equality that is recognized by other participants in the deliberation. The condition (c), however, refers to the other pillar of deliberation, the rational capacities of the participants to weigh the arguments on the way of finding truth. Even though they are clearly strongly idealized conditions that can hardly be achieved in the actual discourse, they represent the departure point for any participant who wants to engage seriously in the discourse. In the argumentative exchange, these conditions create the frame of expectations, which depends entirely on the rational capacities of the participants to adjust their arguments according to the rules of truth. As long as the participants in argumentation proceed from the assumption that this is the case, they have no reason to worry about the inadequate procedural properties of the communication process.[258]

Therefore, the highly idealized situation is ready to be modified and to 'lower' its original criteria. According to Habermas, "inconsistencies that provoke doubts about the genuineness of an argumentative exchange do not arise until clearly relevant participants are excluded, relevant contributions are suppressed, and yes/no stances are manipulated or conditioned by other kinds of influences."[259] In order to ensure the minimum of conditions of equality, the society should construct and apply certain moral and legal norms that can be justified by their "universally and publicly cogent reasons."[260] This is a moment in the

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[257] Habermas, Between naturalism and religion, p.50; Truth and justification, p.106-7.
[258] Habermas, Truth and justification, p.108.
[259] Habermas, Between naturalism and religion, p.51.
[260] Habermas, Truth and justificaiton, p.238.

discourse theory when the concept of human rights is employed as the cornerstone of moral and justice, which is in turn justified due to their universal merits. Habermas argues that moral and law do not stand opposite to each other, they co-exist in such a way that one can talk about "the complementarity of law and morality."[261] Thus, human rights are not a part of moral, but they are *legal* rights in the full sense. This position allows him to deconstruct the notion of public sovereignty that is divided and dispersed among different levels of integration, while the law enables the construction of the global politics of human rights. With this relation in our mind, we have *to form* a communication, constraining it to some of the norms that enable these conditions. Likewise, communication needs to reflect "the full inclusion as well as the equal, uncoerced participation oriented toward reaching mutual understanding on the part of all those affected so that all relevant contributions to a given topic can be voiced and so that the best arguments can carry the day."[262] Therefore, the paradigm of total inclusion via human rights is the normative, universalist claim of modernity.

The human rights policy that Habermas's theory takes as its central point, on the one hand, relies on one comprehension of modernity, and on the other hand, on the concept of humanity that becomes a single moral subject in the modern world and provides human rights with universal legitimacy. He defines his approach to human rights as modern, and thus beyond traditional debates on the positive and natural law.

The concept of human rights does not have its origin in morality, but rather bears the imprint of the modern concept of individual liberties, hence of a specifically juridical concept. Human rights are juridical *by their very nature*. What lends them the appearance of moral rights is not their content, and most especially not their structure, but rather their mode of validity, which points beyond the legal orders of nation-states.[263]

Human rights offer a new modern moral content defined by the cosmopolitan claim, the content that his modern theory lacks. This content is added to the juridical structure, institutionalized and, therefore, rationalized. As the moralizing ingredient of the positive law, human rights are defined as existing before the legal norms, because a norm cannot be imposed justly without adherence to the presumed universal human rights policy, which in return signifies that human rights are "*sufficient for their justification.*" Furthermore, even though these rights continue to depend on the structure of national states, this is on its way of changing towards the true

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[261] Habermas, BFN, p.453.
[262] Habermas, Truth and justification, p.251.
[263] Habermas, The inclusion of the other, p.190.

character of universal rights, according to Habermas. Thus, "[t]he human rights depend from their institutional incorporation in one politically constituted world society."[264]

The fundamental rights of people are thus a simple expression of one subject – humanity, and "the implementation of such rules is in the equal interest of all persons qua persons" and are "equally good for *everybody*."[265] This use of human rights is, in my opinion, correctly described by Emanuele Catrucci as the "ideological approach" that corresponds to "the arrogant theology of humanity," and together reveals "the *strategic* nature of Habermas project." Catrucci continues: "all in all – we can say – inspired by something not very different from ancient intent of philosophers to justify that «might is right»."[266] In the last chapter I will show that the human rights, along with the liberalist theory of modernity and humanity, are able to legitimize their policy to the point of justifying the "humanitarian" war, and that this policy, which Habermas openly advocates in his latest writings, deeply depoliticized his theory, making him incapable to understand political identities outside of the universalist definition of modernity. Therefore, the strategic reason in Habermas's usage of human rights prevails over the supposed openness of the communicative reason that has only the including potential. This naturally flows into his theory of democracy, where exclusion and violence become even more apparent.

On the other hand, a liberal conception of fundamental rights for Schmitt means the limitation of the political and state. According to Kervégan, from the function and development of human rights, Schmitt derives quite opposite arguments than Habermas – one argument is transformation, and other contradiction. Linked to the former, Schmitt traces the transformation in the meaning of the human rights, as linked to the human nature, and as linked to the constitution of a state. This transformation implies canceling the space of the political and state, because we can only talk about the subjective rights that are protected by the statute in the constitutional rights, and not about "genuine basic rights in the sense of the fundamental distributional principle of the bourgeois Rechtsstaat."[267] For Schmitt, the only *status* can be given to the state, and there cannot be a parallel status to it, like the one that basic rights want to derive from the human nature. The constitutional rights are internal to the state, they are not above or before it, and therefore cannot question its character. This transformation leads to the contradiction between the two types of basic rights. In the first group there is individual,

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[264] Habermas, Sobre a constituição da Europa, p.5.
[265] Habermas, The inclusion of the other, p.191.
[266] Catrucci, Jürgen Habermas and the political realism: A critique, p.288.
[267] Schmitt, CT, p.211.

collective and social, and political freedom, while in the second group there are social rights. Schmitt calls these "the essentially *socialistic* rights of the individual" (such as the rights to education, social protection, retirement, right to work, etc.), and like all other rights, they have their logic and meaning only as constitutional rights because they cannot be "unbounded in principle" and thus they stand "in opposition to the genuine basic and liberty rights."[268] In this dualism of basic rights, we can trace the opposite relation between right (*Recht*) and law (*Gesetz*). The first group of rights carries "a restrictive and mainly negative application of the law," while the second group, the social rights require "a realization of law [*droit*] through the law [*loi*] in a context that is neither individualistic nor liberal."[269] In other words, in addition to the confrontation between the status of the state and the status of basic rights, there is a confrontation among different basic rights which in their pluralism confront the meanings of *direito* and *lei*. For Schmitt, the basic rights can only exist as constitutional rights, and as such "are not valid for foreigners because otherwise the political community and unity cease to exist."[270] Thus, a liberal concept of equality that is based on the concept of human rights is a blank and indifferent concept, and most importantly, a non-political concept.

2.6.2 Rationalization – another condition of practical discourse

In addition to equality, other important conditions of deliberative democracy are the rational capacities of participants who are willing to be employed in the discourse, following and understanding the arguments on the way of reaching understanding. Rationality in the theory of communicative action is considered to be the ability to understand what is best for the society and to be prepared to give up their opinion because the other proposal is rationally better. In discourse, whether a belief, which is considered irrational, will become rational – depends solely on good reason. In democracy, rationality is embraced on the argumentative level of public communication in a discourse where opinions and procedures of will formation produce the discursive rationality which in turn makes the democratic administration to be bound solely to the law and statute. When the last two are produced discursively and enter into the democratic process enriched with the legitimating power, the striving subsystems cannot rule by themselves. Therefore, "*[r]ationalization* means more than mere legitimation but less

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[268] *Ibid.*, p.207-8.
[269] Kervégan, Hegel, Carl Schmitt, p.31.
[270] Schmitt, *op. cit.*, p.207.

than the constitution of power."[271]

This discursive rationalization comes with a consensus among the participants, and this discursively reached consensus is definite for the participants, and has the power to ground the norm that is based on the intersubjective recognition. In other words, "a discursively reached agreement entitles us to take a proposition to be true."[272] This, of course, must occur under the *prepositions* of the above stated ideal conditions. I will return to this rational preposition in the last chapter, but what is important to note at this point is how Habermas brings rationality from a certain "form" of communication, under the idea of an ideal speech situation, to the practical reason of communicated truth and justice. All cognition is conceived discursively, meaning that the individual reason is not enough to reach a rational consensus,[273] and that we need to find a publically and universally cogent reason. The latter brings upon certain knowledge in the common world of a society that has the capacity for a new justification in modernity. As a result, both moral rightness and truth, as components from the practical and theoretical world, are found in the discursive, public and universal reason that appears in the linguistic medium of communication. Thus, following the logic of rational consent, "an agreement about norms and actions (…) warrants the rightness of moral judgments."[274] Moreover, in his pragmatic approach to the theory of truth, Habermas will conclude that the truths are available to people "only in the form of what is rationally acceptable."[275]

2.7 Deliberation in the modern world

On a procedural level, deliberation is much more than just a talk: it is a very particular kind of public talk. Above all, a deliberative democracy in its classic formulation represents an account of political legitimacy "that outcomes are legitimate to the extent they receive reflective assent through participation in authentic deliberation by all those subject to the decision in question."[276] A democracy that takes into consideration the individuals who are active, rational and ready for consensus creates for them the commitments that lead to the

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[271] Habermas, BFN, p.300.
[272] Habermas, Truth and justification, p.257.
[273] As a counter argument, Mouffe urges the "Habermasian theorists" to distinguish a mere agreement from a rational consensus. In her comment about deliberative democracy she concludes that the "[c]onsensus in a liberal-democratic society is – and will always be – the expression of a hegemony and the crystallization of power relations" (Mouffe, Democratic paradox, p.49).
[274] Habermas, Truth and justification, p.258.
[275] *Ibid.*, p.250.
[276] Dryzek cited in Parkinson, Legitimacy Problems in Deliberative Democracy, p. 180.

following contrast between institutions of deliberative democracy, on the one hand, and representative and constitutional institutions, on the other. Representative institutions are flawed because they accept whatever preferences people might indicate, whether they correspond to their judgments or not. Additionally, the institutions based on constitutionalism, such as supreme courts and constitutions, are contrary to democracy, since they effectively remove decisions from the hands of the people altogether. In contrast, deliberative democracy retains the commitment that no decision should be beyond the reach of the people, and that institutions should be structured so that people are able to make their decisions on the basis of good reasoning about the relevant information.[277] Therefore, individuals who through public communication express their arguments under the prepositions of ideal conditions and rationally come to a consensus are a cure for a deficiency of legitimacy. However, the deliberative decisions will continue to be illegitimate for those who were not part of a given discussion.

One of the possible solutions is that the deliberative theory "loosens" a little and instead of ideas being exchanged between all individuals, that it allows a lot more people to become part of the deliberative process as the observers, as Rawls would suggest. Another problem could be related to the claim that individuals are willing to change their preferences, interests and goals, because of their readiness to consent, which in the discourse ethic is found in solidarity, as explained above. This, in return, can lead to the situation where deliberation may lead people to hold beliefs that are not in their best interest, as stated by Przeworski. According to this author, deliberative models of decision making justify ideological domination because deliberation alters individual consciousness under the coercive pressure of collective action, which in turn questions the condition of rationalization. People may discover that their arguments are not sufficient to persuade others, they can listen to their arguments and yet vote in favor of their interests.[278] That is why every deliberation will end up with aggregation, because people will not deliberate only by their ratio, on a basis of a good reason, but also by their own preferences, and under conditions of unequal rational capacities or certainty to defend one's argument, people might follow ideologically what just seems to be the strongest argumentation.[279]

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[277] White, A Rawlsian Idea of Deliberative Democracy, p. 7.

[278] Przeworski, Deliberation and ideological domination, p. 141.

[279] Following Gramsci, Przeworski distinguishes two types of beliefs (technical and equilibrium) and in Gramscian language, a system that comprises both classes of beliefs is called "ideology" (Przeworski, Deliberation and ideological domination, p. 143). In other words, if all people are equal in their possibilities and rational abilities, they should logically come to the same conclusion without the need for discussion. That brings us to the conclusion

2.7.1 Discourse theory in between liberal and republican political theory

By choosing to keep the social subject and the constitutional norms active, Habermas again proves his shift from the *philosophy of consciousness* to the *philosophy of language,* and from a subject-centered to a communicative conception of reason and rationality. Accordingly, "[d]iscourse theory reckons with the *higher-level intersubjectivity* of processes of reaching understanding that take place through democratic procedures or in the communicative network of public spheres."[280] This communicative network is based on the subjectless communication used in discussion and decision making on the rational opinions and will-formation. The latter may in some instances even replace certain political matters, because they will discuss and deliberate on matters that are truly important to a society. That is why in Habermas's model of democracy, the democratic process is taken in its maximum form, and there is no place for idling in the political debate.

The political theory of deliberative democracy and civil society seeks to mediate between the sociology of law and the philosophy of justice in order to show that what can guarantee the constant openness of system are not the established institutions of restricted law, but the sovereignty of public deliberation. On this way Habermas's main goal is to define how the communicative power ought to be related to the administrative and social power. Therefore, he will propose a model between liberal and republican, while criticizing and deconstructing both of them. The reading proposed (…) differs both from the liberal conception of the state as guardian of an economic society and from the republican concept of an ethical community institutionalized in the state.[281] Reaching the political totality that will make politics flow on all levels of society and in all subsystems, re-politicizing a depoliticized population can be achieved in a deliberative democracy that is not rooted in either the republican or the liberal

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that in the deliberation the beliefs are altered as a result of communication, therefore, it must be because either (a) individuals have unequal access to information, or (b) they see themselves as having unequal reasoning capacity (*Ibid.*, p.145). His formula is quite simple: first, deliberation can occur only if someone pays for it; second, deliberation can be effective only if there is inequality, either of access to specific information, or of calculating capacity; and last but not least, with an unavoidable dose of a self-interest. This can easily lead to manipulation, indoctrination and brain washing. Technical beliefs are difficult to manipulate, but equilibrium beliefs are endogenous: they are true only if they are shared and individuals have little direct knowledge about the beliefs of others (*Ibid.*, p.154). Therefore, the ideological manipulation he is talking about occurs by manipulating the mutual expectations. Like this, deliberation can coordinate beliefs and lock individuals into equilibria (*Ibid.*, p.155).

[280] Habermas, BFN, p.299.
[281] *Ibid.*, p.296.

model of politics. It is precisely in the mediation between the theory of discourse and the law where Habermas decides to define principles of the *Rechtsstaat*. One thing remains clear – the latter is not possible without democracy.

In the way he criticizes the republican model, he makes it clear that the "state-centered understanding of politics" constitutes a powerful part of the republican argument, and that can only give up the idea of "citizenry capable of collective action."[282] Furthermore, Habermas argues that "[t]he meaning of legal arguments is exhausted by their function of reducing the surprise value of court decisions (…) and increasing the actual acceptance of such decisions by clients."[283] Clients are citizens in front of the Courts, in a case where lawyers naturally decide to follow the logic of what Habermas formulates as a situation where "reasons justify the decisions and not decision the reason."[284] In sum, he argues that in republicanism the constitutional court is transformed into some type of the "authoritarian agency" that is operating with the pre-given constitutional orders made and written by the legislative founders of what today should be reproduced as a common will of people. Moreover, (...) this expectation of virtue pushes the democratic process, as it actually precedes in welfare state mass democracies, into the pallid light of an instrumentally distorted politics, a "fallen" politics.[285]

In the critique of the republican constitutional model, Habermas develops a very light critical approach to the external tension in the law, focusing on the tension between the state and society, and the way to surpass that tension according to some more liberal understanding. In agreement with the liberal argumentation, democracy can create a bridge between the state apparatus and the social sphere, enabling the exchange of reason between them. The law in a liberal scenario serves as a regulator of the balance between power and interest, and constitutional normative provisions, especially its system of human rights, would be responsible for penetrating the social interests into the state structure which would then become motivated to act in the social interest through a political debate among the political parties. This is still a state-orientated politics, where it is possible to derive politics only from the state apparatus. It is oriented toward the input of a rational political will-formation but also toward the output of government activities that are successful on balance.[286] The discourse theory

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[282] *Ibid.*, p.298.
[283] *Ibid.*, p.50.
[284] *Ibid.*
[285] *Ibid.*, p.277.
[286] *Ibid.*, p.298.

approach to democracy needs to find the way to enable spreading of politics independently from the state apparatus.

On the other hand, the liberal model depends on the constitutional provisions that enable the functioning of an economic society that defines the act of satisfaction of personal life plans and private expectations of happiness as a common good. This is practically a summary of his critique of modernity that encages the political activity of citizens in the electoral periods, which in turn leads to the disability of citizens to achieve their nature of *zoon politikon* and fulfill their roles as members of society that represents the extension of their identity. The liberalist legal paradigm understands the law as a means of enforcing the private interests of economic subjects. "[Therefore] the liberal state is "der Hüter der Wirtschaftsgesellschaft."[287] With the over-emphasis on private autonomy, liberalism does not adequately address the factual lack of freedom and equality."[288]

In "The theory of communicative action," we have seen that Habermas offers a theory that is capable of articulating the pathologies and achievements of modernity, while searching for its modern reason. In *Faktizität und Geltung,* he will continue to explore the capacities of modernity that can enable it to overcome its own pathologies. Simultaneously, he will continue with the project of a reformed modern society based on the discourse theory of deliberative democracy, with the trust in the means of modern law and the constitution. On this path, the discourse theory will calculate the golden ratio between the liberal and the republican model where strong normative basis are held by the constitutional provisions as a "consistent answer to the question of how the demanding communicative forms of democratic opinion – and will-formation can be institutionalized."[289] In contrast to liberal and republican legal concepts, Habermas's attention will be focused on the proceduralist legal paradigm. In order for deliberation to come to life, the citizen participation and will are not enough; a strong institutional framework is also needed to provide conditions and rules for the deliberative process.

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[287] *Der Hüter der Wirtschaftsgesellschaft* or in English "the guardian/protector of the constitution" became the symbol of the constitutional debate between Carl Schmitt and Hans Kelsen that started with Schmitt's reply to Kelsen through a number of articles that were published in a monograph-type book in 1931 under the title *Der Hüter der Verfassung* ("The guardian of the Constitution"). Kelsen's sharp reply to Schmitt's book was an essay *Wer soll der Hüter der Verfassung sein?* ("Who ought to be the guardian of the Constitution?"), in which we can find one of the most intense critiques of Schmitt's constitutional theory. See Chapter Three, section 3.3, "Constitutional debate between Schmitt and Kelsen."
[288] Madung, Politik und Gewalt, p.125.
[289] Habermas, BFN, p.298.

2.7.2 Internal vs. external tension in law

The dual model of society, which was explained in the first part of the chapter, brings the dual model of the law. Therefore, we can observe the uncoupling of the social model in the legal theory as internal and external tension between facticity and validity. As explained earlier, the internal tension is a tension in the process of reaching mutual understanding in social processes of communication and deliberation, and also a tension between strategic action and the action oriented towards understanding. The external tension can be observed as a pressure between a constitution and its legitimacy, between the already incorporated legal core and current social facticity. In the short section that follows, the external tension will be clarified further, mainly with the goal of showing how Habermas was in his earlier writings excluding the institutional dimension of law, focusing mainly on solving the problem of its internal pressure.

As explained before, Habermas uses the discourse theory to deconstruct the identity of modern law. On the level of the judiciary, he "trusts in the argument of the discursive character of the judicial procedure more than would be advisable or justified for a critical-theoretical approach."[290] In other words, he avoids directing his theoretical attention to the fact that certain constitutions of some liberal democracies appear to be better when they are in the hands of judges and lawyers than when they are in the hands of the people. How can a constitution claim to enjoy a democratic legitimacy, how can it be considered a creation of the people if the ways of changing and interpreting it are in most of the cases in the hands of those occupying the positions of power? The participation of an ordinary citizen in the constitutional changes in democracies is weak at best, which seriously undermines the democratic character of the constitutional law and its correspondence to the given social reality. When talking about the two levels of development and how differentiation of the system needs to correspond to the levels of rationalization in the lifeworld, Habermas deals mostly with the internal tension.

The question of establishing and maintaining the legitimate power of law in his theory is transferred to democracy through the discourse theory. On that way he looks for certain connections between the historical and sociological discourse, as an argument that can bring upon the discussion and consent on the relation between the current norm and reality.

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[290] Coelho, Tension Between facticity and validity in the Judicial Procedure, p. 8.

"Empiricist redefinitions thus do not give us a way to avoid the question of how norm and reality are related. If this is the case, then we must return to those normative models of democracy already introduced and ask whether their implicit conceptions of society offer any points of contact with available sociological analyses."[291]

We can summarize that the solution in overcoming the conflict between facticity and validity consists of three moments: the language (being able to mean the same thing by the same words and expressions); rationality (being able to consider yourself rational); and reaching mutual understanding and believing in it (that their consensus will not subsequently proven false or wrong).[292] The first occurs in the communicative action and depends on the second condition of rationality that can be communicated and therefore expressed in the discursive form of communication where subjects can reflect upon their reality in the form of argumentation. However, without the third condition, the readiness to consent and believe in the rightness of your decision, the democratic process cannot be triggered. Idealization that emanates from the deliberative process and consensus achievement, as a feature that modernity or, better said, the modern law, has a capacity to "[i]mply a tension between the de facto social acceptance *(soziale Geltung)* of a group consensus and the idealized validity *(Gültigkeit)* that such a consensus must claim for itself if members are to accept it as reasonable."[293] In other words, reaching consensus through the communication, in the conditions of a deliberative democracy, is a process that requires certain mutual similarities, shared values that usually require the same memory, culture and history. Habermas finds these in the moral sphere that in the law is grasped in the project of human rights. This is his very powerful argument about the complementary relationship between law and morality in the project of cosmopolitan law, and is the most criticized point of his legal analyses.

It remains clear that, for Habermas, by removing the external tension, we will not solve the problem of a legal-democratic strain between facticity and validity, because the solution must come from the internal level. That is why instead of incorporating a new level of analysis at the level of democracy, Habermas returns to the discursive theory that allows the theory of communicative action to penetrate into the new model of democracy. In what follows, I will deconstruct Habermas's model of deliberative democracy through the critiques and complements coming from other authors who are for and against the deliberative democracy.

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[291] Habermas, *op. cit.,* p.296.
[292] See Rehg, Translator's Introduction to BFN, p.xv.
[293] Rehg in Habermas, BFN, Translator's Introduction, p.xvi.

Additionally, the last argument will consider Habermas's writings on the cosmopolitan law that I will examine following his writings on the future of the European Union.

2.8 Deliberative democracy and its legal core

For Habermas, there are numerous definitions and reasons why deliberative model of democracy is better than the aggregative, why deliberation is superior in nature than aggregation. According to Cohen, we can distinguish five main features of the formal conception of deliberative democracy: first, deliberative democracy is an ongoing and independent association, whose members expect it to continue into the indefinite future; second, for members of a democratic association, free deliberation among equals is the basis of legitimacy; third, deliberative democracy is a pluralistic association; fourth, as members of the democratic association regard deliberative procedures as a source of legitimacy, it is important for them that the terms of their association are not merely the result of their deliberation, but also be manifest to them as such; and fifth, members recognize each other as having deliberative capacities.[294]

The normative nature of deliberative democracy is based on two principles: it insists on reasoning between people as the guiding political procedure, rather than bargaining between competing interests or the aggregation of private preferences; and the essential political act (…) is a public act, as opposed to the purely private act of voting.[295] Therefore, deliberative democracy is considered not only as a market of private interests where individuals are given conditions to act in the network of intersubjectivity, but it also represents a forum where the public agreements are being created. In order for a public discussion to be guided by the public interests, and not by particular fractions, deliberative democracy requires equality among the participants. This total inclusion is possible only within an institutional body that can guarantee ideal conditions and offer means to universal reason to penetrate in the real world of social.

Aside from the normative structure that further development of writings on deliberative democracy has to offer, in his theoretical and practical quest, the main task of Habermas's theory of democracy is to offer a concept that can solve the problem of legitimation. According to him, for society to function in a stable and long-term way, people need to believe in the

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[294] Cohen, Deliberation and democratic legitimacy, pp. 3-4.
[295] Parkinson, Deliberating in the real world, p. 3.

norms and political decision of their country. Without the legitimization of laws and politics, the colonization power of the steering media of money and administration can overtake the authoritative power over the state apparatus. Therefore, the main task of his democratic proposal is to establish *demos* that can be fully bound to the normative system and positive law, since it is also the creator of these. On the level of positive law, this would mean a full "co-originality" of public and private autonomy, because citizens would exercise their freedom only by participating in public autonomy as lawmakers. Their private autonomy and the full meaning of the individual freedom must be bound to people's exercising of public autonomy.

In order to come to this point, Habermas employs the three pillars of his theoretical melting pot: (a) *the discursive theory of law* allows the constitutional democracy to be built on the premise of legitimate law (by guaranteeing private autonomy) – "the procedures and communicative presuppositions for a discursive opinion-and-will-formation that in turn makes possible (the exercise of political autonomy) legitimate lawmaking;"[296] (b) *the communication theory of society* serves to implement the systems theory model of democracy and social integration, where the communicatively established political system will be one among other subsystems, and (c) *a specific concept of law* that allows him to connect the empirical and normative analysis of his philosophy. Related to this statement, Habermas talks about a specific legal communication that can function as "a medium through which the structures of recognition built into communicative action are transferred from the level of simple interactions to the abstract level of organized relationship."[297] In other words, the rights that define one's individual freedom must also include rights of political participation.

It has been shown above that the new concept of deliberative democracy wants to "decentralize" politics, get it outside of the national state by recognizing the potential of creating the political and being political towards individuals in the broadest sense. On this way, the concept of a state and a nation will merge into the "nation-state," where the equality between these two is not only promised in the positive law, but is the actual part and consequence of the rational discourse. The rise of the new concept of democratic state, according to Habermas, managed to solve "two problems at once: it made possible a new *mode of legitimation* based on a new, more abstract form of *social integration*."[298]

Therefore, a deliberative concept of democracy first needs a new public sphere based

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[296] Habermas, BFN, p.437.
[297] *Ibid.*
[298] Habermas, The inclusion of the other, p.111.

on the modern, more abstract social integration. We can freely say that on this road Habermas needs a new citizen, one who is ready to engage seriously and rationally in the public communication, and in turn, be ready to assent to the power of a more rational argument. The readiness to obey the norms despite not being originally proposed by the given individual needs more than just a rational argument. At this point, what Habermas needs is a strong social solidarity that, unlike the traditional modern state that is derived from the concept of nation, finds its roots in the constitutional patriotism. According to him, the traditional democracy is lacking the democratic process itself, "the communicative practice that is performed collectively, and where, finally, the true understanding of constitution is open for discussion."[299] In this formula we can focus on two points: the communicative practice, and the true understanding of constitution. The first remark we have already exposed from its origins in the theory of communicative action, all the way to its discursive form in the discursive theory of law. The second part is what the citizens of the post-secularized nation-state have to do. They need to reflect the constitutional provisions not only abstractly, but also concretely "from the historical context of their own national history."[300] This abstract and legally mediated solidarity becomes possible only when the principles of justice created by the legal communication, manage to enter into the complex network of value orientations in a culture.

These two concepts of constitution and legal communication are crucial in order to bring Habermas to the new cosmopolitan political order. Although it will take some time for him to clearly define the potential of the cosmopolitan version of his theory, he left this question open in his earlier texts acknowledging that "[t]he web of legal communication is even capable of embracing complex societies as a whole."[301] What we can conclude from his later writings, the so-called post-national system must be political, must have a certain institutional framework, and it is certainly transnational. This is the last point I will reflect upon in what follows, using some of his writings about the EU, where, in my opinion, it is very explicit how Habermas seeks to abolish the true nature of power and the political by putting them under the legal and ethical discourse.

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[299] Habermas, Ratzinger, Dijalektika sekularizacije (Germ. *Dialektik der Säkularisierung*), p.21..
[300] *Ibid.*, p.22.
[301] Habermas, BFN, p.437.

2.8.1 Habermas's model for the European Union

In 2007, citizens of the member states of the European Union were put in front of a new idea – the Constitution of the Union. This idea appeared in the unprepared union that will suffer a deeper crisis in the years that follow. The economic crisis that hit the whole western world, starting from the collapse of the bank system of the United States of America in 2006, led to fiscal and market problems in the Union, leaving some state-members close to bankruptcy. The recovery of these countries was rather slow, and when another wave of debt crisis hit after 2010, the crisis management was largely imposed by the ruling Troika – the European Central Bank, the European Council, and the International Monetary Fund. That is why even before the articulated political crisis in the Union, we can say that the first crisis of the global banking system was only a herald of a more profound, essential systematic and political crisis, with a democratic deficit as its consequence, ultimately the crisis that Habermas embraced remarkably in his writings. In the discourse about the crisis, many authors, including Habermas, were placing the significant emphasis on German solidarity. The so-called "German question" is an important argument in the critique of power in the EU decision policy, but on the other hand, it is still the main integrative engine of the Union that after the economic crisis in 2016 had its first disintegration act. The question that appeared a decade ago is: can there be the Union without the German political and economic solidarity? In his text "Why Europe needs constitution?" besides the evident political benefits that the Union can achieve in the global affairs with a firm foreign and defense policy, oddly enough, Habermas puts his interest in "the containment of a potentially dangerous Germany."[302] As a German citizen born in 1929, he had the opportunity to live through the WWII, and this has always influenced his opinion on the role of Germany in the Union. The solidarity of Germany for him was not based solely on the present situation, but it has always been a means of redemption for the past crimes that his country committed in Europe and, in some sense, a chance for a historical reconciliation. Without entering further into the "German question," I will continue with the next major problem of the European Union and Habermas's remedy.

2.8.2 European pathologies

The democratic deficit represents a reflection of the legitimacy problem of the

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[302] Habermas, Why Europe needs constitution? in New Left Review, 11, 2001 (5-26), p.7.

institutional design developed by the EU, with the growing gap between community decisions and people, in which the politics on the national level is where people remain involved and participate in a more serious way. Due to the failure of adopting a common European constitution that was supposed to provide the concept of European citizens with its abstract meaning, the democratic crisis became the crisis of European identity or, rather the lack of it. However, for Habermas, "the lack of a "European people" is not an insurmountable obstacle to joint political decision-making in Europe."[303] On the way towards "an ever-close Union," the problem of sovereignty increased. Even though the Union represents a relatively new form of organization whose proper definition is still being questioned in some human sciences, it is formed by the traditional national states bound by Union's treaties. The cosmopolitan ideas in Habermas are mentioned above, but in his latest writings about the EU, the remedies he offers are not based on the post-national ideas for the Union, or on the ideas that the juridical transnational system, embraced in the institutional core of the reformed Union, could offer. Instead, he decides to argue that the solution is in creating *a double sovereignty*, with double constituting authority of the entire citizenry of Europe (European citizens) on one hand, and of the different peoples of the participating nation-states (European peoples) on the other. This statement is supposed to correspond to his decentralized politics explained in BFN:

"[T]he discourse theory of democracy corresponds to the image of a decentralized society, albeit a society in which the political public sphere has been differentiated as an arena for the perception, identification, and treatment of problems affecting the whole society. (....) Strictly speaking, this power [communicatively generated power] springs from the interactions among legally institutionalized will-formation and culturally mobilized publics."[304]

Furthermore, a reconstruction of the notion of sovereignty has in its reason the arguments that can attract the member-states of the Union. If the dialectics of modern states are preserved in the Hegelian way, the permanent achievements are possible, and the concept of state does not have to be subordinate to the forces of history (that, as we have seen, ends in its modern articulation), then "living justice" is possible.[305] By the same token, Habermas structures his project for the Union, as a project towards the cosmopolitan world. Thus, the national state, like in Hegel's, also survives in the Habermas's system, and both authors defend it with the public will and interests of the people in defending their rights and liberties on the

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[303] Habermas, Democracy in Europe: Why the development of the European Union into a Transnational Democracy is Necessary and How it is Possible, p.9.

[304] Habermas, BFN, p.301.

[305] See Habermas, Sobre a constituição da Europa, p.78.

path towards a more cosmopolitan future. Habermas states this very clearly: "The national states are more than the incorporation of the national culture worth of preserving; they *guarantee* the level of justice and liberty that citizens, with the reason, want to maintain."[306] Thus, one has every right to conclude that the "national culture" that the European citizen seeks to protect is essentially similar to the "national culture" of all other citizens under the reason of human rights. Particular differences or political antagonisms are thus not influential enough to be part of the democratic material that the citizens of one state would transfer to the integration on the level of the Union. Likewise, the subjective consensus becomes bound to the universal rationalism in the context of the democratic process of institutionalized deliberation, in accordance with the normative tenets of protected human rights.

2.8.3 The European Constitution

If we miss the chance to criticize the difficulty of bringing the idea of "two Europeans" into practice – if we can even use that word without fear of losing it in its semantics, we can try to continue to follow this "tough experiment." With the two constituents, the eager European constitution would have its legitimacy chances. In practice this would mean the following: if we are about to decide on the content of the EU Constitution, we are going to have two parallel processes – discussion and adoption of the proposed text of the constitution in each of the national states, and the same process on the European level, in the European Council. After that, again, we need to have a global EU voting. This is the only way that "both sides" would get the chance to provide the legitimacy to the future document, while democratic rules are complied.

Supposing that we manage to surpass this step also, and reach the institutional level of the current federalized supranational union, that would look as follows: it would consist of a strong parliament with the capacity to take legislative initiatives and whose approval would be necessary for all political questions; the Council would be reformed into the Council of Ministers, and finally, the Congress would be between the Parliament and the Council answering to both equally. Bearing in mind that the citizens (or their representatives), as we would like to assume, insisted that the democratic-constitutional substance of 'their' states should remain intact in the future Union.[307] From this and previous proclamation, we can only

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[306] *Ibid.*, p.78.
[307] Habermas, Democracy in Europe: Why the development of the European Union into a transnational democracy

assume that in this "Euro-Union" there would not be only two sovereigns, but also a larger administrative apparatus, where everything would be doubled. What is even more troubling with this "experiment" is that it would have two parallel realms of democratic deliberation supposedly working for the same purpose – providing the EU politics a stronger legitimacy ground.

The changes described above must begin with the Council, the cornerstone of the legal and political changes in the Union. The fact that the Council is composed of the "great 17" who are leaders in their own national states makes this transition more difficult because politicians are not the same as philosophers. Nevertheless, this decision could be possible among them because of political points and future benefits, where the rational argument prevails again. This argument is further related to the idea of a stronger European Parliament, as the carrier of the future institutionalized political character of the Union, and as the realm where the deliberative model of democracy can be organized under the communicative reason. Besides his previous and very strong skepticism about the political process carried by the political parties in democratic parliaments,[308] Habermas bases the new union on this institution. His critique of a non-sufficiently empowered parliaments stands very strong in terms of the latest practice, and it goes hand in hand that the EU policy is more focused on providing the image of stability in order to answer the global economic challenges and the ones considering the defense of the peace on its borders, than in evolving into a democratic political union. Likewise, its relationship and support to the Balkan countries and the willingness to tolerate their openly non-democratic politics, defines those countries more as the so-called "stabilizing democracies," than the true ones. Thus, the phrase "stability in the region" became a mantra of the EU external politics towards the Balkan Peninsula, and "economic and political stability" a mantra towards the "bad" member states, such as Spain, Portugal, Greece, Italy or Poland. The democratic values are falling down to the agenda of the Union, and this is due to the policy of the Council. Thus, when the president of the European Commission opens the speech in the European Parliament with the words: "The European Parliament is ridiculous, totally ridiculous (…) [and that he] will never again attend the meeting of this kind,"[309] it is at least very hard to imagine the political desire of the executive power to support the reformation that Habermas

is Necessary and how it is possible, p.11.

[308] See for example Habermas, The structural change in the public sphere, specifically pp.196-222.

[309] European Commission President Jean-Claude Juncker speech in the European Parliament held on July 4, 2017. Available at: https://www.theguardian.com/world/2017/jul/04/jean-claude-juncker-criticises-ridiculous-european-parliament [Last accessed on 07/08/2017]

recommends.

In order to avoid the repeating of history of world wars, Habermas calls for a "constitutional patriotism" for which the solidarity among the people can be used, until the majority of the cultures stop being political cultures. This kind of patriotism would allow decolonization of the lifeworld as the political culture would get separated from the particular culture, and more importantly, it would lead to the communication between different lifeworlds. In the case of the EU, he sees the constitutional patriotism as a potential asset for such a synthesis because it would enable a decolonization, in which the shared values and ideas would have the effect of a social glue. For the nation-states with their own national histories, a politics that seeks the coexistence of different ethnic communities, language groups, religious faiths, etc., under the condition of equal rights, entails a precarious and painful process. The majority culture, assuming itself to be identical with the national culture as such, must be free from its historical identification with a general political culture, with all citizens being able to identify themselves under equal terms with the political culture of their own country. To the degree that this decoupling of the political culture from the majority culture succeeds, the solidarity of the citizens is shifted onto the more abstract foundation of a "constitutional patriotism."[310] Simply put, Habermas believes that the European Constitution as a product of public deliberation of communicatively competent and rational participants, via the institution of inclusive and just modern law, will be the solution to the crisis of legitimacy and democracy, and would develop the specific supranational democracy that would provide the European decisions and institution with legitimacy due to its deliberative characteristics.

On the way of resolving the problem of legitimacy in the EU, Habermas admitted that he did not know what to do with the relation between the political and sovereignty. His diagnosis of legitimation pathologies in the Union is holding its firm basis when the rise of the right-wing populism, the disintegration of the Union, the lack of solidarity, the migration crisis, etc., are challenging the further development of the EU. However, in order to avoid reforming the meaning of the political according to his discursive theory, he makes a big leap in offering a plan according to which it is possible to build the existing EU system – a new idea of deliberative democracy. Furthermore, on this path he ends up betraying not only his critical position towards modern pathologies, such as bureaucratization, but also the very idea of deliberative democracy. First of all, the deliberative democracy cannot be based on the "top

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[310] Habermas, The postnational constellation: political essays, p.74.

down" process. It has to start with people, and end in their institutionalized communicative reason. The concept of European citizens or European peoples is not possible if we want to stay in the normative frame of the supranational democratic system, because it depends on the decision of the European Council to give more authority to the European Parliament. Likewise, no critical relation towards this decision is possible. Secondly, the dualism and tension in law and politics would not be quickly resolved by the creation of the "Euro-Union" as the bearer of a new democracy. There is no guarantee that such creation would repair problems, let alone that it will not make them worse.

2.9 Conclusion to the chapter

I hold that the deliberative model of democracy and the discourse theory are plausible as ideas for the discussion about modernity. The aim of this chapter was to show that relation and, more importantly, to point out that in order to give this normative frame to his philosophy of language, Habermas entered the labyrinth of modern law and democracy, where the political power and particular interests cross their swords, as a philosopher determined to make his way towards communicatively recognized deliberative democracy. Therefore, I believe that the loss of critical voice in his latest writings is the product of creating his path above the complexity of antagonisms, particular interests, different world views of particular cultures, feelings, passions and experiences of very particular people. His Hegelian project of finding the symbiosis between particular and universal – the intersubjective mind in modernity and its institutions, such as law, became a closed system in his more recent writings on the European Union in the way shown above. That is why this chapter is completed with those writings, as it is clear that Habermas continues only to develop his system on the empirical level of interpretation and projection, leaving the theoretical deconstruction only to the degree of justification of the proposed practical measures with the theoretical mind.

Habermas will clearly say that "the deliberatively filtered political communications that depend on lifeworld resources – on a liberal politic culture and an enlightened political socialization, above all on the initiatives of opinion-building associations"[311] are the conditions for a deliberative model of democracy. This equalization of liberal and democratic concepts is masked in the politics of human rights, and in the cosmopolitan need for their legal

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[311] Habermas, BFN, p.302.

institutionalization. Human rights offer a new moral content for reformed modernity where the national states continue to protect the liberties and freedom of their citizens, but openly engage in the project of universalization. However, "[i]t should be recognized that law, in the form of the universalist administration of the rights of man, is hence degraded – contrarily to what Habermas himself would like – to a questionable tool of moral propaganda, exposing the connection between propaganda and humanity."[312] The theological significance that humanity and human dignity get in Habermas's politics of human rights bring within itself a latent danger of imperialist politics based on the abstract ideas of human rights. Habermas is aware of this, and by insisting that human rights have an original juridical and not moral meaning, he wants to subdue those dangers with a normative imperative. However, the testimonies of millions of people, the newspaper headlines and the rising numbers of violent activities that are supposed to symbolize a death in the name of a better future, or a death in the name of humanity, are no different from the death in the name of nation.

In terms of discourse, the intersubjectivity can be recognized and finally realized in the project of the just institution, and a law which will embrace the communicative reason. The rational potential of societies gets mobilized and possible with the theory of communicative action. The modern law steps in to fill the functional gaps in social evolution. The tension between validity and facticity, already built into informal everyday practice in virtue of the ideal content of the pragmatic presuppositions of communicative action, becomes more acute in the validity dimension of modern law.[313] In addition, the rational capacities of individuals in the modern world need to become secularized from the religious domain, in the sense that they need to be put into the service of public debates and public sphere. It is interesting that while Habermas acknowledges Christianity in providing the Western philosophy with ideas such as responsibility, autonomy, historicism, human dignity etc., he at the end of the day defines the religious feelings as something pre-modern that at the moment of entering into the modern democratic world gets abolished by the imperative for a new reason. Although instead of the word "abolished" one needs to use the word "substituted," the consequence remains the same: for Habermas there is a place for religion in the modern world as long as it produces the integral cognitive content, and is capable of communicating with the secular. In other words, "the liberal political culture can except from religious people to participate in the efforts of translating the

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[312] Castrucci, Jürgen Habermas and the political realism: A critique in Sociology and Anthropology 3(6), 2015 (285-294), p.293.
[313] Habermas, Communication and the evolution of the society, p.42.

relevant contributions from the religious language to the publically accessible language."[314]

The "publically accessible language" is what the intersubjective mind needs in order to step forward as the author of the new reason. Habermas who previously considered that "[t]he modern law didn't contemplate the intersubjective nature of forming a common will, so it cannot be conceived as a formation of Individual will on a large scale"[315] does not exist anymore, and the new argument is completely opposite to the old. It is in the medium of law where the consensus about the universal is already taking place in the politics of human rights. The never-ending possibility of rational consensus stems from the postulates of the theory of communicative action, formed in the discourse theory and finally brought into the cosmopolitan democracy. This chapter provides an insight into the beginning and end of Habermas's system where everything is bound in the form of a circle, just as Hegel would recommend. However, in the last chapter, the points that I will return to are focused on revealing a certain connection between the political and violence, and the latent excluding power of Habermas's theory in which the consensus always means exclusion already on the level of the ideal speech acts. Finally, the demonization of a new enemy who is becoming more and more dressed in the clothes of the traditional, substitutes the radical critique of violence. These points are vital in providing the dynamics of re-thinking Habermas's ideas. Thus, in that chapter I will return to the history of the socialist federation of Yugoslavia, and thus further provoke his system, the system in which the idea of the intersubjective possibility of the socialist democracy has disappeared shortly after the Yugoslav group of *Praxis*. Moreover, the moments when Habermas returns to the arguments coming from the Yugoslav experience is where his theory of consensus shows perhaps the greatest incompetence.

In order to reach this level of discussion, in what follows, I will use the political and legal theory of Carl Schmitt. Habermas had numerous more and less open dialogues with this author, many times showing the need to respond to his critique of liberal concepts, because his theory was a clear opposition to the one advocated by Schmitt. However, we shall see with whom he actually shares many of his early ideas, and to whom he never manages to give a 'final answer'.

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[314] Habermas, Glauben und Wissen, cited in Habermas, Ratzinger, Dijalektika sekularizacije (Ger.: *Dialektik der Säkularisierung*), p.32. Translation mine.
[315] Habermas, Comentários a ética do discurso, p.199.

Chapter III
Conflict as a basis of law – towards the depoliticization

3.1 Schmitt and the political

Carl Schmitt was born in a small town in North Rhine-Westphalia, Plettenberg, and this was a place of great importance to him. It is where he decided to return after his unsuccessful 'political' career, the place where he had a small group of friends, mostly his colleagues and students who visited him, and finally, this is where he remained until his death. His writings are primarily related to the nature, the rise and the idea of nationalist-social Germany before and during the Second World War, and his work became part of 'politics of memory' (better said, politics of forgetting) that tends to put authors like Schmitt under the academic label of 'dangerous' whose material is said to be a bad reading, if some reading can be defined as such. In Germany, this fame of his name continues to exist. Schmitt earned this notoriety fairly by sharing the ideas of the nationalist-socialist German elites, bolstering the decisions and plans of the Third Reich with his legal-philosophical writings. If one is approaching Schmitt exclusively through his political and legal theory in his early writings, and ignoring his direct implications with the regime and the idea of the Third Reich, then one is dealing with 'dark matter.' This, among other aspects, makes him a challenging author, and very difficult to justify, since the critique of his total state theory in something that tends to be called modern legal and political theory is absolute and utter.

Even though it is possible to observe at least three phases in Schmitt's work, and that he was criticized for not being really a systematic writer, the ideas that had started to develop in young Schmitt before the First World War are the same ideas we can find in his writings before and during the Second World War. If we consider years before the end of the WWI (1914-1919) as the first phase in Schmitt's career, his works after the WWI can be roughly divided into two periods: from 1919 to 1933, and post-WWII period from 1933 until 1945. Since this work is not focused on a complex and still widely discussed reputation, which fluctuates from one to other extreme point, but rather on the ideas Schmitt explored in his political-legal theory, some aspects of the complexity of his creativity cannot be ignored. Therefore, in what follows, I will focus on introducing his work through more biographical and historical argumentation, with a goal to roughly show the original ideas and the influences he must had experienced. In this way, I will not ignore the reality of his historical responsibility,

and before dealing with concepts which are essential for this paper, I will take a step back and try to present an image of Carl Schmitt as the author who grew, changed, but nevertheless, as I shall conclude, kept some of his original ideas.

3.1.1 Three levels of deconstruction of Carl Schmitt

By exploring the lives and works of some authors, truly great intellects, such as Heidegger or Schmitt, we cannot ignore the question: how did they from being politically and military active,[316] come to the point of ideologically supporting the Third Reich project, making theoretical and philosophical justifications, and glorifying Nazi Germany? In the case of Carl Schmitt, German sociologist Nicoulaus Sombart tried to answer this question in his books *Jugend in Berlin. 1933-1943. Ein Bericht* (1984) and *Die deutschen Männer und ihre Feinde* (1997).[317] Having had the opportunity to meet and have private conversations with Schmitt during their long walks, his approach is, simply put, psychoanalytic cut of Schmitt's youth that got pasted onto his future personal life and professional career. This cut consists of three parts: first, his relationship with his parents; second, his relationship with religion; and finally, his relationship with himself.

(I) Sombart puts emphasis on the first level where we have a strong father of Schmitt who was raising his son in a strict catholic manner[318], and a weak, religious mother who was not such a strict parent. This dichotomy of a strong father on the one hand, with whom the son did not have good relations, but had to obey and respect as the necessary father figure in his life and society, and a weak mother on the other hand, shows Schmitt's attempt to return to the matriarchal principle and his failure to do so, since it is highly unlikely for that to happen in a world where a strong father is needed. This psychoanalytic profile is closely related to the biographical moments of young Schmitt who after the defeat in the First World War felt not only disappointment, but also a certain tiredness of killing and destruction. A strong father failed to protect his children, so perhaps a good mother could try to save the future, if the past had already been destroyed. The mother figure is primarily seen in Catholicism, which brings

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[316] Schmitt and Heidegger had served army during the First World War. Since there were both physically unfit to serve as soldiers, they worked as military censors, opening and censuring the letters of soldiers.

[317] Complete tittle of this book is *Die deutschen Männer und ihre Feinde. Carl Schmitt, ein deutsches Schicksal zwishen Männerbund und Matriarchatsmythos* (München, Hanser, 1997).

[318] Perhaps the strongest Catholic influence came from Schmitt's uncle who has during his life left all his possession to the church and who, according to Schmitt's biographers, had a great influence on young Schmitt to start studying law, and not philology.

a certain level of ethical life, and more importantly, consequences for immoral behavior. This matriarchal principle is non-violent, and does not lead to a priori demolition. However, it is a weak principle that may be worth trying, but not at the time of Schmitt's first political thinking (especially in Political Romanticism), when the characteristics of the mother are increasingly being used in liberalism and pacifism, for which he had no respect. In his relationship with religion and the Catholic Church, Sombart saw the reflection of parent-child relationship. Schmitt had received a strong catholic education, which was the case with many young people of his time. The church also represented a very important part of his work, not only as a source of numerous references that he found in religious scripts, but also in the political significance of religion. Müller finds that the influence of catholic ideas, and catholic ideology that Schmitt had adopted from his youth helped him to construct his method that he defines as something between ideology, demonology and myth.[319] Schmitt's relationship with religion is also closely connected to the turbulent times of the First World War and his auto-reflections, which he described in detail in his diaries that he had started writing in October of 1912.

(II) At the beginning of the WWI, Schmitt was unable to fight for the Empire due to his physical incompetence, and had to sit and watch the destruction and misery of the war in Germany. An important biographical moment was the death of his friend Fritz Eisler[320], who, despite his physical condition, went to fight and lost his life as a soldier at the beginning of the war. This moment made Schmitt see the severity of violence happening around him, and made him think that the war is corrupt and distressing, and something that should not be happening. However, the protection of the Empire had to be a just cause, and if war had to be won for that cause, then the war had to be a part of people's history. In his diaries, young Schmitt was aware of his passiveness and his desire for political activity, and in the course of WWI he was given a chance to be used for a much more important cause than his psychological problems. With the help of a university professor, physically unsuitable for the army, Schmitt gets his long desired role in the historic moment of the Great War as a censor. This 'job' made him despise the law, which was the one thing that this jurist knew best, and all lines were crossed with the opening of soldiers' private letters which was a major violation of their privacy. This was a new moment with academically and socially protected young Schmitt which could have

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[319] See Jan Müller, Carl Schmitt's method: Between ideology, demonology and myth in Journal of political ideologies, 4(1), 1999 (61-85), pp.64-7, and pp.75-8.
[320] Fritz Eisler studied law with Schmitt, and his PhD thesis was oriented by the same professor as Schmitt's. He was coming from a rich Jewish family, and during his life he was financially supporting Schmitt, which his brother continued after his death. See Molnar, Sunce mita i dugačka senka Karla Šmita [Sun of the myth and a long shadow of Carl Schmitt], pp.85-6.

significantly influenced his relationship with (better said, his fear of) the authority in the army. If he had the hope of good prevailing over bad, as the catholic spiritualism has, after experiencing the war and working as a censor, his Catholicism was replaced with militarism.[321] According to Molnar, this is when the good mother goes into the background, and the focus is on the strong father-protector. The second moment in life that could have influenced his relationship with Catholicism was his emotional life during and after WWI. In 1916, he married Pavla von Dorotić, who was introduced to him as a Spanish dancer, but in the end turned out to be an Austrian girl who, in addition to the fake exotic Spanish epithet, also used another false representation as a Serbian aristocrat.[322] This woman, who he used to call "Cari", according to his biographers, was very important in his life. During this marriage, he got far removed from the catholic way of life, and he also tasted the joys of hedonistic lifestyle practiced in bars and dancing clubs. After their divorce in 1922, his diaries started filling up with thoughts about this young dancer and the disappointment she had caused, although he would always consider her as his only passion. Traces of Pavla in his diaries go all the way to several days after his second wedding in 1926, when he writes the note about the dream of his new wife, Duška Todorović, dancing and looking like his first wife.[323] Cari becomes his "Hetaera Esmeralda", his poisonous butterfly.[324] The divorce with Cari caused Schmitt to be excommunicated from the church, when the Catholic Church had realized that he was committing the sin of bigamy when marring Duška Todorović. According to Molnar, the situation was so serious in those years that Schmitt was desperate to leave Bonne, and go to Berlin, and according to his students, in those years he called the members of the Catholic Church "celibate bureaucracy", and was showing consequences of his spiritual alienation after his excommunication.[325] Changing his relationship towards religion, and his deviation from the pure religious myth, influenced his writings at the time when his spiritual detachment began. He will ultimately replace the religious mythology offered by catholic politicians during those turbulent times between the two wars and the fall of the Weimar Republic, with the mythology of national homogeneity and *stato totalitario*, a myth which he will ultimately

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[321] This possible 'shift' due to the given circumstances, Molnar describes in his book under the section "War experience of a lawyer," see Sunce mita i dugačka senka Karla Šmita, pp.90-6.
[322] See Mehring, Carl Schmitt: Aufstieg und Fall, pp.57-8.
[323] His diaries in this time are full of fear of different sexual adventures that are attracting him or that he had participated in, despite being married. His feling of being attracted to his students, cleaning ladies, colleagues, etc. was at some point presented as a fear: *Angst vor ihrem serbischen Gesicht, vor ihrer slawischen Schlauheit*. See *Ibid.*, p.195.
[324] *Ibid.*, p.58.
[325] See Rüthers and Koenen in Molnar, Sunce mita i dugačka senka Karla Šmita [in what it follows Sunce mita], note 20, p.125.

consider possible to be realized in the Third Reich.

(III) The third level of Schmitt's profiling occurs on the psychological and physical level, and Sombard will describe this German author with the words weak, doubtful, unhappy, and once again weak. He was a small man who did not meet the requirements to serve in the army during WWI. In addition to this, what is concluded generally from his diaries is his constant fall into depression, and continued dissatisfaction with himself and his life. He knew that he needed a certain breakthrough in his passive and useless life; he wanted to be active, to give voice to his passive thoughts, and thus feel liberated. Moral strings acquired from strong catholic education kept him from enjoying a hedonistic life until the end of the war when he met his first wife. Introverted, unhappy, and mostly, scared and dissatisfied, Schmitt saw in his military engagement a way of having a clear stand point, a way of firmly standing behind an idea, which for him meant the preservation of the Empire. According to Sombart, the war will change everything about Schmitt, it will make him a stronger writer and introduce him to less moderate argumentation. In this first period, Sombart's profile of Schmitt produces this original idea that he will repeat and apply as a proven formula in all the steps Schmitt made in his professional and personal life. A portrait of a fragile man who hates himself for his weaknesses and tries to find his position in turbulent times that no one really understood but experienced first-hand, represents a picture of the young Schmitt that Sombart offers and closely associates with his relationship with parents, which can also be directly applied to his relationship with Catholicism, and relationship with himself in the last instance.

When it comes to Sombart's profiling of Carl Schmitt, it can be said that, for him, the first phase which lasted before and during the First World War is the most significant in the intellectual and personal development of this German author. The most important experience in this period was his military service and overall experience of war, which gave young Schmitt direct contact with the banality of law and power of the military authorities. In the coming years, his mother's death will make another impact on him, and according to Sombart, push him more towards national-socialist ideology and glorification of the Third Reich. Aside from the diaries that Schmitt was writing during most of his life, and correspondence with several friends and colleagues, Sombart's books are the only ones that focus mainly on the persona of his friend. However, his psychoanalytical approach puts focus solely on the parent-child relationship disorder, which in combination with personal weakness, fear and uncertainty (a clinical diagnosis of the generation of men in post-WWI and pre-WWII period in Germany), fails to give a precise relationship between his personal experiences and his later theoretical argumentation. Sombart is wrong especially when considering that in Schmitt's psyche Hitler

had allowed the "return of suppressed" female principle, showing it as an image of evil mother who is liberated from the guilt of hating the father.[326] According to Molnar, what we can conclude is quite the opposite: Hitler represented a strong father-soldier figure towards whom Schmitt felt fear, but also respect, and more importantly, whose significance for the future of the nation was indisputable. The mother cannot defeat the enemies and keep the country together. She can, as can be seen in his later writings on religion, step outside of the frames of the Catholic Church and become the "soul of the world,"[327] and offer ideological value and legitimacy of the strong father. Other authors, who have dealt with Sombart's attempt to deconstruct the complexity of Schmitt's political outcomes, read differently this complex dichotomy that is in the center of Sombart discussion. For instance, Balakrishnan writes: "Sombart´s outrageous and bizarre theory that the interpretative key to Schmitt´s political thought, and even his personal life, is an uncomprehending **fear of women** [emphasis added], seen as the mythic enemy of the German male."[328]

3.2 On the way to defining the political

The first period of Schmitt's oeuvre, as mentioned above, corresponded to the period before the WWI. In 1912, a still silent and indecisive young jurist will publish a paper that will give him modest academic attention – *Gesetz und Urteil. Eine Untersuchung zum Problem der Rechtspraxis* (English translation: *Law and Judgment: An Investigation into the Problem of Legal Practice*). After serving the army in the WWI, Rhenish political theorist habilitated in 1916 with the work *Der Wert des Staates und die Bedeutung des Einzelnen* (English translation: *The Value of the State and the Significance of the Individual*), that was originally published two years before. The influence of the war, and his role in it, took the notion of state and law to the highest level. This book deals with the relation between the law and state, separating the state from the police, and giving it absolute value since "the law is what state commends, only because the state is the one that commends."[329] The whole second chapter of the book is dedicated to the state, and the following chapter deals with the issue of individuals in the state. This work, written in the onset of the WWI, was the jurist's answer to the endangered German Empire, whose fall greatly affected Schmitt's turn towards a more political theory.

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[326] Molnar, Sunce mita, p.70.
[327] *Ibid.*, p.71.
[328] Balakrishnan, The Enemy: An Intellectual Portrait of Carl Schmitt, p.288, note 12 in notes to pages 179-183.
[329] Schmitt, Der Wert des Staates und die Bedeutung des Einzelnen, p.51.

In this early period there were certain influences coming from the current academic environment that I think are important to mention. The time when Schmitt lived and worked, was indeed turbulent for every citizen of Europe, and academically it was marked by the search for alternatives, the opposing ideas that might give a solution to the violence and uncertainty that the 20th century brought to Europe. During his first academic steps, Schmitt did not belong to any particular string of thought, and although he had a strong basis of catholic values, he knew that his work would depend on going to Berlin (where he would not come before 1928), and on pursuing more incognito academic and political career. In the course of time he moved towards a central political wave, in which, after the fall of the Weimar Republic, there was, for example, the rising Italian fascism that he had admired greatly, while in Germany the so-called 'political Catholicism'[330] was making the room for the critique of liberalism and incapable parliamentary democracy of the WR. In the Introduction to the English translation of the *Verfassungslehre,* Seitzer and Thornhill dedicate an important part to the academic-theoretical environment in the 20th century Germany. I will organize them in two main points: firstly, a neo-Kantian school that had inspired in a great deal the early works of Schmitt, and with which he will confront in a course of the anti-Kantian orientation of his Weimar period; and secondly, a positivism prevailing at that time as the main orientation in the definitions of the legal person and the legal norm.

3.2.1 Theoretical clime in the German academic world after WWI

Certainly, the influence and relation with the historical time Schmitt was living in, the time of the political decline of the first German monarchy, and then of the Weimar republic, shaped many of his legal and political conclusions. The second historical period is the disposition that chronologically belongs to what was defined as the second epoch. Therefore, in the next section, I will reflect on it briefly, and draw some conclusions about the background influences on his Weimar phase.

(I)   Neo-Kantianism was the most influential school in the first decades of the 20th century in Germany and neighboring countries, such as Austria. There were many schools[331]

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[330] See for example Brian J. Fox , Carl Schmitt And Political Catholicism: Friend Or Foe?, CONY, 2015.

[331] The first published use of the term *Neo-Kantianer* appeared in 1862, in a polemical review of Eduard Zeller by the Hegelian Karl Ludwig Michelet. Afterwards usage of this term represent a dominant philosophy at the outbreak of the World War I. Work of numerous authors can be divided in the two major schools of this period: the Marburg School with Hermann Cohen as a school leader, and the Southwest German School, (also known as the Baden School or Heidelberg School) had Wilhelm Windelband, Heinrich Rickert and Ernst Troeltsch as main

that were focused on using the practical philosophy of Kant in political, theological, epistemo-logical or legal theory. The theory itself can best be shown in the works of Hermann Cohen, a German Jewish philosopher and one of the founders of the Marburg School of Neo-Kantianism. Cohen takes the essential ideas of Kantian philosophy that are viewed in the light of private autonomy, since, according to him, we should look for 'the conditions under which human reason, in the form of the pure will, can independently deduce universally binding moral or even natural-legal principles to justify and explain its actions.'[332] Accordingly, autonomous citizens can reach the level of ideal deduction that recognizes universal principles, and become able to build the rest of principles on that. Cohen, like some other neo-Kantians, had strong connections with the SPD (*Sozialdemokratische Partei Deutschlands*, in English: German Social Democratic Party), and he had influenced the political course and philosophy of the party, on its moving towards a common economy. Furthermore, the neo-Kantian influence on the legal theory of the beginning of the 20th century was very important in then current and subsequent debates in Germany, especially in the definition of a state as a universal moral person, and the adoption of the theory of evolution as the doctrine of universality, where '[t]he unity of the highest principle is not a "creative unity, but merely an ideal unity, namely the unity of the law."'[333] This philosophy has served to provide full justification for the rising *Rechtsstaat* that, through its inner logic and system of norms that provide human rights and liberties, is able to create the conditions for realization of people's rational capacities.

(II) During the decline of neo-Kantianism, its influence had prevailed during the Weimar Republic mainly through the works of Hans Kelsen. His draft of the first democratic Constitution in Austria, 'was guided first, by the quasi-Kantian claim that the state cannot be defined as a state if it does not act as a bearer of legal order, or as a "system of norms."[334] Simply put, following neo-Kantian logic, the state can be seen as a legal norm whose depoliticization is necessary in order to reach a neutral legal order, a *Rechsstaat*. Secondly, by using the Kant's idea of universalism, Kelsen was of the opinion that the state, as a normative order, is derived from the 'ideal realm of norms', and its legitimacy comes from that realm of pure, objective, universal norms that justify its existence and the use of its powers. Finally, what is most interesting here, he had strongly criticized, *via* using the Kantian arguments, and rejected any definition of sovereignty based upon any collective or particular will. Sovereignty belongs

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school representatives.
[332] Seitzer and Thornhill, An Introduction to Carl Schmitt's *Constitutional Theory*, p.4.
[333] Cohen cited in Neo-Kantianism in Contemporary Philosophy, p. 146.
[334] Seitzer and Thornhill, *op. cit.*, p.5.

only to the legal order, as its property, and when a state is identical to its legal order, sovereignty becomes the attribute of the state, as Kelsen wrote: "Sovereignty (...) must be an attribute of the order of the state."[335] This is a crucial conjunction where Kelsen and Schmitt make opposite turns, and the point upon which one of the greatest legal debates of the 20th century legal theory was focused.

3.2.2 Schmitt's antagonistic relation to the neo-Kantianism ideas

Even though young Schmitt was under the influence of Kantian philosophy and he studied carefully this author, in his mature work anti-Kantian orientation prevails. There are five points in Schmitt's political-legal theory that represent the direct antagonistic opposite of neo-Kantian arguments. Seitzer and Thornhill put them in the following way:[336]

a.   The Neo-Kantian idea of the possibility of reconstructing Marxism as a theory of common ethical self-realization is the first idea that Schmitt profoundly opposed. For him, Marxism, as liberalism in the social democratic movement, represents an absolute danger to the state, and its materialism can only bring the death of politics. Although he admired Marx[337] and his philosophy of history that relies on and protects the Hegelian concept of historical development, in practice, on the political level, he had no respect for Marxist materialism.

b.   The second argument comes from the historicism as an opposition to neo-Kantian universalistic ideas and values. Opposite to those, Schmitt will claim that every nation has its own exact and different law and history, and thus its interpretation of various laws and of the concepts like sovereignty or legitimacy as well. In his historicism, Schmitt basically abolished all arguments of Enlightenment project which at that time were largely based on Kant's concept of universalism. He was particularly critical of some legal conclusions of this period, like the claim that the representation of the legal norm is based on the so-called universal rationality, and that all legal phenomena exist in the sphere of the law,

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[335] See Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre (1920); note 1504 in The Guardian of constitution.
[336] Seitzer and Thornhill, *op. cit.*, pp.7-9.
[337] See Dotti, From Karl to Carl: Schmitt as a Reader of Marx in C. Mouffe (ed.) The Challenge of Carl Schmitt, pp-92-117.

separated from social reality. The way Schmitt valued the political as a counterpart of social, corresponded to the claims of historicism that observed politics as the highest expression of human being in the historical moment. This intellectual conception suited Schmitt perfectly, and gave him the means to present his political-legal theory on a strong anthropological basis.

c. The connection between the constitution and the state is the third antagonistic point between Schmitt and neo-Kantianism logic. For the latter, the moment when the state is given a constitution is when it becomes legitimate, because through a constitution 'it represents the essential attributes of the human person and refers to the anthropological origins of legitimate political power.'[338] This is the argument which was explained above, argument about the realized autonomy of individuals, and the state as a universal moral person, which by giving **itself** a constitution, gives a constitutional form to the universal moral law. Even though Schmitt also acknowledges an anthropological moment in the creation of the state that has its own personality, he finds that moment inside the state, not something external to it. Briefly put, unlike neo-Kantianism, for Schmitt a constitution cannot represent group of norms that were derived independently from the state, in the realm of universal moral, because a constitution is never detached from its state, representing its identity, and therefore is always united within it.

d. The fourth point considers the concept of legitimacy. Neo-Kantianism traces legitimacy in legality, or rather, in the legal sphere. On the contrary, Schmitt's thinking of legitimacy is inseparable with the subject of sovereignty and politics, and therefore his view of the legitimacy which is integrated into his voluntarist and decisionistic model. As it will be presented in a legal discussion between Kelsen and Schmitt, the former is of the opinion that legitimacy increases as it gets more detached from personal will; on the other hand, in the case of the latter, things are completely opposite – legitimacy depends entirely on the substantive will of the given carrier of sovereignty, or at a given historical moment that is represented in historically formed people.

e. The last point goes hand in hand with the previous two, and the concept of legitimacy is extended to its relation to legality. Both 'schools', one coming from

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[338] Seitzer and Thornhill, *op. cit.*, p.8.

Schmitt and the other coming from neo-Kantian authors, come from very different definitions of legitimacy, and with their relation to legality, these two strings of thought end up on very opposite sides. Simply put, for neo-Kantianism, politics comes after the law, and for Schmitt politics always precede the law. I will approach this problematic in Schmitt's writings later, since he dedicated many of his works to this problematic, which he sees as a part of 'modern pathology.' At this point, it is enough to understand the concept of legitimacy as a consequence of the legality in the writings of neo-Kantian authors, while legitimacy is considered a necessary trigger for the start of any further legal or state related activity. In sum, Kelsen and his associates view politics as a 'technical or executive component of the legal apparatus'[339] depending on legality. Schmitt views legality as a 'formal condition' that depends on a prior meaning that comes from legitimacy.

3.2.3 Positivism in the background

(III)   Before the outbreak of the World War I in Germany, positivism was mainly used in legal debates which went from being economic to more political and legal discussions. It was used as a method to provide solutions and explanations for the rising capitalist modes of economy within the *Rechsstaat*, basically of establishing and defining the legal conditions for economic autonomy outside the state. Many authors of this period were focused on connecting the legal theory with naturalistic theories, observing the legal evolution according to positive patterns, and therefore, as Carl Friedrich von Gerber, trying to make the link between positivist and organic theories of law.[340] Legal positivism does not recognize any extra-legal principles, which is very important for understanding the legal discussion in the 20th century Germany when the first basis for German liberalism was given. According to this argument, 'the validity of law depended on its status as an internally consistent set of rules, and it could not be reconstructed or interpreted on the basis of moral prescptions.'[341] The relation between politics and law is not very important for legal evolution itself, since the evolution of law is independent of political control. That creates another feature of the positivist legal theory, according to which

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[339] *Ibid.*, p.9.
[340] For more insight about the connection between the early 20th century positivism in Germany and organic theory of law, see Chris Thornhill, Positivism and organic theory – The two faces of early German liberalism in German Political Philosophy: The Metaphysics of Law, Routledge: London, 2007, pp. 186-217.
[341] Seitzer and Thornhill, *op. cit.*, p.10.

the state is under the law, and its legitimacy does not depend on political activity, but on the nature of its legal personality. This is the so-called paradox of the early positivism, marked by 'paradoxical conviction that the law exists as a formal system of constitutional rules and procedures independent of the state yet that the state is the ultimate origin of the law.'[342] When confronted with this line of legal interpretation, which was marked by its internal paradoxes, Schmitt opposed it, but kept some connection to it. We can talk about at least four main reasons[343] for Schmitt's opposing to the early positivism: (a) Due to his opposing to neo-Kantian philosophy of law, in the realm of positivist critique, Schmitt rejects 'idea of law as a neutral sequence of norms.' (b) Claim that the state makes the law and at the same time its authority is limited by this law is rather absurd for him. (c) The positivist focus on private law is not sufficient to embrace the essence of the political, and therefore of the notion of legitimacy. (d) In his methodological plan, with his social examination of the origin of the law, Schmitt was far from purely positivist ideas of legal evolution. However, Schmitt kept certain ties with a positivist doctrine, which is not very surprising, since early positivist authors were mostly conservative political thinkers, despite their focus on social and economic progress. For instance, the focus on a strong state that is in the centre of the legal order, as its only origin, is what he shares with the positivist legal theory. Nevertheless, during his work, Schmitt remains faithful to the project of purifying legal and political theory from positivist ideas, and one of the best ways to present his critical view is through his discussion with Kelsen, which provides us with another important insight into the understanding of time during the weak liberal republic, and the consequent collapse of the Weimar idea that stifled itself and left room for the Nazis to write a new page in German history.

3.2.4 The Weimar period

German word *Reich* in literal translation means 'realm,' a territory of regent, or generally, a politically organised state. However, this term is mostly used in connotation to the Empire, as the English translation of *Deutsches Reich* would most commonly be the 'German Empire.' After the fall of the monarchy, the first attempt for a liberal democratic-constitutional reform was called the Weimar Republic, and it was based on the Weimar Constitution. Article 1 of this constitution states: "The German Reich is a republic. State authority derives from the

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[342] *Ibid.*, p.11.
[343] *Ibid.*, p.11.

people." During the time of the WR is when the second period in Schmitt's work begins, the so-called Weimer period, and this was marked by three capital works: *Politische Romantik* (1919), *Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (1921), and *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (1922). "Political Romanticism" represents the very beginning of Schmitt's more straightforward critical approach to liberalism that marks his Weimar period. The book is focused on a critique of the romantic movement in culture, but according to Sombart, it can be read as a critique of government of Wilhelm II that was called, during the last years of the German Empire, a "political romantic"[344] due to his soft and hesitant ruling, which is quite the opposite from the figure of a strong father who eventually caused the fall of the Empire and defeat in the First World War. However, when reading this book, it is very difficult to clearly find this motivation. I rather believe that "Political Romanticism" is the book in which Schmitt starts to define and protect his concept of the political, and more importantly, it is the point when he begins his fight with the liberalism.

In the first dimension of defining political, Schmitt defines romanticism that is based upon the ideas of the 'natural goodness of the human beings' that for him 'is not a historical knowledge,'[345] and that it 'has nothing to say about the social character of the persons who were the bearers of the movement.'[346] For a historical way of thinking, however, this is what really matters. Romanticism seen in art, according to Schmitt, is a 'necessary result of the social, political and religious condition of people,'[347] and any separation from social and historical reality is untrue. The second claim about romanticism in politics, considers the universal, meaning that everything can be a subject of romanticism. With this type of 'universal art,' political is simply put under aesthetical, and the artistic ego becomes the 'new God'. A demand for universalism for Schmitt was not representative in his time, and it certainly was not defined in the history as a romantic revolution. Furthermore, romanticism with its 'principle of unclarity'[348] meant the loss of its revolutionary character, and surpassed to the sphere of restoration, it had kept only one feature that can define it – as an antithesis of classicism. Observed as a political concept that hides itself in aesthetical dimension, and plurality of definitions, romanticism enters in the sphere of political parties, with a simple vocabulary

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[344] See Sombart, Die deutschen Männer und ihre Feinde, p.237.
[345] Schmitt, Political Romanticism, p.2.
[346] *Ibid.*, p.10.
[347] *Ibid.*, p.9.
[348] *Ibid.*, p.7.

change using, for example, the word 'liberal.'[349] Therefore, Schmitt considered that the 'German revolution' after WWI (as it was before, see Sturm und Drang revolution) was the name of a 'liberal revolution' that was advancing covered with ideas of natural goodness of humans, embracing all matters as its subject, and neutralizing the historical-political moments with its aesthetic approach that was above the religious one.

"Political Romanticsm" puts Schmitt's theory on the side where he chooses to stay for the rest of his career. It is also a sort of preface to his book on dictatorship, which on the other hand represents a more explicit introduction to his theory of sovereignty. In "Dictatorship" he makes a distinction between commissarial and sovereign dictatorship where the former is a temporary form, focused on restoring the current legal order, while the latter comes as a revolutionary transformation of the status quo and offers a true alternative to the new legal order. For Schmitt, the concept of dictatorship constitutes the "missing link" of modern jurisprudence. The dictatorship represents a paradigmatic attempt to grapple seriously with the exigencies of legal indeterminacy.[350] One year after *Die Diktatur* in "Political theology," he focuses again on the theory of sovereignty that gets its final definition.

3.2.5 In a dusk of the Weimar Republic

Officially, the Weimar Republic existed until the NSDAP[351] took over the power in the German parliament, or more precisely, until January 30, 1933, when Hitler was appointed to become the Chancellor of Germany by the President of the Weimar Republic, Paul von Hindenburg. After Hindenburg's death the following year, Hitler merged institutions of chancellor and president, and became the sole ruler. Shortly after, on August 19, 1934, a federal referendum was held, after which Hitler becomes *Führer*, the leader of what remains to be called the *Drittes Reich*. Understanding this historical momentum of the last Weimar years is very important in order to understand what remains a truly intriguing question to date: why did liberal Germany decide to accept a radical national-socialist model that led to a devastating war and, more importantly, what inspired Schmitt and other intellectuals of that time to support the new German model? In addition, this was the period when Schmitt became more politically active and when the fame around his name started to grow. In what follows,

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[349] *Ibid.*, p.29.
[350] Scheuerman, Carl Schmitt: The End of Law, p.31.
[351] NSDAP stand for *Nationalsozialistische Deutsche Arbeiterpartie*. English translation: National-Socialist German Worker's Party; in the WR period, led by Adolf Hitler.

I will first deal with the most important political and legal moments of the last years of the WR. Afterwards, I shall reflect upon the role Schmitt had as one of the most important law commentators and analysts of the Weimar Constitution, and present his famous discussion about the guardian of the constitution held with Hans Kelsen. This last part will most significantly finalize the portrait of Schmitt in concrete historical moments, which will provide the essential background for understanding his main theoretical concepts that we are examining in his work.

3.2.6 The fall of the Weimar Republic

The story of the fall of the WR is a story of the rise of Hitler. There are many contradictory standpoints of more or less conservative historians about the reasons and motives concerning the political events in Germany at the beginning of 1933. Most of them focus on the pressure Germany had to experience after the defeat in WWI, and provisions and obligations it had due to "The Treaty of Versailles". The Treaty was signed exactly five years after the assassination of Archduke Franz Ferdinand, and in addition to imposed economic measures and the reduction of territory, it has also dealt with military restrictions as part of future prevention of war and maintenance of peace in Europe. Part VIII of the treaty refers to the post-war reparation.[352] The German empire lost about 13% of its territory and 10% of the population. On the other hand, the reparations fees that Versailles obliged Germany to pay were far from the amount that could have caused severe economic issues. In fact, these reparations were about 1.7% of gross social product, which corresponds to the current found for development aid.[353] Considering the reduction of its territory, a major part of citizens, which was on the seized German territory after Versailles, was agricultural and predominantly rural and poor. That resulted in Germany actually becoming a richer state per capita. Additionally, the lost areas had a turbulent policy of German colonization which was a huge problem to the German Empire. From the economic perspective, the biggest issue for Germany was the post-war credit that the German Empire used much more than the countries

[352] Article 231 is the first article in Part VIII that talks about Reparations, and upon being written, it provoked many debates due to its vocabulary that puts all the guilt for the World War I on Germany and Germans. "The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies." (Article 231, Part VIII, The Treaty Of Versailles).
[353] Breuer, Anatomie de la Révolution conservatrice [original title : *Anatomie der konservativen Revolution*], p.66-7.

of Allies did.[354] These credits were enormous and they were a burden to the new republic, much more than the reparation fees that Germany paid off 92 years after the signing of the Versailles Treaty.

Military restrictions were mainly addressed in Section I, Chapter I – *Military Clauses*, where articles focus on the speed and manner of military reductions that Germany needed to fulfil, while Chapter II of Section I defines the reduction, quantity and production of munitions and armaments. In the years when general Schleicher was the chancellor, and especially when he became minister of defence, a 'turn towards martial nationalism'[355] stood as a viable option to escape the Versailles jaws and the only way to put the German destiny back into the hands of the German people. In addition to military restrictions, in the last years of the WR, there were a million members of *Stahlhelm* and half a million members of *Reichsbanner*[356] that were just a few of many paramilitary formations and units, mostly organized and formed by members of the political parties. In the dusk of political coalitions in the *Reichstag* of the Republic, the leading opposing parties were focused on halting the Versailles orders and doing whatever necessary to restore sovereignty of the country during a rather conservative revolution. One of the many advocates of the strong turn, Max Weber "had announced in January 1920 that he would ally with any power on earth, was it the devil himself"[357] in order to see the sovereign Germany again.

Overall, in addition to the despair of the lost war, the political scene in the WR was very complex from its very constitutional birth. There was a very short democratic tradition in Germany, and just before the Weimar Constitution was adopted, there were attempts of more Marxist revolutions in Munich and Berlin. This showed that the liberal and democratic constitution was made in conditions that were far from those of a political hegemony. Many political parties that were sitting in the Republic's *Reichstag* were forming very strong anti-liberal ties that had simply prevailed in the last years of the WR, and were eventually adopted by the last government. Additionally, the existence of many paramilitary groups that were managed by the political parties was pushing the situation increasingly into a one-way street: to the rejection of the Versailles Treaty and to the idea of unconditional recovery of German sovereignty. In such turbulent times, it now seems, it was quite easy to find an enemy who

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[354] *Ibid.*, p.67.
[355] Molnar, Sunce mita, p.135.
[356] Furthermore, there were around 300.000 of SA members, 50.000 members of SS, and 150.000 members of communist *Roter Frontkämpferbund* (Alliance of Red Front-Fighters). More about this, see Eric G. Reiche, The Development of the SA in Nurnberg, 1922-1934, ff. 79 (Cambridge University Press: Cambridge, 2002)
[357] Breuer, Anatomie de la Révolution conservatrice, p.70.

was flying above German land. The grand premiere of Schmitt's political theory took place in those last years of the Republic.

3.3 Constitutional debate between Schmitt and Kelsen

'The strike against Prussia' (*Preussenschlag*) is a name of the situation in the WR which started ten days after Schmitt had published *Legalität und Legitimität*. On July 20, 1932, President Von Pappen uses an emergency decre and authorizes the *Reich* chancellor to depose the government of Prussia based on Article 48 of the Weimar Constitution, which consequently put the biggest German state under the martial law. At that time, the liberal democratic government in Prussia was causing major problems to the executive powers which were losing control over their political decisions. Shortly before 1932, with another emergency decree, president Paul von Hindenburg will ban all extremist political and paramilitary parties, such as the communists and the SA (*Sturmabteilung* – a paramilitary organisation of the Nazi-party), and immediately before *Preussenschlag*, he will lift that ban that had provoked violent conflicts between the communists, Nazis, and the police in some of the towns of Prussia. This violence was officially a call for an emergency decree, which was supposed to protect public security and maintain whole Germany under the peaceful Weimar Constitution. However, Schmitt was of the opinion that '[t]he real goal of *Preussenschlag* was to wrest control over Germany's largest state from the social democrats and to make Prussia's executive power available to the conservative federal government.'[358]

During the course of events, Prussia addressed the *Staatsgerichtshof*[359] with the claim that President Hindenburg exceeded his powers acquired by the Weimar Constitution when issuing the emergency decree. In regard to the court's decision, Schmitt will write that the court:

'[R]uled that the federal government did not have the power permanently to depose the Prussian ministers or to take over all competences of a Prussian government. At the same time, the court held that the Reich's assumption of Prussia's executive power was justified as a measure to protect public security, and thus refused to interfere with the federal government's

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[358] Vinx, The Guardian of the Constitution, p.1.
[359] *Staatsgerichtshof* was a special tribunal convened by *Reichsgericht* – the Weimar's Republic highest civil and criminal Court, and empowered by Aritcle 19 of the Weimar Constitution, in order to judge in the matters of the German states, and to arbitrate in conflicts between the Reich and Länder.

momentary control over Prussia's administrative apparatus.'[360]

This court decision flagrantly violated the constitutional democracy, according to Hans Kelsen. On the other hand, Schmitt considered that the sovereignty of the state is within the governing political party and its policy, and that Prussia with its social democracy was not the guardian of the constitution. For him, the guardian of the constitution must always be in the hands of the carrier of political decision who is the head of the executive power. In what follows, the main points on one of the most important constitutional discussions of the 20th century shall be presented, encompassed in the discussion between Kelsen and Schmitt.

3.3.1 Kelsen's views about the constitutional guardianship

Kelsen and Schmitt's debate about the judgment on the *Preussenschlag* was only a part of a lengthy discussion on the problem of the constitutional guardianship. In 1929, Kelsen published a paper entitled *Wesen und Entwicklung der Staatsgerichtsbarkeit* ("On the Nature and Development of Constitutional Adjudication") where the theory of legal hierarchy is used on the way toward the claim that the constitutional court is a true guardian of the constitution.[361] Schmitt, on the other hand, entered into this academic exchange with Kelsen through the number of articles published in monograph in 1931 under the title *Der Hüter der Verfassung* ("The guardian of the Constitution").[362] Kelsen's sharp answer to Schmitt's book was the essay *Wer soll der Hüter der Verfassung sein?* ("Who ought to be the guardian of the Constitution?")[363] in which we can find one of the most intense criticism of Schmitt's constitutional theory.

Both authors ask the same question – who is and who should be the protector of the Weimar Constitution? Since they come from different theoretical backgrounds, subsequently, which is obvious from the reading of the above mentioned texts, they end up at very opposite points in constitutional and legal theory. Kelsen starts from the neo-Kantian legal evolution where every legal norm moves forward with the approval of a higher level legal norm. This theory gives the basis for the *Stufenbaulehre*, the theory of the legal hierarchy that Kelsen

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[360] Vinx, The Guardian of the Constitution, p.4.
[361] In this work translation available in Vinx was used, The Guardian of the Constitution, "Kelsen on the nature and development of constitutional adjudication", pp.22-79.
[362] Translations in Vinx, The Guardian of the Constitution, "The guardian of the constitution: Schmitt's argument against constitutional review ", and "The guardian of the constitution: Schmitt on pluralism and the president as the guardian of the constitution", pp.79-174.
[363] *Ibid.*, pp.174-222.

adopts from his student Adolf Julius Merkl,[364] and applies it in a great deal to his vision of a constitutional adjudication. The theory of legal hierarchy corresponds to his view of legal evolution, where the processes of reproduction and production of law are fluent, and depending on whether some legal process starts from above or from bottom, the law becomes more or less concrete. The main idea at this point is that the legislative process does not end with the statute, on the level of a constitution, but rather continues to the bottom, to the level of the individual act of administration. If one takes the view that the law is exhausted by the statute, the meaning of the idea of legality will be reduced to conformity with the statute. And in that case, the extension of the concept of legality will hardly be self-evident.[365] He finds this extension of the concept of legality in the constitutional adjudication, in what he calls 'a limb of the system of legal-technical measures.'[366] Basically, this means that when a court is performing the act of cassation (annulation) of norms which are legally defective, it is making a legislative activity, in addition to the juridical one. Moreover, for Kelsen, this symbiosis between the legislative and juridical activity, seen in the institution of the constitutional adjudication, is based on the statute itself. Furthermore, he finds that the state parliament is always the object of a legal paradox because it is very 'politically naïve' to except this state organ to annul the statute that it had enacted before. Therefore, the cassation of legally defective acts is possible by an administrative organ that is independent and distinctive from the legislative one. This gives the court the power to be a preventive or repressive organ against legally defective acts, as it is independent of any individual power and individual norms, and has a specific autonomous form which is responsible only to the general norm, to the statute itself.

The second role of the court as a guarantee of legality is of personal and material nature. In this case, the courts perform the annulation of a legally defective act, in their individual appearance. In order to understand this argument of Kelsen, we must bear in mind his distinction between the act of annulling and the nulling of a legal act. The latter means the cancellation of legality of an act from its very beginning and its replacement by another legal act. The cassation or annulation of the general norm by the court is possible only in an individual case, and in these cases the general norm continues to exist, and only its legal effects are being annulled. If one decide to transfer the power of review to a single public authority, it will also become possible to extend the cassation beyond the individual case. Then we would be faced with the annulment of the general norm as a whole, i.e. for all possible cases to which

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[364] Cf. Vinx, The Guardian of the Constitution, p.7.
[365] Kelsen, On the Nature and Development of Constitutional Adjudication, p.23.
[366] *Ibid.*, p.25.

the norm, according to its meaning, would have to be applied.[367] Kelsen's argument is quite clear in this matter. In order to defend the cancelation of the concept of the division of powers, he prescribes to the courts the ability to maintain the stability of the legal system by maintaining the general norm.

When considering the guarantees of constitutionality, he recognizes the annulment of the unconstitutional act as the most effective guardianship of the constitution. This is the part where the need for the constitutional court of the WR is put as a necessity for the Republic's protection of legality. Kelsen, who was one of the authors of the Austrian Constitution, wants to follow the Austrian model in the new project of proper constitutional court that will replace the *Staatsgerichtshof*. Only with this kind of court it is possible to have a protected constitution as the highest legal norm of the state, and once for all to finish with the constitutional monarchy of the First Reich. When defending his thesis, he will first focus on the legislative power of the courts, 'as inholding that all legal decision-taking is partly discretionary,'[368] thus political. This cancelation between a clear division of powers gives Kelsen an argument to justify a constitutional adjudication as the protector of legality, and not just as an apparatus of judges whose job is simply to find the already existing norm in the statute and apply it, as some sort of 'legal automata.'[369] Consequently, every political conflict is a legal conflict, and the difference between the political character of the legislation and the adjudication is only quantitative, not qualitative.

The view that only legislation is political, and that 'real' adjudication is not, is just as wrong as the belief that legislation alone is productive creation and adjudication nothing but reproductive application of the law. At bottom, these are just two variants of one and the same mistake.[370]

3.3.2 Schmitt's constitutional arguments

At that time, the professor at the *Handelshochschule*[371] in his book-length essays on the protector of the constitution gives his contribution to the constitutional theory of the WR, and as the time will show, he put the last nail in the coffin of the dying Weimar Constitution.[372]

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[367] *Ibid.*, p.40.
[368] Vinx, The Guardian of the Constitution, p.13.
[369] See Kelsen, Who ought to be the guardian of the Constitution?, p.189.
[370] *Ibid.*, p.184.
[371] The school with no particular high prestige, where Schmitt started working in 1928, during his process of moving to Berlin.
[372] Schmitt was called more than few times the "Weimar gravedigger." Once when they referred to him as a gravedigger of the Weimar Republic and the Weimar Constitution, he replied that even if that was the case,

Even though there are more than a few contradictory positions in his writings on constitutional theory, his main statement remains clear: no Parliament and no Court of any kind can be the guardian of the highest legal document in the country. After a long discussion on the differences between the Supreme Court of the United States of America and *Der Staatsgerichtshof*,[373] Schmitt reflects on the idea of having a court for the guardian of the constitution as a violation of the order established by that constitution. By performing its legislative role, constitutional adjudication exceeds the legitimate powers of the court, and these actions can jeopardize the system of norms that the state is based on. Courts have the right to review only ordinary statutes, but not general norms that can change the constitution, with the exception of the parts of the Constitution that consider the basis and position of the courts, and 'of the provisions about the independence of the judiciary.'[374]

It is not that Schmitt was against an independent and strong judiciary. On the contrary, he was of the opinion that a true democratic state must have independent and free courts, with judges protected from political pressure. The main reason for his critical position towards constitutional adjudication, that he equally shared in the critique of parliamentary democracy, was the argument that judges are bound by the constitution to obey and serve the general norm, without given power or task to change it. In other words:

[T]here is no rule of law in the liberal bourgeois sense without independent courts, that there are no independent courts without subjection to the content of statute, and that there can be no subjection to the content of statute without a distinction in kind between statute and court judgment.[375]

Therefore, in this normative sense, courts are empowered by statute to be independent and protected in their revision activity and deciding upon the individual cases. However, their link to the general norm disables them from changing that norm which corresponds to his reading of Article 102 of the Weimar Constitution.[376]

Why was Schmitt against any project where the constitutional adjudication would be given the power to control legality of the general norms? Moreover, in *Verfassungslehre* (1928), published before the crisis in Prussia, he held a criticising position towards the Weimar

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somebody had to kill it first. See Molnar, Sunce mita.

[373] *Staatsgerichtsbarkeit*: Literally, a court/judicature in matters of state. The term is used here to refer generically to a special constitutional court of the Continental European type.

[374] Schmitt, The Guardian of the Constitution, in Vinx p. 85.

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

[376] Article 102 of the Weimar Constitution says: "Judges are independent and **subject only** [emphasis added] to the law". For Schmitt, the moment when the judge abandons the ground that gave him or her facts to decide upon the matters, which are the content of statute, that judge is no longer independent.

Constitution, especially towards Article 48.[377] However, in *Der Hüter der Verfassung* his position towards this constitution will be far less critical, especially in the parts in which he defends Article 48 and gives the President of the Republic the title of the guardian of the constitution. First of all, what follows from the possibility of a judiciary having a political (legislative) role is not 'a juridification of politics but rather a politicization of adjudication.'[378] There is a material difference between the adjudication and the legislation, because there is no adjudication that is not bounded to the statute. The tendency, as he calls it, towards constitutional adjudication, is one of the consequences of the liberal confusion between liberalism and democracy, and the tendency to transform the institution of the constitution into a kind of compromise or contract. Schmitt gradually comes to the point where the enemy number one of the Weimar Constitution can be found in the constitutional adjudication. By deciding to confront the idea of a 'too big' constitutional court, and by putting himself in the public eye, is exactly the best way that Schmitt could offer to defend the Weimar Republic.

The influence that was coming from actual political events and Schmitt's personal background derived the first image of a clear enemy of the project of stability, something that Schmitt was ultimately searching for. In his opinion, the only thing that was maintaining the country together were written articles that were supposed to articulate the public will, as political discussion became impossible. The last years of the WR can be compared with a political theatre where one scene was repeating: in the case of *Reichstag* – the constant suspension of the enacted decrees which the President had enacted in accordance with the provisions of Article 48, and then the presidential decision to dissolve the *Reichstag*. The political scene did not resemble a normal state, which is a precondition for the legal validity. However, there was the statute, and there was a legitimate power of the President to use this statute on behalf of the people who gave him that right. In a situation where a parliament is

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[377] The full text of Article 48 of the Weimar Constitution goes as follows:
"If a Land does not fulfil its duties according to the Reich Constitution or Reich statutes, the President can compel it to do so with the aid of armed forces.

In the German Reich the public security and order are significantly disturbed or endangered, the President can utilize the necessary measures to restore public security and order, if necessary with the aid of armed force. For this purpose, he may provisionally suspend, in whole or in part, the basic rights established in Articles 114, 115, 117, 118, 124, 153.

The President must inform the Reichstag without delay of all the measures instituted according to paragraph 1 or paragraph 2 of this article. The measures must be set aside at the request of the Reichstag.

In the case of immediate danger, the Land government can institute for its territory the type of measures designated in paragraph 2 on an interim basis. The measures are to be set at the demand of the President or the Reichstag.

A Reich statute determines the details of these provisions."
English translation of the Weimar constitution from the Appendix in Schmitt, Constitutional theory, pp.409-41.
[378] Schmitt, *op. cit.*, p.91.

unable to form a majority to decide on state and social matters, and when the president uses emergency decrees to create laws, or a power to dissolve the parliament in order to implement those decrees, judiciary performing of more than the administrative role of interpreting the statute seems like additional risk for the stability of the republic. That is why Schmitt will return to his political theory and find justified argumentation to put the President as the only one who can be the guardian of the constitution, and who, considering the situation in the last years of the WR, should perhaps better be called the saver of the constitution.

In the part where he talks about pluralism and the president as the guardian of the constitution, Schmitt gives his two main theoretical defenses of the institution of the President. The first one refers to the separation of the society and the state that during the German monarchy was evident in the dualistic system of the prince and people, the crown and the chamber. In this system, the representative body, the Parliament, was the point where a society could meet with the state and confront it in search of its rights and interests. This dualistic existence of what we call a state is the starting point in his criticism of parliamentary democracy, and his presentation of the state types according to a dialectical movement from the 17th to the 20th century. When society stands separated from the state, social integration through different types of antagonisms (economic, religious etc.) remains in the 'state-free' zone. The state, on the other hand, neutralizes these antagonisms in a way that does not hinder integration processes. One of the main ways of taking this position is through the non-intervention principle. Schmitt criticized this logic in terms of many political and legal aspects. In *Der Hüter der Verfassung* he sees the adoption of the policy of non-intervention as an absolute mistake.

"To adopt a policy of non-intervention would mean to give free rein, in the social and economic antagonisms and conflicts of today's world (…) to the different power groups in society. Under such circumstances, non-intervention is nothing more than an intervention in favour of the party that is stronger and more ruthless."[379]

The way of overpassing this division comes in the 20th century constitutional republic that can count on a society which 'shares' its integration processes with the state. However, the political-legal conflict between the branches of power continues to exist, especially in the Weimar Republic which had a chancellor and a president as two main executive powers. When there is a conflict between the two sides that have the power of political decisions, the one who decides is not a judiciary, but rather (1) "a higher third that stands above the different options

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[379] *Ibid.*, p.135.

– a sovereign ruler of the state";[380] or (2) an authority that stands alongside the state, not superior to the constitution, but neutral towards both options, a *pouvoir neutre et intermédiare*.[381] This neutral power does not have superiority over other powers and is not protected from any kind of control; hence in that case we would speak of the ruler, and not of the guardian of a constitution. The president has a neutral and mediating role and he acts as the political head of the state and, by means of his position and power, represents the guardian of the constitution. When 'the President is not the leader, but instead the "objective" man as a nonpartisan, neutral arbiter, then he is this as bearer of a neutral authority, of a *pouvoir neutre* (…) a referee, who does not decide.'[382]

The neutral power is not, so to say, active all the time, but it is not only a *régne*, since the real political leader needs to govern in order to be able to protect the state of law. Although it is a kind of material existence of special powers, the president of a country actively uses those absolute powers only in the state of the emergency. Nevertheless, the neutral power is present and indispensable, at least in the system of a rule-of-law state with a separation of powers.[383] However, in order to be the true holder of *pouvoir neuter*, the political leader needs to be elected by the majority of people, because only this political entity can provide him or her with the necessary feature that separates him or her from the dictator – the political. Here we can find the cornerstone of Schmitt's political theory – his concept of the legitimacy.

3.3.3 Three main points of a linear separability between Schmitt and Kelsen

Reading essays that are part of the exchange between these two authors, is at some point (especially in Kelsen's answer to Schmitt's "The guardian of the Constitution") dealing with the 'thesis-antithesis' situation, fulfilled with the opposing arguments that even get to a point of a minor academic offensive tone.[384] The most important arguments considering the constitutional theory in the Weimar Republic, given by these two authors, were explained

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[380] *Ibid.*, p.151.
[381] Concept of *pouvoir neuter, intermédiaire et regulateur* Schmitt takes from the French author Benjamin Constant, an early 19th century political writer who was supporting a change towards a constitutional monarchy in France. Schmitt often referred to very conservative writers (such as, for example, his writings and his admiration for the Spanish long-forgotten conservative, catholic monarchist Donoso Cortés), and Kelsen, in turn, saw his support for the Constant's concept as another proof of his tentative to bring constitutional monarchy to Germany.
[382] Schmitt, Constitutional Theory, p.370.
[383] Schmitt, The Guardian of the Constitution in Vinx, p.156.
[384] For example, Kelsen will use euphemistic structure to point out how Schmitt 'is simply the victim of an equivocation', in Kelsen, Who ought to be the guardian of the Constitution?, p.189.

above. At this ending point, I will focus on three main points of difference that put Kelsen and Schmitt at the opposite ends of the legal and constitutional theory, and which absolutely leave no chance for a crossing point.

The first is **the concept of sovereignty**. For Schmitt, sovereignty is simply put the center and the basis, the air that each political unit must have in order to survive. It is a very complex approach that he has when he talks about the theoretical significance of sovereignty, and it can be further discussed about Hobbesian or Machiavellian influences his theory has, but the principal and strongest pillar remains obvious – the concept of sovereignty is impossible to separate from the concept of the state. Due to its given complexity, this paper will not examine Schmitt's theory of sovereignty *per se*. Rather, in the second part of this chapter, its surrounding notions of state, political, legitimacy and legality will be embraced and brought to the concept of the modern law, which will provide answers to the reader interested in Schmitt's concept of sovereignty.

Additionally, in "Political Theology" Schmitt famously defines the sovereign as the one who decides on the state of the emergency (a *pouvoir neutre*), which left the door opened for the legal definition of sovereignty. What should be kept in mind is that even though we can talk about legal concepts that define a purely political notion, there is no point in Schmitt's oeuvre at which the legal sphere gets to be above the political. Therefore, his reading of history will always be political, although the notion of law has been placed at the heart of those interpretations. The political, as in the case of Hegel, can become theological, better said, it can develop into an ideology that precedes further argumentation. Later in this paper, a critique of Schmitt's theory from this perspective will be provided. However, at this point, the important thing to understand is the position of Schmitt versus the positivist theory, based precisely on the legal separation from the state and from the political unit that is the bad omen of modernity.

Kelsen, on the other hand, in the spirit of positivism, develops the opposite vision of the sovereignty – 'if it exists at all'[385] – as not a priori concept of the state, but as a characteristic of the legal order of the state. He sees a 'sovereignty as a property of normative order, namely as the normative independence of a legal order. If the state is identical to its legal order, it follows that sovereignty can also be described as an attribute of the state, but never as a power that originally inheres in a particular organ of state.'[386] This definition brings us back to the part when we dealt with the theoretical influence of neo-Kantianism that Schmitt must had had

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[385] Kelsen, On the Nature and Development of Constitutional Adjudication in Vinx, The guardian of the constitution, p.45.
[386] See note 1504 in Vinx, The Guardian of the Constitution, p.255.

after the WWI, and how he had reflected on their hierarchy between the legal and the political. [D]iscipline and the German sense of order[387] for Schmitt were the main reasons why there was no civil war during the last years of the WR. For positivist thinkers, the legal order not only prevents violence, but is justifiable and powerful enough to be placed above the political sphere that still remains the strongest tie to the social categories.

The question of sovereignty is connected to their vision of **the general will**. When Schmitt defends the president of the republic as the only justified guardian of the constitution, he calls for the general will of people that is through the processes of representation embraced in its full extent. No parliament and no court can represent a general will except one person who carries a legitimate right to protect the constitution, from both – the executive power and the people. The "unified will of the people exists as long as a people is willing to take (or rather to support) genuinely political decisions."[388] This will is born and defended in the personality of the elected president, who is the only one capable of protecting it in true democracy by having the right to decide upon the extra-legal space, which is the state of the emergency.

Kelsen, on the other hand, calls the general will as 'false and fictional' which can bring upon 'autocratic implications'. In his view, the mere existence of some kind of a popular will that can exist outside the constitution provides the possibility only for autocratic implications. This critique is connected to his critique of neutral power[389] that observes the president as being able to keep more neutral positions in the execution of his power, the claim that Kelsen sees as "an unbearable contradiction."[390] The executive power understood according to the *pouvoir neutre* can only lead to a complete state of autocracy. Therefore, an extra-legal space where the protection of the supposedly existing unified will of the people is absurd for Kelsen, since there cannot be a will or politics outside of the constitution.

Last but not least is the concept of **the emergency decree**. Several times the significance and controversy of Article 48 of the Weimar Constitution was mentioned. The use of this article marked the last years of the WR and opened a legal discussion that prevails until today. In "Legality and legitimacy", Schmitt criticized this constitutional article and pointed out the absurdness of the state that is governed only through the emergency decrees, which was a reality in the period from 1930 to 1932. However, his opinion will change in the

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[387] Schmitt, State, movement, people, p.7.
[388] Vinx, The Guardian of the Constitution, p.15.
[389] In the essay "Who ought to be the guardian of the Constitution?", when talking about the neutral power, Kelsen, instead of using the word president for a highest executive power, prefers to use the word monarch. Even in his choice of vocabulary, implicitly he wants to connect Schmitt's legal and political theory during the Weimar period with the renovation of the constitutional monarchy.
[390] Kelsen, Who ought to be the guardian of the constitution?, p.177.

Verfasungslehre, and in "The Guardian of the Constitution", the use of the power to decide on the state of exception is considered a key point in the process of transformation of a simple leader into a true political leader. That is why the *Preussneschlag* was an important event in understanding Schmitt's political-legal standpoints. In his closing statement in the case *Prussia contra Reich* in Leipzig, he will clearly conclude that "the president of the Reich, who has several competences by virtue of article 48, **can and must** [emphasis added], if necessary, also exercise these competences in the interest of the autonomy of the Land."[391] In this statement, he acknowledges the power of the guardian of the constitution to the *Staatsgerichtshof*, but reiterates that this court cannot make a political decision and that its jurisprudence remains in the domain of justice. Since the parliament had no chance of making political decisions either, due to its inability to reach a general consensus, the president was left as the only one that can create politics.

In my opinion, the reason for putting the president in the center of his political and legal perspective was due to the combination of the given circumstances when the government was able to function only by the emergency decrees on one side, and his political theology on the other. There are many critical voices that observe Schmitt's involvement in the case of the *Preussenschlag* as his political and personal support of Hitler's government. However, there are too many facts which, at least, put this claim in serious doubt. On the contrary, Schmitt can be seen as the protector of the Weimar Constitution, as one of the few who still believed that the constitution can be changed in order to correspond the changed reality of the WR. At that time, his opinion was similar to that of General Kurt von Schleicher, the advisor to President Paul von Hindenburg, who thought that the Weimar Government needs to be changed or civil war would arise. Although, in the last years of the WR, by defending the use of Article 48, Schmitt had halted talks on changing the constitution. However, all of this can be interpreted as a fear from a civil war that was indeed in the air in Germany before 1932. Moreover, we cannot forget the personal level of this catholic jurist who had suffered greatly after the fall of the first *Reich*, which brings us back to the opening arguments presented at the beginning of this chapter.

The insecurity of being forever remembered as a mild-minded theoretician had influenced Schmitt to renounce his distancing from the political system after the fall of the general Schleicher. On May 1, 1933, he received his NSDAP membership card with the number

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[391] Prussia contra *Reich*: Schmitt's closing statement in Leipzig, p. 224. Translation available in Kelsen, Schmitt, The Guardian of the Constitution, pp.222-8.

2.098.860. From this moment on, he finally got the chance to have an important role in the political system of the new Germany, of the third Reich, that will result in bringing nothing but destruction, and that will definitely fail to bring upon the system professor Schmitt was talking about so much. However, as stated at the beginning of this chapter, one cannot stay blind to his involvement in the party, and moreover, to his statements on the Jewish people. One example of this is Schmitt's speech at a conference held in Berlin, on October 3 and 4, 1936, titled *Das Judentum in der Rechtswissenshaft*. In this speech, like all anti-Semitists of that time, he showed the fear of the Jewish intelligence, fear of their anarchic and chaotic legal theory which can, if not removed from the libraries and bibliographies, mislead young German students. In order to protect the German mind, he called for a clarification of who is Jewish and who is not, so that the censorship of Jewish books and authors could be done properly. The main idea he shared in this speech was "that Jewish opinions, with their intellectual content, cannot be put on the same level with the opinions of German or other non-Jewish authors."[392] In another text, he showed the same fear and urge to destroy Jewish science in general.[393]

Even though after WWII he did not talk much about his participation in the party, Schmitt did continue to publish writings, and his house in Plettenburg became a certain stopover for young, critical minds. Many of them tried to make a connection between Schmitt's political theology and Marxist critical theory, as was the case with Franz Neumann and Otto Kirchheimer, who were focused on Schmitt's critique of liberalism. Little by little, this 'renaissance' casted the light on the reformist potential of his ideas, and put him into the scope of the critical theory. Despite that, working with his political-legal theory remains controversial in the academic field, even though many political analyses of contemporary political events can be analyzed according to his concepts. I am of the opinion that the enormous critical potential, and very clever and clear questions that Schmitt set in modern law and the modern state, still do not have satisfactory answers. In the next part of this chapter, I will examine the main concepts which were briefly mentioned above. This time, the focus will be placed on their theoretical weight and their potential of opposing arguments given by Habermas.

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[392] Schmitt, Jews in Jurisprudence, English translation by Tomislav Sunić is available on https://archive.org/stream/CarlSchmittsjewsInJurisprudence/CarlSchmittsJewsInJurisprudence_djvu.txt [last accessed o 30/07/2017]

[393] For a good insight about anti-Semitism in Schmitt's writings, see Raphael Gross, Carl Schmitt and the Jews. The "Jewish Question," the Holocaust, and German Legal Theory, University of Wisconsin Press.

3.4 From the *zoon politikon* to the *friend-foe* relationship

"Homo est naturaliter politicus, id est, socialis."

Man is by nature political, that is, social.

Thomas Aquinas[394]
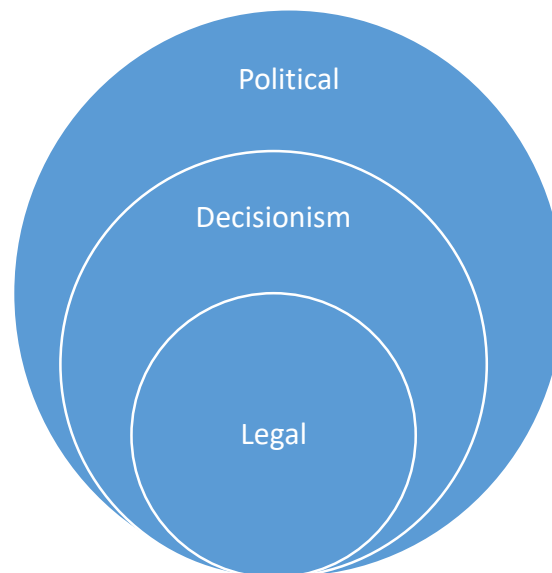
Figure 8

In order to be distinguished from other animals and gods, human nature and destiny are *a priori* concepts connected to their states that is seen as the consequence of a 'natural growth.' Growth always means progress, as the ideas of the theory of evolution had penetrated into the social, political, and legal discourses. Observed in this way, the state as a production of social growth, due to natural laws of progress and evolution, represents the increased levels of rationality that in turn create its basis. This basis was examined in the previous two chapters, where the connection between the rationality and modernity was shown.

On the other hand, Schmitt finds this progress in the concept of the political, which cannot survive outside a certain social structure that allows it to exist. When he talked about Hamlet, he said that '[t]he tragic thing does not lie in the play, but outside it, in reality.'[395] There is no tragedy in the world of gods. The protagonists of the Greek tragedy were always humanlike, and the main conflict always occurs between people who always have their own

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[394] Aquinas cited in Hannah Arendt, The Human Condition, p.23.
[395] Schmitt's letter to Kojève, Plettenberg, 11/5/56, p.108 in Alexandre Kojève-Carl Schmitt Correspondence and Alexandre Kojève, "Colonialism from a European Perspective."

statements on moral and ethical questions. Therefore, we can talk about the conflict between the two pathos where the outcome always contains a "rational injustice". Reality is seen only in the social, in the city, in the political structure; reality is in the conflict which Hamlet felt on his skin. The man ceases to be human when he ceases to be political, which is the first philosophical pillar that Schmitt gives to the concept of political.

Schmitt also sees the political inseparable from the human nature, and as "a basic characteristic of a human life; politics in this sense *is* destiny; therefore man cannot escape politics."[396] Habermas is of the opinion that people have to communicate in order to agree that they disagree. For Schmitt, one cannot escape the political even when he or she wants to cancel it. The political is the only We-reality, something we share between us and that we are able to comprehend with our thoughts, and therefore, it is both the speculative and empirical reason. Hence, the political has complete supremacy because every activity can be political as there is no social or individual activity that is able to exclude conflicts by its nature. Every religious, moral, economic, ethnic or other opposition becomes a political opposition.[397]

That is why he will never liberate himself from the state, as the only concept that can universally grasp the truth about the political and unleash its development. However, even though at some points one might think his idealization of the state came to a certain dogmatic level, in my opinion, even in his writings during Nazi Germany, Schmitt was clear that the state was only one element in the triadic concept of German society, and that "the political cannot any longer be determined by the State, rather the State must be determined by the political [italics removed]."[398] Therefore, if we have to choose one concept that Schmitt glorified the most, it would certainly be the political.

3.4.1 The political as a natural state and a central domain

For Kervégan, there are three main characteristics of Schmitt's concept of the political: (a) the political does not have the substance, it reflects the conflictual potential of human practices; (b) the political is omnipresent, it is the substance itself; and (c) one of its possible expressions is war, but not its purest manifestation that is found in a irreducible decision.[399] Following the arguments of this French professor, what is left to embrace while deconstructing

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[396] Strauss in Schmitt, *Notes on* The concept of the Political, p.110.
[397] Schmitt, O conceito do Político, p.63.
[398] Schmitt, State, movement, people, p.15.
[399] Kervégan, Hegel, Carl Schmitt. O político entre a especulação e a positividade [in further text Hegel, Carl Schmitt], p.353.

the notion of the political is its central position in history where it is always the fundamental domain. Regarding this thesis, Schmitt will start the search for the political in what is called the natural state. At this point he arrives at the Hobbesian argument, where politics can be defined as a 'friend-foe' relationship. The third argument that will be discussed in the following text is the metaphysics of the decisionism, the creative act of rational totalities that ultimately puts authority in the political above the legal.

3.4.1.1 Historical changes of the central domain

For Schmitt there are four changes in central domains of intellectual life in European history. In each age definitions of main concepts, ideas and state are shaped by the central domain whose feature is to shift in history according to its internal logic. This logic is not progressive, and therefore does not provide acceptance of historical rationality as a basis for further legitimacy of thoughts. The first shift happened in the 16th and 17th century, and it was represented by the transition from theology to metaphysics, with authors such as Galileo, Kepler, Descartes, Hobbes etc. This change was followed in the 18th century by the project of the Enlightenment that was actually shunted metaphysics for Schmitt, and it literally meant the appropriation of great accomplishments of the 17th century. Typical expressions of this period are Rousseau's theory of social contract and Kant's concept of God. The third shift had happened in the 19th century with the secularization, and with the "hybrid and impossible combination of aesthetic-romantic and economic-technical tendencies."[400] This century was at its core economic, and Marxism was its great expression. The last change in the central domain that Schmitt had the opportunity to witness occurred in the 20th century when the "religion of the technical progress" arose. In this period, people start to create religious feelings for technology and progress.

What is important to understand about the changes in the central domain, observed as historical changes, is that for Schmitt they are "erroneous transfer of a concept at home in one domain (e.g., only in the metaphysical, the moral, or the economic) to the other domains of intellectual life."[401] Each shift was actually a change towards further neutralization, where the former central domain gets substituted by a more neutral domain, as a historical human hope for a neutral and conflict-free environment. However, the current neutral domain after some

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[400] Schmitt, The age of neutralization and depoliticization, p. 84.
[401] *Ibid.*, p.85.

historical time, which in his timetable would be one century, ceases to be neutral, becomes politicized and therefore causes a new change.

In the 18th century when the central domain was a humanitarian-moral belief, according to Schmitt, we can trace back the concept of *progress* that, beyond improvements in many social areas, acquired the second meaning: *moral* perfection.[402] A word that has previously been clearly linked to economic and technical development, with the 18th century's central domain, becomes a byproduct of economic progress, and questions of moral become the biggest problems. The same goes for the shift in the definitions of other concepts, for example, the shift in the meaning of the *clerk*.

According to Schmitt, the biggest change had happened in the sphere of theology that got suppressed to the individual level, losing its role of public debate. Further shifting to economy was just the herald of moving towards technology as a central domain, which once again showed a tendency towards neutrality, because it cannot be anything more neutral than technology. The latter shows no means to be politicized, and therefore cannot be changed as the central domain. Schmitt criticizes this 'apparent' feature of technology and believes that it is "always only an instrument and weapon; precisely because it serves all, it is not neutral."[403] The given critique of technology is what we have shown Habermas in his early works was focused on, and what seems to be forgotten in his latest works.

In addition to the obvious critique of modern technology as a possible means that can and is used in wars and conflicts, as a weapon in the hands of those who simply have access to it, technology as a central domain can be criticized from the social perspective because it always remains culturally blind. Therefore, technology remains incapable of providing definitions for social concepts and roles, a role that central domain has.

Schmitt uses changes in the central domain as part of his critique of the European liberal democratic state that remarkably maintains the search for the neutrality, for a neutral domain in which there will be no conflict, which for our author means without politics. [I]t is remarkable that the European liberal state of the nineteenth century could portray itself as a *statuo neutrale ed agnostico* and could see its existential legitimation precisely in its neutrality.[404] This tendency towards neutrality continues to exist on the acceptance of the positive law, which, in order of maintaining the order, constitutes the *concept of truth*. When the pre-defined truth is given in the modern state as a priori rational structure, precisely through

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[402] Cf. *Ibid.*, pp.86-7.
[403] *Ibid.*, p.91.
[404] *Ibid.*, p.88.

the transfer of domains, theology penetrates into the sphere of norms, and brings irrationality to the rational structure.

That is why, he will observe what has never been in the center domain, and that is the domain of thought. Schmitt writes: "If a domain of thought becomes central, then the problems of other domains are solved in terms of the central domain – they are considered secondary problems, whose solutions follow as a matter of course only if the problems of the central domain are solved."[405] Even though he never focuses on the historical possibility of this idea and roots it in a collective thought plausible in a rational society, it is important to emphasize the rational imperative Schmitt manages to develop. This imperative can be evolved as a central domain, and thus solve problems from other domains. However, this call for a rational he will ultimately find in the concept of political, which is the only possible central domain, and the only one that matters, putting all others in a secular position.

3.4.2 A political unity is a supreme unity

Political unity is the supreme unity, not because it dictates (its law) in an all-powerful way or because it levels all other units, but because it decides and can, within it, prevent all other conflicting groupings from converging to extreme hostility (the civil war).[406] The possibility to exert pure force and decide on the lives of citizens of one country is in the hands of a political leader, one of the exits Schmitt takes on his theoretical-practical path to the concept of sovereignty. This power is established in the state of exception, and is practiced by the means of a sovereign decision, and is one of the reasons why Schmitt never showed any respect for revolutionary attempts, even though for him the rise of the national-socialist state was based on the "German revolution" that was legal, because of its "keeping with the former constitution."[407] Intertwining of the political sphere with the social sphere, without using the given legal order and constitutional order, for the jurist is unacceptable, even for a greater cause. There is a clear monopoly of political power, and any kind of extra-political or extra-legal space is not legitimate for Schmitt.

During the Weimar Republic, at some point, almost every political party had the power over some paramilitary group, with the possibility of providing numbers of soldiers with weapons and personnel to operate with. This situation was hanging above the WR as a dark

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[405] *Ibid.*, p.86.
[406] Kervégan, Hegel, Carl Schmitt, p.54.
[407] Schmitt, State, movement, people, p.7.

cloud that can bring upon a civil war at any moment. However, although Schmitt condemned the political parties that were managing paramilitary groups, he must have been aware that during the *Preussneschlag* the violence in some cities of Prussia was a direct consequence of lifting the ban on the public gathering of extreme political parties. That violence was later used to defend the usage of another emergency decree that had deposed the government of Prussia. Why did Schmitt defend this political maneuver that had produced not only violence, but also a constitutional disorder? The answer is quite simple – because it was the president's decision, and therefore it was justified.

3.4.3. Homo homini lupus – war and decision in Schmitt's theory

War does not serve as the main idea for this paper, although it is a big part of its beginning and its end. Many authors find the relation between war and Schmitt's theory and his political ideas as very natural and obvious. Regarding his later personal and political choices, one cannot try to exclude the importance of war and violence, notions that make a big part of his definition of the *nomos*. However, in his earlier life, in time before and during the WWI, we can trace the feelings of sadness, fear and disgust with the world that was at that time made of war and violence. When reading his diaries, one can easily feel the fear and sadness that Schmitt felt on the outbreak of the WWI, in which he lost some of his best friends. His experiences during this war greatly affected his attitude towards the war from the point of view of a citizen, and not of a theoretician who hides behind his pen. For example, after the liquidation of Russian military imprisoners, Schmitt will write in his diary: "The warfare is a pure genocide. It simply destroys. Thousands of Russians have been forced into the sea and killed with machine guns."[408]

After the WWI, apart from the bitterness of the past war, what created even more chaos in the already chaotic Germany of the 20th century was a constant possibility of a major civil war. It was a time when the enemies were clearly defined, and in order to maintain the Reich, those enemies had to be placed outside the state. This conflictual period for Schmitt existed both on a personal and professional level, making him impossible to imagine peace as a final solution that could maintain political dynamics. He will note in his diaries during WWI: "I wouldn't know what to do if the peace suddenly emerged. I really don't know. I live aimlessly

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[408] Schmitt cited in Molnar, Sunce mita, note 46, p.93.

from day to day. It is unbearable."[409] In addition to a certain 'fear' of peace that can be found in the first part of Schmitt's quote, there is a notable 'fear' coming from the lost human and citizen who had never asked for the constant wars and possibilities of wars happening around him. Because this was exactly the reality that Schmitt was dealing with – a lot of fear and destruction, violence and exceptions, and more importantly, things were happening without a clear meaning and idea, such as international sanctions and isolation from the League of Nations that Germany had experienced after the WWI.

Therefore, from the material he was given as an intellectual situated in the most difficult historical moment of the 20th century, Schmitt will first articulate two ideas that will be a part of his work until the end. First, he defines global peace as a depoliticized world. This statement makes a strong link between the war and the political. But, as will be shown in the last chapter, this link is deeply rooted in his critique of liberalism and its politics of cosmopolitan human rights. "The definition of the political provided here is neither war like nor militaristic, imperialist or pacifist. Nor does it represent an attempt to define the victorious war or existent revolution as a "social ideal," because war and revolution are not "social" or "ideal.""[410] And second, the search for the meaning he places, from the beginning, in the antagonistic political relation and authority of the state, where the violence and norm get their logic in the decision.

3.4.3.1 Speculation in the 'friend-foe' relation

The notion of the political, Schmitt reduces from the theory of a natural state, where the political relations resemble the ones in the state. In order to define this natural state, he chooses to discuss political relations using the 'friend-foe' formula. He does this in order to define the political as a 'central domain', better said, to define the political above and distinct from other social domains, with 'friend-foe' relation as its dialectic strength. In order to understand this relation, it is important to go beyond the simple semantic meaning of the given words. A friend does not have to be good, nice and fair, just like an enemy is not a priori its exact opposite. Their relationship is conflictual, however it is not necessary to have an ongoing quarrel or an open conflict in order to obtain a political relation. The possibility of a quarrel that stems from a 'friend-foe' relation is sufficient to define the relation as a political one. Therefore, one can have such a reading of Schmitt where the 'friend-foe' relation does not necessarily mean war

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[409] Schmitt cited in Molnar, Sunce mita, p.98.
[410] Schmitt, O conceito do Político, p.60.

or conflict. Chantal Mouffe, for example, is one of the authors working on a 'positive' interpretation of this relationship as part of her radical theory of democracy.

The enemy, who is in the sphere of political "need not be morally evil or aesthetically ugly (...) But he is, nevertheless, the other, the stranger."[411] The adjective 'stranger' is put in the center of the definition, giving a social dimension to the sphere of political. It is the "other in its otherness" and it has been alienated from its subject. However, it is not different from the subject; it is just a distorted reflection of the same. Enemy is our own question in form.[412] Enemy and friend do share the same form, and if we suppose that the basis of the 'original' are rationality and freedom, then the 'other' – the 'alienated,' would mean irrationality and unfreedom. That is why Schmitt asked Kojève "whether there can be an enemy in Hegel at all," to which he will answer: "yes and no." He finds the positive answer in world history, which is a struggle for recognition and is "the history of *enmity* between peoples."[413] The negative answer is posed in the limitation of the history which is being subordinated to the absolute spirit. Thus enmity is (…) only a "moment" of the "Logic" i.e. of human speech. The fulfilled reason of the wise man (…) speaks (…) *about* the (past) enmity, but the wise man never speaks *out* of enmity.[414] Similarly, Schmitt describes the enemy in Hegel's philosophy: "Hegel also established one definition of the enemy, which is generally avoided by other modern philosophers: he [the enemy] is the ethical difference (not in the moral sense….), like one stranger that needs to be denied in its living totality."[415] The dualism and the sameness of enemy and friend are at the core of the political, and only there we can find the opportunity to observe its manifestation. Following the nature of their relationship, we can conclude that a friend relates to an enemy as to his dialectical twin, and vice versa.

Furthermore, the 'friend-foe' relation is not static, it demands to be dynamic, and thus, it is a relationship between one another in their originality and otherness on the one hand, and in the process of their definition on the other hand. This is also what Hegel calls a caprice of the will "in which are contained both a reflection, which is free and abstracted from everything, and a dependence upon a content or matter."[416] In the equal spirit we are represented

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[411] Schmitt, The concept of the political, p.27.

[412] A verse from Däubler's poem *Das Nordlicht* (1910) cited in Schmitt's letter to Kojève, Plettenberg, 14/XII 55.

[413] Kojève's letter to Schmitt, Paris, 4/I 56, p.107 in Alexandre Kojève-Carl Schmitt Correspondence and Alexandre Kojève, "Colonialism from a European Perspective."

[414] *Ibid.*

[415] Schmitt, O conceito do político, p.89.

[416] Hegel, Philosophy of Right, p. 38. Translated by S.W. Dyde (Kitchner, Ontario: Batoche Books), 2001. In Hegel, Elements of the Philosophy of Right, ed. Allen W. Wood and translated by H. B. Nislet (Cambridge: Cambridge University Press), p.48, translation is: "The freedom of the will, according to this determination, is arbitrariness, in which the following two factors are contained: free reflection, which abstracts from everything,

simultaneously in our singularity and in our universality and the definition of some matter needs to contain its negation, its caprice. Observed like this, the definition of the political in Schmitt's works may be related to the process of achieving freedom. Hegel says: "Liberty is possible only for the people that have one state as the juridical unity."[417] That is a statement that Schmitt's political realism shares.

3.4.3.2 Hegel and Schmitt

Both Hegel and Schmitt have their central domains, the engines of world history that are at the same time out of domains of classification. The political we find in Schmitt and the freedom in Hegel are indeed the concepts that are able to grasp all the existing terms, but they are not fully embraced by any other conceptualization. They exist as something beyond singular and particular, like the definition of *example* by Agamben.[418] Furthermore, they depend on the historical moment where they can only be recognized, and therefore become the objects of speculation that can bring upon a certain definition and recognition. Schmitt goes far enough to say that "[a]ll concepts of the spiritual sphere, including the concept of spirit, are pluralistic in themselves and can only be understood in terms of concrete political existence."[419] By the same token Hegel talks about the freedom, which is the main goal of the existence of individuals and the whole society and according to the stages of the development of a free man and a free society, world history can be explained. His concept of an objective spirit is impossible to observe separately from freedom, in the same way that Schmitt cannot observe freedom out of the political.

Jean-François Kervégan traces the mutual exchange between these two German authors in his book *Hegel, Carl Schmitt*. According to him, he uses Schmitt to reveal the complexity of Hegel's thinking about the right and politics. In the Introduction of this book, he answers the question of why he chose to confront Schmitt and Hegel. Firstly, the legal philosophy of Carl Schmitt[420] which can be defined as primarily *anti-positivist* (shown above in the discussion between Kelsen and Schmitt) has managed to fall into the trap of metaphysics, and by putting *decisionism* in its central position, entered into the 'metaphysics of positivism.' This is one of

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and dependence on an inwardly or given content and material."
[417] Hegel, *Politishe Schriften*, p.114 cited in Kervégan, Hegel, Carl Schmitt, p.127.
[418] See Agamben, A comunidade que vem, pp.17-9.
[419] Schmitt, The age of neutralization and depoliticization, p.85.
[420] Here he refers to the legal theory developed in Schmitt's works prior to WWII, what we had named before as the Weimar period (1919-1933).

the major conclusions of Kervégan's book that shows how the metaphysics of decisionism has finished with rationality in Schmitt's legal theory due to the first decision of the creation that is irrational. Besides irrationality of the decision, especially observed in the political-legal exchange that rejects rational possibilities for the law, with decisionism Schmitt also cancels the speculative possibilities of positivism. This argument that merges the concepts of Hegel and Schmitt can be brought to the empirical level of history that "consists in liberating the space of positive rationality from its philosophical ties (...), making the decision, an essentially irrational component of every juridical and political order, the unthinkable prerequisite of law itself."[421] Therefore, we could say that Schmitt's decisionism closes the circle of speculative dialectics, and sees no possibility of reconciliation of the mind and the history in the law.

The second argument he gives considers a juridical power. The German jurist was strongly rejecting even a possibility for a juridical power to decide on the statute and subsequently, to have any formal legislative power. The sovereign decision is to be made only by the president, and Schmitt is very clear about that. This is what he and Hegel share to some extent, a secret prevalence of the political over the legal whenever their separation is taken as a positivist argument. "What brings closer the jurist Carl Schmitt to Hegel is a radical refusal of *legalism*. Like Hegel, he rejects the abstract separation of law and politics."[422] For Kervégan, the discussion between Kelsen and Schmitt can be compared with the one Hegel had had with Kant, having their relations towards the positivism. However, as shown in the first point, even though both Hegel and Schmitt have the same critical epicenters, their exit points are different, and after the critique of positivism in law and politics, Schmitt takes the path of decisionism and the irrational decision becomes the foundation of his political-legal philosophy. In addition, according to Hegel, the state is possible without politics, as a concept that in history obtains its own universal rationality. Schmitt is not of that opinion, as for him the political on some level of examination can exist without the state, but not the other way around. The movement of the political is not a priori connected to the evolution of the state. What is inseparable from the political is the relationship between the friend and enemy, viewed as the ever-existing possibility of war. As we have elaborated above, for Hegel (if one can talk about the concept of an enemy in the Hegelian terms), that enemy is "the ethical difference (...), the stranger to be negated in its living totality."[423] Schmitt, on the other hand, gives no clear suggestions whatsoever on how to end the relationship with the enemy, he sees no chance for

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[421] Kervégan, Introduction in Hegel, Carl Schmitt, p.xxxii.
[422] *Ibid.*, p.xxxiii.
[423] Schmitt, O conceito do político, p.89.

the political or for the state to exist without having it.

Schmitt himself defines the fundamental ambiguity as the main characteristic of the Hegelian thought, which stands for another aspect that Kervégan develops in his analysis. Namely, Schmitt finds Hegel's theory, in its most extensive form "the double face that bears all the answers and all the oracles of the spirit of the Hegelian world."[424] The double face appears in Hegel's relation to the political, more specifically, to his political anthropology. While in the biggest part of his work he maintains the anthropological pessimism and thus remains political "in the highest sense," in his protection of human freedom, he loses his political realism in the defense of the human optimism. Thus, Hegel, according to Schmitt, is not capable of reaching the meaning of the highest decision. His dialectics and continuing project of forming the system (that was shown in the first chapter) represent "vain but grand" attempt "to unite past and future in the magic of the speculative present. (…) Like this, Hegel is constantly conducted to the attempts of reconciliation that are despite everything, condemned to fail."[425] Therefore, we can say that Schmitt follows Hegel until the latter's theory of recognition and possibility of the reconciliation in law, and Habermas perhaps continues from those points. This thesis will be examined in the following chapter.

In order to complete our examination of the complex concept of the political offered by Carl Schmitt, in what follows I will devote attention to the concept of the decisionism, the one that, as we could see, Kervégan and many other authors put in the center of Schmitt's political and legal theory. My approach to this concept will be through the concept of authority, the third and penultimate feature I have chosen to embrace within the concept of political, which is essential in the relation between law and politics.

3.4.4 The authority as the political

The European history can be interpreted through the change in the central secular domains, with the movement of the most neutral domain towards the central position. However, what has never been in the central historical domain, according to Schmitt, is a thought. The reason for this is the impossibility and the historical unwillingness to fully realize this domain, and due to this, Schmitt will develop the concept of political as a pluralistic one, and based on the 'friend-foe' relation, in the way explained above. Nevertheless, while

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[424] Schmitt, *Ex Captivitate Salus*, p.60 cited in Kervégan, Hegel, Carl Schmitt, p.136.
[425] Kervégan, Hegel, Carl Schmitt, p.137.

observing the reality of his time, which is the time before, during and between the two world wars and also the time of the emerging of the German state, he decides to look for the answer of this political problem in the authority. That is the third characteristic of the concept of political that is rooted in the concept of the state of exception.

Schmitt uses the *Ausnahmezustand* to pave the way for the definition of the sovereign, and by that, to pose political authority above any higher legal necessity. In the state of exception, legal norms are not governing, law ceases and the sovereign rules according to his decisions. The *Ausnahmezustand* is therefore standing opposite to the normal state of affairs, which is the prerequisite for the constituting laws, and the rules are applicable only in the state of normality. When 'normality' as the condition for a legal hierarchy ceases to exist, the whole unity is put into the hands of the one that carries the most legitimacy – the sovereign. The most important writings on this matter date from the Weimar period, but the true strength of this argument becomes most visible in the last years of the WR, and especially after 1933, when his political theory focuses on the authority as the only capable of bringing together the ideas presented in "Sate, Movement and People".

The authority revealed in his reading of the sovereign has many layers. The (un)famous Article 48 of the Weimar Constitution reserved this power for the president, and Schmitt gave it a speculative reasoning. The President of the Weimar Republic had not only a legal, but more importantly, a legitimate power to decide upon the state of exception when other state organs had failed to restore the system back to normal. While reading *Legitimacy and Legality*, as McCormick pointed out in the Introduction, it is not so easy to understand Schmitt's position towards the Constitution of the Weimar Republic, and it remains unclear whether he is arguing against or for it. Bearing in mind that at the time when the book was published he was working as an advisor in the cabinet of ministers, respectively Kurt von Schleicher and Franz von Papen, we can conclude that his position towards the 1919 Constitution could not have been neutral and free from the political influences of the time when the WR was counting its last days. Although, at some points there is an impression that he is defending Article 48, and at others, that he uses this constitutional article to criticize the political and legal reality of the WR whose only way of functioning is out of the normal state and therefore without the law.

In "Political Theology" the focus is put on the notion of sovereignty, and who is a sovereign, a question which is rooted in the answer of another question: what is the link between the sovereignty and the decision? The sovereignty, which can justifiably be read as the concept of state with all the features prescribed by Schmitt, allows the decision to take place, and this is most visible in the state of exception. Therefore, when we employ this concept

through the prism of Schmitt's theory, we refer to the decision on the state of exception, a decision above any other, the decision that in the last instance shows that the political is above the legal sphere.

3.4.4.1 The Dezisionismus

Schmitt finds political authority in the specificity of political decision. If we talk about the doctrine of decisionism (German *Dezisionismus*), we can first refer to it as a concept that uses the political, ethical, and jurisprudence means in the way of defining the legal precepts as products of decisions made by the legislative organs. Therefore, the link between the law and the political is grasped best in the decision of the political authority. For Schmitt, at the core of the political is the right and power to decide which brings both legitimacy and legality within the process of decision making. In the other direction, the decision defines the political and shows the authority in it. This doctrine that we have presented as the central point of Kervégan critique of Schmitt is a very complex question to reflect upon, and there are various ways to discuss it.

To start with, we have to understand that for Schmitt the idea of a legislative state is rooted in the notion of legal, particularly in the process of legal deciding. These decisions are being made by the following and famous Hobbsian formula: *auctoritas, non veritas facit legem*. This is the easiest path to follow in order to track down the authoritative argument in Schmitt's writings. Who makes the law? Who has the ultimate authority? Perhaps somebody will find an answer in Article 48 of the Weimer Constitution, and if that is the case, it all comes back to his definition of the state of exception and sovereignty. However, by doing so, the attempt to reach an objective and purposive value that can be retracted from Schmitt's work would fail. Hence, I will try to incorporate authority argument into the critique of decisionism and cast a light on the relation between the law and the political, between a legal and political decision.

The power of decision making that is in the hands of the highest political authority of one state is the main guardian of the constitution, and the strongest link between the *state, movement, and people*, what Schmitt calls 'the triadic structure of the political unity.' The highest political decision defines even what is outside the political: "It is one of the fundamental notions of the politically uptodate German generation that to *determine whether a matter or a field are apolitical is precisely the political decision in a specific way*."[426] In this sentence, and

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[426] Schmitt, State, movement, people, p.18.

in the book "State, movement, people," Schmitt clearly explains how a 'good state' (in this specific case, he refers to the national-socialist state) should be organized, and who can get the right over the political. By defining the apolitical sphere, or rather, by giving the adjective of apolitical to some of the state and social structures, the sphere of political is concentrated in a few hands of the political authority. The courts, people and civil servants in this formula get depoliticized, and they are carried by the leading political body which is made up by the party and the movement. It is in "State, movement, people," perhaps more noticeably than in any other book, where we can observe that the notion of political, viewed as a form of the *zoon politikon*, gets substituted by the political authority, more precisely, by the political decision.

Although the main purpose of the claims presented in that book was to provide a theoretical support for the rising National-socialist party, and that the terrible outcomes of this "political project" are well known, what prevails in his demagogic writings is that in "the legislative state there cannot be numerous sources of the law. The lawmaker of a logically consistent legislative state must retain its "monopoly" of legality."[427] And this monopoly is grasped in the concept of sovereign who has the right to decide upon the exception. In parliamentary democracy, in which on one side there is a parliament with its legislative power, and on the other side there is the head of the state with the power of the highest decision that puts him or her **above and outside** the law – the decision upon the state of exception. This situation, according to Schmitt, does not guarantee the state of normality, which is a necessary condition for the legal effectiveness. This is precisely the situation that he witnessed during the last years of the Weimar Republic when the President and the Parliament entered in an open conflict, and the state had to function on the basis of emergency decrees and decisions of the political authority. A sovereign decision thus can be described as a window through which we can observe what liberalism always finds ways to avoid – the authority, more precisely, the decision. On the way of defending it, Schmitt refers to the critique of the liberal depoliticized state. For him, in this state even the notion of justice is part of a particular administrative power of some state organ, and therefore, every law is a state law and vice versa – every state activity is a law which he sees, in the liberal state, as a simple implementation of the norms by state administrative machinery. In the last chapter, this paper will return to his critique of liberalism, but with the aim of showing the 'missing' antagonistic nature of the political in modern times, and the way to bring it back to life.

The main question posed at this point is how does the sovereign decision build the link

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[427] Schmitt, Legitimacy and legality (LL), p.19.

between the political and legal according to Schmitt? By making a political decision, the highest political authority that has the legal power of deciding is dissolving its legitimate power to other apolitical bodies and giving them the necessary legitimacy for their functioning. By the same token, "[o]nly on the basis of uncontested political decisions (…) may the law then spread to all the sectors of the public life in a free and autonomous expansion."[428] The solution for the modern tendency of 'uncoupling' between the social sphere and the state, between political and legal, Schmitt finds in the legitimacy and legality of a political decision. Therefore, a specific political decision is what makes the difference between legal and illegal order. Furthermore, it is the decision that is capable of creating politics from any form because it does not depend on the norm, and it precedes it.

This argument is at the centre of the radical critique of Schmitt that Karl Löwith presented in the article "The Occasional Decisionism of Carl Schmitt."[429] The first argument about the *occasional decisionism* in Schmitt's works is that it stands for the so-called "active nihilism." This nihilism is described as a form of thought that tries to affirm the meaningless emptiness of the modern world, to face up to the challenges of nihilism by resolutely locating itself in this emptied-out world.[430] On the other hand, the nothingness as the beginning of the sovereign decision can be traced in at least several Schmitt's works:

Looked at normatively, the decision emanates from nothingness.[431] The sovereign decision is absolute beginning, and the beginning (even towards arkhé) is nothing but sovereign decision. It arises from a normative nothingness and from a concrete disorder.[432]

However, in the last chapter of "Political theology," Schmitt will demonstrate his awareness of the difference between dictatorship and legitimacy, and how a decision can dissolve legitimacy, something that many of his critics seem to forget. Donoso Cortés in his last endeavours to save the monarchy before the "last battle" ends in defending the political dictatorship. Similarly,

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[428] Schmitt, State, movement, people, p.15.

[429] *Der okkasionelle Dezisionismus von C. Schmitt* was originally published under the pseudonym Hugo Fiala in 1935, during the Italian part of Löwith's exile in 1935. The final version of the article was firstly published in the anthology *Gesammelte Abhandlungen. Zur Kritik der geschichtlichen Existenz* (Stuttgart: W. Kolhammer Verlag) in 1960. The English translation by G. Steiner – "The Occasional Decisionism of Carl Schmitt" is available in R. Wolin (ed.), Martin Heidegger and European Nihilism, New York: Columbia University Press, 1995 (137–169).

[430] Falk, The 'Theological Nihilism' of Friedrich Gogarten. On a Context in Karl Löwith's Critique of Carl Schmitt, p.222.

[431] Schmitt, Political Theology, pp.31-2.

[432] Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* cited in Kervégan, Hegel, Carl Schmitt, p.119.

Joseph de Maistre has reduced "the state to the moment of the decision, to a pure decision not based on reason and discussion and not justifying itself, that is, to an absolute decision created out of nothingness." Like this, Schmitt continues, the decisionism "is essentially dictatorship, not legitimacy."[433]

The decisionism, thus, cannot go beyond the state, or jeopardize the political meaning of the state independent from the situation. In other words, it cannot reject political and historical rationality. Its task is to point out the absolute or relative rationality and to reveal when rationality becomes impossible, like in the situation of "[t]he either/or of moral decision, the decisive and deciding disjunction"[434] typical of liberalism. In other words, the decision cannot be reduced to the logic of normativism and Schmitt's decisionism "can then be perceived as an undoubtedly paradoxical form of juridical rationality. (…) Observed this way, decisionism would be not so much a rejection of rationality, but **the option** [emphasis mine] that would allow it to escape from the bad infinity of normativism."[435] More precisely, the liberal normativism that "simulates a 'dominion of the legal norm', which in reality is only the dominion of a system of legality over the administrative machine."[436]

Furthermore, using the decisionism with the single goal of criticizing liberalism and protecting the Nazi ascension to power is what Löwith interprets in the light of the existing distinction between the decision and occasion. When, for example, Schmitt cites and studies authors like Donoso Cortés or Friedrich Gogarten, according to Löwith, he does that with the aim of protecting his anti-romanticism, anti-liberalism and anti-positivism standpoint. In other words, Schmitt choses to use theological arguments with utilitarian goals without truly sharing them or understanding them. Therefore, "Schmitt's decisionism is ultimately to be regarded as a profane one, since he believes 'only in the power of decision' – not in theology, nor metaphysics, nor humanitarian morality."[437] This is another shortcoming of Löwith's critique, since it is almost impossible to detach Schmitt's teleological arguments from the ones he makes in his theory of the modern state. Moreover, the influences Schmitt had got from his very personal and academic beginnings were examined at the beginning of this chapter. Contrary to the "anti-theological" character of Schmitt's theory that Löwith speaks of, it is precisely in the metaphor of the divine creation where Kervégan places his critique of Schmitt's

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[433] Schmitt, Political Theology, p.66.
[434] Schmitt, The crisis of parliamentary democracy, p.56.
[435] Kervégan, Hegel, Carl Schmitt, pp.119-20.
[436] Schmitt, State, movement, people, p.16.
[437] Falk, The 'Theological Nihilism' of Friedrich Gogarten. On a Context in Karl Löwith's Critique of Carl Schmitt, p.222.

decisionism. The political theology leads Schmitt into "one *metaphysics of the decision*, inasmuch as it constitutes the founding moment, "the political", of any order."[438] Following the conclusions presented above, it can be added that Kervégan's image of Schmitt's decisionism as the "deforming mirror"[439] that in its distorting nature manages to unwillingly grasp some of the notions that can be traced back to Hegel, such as the total state, stands strong in relation to the metaphysics of the decision. Both Hegel and Schmitt's major critique focuses on their concepts of the strong state, but, according to Kervégan, the concave mirror of Schmitt's decsionism posits his concept of the total state as the "*Aufhebung* [annihilation] of Hegel's universal-rational State."[440]

On the other hand, the validity of this decision is enabled by the legal body, not by its content. Thus, a statute depends on a "total existential decision," and law essentially becomes only a statutory law that obtains its validity by the political authority's decision, the moment where Schmitt meets Hegel again. "The state is law in statutory form; law in statutory form is the state,"[441] Schmitt will say. For him the principle of any law or legal system is not a norm, but "the condition of any proclamation of standards [is]: the decision."[442] The decision of this kind is carrying in its essence the negation of some other, opposed decision. This relation puts two opposing decisions in a new conflictual relation, where one will start belonging to the past, and the other will become a legal norm, and thus belong to the future. This is all happening on the plan of the political, where Schmitt's ideas are brought to Hegel's argument about the history of the state, where a sovereign decision will start the dialectical circle, separating the past from the future with the highest decision coming to life.

The concept of sovereign that Schmitt roots in the rules of decisionism that are woven into the legal content is the criteria between what is historically valuable and belonging to the future, and what is historically insignificant, belonging to the past norms. Therefore, the inseparability of the legal decision from the political, and intertwining of these two domains is what marks Schmitt's legal philosophy. Moving in this direction, he will radicalize Hobbes's and Machiavelli's ideas in constitutional ideas for the new German state, based on decisionism as an absolute legitimacy for laws made by an authority. At the same time, he will, according

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[438] Kervégan, Hegel, Carl Schmitt, p.351.
[439] The image of deforming mirror served for Ramón María del Valle-Inclán, in *Luces de Bohemia* (1920), to present a critique of the reality of Spanish society using the term"el esperpento" as a method of observing the political relations of his time. Distorted mathematics of concave mirrors speaks more than perfect mathematics that does not correspond to the 'esthetical' dimension of Spain. A grotesque image is necessary to observe a reality that is part of a corrupt human nature, far from any perfection, in esthetical or ethical sense.
[440] Kervégan, Hegel, Carl Schmitt, p.xxxiv.
[441] Schmitt, LL, p.18.
[442] Kervégan, Hegel, Carl Schmitt, p.350.

to Kervégan, stay in the frame of the Hegelian concepts, not being able to escape them, and finally finish as the "embarrassed Hegelian [*hegeliano envergonhado*]."[443]

3.4.4.2 *Ausnahmzustand* as the antonym of the normal state

The moment when a sovereign decision reveals itself absolutely is the moment when the normal state is separated from the exceptional state, the so-called state of exception. *Politische Theologie* starts with the examination of the phenomenon when the "no-law" gets inserted in the space of "law", the state of exception. Schmitt tries to summarize this in three general points: (1) exception is inside of law; (2) general norm corresponds only to normal situation; and (3) state of exception is one independent zone between chaos and normality.[444] The first point already indicates the main paradox that is built on the nature of the state of exception, which is regulated by law in order to cancel other laws, and especially the division between legislative and executive power. The history of *Ausnahmezustand*[445] gives us valuable empirical material for understanding the consequences and dangers of this legal means. Furthermore, it provides arguments to discuss upon state of emergency as a political tool that reflects upon connection between politics and law. For Schmitt, the most important legal-historical argument was Article 48 of the Weimer Constitution, and as Agamben highlights, without considering this Article it is impossible to understand Hitler's rise in Germany. Moreover, such a nature of *Ausnahmezustand* refers to the power of law that can legally, through a sovereign decision, define what is outside of and what is within the law. This is a very important argument that Agamben develops using Schmitt, yet he goes against him again: "Western politics is not that of friend/enemy but that of bare life/political existence, zoe/bios, inclusion/exclusion."[446] What is the state of exception for Schmitt, for Agamben, through his political-legal analysis, will be a purely biopolitical concept, a homo sacer, a bare life. Such a life that can be killed but not yet sacrificed is the rupture, and it is excluded from the main and normal legal system. Therefore, Agamben uses the nature of *Ausnahmezustand* observed in the law that by using its own structures gets to exclude some or all other parts of law from the structure of law, with the political decision as a trigger.

The second claim of Schmitt is a normative claim, as the "normal" situation is defined

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[443] See Kervégan, Hegel, Carl Schmitt, pp.133-7.
[444] Schmitt, Teologia política, p.x.
[445] See Agamben, State of exception, pp.11-22.
[446] Agamben, Homo sacer, p.8.

by normative, legal conditions. If the state of exception is included in the body of the Constitution, the conditions that allow *Ausnahmezustand* are listed by the law and they are outside the law in the sense that they do not belong to a normal situation and therefore cannot be treated by "normal" legal instruments, more precisely, they cannot be treated by any legal instruments. The distinction between the normal and non-normal situation is what Benjamin also describes when he writes about the Police[447], and this distinction is related to the difference between a false and true state of exception. Schmitt sets an exception outside of the rule, which is at the same time defining the rule. This is a paradox of the legal concept of the 'state of emergency' that is caught simultaneously in the cancelation of a norm and defining of another one. Agamben names this paradox a "zone of indifference"[448] that can also be seen as a type of resistance, in which the Constitution represents a legal sphere, and resistance a political-social sphere, and their relation is a game of exclusion and inclusion. Moreover, the jurisprudence is left confused because it is simply not capable of understanding an extreme case, because there is no rule to govern a chaos. However, the state of exception, as Schmitt points out, is not equal to chaos or anarchy, and that is why it possesses a certain type of order, although it is not the juridical order. The way he defines the state of emergency that is a product of the political crisis, and the exceptional measures that result from political activity, is entering the very core of political-legal paradox: "[exceptional measures] find themselves in the paradoxical position of being juridical measures that cannot be understood in legal terms, and the state of exception appears as the legal form of what cannot have legal form."[449]

The exception is at the core of Schmitt's political writings, not only for showing the rule, but also because it aims at the heart of sovereignty in a situation when the norm gets suspended but the state continues to exist. This can be read in the light of Hegelian theory of the state. Albeit, there is a difference in Hegel's and Schmitt's thinking about the state. For the latter, the state is primarily seen as the condition for politics, whereas, for the latter, the state determines politics. Schmitt talks about the politics that defines the State, and about a new relation between legitimacy and legality.[450] On the other hand, while defining the friend-foe relation that is at the core of the political, he does not exclude the possibility of universalism, as a league of nations. However, that "universality (…) would have to mean complete depoliticization and above all, at least a consequent *absence of States* (Staatenlosigkeit)."[451]

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[447] See Benjamin, Critique of Violence.
[448] Agamben, State of exception, p.23.
[449] *Ibid.*, p.1.
[450] Milović, Política e metafísica, p.88.
[451] Schmitt, O conceito do Político I, p.82.

Schmitt's concept of the exception is neither nihilistic nor anarchistic; it is concerned with the preservation of the state and the defense of legitimately constituted government and the stable institutions of society.[452] However, the essence of the specific nature of the exception is that it can never be a rule. If it becomes one, then it is grasped completely in the legal order. That is why, according to Paul Hirst, Schmitt "in demonstrating how law depends on politics, the norm on the exception, stability on struggle (…) points up the contrary illusions of fascism and Nazism." Even more, Hirst continues – "[t]he ruthless logic in his analysis of the political, the nature of sovereignty, and the exception demonstrates the irrationality of fascism and Nazism."[453]

Besides the nature of the rule, what exception reveals is "the essence of the state's authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law."[454] Therefore, exception puts itself outside of general order and "it defies general codification, but it simultaneously reveals a specifically juristic element – the decision in absolute purity."[455] Modern jurisprudence, simply put, does not know what to do with the exception. It places it outside the law, but through the legal nature of the state of exception, it keeps it within the law, as that necessary subjectivity of the sovereign that Hegel finds in the first decision in dialectics of state. Placed outside, but at the same time kept inside, exception is bound to the pure sovereignty, and power of deciding. The exception reveals the legally unlimited capacity of whoever is sovereign within the state.[456] Therefore, besides its irrational form seen in the paradox of its position, in a time of war or crisis, the state of exception highlights the traditional sovereignty that had survived in the ecosystem of the modern state.

3.4.5 The state as the political structure - Polis vs. Oikos

According to Aristotle, a good life cannot be found outside a state where there is only a possibility for bare life, a form of life that had no importance whatsoever for this Greek philosopher. Therefore, a person "that is by nature and not merely by fortune citiless is either low in the scale of humanity or above it (…)."[457] In the classical Greek philosophy, the concept

[452] Hirst, Carl Schmitt's decisionism in Mouffe, The challenge of Carl Schmitt, p.12.
[453] *Ibid.*, p.12.
[454] Schmitt, Political Theology, p.13.
[455] *Ibid.*, p. 13.
[456] Hirst, *op. cit.*, p.13.
[457] Aristotle, Politics, Book I, p.9.

of state is the reflection of the social life as its highest organization. Polis was a public place, where equality and freedom were reachable, and most importantly, it represented political unity. From the knowledge and experience derived from it, it was possible to reach a 'good life', the *zoe*, a category that goes beyond the satisfaction of necessities that are features of the bare life. However, both Aristotle and Plato were aware that communal life of men is not something reserved only for humans, as other animals also show this characteristic. The phenomenon of shared life stands beside person's private life as its second life, as its *bios politikos*. That is why the household, as an aspect of one's private life, precedes the concept of political unity and of the social realm.

The Old Greek philosophical search for the suitable definition of the political starts in the polis – a departure reference that stands for an inevitable form of organization different from the *oikos*. The Ancient Greek sphere of the household had to be distinct from the polis, because the latter was a realm of social life, and the former a realm of private life. Polis should be seen as "a sort of partnership and every partnership is formed with a view to some good."[458] Additionally, in the political philosophy of Plato and Aristotle, "no activity that served only the purpose of making a living, of sustaining only the life process, was permitted to enter the political real."[459] The creation of the social world in Ancient Greece was never able to see the world as a big family or a "world society." On the contrary, from the beginning the household was separated from the public realm.

However, there was no possibility for the polis if people had no place to live in, no economy to organize their private life and private property. "[T]he fact that without owning a house a man could not participate in the affairs of the world because he had no location in it which was properly his own"[460] explains why the *oikos* was a prepolitical structure that was only a necessary condition for the polis. Therefore, needs are connected to the *oikos,* while in the polis one is capable to understand and develop the freedom. In a private household, force and violence can be used in order to maintain the hierarchy of the household, while in the polis we can find the concept of equality that you can reach only outside of the household. [T]he whole concept of rule and being ruled, of government and power in the sense in which we understand them as well as the regulated order attending them, was felt to be prepolitical and to belong in the private rather than the public sphere.[461]

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[458] *Ibid.*, p.3
[459] Arendt, The Human Condition, p.37.
[460] *Ibid.*, p.30.
[461] *Ibid.*, p.32.

Schmitt refers to *oikos* as a step in the development of the polis, but only with the understanding of its connection with the *nomos.* The connection between these two terms was essential for the creation of the polis,[462] and what is even more important in understanding the significance of the state for the political, is that we cannot speak of *oikos* and polis without the law. In the development of the term *nomos,* we can follow three stages: (a) moving from nomadic life to the household; (b) the age of big migration – *nomos* was firstly established due to customs and traditions, and only after as laws and statutes; and (c) the connection between *nomos* and *logos* "meant that the *logos*, as something lacking passion and thus reason, was placed above the instinctive and emotional character of the human individual."[463] In defining the word *nomos*, as in many other occasions, Schmitt employs a linguistic theory and shows that this word is derived from the old word *nemein.* This can be translated as 'to divide, to distribute, to pasture,' and it corresponds to the modern German verb *nehmen* which means 'to take'. From this linguistic deconstruction, Schmitt concludes that the beginning of the polis creation was in the acts of division and appropriation. [J]ust as division precedes production, so appropriation precedes division; it opens the way to approprionment: It is not division (…) but appropriation that comes first.[464] Consequently, there was no basic norm, but a basic appropriation. "No man can give, divide, and distribute without taking,"[465] only God can do that.

The translation of *nomos* with *lex* is one of the heaviest burdens that the conceptual and linguistic culture of the Occident has had to bear. Anyone familiar with the further development of the law-state and with the present crisis of legality knows this to be true.[466] This translation originates from the Roman understanding of every political action as an action of law. However, "[t]he Roman word for law, *lex,* has an entirely different meaning; it indicates a formal relationship between people rather than the wall that separates them from others."[467] For Arendt, as well as for Schmitt, *nomos* precedes the politics as its condition. Arendt saw

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[462] When referring to the birth of the polis from the unity of *oikos* and *nomos*, Schmitt talks about the three statements about the power from Erich Przywara's book "Humanitas." The third statement "To visibility and publicity" is the counter-feature to the secrecy of power. For Plato there were two forms of power: *archy* – originating from the source; and *cracy* – coming from the superior force and occupation. Therefore, the 'Plato's aristocracy and democracy – two *cracy* words – indicate an anthropological power through the appropriation of power, while the two *archy* words – monarchy and oligarchy – have a theological foundation, namely monotheistic or polytheistic power originating in God'(Schmitt, The *Nomos* of the earth, p.337). *Polis*, for Plato, was a synthesis between these two origins of power, between democracy and monarchy.

[463] Schmitt, The *Nomos* of the earth, p.342.

[464] *Ibid.*, p.345.

[465] *Ibid.*, p.345.

[466] *Ibid.*, p.342. In this passage Schmitt refers to the statement of the Spanish Romanist Alvaro d'Ors.

[467] Arendt, The human condition, note 62, p.63.

nomos as a wall between the private and public realm that in ancient Greece was defined by space and belonged to no one. Similarly, Schmitt puts the accent on the connection between *nomos* and *oikos*, between law and place, and fights against observing law as mere norms or oughts that are the main characteristics of positivist and normative legal theories. In the positivist tradition of privileging the form, Europeans lost the sight of "the material [as opposed to the formal] significance of law, i.e., the political, social and economic meaning of concrete orders and institutions."[468]

Although Schmitt is, without a doubt, at some points equalizing concepts of the state and the political, he also writes that "the political precedes the state" as the latter seeks only for a present truth, for a present political truth: "All concepts of spiritual sphere, including the concept of spirit, are pluralistic in themselves and can only be understood in terms of concrete political existence."[469] For him, a world without states would be a depoliticized world where the connection with the political, seen as a social expression of our tendencies and conflictual relations, would disappear. He is clear when he says that the world did not exist in the historical moment in which he lived.

Schmitt's conclusion in many respects is that there is no political outside of the state, which is the same as when Aristotle defines a man without his polis. Schmitt is clear when equalizing human nature with the concept of the political in its birth and its dusk. [T]he political is a basic characteristic of human life; politics in this sense *is* destiny; therefore man cannot escape politics.[470] The importance of this relation can also be observed in the way Schmitt sees the global world, first as European, with the national states that build a network of pluralistic relations between them. He cannot imagine a global universal state like Kant did. For him the escape from state is the escape from politics. We can conclude that for Schmitt, the concept of the state is not some abstract construction based on symbolic contract between people and the sovereign. It is based on the idea that is woven in the origin of the concepts of humans and law through the unity of *nomos* and *oikos*, and which is active due to this social and political origin. As Dostoyevsky would say: "the bees found their formula in the beehive, because animals, too, have their *nomos*."[471]

Kervégan questions and negates this strong relation between the political and the state which is immediately attributed to Schmitt. He writes that "the usual confusion between the

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[468] Antaki, Carl Schmitt's nomos of the earth in Osgoode Hall Law Journal, 42(2), 2005 (317-34), note 66, p.330.
[469] Schmitt, The age of Neutralizations and Depoliticization in The concept of the political, p.85.
[470] Strauss, *Notes on* the concept of the Political in The concept of the political, p.110.
[471] Schmitt, The *Nomos* of the earth, p.341.

political and the state can be understood in a historical perspective."[472] He bases this opinion on the following statement of Schmitt: "It really existed a time when the identification of the *state and political* was justified because the classical European state had achieved this completely unlikely thing that was to install the peace inside, and to exclude hostility as the legal concept."[473] In this respect, the political is above the state, but can be observed only in the state, and Schmitt will not leave doubts about that.

3.4.5.1 Main types of the state

One of the main motives for Schmitt to write *Legalität und Legitimität*, in his own opinion, was the obvious 'collapse of the parliamentary legislative state' in the dusk of the parliamentarian democratic state of the WR. Consequently, this book was one of the main reasons for calling the author "a gravedigger of the Weimar Republic." In the Introduction of "Legitimacy and Legality", Schmitt abandons the classic typology of states, dated from Aristotle, which recognizes three forms of state, monarchy, aristocracy (oligarchy), and democracy, not because this classic Greek division is pre-modern, but because today the "normative fiction of a closed (…) system of legality emerges in a striking and undeniable opposition to the legitimacy of an instance of will that is actually present and in conformity with law."[474] He does not base the new state regimes according to the class that forms a state, as it was the case with the classic division, but due to the process of its formulation and of applying the law, choosing to speak about jurisdiction, governmental/administrative and legislative state. More importantly, with the novel state types, he wants to consider the legitimacy capacities of each of these, and in relation to them, he searches for the connection between the state form and the legitimacy capacities in those states, as the main goal of his criticism.

Jurisdiction state

In the medieval period, the state power was concentrated in the adjudication where the free courts were making legal norms, and that is historical form of jurisdiction state (German: *Jurisdiktionsstaat*). This state was based on decisions in concrete cases "in which the correct

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[472] Kervégan, Hegel, Carl Schmitt, pp.60-1.
[473] Schmitt, La notion de Politique, p.44-5 as cited in Kervégan, Hegel, Carl Schmitt.
[474] Schmitt, LL, p.6.

law, justice, and reason reveal themselves directly,"[475] and therefore, there was no need for a general norm. Laws were made by judges who decided on specific cases, and so this type of state was very actual since it dealt with real cases in real time, without a pre-ordered norm waiting to be applied. Actually, it cannot be said that there is no norm or idea that judges need to follow. All their decisions should be made in the name of justice and law, but "[t]he ethos of the jurisdiction state is that the judge renders judgment directly (…) without mediation of norms of justice from other, nonjudicial, political powers."[476] This principle means that the notions of justice and law are self-sufficient to exist not only as mere ideas or tools. Therefore, in a very loose definition of the *Rechtsstaat*, jurisdiction state can be a type of the *Rechsstaat* as long as the judge generates general ideas and applies his decisions as laws. However, for Schmitt this new type of state is more a historical phenomenon, "yet, he still identified resemblances to it in contemporary Anglo-Saxon legal and political thinking."[477] Regarding this claim, we can remember that the discussion between Kelsen and Schmitt was held precisely on the line between the definition of judiciary power and the question of whether judges can make the law. However, the arguments between these two jurists were more oriented to define the relation between the legislative, executive and juridical power, that are all intersected with the concept of the guardian of the constitution, which in turn offered some different legal and political definitions.

Governmental/administrative state

In governmental-administrative states, men do not rule, and norms are not valid as something higher. Instead, the famous formula of "things administer themselves"[478] holds true. The executive power or bureaucracy administrates the state by issuing special decrees that take the function of norms. In governmental states there is not much of the ethos, but rather a strong pathos, which was in the case of the Prussian administrative state of Friedrich Wilhelm I and Frederick the Great, composed of the *honor* and *glory*. This was the state of absolute princes of the 17th and 18th centuries, and when the public saturation of their pathos occurred in the 19th century, the need for the administrative state emerged. Furthermore, the beginnings of the administrative state were justified also by its usefulness, and, as was the case with jurisdiction state, factuality of its concrete measures.

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[475] *Ibid.*, p.4.
[476] *Ibid.*, p.8.
[477] Tuori, Ration and Voluntas: The tension between reason and will in law, p.242.
[478] Schmitt, *op. cit.*, p.5.

In turn, the administrative state for Schmitt represents a full depoliticization guided by the concepts of liberalism and democracy, and that is at the other end of the spectrum of what Schmitt defines as a legislative state. In his opinion, this type of state was the WR in its last stages. Therefore, he uses the administrative state as part of his critique of liberalism that can be incorporated into critique of modernity and modern law as its product. In this state, the "legal norms appear free-floating, almost spectral, certainly unconnected with real human beings. Law disconnected from both those who make it and those over whom it is applied might easily identifies as illegitimate."[479] In this regard, the concept of legitimacy is completely disconnected with legality. For Schmitt, legality is not a sufficient condition for legitimacy, and since the legitimacy characteristics of the administrative state are very poor, one of the consequences can be complete depoliticization. Thus, moving toward this kind of state is actually moving toward the total state, which Schmitt not only criticizes from the perspective of his political-legal theory, but also tries to provide certain remedies to avoid it.

Legislative state

In order to separate the legislative from the administrative state, according to Schmitt, one needs to find a decisive moment that makes it possible to perceive the presence of a legislative state. At that moment the particular 'focal point of the deciding will' in the organization of the state becomes apparent.[480] That is why one of his main conclusions that today is being increasingly revived, is that in a modern state there is only legality without legitimacy, and that only a true legislative state will manage to equate legitimacy and legality.

Over the last years of the WR, as it was already explained, Schmitt saw a continuing transformation of the German *Rechtsstaat* which was moving "towards the total state," more specifically "towards the administrative state." In order to embrace this process scientifically, he had to observe it using some different categories. At the centre of these 'new' political categories is the legal state. The *Rechsstaat* of the 19th century Europe was the parliamentary legislative state that Schmitt criticized as a jurist, and as a theoretician of law and politics. The first part of "Legitimacy and Legality (LL)" is relying on the conclusions made in the *Verfassungslehre*, and one of its goals is to present the *Rechsstaat* separated from other types of state, and accordingly, to observe the law and statute of the bourgeois legal state.

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[479] Introduction to Schmitt, LL, p. xxiv.
[480] García-Salmones, On Carl Schmitt's reading of Hobbes: Lessons for constitutionalism in the international law in NoFo, 4, 2007 (61-82), p.71.

3.4.5.2 Principles of legality in the legislative state

The legislative state is based on the so-called 'principles of legality' that are vital and final norms for a state to be legislative, and in the Introduction to the LL, Schmitt lists those as following:

Firstly, in a legislative state norms are the highest and most important form of expressing public will. Since they express a community will, the supreme will in democracy, they are above other areas that are subordinate to them.

Secondly, the separation of legislative and executive power is of a vital importance in a legislative state "in which not men and persons rule, but rather where norms are valid."[481] This is a very important criterion in the process of separation of the *Rechsstaat* from the jurisdiction, governmental and administrative state.

Thirdly, in a legislative state there is not "any government or obedience in general because only impersonal, valid norms are being applied."[482] This means that legality is establishing the legal system, and at the same time that is justified by becoming a 'closed system' that suspends any right to resistance. In this regard, the statute is a specific manifestation of the law, while legality is the particular justification of state coercion.[483]

The principles of legality clearly define a legislative state as a state which is focused on the general norm that is above society, putting every aspect of people's lives under its structure. In a state that focuses only on legality, there is no personal will or laws that can rule. Every aspect of power gets its validation only in the general norm, and therefore, the whole state is reflected in the law in its statutory form, and the state knows to exist only as the statutory state. In order to create a stable state, we need to build it under the condition of 'normality' that is necessary for legal norms to work properly, and for certain systematic conditions. "A legislative state is a state type governed by impersonal, that is, general and preestablished norms that are meant to be lasting and that have a definable, determinable content,"[484] and a rule of division of power between legislative, juridical, and executive branches is highly respected. Therefore, the first condition of the legislative state is the state statute. The bourgeois *Rechsstaat,* for Schmitt, is a statutory state, and is based on a formal concept of law. If the "rule of law" should

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[481] Schmitt, LL, p.3-4.
[482] *Ibid.*, p.4.
[483] *Ibid.*
[484] *Ibid.*

retain its connection with the concept of the *Rechtsstaat*, it is necessary to incorporate certain *qualities* into the concept of the law, through which it is possible to distinguish a *legal norm* from a *command* based on a mere *will* or a *measure*.[485] Schmitt sees these qualities mainly in bourgeois freedom and in the concept of individuality, and when related to these, the statute can become a general norm.

However, this is not enough, and here is where Schmitt speaks of a 'certain opposition' as a necessary condition for the legislative state in its formal meaning. This opposition is seen in the popular assembly, a parliament, that is "bound by its law and its authority becomes legislation, not the means of an arbitrary rule."[486] Viewed like this, the general norm, which is the statute, in the bourgeois *Rechtsstaat* needs to have an opposition represented by a personal or collective body that is qualified to speak in the name of personal or collective will. Posner and Vermeule in their paper „Demystifying Schmitt" refer to this condition as a separation of state and society (in this legal situation we would talk about the constitution and certain political actors) as two parts of constitutionalism, the separation that we had discussed above. They said this in the following way:

The "closed system of legality" in the legislative state cannot, by itself, secure the political conditions for its own enforcement; obedience to or compliance with the law needs microfoundations in the incentives and beliefs of political actors, including voters, officials, political parties, interest groups, and social movements. In the terms of legal theory, Schmitt anticipates the point that compliance with the large-c Constitution is shaped and constrained by small-c constitutionalism.[487]

Simply put, even in a legislative state there is a need for a political basis of the constitutionalism that is mostly achieved in a democratic environment with a system of the representation. Later in the text, I will reflect a little bit more on Schmitt's critique of democracy, but at this point, an account of the definition of legislative state that we must have on our minds in order to understand the legal theory of Schmitt, is that these 'political actors' that are used as the 'opposition' are, in his opinion, the way in which legality puts legitimacy under the constitutional legality. In other words, as already mentioned, legality can become a 'dead word' without legitimacy that is put on its side. However, the constitutionalism that reflects this legality is a necessary condition for a true *Rechtsstaat*, and Schmitt will never normatively base his ideas of the state on something other than the constitution.

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[485] Schmitt, CT, p.181.
[486] *Ibid.*, p.181.
[487] Posner and Vermeule, Demystifying Schmitt, p.4-5.

3.5 Legality as the concept that comes after legitimacy in the theory of democracy

It is (…) universally agreed that all questions must be concerned either with something that is written or something that is not. Those concerned with what is written are questions of law, those which concern what is not written are questions of fact. Hermagoras calls the latter *rational* questions, the former *legal* questions, for so we may translate *λογικόν* and *νομικόν*.[488]

It was shown above how the concepts of political and legal, under the rules of decisionism, can meet in the theory of the state (some tend to call it the theory of sovereignty), and after this merging only one concept is left to be saved – the political. Following the definition of the political as the meta-concept of his legal theory, Schmitt bases his solution for the relation between the private and social realm in the theory of the state. Only political actions can bring upon rationality among complicated social relations where everything is being defined and negated. Social capacity to create a rational basis through political action is the foundation for the legal norm. Without this process, the law loses its claim over rationality, and without the knowledge of those basis, irrationality enters the rational structure.

Schmitt's definition of the political concept of law brings conflict into the legal definition that in certain situation clearly shows the true holders of power, the sovereigns. This conception can be briefly described as the conflictual basis of law that is best seen in the relation between legality and legitimacy. While discussing about the concept of the modern law, we have seen how Habermas talks about the possibility of 'reconciliation' between legality and legitimacy, while Schmitt sees only an obvious 'divorce' between them, which has serious consequences for our democracies. Habermas would go to great lengths to show that the substance of rational-legal legitimacy consists in the participation of citizens in the formulation of legal and constitutional norms, and not in, as Weber suggested, their "belief in" such norms or, as Schmitt averred, their collective acclamation or rejection of them.[489] For the latter everything starts within the political, but its outflows mostly lead through the law into a democracy, or more precisely, in the critique of the parliamentary democratic system, which is

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[488] Quintilian, Institutio Oratoria, Book 3, with an English Translation by Harold Edgeworth Butler.
[489] McCormick, Introduction to Schmitt, LL, p.xv.

actually based on a critique of the formal concept of law which due to the lack of substantive criteria is incapable to bring upon the legitimacy of the regime. Therefore, the last argument in this chapter will consider certain readings of Schmitt's work which can cast light on his understanding of the relation between legitimacy and legality in a democratically organized state.

3.5.1 The instrumental type of democracy

If one is to conclude that Schmitt is an author who rejects democracy as a 'proper' system, then one is to be considered mistaken. On the contrary, Schmitt never offers us a possible future outside of democratic frames, although in some respects it can be discussed how democratic his democracy is actually. For him, democracy, as is the case with liberalism, at a certain point became capable of self-justifying its own existence, and of placing its goals inside itself. The realization of these goals is the product of its instrumental rationality which is internally defended by its legality. Laws are repeatedly being legitimized by the liberal concept of legality, and the potential of rationality as a universal standard, is being relativized "into a mere opinion or cultural disposition characteristic if a particular time and place."[490] Schmitt's critique of parliamentary democracy is essentially based on the relation between legitimacy and legality, and is focused on some important argumentative points that will be briefly examined in what follows.

(A) For Schmitt, democracy is only possible in **homogeneous societies**. [T]he homogeneous people have all the characteristics that a guarantee of the justice and reasonableness of the people's expressed will cannot renounce. No democracy exists without the presupposition (...) that the people are good and, consequently, that their will is sufficient.[491] The need for homogeneous will of a certain demos is a *conditio sine qua non* for a just and legitimate society. This will is what I have called earlier the substantive will that preexisted the constitutional norm. If we look at Habermas' theory of democracy explained at the end of the previous chapter, we can see how the substantive will Schmitt employs stands opposite to the active will formation in Habermas' model of democracy because of its very static nature that is based on the unification of people in one society. Thus, the homogenous will goes against obvious social

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[490] *Ibid.*, p.xxviii.
[491] Schmitt, LL, p.24.

pluralism that modern democracy theories have no problem of embracing through a network of political parties. For McCormick, by trying to make a disconnection between heterogeneity and theory of democracy, Schmitt shows his fascist aspirations that allow the "right-wing, elitist, nostalgic monarchists like Schmitt [to] present themselves as "democrats" or "populists.""[492]

Constitutional norms in democratic systems are there to prevent thinkers such as Schmitt from promoting ideas of the homogeneous will. This argument, however, stands on a very weak basis in modern history, since we are witnessing an obvious search for the social groundings in modern democracies that are, through the programmes of legal political parties, many times found exactly in the interpretations of the homogeneous will of one nation or state. The constitutions of many liberal democracies that are suffering from the rise of right-wing populism, following the argument of McCormick, have failed to protect democracy from fascist ideas. Mouffe, on the other hand, will approach this problem differently. She does not observe the constitution as a protection from 'wrong' social aspirations. In her view, "the right-wing populism is the consequence of the post-political consensus. It is the lack of an effective democratic debate about possible alternatives that has led in many countries to the success of political parties claiming to be the "voice of the people.""[493] Therefore, this modern moving toward right-wing policy that promotes in many ways the idea of homogeneous will as the only legitimate source of political decisions is a consequence of democratic deficit. The latter, according to Mouffe, is based on the main tenets of liberalism that placed its principles above democratic and public sovereignty principles, and by doing so, it set itself as the only interpreter of democracy in the modern world. All of this brought the so-called 'the end of politics,' instead of so well advocated 'the end of history'. By taking the conflictual part of the politics, which happens through the law, the "[p]olitics in its conflictual dimension is deemed to be something of the past and the type of democracy which is commended is a consensual, completely depoliticized democracy."[494]

(B) This marriage between liberalism and democracy is what has left us with many wrongheaded interpretations and prescribed features of what we tend to call modern democracy. From the reading of Schmitt's LL, Kirchheimer notes that democracy cannot be justified by the principle of equality, and tends to argue this statement by defining the **equal**

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[492] McCormick, Introduction to Schmitt, LL, p.xxxii.
[493] Mouffe, Democracy in Europe: The Challenge of Right-wing Populism, p.1.
[494] *Ibid.*, pp.2-3.

chance as: (a) an equal treatment of all persons, parties and legislative proposals at certain stages in the creation of democratic laws; (b) an equal chance to form a political majority that can be achieved when the right of every party to gain this status is left undisturbed by legal standards.[495]

The unconditional equal opportunity to obtain a political majority is the legal principle of democratic constitutions, and it has become the principle of justice in liberal democracies. For Schmitt, due to the existence of a legal state that is based on the legality of any expression of state authority, the equal chance is already impossible. Furthermore, the general definition of the equal chance as a legal principle goes against the indeterminate nature of the equal chance that always depends on a specific situation that is being defined by the ruling political party. Kirchheimer summarizes these objections to: (a) the "political premium resulting from the legal position of power," as in the case of a ruling party that always has more legal-based power; and (b) the absence of specific norms that truly promote and protect this principle.[496] These arguments again lead to Schmitt's conclusion that constitutions in parliamentary democracies cannot guarantee freedom and equality, which remains essential for the justification of democracy. According to Kirchheimer:

Schmitt is right to argue that parliamentary democracy cannot establish full "equal chances" for all parties, but he is wrong to claim that this failing results chiefly from parliamentary democracy's basic organisational structure. Instead, such failures can be traced back to the concrete content of specified private rights and certain other material-legal standards.[497]

Thus, one can conclude that "[d]emocracy is (...) confronted with a choice: it is either unrealised or unjustified."[498]

(C) Schmitt's next observation is that parliamentary democracy cannot recognize or deal with the nature of the political, and therefore can only strive to neutralize it. Reducing of the will formation to a simple majority vote and 'yes or no' decisions are two main procedural characteristics of parliamentary democracies that obscure the true meaning of politics. If the principle of equal chance is the pillar of democracy, it reveals another feature of democracy –

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[495] Kirchheimer, Remarks on *Legality and legitimacy* in The Rule of Law under Siege, p.77.
[496] *Ibid.*, p.78.
[497] *Ibid.*, p.80.
[498] *Ibid.*, p.79.

an obsession with **finding the majorities**. Schmitt, who deviates from the idea of the homogeneous will of *demos*, finds that the importance of the democratic process is not the finding of minorities, but the focus on obtaining the support of majority. This brings the political game to a more mathematical relation, where the argument of a quantitative majority ceases with the nature of "[t]he democratic identity of governing and governed, those commanding and those obeying. (…) The majority commands, and the minority must obey."[499] Consequently, a party or group of parties receiving 51 percent of the votes will get the power to make and enforce a valid statute that they have made. They have a monopoly over the validity of statutes and their execution as well as the production and sanction of legality. There is no need for a social validity, the modern law is itself the beginning and the end.[500] We can even see that many times this electoral majority is not even based on mathematical logic. In this way, according to the rules of some electoral systems, you can gain the power by winning fewer votes in the elections (for example, in the United States of America), or in the case that a party does not really need to have 51 percent of the vote in order to govern and be the head of the executive power (as in the case of the Spanish electoral law).

(D) We have seen how Habermas puts the deliberation at the center of his democratic theory, following the idea that the communicative processes are capable of illuminating and bringing upon the rational from the people. This preposition in democratic theory is used to make decisions that will form a rational political society. Schmitt, on the other hand, argues against this scenario which in his opinion remains impossible until a democratic society manages to embrace all aspects of political processes together with all antagonisms that they bring, to institutionalize them and use them to shift negative energy into decision-making energy. There is no deliberation in referendums and public discussions that democracy offers in the name of radicalization of democratic processes. Regarding the public referendum, Schmitt writes:

The people can only respond yes or no. They cannot advice, deliberate, or discuss. They cannot govern or administer. They also cannot set norms, but can only sanction norms by consenting to a draft set of norms laid before them. Above all, they also cannot pose a question, but can only answer with yes or no to a question placed before them.[501]

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[499] Schmitt, LL, p.28.
[500] *Ibid.*, p.31.

[501] *Ibid.*, p.93.

This is one of the arguments that still makes Schmitt a good reference for criticism and ideas that can move us from simply maintaining the *status quo*, and motivate us in search of some alternatives in our social existence. The same critical link is traceable in Habermasian arguments that focus on creating conditions for strengthening the public voice and motivating people to have greater participation in democratic processes. Habermas finds the principle of intersubjectivity as a possible remedy that needs to be recognized by law, and *via* it institutionalize communicative action into the core of our normative system. Schmitt, on the other hand, decides to focus on the principle of nationality that he derives from the homogeneous will of the history of demos, as a source of law.

(E) While for Weber legality is a thin form of legitimacy, Schmitt, on the other hand, argues that legality does not pose either procedural-formal or moral-practical rationality, and that words legitimacy and legality, in what can be labeled as parliamentary democracy, are standing one opposed to the other. Schmitt agrees more with the conclusions of Kirchheimer that "the legitimation of the given system of social power is achieved through the forms of the existing legal order."[502] The only foundation this democracy is left with lies in its principles of legality that reside in the authority and presupposed rationality of the general norm, and "[t]he distinctive rationalism of the system of legality is obviously recast into its opposite,"[503] carried by the winds of neutralization and depoliticization. These state regimes cancel the possibility of legitimacy outside the state; everything needs to be based on and to reside in the state legality which becomes the only way for the legitimacy of the formal law.

Furthermore, what Kirchheimer observes in parliamentary democracies is the tendency towards a greater legal control over the administration where the rationalized concept of law is being substituted with the right to resistance, and it "corresponds to the formalization of the concept of legality."[504] Degradation of the right to resistance to a catalogue of constitutional rights – it was like this that Kirchheimer saw the situation in the Weimer Republic. In pair with the democratic ideology, they produce a "social order that had not yet been fully rationalized."[505] Additionally, McCormick refers to the submission to the rules of parliamentary democracy and the loss of the right to resistance, as follows:

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[502] Kirchheimer, Legality and Legitimacy in The law under the siege, p.44.
[503] Schmitt, LL, p.10.
[504] Kirchheimer, *op. cit.*, p.46.
[505] *Ibid.*, p.46.

Schmitt's strategy seems to entail a switch from a dishonest to an admitted relinquishing of the right to resistance: in other words, an exchange of a surreptitious submission to parliamentary statutes for an acknowledged submission to the plebiscitarianly representative President. The one is a subjection to a particularistic, legalistically empowered party; the latter, a subjection to the general, democratically legitimate will.[506]

We can see that Kirchheimer, like Schmitt, and Weber to some extent, maintains the faith in political action as a realm where social rationality and freedom can be expressed. The derogation of parliamentary democracies they find in the derogation of modern law that with equalizing legality with legitimacy reduces the political space to a minimum.

(F) Both Kirchheimer and Schmitt witnessed the failure of the Weimer Republic, and they had clearly seen that the new liberalism, incorporated in the theory of democracy through the conditions of a legislative state, explored the ways to gain more democracy and re-justify its governing. In this period, **the bureaucracy** will also claim its power and help the system to maintain the 'class-divided democracy'. The bureaucracy strives to make its supposed position "beyond class" independent of the interplay of class relations and to establish itself as the unmediated representative of the national order, independent of all social and political constellations.[507] One of the authors who perhaps manages best to grasp the power and position of bureaucracy is Weber, and in the previous chapter I criticize Weber using the idea of what Habermas calls "the Weber's paradox". In addition, what Kirckheimer sees in the nature of the bureaucracy is that, like any other system that wants to rule, bureaucracy also needs to seek its legitimacy. This type of social approval is found in special relations between the civil service and the state. If the growth of administrative power is not followed nor controlled by some social powers, and if it is left to control the state apparatus, we can easily end up with having "bureaucratic aristocracy". Even though he does not see this phenomenon as able of changing the concept of public sovereignty, he stresses out that the bureaucracy as the neutral mediator "is the champion of a new system of legitimacy-based rule that is suspending the epoch of legality based parliamentary democracy (…) [and that it] takes itself to be the "final end goal of the state.""[508] For this author, the pathology of bureaucracy is an evident sign of the decay of the legislative state, in the same way that Schmitt described the administrative state.

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[506] McCormick, Introduction to Schmitt, LL, p. xxx.
[507] Kirchheimer, *op. cit.*, p.45.
[508] *Ibid.*, pp.58-9.

3.6 Conclusion to the Chapter

The goal of this chapter and its organization is to present the oeuvre and the main interpretation of the German jurist Carl Schmitt. The presented critiques of his legal and political theory have been chosen to the extent that I believe they actually provoke Schmitt's standpoints. Many other critiques are not part of this chapter, because of the lack of relevance or space on the one hand, or because of the too obvious and thus limited subject of their critical arguments, on the other hand. No matter how systematic and clear his political and legal analyses were, anyone who tends to use late Schmitt's political 'suggestions' and ideas cannot ignore that "rotten" in Schmitt that came out in his personal political choices. Likewise, I believe that readers of this chapter can also keep that on their minds.

The focus of the chapter was put on his earlier academic phase and on the ideas coming from that period, with strong confidence in the necessity of discussing his 'old 'definitions, which in their clarity remain very firm to this day. Does Schmitt reappear in modern societies within the state of exceptions and executive decrees? Or in the protection of national identity and national ideas with the rising of the walls? Perhaps even better question is whether Schmitt's political realism has ever disappeared from modern law and democracy? Finally, the most important question for this paper is – can Schmitt's idea give additional rationality to the violent disintegration of Yugoslavia and maybe even respond to the actual Serbian politics? According to Aleksandar Molnar, present-day Republic of Serbia is based on Schmitt's ideas and it is a historical product of, what he calls, "the constitutional path of Serbia – from Karl Marx to Carl Schmitt."[509] Even though I have chosen in the foregoing text not to develop a Yugoslavian or Serbian argument in Schmitt's context, the following chapter will precisely define that context and work with it, in the same way that some of Habermas's ideas will reappear in it. More importantly, in this way, it will be possible to observe the limits of both Habermas and Schmitt in a modern meaning. Finally, the connections between Hegel and Schmitt that Kervégan observes with a lot of attention, and ending with calling Schmitt the "embarrassed Hegelian," represent a standpoint that can provoke Habermasian cosmopolitan vision to its core, and place both conflict and consensus in the shared context.

When Schmitt said that: "[t]he certainty that we are dealing only with a passing

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[509] See Molnar, Sunce mita, pp.19-35.

phenomenon still does not free us from the duty of analyzing the ongoing decay of the legislative state,"[510] he was right. It was not an ongoing phenomenon that had passed then, as it did not pass until today. Habermas describes continuous modern pathologies as a byproduct of the uncoupling process between the system and the lifeworld, supported by the rise of steering media of money and power. However, in order for any system to be stable in the long run, the principles of legitimacy need to meet with the social and legal reason. For this to happen, Schmitt is searching for "the perspective of the reinvention of politics that is the perspective of the articulation of people. It is the political subjectivity that the system forgot. It is the constitutional subjectivity (…) that is the possibility for the direct democracy and thus the possibility for a democracy itself."[511] And this is how he sees the possibility of an alternative to modern metaphysics.

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[510] Schmitt cited in Kirchheimer, Legality and Legitimacy, p.45.
[511] Milović, Política e metafísica, p.90.

Chapter IV

4.1 Introduction to the chapter

The first chapter of this paper, using the conclusions from Hegel's philosophy, raised the question about the particular and universal in the history, the question that can be asked in the case of the Socialist Federal Republic of Yugoslavia. Why in this country there was no consensus over the particular national feelings that could have brought about shared levels of their social existing? Instead, these feelings became the foundation for the conflicts between nationalisms based at the core of the political discourse, and were further institutionalized in the Constitution of the Socialist Federal Republic of Yugoslavia from 1974. These two claims, the claims about consensus and conflict, are the points where the political and legal theory of Habermas and Schmitt end their journeys. Therefore, after analyzing in the second and third chapter the path both German thinkers used in order to reach these ends, in this chapter I return to the historical moment of Yugoslavia with the goal of presenting the dialectics that led to its violent break up.

In what follows, I will join some conclusions about the fall of the socialist state of Yugoslavia which has led to the rise of the nationalist country. This shift can be observed from a multidisciplinary level of research that can include social, historical, political, legal, ethnic, economic, and other platforms of interest, given the complexity and consequences of that overwhelming shift. Thus, after the theoretical examination of certain aspects of modernity in the field of law, politics, philosophy and history that I have examined above, at this point I will turn to the example of Yugoslavia and present it as the rupture of modernity within the modern legal and political theory. Why there was no consensus about the general "Yugoslav" values in the Constitution of 1974, and why nationalist conflicts did not shift to the dialectic of antagonisms that would carry the political process and avoid the war? In the first part of this chapter I will answer these questions from the historical, legal, and social perspectives of Yugoslavia. In doing so, the prevailing game between consensus and conflict, between intersubjectivity and nationalism, will be seen in the story of the disintegration of this country. Therefore, after reflecting upon the political situation before the war and, more importantly, upon the constitutional debate, I will continue with the synthesis of the Habermas's intersubjective mind. This part will show the excluding and violent structures of his theory of discourse, and lead us to his writings about nationalism as the worst enemy of

cosmopolitanism. It is at this point where his theory meets Schmitt's political concept of law, and that debate is not only about their views on democracy and law, but perhaps more importantly, the debate reveals the connection between law and politics. Therefore, following Schmitt's concept of the political, I will employ its reading of Chantal Mouffe with the goal of showing how, in the case of Yugoslavia, nationalist antagonisms could have been transformed into agonistic pluralism that could have led this country to democracy, instead to nationalist autocracy.

4.2 Yugoslavia – hovering between truth and lie

If we take into account the modern definition of constitution, from 1835 until today, Serbia has changed 13 of its highest legal documents: three as a vassal state, four as an independent country, two as a monarchy – under the name of the Kingdom of Serbs, Croats and Slovenes and then the Kingdom of Yugoslavia; and four documents as a part of the Federal People's Republic of Yugoslavia, the Socialist Federal Republic of Yugoslavia, the Federal Republic of Yugoslavia and the State Union of Serbia and Montenegro. Politically, we can talk about three Yugoslavias and two Serbias, which is a fact that entitles many Serbian citizens today to say that their country has changed its name five times. The first Yugoslavia (The Kingdom of Yugoslavia) was a monarchy established after the WWI. This was also the first time that a project for the integration of different people started. The fall of monarchies in Europe after the WWII will bring upon the second Yugoslavia (the Socialist Federal Republic of Yugoslavia – SFRY, hereinafter Yugoslavia) which was a socialist country, where the previous project of integration through aristocratic logic was replaced with the communist concept of "brotherhood." There were no citizens of Yugoslavia, there were no Sirs or Madams, only comrades united in the idea of a socialist revolution. The second Yugoslavia was a big project that was carried on the wings of the economic revival of the country and communist ideology. This stemmed from the defeat of the Nazis, and nationality was supposed to be in the background, since the whole world witnessed what can be done in the name of one nation. Even though the communist term of "brotherhood" should have brought certain shared values to the concept of a Yugoslavian citizen, such an outcome never occurred. The third Yugoslavia, the Federal Republic of Yugoslavia (called like this although it consisted of only two ex-Yugoslavian republics – Serbia and Montenegro) lasted from 1992 until 2003 and was a consequence of the failure of its socialist precursor. Finally, after the fall of the third

Yugoslavia, the State Union of Serbia and Montenegro was formed under the ideas of the Constitutional Charter of Serbia and Montenegro. This legal document formed a new country of Serbia and Montenegro, with a confederative character, for the purposes of continuing the idea of Yugoslavia. After the referendum on independence in 2006, Montenegro and Serbia became two separate republics.

In what follows, I will focus on showing that nationalism became a particular consequence of the Yugoslavian communism by giving, in my opinion, the main documents that are useful for this paper. Academic focus on the event of the violent disintegration of Yugoslavia is immense, extending from economic, political, sociological, cultural, historical analysis to the focus on the role of the Yugoslavian literature and the Orthodox Church in the events prior to the war. However, the aim of this paper is not to judge and critically analyse the existing research. That is why, I will limit myself to a more theoretical thinking about the concept of Yugoslavia as part of a modern dialectic that was moving between its particular and universal destiny, and whose inner dialectics of the power of political elites led to the legal and political changes that were later interpreted and considered only in the name of nationalism. Therefore, I chose the work of Zoran Đinđić as the main source of Yugoslavian critique, which I complement with the work of other authors who can provide certain legal and political analysis for this theoretical critique.

4.2.1 Yugoslavian unfinished statehood

Zoran Đinđić makes three important claims about the Socialist Federal Republic of Yugoslavia which in turn bring the thesis of the Yugoslavian unfinished statehood:[512] that it was never a state, it was never a federation in its full meaning, and it was never a legal state. The first claim is based on the thesis that in Yugoslavia there was an ongoing separation between the state and sovereignty. This in turn produced a situation in which sovereignty became infinite, free-floating and detached from the state character. The new definition of sovereignty was grounded in the Communist party and the class. Therefore, "[i]t is not about that the state obtained the excess of sovereignty, but on the contrary, it is about that in socialism a state is not at all the sovereign. It is only the *means* in the hands of the true sovereign that

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[512] Philosopher Zoran Đinđić (who is later going to pursue political carrier as the first democratic prime minister of Serbia) develops this thesis in his book "Yugoslavia as an unfinished state" (original title: Jugoslavija kao nedovršena država), which was published in 1988, just few years before the beginning of the War in Bosnia, and 15 years before his assassination in March 2003.

doesn't have a public and legal, but metaphysical-political status."[513] In a decade before the war, the legal and political question of who is the sovereign in Yugoslavia brought devastating answers. Responsibility for the dissolution was left to be found in the metaphysical space of mythological concepts of historical and nationalist politics, instead of enabling this discussion to enter into the public sphere and offer answers on the future of Yugoslavia.

In other words, Yugoslavia did not reach the level of a true state, because it never managed to grasp the intersubjective nature of the given reality, focusing its discourse on the interpretations of that state. The bases for communication about the values and presumptions of a common life were left to be found in the notion of communist, and the apparent lack of the latter was used for "its own life prerequisite."[514] Thus, the system that had the idea of total emancipation and transparency ended up offering a non-reflexive political system, moving towards the traditional level of rationalization. Following Weber's classification of four types of social actions,[515] Đinđić is of the opinion that the type of action and its corresponding level of rationalization in the original socialist idea match the value-oriented (*wertrational*) social action. In order to understand his argument better, we can use the table below which explains Weber's classification according to the means, goals, values and consequences.

Types of action according to the degree of rationality	Means	Goals	Values	Consequences
Instrumentally rational	+	+	+	+
Value-rational	+	+	+	−
Affectual	+	+	−	−
Traditional	+	−	−	−

Figure 8[516]

However, in the practical discourse of this socialist state, the silence ended with the deliberation about values (communism, emancipation) and goals (the power of the working class), leaving

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[513] Đinđić, Jugoslavija kao nedovršena država, p.237.
[514] *Ibid.*, p.23.
[515] Max Weber defined four orientations to social action:
"(1) instrumentally rational *(zweckrational)*, that is, determined by expectations as to the behavior of objects in the environment and of other human beings; these expectations are used as "conditions" or "means" for the attainment of the actor's own rationally pursued and calculated ends;
(2) value-rational *(wertrational)*, that is, determined by a conscious belief in the value for its own sake of some ethical, aesthetic, religious or other form of behavior, independently of its prospects of success;
(3) affectual (especially emotional), that is, determined by the actor's specific affects and feeling states;
(4) traditional, that is, determined by ingrained habituation."
Weber, Economy and Society: An Outline of Interpretive Sociology, pp.24-5.
[516] Đinđić, *op. cit.*, p.219.

the system capable of opening itself only to discussions about communist means, in other words, about the revolution. This silence is exactly what Đinđić feared most, because it had allowed the existence of a country that is resisting articulating its final definitions until its very last days. As a consequence, this silence was creating a dark hole that would swallow its own latent existence, and become strong enough to continue to exist in the Balkans to this day.

The second claim considers the (un)federal character of Yugoslavia. The definition of the Yugoslavian federation, in its most general aspect, involved the union of six political units (socialist republics) into one state. Đinđić sees this union as the union of non-states that were forming a non-federation, where they ultimately placed the birth of their own political existence. He calls this process the "reverse federalization." Therefore, instead of forming a federal state, as the next level of political identity, of units wishing to join their territories and political destinies, in the case of Yugoslavia, the federal state was a condition for the development of their political character. For this reason, federalism existed "only as the emotional symbol without the influence on the political power and the ways of using that power."[517] And that is why the same numbed federalism never offered an answer to a growing conflict. In return, when territorial units, via the process of federalization, managed to reach the level of political and legal definitions of their statehoods, they started to look for their peculiarities that would differentiate them from other units. This is a very important argument that can explain the rise of nationalism as a product of the "silent" Yugoslavian communism and that can serve as the grounding point for further political and legal reading of the events in Yugoslavia after the death of its president Tito. Thus, instead of generating strong Yugoslavian emotions and values that would define it as different from others, in relation to other states, the logic of Hegel's dialectics of the modern state went reverse, and the new federal state became a mirror in which its federal units were looking for the reflection of their differences and special destinies. Like this, Yugoslavia was a surrogate for the newborn nationalism of its territorial units based on ethnic originality and the invention of the past, which in return led to nationalism that was later used to defend the fight over power. Đinđić observes this consequence as a specific type of "free fall" into the state of nature, as "the situation in which already stabilized a non-political character of the relation between the "subjects of the federation" could evolve into the Hobbesian conflict."[518]

Finally, Yugoslavia was not a *Rechsstaat* because its legal framework did not state

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[517] *Ibid.*, p.34.
[518] Dimitrijević, Introduction to Đinđić, Jugoslavija kao nedovršena država, p.xv.

clearly who had the power to decide, who had the sovereignty, and thus, it was hindered to dissolve the ongoing conflicts. At this point, we arrive to a very important, and according to many the crucial, factor that ruled the destiny of Yugoslavia years before people were aware of that verdict – the Constitution of the Socialist Federal Republic of Yugoslavia (Constitution of 1974), adopted in February 1974. In the text of this constitution, nationalism was given the power to form an effective successor to the socialist Yugoslavia. The first basic principle of "new Yugoslavia," in its first sentence, defined the new sovereign:

The peoples of Yugoslavia, starting from the right of every nation to a self-determination, including the right to secession, based on their freely expressed will of the common struggle of all nations and nationalities in the People's Liberation War and Socialist Revolution, in line with their historical aspirations, aware that further strengthening of their brotherhood and unity in the common interest, along with nationalities with whom they live, united in a federal republic of free and equal nations and nationalities and to create a socialist federal community of working people - the socialist Federal Republic of Yugoslavia (…).[519]

The carriers of this document were "working people, nations and nationalities"[520] (in Serbian: *radni ljudi, narodi i narodnosti*), and the proclaimed idea of national equality that belonged to the independent republics that had the right of succession, became the basic idea for the sustainability of the state system. The national equality was conceptualized (…) as an idea that is established and reproduced with the main goal to prescribe and produce a wanted (…) reality.[521] Therefore, the ongoing aspirations, instead of being discussed and resolved by means of new constitutional and legal framework of the federation, were left to the disappearing communist idea that continued to promise "an ideological resolution of the national question through a social revolution that subsumed class and national distinctions within a socialist framework."[522] The ongoing process of losing the sovereignty and the federal character of Yugoslavia left the processes of democratization and, on the basis of that, rise of the civil society, far from a platform where all federal units could participate in a somewhat public

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[519] The Constitution of the Socialist Federal Republic of Yugoslavia, Article 1.
[520] It is possible to debate about the corresponding English translation of the word *narod* with "nation." In fact, a more suitable translation of this Serbo-Croatian word would be "people," as "people" is a much broader term than "nation." In Serbo-Croatian language there is also a difference between the words *narod* (people) and *nacija* (nation), but in my opinion the mistake becomes even greater in translating the word *narodnosti* with "nationalities," as the latter term refers to the ethnical and folkloric aspects of one people, and not to the features derived from the fact of belonging to one political, geographical or legal union.
[521] Dimitrijević, *op.cit.*, p.xv.
[522] Pešić, Serbian Nationalism and the Origins of the Yugoslav Crisis, p.vi.

discussion. The new constitution was never even close to offering proposals for this platform, and that is why, in the last decade of Yugoslavia, people were going back and forth between the demands to continue with the communist project coming from the so-called federal level, and between the projects of nationalization happening on the level of the federal units. The Constitution of 1974 was supposed to provide a legal framework for these processes, but it ended up being the last constitutional voice of socialist Yugoslavia, and mostly remembered as the herald of the nationalist future of the republics, a future that was already incorporated in their socialist character.

4.2.2 Political and legal debate prior to the Constitution of 1974

In the years prior to this constitution, there was an ongoing constitutional debate on what the new Yugoslavia should look like after the death of President Tito[523]. The so-called "Kardelj's federal concept," years before the adoption of the constitution, was regarded as the official interpretation of the future Yugoslavia. This concept was built on the Marxist idea of "dying-off" of the state[524] in socialist society for which Yugoslav society was supposed to strive. Federal unity should thus be organized under the logic of nations and their nationalities that by the logic of socialist self-governing will carry out the socialist project. The federal state in the future would remain only as a protector of the minorities in Yugoslavia. This vision of the "most Marxist Yugoslav communist"[525] served as a model for the new constitution that gave up the creation of a new "Yugoslav nation," and instead offered a new federal model under which six nations could develop. Contrary to the conclusions about the non-existence of sovereign states that were presented above in the writing of Đinđić, Kardelj advocated that the new constitution should depart from the premise of the full statehood of all six republics by recognizing their political character and their sovereignty. They were legitimized by the people of that republic, and although, for example, Croatian or Macedonian people were living in the Serbian state, under the constitution, the sovereignty of each state was limited to its borders.

Thus, the new constitution and growing constitutional debates were held on the lines between suppressing the liberal strings coming from Serbia (intensified in 1972) and a rising

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[523] Josip Broz Tito was born in 1892, and he died in 1980, meaning that when the Constitution of 1974 was signed, he was more than 80 years old.

[524] Engles' term *Überwindung* is usually translated in English as "the withering away of the state."

[525] Edvard Kardelj was a Slovenian journalist and politician, the 7th President of the Federal Assembly of the Socialist Federal Republic of Yugoslavia and, according to Jović, in the crucial years in finding the idea for the new Yugoslavia, he became the second most influential person of the federation, after Tito.

nationalism in Croatia (especially in 1971, the so-called "Croatian spring"[526]). Tito and other party officials seemed to keep these two movements under control by replacing the representatives of the political and academic circles. However, "[i]t was not only the conflict (…) between Tito and the republican leadership in Serbia and Croatia, but it was primarily the conflict inside of the political elites in those two republics"[527] which marked the pre-constitutional period. That is why the functioning and political-legal rationalizing of these elites should not be highlighted only in the context of the Constitution of 1974, but also as the finish line of the increasing nationalism that managed to rise from the communism. When those elites "gave up on political centralism and initiated programmes of administrative decentralization, any notion of realizing a unified Yugoslav culture was likewise abandoned."[528] These programmes got their legal framework in the Constitution of 1974, and its project to use nationalities – *narodi*, to fill the expanding hole where sovereignty was supposed to be.

What is peculiar to this constitution, is that its creators were inspired by very Marxist and communist ideas, thinking they are leaving the room for the development of people under the rules of self-government. It is exactly in the name of the latter that the nationalities were supposed to serve. The awareness of the difficulty to produce Yugoslav culture or the Yugoslav national identity, while insisting on the federal project of Yugoslavia, led the constitutional fathers to the conclusion that the lack of intersubjectivity and legitimacy of the Yugoslavian project could be overpassed on the level where strong republics would be left in their own development. Their solidarity with the constitution and the idea of socialism and self-governing was the only thing that kept the federation existing. As Habermas discusses in his works, the constitutional patriotism should provide the conditions for a stable union and leave national debates to civil societies and their discourse processes. However, in the same way that this project does not work in the European Union, in Yugoslavia it did not get further than promoting the legal aspects of the Union.

The constitutional debate and political crisis prior and after the enactment of the Constitution of 1974, revealed not only the legitimacy and national crisis of Yugoslavia, but also touched upon the concept of political and legal sovereignty by questioning who has the power to decide on certain issues of the federation. The 'game' over particular national interests

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[526] "Croatian spring" is the name used to describe the MASPOK – *masovni pokret* or the mass movement, a cultural, political and social movement happening in the last years of '60s in Croatia, until 1971. During the movement, participants were asking more autonomy for the Socialist State of Croatia. For more information, see Ante Batović, The Balkans in Turmoil – Croatian Spring and the Yugoslav position Between the Cold War Blocs 1965-1971, LSE Ideas, 2003.
[527] Jović, Jugoslavija – država koja je odumrla ("Yugoslavia – the state that died out"), p.165.
[528] Wachtel cited in Ramet, Thinking about Yugoslavia, note 32, p.62.

and the fight for the survival of the universal idea of Yugoslavia, in the years prior to the constitution, became a political fight aimed at protecting the interest of those elites whose particular affairs were the only guiding system of their actions. The Federal Constitution from 1974, although in theory based on very Marxist ideas of the further development of socialism, did not offer a framework for federal development towards the new future. Instead, through it "the federation provided the structure in which republic elites competed not for the support of Yugoslavs, but for the support of the people of their respective republics."[529] Therefore, in the light of this reading about Yugoslavia, we can conclude that the concept of nationalism, which was developing even more after the Constitution of 1974, was very closely related to the political interests of the elites in each republic. In return, we must assume that it is necessary to include the nature and actions of these elites when considering the disintegration of Yugoslavia.

4.3 Yugoslavian nationalism as the specific consequence of the Yugoslavian communism

One cannot observe the rise of nationalism after Tito's death and the violence in the wars in Bosnia and Kosovo, as a consequence of Serbian or Croatian nationalism, which belonged to the pre-modern rationalization among their citizens. Nationalism, the way it was defined above, entered the political vocabulary before the fall of the socialist Yugoslavia through the legal definition of the nations and nationality as the new carrier of the socialist idea in the Constitution of 1974. The national and separatist aspirations that existed prior to this constitution have never been part of a federal or constitutional debate. That is why they were used as a tool by the political elites who, at the moment when the gap between the communist and non-communist future opened, decided to use nationalism as the main material for the bridge towards the new future. Within it, they were hoping to answer all social, political and legal questions of the new statehood, but more importantly, to continue to occupy the positions of political power. This is the same material Milošević will use a decade after the war in Bosnia, during the war in Kosovo, which confirms the thesis of the specificity of these conflicts.

Prior to the war in Bosnia, the Yugoslavian communist society was already going through the certain changes. The uncoupling was happening in the dual identity of citizen and communist. The Yugoslav Constitution from 1963 did not refer to Yugoslavian citizens as the

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[529] Ramet, Thinking about Yugoslavia, p.67.

carriers of the constitution. The next constitution in 1974 still did not recognize citizens as part of the political action, giving them certain rights and obligations. For Đinđić, keeping the concept of citizens from the political sphere, refusing to define it sociologically and not only logically, was in order "to prevent the transformation of the working democracy (...) into political democracy."[530] According to this author, in socialist Yugoslavia, a priori there were citizens, and every person living in that country was a citizen. Yet, in order to protect its socialist ideas and future, the system recognized the possibility for a person to be a citizen and a communist, or both – a citizen and a member of the working class. This is related to our first claim from the aforementioned Serbian author: in socialism, the state had no sovereignty. It was only the *means* in hands of a true sovereign that didn't have a status of public law person, but metaphysical-political subject.[531] This subject was a communist party, and in order to proclaim its political and metaphysical power, and maintain its order, it had no interest in creating a civil society.

Refusing the citizens to enter into the processes of political deciding and to introduce them into the ongoing process of development, a civil society that was about to emerge led to "the dreadful rigidity of its internal political structure and its consequent chronic inability to adapt to both internal and external change."[532] The truth was that the reality of Yugoslavia was already influenced by the ongoing changes in the world and the changes in the sphere of production. The public and the private sphere were becoming increasingly separate, and the first signs of what civil societies of six countries will become, were seen in the years prior to the Bosnian war. This change was very quiet and timid, and the rise of these forthcoming civil societies was parallel to their own process of rationalization that was forming their political character. Meanwhile, it became quite unclear, in Yugoslavia, whether one can be at the same time a communist and a Slav? It seems that the concept of citizen was not only left to each federal unit, but was confined (especially with the Constitution of 1974) to the legal definitions of nationalism.

That is why in the years before the war, Đinđić will refer to Yugoslavia as an "unfinished project" which he diagnosed as having two autonomous diseases: the impotence of the state system to respond to the changes coming from its environment, in the words of Weber, to adapt to the newly established modes of production and incorporate a new rationalization coming

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[530] Đinđić, Jugoslavija kao nedovršena država, p.241.
[531] *Ibid.*, p.237-8.
[532] Allcock cited in Ramet, *op. cit.*, note 43, p.65.

from the strategic purposive world of actions; and on the other hand, he observed the ongoing change in the rationalization of the social sphere that began to feel constricted in its old clothes and began to ask for more space. In the case of the never-existing civil society and subjectivism in communism whose hopes were finally killed by nationalism, the differentiation of the communist system did not correspond to the levels of rationalization in the social sphere. Individuals, subjects, subjectivity, intersubjectivity were all seen as the enemies of the hardly built 'unity and brotherhood' in the socialist Yugoslavia, because these categories had never really reached the point of questioning and controlling the distribution and origin of power.

4.3.1 At least two arguments to think nationalism in Yugoslavia

In the last years before the war, the call for the independence that will become the "trade mark" of the Balkan Peninsula, created the contra reaction in Serbia, formulated in the pure nationalist idea of the project: "all Serbians in one state." It is hard to tell how much ratio this parole had for Yugoslavian comrades. Since there was no Yugoslavian civil society to appeal to, or a normal state of affairs to count on, the above mentioned parole can be viewed as politically coined mantra whose purpose was to allow the power holders to maintain their positions. This can be traced back to the constitutional debate where one can look for the reasons for the decision of Serbia to accept the constitution, which opened the door to separatist groups and protected every nationality more than ever. According to Jović, one cannot be guided by the popular political interpretation that Serbia was forced to accept the imposed constitution. Quite the contrary, "Serbia accepted that constitution because it was always corresponding to the perceptions of Serbian national interests, the way that the political elite in that time has seen it. The same argument stands for the other Yugoslav republics."[533] Therefore, as stated above, nationalism in the case of Yugoslavia cannot be observed without reflecting on the power game of the political elites in all six republics. To this claim we can add Đinđić's placement of the motives for the rising wave of nationalism inside of the Yugoslavian federal units, in the processes of building their political character according to the conditions of the "reversed federalization."

Pešić, on the other hand, presents two possible ways of defining this very distinct nationalism that had marked the last years of the socialist Yugoslavia, and ultimately led to the

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[533] Jović, Jugoslavija – država koja je odumrla, p.159.

war in the region. According to the first argument, nationalism is seen as a power game, specifically as a type of political power game. At the moment when the federation was giving signals for a change, moving towards democracy, the political elites of the six republics (following the Serbian model) started to use the concept of nationalism as a means of maintaining their positions of power. Therefore, nationalism can be viewed as "the most convenient strategy for Yugoslavia's republican political elites, particularly when they could easily manipulate public opinion through their control of their respective republic's major sources of information."[534] However, although this view finds its reason in many historical events, on the theoretical level "[s]uch an understanding of nationalism as "false consciousness" discounts the power of national sentiment among the region's ethnic groups."[535] In this way, the history of the struggles in this socialist republic are put only under the realm of nationalist struggles, overlooking the other aspects that could include the link between those nationalisms and their political communities, as the process of social development and social integration.

Thus, the second view that Pešić presents refers to the nationalism in the Balkans and Yugoslavia, as a historical and comprehensive concept that emerged in the process of developing the political character of the holders of those nationalist feelings. Observed in this way, nationalism is a by-product of modernity in the case of contemporary societies. Against Habermas's universalist tendency in setting borders between traditional and post-traditional societies, we can add that "[n]ationalism seems to be the form of pre-modern consciousness, but in Eastern European countries nationalism was a specific consequence of communism."[536] In other words, in order to build its own national character in the environment of the more and more hermetically sealed communism of the multinational federation, under conditions of modernity, the states of Yugoslavia moved towards their homogenization, to the level of nationalist ideas, since the abstraction of the ideas of communist ideology proved to be insufficient. Charles Tilly, for example, thinks that the modern era legitimated the principle "that states should correspond to homogeneous peoples, that members of homogeneous peoples owe strong loyalties to the states that embody their heritage, and that the world should therefore consist of nation-states having strongly patriotic citizens."[537] Tendencies to be defined as one

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[534] Pešić, Serbian Nationalism and the Origins of the Yugoslav Crisis, p.2.
[535] *Ibid.*, p.2.
[536] Milović, As metáforas do poder na Iugoslávia, p.2.
[537] Tilly, States and Nationalism in Europe, 1492–1992, p.23. As cited in Pešić, Serbian Nationalism and the Origins of the Yugoslav Crisis, note 10.

independent national state, or as a part of a multinational formation, are showing their rise in the modern political discourse. This phenomenon is what Schmitt observes in the modern democracy and later uses for his theory of the total state:

A democratic state that finds the underlying conditions of its democracy in the national similarity of its citizens corresponds to the so-called nationality principle, according to which a nation forms a state, and a state incorporates a nation. A nationally homogeneous state appears then as something normal. A state lacking this homogeneity has an abnormal quality that is a threat to peace. The national principle thus becomes the prerequisite of peace and the "foundation of international law."[538]

With the Constitution of 1974, the multinational character of the Yugoslavian federation was reinforced, and the processes of statehood development in the federal units gained their legal basis. The concepts of nations and nationalism were supposed to be under the rule of the socialist self-governing democracy, which was one of the ten main pillars of the legal framework of Yugoslavia. The writers of this very long constitution justified giving more power and independence to the national states with the logic that only the development of its units could lead to the federal development. However, with the problems of controlling the power and sovereignty holders in the socialist system, this legal shift did not bring so much logic. The national equality that was supposed to correspond to the principle of self-governing failed to fulfil the goal that its authors prescribe – to become an idea that can both produce and reproduce the desired reality under the auspices of the higher socialist idea of development. Therefore, the holders of the highest power, as Đinđić observes, were in a certain meta-constitutional, over-political and over-legal space. Furthermore, the link between the political and legal power can be read according to the grammar of a non-existent Yugoslavian civil society, where "a Serbo-Croatian compromise represented the foundation of Yugoslavia."[539]

According to this point of view, the legal provisions of the Constitution of 1974 only gave support to the already existing feelings of ressentiment,[540] which existed among the members of the ethnic groups who were in the process of building their political character. This brings us to the first argument about nationalism in which these feelings are viewed as the main "raw" material in crafting a very new structure of nationalism that could no longer be rooted

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[538] Schmitt, CT, p.262.
[539] Pešić, *op. cit.*, p.2.
[540] In her article "Serbian Nationalism and the Origins of the Yugoslav Crisis" Pešić talks about the "atmosphere of resentment" that was existing at least a decade before the War in Bosnia. Besides the Serbian and Croatian nationalism, she takes this atmosphere as the main reason for the violent disintegration of Yugoslavia.

in certain historical or ethnical facts. And it is precisely here where these meta-constitutional and above-political powers see their possibility to maintain their positions. Thus, the position towards Yugoslavian nationalism is derived best from both arguments presented above. Nationalism that was the "political strategy of communism" that did not "allow the development of civil society,"[541] along with feelings of resentment blended in the political, historical, sociological and legal definitions, place the cause of frustration within the federation itself, and in all the values it could prescribe to itself. With the course of events before the war, this latent hostility became an open conflict held on the lines of power-defined nationalism.

4.3.2 The "logic" of Balkan violence

The story of the second and third Yugoslavia and their relation give the impression that they are more attributed to Schmitt's concept of the political than to the theory of the communicative action. Therefore one might rapidly conclude that this is the case because the latter tells us something about the modern world, while the former investigates the phenomenon dating from the traditional world. However, even a layperson at the current world moment will at least decide not to make such a strict conclusion. Modern world, modernity, is what both Schmitt and Habermas consider in their respective theories, albeit they take its very different positions and aspects as the crucial ones. The political and legal events such as: the migration crisis, the ongoing conflicts and wars, the under-controlled and imperialist banking systems and corporations, the oligarchies hidden under the cape of democracy, and many other contemporary and emerging problems, perhaps more than ever, refer to Schmitt's concepts and diagnosis that can tell us more about the continuous and profound crisis in the modern world.

The communist society of the socialist Yugoslavia was a conscious carrier of political and legal practice, and historically it represented a social community where the intersubjectivity stemmed from its social practice. That is why its nature was modern, and its existence was not happening on the borders between the traditional and the modern world, but better on the lines between the different alternatives that Yugoslavian society was about to reach. These lines were explained above in the constitutional debates before the Constitution of 1974 was adopted. Those debates and that constitution were the heralds of the new Yugoslavia that even president Tito knew it was supposed to come. However, even the greatest

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[541] Milović, As metáforas do poder na Iugoslávia, p.2.

pessimist or fortune teller could not have guessed the scenario that revealed a new path that the so-called third and last Yugoslavia was about to take. Therefore, we have to observe the outbreak of violence in the war in Bosnia as a modern consequence, and in it, observe that the "modern mind" failed to be recognized in political or legal actions prior to the conflict, and that it was replaced by the radical discourse of nationalism.

In addition, another violent conflict that occurred in Kosovo, at the end of '90s, can be analyzed in the light of the war in Bosnia as a consequence of political interests for the preservation of power. We have seen that in socialist Yugoslavia a communist myth based on the "logic" of "annulment of reality"[542] was replaced with a nationalist myth under the logic of political fight for keeping the power. Following this logic, in the last years of the nationalist and authoritarian rule of Milošević, the myth about Kosovo managed to transform Serbian politics into a myth. That is why the second monument to specifically Serbian tragedy is Kosovo. The link between these conflicts puts us in front of the historical dilemma of the violent and separatist Balkan coil where the particular "truths" and stories became the only way to experience and confront the past. This connection between the logic of two Balkan wars in the '90s, one in Bosnia and other in Kosovo, provides us with another important key argument for our story about modernity – the violence as the modern consequence. The war in Kosovo shares the ethnic and nationalist nature of the war in Bosnia, usually described in Serbian aspirations against the separation of this region and its open nationalism aimed against the Albanian population. Ramet for example, considers the "Kosovo riots"[543] of 1981 as the turning point in Yugoslav history, and as the place where the first serious crisis after Tito's death started and accelerated.[544] This corresponds to what Milović calls a long "political silence" between Serbians and Albanians that was used to create another irrational and nationalist feelings, redirecting the social energy according to the interests of the holders of political power. When those elites could not base their ruling in the state, and when a new democratic change appeared on the horizon, they acted the best way they knew – playing the card of Serbian nationalism,

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[542] See Đinđić, Srbija ni na istoku ni na zapadu ("Serbia neither east nor west"), p.50.

[543] "Kosovo riots" refer to a student protests that happened during March and April in 1981 in Priština, the capital of Kosovo. They started as the student demonstrations asking for the better conditions for Kosovo's students (according to Julie Mertus, in Priština only, at that time almost one in ten adults in the city were students) and have further developed into more political demonstrations asking for the "Republic of Kosovo" inside of Yugoslavia. On 1st and 2nd April there was an escalation of the protests in nine cities of Kosovo. In consequence, the leadership of Yugoslavia proclaimed the state of the exception, sending more police to break the riots. Many students were killed during month of April in Kosovo. According to the Yugoslav press, eleven civilians had been killed by police, while Amnesty International reported that the number was above three hundred victims. More about this event see Julie Mertus, Kosovo: How Myths and Truths Started a War, University of California Press, 1999.

[544] See Ramet, Thinking about Yugoslavia, p.66.

just this time in the name of Kosovo. Like this, Serbian nationalism became an open concept against everything that is not Serbian, which in the conditions of the ethnically diverse Balkan Peninsula meant Serbia and Serbians against everyone else, and everyone against them. This equation offered politicians a platform where they could act authoritatively, disguising economic and social problems with a call for the protection of territorial integrity and national sovereignty. That platform still exists and the same discourse is active today, except that now it is more focused on reviving the past crimes and fights (mostly those involving violence against Serbians and Croatians, with the emphasis on growing aspirations for Greater Albania as the scapegoat). This type of political activity is based on mythological violence and mythological interpretation of the past, and it maintains itself in the conditions of modern democracy and its law.

On the other hand, the possibility of reaching intersubjectivity in modernity, and thus opening the system for the processes of legitimization that would within the intersubjective environment join together the dialectics of particular and universal into one social realm, still remains an appealing and unfinished project. By presenting one historical event, the fall of the socialist federation of Yugoslavia, the author of this paper has no goal to answer the questions coming from history, or to re-write the same. This historical capture serves only as a sociological, political and legal mirror in front of which modernity is placed, and within the theory, before which both of the above mentioned authors are put. Why the conflicts in Yugoslavia did not become part of perhaps some type of antagonist model of democracy in Mouffe's definition, and why its society did not legally and politically recognize new levels of intersubjectivity that would lead to a new federal consensus which might have replaced nationalism with constitutional patriotism, under the logic of universal reason?

In what follows, I will reflect upon those questions. Firstly, I will argue that Habermas's theory of communicative action, and the project of finding the 'mind,' the rationality in modernity, has failed in Yugoslavia due to its inconsistencies and its inability to think of a true alternative to the positivist order of normative democracy. I firstly trace those in the discourse theory in the form of exclusion and violence within certain communicative processes. Later, as the outcome of that exclusion, his reaction to the NATO bombing of Serbia as a consequence of Serbian military activities in Kosovo, reveals Habermas's ambiguous relation to violence. By defending the principle of using violence in the name of the categories that were not defined in an open communication process, and therefore do not carry within themselves a legitimacy, Habermas ended up defending the possibility of the imperialist system that Schmitt predicted

for the future of liberalism. After these two points, I will return to the concept of nationalism as the main engine of Schmitt's pre-political concept of law, and as the enemy of cosmopolitan ideas in Habermas's view.

4.4 Intersubjective fundamentals of the modern mind

As we communicate, we form a spoken reality that is indeed our social reality. Via communication links and practice, the intersubjective reason overcomes subjective levels of particular rationalizations and finds its way to a universal truth that is always a social truth. People can understand the meaning of their social existing only when they communicate, and without this understanding they remain, in the modest tone of the word, lost. This understanding of communication Habermas adopts mostly from George Herbert Mead who established unbreakable links between communication and the development of the mind and of the self. Thus, communication is not seen as a means that already intellectually formed actors use to exchange already known ideas. On the contrary, it is a process where the individual self and its society are created. Accordingly, communication for Habermas is also symbolic, ideal; it does not belong to the material world, as in the case of Marx. His communicative postulates bring a synthesis of sociological, philosophical and philological knowledge, but remain on the level of presumptions, as their starting points. In order to be more actual and factual, communication is linked to the processes of legitimation, the sphere in which his theory becomes normative. In order to reach these normative presumptions, we need to communicate, and that is why the legitimation can only be achieved in the background of institutionalized communication. The fact that we have to communicate in order to agree or disagree is the symbolic side of communication. On the other hand, the principle that behind every legitimation act there must be a corresponding communicative act forms its factual side.

4.4.1 Towards the discourse theory of law

Habermas thinks that power is separate from justice,[545] which requires a new type of justice based on a new communicative rationality. That is why he refers to post-traditional

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[545] The "separative theory of law" is perhaps most notable observed in the works of Walter Benjamin who makes the difference between the mythic and divine law as the difference between law and justice. See Benjamin, Zur Kritik der Gewalt.

societies as the carriers of new rationality and new justice. In order to reach those, society needs to be built on the communicative rationality that is the product of the processes in the discourse. Therefore, the discursive theory takes on the project of the post-metaphysical justice using the power of the communicative reason. This is justified in the fact that the moral and legal norms in modern societies cannot be based on the metaphysical or religious notions. They need to find their dialectics of secularization and their reason in the practical world of communication. The latter occurs in the discourse and "in a culture such as ours, the only forms of rationally acceptable justification for binding norms is, precisely, the ability to stand up to critical scrutiny and prove acceptable to those who have to live by them, in a discursive situation in which all are treated as free and equal participants."[546] In other words, the project of critical mind is possible in practical discourse, via argumentative communication conducted under the rules of freedom and equality. With the belief in the universal moral foundation, Habermas opens the door wide to the project of universal law-making, the so-called "U" principle.

The bridge between cosmopolitan law and action oriented towards understanding is in the basis of the discourse theory of law. And the realization of the latter is part of the social and moral development, and of the reason seen as its transition from the pre-modern to the modern operating structures. This transition leaves the former belonging to the 'past,' to the traditional structures that are packed with irrational content that disables social reflection and thus the process of legitimation. That is why "those" postmodernists who still believe that pre-modern societies can tell us something more about the today's world, are on the side of the sacred, and in their arguments are very archaic. Habermas's debates with "sceptics" who do not see the difference between mere modernism and true modernity always end with the former criticizing their conservative discourse, a discourse that can be divided into three branches: antimodernism, premodersnism, and postmodernism, or in other words: the young, the old and the new conservatives. What the philosopher tells us here is that searching for the system of thoughts beyond modernity a priori means a fall into the traditional, into the reinvention of the past. In the above mentioned division, Derrida and other poststructuralist belong to a group of young conservatives who focus on "a decentred subjectivity," while the old conservatives (such as Leo Strauss and Robert Spaemann) search for "positions *prior* to modernity."[547] Schmitt on the other hand, belongs to a group of new conservatives due to his relation to the aesthetical, as something that belongs only to the private sphere, and together with moral questions cannot

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[546] Greiff, Habermas on Nationalism and Cosmopolitanism in *Ratio Juris*, 15(4), 2002 (418-438), pp.419-20.
[547] Habermas, Modernity: an unfinished project in Habermas and the unfinished project of modernity, eds. D'Entrèves and Benhabib, (38-59), p.53.

be part of the political argument.

In conclusion, as a true protector of the main goals of the Frankfurt circle, Habermas decides to defend modernity as a part of his Enlightenment legacy and to call it "an unfinished project." And even though the modern "paradigm of the philosophy of consciousness is exhausted," it is possible to replace it with "the paradigm of mutual understanding."[548] By the same token, the philosophy of subjectivity in his theory moves towards the philosophy of language guided by the new main principle – the intersubjectivity. That is why the difference between the old and the new world ends in modernity, and just as Hegel, almost two centuries ago, called for the end of history, Habermas asks that all the debates remain within that new world. While Adorno, the author and friend he admired perhaps the most, in the Introduction of "Negative dialectics" under the title – The possibility of philosophy, writes that "[p]hilosophy, which once seemed obsolete, lives on because the moment to realize it was missed,"[549] and Habermas thinks we are still living that moment. Finally, as Hegel found the main quest of the new world in finding the *Allgemeinheit*, a true community that would replace the old one, Habermas puts this quest in front of the philosophical discourse of modernity.

However, although his critique of the post-structuralist and post-modern thinkers is often quite strong, in my opinion, it reveals a very important feature of both the theory of communicative action and discursive theory. I have already pointed out that, in TCA, not every communication, like everyday communication for example, is considered relevant and capable of reaching the levels necessary for rational consensus. It is only the argumentative communication which happens under the conditions of equality and freedom that is promised with that right and capacity. This logic of exclusion flows from TCA to the theory of discourse, where violence is performed to what we can at this point name as "the Other." In order to avoid further misunderstandings, I would like to state that the way notions of the "other" or "outside" are used in this paper does not require the definition and existence of the "one" or "inside." Likewise, both "other" and "outside" are examples of the latter notions, which in their reflexivity refer to what can be observed as their opposites, as their integral parts. That is why, with the need for clear definitions, the concepts of the "other" and "outside" represent an integral part of the subject's and system's speculation process, and they are not concepts that stand against their semantic opposites, or that can, due to this presumption, carry a negative or excluding meaning. Therefore, they are integrated into the definition of a subject we choose to

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[548] Habermas, The philosophical discourse of modernity, p.296.
[549] Adorno, Negative dialectics, p.3.

observe, as its feature, which becomes apparent in the dialectical process of its self-definition. The question of the "other" may also be presented as the question of alterity, and in what follows I will search for it in the modern discourse and see what emancipatory potential Habermas gives to it.

4.4.2 From pre-discursive to discursive levels of communication

In the second chapter, the concept of the ideal speech act was presented in order to show how Habermas brings rationality via communication to a discursive level of argumentation. At this point, I want to return to that concept, as to the idea that precedes the discourse and keep it related to the philosophy of language.

In the process of defining an ideal speech situation, Habermas was mainly influenced by the philosophy of language and the development of pragmatics, a subfield of linguistic and semiotic studies. These studies were developing in the second half of the 20th century as a reaction to structuralist linguistics, which was unable to explain real communication. Linguistic communication cannot be described merely by observing the grammar and semantics in ideal sentences. The meaning in speech acts is shared, determined and built not only by the conventional content that can be encoded in dictionaries, but also by the communicating subjects' intentions, experience, partially shared knowledge and vision of the world, context, etc., as well as the willingness to cooperate in order to understand and be understood, the ability to imply, deduce and induce, to relate emotions and connotations to words, etc.

Similar to the contextual framework of communication, we can observe the concept of an ideal speech situation. For Habermas, it represents the proof of our commitment to rational debate, and also represents a model for observing the differences of the violent act disguised as rational, in other words, for clarifying the difference between communication oriented towards understanding and communication oriented towards power. Therefore, the ideal speech situation "is an expression of the symmetry between partners in dialogue."[550] In this definition, there are two words we can closely observe: symmetry and partners. The latter is connected to the principle of equality as one of the conditions of the ideal speech situation, and it basically means treating our communicative partner or partners as subjects, and not as things. Thus, we promise that our relationship is driven by the communicative action and intersubjectivity, and

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[550] Adams, Habermas and theology, p.27.

not by the strategic or goal oriented action. The word 'symmetry' means that the speech is peacefully oriented, and that the only force that can be used is the force of a better argument. For Habermas, violence is at the core of the strategic action, in which involved parties look for asymmetry as the way of imposing their interests. In other words, it is only via communicative action that we can act non-violently, searching for symmetry between arguments, and thus reaching understanding, consensus.

Despite many of the criticisms of this concept, Jürgen Habermas defended the ideal speech as an existing, and not in a Kantian way, as an ideal concept. Unlike Kant's definition of 'ideal' as a regulative concept, the ideal speech situation offers a constitutive argument because its existing is presupposed by participants in communication, and this is a necessary condition for reaching understanding. Even if there is no particular experience of the condition of ideal speech, the presupposition of its existing and its necessity orients our action towards a rational consensus. Like this, we can see how Habermas derives the ideal speech situation from his concept of rationality and from the study of pragmatics in linguistics. If we are to presuppose the existence of this situation, and thus give a constitutive meaning to it, we presuppose a certain context that can be observed as a shared or universal. On the other hand, as Adams will conclude, the 'ideal' does not correspond to Hegel's definitions either, as it cannot be prescribed as a 'product' of a historical manifestation, "[i]n other words, there is no place on a map that you could visit to experience the ideal speech situation."[551]

The action oriented towards understanding corresponds to the communicative reason, and therefore the place where it is possible to reach it is the lifeworld. On the other hand, the system operates under the logic of instrumental reason and strategic action. Our recognition and awareness of the ideal speech conditions protects us from a disguised reason, from the irrational that wants to present itself as the rational and finally, from violence. Albeit, its existence is based on the presupposition of rationality that is always communicated in action that is free from violence, force, and thus from irrationality. However, what Habermas avoids reflecting upon, in a communication where the participants are committed to using only the power of better arguments, is "[w]ho decides what is and what is not an argument, by what criteria, and what constitutes the force of the better argument?"[552] Additionally, what are the criteria for the presupposed symmetry that the participants are silently committed to it? Thus, the main Habermas's fallibility starts in the definition of the ideal speech act. And it is from

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[551] *Ibid.*, p.33.
[552] Bernstein, The new constellation, no page numbers available in the digital copy of the book.

that definition that his dualism, seen as the dialectics between communicative and instrumental reason, guided by the rules of social development and integration, will departure and reach the levels of discursive theory. Consequently, it will carry a fear from irrational, seen in the exclusion of whatever is not corresponding to the action oriented towards understanding or that is not coming from the lifeworld, to his normative theory. When a society reaches the discursive level of justice and law, and within it, the intersubjective mind, what once belonged to the pre-discursive and non-discursive levels of development disappears. It becomes marked as the irrational, and thus unwanted in the definition of society, it loses the possibility of a political definition. And as Paul Hirst notes, "Habermas's 'ideal speech situation', in which we communicate without distortion to discover a common 'emancipatory interest', would appear to Schmitt as a trivial philosophical restatement of Guizot's view that in representative government, 'through discussion the powers-that-be are obliged to seek truth in common'."[553]

4.4.3 From traditional to post-traditional society

We have seen that for Habermas modernity is still capable of providing the 'mind' and reason of our existing, by offering definitions that can be derived from that reason. He does not share Weber's pessimism about modernity, and even though he talks about its pathologies, through his theory he wants to reconstruct, re-think modernity, and ultimately, to 'repair' it via communication reason and 'liberation' of the LW. In this way, we can conclude that the social theory he develops is a continuation of the *Aufklärung*, but with even more criticism and demands for its inner reflexion. This critique is defined in the pathologies of modernity primarily seen in the loss of legitimacy due to the colonization of the LW by the system. For Habermas, as opposed to Weber, there is no danger in the existence of the system as a social organization of the instrumental and strategic reason. It is only when the system starts imposing its reason on the communicatively organized LW, and when it starts canceling the communicative space of the LW, a crisis arises, and the legitimacy loses its claim.

Habermas's claim is clear: a society that cannot derive its social meanings from the existing traditional religious and moral claims begins the search for the new meaning, a journey that will lead it to a post-traditional society. The dialectics of modernity is between the LW and the system, between communicative and instrumental reason. The questions about the *other*,

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[553] Hirst, Carl Schmitt's decisionism in Mouffe, The challenge of Carl Schmitt, p.14.

or the struggle between rational and irrational, occur only in the transition from premodernity to modernity. That is why this transition is based on exclusion, which continues as a means of the universal emancipatory project of modernity. Thus, "*history's* schematic evolution into modernity is, like that of the *subject* into maturity, reconstructed as a process of eliminating – that is, rationalizing away – any otherness that might have played within traditional cultures or immature ego-development."[554] It was shown above that the first exclusion of non-wanted content in modernity is being performed under the premise of an ideal speech situation that leads the communication process from simple to argumentative communication, i.e. from the pre-discourse to the discourse level. Perhaps at that point, we can first observe the *other* in Habermas's theory, according to Richard Bernstein[555], as a partner in a communicative act. However, if this partner is not committed to the ideal speech conditions that move only towards the symmetry which is in its nature oriented towards universalization, the communication becomes the means of exclusion.

If one needs to say something about the pre-discursive level of social rationalization, or about the pre-conventional level of moral development, one can easily observe that both of these processes correspond to the pre-political and traditional level of rationalization and integration. The conditions for the critical reflection on these levels are not possible, and that is why societies cannot find the way to incorporate the social reason into their moral or legal norms. Simply put, we can only talk about the legality or procedural correctness of the norms, but not about their understanding and legitimation. However, on the way from one level of development to another, Habermas defines the forces of traditional reason as mystical, irrational and apolitical. This position can be seen best in his critique of postmodernism that threatens to "replace reason and truth with an undifferentiated chaos."[556] It is interesting to mention that Slavoj Žižek, in a shared traditional and modern sense, sees the potential for true postmodernism. The Balkans has that potential, since "there is no oposition at all between modern and tradition-conscious people. (...) In this sense, the 'West' can learn very much from the Balkans."[557]

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[554] Coole, Habermas and the question of alterity in Habermas and unfinished project of modernity, eds. D'Entrèves and Benhabib, (221-45), p.224.
[555] See Bernstein, The new constellation.
[556] Coole, Habermas and the question of alterity in Habermas and unfinished project of modernity, eds. D'Entrèves and Benhabib, (221-45), p.223.
[557] Interview with Slavoj Žižek and Zoran Đinđić published in Süddeutsche Zeitung, No. 34, 27. 8. 1999. Serbian translation of the interview available on http://dvogled.rs/2013/03/slavoj-zizek-i-zoran-dindic-razgovor-27-08-1999/ [last accessed on 30/07/2017].

In connection with the above mentioned modernist position, Diana Coole's statement that Habermas's theory "posits too sharp a break between modernity and premodernity, with the former in crucial but mistaken ways *defined* by its impossible purging of alterity from its lifeworld,"[558] in my opinion, is correct. Habermas largely ignores the irrational veil of politics and power, and by submitting political processes to the law, the irrationality can become law's protégé, a consequence that is not hard to observe in contemporary events. Furthermore, when defining the pre-modern as archaic and traditional, he refuses to allow access for modernity to the *other*. By continuing Hegel's project for the universal, Habermas's theory of discourse remains with some difficulties in dealing with the irrational residue that is left behind in his theory of social and moral development. This residue, the *other*, or alterity, remains only in the aesthetic sphere, in art and religion, without the possibility of entering into the debate about definitions of a modern mind. Thus, the shadow is cast on the intersubjetctive finalities of his theory. Furthermore, the 'break' between the old and the new world allows violence to enter the political and legal structures of modern societies.

In the second chapter, it was shown how the discourse theory comes to the deliberative theory of democracy, and how that connection is seen as a strong link between law and discourse. What does this link mean for the traditional societies, and how do traditional ideas move towards post-traditional rationality, towards modernity? Đinđić correctly observes that there is a synthesis between crisis and knowledge. When the bases of our societies are starting to be questioned is when the crisis arises. But without it, a new reflection is impossible, and thus it is a necessary condition for a new knowledge. If we allow ourselves to observe the constitutional debate prior to the Yugoslav Constitution of 1974 as a crisis that provoked a new level of discussion about the meanings and future of our society, why did it not bring about the emancipatory knowledge? Why it did not allow the principle of intersubjectivity to produce a social consensus? In other words, can we observe nationalism that led to the war as the final solution for the socialist Yugoslavia, as something preceding the reason, as the *other*, irrational and thus traditional? Furthermore, how can its expressive existence in some of the ex-Yugoslav republics after the war, and its latent existence today, be explained under Habermasian reason?

4.5 War as the strategic action

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[558] Coole, *op. cit.*, p.226.

This paper has several times reflected on the non-violent character of Habermas's theory. His short but very intense experience in the WWII left traces in his social theory. Thus, one of the main goals of the communicative reason is to be able to fight against hidden violence, and modern law is the shield and armour of that reason. If one concludes that the main goals of Habermas's theory of communicative action and his discourse theory of law and democracy are to provide societies with other levels of integration, based on mutual understanding and respect, instead of capitalist phenomenon of competition and profit gaining, he or she would not be mistaken. That is why, for Habermas, violence is a disordered communication, and its extreme version – terrorism, would be a type of communicative pathology. "The spiral of violence begins as a spiral of distorted communication that leads through the spiral of uncontrolled reciprocal mistrust to the breakdown of communication."[559] And that is why his writings about the NATO bombing of Serbia represent a caesura in his thinking about violence from the perspective of the theory of the communicative action, and as will be shown below, in his legal thinking.

Although the war in Kosovo and violence in that region was analyzed immediately in many academic debates, it took a bit longer to gather major theoretical reactions to the decision of NATO to bomb Serbia. A month and five days after the bombing started, Habermas wrote an essay for the German magazine "Zeit", where he took the position of defending the "necessity of violence when it comes to protect other population." It is interesting that the title of this essay *Bestialität und Humanität*[560] is clearly connected to Schmitt's slogan about humanity, and in it, Habermas refers to Schmitt more than couple of times. The main conclusion that can be reached while reading this essay is that "a workable peace option," or what Habermas calls the "cosmopolitan condition" can be war and violence. According to the author, NATO was fulfilling its responsibility to protect cosmopolitan citizens from "large-scale killings, ethnic cleansing, and serious violations of international humanitarian law" for which sovereign governments "prove unwilling to prevent."[561] Like this, NATO suddenly bypassed the international law and the UN, and became a legitimate institution that has validity to protect citizens under the logic of humanitarian action. In other words, by using force and violence, NATO was using 'reason' and 'universal justification' of the "cosmopolitan condition," which

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[559] Borradori, Philosophy in times of terror, p.64.

[560] Full title is *Bestialität und Humanität: Ein Krieg an der Grenze zwischen Recht und Moral* in *Die Zeit* 18 (April 29, 1999). English translation by Franz Solms-Laubach is "Bestiality and humanity: a war on the border between law and morality."

[561] Habermas, Bestiality and humanity: a war on the border between law and morality, no page number. Translation available on http://www.theglobalsite.ac.uk/librarytexts/011habermas.htm [last accessed on 10/09/2016].

was necessary to protect the universal rules of human rights. The validity of human rights directly defends the interventionist wars that after 1999 practically became a symbol of the post-modern imperialism, and its guiding ideas ended in an open, legalized and brutal violation of the most basic human rights, which today is generally referred to as the counter-terrorist legislation.[562]

"The terrorist misappropriations of state power (in the Kosovo case) transform(ed) classical civil war into mass murder. When nothing else is possible, neighboring democratic states should be allowed to rush to provide emergency help as legitimated by international law(…) [V]ictims are not to be left at the mercy of thugs."[563]

While commenting on the 78 days long bombing, his arguments were surprisingly far from any communication disorders as the cause of violence. In this case, the violation of the international and martial laws, bypassing the UN Security Council and thus the questions about the legitimacy and legality of this bombing were excluded. In the above mentioned essay, Habermas defends the official NATO politics, using their data and, for instance, mentioning the number of about 300 thousand expulsed and killed people in Kosovo, concluding that "the (Yugoslav) terrorist misappropriation of state power transformed classical civil war into mass murder."[564] He does not show preoccupation with the international law, as in the case of the UN intervention in the war in Bosnia after the massacre of Serbian army in Srebrenica, in 1995. With regard to this case, he reflected upon the war and pondered between law and moral, and by thinking historically (Serbian violence throughout the time) and morally (cosmopolitanism), he stayed on the side of moral guided by the cosmopolitan thought of global responsibility. Thus, the concept of war that always belongs to the irrational, that always operates under the rules of strategic action, becomes justified in the philosopher's opinion. In addition to the call for humanity and justice for the killed civilians, if we go deep enough, we can see that the justification of the strategic action is possible if it represents the condition for the future rational discourse. *Bestialität und Humanität*, as a consequence, opens the rational systems of law to use the irrational, strategic action oriented towards the rational goal. In other words, it justifies the concept of an interventionist war.

In this way, Habermas's theory became the guardian of human rights and liberal values in their

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[562] More about this see Vanja Grujić, Human rights and counter-terrorist legislation, Global education magazine, Dec.2015.
[563] Habermas, *op. cit.*
[564] *Ibid.*

fight against the enemies of humanity, a liberalistic formula that Schmitt criticized in a great deal, and that may end in justifying violence. It was shown in the second chapter how Habermas envisages human rights. They are juridical in their nature, says the philosopher. However, the rationality, the modern reason became 'moral' in Habermas's concept of human rights. By developing the idea of the universal human rights as the solution for democratic crisis, Habermas ends in protecting what Marcelo Neves calls the "imperialism of human rights." The danger of resorting to 'morality' and 'reason' without legal proceduralization is that the lack of a legal framework could lead to uncontrollable abuses and hence to the impunity of those who are strongest.[565] The NATO bombing, as other military 'interventions' are standing for the situations when the violent protection of human rights has perhaps managed to stop an ongoing aggression, but not the conflict and fear, as well as it did not manage to bring a 'new law.' How much 'reason' these human rights have for hundreds of thousands of refugees or poor people that the war in Kosovo has left – no more than the bombs dropped on a hospital or embassy.

Moreover, with the demonization of the enemy (in this case of Serbia) the objective input on the sociological, legal and political consequences of the conflict in Kosovo is disabled, leaving debates about it in the hands of political elites that are again reviving the myth about Kosovo whenever their power is put under the question. Nearly two decades have passed since the NATO bombing of Serbia, and the silence between Albanians and Serbians is still an ongoing problem. The only communication takes place within the official international politics held in the presence of officials from other countries, which appears like the imposed dialogue that neither Kosovo nor Serbia want to be a part of. In the social sphere of both countries, it does not appear that nationalism is languishing. On the contrary, it is intensively recruited by the political elites as a potential weapon to maintain the power, and perhaps provoke another conflict. The latter is already defined as "legal" due to the Serbian Constitution from 2006, which in its preamble and Article 1 calls for the protection of Kosovo as an integral part of its territory. Moreover, the legal status of both Bosnia and Kosovo continues to be frightening, and in the case of the former, there is an articulated opposition in *Republika Srpska* that has a loud separatist policy. Thus, peace in the region and a peaceful solution for the population living in Kosovo is used in terms of the political will of several politicians in the region.

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[565] Neves, The Symbolic Force of Human Rights in Philosophy and Social Criticism, 33, 2007 (411-44), p.436.

4.5.1 Cosmopolitan law as the law in the name of humanity

In "The inclusion of the Other,"[566] Habermas tries to answer the challenges coming from Schmitt's concept of the political that relate to his interpretation of the cosmopolitan order and international wars. According to him, Schmitt's "anti-humanist" position is a wrong-headed returning to the classical international law, which makes his position "anti-human" in its refusing to condemn the war. Habermas's claim about the war in its political-legal interpretation is focused on defending the cosmopolitan order and the value of humanism as its basic point. He admits the level of the "momentous forces" of the international war, but claims that "[t]hese forces are still more likely to be tamed through the sanctions and interventions of an organized community of nations than through the legally ineffectual appeal to sovereign governments to conduct themselves in a reasonable manner."[567] Thus, the war as the **crossing** of forces between two or more states in the anarchic international environment, such as it is in the martial law, belongs to the traditional world and its traditional law. Under the new logic of the world moving towards a more cosmopolitan order, a new cosmopolitan law through the democratic legal principle is able to incorporate moral concepts into its legitimized structure. In other words:

Cosmopolitan law is a logical consequence of the idea of the constitutive rule of law. It establishes for the first time a symmetry between the juridification of social and political relations both within and beyond the state's borders.[568]

It is the logic of a cosmopolitan law that is capable of penetrating into the traditional concept of sovereignty, and even though it does not ask for the abolishment of the traditional national state, it finds the middle way where the sovereign states are going to be enforced by the overwhelming and thus stronger cosmopolitan argument (that is the "language of humanity") to respect its rationality. Therefore, intervention in anarchic international relations is not only necessary with normative argument, but also with human and universal argument. However, this conceptualization of the problem of war, as we have seen above, does not mean full pacification and moving towards an exclusive peaceful solution for the emerging conflicts. Defense of the principles and values of humanity is above peaceful demands. Humanity is thus the absolute "highest value" that can be carried only by the cosmopolitan law. This law for Schmitt is not only a dangerous tool of liberalism and its policy of human

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[566] See Habermas, The inclusion of the other, pp.193-201.
[567] *Ibid.*, p.194.
[568] *Ibid.*, p.199.

rights, but its reason is hypocritical. Using the "theology of humanitarism" in order to avoid political conflicts and the political is the way towards allowing modern wars in the name of humanity. Humanity thus becomes a value that masks the goal of war or conflict, where the enemy is the enemy of humanity, of the highest moral concept us humans could possibly share, and thus its demonization is inevitable and it immediately justifies the most horrible violence. Schmitt breaks the opacity of wars in the name of humanity, in more contemporary words – the interventionist wars, by reminding that it:

"…is not a war about humanity, but a war for which a given force seeks to take possession, against his opponent, of a universal concept in order to identify himself with it at the expense of his enemy, in the same way that one can use the concepts of peace, justice, progress and civilizaiton wrongly, to claim them for oneself and snatch them from one's enemy. 'Humanity' is [in fact] a particularly efficient toll of imperialist expansions (…) By now we know the secret law of this vocabulary and are aware that today the most terrible war can only be undertaken in the name of peace, and the most abject inhumanity only in the name of humanity."[569]

The paradox of this modern formula is not only in the moral character of the concept of humanity, as Habermas insists. In my opinion, Schmitt's critique is derived largely from the impossibility to legitimize the concept of humanity as a homogeneous concept whose definition is shared and interpreted the same in the whole world. Consequently, the democratic legitimation of it, that Habermas insists on, is doomed to failure, and that is why its usage is left to the logic of political, economic or ideological usage where it can re-interpret it and used as it serves to particular interests. In other words, Schmitt's critique of this democratic principle that allows its universalization breaks "with the very deeply entrenched conviction in Western democracies that they are the embodiment of the 'best regime' and that they have the 'civilizing' mission of universalizing it."[570] By revealing and reminding that in the end of any discourse (liberal or democratic) the non-moral definition of what is suitable to be the "human value" is not a decision of general popularity of the world, but rather a political decision that is prone to changes.

Aware of the weaknesses in promoting the integrative power of the "human value" as the carrier of universal morality, Habermas employs the standpoint to which this value is reflected in the concept of human rights that have exclusively a juridical nature as the

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[569] Schmitt, The concept of the political, as cited and translated in Castucci, Jürgen Habermas and political realism: the critique, p.287.
[570] Mouffe, On the political, p.83.

individual, subjective rights. Therefore, the protection of these rights becomes a new cosmopolitan orientation that can move from a transnational to a more universal level. Distancing human rights from the moral rights and natural laws is double folded in Habermas's argument. On the one hand, he is very clear, historically and philosophically, that the concept of human rights exists in its positive form, as part of the positive law. In his interpretation of public sovereignty expressed in the right to communicate and participate, he goes even further and claims that "the rule of law is expressed in those classical basic rights that guarantee the private autonomy of members of society. Thus the law is legitimated as an instrument for the equal protection of private and public autonomy."[571] However, even though he tried very hard to develop the principle of human rights in a juridical context, the legitimacy of these rights, as well as for every other law, is placed solely in morality. Like morality, law should also protect the autonomy of all persons equally (…) [and that is why it is] better understood as a functional complement of morality.[572] However, with regard to their justification, universal human rights show a different character, since they answer only to the moral claims of all people:

Basic rights, by contrast, regulate matters of such generality that moral arguments are *sufficient for their justification.* These arguments show why the implementation of such rules is in the equal interest of all persons qua persons, and thus why they are equally good for *everybody.*[573]

It is clear that Habermas's defense from Schmitt's claim about the liberal usage of humanity as the highest moral value ends up where in its initialization – with the strategic reconstruction of the modern law and politics of human rights, where the basic rights end in providing his communicatively based law and deliberative democracy with the new moral content. Additionally, it is interesting that in one of his most recent books, "About the European Constitution," Habermas at the very beginning lists three claims about cosmopolitan human rights. The last claim is reportedly defending his theory of human rights against the "total rejection" of the same with the "radical content" of Carl Schmitt. However, after the historical justification of human rights and the fight for human dignity, contrary to the announced dialogue with Schmitt's political, there is another liberalist monologue about the flaws and dangers of the politics of human rights, referring to Carl Schmitt's critique of that politics only once, in the footnote.[574] Instead, his "defense" is actually another mild discourse that offers even milder critique of the danger of humanitarian wars and the constant restriction of human

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[571] Habermas, The inclusion of the other, p.258.
[572] *Ibid.*, p.257.
[573] *Ibid.*, p.191.
[574] See note 39 in Habermas, Sobre a constituição da Europa, pp.33-34

rights, for which there were more than enough easily accessible cases from a recent history to refer to. Moreover, he does not discuss the imperialist politics of the United States of America exactly when related to Schmitt's claim about abusing the politics of human rights in order to impose particular values or political interest, usually via violence. Habermas does not enter into any discussion of this kind, and continues with the same arguments given in the essay *Bestialität und Humanität*.

The moral content of modernity, therefore, is no longer connected to the identity of one nation or group, but rather is derived from modern rationality and human dignity. So, how does Habermas reflects on those potential traditional obstacles for his politics of human rights? As any other enforcement, the enforcing of human rights a priori provokes and uses some kind of violence, in terms of enforcing of human rights politics. That is why they "cannot be imposed on this practice as an external constraint."[575] This is an understandable claim connected to pluralism and the validity of norms. Even though, according to Habermas, they have a special character in relation to other constitutional rights, their justification and thus empowerment cannot come from the outside of the state. Furthermore, according to the rules of the theory of communicative action, legitimacy can be claimed only if all people involved in the discourse have reached consent. Even if we can claim the existence of more or less universal consent, in the modern world, the implementation and respect of human rights relies solely on the political decision of national states, because the signing of the Universal Declaration of Human rights does not mean a commitment to its idea of global protection of human rights.

The statute is the basis for, the general presupposition of, but not the instrument of the expropriation. For this reason, the guarantee of the liberty rights of individuals includes over and over again the turn of phrase that an intrusion into the guaranteed sphere of freedom is permissible only *on the basis of statutes.*[576]

Finally, in his insisting on the discourse of human rights as the carrier of the cosmopolitan project, and confronted with the political reality of civil wars, Habermas ends in advocating that "human rights would have to be implemented in many cases despite the opposition of national governments, international law's prohibition of intervention is in need of revision."[577] This opinion was clearly demonstrated above, and it is very familiar to the 21st century observers, just the way Schmitt was warning when he said that "the concept of mankind

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[575] Habermas, The inclusion of the other, p.259.
[576] Schmitt, CT, p.192.
[577] Habermas, *op. cit.*, p.182.

excludes the concept of the enemy" [*Der Begriff der Menschheit schliesst den Begriff des Feindes aus*]. Habermas's cosmopolitan claim thus goes beyond the change of the international law into a more legal order that would replace the state of nature that still exists there without discussion. His rhetoric of cosmopolitanism moves from the "particular" politics to the standardization of politics. As Castrucci will conclude:

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Habermas's thesis of the pristine, indestructible, juridical stature of the human rights (…) is an ideological thesis of post-natural law legitimation of the power structures functional to the domain of certain political parties, which obviously cannot pretend to be 'a totality', but which are aware that only this fiction makes the exercise of their command admissible.[578]

4.5.1 Nationalism seen as the enemy of cosmopolitanism

Challenges coming from both consensus and conflict, as the basis for a dialogical or antagonistic political-legal motive, are at the core of understanding the political and legal, and their relation to democracy. Therefore, the concept of nationalism employed in this paper serves the purpose of highlighting the ruptures in modern theory that Habermas protects, ruptures that within themselves carry legitimate deficits that always mean exclusion and violence. For Schmitt these are products of the neutralization and depoliticization of liberal societies, while Habermas, in his latest works, focuses on Weber's concept of modern pathologies that are the expected product of modernization, and their radical critique is not essential for the improvement.

At the core of Habermas's more recent writings about the future of cosmopolitanism, an apparent turn towards legal cosmopolitanism can be seen. This firstly means that moral becomes part of the normative system, and secondly, that we are witnessing an increasing need to replace strongly criticized nationalism with cultural means of identification. Although he explicitly rejects the idea of one cosmopolitan state that would correspond to Kant's idea of a world government, his model is rooted in Kant's thinking about cosmopolitan law and cosmopolitan solidarity. In the second chapter, we could see how these ideas are thought on the empirical level of the EU. The case of the Union helps him to insist on abolishing the national identity[579] as the carrier of rationality, replacing it with a cultural identity that can grasp the

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[578] Castrucci, Jürgen Habermas and the political realism: a critique in Sociology and Anthropology 3(6), 2015 (285-294), p.293.
[579] For more about the development of the European national state and its reformation see Habermas, Realizações

fine feeling of the members of one community that are its driving force.[580] A similar 'reformation' he prescribes to religion in a post-secularized society, where the culture stocks provide one society with the feature of solidarity, which stands at the other end, bounded to the normative system, to the constitution.

What he calls Serbian "ethnonatioanalism," represents the enemy of the cosmopolitan project. In the "Inclusion of the Other"[581] he refers to nationalism as a traditional phenomenon, which is placed in the same category as religion. The "ethnonationalism" is an even more dangerous side of the coin that breaks up with the traditional distinction between "ethos" and "demos." The former is always linked to blood and kinship ties, and it is a pre-political dimension that through the social development becomes substituted with the category of "demos." In "The philosophical discourse of modernity," Habermas thinks about the co-originality of law and politics in modernity, and in this way moves towards further marginalization of the political. Therefore, the absence of political "*is* the philosophical discourse of modernity."[582] That is why we can rather talk about "an absent politics" in Habermas's work, than about a specific political theory. Schmitt, on the other hand, gives all the power to the political, understood in the friend-foe dialectics, as the only one capable of deriving a true legitimacy. Moreover, one of the most important conditions for democracy, in Schmitt's view, is the hegemony of people in the state. The hegemony that no constitution or representative body manages to incorporate in its normative-procedural structure because the essence of the state, as well as for Hegel, for Schmitt is in the pre-political, in the authority and its decision.

It is true, that democracy can only be exercised as a joint practice. But Schmitt does not construe this commonality in terms of the higher-level intersubjectivity of a discursive agreement between citizens who reciprocally recognize one another as free and equal; instead he reifies it into the homogeneity of members of a single people.[583]

It is in their writings on nationalism as the foundation or unwanted, irrational leftover of the modern democracy, where we can see a true motive and potential of Schmitt's and Habermas's

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do Estado nacional europeu, pp.297-311 in Anderson, Um mapa da questão nacional (Verso, 1996).
[580] For more about the relation between cultural and national identity in Habermas see Max Pensky, Cosmopolitanism and the solidarity problem: Habermas on national and cultural identities in Constellation, 7(1), 2000 (64-79), Blackwell Publishers Ltd.
[581] See specifically Chapter Three, title five - On the Relation between the Nation, the Rule of Law, and Democracy, pp.129-155.
[582] Bernstein, The causality of fate in Habermas and the unfinished project of modernity, eds. D'Entrèves and Benhabib, 1996 (245-69), p.225-6.
[583] Habermas, The inclusion of the other, p.135.

respective theories. For the latter, nationalism implies violence, exclusion, the possibility of bestiality and absolute destruction of society. It opens the door for one or a group of subjects to use nationalism in order to disguise their violence with the political process, and impose their subjective will, circumventing the social and intersubjective reason that is in its nature universal. Looking back on the case of socialist Yugoslavia, it is not hard to deduce a similar conclusion. It was the subjective will of few political elites who first usurped the right to decide on the interpretation of the constitution according to their political needs and goals, oriented by the strategic action. Later, those elites, whose grounds were already shaking, took the project of nationalism as their official politics and began to re-define the values and categories of Yugoslav society.

If we follow this line of thoughts, we can conclude that the violence and the break-up at the beginning of the '90s, were indeed a specific history, but under the 'logic' of nationalist politics, which, on the other hand, was held as already very familiar in Europe. Nevertheless, in this explanation we fail to answer two paradigmatic questions: why in Serbia the consequence of the dissolution of the federation was a cruel nationalism where the 'collective amnesia' was systematically put above the intersubjective development of society; and why the politics focused on national and ethnic questions led to other violence, this time on the territory of Serbia? Habermas fails to see the importance of the connection between those conflicts, and thus re-think the intersubjective postulates of modernity offered by his theory.

The exclusions that I have presented above, one happening in his definition of the ideal speech acts, and the other on the way from pre-discursive to discursive argumentative levels of communication, are both embodied in his blind faith of modernity and modern law. By excluding what one might interpret as traditional, we do not protect modernity from, for example, nationalism. By institutionalizing normative structures that impose and promote dialogue, equalize private and public sovereignty and protect human rights, we will again fail to eradicate subtle conflicts and antagonisms between nationalities or ethnic groups, even though they share the same constitution. As Adorno says, "[t]he premier demand upon all education is that Auschwitz not happen again."[584] Auschwitz cannot happen again, just as the ethnic war in the Balkans cannot be repeated. We have to put our energy into education, where true ideas and relations within society can be thought. However, what has happened and is still happening in Guantanamo "was no civilization break (…) [; it] was the realization of the

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[584] Adorno, Education after Auschwitz, p.1.

Western policy."[585] That is why there is an increasing demand to re-question the fundaments and logic of that policy, which is the goal of the following section.

4.6 Schmitt between conservative and critical thinking

Observing nationalism as a political doctrine leaves us with emerging problems, and with regard to this claim, Yugoslavia represents a legitimate argument that testifies to this. Schmitt finds one of the main consequences of modernity and the modern political and legal theory in the process of demonization of enemies who become enemies of 'universal' morality. In this way, they become defined as the enemies of humanity, and in return their destruction is morally justified. By taking the right to define and pervert the notion of enemy from the realm of political actions, modernity defends its hegemony over a system of values, depoliticizing the social sphere. This mythology of violence tucked within the modern discourse of exclusion and politics of enemy is possible to observe in the history between the second and third Yugoslavia, and in my opinion, it can still be seen in the contemporary Serbian politics.

The intersubjective world, together with the logic and rationality of modernity, according to Habermas, has its historic chance under the tenants of consensus and dialogue. The function of the law, as shown in the second chapter, is to stand between the lifeworld and the system, embracing the logic of both of them, understanding their sides, and thus preventing conflict between them. In view of this role of law, the main character is given to the concept of human rights, the cornerstone of Habermas's most recent writings. For this philosopher, human rights are not moral rights. They are legal, subjective rights, and as such are not simply subordinated to existing legal norms, they are part of those norms. The complementary character of law and moral, reflected in human rights, is based on a liberalist comprehension of modernity. Humanity, on the other hand, becomes a moral subject capable of legitimizing the policy of human rights that protects the lifeworld. How is then possible to talk about a humanitarian war, a humanitarian intervention, or a war in the name of humanity? How does that humanity speak in its name when asked about the violence it used in order to prevent other violence? Finally, where is the consensus on the definition of that humanity, on its powers, means and limits, and how is the war for humanity an intersubjective expression of human

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[585] Madung, Politik und Gewalt, p.129.

reason?

These are the questions in which Schmitt's political theory and his critique of liberalism find their arguments. Schmitt, instead of discovering the fundamental human equality that is recognized in the reflexive process of people in modernity, observes a fundamental inequality both in front of the law, and as an ideal used to define the bourgeois *Rechtsstaat*. The law can promise only abstract equality in the limits of a norm, and not before the individual command, or decision "because, in terms of content, it is entirely determined by the individual circumstance of the single case, while the law in the sense of the Rechtsstaat means a normative regulation, which is dominated by the idea of justice, and under which equality means justice."[586] This meaning of equality corresponds to the formal concept of law, and as such, it is non-political because it does not consider inequality as a possible situation. Hence, the decision of the highest executive power brings to our sight the difference between the statute and the decree, the difference that liberal concept of law fails to see. For example, in January 2017, when the president of the United States signed the executive order 13769 titled "Protecting the nation from foreign terrorist entry into the United States,"[587] the power of this decree went above the power of the statute, and the limits of a general equality before the law were revealed. And similar to Schmitt's analysis of the 19th century monarchies, a decree issued by the highest executive power "would not be considered law"[588] because it is outside of the statute. Thus, in modern democracies, what tells us more about the normal state of law is the point when that state ceases to exist on its own merits, the state of exception, when the link between law and politics shows its strength.[589]

Another argument considers that, for Schmitt, the homogeneity of people and their shared destiny are the basis for the pre-political and pre-legal foundation of law and nation. In the "State, movement, people," he defines "the People, as the *apolitical* side, growing under the protection and in the shade of the political decisions."[590] However, the category of "the People" has no meaning until it becomes part of the triadic structure, where in connection with the state and movement, under the rules of decisionism, becomes an expression of the political. In relation to equality, the law of one country poses the idea of equality for its citizens who are

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[586] Schmitt, CT, p.194.
[587] Full text of this order is available on the https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states [Last accessed on 30/07/2017]
[588] Schmitt, *op. cit.* p.189.
[589] More about the state of exception, see Chapter three, section 3.4.4.2 - *Ausnahmzustand* as the antonym of the normal state.
[590] Schmitt, State, movement, people, p.12.

considered part of the political unity that, in order to be stable and united has to have some level of homogeneity. Likewise, "[i]t is through their belonging to the demos that democratic citizens are granted equal rights, not because they participate in an abstract idea of humanity."[591] Any kind of forcing towards universal concepts would imply cancelation of politics, leading in direction of the depoliticized world. For Schmitt, the politics of the modern national states is an endless struggle guided by national interests. Thus, nationalism arises as an important part of his political theory. The political struggle, organized in the logic of the friend-foe relationship, provides nationalism with an important feature – the particularity, because political fights in one state spread from the national level towards the inside of the state, to the rivalry between different interest groups. That is why Schmitt sees the world filled with particular struggles of particular people with their particularly motivated interests in particular national states. Habermas's cosmopolitan model would like very much to abolish this world, along with hostility and violence, to submit it to the universal normative concepts, and to the corresponding universal and transcendent moral content. Likewise, he is ready to take a risk and create the world where there would exist only legality under the cape of legal cosmopolitanism, where the possibility of legitimacy would have to be searched in the law and rational consensus, while the exclusion/inclusion questions would be depoliticized and placed into the realm of morality. Finally, the world that, in its tendency to abolish antagonism, risks a situation where the political struggles of different life-views may arise in major antagonistic conflicts guided by the logic of violence. We have seen how Habermas's most recent writings are cocooned in the idea of that world, and that is why Chantal Mouffe takes that theory as a departure point in her critique of modern liberal democracy. Before I present her re-thinking of Schmitt's concept of the political, I will first present two concepts of law – one belongs to the liberal tradition, and the other is an essential part of Schmitt's solution for the 'wrong-headed' liberal politics.

4.6.1 Centripetal and centrifugal force of law: formal and political concept of law

In order to bring Habermas's claims about nationalism closest possible to Schmitt's concept of the political, it is necessary to observe where these authors choose to root their thinking about the legal. The former is representing the liberal concept of law based on the

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[591] Mouffe, The democratic paradox, p.41.

liberal claim that there is no social phenomenon or any idea of the state life that cannot become part of the statute. This liberal phenomenon was used as an argument for the sovereignty of law that is part of the 'formal concept of the law' that *Rechtsstaat* adopts, and for Schmitt it is "completely wrong-headed."[592] The obsession of the legislative state to give a form to all aspects of the social existence in order to put the concept of sovereignty under the 'legal legitimacy,' creates an obsession for the sovereignty of law. The concept of law appointed here, works according to what I will call the **centripetal force**, bringing all established relations and rules to the center of the *Rechtsstaat* where they get their form according to the general norm, and from that moment their legitimacy is shared with the norm. It is exactly this force that makes the entire system to rely on the administrative power of its structure, and on the 'legal-rationality' that comes with it. This rationality is part of what Chantal Mouffe calls "the post-political *Zeitgeist*," and her theory, as we shall see in this chapter, tends to challenge and criticize its inner logic.

The formal concept of the law is based on the statutory form of the law, and in Schmitt's view, is an instrument used in the continuous process of the historical neutralization of domain, which avoids the separation of sovereignty from the law, and which gives the law the power to create sovereignty. In the legislative state of the WR there was legality with no content, absolutely neutral, value and quality free. Therefore, neutralization is the first step toward depoliticization. According to Schmitt, the formal law of a logically consistent *Rechtsstaat* exists alongside the political concept of law, since the component of the constitution is not sufficient to answer the legal requirements of modern societies. By ignoring and neutralizing the political component of the law, a *Rechtsstaat* avoids answering the questions about sovereignty outside the law, and, more importantly, it breaks the links between legitimacy and legality.

In order to better understand the last argument, we have to follow the differences between statutory and substantive law. Contrary to the statutory law, which was explained above as a formal concept of law, Schmitt defines the law in substantive sense as "a legal norm or legal principle, a determination of what should be right for everyone."[593] Therefore, the law has a meaning outside its form, and consequently, it has a form that does not belong only to the legal nature. In order for the state to fulfill the 'criteria of legitimacy,' it is not enough to have only the law in its statutory form. The law needs to refer also to a set of "a preconstitutional

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[592] Schmitt, CT, p.187.
[593] Schmitt, LL, p.21-2.

and prelegal substantive values or concrete decisions to which appeals might be directed when the formal rules of liberal or social-democratic regime collide or appear vulnerable."[594] This substantive criterion is what Schmitt sought and finally found in the figure of authority, of sovereign. And this criterion, and not the law itself, can be a source of legitimacy for a given regime.

Therefore, besides the given critique of the law of the *Rechtsstaat*, Schmitt defines the political concept of the law as capable to truly grasp the political in the law, instead of transferring it into its statutory form. In the formal concept of law, the law is always a legal norm. The law, in the sense of the political concept of law, is concrete *will* and *command* and an act of sovereignty.[595] 'Sovereignty' is thus not a matter of formal constitutional doctrine or essentially hypocritical references to the 'people'; it is a matter of determining which particular agency has the capacity – outside of the law – to impose an order which, because it is political, can become legal.[596] Therefore, this concept of law operates under a **centrifugal force** that keeps the political will away from the absolute possibility of becoming the part of the general norm, so it maintains its essential feature to describe a will or command. To understand this better, we have to return to the moment when the first democracies started to develop under the principles of absolute monarchies. At that time, people were asking not only for a new *Rechtsstaat* that could protect their rights, but also for the greater power of their parliaments. In this transitional times, the democratic force of the law, the one that is pre-constitutional, and best conveyed in the syntagm 'will of people,' gets blended with the rising idea of *Rechtsstaat* and its formal concept of law "whereby at that time the people were replaced, entirely self-evidently and for the most part tacitly, by the will of the popular assembly, of the parliament."[597] According to this, the political form of law is a democratic concept of law that existed before the formal concept of law. When the rule of law became the rule of the popular assembly, a strategic rejection of the political sources of law was implemented. In order to intrude into freedom and property, there must be a legal norm with certain qualities, the ones that were described above. By avoiding the political definition of law, liberalism is "threatened by a condition of politics which converts the 'rule of law' into a merely formal doctrine. If the 'rule of law' is simply the people's will expressed through their representatives, then it has not determinate content and the state is no longer substantively bound by law in its actions."[598]

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[594] Introduction to LL, p.XVI.
[595] Schmitt, CT, p.187.
[596] Hirst, Carl Schmitt's decisionism in Mouffe, The challenge of Carl Schmitt, p.11.
[597] Schmitt, *op. cit.*, p.188.
[598] Hirst, *op. cit.*, p.11.

4.6.2 Instrumentalization of Schmitt's methodology

In the article "Carl Schmitt's method: between ideology, demonology and myth," Jan Müller tries to find a link between Schmitt as the political theoretician and Schmitt as a supporter of Nazi politics. That link he places in the single method that marked Schmitt's theory as an ideology, a method that consists of ideas, concepts, myths and demons. Correspondingly, his personal political strivings can be read as part of his ideology with a single method. A large part of this ideology is actually the melting pot of three points covered at the beginning of the previous chapter: Schmitt's relationship with his parents, with Catholic religion and finally, with himself. The idea of the state would replace the authority from the family, while the religious experiences are replaced with the mythical essence of the nation. When it comes to the relationship with himself, considering the vocabulary used in some of his diaries, one might correlate the demons of the past and the uncertain future of young Schmitt with the demons who continue to haunt his later theory.

By using the "political destruction by deconstruction" Müller points out that:

Schmitt 'decontructed' phenomena such as parliamentary democracy by radically pushing its supposed principles to their limits, only in order to construct internal incoherence and a fundamental contradiction between liberalism and democracy. In that sense, he instrumentalized ideology as a science of ideas and as the systematic treatment of ideas 'purified' and pushed to their extreme.[599]

In other words, according to Müller, Schmitt's definitions and conclusions about the political correspond to his method of defeating the enemy, waiting for the moment when his political ideas will be considered as a friend in the "friend-foe relation." His enemy was first romanticism, and later liberalism and parliamentary democracy. Even though he used modern concepts, his ideas are focused on copying the critique of old concepts in a modern framework. Thus we find many of his dialogues with conservative authors, such as, for example, the long-forgotten protector of Catholic monarchies, Juan Donoso Cortés, whose ideas enforced Schmitt's critique of the liberal's avoidance of decision; the re-interpretation of Simon Weil's book *Attente de Dieu* in the light of the main concept in his definition of *nomos* – the

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[599] Müller, Carl Schmitt's method: between ideology, demonology and myth in Journal of political ideologies, 4(1), 1999 (61-85), p.66.

appropriation; then the influence of poet Theodor Däubler, that in many ways resembles the influence that Fridrich Hölderlin had left on the work of Walter Benjamin, and also his exchange with many theologians, Karl Barth or Friedrich Gogarten to name a few. All these influences, according to Müller's interpretation, are used with the goal of creating the legal and political ideology organised around one central idea – the political. Ideology that has finally "served to legitimate the invasions undertaken by the Nazis."[600]

Schmitt most certainly had his method that was at some points certainly burdened with paradoxical conclusions. However, the main goal and focus of his theory was not the legitimation of his political goals, but the never-ending critique of liberalism and its wrong-headed reason. The "metaphysical tails" that Müller tries to prescribe not only to Schmitt's academic approach, but also to his personal political opinions that were accordingly already pre-defined, is the approach that can be seen, borrowing the metaphor of Hegel, as "the night in which (…) all cows are black."[601] Observed and read in this way, Schmitt's ideas will not see the light from the particular author's political history, and will end up in the strategic logic of his ideology. Likewise, Müller's critique of Schmitt's method encloses his concept of the political in the instrumental nature of his ideas and concepts, and by the same token makes his critique of the relation between law and politics, norms and decisions, legality and legitimacy, opaque. As Shapiro, when referring to some critiques of Schmitt, concludes:

"Schmitt's vacillations between harsh objectivity and surplus passion (Balakrishnan) or "realism and impressionism" (Müller) mimic the fraught combination in modern politics of administrative power and popular enthusiasm. His attempt to distinguish legitimacy from propaganda, law from power, and conservative from revolutionary politics can be seen as an ironic, or tragic, demonstration of their entanglement. Yet Schmitt also illustrates the means by which such entanglement serves political power, particularly in his discussion of myth, oratory, and the historical role of religious imagery. Finally, his combination of strategic, polemical, and critical perspectives provides us with an instructive guide to their interplay in political struggles."[602]

On the other side of the coin, we can try to summarize the most important points in Schmitt's critique of liberalism. Although his theoretical approach is largely 'inspired' and guided by the logic of the antipode of liberalism, where most of the conclusions are based on

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[600] *Ibid.*, p.74.
[601] Hegel, Preface in Phenomenology of Spirit, p.9.
[602] Shapiro, Carl Schmitt and in intensification of politics, p.10.

the critique of liberalism's flaws, it continues to provide not only certain insights on modern democracy, but also a code which we can use in understanding the political and legal, modern dysfunctionality to protect some people and, more importantly, to protect the political. In what follows, I will summarize Schmitt's critique of liberalism in a way that can serve us to observe the excluding moment of consensus and discussion. This critique will later be used as the basis for Mouffe's project of radical democracy that will 'calm' the antagonism and prevent them from escalating into an open conflict, just as the war in Yugoslavia had escalated.

4.7 Conflict versus consensus

It is in the theology of law and norms where the "emptying of the political" takes place in modernity, and for Schmitt, it is absolutely related to the liberal politics of human rights. Even though he was a jurist, Schmitt, at the end of his arguments, wants to protect the political, not the law. That is why, for example, his constitutional debate with Hans Kelsen[603] was actually a critique of liberal equalization of the state, norms and law under the liberal "logic" of sovereignty. Since, for Schmitt to talk about the truth is not possible through positive liberal politics. An example of this politics is, for instance, seen in the way "Kelsen solved the problem of the concept of sovereignty by negating it."[604] In this way, liberalism continues in its tentative to cancel the concept of the state, and detach it from the law. In regard to this liberal politics, Schmitt refers to Kelsen's forerunner, Hugo Krabbe who understood the sovereignty of the law using "the thesis that it is not the state but law that is sovereign."[605] An even more important Schmitt's observation about Krabbe is that he is led by the thought that, in modern times, we are no longer living under the rule (domination) of people, but under the rule of norms. Likewise, "[t]he modern idea of the state, according to Krabbe, replaces personal force (of the king, of the authorities) with spiritual power. (…) This is the essence of the modern idea of the state."[606] This way, the modern law excludes the people and choses to be led by the "intellectual powers" grasped in the system of norms. Altogether – romanticism, liberalism and positivism are focused on removing subjectivity and personality from politics. Consequently, "[t]he modern state seems to have actually become what Max Weber envisioned: a huge industrial

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[603] See Chapter Three, section 3.3 – Constitutional debate between Schmitt and Kelsen.
[604] Schmitt, Political Theology, p.21.
[605] *Ibid.*, p.21.
[606] *Ibid.*, p.22.

plant."[607]

According to Schmitt, by cancelling the concept of the state we exclude people from the organization of their societies, subjugating them to the power of the modern positive law. However, this law can never be observed as some neutral expression of an equal and open deliberation of all free and rational people. It is rather a product of the liberal and deeply negative politics that in the modern age decides what is good and what is bad, turning questions of politics into questions of ethic. Thus, the Hobbesian claim "*autoritas, non veritas facit legem*" does not lose its reason in the modern liberal democracy. It is simply masked under the new political theology of humanism and cosmopolitanism. This argument is clearly articulated in "Political Theology" whose main goal, among other ones, is to reveal the decision behind any order, including the juridical.

But sovereignty (and thus the state itself) resides in deciding this controversy, that is, in determining definitively what constitutes public order and security, in determining when they are disturbed, and so on. (…) After all, every legal order is based on a decision, and also the concept of the legal order, which is applied as something selfevident, contains within it the contrast of the two distinct elements of the juristic-norm and decision. Like every other order, the legal order rests on a decision and not on a norm.[608]

Read in this way and derived from Schmitt's earlier works, decisionism that may be described as a window through which Schmitt observed the world history since the 16th century, is the main tool in distinguishing responsibility from authority in modern politics. "In short, Schmitt's political theory can be read as an attempt to understand the possibility of modern authority, that is: responsibility. (…) Decisionism claims that this ultimate responsibility always falls on a person, never a mere norm."[609] And in his critique of liberalism, we can see how the notion of responsibility is removed from the political authority, from the holders of the power in one state, and placed on the people who can act for or against humanity.

This chapter begins with the dialectic of the historical and cultural dissolution of Yugoslavia – a federal, communist state that left some questions unanswered. In addition to its particularity, Yugoslavia's disintegration was part of universal, global changes between the 'West' and 'East,' where communist regimes lost "the cold war," and liberal capitalism took

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[607] *Ibid.*, p.65.
[608] *Ibid.*, pp.9-10.
[609] Hjalmar Falk, The 'Theological Nihilism' of Friedrich Gogarten. On a Context in Karl Löwith's Critique of Carl Schmitt. European Review, 22, 2014 (217-230), p.221.

the victory, leaving its enemy demonized, as Schmitt would say. Besides the power of the universal spirit and history, another consequence of the end of one country was violence. The question of the historical possibility of communism can be very attractive, and Yugoslavia can serve for that kind of study. However, this chapter does not have this as its central question. Instead, in order to show the nodal points of Habermas's theory and how Schmitt's critique of liberalism and theory of the political relate to those points, the main questions are: why there was no consensus between ethnicities, and why ethnicities in Yugoslavia did not reach the level of intersubjective recognition under the flag of one state? The 'legal' consensus was given in the form of the communist politics offered in the Constitution from 1974. This legal document became the only source of the political unity, and it was providing the idea of Yugoslav people. However, the political interpretation of this statute was standing in opposition to it, which can be observed in the decisions of the federal states. Naturally, the will of the majority of Yugoslav people could have been opposed to the Constitution, demanding a different system, more democratic and focused on civil liberties, for example. Albeit, such presuppositions are also not part of this paper, as the political-historical reasons for the fall of communism are not either. Yet, the consequences of that fall are, in my opinion, able to reflect on both communism and the current democratic system in, for example, the Republic of Serbia. This argument is envisaged in the post-war nationalist regimes that were marked by the liberals as just a "temporary delay" on the road towards unavoidable democratization, or as "a short parenthesis before rationality reimposes its order, or a last desperate cry of the political before it is definitively destroyed by the forces of law and universal reason."[610]

Finally, we can talk about the specific disintegration process between ethnicities and nationalities that has produced immense violence focused on abolishing the enemies. This fall has led to the rise of the nationalist politics in all states, the politics that continues nowadays. There was no "Yugoslav law" to protect victims of the War in Bosnia, as there was no respect for international law in the case of the NATO bombing of Serbia. Both of these conflicts represent the state of exception *per se,* where politically led decisions showed their power. From this perspective, Habermas's arguments do not answer on the above posed questions and where his argument fails to answer, it seems like Schmitt's political and legal theory can continue. So, where does Schmitt's concept of the political elaborated in the previous chapter, and the above-summarized critique of liberalism, appear in Yugoslavia? More importantly,

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[610] Mouffe, The return of the political, p.1.

what kind of conclusions it can present for the questions asked at the beginning of this chapter?

The answer is again in Schmitt's critique which some authors have managed to use towards a more productive reading of Schmitt's work. One of them is most certainly Chantal Mouffe, who shares a similar style of writing as Carl Schmitt, presenting her main points very clear and open, staying firm in her statements. Even though her political theory has much more to offer than what will be shown in the following text, her usage of Schmitt's concepts and, most importantly, of his critique of deliberation and consensus, is in the context of the need for radical democratic politics. Finally, what she calls "agonistic democracy," apart from offering an alternative to the liberal model of democracy, represents a model where ongoing social conflicts (that are in reading of Schmitt always political) can develop into a type of social energy, instead of becoming open antagonisms like in the state of war. In the following text, I tend to present the way Mouffe uses "Schmitt against Schmitt" that is based on the productive usage of Schmitt's critique of liberalism and liberal democracy, with the aim of empowering and helping liberal democracy to question some of its presuppositions in order to become more stable and more inclusive. Therefore, I will start from Schmitt's critique of liberalism that will put forward the fundamental arguments for further discussion about agonistic democracy. The goal of the second part of this chapter is not to solely discuss Mouffe's political analyses and certain democratic features, but to see how her interpretation of Schmitt casts a light on the possibility for an intersubjective structure in pluralist democratic conditions.

4.7.1 Critique of liberalism

There are three characteristics of liberalism that Kérvegan distinguishes from Schmitt's writings: political negation of the political, optimist individualism and ethics of discussion, and metaphysics of indecision.[611]

(1) The first point reveals the political paradox that liberalism presents as its critique of the political. According to Schmitt, the liberal critique of politics is not grasping the political and deriving from it a liberal political thought. Thus, it only exists as a cancelation of that political that is the main product of the "political critique of the political." Consequently, liberalism finds the main enemy in the modern state due to its monopoly over politics. Therefore, liberalism is a policy of denial of the political, a political critique of politics and its normal

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[611] See Kérvegan, Hegel, Carl Schmitt, pp.96-118.

vector: the modern state.[612]

Politics of limiting the power of the state is nothing else than the destruction of the political, which is in return making it too weak to respond to the challenges coming from the social world that in its essence includes radical politics coming from both left and right. This argument is very important for two reasons: first, as it will be shown below, it allows the connection between the principles of liberalism and parliamentary democracy. The merging of these two different concepts can also be seen in a constitutional theory where "the liberal bourgeoisie established a certain ideal concept of constitution in its struggle against the absolute monarchy and identified it with the concept of constitution in general."[613] Consequently, their politics stands out as the only type of politics, leaving the "other types" outside, marking them as their enemies. In the same light, "there is a constitution only when private property and personal freedom are ensured. Everything else is despotism, dictatorship, tyranny, slavery, or whatever designations may be, not a "constitution.""[614] In consequence, as Schmitt observes, "the modern, bourgeois-Rechtsstaat constitution (…) [is] often equated with the constitution as such and "constitutional state" is given the same meaning as the "bourgeois Rechsstaat.""[615] This merging of two different concepts, liberalism and democracy, according to Chantal Mouffe, is one of the main features of the modern democracy and is one of the reasons of its irrationality.

On one side we have the liberal tradition constituted by the rule of law, the defence of human rights and the respect of individual liberty; on the other the democratic tradition whose main ideas are those of equality, identity between governing and governed and popular sovereignty. There is no necessary relation between those two distinct traditions but only a contingent historical articulation. [616]

Secondly, the main goal of liberal politics is to limit, and ultimately to destroy the concept of the sovereign state. Its critique of the state power, and the never-ending fight against the state that with the project of universal human rights calls for the origin of law outside of the state and constitution, shows how the latter became a means, and not the goal of modern societies. Therefore, as Schmitt concludes, one cannot speak of the positive, but only about the negative politics of liberalism. Liberalism certainly did not radically deny the state, but on the other hand, it also found no positive theory of the state and no self-reform, but rather sought to attach

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[612] *Ibid.*, p.99.
[613] Schmitt, CT, p.89.
[614] *Ibid.*, p.90.
[615] *Ibid.*, p.169.
[616] Mouffe, The democratic paradox, pp.2-3.

the political to the ethical and subordinate it to the economic.[617] Therefore, a modern, liberal state "in fact always remains a *state*, so it still contains another distinctly *political* component besides the bourgeois Rechtsstaat one. (…)The political element cannot be separated from the state, from the political unity of a people."[618]

(2a) Anti-state radicalism grows in the same measure as the faith in the radical goodness of human nature.[619] Therefore, the second argument about liberalism relates to the anthropological roots of the human nature that liberalism choses to employ. Between "good" or "bad" people, by their own nature, the imaginary state of nature can be defined. For Schmitt, the meaning of the modern state is always derived from a certain theological meaning.[620] In order to be theological, it always has to observe humans as sinners, as "bad" by their nature, and the rejection of this nature is the rejection of the political. Additionally, according to the definition of the political as the real possibility of one enemy, "the notions and the political reasoning cannot satisfactorily take an anthropological optimism as the starting point."[621] Liberal faith in a good woman or man is not the one that a true anarchist, for example, can defend, because it is used as an anti-political idea of a woman and a man who do not need the state in order to develop their nature, since the state represents just the means of society that is subordinate to it and controlled by it. Therefore, in this interpretation of modern society, the accent is put on the individual nature that from the fact of belonging to the human race acquires certain liberties and rights, without the need of the state. As Kérvegan observes, this "optimism" in liberal theory shifts its meaning: "from a hypothesis about the nature of the individual it becomes a speculation that deals with the benefits, even though unforeseeable, of the great society and its complexity."[622]

(2b) Liberalism with its negative politics, or non-politics, transforms the question of the political into the ethical questions, putting the focus on the individual ethics of the "bourgeois Rechtsstaat." This includes the "legitimation of the established order (of the "political and social *status quo*"), that operates under the ethical pretext."[623] The "pathos of ethics" comes from the objective and materialist economic reason, form the structure that occupies the

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[617] Schmitt, O conceito do político, p.88.
[618] Schmitt, CT, p.169.
[619] Schmitt, O conceito do político, pp.87-8.
[620] "All significant concepts of the modern theory of the state are secularized theological concepts." (Schmitt, Political Theology, p.36.)
[621] Schmitt, O conceito do político, p.91.
[622] Kérvegan, Hegel, Carl Schmitt, p.105.
[623] *Ibid.*, p.107.

political. On the other hand, like any other ideology, liberalism requires the "spiritual" level that Schmitt finds in the discussion. [O]n the place of one clear distinction between "war" and "peace" as the two different statutes, enters the dynamics of the eternal concurrence and of the eternal discussion."[624] Therefore, even without the mythology that liberalism develops from the logic of progress and economic freedom, it is possible to observe specific liberal ethics in the ethics of discussion.

Just as it discusses and transcends in every single political situation, liberalism would like to dissolve the metaphysical truth into a discussion as well. Its essence is deliberation, prudent mediocrity, in the hope that the decisive comfort, the bloody combat of decision, could be turned into a parliamentary debate and be permanently interrupted by an eternal discussion.[625]

From this statement, it is clear that the public debate in liberalism is part of liberal ethics, and thus it is pointless, a "prudent mediocrity" when related to the political. It is with deliberation and parliamentary discussion that liberalism wants to hide the decision, the power, and finally to cancel the political transformation into the ethics of the discussion. What is more important, this ethics is just an institutionalized expression of liberal theology and its glorification of individual subjectivism. Therefore, the apparent intersubjective, social, free and equal façade of liberal parliaments is actually hiding the true face of liberal politics – subjectivism revealed in the administrative, economic and legal power.

(3) The last characteristic that Kérvegan examines in relation to liberalism is the metaphysics of indecision. Regarding this point, we can see that Schmitt goes to the core of liberal 'logic' and there he finds a metaphysical system that is used to justify its ethic of discussion and cancelation of the political. However, Kérvegan believes that the "metaphysical nucleus" of liberalism is not so clearly defined in Schmitt's 'negativity' towards liberalism. A related question for this doubt is whether Schmitt's decisionism represents the alternative for the "metaphysic of indecision?" In this regard, Kérvegan reflects upon the last paragraph of the first chapter in "The political theology" where Schmitt quotes the passage of "one Protestant theologian" about the importance of the exception, and its opposite but still essential character in defining the general. This theologian is Søren Kierkegaard, and according to Kérvegan, it moves us closer to what Schmitt finds at the core of liberal metaphysic.

"Precisely a philosophy of concrete life must not withdraw from the exception and the extreme

[624] Schmitt, *op. cit.*, p.98.
[625] Schmitt cited in Kérvegan, Hegel, Carl Schmitt, p.110.

case, but must be interested in it to the highest degree. The exception can be more important to it than the rule, not because of a romantic irony for the paradox, but because the seriousness of an insight goes deeper than the clear generalizations inferred from what ordinarily repeats itself. The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: it confirms not only the rule but also its existence, which derives only from the exception."[626]

Therefore, the essence of liberal metaphysic "depends on indecision [of] all representation, [of] every content of thought that seeks to escape the absolute character of "ethical disjuncture.""[627]

Radical theology is the argument mostly used in the critique of Schmitt's decisionism that was shown in the third chapter, section 3.4.4.1 - The *Dezisionismus*. In the Foreword of *O conceito do politico*, Hans Georg Flickinger tries to answer how Schmitt translated theological motives into political. Following the nature of the divine creator (the Christian god), the world creation rests on the first, divine decision. The second moment is found in the legitimation of that decision that is found in the divine sovereignty itself. Likewise, Schmitt's definition of political sovereignty ends in the same radicalism – in self-legitimation, closed dialectics. In the third chapter, I have reflected upon the importance of theology and religion in Schmitt's personal and academic life. Where those 'moments' become more apparent is precisely in the authority that is not a main, but an essential part of the political. It is the authority that bares the weight of a sovereign decision, and it is defined by the law, by the right to decide on the state of exception. Therefore, Schmitt needs the norm to define and show the sovereign, while simultaneously the sovereign is apparent in every political and social expression in the process of deciding. However, Schmitt, like, for example, his counter-author Kelsen, does not define a norm that puts the order in the chaos. Schmitt's answer is not legal, but political. By observing decisionism as an alternative to liberalism is possible only on the plan of politics, because Schmitt's argument is precisely that – when the law fails to prevent or stop the socially unwanted situation, the solution is possible only in the sphere of the political, where the authority and decision find their anchor. The question is how this political answer to the flaws of the modern state can be related to a law without the need for exclusion or violence. With these questions in mind, and with the story of Yugoslavia as the ideal background, in what follows, I will present in more detail the way Chantal Mouffe sees the pacifying, inclusive and finally intersubjective potential of the social conflict above consensus.

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[626] Schmitt, Political Theology, p.15.
[627] Kérvegan, Hegel, Carl Schmitt, p.117.

4.7.2 Re-thinking the political

"The enemy is the embodiment of your own question"[628]

Following Schmitt's political theory, Mouffe thinks that we first need to think of the political – viewed as the antagonistic structure of each community, in order to envisage the democratic politics that are grasped in a set of practices and institutions that form a democratic order. My reading of Chantal Mouffe, which will be presented as the final part of this chapter, is divided into the following points: (1) (re)interpretation of Schmitt's notion of the political – about 'friend' and 'enemy'; (2) the 'undecidability' as opposed to universal rationalism; and (3) from the critique of liberalism towards the new model of democracy.

Re-thinking of 'friend-enemy' relation

(1) Every political action tends to lead in direction of the division between 'friend' and 'enemy.' In international relations, this relation is a more or less silent rule, and in the state of war, its appearance breaks with any opacity. That is why war is finally the most political category, according to Schmitt's definition of the political: "Nowadays enemy is the primary concept in relation to war."[629] However, Schmitt makes a clear difference between the war and the antagonistic fight, or between the war as status and war as action. In the act of war and in terms of the destruction it brings, the enemy is clearly defined and the hostility is visible, and therefore, there is no need to question its presuppositions. However, in the case of the war as a status, the enemy exists even when the feeling of hostility passes, and when the apparent conflict is over. *Bellum manet, pugna cessat.* Here the enmity manifests itself in the *presupposition* of the state [status] of war.[630] These manifestations are always political, and they are dependent on the presupposed enmity that gives reason for such politics.

Mouffe is aware of the victorious interpretation of the post-communist world by the liberals, and how they jumped at labeling the antagonisms that have emerged in that period as archaic, pre-conventional, traditional, bounding them in their irrationality to the concept of the political. In this way, by canceling the antagonisms, the political is also canceled, and the

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[628] Theodor Däubler, *Hymne an Italien*. In German: „Der Feind ist deine Frage als Gestalt."
[629] Schmitt, O conceito do político, p.129.
[630] *Ibid.*, p.129.

possibility of violence, hostility or war is replaced with peace. The same way Schmitt was criticizing the liberal interpretation of peace as the opposite of war, in the sense that if there is no war, there is only peace and vice versa.[631] In regard to the newer world order, Mouffe finds similar dangerous liberal politics regarding antagonisms as "an impotence that, at a time of profound political change, could have devastating consequences for democratic politics."[632]

In every social organization, in every democracy, there is a division between 'we' and 'they' that is usually defined in the legal definition of citizenship. In order to be part of the 'we-group' one must be part of the demos, and this is possible through her citizen's rights. Therefore, 'they-group' has no access to the rights of demos, and cannot share experiences and benefits with that demos. This is best seen in Schmitt's critique of human equality, which counts on humanity as the source of its power. The juridical reality of the 'we/they' relationship proves its 'friend/enemy' character in the never-ending possibility of antagonisms, the possibility entailed in the political character of that relationship, according to Schmitt. Mouffe shares the antagonistic view of the political, but she observes the 'friend/enemy' distinction as just one of the possibilities for antagonisms.

In the field of collective identities, we are always dealing with the creation of a 'we' which can exist only by the demarcation of a 'they'. This does not mean of course that such a relation is necessarily one of friend/enemy, i.e. an antagonistic one. But we should acknowledge that, in certain conditions, there is always the possibility that this we/they relation can *become* antagonistic, i.e. that it can turn into a relation of friend/enemy.[633]

This argument is essential in her model of democracy, and one of the crucial deviations from Schmitt's political theory. In order to define her position more precisely, she makes a distinction between two forms of antagonism: the one that she calls "antagonism proper," and the other she calls "agonism." The former is grasped in the Schmittian terms of the friend/enemy relationship that has no shared symbolic frame to count on, and where people see themselves as enemies. The latter, on the other hand, is the relationship between 'adversaries' that "are being defined in a paradoxical way as 'friendly enemies', that is, persons who are friends because they share a common symbolic space but also enemies because they want to organize this common symbolic space in a different way."[634] 'Adversary' does not replace

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[631] Cf. *Ibid.*, ff. 134.
[632] Mouffe, The return of the political, p.2.
[633] Mouffe, On the political, p.15.
[634] Mouffe, The democratic paradox, p.13.

'enemy,' it just defines his or her position as non-wanted in the democratic context, and that is why the enemy "remains pertinent with respect to those who do not accept the democratic 'rules of the game' and who thereby exclude themselves from the political community."[635] Mouffe needs 'enemy' in order to distinguish it from 'adversary' in the process of defining her adversary politics. That is why the concept of adversary does not change the Schmittian basis envisaged in the fact that the social, political world is agonistic, and that conflicts are naturally arising on the boundaries of these antagonisms. Moreover, by keeping the "antagonism proper" as the possible outcome of social interaction, Mouffe protects the potential of political pluralism.

However, the 'we/they' division in liberal democracy and their antagonistic relationship is not enough to proclaim impossibility for liberal democracy, as Schmitt had concluded. Quite the contrary, Mouffe thinks that the very differences can unite us together in the search for both individual and common identities. The moving between singular and universal meanings is indeed marked by the opposites, and conflicts might arise between those opposing strengths. But, the possibility of these conflicts does not mean the call for their abolishment, their dissolution in 'overlapping consensus' is justified by the universal reason. It brings a social potential, social energy and the will to argue, accept or reject, and not only to 'interpret' pre-established rules and norms. It is in that possibility of the conflict, in the relationship between adversaries that 'the political' is build and protected. Just as Mouffe observes them:

I believe (…) that it is the existence of this tension between the logic of identity and the logic of difference that defines the essence of pluralist democracy and makes it a form of government particularly well-suited to the undecidable character of modern politics. Far from bewailing this tension, we should be thankful for it and see it as something to be defended, not eliminated.[636] Therefore, "[w]e need to make room for the pluralism of cultures, collective forms of life and regimes, as well as for the pluralism of subjects, individual choices and conceptions of the good. This has very important consequences for politics."[637]

The social impossibility of closure

(2) Contrary to the discursive tendency towards the "absolute non-fixity, or absolute fixity,"

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[635] Mouffe, The return of the political, p.4.
[636] *Ibid.*, p.133.
[637] *Ibid.*, p. 151.

Ernesto Laclau and Chantal Mouffe propose the *field of dicursivity* that "determinates at the same time the necessarily discursive character of any object, and the impossibility of any given discourse to implement a final suture."[638] Only by recognizing this basis of the social communities we can think of the open system, instead of moving towards the closure of the system. The 'impossibility of fixing ultimate meaning' means that in the social context it is possible to envisage only the pluralism of meanings. From the works of Ludwig Wittgenstein and Jacque Derrida, Mouffe continues in deriving the concept of 'undecidability' that serves her political pluralism. This principle finally manages to break the metaphysics of decisionism, but not to cancel the political decision, which allows her to protect her model of liberal democracy from the radical critique in Schmittian way.

'Undecidability' in the name of a sort of contextualism first breaks with the concept of rational universalism. Habermas's theory (as with Ronald Dworkin or John Rawls) is focused on finding the universal truths that need to be organized by the reason, and therefore these truths are necessarily the most rational because they are universal. Consequently, for him and for other liberals, the liberal, constitutional, modern democracy is not one of the possible truths, but *the* reasonable truth that people will reach when they stop being irrational and traditional, and become modern. Mouffe opposes this to Wittgenstein's claim "that what is "reasonable" cannot be characterized independently of the *content* of certain pivotal "judgments"."[639] Instead of focusing on values and truths, pluralism develops around actions, and the present political language-games, because every identity is *relational*. By the same token, "[s]ociety never manages to be identical to itself, as every nodal point is constituted within an intertextuality that overflows it."[640] This means that social identities need to remain open and incomplete in order to move and adapt to different historical discourses. However, what is also important in understanding of this argument is that these unfixed identities or articulated relations do not flow without any fixation. The impossibility of the ultimate fixity of meaning implies that there have to be partial fixations – otherwise, the very flow of differences would be impossible. Even in order to differ, to subvert meaning, there has to be a meaning.[641]

This 'meaning' is what Schmitt would call 'pre-political' or the condition of homogenous society. Similarly, Mouffe's theory also asks for certain shared values of one demos. If we imagine Tito's concept of "brotherhood and unity" as an attempt to provide the

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[638] Laclau, Mouffe, Hegemony and socialist strategy: towards a radical democracy, p.111.
[639] Mouffe, The democratic paradox, p.65.
[640] Laclau, Mouffe, Hegemony and socialist strategy: towards a radical democracy, p.113.
[641] *Ibid.*, p.112.

new state with a shared background, then the failure of that project is understandable under pluralist definitions. The "brotherhood and unity" served as the guiding link between six states in Yugoslavia, especially after the WWII when the unity seemed as the only way to continue with peace and progress. However, this communist mantra has never managed to incorporate the growing social antagonisms. The last attempt to reconcile pluralist visions of the future of Yugoslavia, and define them altogether, was the Constitution from 1974. Even though the text of this constitution tried to leave more room for nationalities and their states to develop, even the changed definition of the unity was not enough, because there was no political unity. There was no demos, or as Đinđić says, no citizens to refer to. In the end, the "brotherhood and unity" was just a myth that, after Tito's death, many nostalgic politicians in Serbia were using to promote their reactionary politics, in the same way they will use the myth of Kosovo. That is why Milović's opinion that the Serbian people were victims of the communist and then the nationalist terrorism of these ideas, holds true to this today.

In terms of rules and norms, the 'undecidability' posits itself opposite to consensus and interpretation of rules. For Mouffe, each consensus is a type of exclusion, and not every institutionalized deliberation is equal and free in the same way for all people. These conclusions are derived from Schmitt's strong critique of consensually based democracy, where rational deliberation is leading social actors to consent. For Wittgenstein, 'obeying a rule' is a practice and our understanding of the rules consists in the mastery of a technique. The use of general terms is therefore to be seen as intersubjective 'practices' or 'customs' that are not that different from games like chess and tennis.[642] If social actors react differently when faced with a certain rule, it is in pluralism of definitions of their identities where they will find arguments for obeying or disobeying the rule. In the case these rules are defined only by the principles of rationalism that claims which rule is correct, and not by the practice of different usages of them, one can only count on simply following the rule. Reflecting Habermas's rational consensus, we can notice the possibility of applying Wittgenstein's argument. If there is a notion of what is rational and therefore what is not, how can we talk about mutual consensus? If our understanding of the norms is rooted in our relation to them, defined in a particular experience that depends on the different identities we have, there must be pluralism of the interpretation of the same norm, and it is precisely in this pluralism that Mouffe discovers the intersubjectivity and social energy that can trigger a democratic process. Habermas, despite being aware of the different interpretations of the world, constructs the rational as homogenous and uniformed,

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[642] Mouffe, The democratic paradox, p.72.

able to impose the rightness of the norm without involving in further particular interpretations, disabling the question – Why is this norm or rule right or wrong? Moreover, with the existence of different interpretations, it is natural there are conflicts around them, because they have to clash in their political existence. Because the social is "permeated by *struggle* where contesting discourses seek to invest things and relations with different meanings. It is the profound *undecidability of meaning*, and the consequent constant struggle over it, which render the social inherently "political"."[643]

These conflicts, which are, according to Laclau and Mouffe, the essence of the political nature of the social, are excluded in the discourse theory which sees their interpretations as only factual, uncontested and natural. The neutralization of different life views is the product of the fear of conflicts that Habermas and other liberals have. By submitting processes of thinking about norms and rules to the principles of rational consensus, the main goal becomes to prevent those conflicts between different interpretations to emerge, as all sides promise to follow the reason of the better argument. However, a better argument always has to be rational, and any other is not acceptable. But, an 'irrational' argument or interpretation does not disappear from the society with consensus. Quite the contrary, it continues to live in its particular life that will, in the first moments of crisis or instability, show itself as an open antagonism ready to enter into conflict, because it already has a clear vision of the friend-enemy relation. Thus, if certain rules or norms are canceling or denying parts of some social identity, this identity can, of course, change, but not solely because that is a 'rational' thing to do according to consensus. Moreover, by being in its irrationality outside of consensus, it can develop an antagonistic relation toward the 'rational.' The only way to prevent this is to give it a political meaning, because it is only in pluralist politics where these antagonisms can be prevented. As Mouffe says:

The advent of liberal pluralism as well as its continuance must be envisaged as a form of political intervention in a conflictual field, an intervention that implies the repression of other alternatives. Those other alternatives might be displaced and marginalized by the apparently irresistible march of liberal democracy, but they will never disappear completely and some of them can be reactivated.[644]

However, according to Mouffe, a certain consensus must exist, but not around symbolic

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[643] Laclau and Mouffe, Hegemony and socialist strategy, 2nd edition, p. xii.
[644] Mouffe, The return of the political, p.152.

liberal values, such as humanism or equality. She asks for consensus in democracy, on the principles of pluralist democracy. These principles are not found in canceling the conflicts, but in "creating strong forms of identification with them. This should be done by developing and multiplying in as many social relations as possible the discourses, the practices, the language games' that produce democratic 'subject positions'."[645] In this way, unlike today, there will also exist a social and political environment where alternatives can emerge, when everything that is not grasped by the 'western,' liberal idea of democracy is excluded from the right for interpretation. When Đinđić named his book "Yugoslavia as an unfinished state" he was, according to Žižek, referring to Habermas's claim about modernity. Yugoslavia did represent an unfinished project, but not of modernity in the liberalist definition. That is why its tragedy is not only in the conflict dissolution, but also in the demonization of its ideas to the ideological core.

Mouffe's critique of deliberative democracy

The world that Mouffe sees is different from the world Habermas thinks of. In her critique of the modern democratic environment, she reminds us of the aggregative model of Schumpeter's *minimal* democracy, which was present in the second half of the 20th century, and developed under the influence of Rawls' normative political theory. Mouffe believes that there are many versions of deliberative democracy, but that we can roughly divide them into two schools: one represented by Rawls, and the other by Habermas. Both authors think that they have found a solution to the problem of compatibility between liberalism and equality, which is a problem liberal theory deals with from its beginnings. On the other hand, Mouffe thinks that instead of finding a solution, they both end up privileging one dimension in relation to another: in the case of Rawls that is liberalism, in the case of Habermas it is democracy. As far as the latter is concerned, in "Between facts and norms" he makes it clear that one of the objectives of his procedural theory of democracy is to bring to the fore the "co- originality" of the fundamental individual rights and of popular sovereignty. On the one hand, the self-government serves to protect the individual rights; on the other hand, these rights provide the necessary conditions for exercising popular sovereignty. Once they are envisaged in such a way, "then one can understand how popular sovereignty and human rights go hand in hand,

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[645] *Ibid.*, p.151.

and hence grasp the co-originality of civic and private autonomy."[646] In this way, the political is canceled within the deliberative democracy that cannot recognize it. According to Mouffe, the trouble with deliberative democracy and with liberalism in general, is that they try to evade, and even have fear of, politics. Their moralism invites intransigence, their rationalism denigrates the passions, their quest for consensus denies the tendency to antagonism, and their search for final answers flies in the face of value pluralism.[647] In conclusion, deliberative democracy is canceling the true and inevitable nature of the political, failing to incorporate it in its theoretical and practical core, which can be seen in the rise of right-wing populist parties, that are, through the channels of the representative democracy, managing to occupy power positions in some democracies, changing the face and nature of it, and offering a right-populist politics against the neo-liberal ones.

Habermas states that only political systems can "act."[648] His critique of the ongoing uncoupling never ends in the critique of power relation. Quite the contrary, he keeps the institutional framework and power relation of the 'traditional,' modern, liberal democracy. The public opinion worked in the democratic processes, ending as a product of institutionalized channels for free and equal communication and deliberation, established by the decisions of the power holders and, according to Habermas, this system-dependent process will "only point the use of administrative power in specific directions." We can observe this very well in his writings about the EU. Although the existence of a stronger parliament depends solely on the political decisions of the Council members, Habermas continues to develop his plan for a new Union without entering into the nature of that decision. Moreover, his romanticized and heroic view on the possibilities of the European Parliament is part of what Mouffe and Schmitt call the identification of liberalism with democracy. The goal of democracy thus becomes the creation of a consensus, and that consensus is only possible if people are able to put aside their particular interests and think as 'rational' beings. However, while we want the end of the conflict, if we want people to be free, we must always allow for the possibility of conflict and provide an arena where differences can be confronted. The democratic process should provide that arena. A liberal democratic regime, while fostering pluralism, cannot equate all values, since its very existence as a political form of society requires a specific ordering of values which precludes a total pluralism. A political regime is always a case of 'undecidable decided'

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[646] Mouffe, The Democratic Paradox, p.85.
[647] *Ibid.*, p. 25.
[648] Habermas, BFN, p.300.

and this is why it cannot exist without a 'constitutive outside'.[649]

4.8 Towards conclusion

Once it is granted that the tension between equality and liberty cannot be reconciled and that there can only be contingent hegemonic forms of stabilization of their conflict, it becomes clear that, once the very idea of an alternative to the existing configuration of power disappears, what disappears also is the very possibility of a legitimate form of expression for the resistances against the dominant power relations. The status quo has become naturalized and made into the way 'things really are'. This is of course what has happened with the present Zeitgeist, the so-called 'third way', which is no more than the justification by social democrats of their capitulation to a neoliberal hegemony whose power relations they will not challenge, limiting themselves to making some little adjustments in order to help people cope with what is seen as the ineluctable fate of 'globalization'.[650]

Regarding the argument of universalism and globalism, Mouffe's approach answers with the image of the multipolar world, and the multipolar perspective that comes with it. Even in the proposed democratic model of Habermas where the supposed rational readiness needs to motivate people to abandon the plan of following their interests and adopt a more rational approach, it remains unclear what are the rules that define what is a rational consensus. More importantly, by fixing rational consensus to liberal rationality, Habermas excludes potential conflicts of interests that are at the core of the political. Mouffe, on the other hand, proposes to observe the ongoing crisis in both left and right oriented politics, from a different angle. Mouffe's critique of liberalist army of rationality and cosmopolitanism challenges not so often the questioned premises of the contemporary 'Western world.' Her input is not only showing the shortcomings and flaws of the claims that modern democracy presents as its own, but it goes beyond critique, opening the door towards a different 'world' and finally to pluralism of rationalities. First of all, the 'apparent' triumph of the current model of liberal democracy needs to be questioned and analyzed in order to leave room for other solutions and types of democracy. Her agonistic model is one of those types, such as the deliberative model of Habermas. In any case, her model has a tendency to offer a political platform in which conflicts,

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[649] Mouffe, The return of the political, p.152.
[650] Mouffe, The democratic paradox, pp.5-6.

interests and pluralistic structure of preferences and values can clash in the political way as social 'adversaries' whose clashes are not going to be interpreted as irrational and 'bad' for the stability of the system, but as the social engine that enables the political unity. A platform that did not exist in Yugoslavia, where the only 'consensus' was constitutional, and thus the only unity was the legal unity. Pluralism in Yugoslavia, seen in the differences between the six nationalities and even more ethnicities, at least theoretically and academically, can be interpreted as the opportunity that could have been used in the ongoing change of Yugoslav society. Moreover, the legal structure that existed around this pluralism, although it was a communist one, failed to protect the potential of conflicts between nationalities and the future of the federation, the conflicts that are inevitable and essential for the political and pluralist model of democracy.

In addition to the limited interpretation of her ideas, there is at least one question that can be posed in front of Mouffe, and it considers the modern law. It is clear that Mouffe writes in the name of the excluded, the different, and she writes against intellectual colonization, for open, democratic, political society, where people will have more room to decide upon their future because their clashing interpretations of the world will be part of democratic politics. In this society, the concept of justice and the interpretation of norms must also be organized under the logic of "the impossibility of closure"; they must be a specific type of practice, and not just interpretation. Besides Schmitt's antagonisms in the political, she adds Wittgenstein's contextualism in order to define more closely the pluralist model of democracy she finally proposes. However, 'the legal' in her theory is heavily dependent on the political unity that (although less than Schmitt's theory) still requires a high degree of homogeneity. It remains unclear how, in the agonistic model of democracy, that 'traditional,' particular, will provide the part of the normative structure for polity. Moreover, can this social structure, which is partially un-fixed in its pluralist meaning, and partially fixed in its shared values, be used for the legal framework of the new pluralistic model of democracy or will it bring upon an even wider gap between the new politics and the democratic, constitutional law? Following these questions, it is possible to state that Mouffe is lacking the new model of law to serve her political structure, the law that will not only institutionalize social conflicts in the political manner, but will be flexible enough to accept pluralisms into its normative structure. Otherwise, there could emerge an antagonistic structure around and in the law itself. The law might always be serving the political in both Schmitt's and Mouffe's view (or in the case of any other 'serious' leftist reader of Schmitt), but in the case of the latter, there is a need for a more interpretative law that could

understand never fixed and always relational social identities. Besides the critique of modern liberal democracy, she is lacking a serious critique of the law that could lead her towards a new model of law within her political frame of agonistic democracy. As in her political thinking, where notions like rationality, universality, cosmopolitan human rights, consensus, etc., are strongly challenged and provoked by many critiques, her opinion on the law should be the same. It is not enough to strengthen one argument more than the other, thinking that it will be strong enough to provoke a domino effect. This is precisely what Habermas is trying to do in his latest articles on the European Constitution, except that his model starts from the modern law.

Finally, from the critique of the liberal concept of equality, Schmitt manages to envisage a reality of the current liberal democracy where "[u]nder conditions of superficial political equality, another sphere in which substantial inequalities prevail (today, for example, the economic sphere) will dominate politics."[651] The fear that originally led Habermas to think about the 'colonization of the lifeworld' and the ongoing loss of legitimacy. Similarly, it is precisely on this critique that an unstable alloy made of liberalism and democracy was revealed, and that Mouffe's political thinking is based upon, and that Habermas's legal theory is still trying to reconcile. However, Mouffe manages to 'scratch behind liberal rhetoric' not in order to reveal its complete absurdness and tragic fate as Schmitt does, but, on the contrary, to prevent the tragic destiny of the project that, according to her, can still be reformed in a way to serve people. In this way, she challenges both Habermas and Schmitt, since she can provide both of them with a very strong critical insight.

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[651] Schmitt, Crisis of Parliamentary Democracy, p.13.

Conclusion

I

The main questions this paper tended to examine consider the fundaments of modernity, and how to understand the role and nature of the law and politics in it. In the book *Metafísica e política,* Milović observes how metaphysics, that was once the basis of politics, becomes its product in the context of modernity. To understand this switch, he departs from the traditional world that ends in the modern concept of subjectivity where the subject becomes recognized. That is why Hegel's presuppositions are so important for this study. The modern world is a world of recognized freedom, according to Hegel. The traditional world is moral and the modern world is free.[652] It is with the French Revolution that the free individuals become recognized in the Universal Declaration of Human Rights, and when the slave/master relation is overcome in the world history by the mutual recognition of the 'rights to have rights.' The law becomes the realization of freedom in the modern world history (ultimately the only one that Hegel thinks about), because free will is confirmed in this law.

The other motive we get from reading Hegel is that the world is social, and therefore freedom is a social concept, and not a natural feature that human beings need to discover. Thus, he breaks with the jusnaturalism that sees the state as the moment when we need to abandon our freedom for the sake of stability and security. On the contrary, for the German philosopher, the state means realization of this freedom, and this dialectics of the modern state as a quest for freedom was envisaged in the first chapter. For Hegel, the truth about the particular is always in the universal, and the latter gets its reason in the modern state.

Finally, what Hegel shows is that "we don't have to choose between jusnaturalism and positivism. By looking for another theory about the human being and reason, we can overcome the both."[653] However, by proclaiming the end of history with the French Revolution, and by excluding others from that history (Hegel's writings on women and Africa are an obvious example of this exclusion) Hegel stays far from "the diagnosis that reveals the profound inequality in the modern capitalism."[654] Since history is always a realm of domination of the universal over particular, "the philosophical concept of subjectivity therefore, prepares the

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[652] Milović, Metafísica e política, p.46.
[653] *Ibid.*, p.49.
[654] *Ibid.*, p.59.

violence."[655] This synthesis is what Đinđić's book "Subjectivity and violence" reflects upon, and that is seen in the reading of Milović as a consequence of the modern identity and modern metaphysics. That is why, at the end of his examination of modern metaphysics, Milović asks for a return to the concrete – to a subject that got lost in the abstractness of modernity. Even in Habermas's usage of the word 'intersubjectivity,' the subject seems to be increasingly lost, excluded and marginalized. Habermas's theory via critique wants to think of an alternative that can still happen in modernity. His philosophy does not reach the outside of modernity, where the reconstruction of the social reason under the premises of intersubjectivity and communication can lead to democracy, equality and freedom. Democracy is still possible in modernity, and that is clear in Habermas's latest writings. Finally, it is the intersubjectivity that can make our social world free of violence. That is why, in my opinion, Hegel and Habermas represent the continuation of the modern project, and as I have shown in the last chapter, the latter fails to give the particular structures a chance as the possible carriers of an alternative and, like Hegel, ends with proclaiming the end of history in the European positivist reason that becomes a criterion that separates the pre-modern from the modern world.

II

The politics in the modern world has become just a tool for maintaining the systems working – this diagnosis provokes Schmitt to think of an alternative to the regime of the Weimar Republic. Schmitt saw that the state was becoming the means of positivist legality, carried by the processes of depoliticization and neutralization, where again there is no norm to balance and control the system, but only a hidden decision. However, as it was shown in this paper, Schmitt's alternative ends with what Kervegan calls the "metaphysics of decision." Albeit, what Schmitt reveals to us against Hegel's philosophy of right and history is that Hegel "chose, with all the consequences that this could imply, the positivity and not the dialectics."[656] This critique, in my opinion, can also stand against Habermas's call for a cosmopolitan law. It is in his critique, or rather, in the rejection of positivism and liberalism, where Schmitt comes to the point that democracy a priori does not happen in modern systems. Even though he insists on searching for a new form of democracy and representation of the will of people, "Schmitt is no democrat, he recognizes and insists on the things democrats often wish to forget."[657] And this is exactly where Chantal Mouffe continues his argument. She continues to search for the

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[655] *Ibid.*, p.73.
[656] Kervégan, Hegel, Carl Schmitt, p.360.
[657] Hirst, Carl Schmitt's decisionism in Mouffe, The challenge of Carl Schmitt, p.16.

possibility of the political in the modern world, revealing the deep depoliticization of our detached societies. Politics calls for *decision* and, despite the impossibility of finding a *final* grounding, any type of political regime consists in establishing a hierarchy among political values.[658] That is why she asks for political pluralism among the agonistic context of our common existing. And it is exactly the lack of political pluralism that Đinđić saw as the *hamartia* of the socialist system of Yugoslavia. "The socialist model of social order emerges as a result of a direct critique of political democracy (...) [It] is restored as a permanent abolition of political pluralism."[659] Is it possible to think of this kind of pluralism in the modern liberal democracy and in the modern law? By envisaging the shortcoming of Habermas's theory, this paper shows that simply is not the case and, as Milović concludes, the modern politics and law are creating the new metaphysics where we end in reproducing the 'rational model' without questioning its basis.

In the VIII thesis about the philosophy of history, Walter Benjamin says that the world we live in is a time of exception that rather became a normal state, a rule and a continuous state of affairs. Interest Benjamin had in *Ausnahmezustand* is not only due to its legal paradox, but also as a possible rupture that can be opened and used as a path towards a more complete critique. Likewise, this paper shows that Yugoslavia represents a modern exception, and it is from thinking about it, by reflecting on the violence that produced its political and territorial disintegration, and the consequences of that violence, that we can use to re-think the legal and political foundations of the "traumatized modernity."

III

Kafka's short essay "Before the Law" casts light on the absurdness of the relation between social and legal sphere, and on the power of symbolic irrationalism. A man 'from the country' asking for admittance to the Law, presents rationality that is put outside of that law, sitting on the stool beside the gates of the Law.
"(…) the Law, he thinks, should be accessible to every man and at all times, *but* [emphasis added] when he looks more closely at the doorkeeper in his furred robe, with his huge pointed nose and long, thin, Tartar beard, he decides that he had better wait until he gets permission to enter."[660]

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[658] Mouffe, The return of the political, pp.151-2.
[659] Đinđić, Jugoslavija kao nedovršena država, p.94.
[660] Kafka, Before the law.

The mere existence of the doorkeeper, and the gate, is the state of exception that became the rule precisely because of the fear of the unknown that is disguised as a higher rationality, pictured in hierarchically ordered doorkeepers. Kafka will show the absurdness of the given situation in the last sentence of the text, when all the curtains fall, and the truth is finally given the right to show itself. The gate was made only for the old man from the country, and when his eyes rest, the doorkeeper can close it. This is how Benjamin saw the existing form of the state of exception – through the irrationality of politics and law, through violence in history and violence over these men and women 'from the country.'

Other kind of violence that law brings, physical and symbolic violence, was highlighted in a short story "In the penal settlement,"[661] where Kafka uses a very powerful metaphor to emphasize the power and violence of law. The 'remarkable legal apparatus,' that inscribes upon the body of condemned man which command he had disobeyed, gathers all the cruelty of legal punishment, power and authority. However, the metaphor becomes even stronger in the fact that the condemned person does not know what he has been sentenced for. "There would be no point in telling him. He'll learn it corporally, on his person."[662] The absolute cruelty of the divine, great and too complicated even for its creators, the machine stands for the Old Commandment, which is going to be substituted with the New Commandment that comes wrapped with the notions of human rights and liberalism. However, at the end of the story, the 'explorer' who represents an enlightened and progressive system, pushes away men who try to leap from the island, and shows his true face that was previously hidden under the mask of neutrality of an explorer. With this twist at the end of the story, Kafka shows how the modern system does not imply a better system, and that the powerful machinery of authority that cannot show mercy, persists in different forms and under different names.

This machine is a legal machine, and its power comes from the authority, while its engine uses violence as a fuel. Benjamin, like Kafka, saw this continuous and dangerous justification of legal violence that became a part of the rational discourse, and inevitable as if it were a divine creature. Moreover, Benjamin's concept of time is grounded in the idea of this kind of violence that becomes historical and legitimate due to its power in history. Finally, there is no time when violence is justified, and when it is not. That is why when Habermas used the syntagm of 'justified violence' for the NATO bombing of Serbia, his critical argument had seized, and violence went inside of the social-philosophical discourse. Moreover, in his latest

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[661] This story has been also translated as *In the penal colony* (original title is *In der Strafkolonie*).
[662] Kafka, In the penal settlement in Kafka: Metamorphosis, p.158.

writings on the modern law, Habermas fails to see that instead of the battle for legitimacy, what is becoming an increasingly obvious feature of modern political systems is the ongoing battle for legality that brings with itself the articulated legitimacy. The realm of governmental politics is increasingly moving towards what Kirchheimer called the "law-based power" that becomes the main goal of the regime. Contemporary political regimes in Serbia and Brazil are very good examples of such power.

IV

For Derrida, law is always a force; an authorized force which is authorizing itself. The fact that it is "authorized" does not have to do anything with its ability to be just. The word *enforcement* of the law is important for understanding the concept of law. The word "enforceability" reminds us that there is no such thing as law *(droit)* that does not imply *in itself, a priori, in the analytic structure of its concept,* the possibility of being "enforced, applied by force."[663] Agamben will talk about the 'horrible mystery of law and punishment' because, as he argues, the truth is that the law is a process, and the process is in its essence wrapped in a mystery that individuals will hardly ever understand. When one enters in the 'house of judgment' (as Hannah Arendt called the courtroom), or has any other contact with the law, that relation has to start with some process. That is why Kafka is read carefully by philosophers, and Agamben will note that the former had recognized the process at the core of the law that he reflected on in the story of Joseph K. What is particular for Joseph K. is that he felt on his skin the inevitability of the law. When he entered the process, he could not get out. That is another feature of the legal process that makes it even harder to break, since the rollercoaster of its procedures and their specific nature do not resemble anything common that one had contact with in one's social life.

Furthermore, as Habermas will notice, law uses a language that does not resemble a common language, and that is one of the reasons why the social and legal sphere cannot communicate. When we, for example, enter into the 'house of judgment,' we step on a unique scene that will host a process that many of us find difficult to understand. We will fear and respect that process even though we are not completely sure how to define it. This is the great mystery of law that makes its 'rational' structures prone to the penetration of the 'irrational,' which brings us to Adorno's claim: "To think means to think something. (…) The *ratio*

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[663] Derrida, Force of law: The "Mystical foundation of authority", p.6.

becomes irrational where it forgets this, where it runs counter to the meaning of thought by hypostasizing its products, the abstractions, contrary to the meaning of thinking. "[664] In the end, what is the meaning of law, if not justice? Thus, can a positive law, which is indubitably full of a special type of violence – the legal violence, be used to protect the human rights and be related to justice? Benjamin will say that the law that is no longer applied, but is only studied (referring here to Talmud), is the door to justice. In other words, if we do not apply the law, we can reach the meaning of justice. Law cannot be applied without the state that has a unique right to apply it. This would mean that without the state it would be possible to have a just law. However, the violence of law is not exhausted by the violence of the state. Law remains violent even where it is not state law.[665]

<div align="center">V</div>

The purpose of this study was not to compare Schmitt and Habermas, to show how the former influenced the latter. I follow and reflect upon the timid and somewhat secret dialogue between these two German authors, but the central point that I derive from it is that Habermas represents the protector of the liberal discourse according to Schmitt's 'criteria.' Therefore, Schmitt's critique can be put with full legitimacy in front of Habermas's philosophy. Just the way Chantal Mouffe does. Using the power of Schmitt's critical mind, Mouffe manages to penetrate into the opacity of modernity grasped in the emerging liberal model of modern democracy.

Moreover, using the history of the socialist Yugoslavia to frame the main ideas of this study with the example coming from modern history, does not signify that this paper is a story of the fall of communism and the rise of nationalism. Yugoslavia represents the loss of that particularity, of the particular identity, under the force of the winds of the universal reason and globalization. The NATO bombing and the empty, ominous silence between Kosovo and Serbia only confirm that the antagonisms did not disappear with the end of the war in Bosnia and the first disintegration of Yugoslavia. Therefore, "[w]ho won the last war were not the particular republics, which have separated from the Yugoslavia. They all, more or less, lost their own autonomy and identity. Who won the war were the US and European companies."[666] In the words of Mouffe, "[t]he 'free world' has triumphed over communism and, with the weakening

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[664] Adorno, Negative dialectics, p.34.
[665] Fischer-Lescano, A "Just and non-violent Force"? A critique of law in world society, p.3.
[666] Milović, Política e metafísica, p.49.

of collective identities, a world 'without enemies' is now possible."[667]

On the path of thinking about alternatives to the modern concept of reason, in the way that is said above, we need to think of politics and law. The radical critique of law is what is lacking in thinking about the radicalization of democracy. That is why, for a future investigation, the critique of law, its relation to violence, and its possible openness to the concept beyond the positivist law, is a direction in which the reader's attention might go.

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[667] Mouffe, On the political, p.1.

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