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Hans Kelsen and Claude Lefort: On Human Rights and Democracy

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Introduction

1. *An unusual title and an unlikely comparison*

The history of philosophy is undoubtedly full of authors and writings that one can study in order to deal with the problematic articulation between the Universalist discourses and the concept (or experience) of Otherness. Given this fullness of choices, this paper's title might seem awkward since neither Hans Kelsen's writings nor Claude Lefort's works appear *at first sight* to deliver thoughts on these themes.

Indeed, Hans Kelsen (1881-1973) is one of the most significant European legal thinkers of the mid-twentieth century. Surely, one is familiar with the author's major work, the *Pure Theory of Law*. In this emblematic book, and in more than four hundred writings, one finds the expression of the same idea: Kelsen's lifetime work is in fact an effort to build a *scientific* knowledge of law. This perspective is based on a particular neo-Kantian epistemology¹ of human cognition: because men can only build a scientific knowledge with empirical facts as raw material, they cannot access an absolute concept of justice. Therefore, the scientific effort to *know* the essence of law is correlated with a strong rejection of Natural Law. According to Kelsen, the Natural Law doctrine is non-scientific *by definition* since it pretends to detain an absolute concept of justice; in other words, it oversteps what the *Pure Theory* considers to be the limits of human cognition. This radical opposition to Natural Law theories in the name of science is a strong claim that one can find haunting the whole work of Kelsen.

On the other hand, Claude Lefort (1924-2010) is a contemporary French political philosopher known for his conception of Democracy as an "empty place", and for his

We use as much as possible the English translations available. For this reason, we also indicate the original references used with the help of the following abbreviation: "OV". The reader will find a complete list of the original texts and their translations at the end of the paper.

¹ On this particular topic, see: Merle, J.-Ch., "La conception du droit de Hermann Cohen et de Hans Kelsen", *Revue germanique internationale*, 6, <http://rgi.revues.org/1095> and Wilson, H., "Is Kelsen really a Kantian?", in: Tur, R. & Twining, W., (eds.) *Essays on Kelsen*, Oxford: Oxford University Press, 1986, pp. 37-64.

denunciation of totalitarianisms². Lefort's work focuses on these political forms because, according to him, they are not political regimes but a way used by people to live in the Modern Era³. From this perspective, the modern political world is considered and defined as something in movement, dynamic, and always changing – in short: modern societies are a new way of both doing and thinking the political. This claim makes sense if one considers Lefort's view on the Modern Era itself: it is the point of history where men are experiencing a new world, a world where the ultimate markers of certainty have been dissolved⁴. This new *Weltanschauung*, this unique worldview leaves men with an alternative: either they choose to assume this unsettling radical indeterminacy, or they choose to annihilate it. The first choice is precisely what Democracy is: it is the choice to assume together that every decision taken will be questioned and that nothing can be settled once and for all. The second choice, on the contrary, is that of Totalitarianism. It is the refusal of the constant questioning implied by Modernity: in this framework, people refer to a symbolic pole that will be in charge of indicating what is good and what is not, what is just and what is unjust, etc. In other words, they try to annihilate the uninterrupted questioning correlated with their modern conditions, by hiding it behind a symbolic pole of power that seems to be stable.

These short introductions to Hans Kelsen and Claude Lefort might force one to assume that a comparative reading of the two authors will be, not only out of focus regarding the theme illustrated earlier – the interrelation between Universalist discourses and the concept of Otherness – but also inconsistent. Furthermore, nothing seems to link them to one another considering they were not contemporaries and not even compatriots.

² See Flynn, B., *The Philosophy of Claude Lefort, Interpreting the Political*, Evanston, Illinois: Northwestern University Press, 2005, p. XXI: "Arguably Lefort is one of the few political philosophers, together with Hannah Arendt, Raymond Aron, and a small number of others, who have elaborated a plausible interpretation of the totalitarian phenomenon."

³ See Lefort, C., "Three notes on Leo Strauss" in *Writing, the political test*, (D. Ames ; Trans.), Durham, NC: Duke University Press, 2000, p.200 : "Let anyone who doubts that [the fact that Democracy cannot be reduced to its institutions] simply observe how difficult it is, for a people accustomed to live under a despotic regime, to regain the will to be free. A change of institutions does not suffice to achieve it." (OV: Lefort, C., "Trois notes sur Leo Strauss", in *Ecrire, A l'épreuve du politique*, Paris: Calmann Lévy, 1992, p.296). In other words, according to Lefort, Democracy is not merely defined by democratic institutions.

⁴ See Lefort, C., "The Image of the Body and Totalitarianism" in *The Political Forms of Modern Society. Bureaucracy, Democracy, Totalitarianism*. (A. Sheridan; Trans.), Cambridge, Massachusetts: MIT Press, 1986, pp. 292-319, pp.303-304 : "Democracy inaugurates the experience of an ungraspable, uncontrollable society in which the people will be said to be sovereign, of course, but whose identity will constantly be open to question, whose identity will remain latent." (OV: Lefort, C., "L'image du corps et le totalitarisme", in *L'invention démocratique*, Paris: Fayard, (1981) 1994, pp.172-173).

2. *The possibility of a comparative reading*

Nevertheless, this paper would like to open the door to such a comparative reading. The first reason that seems to justify such a gesture is Leo Strauss: although there has never been a direct discussion connecting Kelsen and Lefort, Strauss seems to be able to bridge their respective works. Indeed, *Natural Right and History* – probably Strauss’s most famous work⁵ – is a more or less direct criticism of Kelsen’s legal positivism⁶. Strauss’s criticism of modern social sciences is quite well known: in his view, they are a poisoned fruit since they directly lead men to nihilism⁷. What he in fact denounces is the moral relativism that these sciences defend and postulate as the only legitimate rational option for men. In this framework, one can understand why, according to Strauss, the Kelsenian legal positivism and its rejection of Natural Law constitute a perfect example of modern moral relativism.

Moreover, Lefort reads Strauss’s work with admiration and considers him to be “one of the most penetrating thinkers of our time (...)”⁸. But despite his sympathy for Strauss, and although he agrees that relativism can potentially lead to nihilism, Lefort does not completely adopt Strauss’s rejection of moral relativism. On reflection, he contends, moral relativism can appear to be more than merely a modern inconsistency; it can also be interpreted as the consequence of modernity’s ultimate indeterminacy. Therefore, it appears to be both the result and the condition of Modern Democracy.

⁵ See Smith, B. S., “Leo Strauss, the Outlines of a Life” in: Smith, S. B. (ed.) *The Cambridge Companion to Leo Strauss*, Cambridge: Cambridge University Press, 2009, p.32 : “*Natural Right and History* remains even today Strauss’s most widely read book.”

⁶ See Strauss, L., *Natural Right and History*, Chicago: Chicago University Press, (1953) 1965, p. 4 fn. 2. I quote at length: “The assertion that there exists no legal order [*Rechtsordnung*] in despotic regimes, but instead the arbitrariness [*Willkür*] of the despot, is entirely senseless... since a State ruled in a despotic way, also constitutes a certain regulation [*Ordnung*] of human behaviors... This regulation is precisely the legal order. Denying its legal character is only natural law’s naïveté or arrogance... What is interpreted as arbitrary is simply the despot’s legal possibility of making every decision himself, of determining in an unconditional way the actions of subsidiary bodies, and of modifying or repealing at any time the general or even only the particular validity [*Geltung*] of established norms. Such a state is a legal state [*Rechtszustand*], even if it is judged as harmful. It also has positive aspects. The not so unusual call for dictatorship in modern states of law clearly demonstrates this.” Since Strauss directly quotes Kelsen in German, I use and complete David Novak’s translation here. See Novak, D., “Haunted by the Ghost of Weimar: Leo Strauss’ Critique of Hans Kelsen” in: Kaplan, L. V., & Koshar, R., (eds.) *The Weimar Moment: Liberalism, Political Theology, and Law*, Lanham, Maryland: Lexington Books, 2012, p.395.

⁷ See Strauss, L., *Natural Right and History*, p. 3: “The contemporary rejection of natural right leads to nihilism – nay it is identical with nihilism.”

⁸ Lefort, C., “Politics and Human Rights”, in: *The Political Forms of Modern Society*, pp. 239-282, p.239. (OV: Lefort, C., “Droits de l’homme et politique”, in : *L’invention démocratique*, p.45). See also: Lefort, C., “La dissolution des repères et l’enjeu démocratique” in : *Le Temps Présent. Ecrits de 1945-2005*, Paris: Belin, (1986) 2007, p. 551, where he states that Strauss is one of the rare contemporary philosopher who tries to build a political philosophy. Claudia Hilb gives a study of Lefort’s reading of Strauss in her article: “Claude Lefort as Reader of Leo Strauss”, in: Plot, M. (ed.) *Claude Lefort: Thinker of the Political*, New York: Palgrave Macmillan, 2013, pp.71-86.

If one takes a closer look at Lefort's definition of Modern Democracy, one sees not only the possibility of a comparative reading with Hans Kelsen, but also the possibility of articulating the link between Universalist discourses and the concept of Otherness: this constitutes the second reason justifying the comparative reading this paper aims to achieve. Indeed, according to Lefort, Modern Era is the time defined by the discovery of Otherness. In other words, the awareness of Otherness emerges within Modern Democracy. In this sense, the moral relativism defended by modern social sciences – or, as the paper will show, one might also say the rejection that modern social sciences make of universalist discourses – can be read as a direct effect of the entry of Otherness in people's *Weltanschauung*. This specific attempt to capture the essence of Modernity as the particular emergence of the Otherness allows one to read Kelsen and Lefort together.

The main idea here is to determine whether Lefort's interpretation of Modernity can be applied to the Kelsenian relativistic axiology. If such a comparison works, then it will not only give credit to Lefort's claim that the discourses produced by modern social sciences are in fact motivated by and based on the discovery of Otherness, but it will also "rehabilitate" Kelsen's moral relativism⁹. The latter could then be perceived not as inconsistent, but as an example of how a scholar tried to deal with modernity's radical indeterminacy. Furthermore, this comparative reading could also leave room for a new interpretation of Kelsen's moral relativism as compatible with a particular concept of Human Rights, namely the modern one. In short, the main goal of this paper is to raise the question concerning whether it is possible to combine the awareness of Otherness – i.e. a rejection of Universalist discourses – with a form or concept of human universality. The ambition here is not to answer, but only to raise this question, animated by the conviction that:

"Genuine knowledge of a fundamental question, thorough understanding of it, is better than blindness to it, or indifference to it (...)"¹⁰

3. Plan

In order to raise the question of a potential compatibility between the awareness of Otherness on the one hand, and a form of universality on the other, some hypotheses should first be formulated and defined.

⁹ Rehabilitation seems an appropriate gesture since only few scholars consider the moral relativism defended by Kelsen to be more than an inconsistency. See for instance: Paulson, S. L., "On the Puzzle Surrounding Hans Kelsen's Basic Norm", *Ratio Juris*, 13 (3), 2000, p. 293, who considers that, in order to defend his separation thesis (between law and morals), Kelsen is not offering arguments but only "a crass and vulgar moral relativism".

¹⁰ Strauss, L., "What is political philosophy?" in *Journals of Politics* (19), 3, 1957, p.344.

- 1) How does moral relativism equate to the rejection of universal discourses?
- 2) Consequently, how can this rejection be understood as a result of Modernity?
- 3) How can Modernity be understood as recognition of Otherness?

The current paper will attempt to outline some answers to these questions based on four main texts.

Firstly, in order to explicate the main lines of the Kelsenian relativistic axiology it seems crucial to consider his second edition of the *Pure Theory of Law*¹¹, since one can find within it the grounds for a limitation of human cognition. His Farewell Lecture, “What is justice?”¹², is also relevant to this theme since in it he claims that the human world is a world of relative and conflicting values. The combination of these two ideas leads to the rejection of Universalist discourses – identified with the ones of Natural Law theories – in the name of science.

Secondly, three of Lefort’s articles seem to be relevant. The first, “The Image of the Body and Totalitarianism”, enables us to understand his symbolic political philosophy, and more importantly, to introduce his definition of Modernity. “Dissolution of Marks and Democratic Challenge”¹³ focuses more on the concept of moral relativism, whilst interpreting it as a consistent reaction to modern indeterminacy. Finally, “Politics and Human Rights” offers a restricted concept of Human Rights, reminiscent of Hannah Arendt’s views¹⁴, namely that human rights mean *the rights to have rights*.

¹¹ Kelsen, H., *Pure Theory of Law*. (M. Knight; Trans.) New Jersey: The Lawbook Exchange LTD, (1967) 2008. (OV: *Reine Rechtslehre*. Wien: Verlag Österreich, (1960) 2000.)

¹² Kelsen, H., “What is justice?” in *What is justice? Justice, Law and Politics in the Mirror of Science*, New Jersey: The Lawbook Exchange LTD, (1957), 2013, pp.1-24. One can also listen to the Farewell Lecture Kelsen: <http://gradlectures.berkeley.edu/lecture/what-is-justice/>

¹³ Since this article is unfortunately not yet available in English, we will refer to the original French text, and translate some parts of it when necessary: Cf. Lefort, C., “La dissolution des repères et l’enjeu démocratique” in *Le Temps Présent*, pp. 551-570.

¹⁴ Arendt and Lefort’s views are close, but not identical. In fact, Lefort himself mentions that “the expression [the right to have rights] is borrowed from Hannah Arendt, although she uses it in a rather different sense.” (Lefort, C., “Human Rights and the Welfare State”, in *Democracy and Political Theory*, (D. Macey; Trans.), Cambridge: Polity Press, (1984) 1988, p.37; OV: Lefort, C., “Les droits de l’homme et l’Etat Providence”, in *Essais sur le Politique*, Paris: Seuil, 1986, p. 55). From Lefort’s perspective, the right to have rights is understood as the right to *claim* rights. Hence, the expression implies a certain opposition to the power, an opposition needed in order to earn new rights. Moreover, this new meaning of right emerges with Democracy. Herein lies the main point of disagreement between the two scholars: according to Lefort, Arendt’s use of this expression as synonymous with individual rights makes her incapable of embracing *social* vindications. Indeed, the right to have rights is related to her concept of birth: it is within this event – an event that all individuals share in common – that lies the notion of universal right. All human beings ought to have the right to have rights due to the mere fact that they are born in a human community that, in turn, ought to recognize them as its members. In short, Lefort finds the expression to be strongly

I. Moral relativism as a rejection of universal discourses: the Kelsenian epistemology

Kelsen's axiology allows one to consider moral relativism as a rejection of universal discourses, particularly the ones defended by Natural Law doctrines. From this perspective, the discourses that use universal concepts are considered to be universal discourses: this definition is the one that will be used throughout this paper. In Kelsen's view, these discourses are inconsistent. Firstly, they are inconsistent because they go beyond the limits of human cognition, and secondly, they dogmatically ignore the human empirical world where only relative values exist.

1. *The Pure Theory of Law: the limits of human cognition*

Kelsen's moral relativism is a direct consequence of his scientific goal to build a pure knowledge of law. Therefore, his moral position is based on what he considers to be a legitimate and scientific knowledge. In this framework, the question of morality is only raised because of the question of human knowledge, but how does Kelsen define legitimate human knowledge?

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The difference he makes between 'knowing' and 'evaluating' is helpful here. According to Kelsen, to know something is an action not only different from, but also contradictory with the fact of evaluating something. When one knows something or tries to access such knowledge, one is in fact using their cognition, and the knowledge that emanates from cognition is basically a descriptive one: to know something means to try as

related to Democracy, while Arendt thinks it points to a human natural right given by the mere fact of being born. With regard to Arendt's expression, see *Origins of Totalitarianism*, New York: Harcourt, Brace, Janovich, 1951. A helpful study that places the expression in the context of the entire Arendtian work can be found in both: Birmingham, P., "The An-Archic Event of Natality and the "Right to have Rights"." in *Social Research*, (74), 3, 2007, pp.763-776 and Birmingham, P., *Hannah Arendt and Human Rights: The Predicament of Common Responsibility*, Bloomington: Indiana University Press, 2006. The latter focuses on the particular difference between Arendt and Lefort concerning the "right to have rights" pp. 44-45. On the general opposition between the two scholars, see also the following articles by Claude Lefort: "Hannah Arendt and the Question of the Political" (1985) in *Democracy and Political Theory*, pp. 44-55 (OV: "Hannah Arendt et la question du politique" in *Essais sur le politique*, pp. 64-78.); "Hannah Arendt: antisémitisme et génocide des juifs" (1982) in *Le Temps Présent*, pp. 505-528 ; "Hannah Arendt on the Law of Movement and Ideology" and "The Perversion of Law" (1999) in *Complications, Communism and the Dilemmas of Democracy*, (J. Bourg ; Trans.) New York: Columbia University Press, 2007, pp.146-157 and pp.158-165 (OV: *La complication, Retour sur le Communisme*, Paris: Fayard, 1986.); "Le sens de l'orientation"(1996) in M., Merleau Ponty, *Notes de cours sur l'origine de la géométrie de Husserl suivi de: Recherches de la phénoménologie*. Paris: PUF, 1998, pp. 221-238; "Thinking with and against Hannah Arendt" (2002) in *Social Research*, (69), 2, 2002, pp.447-459. For a short overview of some differences between Arendt and Lefort see Flynn, B., *The Philosophy of Claude Lefort, Interpreting the Political*, pp. 255-267.

much as possible to grasp it *as it is*. In this operation, the knowing subject is a subject exterior to its object; he plays the role of an objective observer. On the contrary, when one evaluates something, one is exercising one's will: evaluation is an act of human will and not an act of human cognition. The nature of human will is prescriptive; it tries to make its object in conformity with some desires. Therefore, evaluation is essentially an attempt to modify objects: it is an ideological act¹⁵.

To understand how Kelsen equates the pair knowledge/evaluation to the pair rational/irrational, one has to keep in mind the main distinction he makes in his *Pure Theory of Law*, namely between *Sein* and *Sollen*. According to Kelsen, only the world of *Sein* can provide a rational knowledge. In other words, only knowledge of laws *as they are* is reachable for man. An approach of laws as they *ought to be* is typically what Natural Law doctrines attempt to reach, and such an approach is unacceptable from a scientific point of view since it is not based on human reason, but on human will. It delivers an object that is modified by human desires, and it does not tell us what the object is, but what a particular human being wants it to be. Here Kelsen builds a dichotomy between the world of *Sein* and the world of *Sollen* on a meta-theoretical level: this dichotomy is used in order to draw the boundaries of the theory of law itself. This determination of the framework in which the theory could constitute itself as legitimate and scientific means the strict restriction of human cognition to the world of *Sein*. In short, according to Kelsen, a legitimate human knowledge is in fact a description of *how things are* – and particularly, in the case of his legal science, of what laws are¹⁶.

How does this particular Kelsenian epistemology lead to the rejection of Universalist discourses? The meta-theoretical separation of *Sein* and *Sollen* is a strong claim presented against Natural Law theories, and in Kelsen's view, the main characterization of such theories is to pretend to detain an absolute and hence, a *universal* concept of justice. If one agrees with Kelsen on the limits of human cognition, then one also rejects, not only any Natural Law theory, but also any human attempt to grasp universal concepts. In other words, if human cognition is limited to the world of *Sein*, then all Universalist discourses are immediately discredited. It is needless to say that such a view implies a particular definition of the empirical world: this world must not contain universal concepts.

¹⁵ In the first edition of the *Pure Theory of Law*, Kelsen already claims how his scientific ambition is strongly opposed to ideology, and therefore, why the science of law can only be a descriptive one. See: Kelsen, H., *Introduction to the Problems of Legal Theory*, (B. Litschewski, S. L. Paulson; Trans.) Oxford: Oxford University Press, (1934) 1997, pp. 18-19. (OV: *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik*, Tübingen: Mohr Siebeck, (1934) 2008, II, §9, pp. 29-30).

¹⁶ From this perspective, the pure theory of law is a legal positivism since it aims only to consider the positive law. For different aspects of legal positivism and its roots, see: Green, L., "Legal Positivism", *The Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/> and Hart, H. L. A., "Positivism and the Separation of Law and Morals" in *Essays in Jurisprudence and Philosophy*, New York: Oxford University Press, (1958) 1983, pp. 49-87.

2. "What is justice?": the human empirical world as a world of relative and conflicting values

Kelsen is fully aware that the latter claim demands some justifications. These are explicitly brought in his Farewell Lecture: "What is justice?". The main claim of this writing is to assert that the human world is a world of conflicting values. From this perspective, one's practical decision appears to be only a personal preference or the result of a determinate emotive state, since it is rationally impossible to decide which values are higher¹⁷. Applied to the concept of justice, such a claim means the rational impossibility for human beings to know or to define an absolute justice. As such, what is considered depends solely on a cultural or historical context. In fact, philosophical history gives proof of this¹⁸: multiple and diverse moral concepts have been defended from Plato until Kant, and despite these great thinkers' efforts, no consensus about what is just and what is unjust has been reached. The main reason for this lack of universal consensus about justice resides in the fact that:

"The absolute in general, and the absolute values in particular, are beyond human reason, for which only a conditional, and in this sense relative, solution of the problem of justice (...) is possible."¹⁹

Although it is impossible to decide absolutely which values are better in order to behave, this does not mean human practical life is condemned to nihilism, to the absence of values. The Kelsenian moral relativism is not amoral or immoral. On the contrary, it consistently calls for human responsibility: if all values are potentially good or bad, then one has to decide on one's own and choose carefully with what values one wants to conduct one's life. Here the concept of tolerance intervenes as a rational criterion: tolerance is the only concept that is able to assume all moral conceptions in their diversity and multiplicity. Tolerance means *welcoming* the moral, religious, or political viewpoints of others: it means trying to understand opinions and beliefs of other human beings, especially the ones we do not share. In the end it becomes the condition of possibility for a

¹⁷ This position is clearly and explicitly stated in the *General Theory of Law and State*: "There is no possibility of deciding rationally between opposite values. It is precisely from this situation that a really tragic conflict arises: the conflict between the fundamental principle of science, Truth, and the supreme idea of politics, Justice." H. Kelsen, *General Theory of Law and State*, London: Oxford University Press, (1945) 1949, p. xvi. Once again, this idea is not new since Kelsen already stated it in the first edition of the *Pure Theory of Law*, where he claims that from the perspective of rational knowledge, one can only see conflicts of interests. When one is resolving a conflict, one is in fact electing an interest, and abandoning another one. Cf. Kelsen, H., *Introduction to the Problems of Legal Theory*, p.17. (OV: *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik*, p. 28.)

¹⁸ See: Idem (OV: p.27); Kelsen, H., "Foundations of Democracy" in *Ethics* (66) 1, 1955, pp.1-101, p. 98 footnote 70; H. Kelsen, "What is justice?", p. 21; H. Kelsen, "The Natural Law before the Tribunal of Science", *What is justice? Justice, Law and Politics in the Mirror of Science*, p. 153.

¹⁹ H. Kelsen, "What is justice?", p.10.

pacific expression of everyone's opinions. According to Kelsen, "[t]olerance means freedom of thoughts"²⁰, and therefore, the ultimate possibility of democracy itself. If tolerance cannot tell men how they should behave, or what values are higher – since this is not its role – it allows them at least to live together peacefully. It forces them to wonder and to question under what form of justice they want to live. Moreover, it requires them to look for a compromise: it demands that they give up their own personal interests – since personal interests necessarily mean conflicts of interests – in order to seek a general interest.

One should underline how Kelsen's conclusion at the end of his Farewell Lecture is fully consistent with his rejection of an absolutist conception of values. Indeed, he formally defines his own position as a preference: a preference for democracy, a preference for tolerance.

"Since science is my profession, and hence the most important thing in my life, justice, to me, is that social order under whose protection the search for truth can prosper. "My" justice, then, is the justice of freedom, the justice of peace, the justice of democracy – the justice of tolerance."²¹

Moreover, since his moral standpoint is a preference, it is then debatable. The rejection of Universalist discourses based on the limits of human cognition is the condition of a moral and political debate. In other words, since we do not know absolutely what justice is, we have to try to find a form of justice that allows us to live together.

II. Modernity as ultimate indeterminacy

In order to see how Kelsen's views can be interpreted as an effect of Modernity, one must first define Modernity. Claude Lefort's political philosophy seems to offer a fruitful insight into it.

1. Modern Era: experiences of irreversibility and uncertainty

According to him, in the Modern Era men are confronted with two sorts of experiences. The first one is the feeling they have of irreversibility, namely a feeling that it

²⁰ *Ibid.*, p. 23.

²¹ *Ibid.*, p. 24. For a debate on this conception of tolerance, and the problems it raises, see: J. Bjarup, "Kelsen's Theory of Law and Philosophy of Justice" as well as Pettit, P., "Kelsen's Theory of Law and Philosophy of Justice", in *Essays on Kelsen*, pp. 273-304 and pp. 305-318. Leo Strauss also stresses the inconsistency of the concept of tolerance defended by modern social sciences: Strauss, L., *Natural Right and History*, pp. 12-13.

is impossible to return to the Past. This feeling is correlative to a sense of future that is completely new compared to the Classical Era. Lefort *is not saying* that Pre-Modern societies do not have a sense of future²². He is far from defending ethnocentric / colonialist / racist views, and does not deny a temporality in Pre-Modern societies: such societies have an experience of the Past, as well as the Present and the Future. In this sense, Pre-Modern and Modern societies do not differ because the latter have a history and not the former. The difference resides elsewhere: what distinguishes Pre-Modern from Modern societies is the respective ways that political power is articulated within them. In other words, while Pre-Modern societies are the theater of complete determinacy, the Modern Era is the place where all possible markers are dissolved. This difference between, on the one hand, a world of determinacy, and on the other hand, a world of indeterminacy, becomes clear when one focuses on the *symbolical* role political power has in these societies.

In the Pre-Modern era, the representation one has of one's social group and of one's world, is strongly dependent on the political power. Political power is the symbolic force that holds the ultimate keys of the legitimate and illegitimate, of the just and unjust, of the truth and untruth. In other words, it clearly and strictly defines the representations people have of reality. This has a direct consequence on the way people experience temporality: since the political symbolically determines everything, then the Past, the Present, and the Future are not blurred; in fact, their definitions are given. To get a glimpse of how people's *Weltanschauung* is symbolically shaped by the political power, a look at Lefort's description of the figure of the king may be helpful.

²² One cannot suspect Lefort to agree with the unfortunately famous assertion that some societies are living in an immediate present. In other words, some societies would not have a historical perspective. This is a problematic claim because in the best-case scenario it is inconsistent. When one is claiming that other societies do not have a sense of History, it is most of the time to set a comparison between their own society and others. Therefore, it is not surprising that such a comparison leads to the conclusion that other societies are not as good as their own. It is not a surprise because what one is doing in order to come to such a conclusion is to judge other societies with the criteria of its own society. Hence, one's society is already established as superior since the only criteria taken into account belong to their society, and not to the others ones that are judged. Such a thought is therefore a pure product of an ethnocentric perspective. One has to wonder what the relevance is of a comparison between societies when the result is fixed in advance, when the criteria of comparison themselves are ideologically selected.

In the worst-case scenario, this difference between societies that have a sense of history and those that do not have knowledge of it is politically dangerous. This difference can potentially serve to draw a line between so-called "advanced", "progressive", or "civilized" societies, and the other ones. When "sense of History" becomes a criterion of civilization, one is therefore faced with a colonialist and/or a racist ideology. A perfect example of this trivial stupidity is Nicolas Sarkozy's Speech in Dakar in 2007, and in which the former French President professed: "the African man has not yet entered history". The comparison is no longer oriented towards differences of habits, culture, so on and so forth; rather, it focuses directly on human beings. Such a thought implies that there are human beings who are more human because they take part in History, while other human beings are less human because they are ignorant about what History is. One can easily imagine what kind of actions this discourse can justify.

2. *The symbolic role of the king*

The king plays a crucial role in the Monarchy. If one focuses on the system of representations that is inherent to such a political society, one will see that it represents itself as a *mystical body*. It is because of this representation of themselves as part of a mystical body, that members of such societies were able to live together. Consequently, people represented themselves as part of the king's body. At the same time the king was also the head of this social body, since he was completely merged with the political power. Therefore, the king was the warranty of "both organic and mystic"²³ social unity: he incarnated and thereby conferred an identity and a unity to the social order. In this sense, without the symbolic figure of the king, the social order could not be an order since the social body cannot exist without him, without people's identification with him. This also means that every member perceived his/her own identity, his/her own essence as depending on this representation: one's identity is defined by the place one has in the social body.

In short, one can see here that the king is the one who draws society's limits as well as its identity; a proof of that is the fact that he essentially determines who is a member of the society, and who is not. Moreover, his discourse builds a symbolic reality that shapes society's representation of itself: what the king says determines both how the members of society perceive reality and how they live in it. The important point one should retain is that the king is the ultimate marker of certainty in Monarchic societies; his discourse and his actions have a direct determining consequence on society. Nothing is indeterminate in such societies because of the role of the king.

"The *ancien régime* was made up of an infinite number of small bodies which gave individuals their distinctive marks. All these small bodies fitted together within a great imaginary body for which the body of the king provided the model and the guarantee of its integrity. The democratic revolution, for so long subterranean, burst out when the body of the king was destroyed, when the body politic was decapitated and when, at the same time, the corporeality of the social was dissolved. There then occurred what I would call a 'disincorporation' of individuals."²⁴

The emergence of universal suffrage means a change regarding the symbolic configuration of the society and a new place for power. In Monarchies, the king occupied the place of power, for he was a man that society considered at the same time mortal and immortal, individual and collective, a man who had an absolute legitimacy since he earned

²³ Lefort, C., "The Image of the Body and Totalitarianism", p. 302. (OV: "L'image du corps et le totalitarisme", in *L'Invention démocratique*, p.171).

²⁴ *Ibid.*, p. 303. (OV: *Ibid.*, pp. 171-172).

it from God. With Modern Democracy, such a conception of the political power becomes simply impossible since the popular sovereignty ensures that legitimacy no longer comes from a transcendent pole, but from society itself. Moreover, the place of power is no longer occupied indefinitely since people who are elected, are designated for a determined amount of time. Furthermore, everyone has the potential to be elected, and as such, the political power becomes a matter of competition. Lefort's most famous definition of Modern Democracy, as societies where the place of power is empty, makes sense in this context. The democratic place of power is an empty one since it is a place that is occupied only temporarily, and by men who are by definition mortal – if one wants to occupy this place definitely, one has then to “cheat”, to use “force or cunning”²⁵.

It will lead us too far from the main point of this presentation to further explain Lefort's conception of Democracy. The main idea one should retain is that Modern Democracy is the place where the political power is facing disincorporation. And since there is no longer a king to shape people's *Weltanschauung*, the members of Modern Democracies cannot count on anyone except themselves to find definitions of the legitimate and illegitimate, of the just and unjust, of the truth and untruth. As a result, the disappearance of the king means the disappearance of the ultimate markers of certainty. Getting back to the idea of temporality, one can now fully understand the difference between Pre-Modern and Modern societies: the latter cannot count on any determinacy for they are literally facing the unknown. The future from now on appears to be both an enigma and an unsettling object.

Conclusion: The possibility of a sense of Universality?

1. *The implicit philosophy within modern social sciences: the awareness of Otherness*

If one applies this conclusion to Kelsen's writings, then one will be able to interpret his moral relativism as a result of Modern Democracy. Moral relativism is a thought that emerges at a time when men lost all their traditional markers of certainty. The Kelsenian call for men's responsibility echoes such loss: since there is no longer anybody to claim what justice is, one has to discover it by oneself.

²⁵ Idem. (OV: *Ibid.*, p. 172).

“This, of course, implies a very serious responsibility, the most serious moral responsibility a man can assume. Positivist relativism means: moral autonomy.”²⁶

But doesn't this call on others to assume responsibility presuppose the recognition of others as similar human beings? In other words, when Kelsen tries to remind men of the importance of questioning the concept of justice, does he not in fact conclude that every man has the potential to accomplish such a task? Does he not mean implicitly that every man is equal regarding this potential capacity to question things?

“They [modern social sciences] can claim that social phenomena are like things, affirm an ideal of objectivity or scientific neutrality. What underlies these requirements? It is the discovery of the Other who, as such, is also a kind of fellow-man (...)”²⁷

No longer defined as merely a part of a social body, the Otherness is from now on considered as a different and independent entity: this is the perspective that Modern Democracy brings. According to Lefort, all these positivistic attempts to reach a scientific knowledge of men and human facts are motivated more or less implicitly by this philosophy. Modern social sciences derive their strength from the awareness of the others as fellow men. The moral relativism they lead to should be rejected as though it means nihilism. But, in the end, it seems that there is an acceptable form of relativism: that is, the one that makes us question others, take their perspective, *in order to look back at our own thoughts, our own perspectives, to question ourselves and maybe even revise our judgments*. This is the strength of Modern Democracy; it forces us to acknowledge the Otherness and its real place. This acknowledgement is only possible if the Otherness is recognized as equal to the Self, if one can perceive in others their common humanity. What else can the Kelsenian conception of tolerance mean except this? When one welcomes the views of others, one implicitly presupposes that these views are worth welcoming: a common humanity between men is thereby presupposed.

2. Human Rights as the utterance of rights

Only in this Modern framework where the social world, in order to be shaped, requests the expressed opinions of every one of its members, can the question of Human Rights be reformulated. It would not be consistent to define Human Rights as rights that are given by an ultimate authority such as the king or God. In fact, there is no way of properly defining Human Rights in a socio-political context where every single value is debatable. However, does this mean that such Rights do not exist? Lefort contends that the respective symbolic status of the law and the political power have changed with the

²⁶ Kelsen, H., “Foundations of Democracy”, p. 97 footnote 70.

²⁷ Lefort, C., “La dissolution des repères et l'enjeu démocratique”, p. 556 (my translation).

emergence of Democracy. Democracy is this new configuration of a society where men can demand to be allowed to speak and to publicly express their opinions. Kelsen's preference for Democracy is fully compatible with such a view since it is based on the fact that men cannot be certain of what is right and what is not. They are therefore placed in the position of debating together in order to determine what is legitimate and what is illegitimate.

"Only if it is not possible to decide in an absolute way what is right and what is wrong is it advisable to discuss the issue and, after discussion, to submit a compromise."²⁸

According to Lefort, this means that the legal question is now located beyond the reach of the political power. This does not mean however that the political power has no influence on laws, or on deciding which laws ought to be prescribed. This only means that the society is the force where the question of laws first emerges. The source of the law has changed in Modern Democracy, precisely because Modern Democracy emerged with the claiming of rights coming from society, namely the claim for universal suffrage.

3. *Human nature as an enigma*

Getting back to the notion of Human Rights, one can give a new definition that is neither metaphysical nor dependent on Natural Law theories. The concept of Human Rights does not mean anything more than the *ability to claim rights*, or the *utterance of rights*. It does not presuppose some kind of nature of things, or some kind of human nature, namely, a fictive nature-in-itself. Such concepts are no longer consistently possible when one takes into account both Lefort's views on Modernity, and Kelsen's criticisms of Natural Law theories. If the ultimate markers of certainty are lost, then human beings are also *subject to indeterminacy*. Indeed, they cannot rely on something or somebody to determine who they are, or what their roles are. Thus, in the Modern Era, human nature also becomes an *enigma*.

"The idea of human nature, which was so vigorously proclaimed at the end of the eighteenth century, could never capture the meaning of the undertaking inaugurated by the great American and French declarations. By reducing the source of right to the human utterance of right, they made *an enigma of both humanity and right*."²⁹

²⁸ Kelsen, H., "Foundations of Democracy", p. 97 fn. 70.

²⁹ Lefort, C., "Human Rights and the Welfare State", p. 37. It is meaningful that Lefort uses the concept of "enigma" because of its Greek root: αίνιγμα comes from αίνισσομαι that means, "to speak in riddles". The linguistic aspect involved in the Greek root can be found also in the humanism defended by Lefort: according to him, Modern Democracy acknowledges the fact that when human beings are talking or debating with one another, there is a part of the discourse that is inherently evasive. In other words, discourse of Otherness is essentially always ambiguous and mysterious; its speech as well as its essence is condemned to be something that one can never

entirely grasp. These ungraspable dimensions of human discourse and essence make one realize how different one is from the others. This radical difference means also that one is condemned to be *alone*: “Man cannot forget *solitude*.” (Lefort, C., “La dissolution des repères et l’enjeu démocratique”, p. 567. my translation.) Despite its heavy weight, this modern solitude also has a positive effect: “Nonetheless, there is a useful form of solitude tied to the institution of democratic society. Man alone can be drowned in the crowd, but it is also there that he is called upon to realize he is different.” (Idem.)

Of course, this way of presenting the philosophy of Lefort seems to suggest a certain “family resemblance” between his views, and the ones of Sartre. Indeed, the aforementioned quote is reminiscent of the following lines of *Existentialism is a Humanism*: “(...) when we speak of “abandonment” – one of Heidegger’s favorite expressions – we merely mean to say that God does not exist, and that we must bear the full consequences of the assertion.” (Sartre, J. P., *Existentialism is a Humanism*, (C. Macomber; Trans.), New Haven, London: Yale University Press, 2007, p. 27. (OV: *L’existentialisme est un humanisme*, Paris: Folio, (1945) 1996, p. 37) This familiar resemblance is invalid in my opinion, especially if one carefully reads how Sartre defines his philosophy. In fact, two main aspects of his definition put him in clear opposition with Lefort. The first aspect is the emphasis he puts on human subjectivity: “(...) [E]xistentialism is a doctrine that makes human life possible and also affirms that every truth and every action imply an environment and a human subjectivity.” (*Ibid.*, p. 18 ; OV: *Ibid.*, p. 23) According to Sartre, human beings are condemned to be free and are therefore responsible for their choices. This freedom of choice is something that Lefort does not postulate. Moreover, it is not because of this kind of freedom that Lefort deduces the modern solitude, he rather attributes it to the loss of the markers of certainty, and therefore, to a political change that is Modern Democracy. Thus, while one author defends subjectivism, the other establishes a hermeneutic of social and political changes. Hence, the two standpoints are different, and do not assume the same assertions. The second aspect that allows one to evaluate how the two scholars are defending different views is the concept of humanism. According to Sartre, his existentialism is a humanism based on the concepts of freedom and responsibility: “(...) we can claim that human universality exists, but it is not a given; it is in perpetual construction. In choosing myself, I construct universality; I construct it by understanding every other man’s project, regardless of the era in which he lives.” (*Ibid.*, p.43 ; OV: *Ibid.*, p.61) Despite the fact that human beings are condemned to choose in their environment, that is here and now, each of their individual choices involves the whole mankind. When one chooses, one does so assuming that one’s choice can be universalized to mankind. In short, existentialism is a humanism since an individual’s choice engages not only himself/herself, but also mankind in general. Hence, one can see how the existentialist’s humanism is different from Lefort’s. According to the latter, it is not our *condition* that allows us to transcend our subjectivity. In fact, the point of departure is radically different: Lefort does not begin with human subjectivity, but with social, economic, and political conditions. These conditions explain why the human being becomes an enigma (while, for instance, Sartre attributes the same fact to the death of God). What links human beings to one another is not primarily their freedom of choice or their responsibility, but their *history*. This historical determination does not prevent one from transcending it, although History has continuity since it always raises the same universal questions. Therefore, “(...) we can, in different situations, through different historical and cultural conditions, find problems that are timeless; and the idea that there is, in addition, a correct interrogation of what has to be thought is what mobilizes all of us, i.e. the idea that there is something today that needs to be thought and transcends our differences.” (Lefort, C., “L’automne du totalitarisme”, in *Le Temps Présent*, p. 650, my translation.) According to Lefort then, it is not because of Modernity or Modern Democracy that human beings are enigmas. They have always been enigmas, however, Modern Democracy is the first social situation to acknowledge and to embrace this fact. In Lefort’s view, freedom is not conceived primarily as a freedom of choice, but as a political freedom i.e. the birth and the extension of a symbolic public space. (See Lefort, C., “La liberté à l’ère du relativisme”, in *Le Temps Présent*, pp. 631-655).

Finally, even though this discussion is not directly linked to the present topic, it is difficult to present the main differences between Sartre and Lefort without mentioning the intellectual dispute the two scholars have about the French Communist Party, and that took place in *Les Temps Modernes*. Sartre published two articles where he proclaimed his engagement with the Communist Party, while Lefort expressed his disagreement with the political party in 1953, in his article

Human nature and law become enigmas since what they are is no longer considered predictable: once debates are opened and defined as places where decisions are taken, no one can predict with certainty what results they will lead to. Nevertheless, do we not have here a kind of universality? Even though we do not know, and cannot determine, what human nature is, we seem to presuppose that such a thing exists and therefore, we are still trying to bring determinations to the table. By accepting and trying to work for a democratic social life, we in fact assume the indetermination of human nature. Nonetheless, we do not abandon such an idea since it somehow represents the condition of the possibility of Democracy itself³⁰. Therefore, have we not reached – precisely because of the awareness of Otherness – a universal concept of Human nature? Can we not say that modern men are universally enigmas?

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“Marxism and Sartre”, questioning its “Marxism” (Lefort, C., “Le Marxisme et Sartre”, in *Éléments d’une critique de la bureaucratie*, Paris, Genève: Droz, (1953) 1971, pp.59-79). Sartre replies to this strong criticism in a long and vehement article, “Answer to Claude Lefort” (“Réponse à Claude Lefort”, in *Situations VII*, Paris: Gallimard, (1953) 1965, pp. 7-93) stating that since Lefort is nothing more than an intellectual *bourgeois*, he has no legitimacy discussing the essence or the actions of the proletariat. Lefort’s answer was published a year after, even though it was written in 1953. In his “From the answer to the question”, he reproaches Sartre for being silent about the link between the French Communist Party and Stalinism. (C. Lefort, “De la réponse à la question”, in *Éléments d’une critique de la bureaucratie*, pp. 80-108.) We mention these articles here in order to underline the gap between the two scholars.

³⁰ Lefort, C., “La dissolution des repères et l’enjeu démocratique”, p.567: “What seems to me to be the greatness of Democracy, is the fact that it acknowledges that everyone is elusive for others.” (my translation).