



# e-Thinking Europe

Book Series

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## Volume 2 – 2015

### Articles

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## Presentation

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The second volume of the series Re-thinking Europe offers an extended and revised version of a collection of papers selected from those presented at the third edition of the workshop *Re-Thinking Europe* held on 19<sup>th</sup> December 2014 at the Free University of Brussels (VUB) and organised by the Centre for Ethics and Humanism in collaboration with the Centre for Critical Philosophy of Ghent University.

As the reader will see, the present volume examines a diversity of topics (cosmopolitanism, fraternity, the burqa ban debate, political theology, human rights and democracy) from very different perspectives, methodological strategies and scientific backgrounds. Nevertheless, all papers share the same ultimate horizon of meaning: Europe as an on-going challenge of permanent reflection on the limits, constraints and possibilities of critical thinking.

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It might be surprising to many to present Leibniz as a political thinker, and more precisely, as one of the forerunners of a European cosmopolitan idea, that of European federalism. Leibniz is known as a great metaphysician, as well philosopher and diplomat, but not as a great political thinker of European and world scale. One need only choose the series of books dedicated to the history of Western political ideas to realize Leibniz's absence. Not merely historians of modern European philosophy, but even political philosophers ignore Leibniz's contribution to political philosophy, as a pioneer of the idea of the European Union. Leibniz's name does not figure in German academic anthologies: absent, for example, from the fourth edition of the *Klassiker des politischen Denkens* (1979)<sup>1</sup> from Plato to Max Weber, celebrated by the review *Neue politische Literatur* in the 70s as "ein gelungenes Schulwerk", characterized by the book review the *Zeit* as a work expounding the "Gesamtbild einer Geschichte abendländischer Staatstheorie" and edited by political scientists like Hans Meier, Heinz Rausch and Horst Denzer. The chapter "The Federalists" of the same book mentions only the American founding fathers: Hamilton, Jefferson and other Federalists. No Europeans besides Immanuel Kant and the authors of the great idea of the Respublica Christiana of the Medieval and early Modern philosophy, are mentioned.

There may be many reasons for this. One of them owes to the huge volume of Leibniz's philosophical work and the scattered character of most of his philosophical thinking, in addition to his status as a diplomat and politician, which overshadows his political philosophical writings. The separation of Leibniz's political thought from his metaphysical theory stands as another reason. And finally, an important number of Leibniz's political writings could be easily found in journals on the history of international relations or theology than in journals on philosophy.

The purpose of this contribution is to sketch Leibniz's place in the history of political ideas on European federalism. We will not be able to give an exhaustive account of his political ideas in general, but we believe it to be possible to highlight his contribution to

<sup>1</sup> *Klassiker des politischen Denkens*, Vol I. *Von Plato bis Hobbes* ; vol II : *von Locke bis Weber*. Munich, 1976.

the idea of the European Union underlying the basic concepts of his political thought (Riley 1972, 1- 44), Goyard-Fabre, 1994, 105-120)<sup>2</sup> by showing both the central role played by Leibniz in European political and federal thought as an important figure on the long list of the greatest pioneers of European federalism and the direct impact of his political ideas on great thinkers from Wolff to Kant and beyond.

In a word Leibniz proves as important as Crucé, Dubois, Guillaume Postel, Podebrady, Abbé de Saint-Pierre and even Wolff in his concern for a European federalism. With his program of a universal republic, Leibniz establishes himself as an important benchmark on the way to Wolff's universal republic and Kant's Perpetual Peace.

In what follows, we will sketch in a first step Leibniz's idea of a universal republic, which is a political ideal, also called by him, *Optima Respublica* or *Respublica Christiana* or *Civitas Dei*. Secondly, special attention will be paid to the theological and metaphysical foundations of Leibniz's cosmopolitanism, to his *Civitas Dei* based on natural right embracing the whole world and to the place of the Christian republic within this cosmopolitan structure, i.e. a republic in accordance with the teachings of Jesus Christ. In this context, Leibniz's *Mars Christianissimus*, which contains a very severe criticism of France's imperialism in Europe and a defense of the German princes based on the Westphalian Treaty, plays a significant role. The last part will be dedicated to Leibniz's position on European federalism and to his debate with Abbé de Saint-Pierre. This debate has the advantage to reveal clearly Leibniz's idea of European federalism. It will become clear that these three parts are all based on Leibniz's metaphysical and theological premises. This explains why many commentators of Leibniz's political ideas contend that his whole metaphysics was at the service of his unified global international political order and, specifically, at the service of his *Civitas Dei*. (Cheneval 2002, p. 53)<sup>3</sup>

<sup>2</sup> For a more comprehensive presentation of the basic notions of Leibniz's political thought, see Patrick Riley: *Leibniz. Political Writings*, Cambridge University Press, Cambridge, 1972, the introduction pp. 1-44; see also Goyard Fabre, *La Construction de la paix ou le travail de Sisyphe*, Vrin, Paris, 1994, Part I, p. 105-120.

<sup>3</sup> "Leibniz stellte die universalische Metaphysik in den Dienst der Politik und entwarf eine Weltrechtsphilosophie (...) Leibniz' Rechtsmetaphysik spielte in deiser Hinsicht bei der Entwicklung des modernen politischen Universalismus eine Gründerrolle" Francis Cheneval, *Philosophie in weltbürgerlicher Bedeutung. Über die Entstehung und die philosophischen Grundlagen des supranationalen und kosmopolitischen Denkens der Moderne*, Schwabe Verlag, Basel, 2002, p.53. Siehe auch Simone Goyard-Fabre, "L'européanisme des pionniers" in : *Regards croisés sur la constitution avortée de l'UE*, in: Gary Overvold, Philippe Poirier et Lukas Sosoe (Ed.) Paris, 2011, p. 31- 48.

Leibniz's political thought can be summarized thusly: harmony and reconciliation and conciliation. Without the search for harmony and conciliation, Leibniz's philosophy would amount to that which Bertrand Russell takes it to be: a sheer opportunistic discourse at the service of changing European political powers. (Russell 1964, p. 202)<sup>4</sup> Through harmony and conciliation, Leibniz succeeds in laying down the metaphysical and theological foundation of the unity of this thought made of "apparent conflicting ideas" taking from each kind of thought that which proves soundest and synthesizing it with the seemingly incommensurable truths of other systems, in this way fusing "Platonism, Cartesianism, Christian voluntarism, Hobbesian mechanism", etc., into a system of thought. (Riley, 1972, p. 2)<sup>5</sup> That is why the search for the "harmonie universelle" or universal harmony is the key concept which lends Leibniz's philosophy a unified shape and can be seen as the core of his thought. (Holz 1996, p. 5)<sup>6</sup> One understands why Leibniz sought to develop a universal jurisprudence. By "universal jurisprudence", we mean that Leibniz intended the establishment of a world republic, a hierarchical system of law common to God as the perfect being and man. "God and man exist in a society of a universal republic of spirits, the noblest part of the universe [...] in which universal right is the same for God and for men." (Riley 1972, idem)<sup>7</sup> The cosmological and cosmopolitan character of Leibniz's political philosophy appears from the start. It stands as a metaphysical theory based on God and the order of creation.

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Leibniz welcomes every idea necessary to sustain this political philosophical program. One of the best illustrations is his work: *Civitas Dei*, the City of God where God is considered the supreme power, the monarch. Since God is the monarch of the universal city, his word is the natural law and theology a part of jurisprudence. The Christian Church hence possesses a legal and political significance. Whereas believers or Christians are the citizens of God's Republic (*Repubblica Dei*), pagans are declared rebels who must be fought (*ubi infideles quasi rebelles sunt*). (Leibniz 1666, par 42, p.190)<sup>8</sup> In this political theory of universal monarchy, morality can only be understood as a legal concept and the relation between man and God as a political relation hierarchically ordained. That is why for Leibniz "it is best to derive human justice, as from a spring, from the divine in order to make it complete. Surely the idea of just, no less that the idea of the true and the good,

<sup>4</sup> Bertrand Russell, *A Critical Exposition of the Philosophy of Leibniz*, Allen, London, 1964, p. 202.

<sup>5</sup> Patrick Riley, Leibniz. *Political Writings*, *Op.cit.*, p. 2.

<sup>6</sup> Hans Heinz Holz, *Sitzungsberichte der Leibniz-Sozietät*, 13, 1996, S. 5.

<sup>7</sup> Patrick Riley, *Op. cit.*, idem.

<sup>8</sup> *De Arte Combinatoria*, § 42, 190.

relates to God. (...) and the rules which are common certainly enter in to the sciences and ought to be considered in universal jurisprudence.” (Leibniz, 1706)<sup>9</sup>

Leibniz's metaphysics is entirely written in political concepts. It appears from the above cited text that there is no difference between God's and human justice. The difference proves one of degree. It can be considered on three levels: 1) On the level of the relation between Man and God, 2) on the level of the natural law of the entire human race and 3) on the level of the State.

The State, according to Leibniz, represents the lowest stage of the universal legal public order. It is subordinated to the World and the human race. Leibniz speaks of “*omnia societati universali sub Rectore Deo*” instead of the World, and this reveals the cosmological and cosmopolitan character of his conception of Law. That means that the whole world is God's city and the legal rules of this city his Laws.

Secondly, the metaphysically grounded structure of Law has a goal, namely the common good (*publice utile*), because it is subordinated to the direction of God's will insofar as God as Monarch of the whole universe wants for Man the best possible good.

Thirdly, when Leibniz refers the State to the universal structure of Law, he does not heed the fate and the multiplicity of concrete States. For him, individuals do not matter in this context. The fact of their existence is neglected or underestimated when compared to the world legal divine order. The project of the *Civitas Dei* or of the universal cosmopolitan republic prevails over the individual States in which God is the Sovereign and legislator. Leibniz is convinced “que le monde est une espèce de cité aussi bien ordonné(e) que possible, dont le Seigneur a en main la sagesse et la puissance souveraine”(Leibniz 1679, p. 523) <sup>10</sup> for the common good of the spirits. By spirits, Leibniz means all reasonable beings, all monads or simple substances living in the City where God reigns as Monarch. The *Civitas Dei* is a society created, conserved and governed by God. It proves a cosmopolitan State based on reason. As Leibniz states it in the *Discours de métaphysique*:

“Il ne faut pas seulement considérer Dieu comme le principe et la cause de toutes les substances et de tous les Estres, mais encore comme chef de toutes les personnes ou substances intelligentes, et comme Monarque absolu de la plus parfaite cité ou République, telle qu'elle est, celle de l'univers composée de tous les esprits ensemble, Dieu lui-même étant aussi bien le plus accompli de tous les Esprits.”<sup>11</sup> (Leibniz 1686 par 35, 88)

<sup>9</sup> *Opinions on the Principles of Pufendorf* in Riley, Patrick, Op.cit. 64- 75.

<sup>10</sup> *Dialogue entre un habile politique et un ecclésiastique d'une piété inconnue (1679-1682)*, p. 523.

<sup>11</sup> *Discours de Métaphysique*, (§35, 88) Leibniz speak also of « République générale des Esprits dont le chef est Dieu » (*Essais de Théodicée*, § 120).

In these, one finds the main lines of Leibniz's political philosophy which can then easily be summarized by underlining the *Civitas Dei's* main characteristics. The *Civitas Dei* is metaphysical-theologically conceived as the normative ideal of the perfect State and Monarch, the latter God himself. All human beings and societies have to submit themselves to this Monarch's power, which is not to be identified with command but with justice. Every rational being necessarily belongs as citizen to the City of God. We have also mentioned the City's cosmopolitan nature. The main question is how and where Leibniz's European federal order fits in this overarching world society. Where is the place of a federal Europe in the world political structure and which kind of role does Leibniz assign Europe to play therein? And, finally, as the whole political philosophy is based on God, what is the function of religion and, specifically, the Christian religion in world politics and in relation to non-Christians in the world?

## II

Leibniz's political philosophy cannot be thoroughly presented without mentioning his writings on international relations, especially the relations between European states. For that, we need to know more of Leibniz's conception of natural right.

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In writing on international affairs, Leibniz gives a concise definition of natural right and the relation between natural right, *Civitas Dei* and international Law.

In a paper on Abbé de Saint-Pierre's project of perpetual peace in Europe, Leibniz writes:

“When I was quite young, I became acquainted with a book entitled *Le Nouveau Cynée* whose unknown author advised sovereigns to govern their states in peace, and to let disputes be judged by an established tribunal, but I no longer know how to find this book...” (Leibniz 1715, Riley 1972, p.178-183)<sup>12</sup>

This indicates his early interests for European and world political problems given that the book *Le nouveau Cynée* speaks of peace and unity in Europe, which Leibniz's *Codex Juris Gentium* (Leibniz 1693; Riley, 1972, p.165-176)<sup>13</sup> will further develop.

Contrary to almost all philosophers in his lifetime, Leibniz shows in the definition of political philosophy's main categories that there proves no separation or distinction between Law, religion and theology. “Tout est lié”, he contends, not only in the City of God

<sup>12</sup> Observations on the Abbé Saint-Pierre's for Perpetual peace (1715).

<sup>13</sup> All the references to the *Codex Juris gentium* are abbreviated.

but also in international relations, the ultimate ends of which remain peace and happiness for the realization of which Europe possesses a special mission.

One of the objectives of the *Codex Juris Gentium* is, as stated in the Preface, to understand the law of nations. Nevertheless, Leibniz takes the opportunity to clarify again a few basic notions from his political philosophy like justice and law, which, Leibniz laments, even after having been treated by so many illustrious authors, have not been made sufficiently clear.<sup>14</sup>

“Right is a kind of moral possibility and obligation a moral necessity. By moral, I mean that which is equivalent to “natural” for a good man [...] A good man is one who loves everybody, in so far as reason permits [...] Justice, then is, [...] will be most conveniently defined [...] as the charity of the wise man, that is charity which follows the dictates of wisdom” (CJG, 170-171).

Needless to say how strange and peculiar these definitions are compared to Hobbes' or Pufendorf's and even to Grotius'. Leibniz's definition has little to do with the natural right tradition. The reader will already have noticed it with the main features of the *Civitas Dei*. Most of Leibniz's writings make no difference between law, a legal duty and a moral duty. Here begin the difficulties in understanding Leibniz's concepts of practical philosophy. Far from Locke's distinguishing two great maxims in moral philosophy, namely justice and charity, Leibniz's conflation of the two comes out in the following definition: “Charity is universal benevolence and benevolence the habit of loving or willing the good. Love signifies rejoicing in the happiness of another [...] into one's own.” (*Idem*) At first glance, the reader is drawn into utilitarian considerations. Then, as D'Holbach says: “L'homme vertueux est celui dont les actions tendent constamment au bien-être de ses semblables. La vertu n'est que l'art de se rendre heureux soi-même de la félicité des autres.” (D'Holbach 1966, Chap. XVI, p. 405) <sup>15</sup> Yet Leibniz's conception of happiness ends at a theological idea of God's perfection, an idea which no utilitarian would defend. Thus Leibniz says that divine love exceeds all other loves because God can be loved with greater result since nothing is happier than God and nothing more beautiful and more worthy can be conceived.” (CJG, 171) Leibniz contends that, as God possesses the supreme power and supreme wisdom, his happiness becomes and even creates our own. At last, he concludes that wisdom is the science of happiness.

The clearness of this chain of definitions proves far from self-evident. This is not, however, the place to analyze in detail the relationships between wisdom, happiness, benevolence, perfection, utility and charity. All these concepts lead to Leibniz's conception of law and justice; the latter is the Love of God from which natural right flows.

<sup>14</sup> Our quotations are taken from Patrick Riley's translation of the Preface of the *Codex Juris Gentium*, in Leibniz. Political writings, *Op. cit.*, id. and abbreviated as *CJG* and quoted in the text.

<sup>15</sup> D'Holbach, *Le système de la nature*, Hildesheim, New York, 1966, Chap. XVI, p. 405.

Furthermore, simple right is born out of the principle of conservation of peace. This stands as the principle of avoidance of misery, and higher right tends toward happiness. But to prove the truth of this conceptual edifice, Leibniz contends, we must assume the immortality of the soul and the existence of God as ruler of the universe, a perfect monarch who imposes all natural laws, rewards just actions and punishes wrong ones. “The divine providence and power cause all right to become fact and assure that no one is injured except by himself, that no good action goes unrewarded, and no sin unpunished.” (CJG, 174) Indeed, this is the teaching of Jesus Christ.

Leibniz’s definition of natural law follows from theological grounds. Accordingly, it leads us to a universal political order based on divine providence. Although it also contains the description and analysis of the political situation in Europe, such as the alliances and treaties between princes, the *Codex Juris gentium*, at least in its preface, proposes little more than the description and explanation of divine monarchy. On this ground, justice is called universal and includes all other virtues, even duties towards oneself, such as “not to abuse our own body or our own property”. These kinds of abuses, which stand beyond the power of human laws, “are still prohibited by natural law, that is the eternal law of divine monarchy, since we owe ourselves and everything we have to God.” (CJG, 174) It appears that without God’s supreme power directing the universe, punishing wrongs and rewarding good actions, there can be no moral and political order. Leibniz establishes this order on a theologically founded natural right theory which is of interest to the state and of a much greater interest to the universe. (CJG, idem)

All that is needed for the development of cosmopolitanism has already been given. And Leibniz’s theologically, even christologically founded cosmopolitanism serves as a theoretical realm in which European federalism finds its legitimate place. Before we come back to this topic, a few more stories need to be told on Leibniz’s international relations or divine monarchy.

### III

Leibniz takes it for granted that the Christian religion reveals God’s will and should likewise be the fount of the world social and political order, as much of the individual states as of European federalism. The tight link between the City of God, the theory of natural right, and revelation gives the impression that Leibniz’s political thought finds its ground in a kind of theology of revelation. This would mean that the ultimate justification of the Divine city rests on faith in the teachings of Christ and the Christian religion. At this point, there becomes necessary further clarification which we cannot undertake here. Nonetheless, it should be noted that Leibniz confers, without any justification, a precedence to Christianity over other world religions and justifies its extension through war against those religions and cultures in the world as we will see later. For present

purposes, it suffices to bring forward a few passages to show the kind of dogmatic certainty with which Leibniz affirms the so-called truths of the Christian religion and their superiority over other religions:

“Les anciens philosophes ont fort peu connu ces importantes vérités : Jésus Christ seul les a divinement exprimées et d’une manière si claire et si familière que les esprits les plus grossiers les ont conçues [...] il nous a donné à connaître le royaume des cieus ou cette parfaite république des esprits qui mérite le titre de cité de Dieu et dont il nous a découvert les admirables lois.”(Leibnitz 1686, Ed. Fichant 2004)<sup>16</sup>

Jesus Christ’s teaching not only overrides that of other religions. For Leibniz, there is no doubt that Jesus stands as the founder of the purest and most enlightened religion:

“les sages d’autres nations en ont peut-être autant quelquefois, mais ils n’ont pas eu le bonheur de se faire suivre assez et de faire passer le dogme en loi [...] jusqu’à ce que Jésus Christ leva le voile, et sans avoir la force en main, enseigna avec toute la force d’un législateur que les âmes immortelles passent dans une autre vie, où elles doivent recevoir le salaire de leurs actions [...] Jésus Christ acheva de faire passer la religion naturelle en loi, et de lui donner l’autorité d’un dogme public.”(Leibniz 1710, Ed. J. Brunschwig 1969)<sup>17</sup>

This finds its basis in what here seems a revelation as Leibniz observed that the theory of natural right is “jus naturae et gentium traditum secundum disciplinam chriatianorum id ex Chriti documentis” (*CJG*, p.8)<sup>18</sup> and that “the learned have rightly held [...] that the law of nature and of the nations should follow the teachings of Christianity [...] the divine things of the wise, according to the teaching of Christ.” (*CJG*, p. 174)

Besides the concept of natural right so defined, Leibniz also recognizes what he calls voluntary right “derived from custom or made by superior”; in the state, civil law receives its force from the one who holds the supreme power. Outside the state, the supreme power is the voluntary law of nations originating from the tacit consent of peoples. In addition to this international law of nations, Leibniz contends that “Christians have another common tie, the divine positive law contained in the sacred Scriptures [...] the sacred canons accepted in the whole Church and, later, in the West, the pontifical legislation to which kings and peoples submit themselves.” (*CJG*, id.) This Christian universalism overshadows the rational structure of other peoples' natural right and allows Leibniz to restrict his cosmopolitanism to European Christian nations, to the “common republic of Christian nations”, the heads of which remain the Pope in sacred matters and the emperor in temporal matters. Thus, Leibniz's cosmopolitanism ends at a Europeanism in which two different theories are at play: one is rational and general and valid for all; the

<sup>16</sup> Leibniz, *Discours de métaphysique*, édition établie, présentées et annotée par Michel Fichant, Gallimard, Folio, 2004, p. 217.

<sup>17</sup> Leibniz, *Essais de Théodicée*, Préface, p. 26-27.

<sup>18</sup> *Codex Juris gentium*, Préface p. 8.

second based on positive legal structure derived from Christian revelation, *gentium christianarum respublica*, in other words, a Christian republic which is, at the same time, for Leibniz, the justification of the European Christian federal order with the right to wage wars against non-Christian peoples, Turks, Muslims and non-European peoples. The question proves how this Europeanism can be situated, “harmonized” or “conciliated” within Leibniz’s universal political theory, i.e. in Leibniz’s cosmopolitanism.

A partial and tentative answer to this question may be found in the *Codex Juris gentium* where Leibniz develops his conception of war and peace. It may help 1) in understanding why and how Leibniz’s universal republic can go hand in hand with his strong Europeanism or European federalism and 2) in capturing its fundamental intuition.

Leibniz deems it not unreasonable to believe, like Hobbes, that war between states and peoples is and will be perpetual. Wars are destructive and do not honour the belligerents, most of all a war waged between civilized nations. In this sense, Louis XIV’s expansionist politics in Europe should be severely condemned. Leibniz himself did so in his *Mars Christianissimus*. Leibniz is not, however, a pacifist for maintaining such. Indeed, it is preferable that the state be ready for war if needed or that they make tactical alliances against an assault coming from an enemy. Thus, it remains prudent and realistic to ready oneself, for, as Leibniz writes:

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“Quand les Français prêchent la paix, c’est à peu près le sermon que le renard allant en pèlerinage à Saint Jacques et publiant une amnistie générale entre les animaux, faisait à une troupe de poules qu’il rencontra sur son chemin. Ils ont sans doute fort bonne grâce de parler de paix perpétuelle, eux qui ne connaissent aucune autre que celle d’un esclavage générale à la turque.”(Leibniz, Werke 1864-1884)<sup>19</sup>

Nevertheless, Leibniz insists on the validity of a minimal justice demanding that one not injure anyone, of a superior justice corresponding to charity, and of a universal justice useful for all mankind. Yet the validity of the rules of justice does not stand in opposition to the idea that, if one wants peace, one should be ready for war. “Tout home de bien, says Leibniz, demeure d’accord qu’on ne doit jamais faire guerre que lorsqu’il est nécessaire” (1864-1884, 110) Therefore, states which follow peace should be armed, unless they are united by common interest. In that case they must make alliances with each other. Against France’s expansion the just war is that which the just man should undertake to restore peace. (1625, Truyol y Serra 1984, p. 68)<sup>20</sup>

<sup>19</sup> *Die Werke von Leibniz. Historisch-politische und staatswissenschaftliche Schriften*, Hanover (1864-1884), vol V, p. 254.

<sup>20</sup> Leibniz, *Raison touchant à la guerre ou l’accomodement avec la France* (1625) See also A. Truyol y Serra, *Die Lehre vom gerechten Krieg bei Grotius und bei Leibniz und ihre Bedeutung für die Gegenwart*, *Studia Leibniziana*, XVI/ 1(1984), 60-72.

## IV

The political situation in Europe after the Thirty Years War was one of total desolation, misery, hunger and political anarchy. In this situation, which kind of peace there was for reconstruction? With a common interest in both, European states needed more than ever to become closer and work together. As a Christian philosopher, jurist and diplomat, Leibniz felt the necessity to take concrete measures for the reconstruction of Europe: 1) reconstruction of Christianity's lost unity, 2) reconstruction by pacification of political relations between European countries by exporting the violence outside Europe and 3) construction of the project of a European union.

1.) Leibniz never accepted the Church's division following the Reformation. As one can notice in his correspondence with Bossuet, he strives for the unity of Catholic and Protestants by downplaying insofar as possible the dogmatic aspects of the church's division and by putting his effort into the unity of Christianity and the integrity of the Holy Roman Empire's constitutive nations with the Pope and the Emperor as the spiritual and secular heads respectively. But numerous tensions and rivalries plagued the empire. Accordingly, the solution lay in exporting tensions and wars outside Europe; its states, for the sake of peace, should then conquer other parts of the world in order, among other ends, to spread the Christian religion and, at the same time, to satisfy their thirst for power and expansion.

2.) Indeed, Leibniz makes concrete proposals about the way political structures in a 17th century Christian Europe devastated by wars could reorganize themselves through the imposition of the *pax christiana* on the world. Starting with the acknowledgement of an imbalance between forces at the European level, Leibniz made every effort possible to analyze methodically the situation and, to that end, made suggestions, where his diplomatic talents constantly shone through. Through metaphysically and religiously based argument, he legitimates France's conquest of Egypt, and this not without defending the Habsburgs against France. In a highly satirical and somewhat amusing writing, *Mars Christianissimus* (Most Christian War God, 1683), he suggests that France wage war against the Turks instead of conquering Christian nations like Holland and other European nations. In this same writing, Leibniz voices the idea of an alliance between German Protestant princes against the power of Catholic France under Louis XIV. And beyond Louis XIV, he pleads for a new European political balance. For Leibniz, the political unbalance in Europe owes to the "House of France", to which the Peace of Westphalia (1648) and the Treaty of the Pyrenees (1659) have granted too many advantages. These treaties, intended to protect stability in Europe or the "political balance of Europe", have instead led to a state of disharmony that fails to respect other states' sovereignty.

According to Leibniz, the “policy of balance” proves in fact a policy that is “unbalanced”<sup>21</sup>. Before this balance, it is important to rethink the overall issue of interstate relationships, to replace, on one hand, strategies of division by those of unity and, on the other, strategies dictated by passion by those of reason.

Leibniz's solution consists in “exporting” the tensions and rivalries between European houses to other parts of the world. The justification of this imperialistic solution lies in the superiority of the European Christian religion and culture. First of all, Leibniz recommends to Louis XIV to conquer Egypt; by doing so, he will strengthen his kingdom and weaken the Turk instead of waging war against Holland, a Christian country:

“Je veux parler, Sire, de la conquête de l’Egypte. De toutes les contrées du globe, l’Egypte est la mieux située pour acquérir l’empire du monde et des mers : la population dont elle est susceptible, et son incroyable fertilité, l’appellent à cette élévation. Jadis, mère des sciences et sanctuaire des prodiges de la nature, aujourd’hui elle est le repaire de la perfidie mahométane, pourquoi faut-il que les chrétiens aient perdu cette terre sanctifiée, lien de l’Asie et de l’Afrique, digue interposée entre la mer Rouge et la Méditerranée, grenier de l’Orient, entrepôt des trésors de l’Europe et de l’Inde?”(Leibniz, 1672 Ed. de Joffmanns 1840)<sup>22</sup>

Leibniz finds two justifications for Egypt’s conquest. The first consists in hindering France’s expansion wars in Europe. The second reason lies in spreading the *pax christinana* all over the world.(Kaplan 1995 p. 91.95)<sup>23</sup> The conquest of Egypt is a “bellum sacrum”, a holy war against the pagans for the utility of mankind. Economically and politically, Europe's greatest threat, the Turks, will be discarded. By giving up its expansion in favor of the Christian nations and by waging war against the infidels, France and the Habsburgs will share mastery of the world and will be able to contribute both to the Christian religion's expansion and to peace and prosperity in Europe.

3.) In a third step, Leibniz designs a project for political Union for the prosperity of Europe, although he himself favoured universal monarchy. At the time, he still admired Louis XIV and would have entrusted him with the general direction of European state affairs: at the least, the charge of arbitrating disputes and litigations. When confronted, however, with Louis XIV's expansionist politics, wholly at odds with a politics of concordat, he gave up his first draft of the project of the Union and concentrated his effort on German unification. For Leibniz, Germany “is the kernel of Europe” (*CJG*, § 87). Leibniz

<sup>21</sup> History will confirm that assertion : after its victories, France saw the creation of coalitions against her ; these eventually isolated the former and shifted the situation (Treaty of Aix-la-Chapelle, Nijmegen and Ryswick).

<sup>22</sup> Mémoire de Leibniz à Louis XIV, sur la conquête de l’Egypte, Edit. By M. De Hoffmanns, Edouard Garnot, Paris 1840, p. 3-4. We underline.

<sup>23</sup> See J. Zenz Kaplan: *Das Naturrecht und die Idee des ewigen Friedens*, Brockmeyer 1995, Dortmunder Historische Studien, p. 91-95.

further wrote in a strong nationalist mood that there is only Germany which is “*personne civile*” (*CJG*, §88) capable of giving Europe its unity. It therefore proves vital that it become a highly centralized State. It must become a true federal State legally harmonizing or conciliating the diversity of German states in political unity: the Empire.

In his capacity as diplomat and also philosopher, Leibniz suggests to each power a solution to satisfy its thirst for expansion in the world. To Leibniz, that division amounts to what those powers must do to ensure peace in Europe: the carving up of the world outside Europe. Thus. England and Denmark have to occupy North America; Spain, South America; Holland, East Indies; and France, with divine providence, is designated as the Christian warrior in the Middle East. To that end, it finds itself bound to attack Africa and Egypt. Likewise, West and East India must be dominated. Human beings must wage war against wolves and wild animals prior to domestication, to which barbarians and infidels are likened.<sup>24</sup>

It is only at this price that Europe can realize its dream of peace. At the same time, Leibniz develops a cultural plan consisting in the creation of learned societies to help to complete his imperialistic program. For peace and development and all the interests of mankind, learned Societies are indispensable to achieving the ideal of *Civitas Dei*. In this sense, Leibniz fully shares the scientific optimism of Bacon’s *Novum Organum*.

As Goyard-Fabre expresses it, “to rebuild Europe’s shredded political unity, is a task that, in Leibniz’s philosophy, does not come under the classic issue of ‘The One and the Multiple’; it must be considered metaphysically, that is to say according to the vertical reference to the almighty divine’s eminent perfection of which universal harmony and jurisprudence are the expression”. (Goyard-Fabre 2011, p. 41)<sup>25</sup> This implies the transformation of the circumstances of justice, imposed by the House of France, to use Hume’s expression, into circumstances of peace, based on law – law offering possibilities of regulation outside of the state of non-right, the state of nature. But law means understanding, and understanding means that we are only one step away from establishing its mechanisms: a union of all European states. Then what stands as the basis of the union recommended by Leibniz?

In his work *Securitas publica*, impressive as it remains relevant even today, Leibniz suggests an association of sovereigns (§32), presided by a rotative Emperor, its objective being a “permanent alliance” (*concilium perpetuum*) with the function of the arbitration in order to avoid an absolutist government. That is why a federation of sovereign national states would be the suitable political strategy. The federation of sovereign states will

<sup>24</sup> Leibniz, *Securitas publica*, 1670-71, I, 167.

<sup>25</sup> Simone Goyard-Fabre, L’européanisme des pionniers, in : Gary Overvold, Philippe, Poirier, Lukas K. Sosoe, *Op. cit.* p. 41.

assure the political unity necessary; every state needs to defend its interests against other political powers but also to respect the freedom and plurality of the States under the imperial administration. This kind of federation of national sovereign states is far from what Abbé de Saint-Pierre is proposing which is totally different from the perpetual council aiming at “the common interest of States” (§24)<sup>26</sup> in the same Empire. Thus introducing a theme which he discussed unsuccessfully with Abbé de Saint-Pierre, Leibniz insists on the creation of peace in the union, on the safeguard of each people's and culture's difference. The advocated union must, at the same time, guarantee the diversity of its components. With this, he anticipates by two to three hundred years the “aborted” project of a European constitution wherein the question of unity in diversity is raised (Oliver Duhamel, 2003, p.158)<sup>27</sup> - which, unfortunately, is no longer to be found in the Lisbon Treaty. Far from being an obstacle, that diversity is well accepted and perceived and remains, to Leibniz, the stepping stone towards the opening up of other sociopolitical and cultural horizons: towards the cultural wealth of each state, each nation having its own particular genius.

## V

16

One cannot entirely discuss Leibniz's foundation of European federalism without taking into account the correspondence between l'Abbé de Saint- Pierre and Leibniz about the *Mémoire pour rendre la paix perpétuelle en Europe* (1712), which helps him to clarify some points of his European federal dream. Leibniz cannot be indifferent to that project. Vanishing though his dream is to resuscitate the Holy Roman Empire with the Pope and the Emperor as heads of the Empire of universal Christendom, he answered Abbé de Saint-Pierre. His answer reveals how realistic and practical Leibniz could be in political matters but also his position against the federation of individual sovereign States based on a contractual model.

L'Abbé de Saint-Pierre published from 1712-1717 his *Projet de paix perpétuelle* wherein he puts forth an idea of European Union founded on the contractual tradition. This intends to replace the imperial order by a federation of sovereign states with a central government. This project of a Union bases itself on a dual political power, the major goal of which is to secure peace in Europe, as indicated by the title. He sent it to Leibniz not only to seek his opinion but to use his influence to help the former convince European princes.

<sup>26</sup> Cf. *Entretiens de Philarète et d'Eugène*: that text, beyond its circumstance has an ideological dimension.

<sup>27</sup> Duhamel, Olivier, *Pour l'Europe. Le texte integral de la constitution expliqué et commenté*, Seuil, Paris, 2003.

In his first reaction to Saint-Pierre, Leibniz expresses an apparent scepticism full of civility. But, as we know, his theory lies in imperial Christian order. “Men lack the will to deliver themselves from an infinity of evils”, he wrote to Abbé de Saint-Pierre: “If five or six persons wanted to, they could end the great schism in the West and put the church in good order” (Leibniz, 1715 Ed. Riley, 1972)<sup>28</sup> To put an end to wars, “it would be necessary that Henri IV, together with some great princes favour your project. The evil is that it is difficult to suggest it to great princes.” (Leibniz 1715, idem)<sup>29</sup>

But this finds itself only the apparent reason. Indeed, the main reason proves that, in his *Codex Juris gentium*, Leibniz carried out a general inventory and evaluation of international relations and all agreements made under the history of the Empire. This history is, for Leibniz, the princes' concrete rights, especially those of the Holy Roman Empire's princes. (Cheneval 2002, p. 112-113)<sup>30</sup> It amounts to more than a merely normative discourse like the Saint-Pierre's project, which remains, for Leibniz, wholly cut off from concrete legal life and historical reality, from the psychological and strategic considerations of European princes.

In a small text, “Observation on the Abbé de Saint-Pierre's project for perpetual peace” written in 1715, Leibniz insists on the fact that Saint-Pierre's project has no originality. Leibniz shows clearly his position by questioning the project's originality in reference to Crucé's *Cyneas*.<sup>31</sup> Leibniz maintains his position against Saint-Pierre's idea of confederation. For him, Saint-Pierre's project of perpetual peace is somehow naïve. The European political situation does not allow to see any dream of perpetual peace. The project is a utopia the political price of which would be very high. It will lead to the lost of freedom, happiness and justice of the citizens and each confederate member state will follow its own economic and politic interests and lose sight of the common ones which can

<sup>28</sup> Letter to the Abbé de Saint-Pierre » (1715) in: *Leibniz. Political Writings*, Patrick Riley (Ed.), *Op. cit.*, 176.

<sup>29</sup> *Op. cit.*, idem.

<sup>30</sup> See Francis Cheneval, *Op.cit.*, p. 112-113.

<sup>31</sup> « Everyone knows, Leibniz adds, that Cyneas was the confidante of King Pyrrhus, who advised him to rest, (content with what he has) at once, because that would also have been his goal, as he confesses to him, if he had conquered Sicily, Calabria, Rome an Carthage. » Emeric Crucé's work particularly deserves mention. He is the author of a work entitled *The New Cyneas, Cyneas* (1623) being the name of a collection of publications about the project for peace in Europe and around the world. *The New Cyneas* is full of stories about the Romans, Albanians, Turks and British, about priests, the rich, and thieves, about philosophers, kings and their advisers... It is a diplomatic program intended for monarchs and princes. The preface unveils this program:

“It is necessary before everything else to uproot the most common vice and the one which is the source of all others, namely, inhumanity”.

To do so, Crucé underlines, that what matters first and foremost is to enlighten minds and, secondly, because human society is “one body, of which all the members are in sympathy” with one another, to bring them closer: only then will they reach happiness – the French, Europeans, and lastly, all Christians. For this union, faith in intelligence and reason is necessary and sufficient: not only will it effectively stop the act of resorting to violence, it will smother the instinct of war itself in humanity

be favored only by the Empire of the German principalities the union of which is indispensable for a new equilibrium in Europe.

With his Realpolitik Leibniz thinks that Saint-Pierre's project is against the very idea of international law and international politics. In his opinion a Saint-Pierre's project of European federation transgresses the idea of international politics understood as a legitimate "struggle for power" to survive and safeguard one's sovereignty. Unless the sovereignty of other States is guaranteed, the achievement of a confederation would not be only totally irrational, but also an impossibility in a state of total disequilibrium, devastation and desolation. In any case, it would not be the best action to be taken.

For Leibniz, the European federal state has to avoid absolutism. It must contribute to the rise of a strong nation indispensable for political equilibrium in Europe. It must be powerful enough to oppose the two potential aggressors, from the East Louis XIV's France and from the South the Muslim Ottoman Empire. For that a treaty is needed between different nations of the Empire if the search for equilibrium must become a reality, a real peace depending on that equilibrium if we don't want to confuse the *Pax Ludovica* or the French peace with that which Europe really needs.

Leibniz's position is not only similar to a Hobbesian account of security in the natural condition of man but also to the contemporary security solution adopted during the cold war in Europe. The dictate of reason in Hobbes's natural condition of man is "that every man, ought to endeavor peace, as far as he has hope to obtaining it; and when he cannot obtain it, that he may seek, and use all helps and advantages of war". (Hobbes, *Leviathan* 1976, Chap. VI, p.190)<sup>32</sup> Leibniz is also for peace but not any price and at any condition. It seems to him that the most rational course of action in the situation in which the German states find themselves at that time, needs war to restore acceptable, that means fair conditions of peace. It is also the kind of action taken during the cold war : the balance of terror. Only a good balance of terror has produced a deterrence effect on the world power. Without the Union of the states of the Holy German Empire there can be no peace or the only peace possible would that of the House of France. So Saint-Pierre Project would suppress one side of the scale. And this against the idea of Harmony. That is why is necessary to restore, even at the price of war, the precondition of peace: political equilibrium of European political powers.

Leibniz's concept of peace is very different from that of Kant. Peace is a negative concept for Leibniz. It means the absence of war (*pax absentia belli*) and is contingent treaties (*pactum pacis*) among states or parties and achievable only through an international legal order (*jus Gentium*) which confers its legitimacy to the just war against

<sup>32</sup> Hobbes, *Leviathan*, chap. XIV, London, Penguin book, 1976, p. 190.

the infidels, non-European, especially Turks and perhaps France (*Bellum justum*) (Rodan, 2007 p.124)<sup>33</sup>

Should the federation be absolutely realized, the unity of the Empire should be conserved as a member of the confederation.

“Since Saint-Pierre has given us two plans for Christian society, Leibniz argues, one in which the Emperor with the Empire make up one member and one in which the Empire is destroyed and in which the emperor would have a voice only as a hereditary sovereign (in Austria) and in which the elector would have each one vote, I must be for the former plan and Justice itself would prefer this plan, following the very principle of M. l’Abbé de Saint-Pierre, that the Christian society must leave things in their present state.” (Leibniz 1715, Ed, Riley 1972, p. 181)<sup>34</sup>

Should the federation be inevitable, the Empire must remain as it is. Otherwise, Leibniz goes quite far in the direction of Saint-Pierre’s Project, which he apparently took rather seriously as a diplomat and as a politician. As regards Saint-Pierre’s proposal of a European tribunal, Leibniz observed that it possesses no guaranty. Perpetual peace between States requires a guaranty without which any agreement would prove mere words for powerful princes. He took up the European confederation’s fourth article, which provides for administrative and even military sanctions against member States unwilling or unable to comply with the rules. This article in Saint-Pierre’s project reads:

“By the fourth shall be specified the conditions under which any Confederate who may break this Treaty shall be put to the ban of Europe and proscribed as a public enemy: namely, if he shall have refused to execute the decisions of the Grand Alliance, if he shall have made preparations for war, if he shall have made a treaty hostile to the ends of the Federation, if he shall have taken up arms to resist it or to attack any one of the confederate.” (Rousseau, 2013, p. 574)<sup>35</sup>

Instead of planning to declare war against the State inclined to violate the federal clauses, Leibniz makes the proposal to establish a European Federal Court in Rome over which the Pope should preside and play judge between Christian princes. He pleads for resuming the old ecclesiastic authority, as well as for excommunication “making Kings and Kingdoms tremble”. Similarly, he stands for a federal financial guaranty, for an European central Bank, because certain nations will be powerful enough not to respect the European tribunal. Thus, to reinforce Saint-Pierre’s proposal, he wrote:

<sup>33</sup> Concha Roldán, Pax perpetua y federacion europea. La Critica de Leibniz a Saint-Pierre, in : II” (FFI2010-15914), “Filosofía de la historia y valores en la Europa del siglo XXI” (FFI2008-04279/FISO) y “Enlightenment and Global History” (ENGLOBE: Marie Curie Inicial Training Network: FP7-PEOPLE-2007-1-1-ITN). P. 124.

<sup>34</sup> Leibniz, *Observations sur le projet de l’Abbé de saint Pierre*, Op. cit. p. 181.

<sup>35</sup> Jean-Jacques Rousseau, *Projet de paix perpétuelle, Polysynodie de l’Abbé de Saint-Pierre*, in *Œuvres Complètes*, Galimard, Pléiade, Paris, tome III, Paris, 2013, p. 575.

“It will be necessary that all these gentlemen contribute a *caution bourgeoise* or a deposit in the bank of tribunal, a King of France, for example, hundred millions *écus* and a King of Great Britain in proportion, so that the sentence of the tribunal could be executed on their money, in case they prove refractory.”(Leibniz 1712 Ed. Riley 183-184)<sup>36</sup>

The interest of the guaranty would be returned to the princes; in cases of refraction, the princes would, however, lose them.

Both contrary to Kant’s hyper-optimistic and somewhat metaphysical solution, wherein the reference to providence or nature replaces the guaranty of perpetual peace, and against Saint-Pierre’s proposal of judicial sanctions without the power of enforcement against powerful member states, Leibniz suggests a highly practical and pragmatic solution two years before his death. Leibniz’s suggestion is a politician’s diplomatic decision, a strategic decision. Leibniz neither waits for nature’s prowess to drive human beings willy-nilly to peace nor for a punitive expedition of tribunal doomed to failure in the face of powerful states. Leibniz chooses the path of efficiency: a European central bank, as the use of force or war remains uncertain in terms of time and resources. For Leibniz, a financially backed agreement comes to the best guaranty of peace.

Although Leibniz sends this letter to Saint-Pierre to show his good will to review the project, he still believes it rather unoriginal and classifies it on a long list of similar proposals. For Leibniz, it stands as one more project among many others on peace in Europe; yet it proves nothing but a romance. “But since it is permitted to write romances,” he confesses in the same letter to Grimarest, “why should we find bad the fiction which would recall the age of gold for us.”

## VI

A history of transcendental philosophy without Kant would be not imaginable. It is not exaggerated to say that the same holds for Leibniz concerning the philosophical foundation of the European Union. No account on the philosophical foundation of European federalism will be finished without mentioning Leibniz’s philosophical endeavor. At quite different periods of his life, Leibniz seeks solutions as to how Europe’s unity could be achieved through a union or a federal system. From the metaphysically grounded ideal of *Civitas Dei* to the Letter to Grimarest about Saint-Pierre’s project two years before his death, Leibniz never ceases to insist on European unity in his writing. He finds in this unity the ferment for the development of the whole world and human

<sup>36</sup> *Letter II to Grimarest: Passages concerning the Abbé de Saint-Pierre’s Project of Perpetual Peace* (June 1712). This proposal will be sent to Abbé de Saint-Pierre on the 4<sup>th</sup> of April 1715 by Leibniz himself.

emancipation. Peace is needed for that. And, for Leibniz, it will come from Europe. Yet still Leibniz remains a cosmopolitan philosopher. His Eurocentric attitude has to be considered as a stage on the way to a world society even if, from a normative point of view, it remains unacceptable. It is not an end in itself but just as his argument for just war one of the means to a global political order, the last stage of which will be dominated by learned societies. In this sense, a more systematic contribution will certainly be necessary to account for the many, sometimes contradictory, aspects, of Leibniz's immense legacy in political philosophy in general and especially for Europe, an Europe contributing to peace and harmony in the world.

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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 epistemology<sup>1</sup> 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.

<sup>1</sup> 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 totalitarianisms<sup>2</sup>. 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 Era<sup>3</sup>. 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 dissolved<sup>4</sup>. 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.

<sup>2</sup> 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."

<sup>3</sup> 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.

<sup>4</sup> 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 work<sup>5</sup> – is a more or less direct criticism of Kelsen’s legal positivism<sup>6</sup>. 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 nihilism<sup>7</sup>. 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 (...)”<sup>8</sup>. 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.

<sup>5</sup> 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.”

<sup>6</sup> 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.

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

<sup>8</sup> 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 relativism<sup>9</sup>. 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 (...)"<sup>10</sup>

### 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.

<sup>9</sup> 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".

<sup>10</sup> 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*<sup>11</sup>, since one can find within it the grounds for a limitation of human cognition. His Farewell Lecture, “What is justice?”<sup>12</sup>, 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”<sup>13</sup> 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 views<sup>14</sup>, namely that human rights mean *the rights to have rights*.

<sup>11</sup> 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.)

<sup>12</sup> 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/>

<sup>13</sup> 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.

<sup>14</sup> 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 act<sup>15</sup>.

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 are<sup>16</sup>.

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.

<sup>15</sup> 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).

<sup>16</sup> 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 higher<sup>17</sup>. 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 this<sup>18</sup>: 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."<sup>19</sup>

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

<sup>17</sup> 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.)

<sup>18</sup> 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.

<sup>19</sup> H. Kelsen, "What is justice?", p.10.

pacific expression of everyone's opinions. According to Kelsen, "[t]olerance means freedom of thoughts"<sup>20</sup>, 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."<sup>21</sup>

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

<sup>20</sup> *Ibid.*, p. 23.

<sup>21</sup> *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 future<sup>22</sup>. 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.

<sup>22</sup> 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"<sup>23</sup> 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."<sup>24</sup>

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

<sup>23</sup> 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).

<sup>24</sup> *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”<sup>25</sup>.

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.

<sup>25</sup> Idem. (OV: *Ibid.*, p. 172).

“This, of course, implies a very serious responsibility, the most serious moral responsibility a man can assume. Positivistic relativism means: moral autonomy.”<sup>26</sup>

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 (...)”<sup>27</sup>

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

<sup>26</sup> Kelsen, H., “Foundations of Democracy”, p. 97 footnote 70.

<sup>27</sup> 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."<sup>28</sup>

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*."<sup>29</sup>

<sup>28</sup> Kelsen, H., "Foundations of Democracy", p. 97 fn. 70.

<sup>29</sup> 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 itself<sup>30</sup>. 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.

<sup>30</sup> 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).

An invitation to a *workshop* is – in my understanding – also an invitation to *speculation*. Its place – and the German idealists understood and theorized this – lies not in the written, but rather in the spoken word, ideally in front of an audience of *speculative co-workers*. I would thus like to seize this unique occasion and speculate about Europe, from the point of view of political theology. The question I would like to raise is the following: How can the concepts of political theology apply to today's European politics? And what does this mean for Europe's self-conception?

I will start with a clarification: political theology should be understood not as a complement to political philosophy, but as being very distinct from it. Unlike political philosophy, political theology grounds “the political” on a unique event in history, namely God's revelation and – in the case of Christian political theology – the incarnation of Christ. Thus, political theology does not begin with man and his essentially political nature, with intersubjectivity or some other particular disposition of his mind, but with *God* as the unquestionable reason and center-point from which political theology derives its concepts and motivation. Different theological conceptions (Christianity, Islam, Gnosticism, etc.) call for different political theologies: theocracy; co-existence of the worldly and the spiritual powers; or sovereignty.

This last form of government is, in the context of political theology, associated with the name of Carl Schmitt, the German jurist and philosopher who played an important role in the legalization of the constitutional system of the Third Reich, but whose writings have nevertheless continued to inspire thinkers after the War. Schmitt's definition of the sovereign as he who decides upon the state of exception, is probably the best-known part of his 1922 work *Political Theology*. Along with its second best-known bit, according to which all key concepts of the modern theories of the state are secularized concepts, it indicates the general outline of his political theology: namely that of a vast critique of enlightenment and modernity, of the autonomy of its political conceptual set, which – and this is its sign of weakness – has to pilfer constantly from theology in order to continue to function and to maintain itself. Political theology reveals the arbitrariness in the use of modern political concepts, the sheer emptiness behind the conceptual construction of modern political philosophy and the degree to which this illegitimate and blind use has estranged it from its original theological founding. Political theology is, at least in its

Schmittian conception, a profoundly anti-modern project. How then could a profoundly modern project like Europe be connected to political theology?

Here, I would like to pick up a thought developed by Etienne Balibar in a 2012 article<sup>1</sup> In his article, Balibar discusses the incessant movement of de-theologization and re-theologization inherent in Hobbes' construction of the Leviathan as a "mortal God", whilst drawing a parallel to our political conjuncture, especially with regards to the problem of laicism, secularization and Islamophobia in today's Europe – the assumption being of course that Hobbes' theory and Schmitt's interpretation can help us to grasp the dialectics of power and to understand Europe's problematic standpoint regarding this question.

One must bear in mind, of course, the profoundly paradoxical structure of Hobbes' Leviathan<sup>2</sup>. In its claim for absolute control (meaning total sovereignty), the State (or the monarch) must alienate every power claim of its people, especially the power claims of organizations and communities – and especially the claims of the clerical institutions. In order to abolish the state of nature – that means the state in which every single set of beliefs has the same claim for authority as the set of beliefs of your neighbor – the personal beliefs must cease to be public and become as private as possible. These beliefs wander into the "box room" of the moral consciousness, and so does the people's power openly to criticize the State/Monarch.<sup>3</sup> In order to guarantee its protection, the State cannot accept any form of authority claim or open form of resistance by the people. Its moral and critical faculties must be "privatized" – the citizen has to become a *subject*.

Considering its famous frontispiece, the biblical reference and the key-role of the anthropological fiction of the "state of nature" (as an anti-Paradise), one can understand how Hobbes' Leviathan takes over the metaphorical and mythical language of religion to turn it against itself. The State – in order to diminish and *depotentiate* the power claims of religion and of popular organizations – adopts theological attributes and replaces the "original" systems of belief by a form of "religion of the State". The more a community is organized around a single belief and the bigger its authority claim is, the more the State has to adopt its characteristics in order to occupy its position. This "metaphorical" strategy results, on the one hand, in a monopole of power by the State that has constantly to assert its authority through the identification of "public enemies". On the other hand, the moral and critical power of the people become sheer polemics, meaning a powerless form of critique unable openly to and thus effectively contest matters of state – and *be*

<sup>1</sup> BALIBAR, É., "Le Dieu mortel et ses fidèles sujets. Hobbes, Schmitt et les antinomies de la laïcité", in: Gonthier, Th. (dir.), *Ethique, Politique, Religions*, 1 (2012), pp. 27-39.

<sup>2</sup> Cf. *Ibid.*, pp. 29-32.

<sup>3</sup> Cf. KOSELLECK, R., *Kritik und Krise. Eine Studie zur Pathogenese der bürgerlichen Welt*, Frankfurt a. M.: Suhrkamp, 1973.

*contested* by the sovereign. To put it simply: the State/Monarch is to blame for nothing, but is responsible for everything. The citizen is responsible for nothing, but to blame for everything. The citizen becomes *hypocritical*; the State becomes *hypertheological*. This gap between public and private is at the root of a permanent *crisis* inherent to this political model and the paradoxical power-strategies that try to overcome it.

In reference to Schmitt's famous characterization of "the Political" as the possibility always to distinguish the enemy from the friend, Balibar emphasizes the importance of the permanent identification of a "public enemy" for the modern State. This search is not only directed towards the outside of the State, but also – and this is important – towards its inside. (This is, in fact, characteristic of *our* political conjecture, in which the "inner" enemy has grown to be more threatening than the "outer" enemy.) To prevent the whole construction from being internally destroyed; to keep the homogeneity of a morally and politically "privatized" individual, the inner enemy has to be defined. According to Balibar, this is precisely the function of the theologization of the enemy.<sup>4</sup> It is only under the theological form that the outer enemy can be projected to the inside of the state, thus giving the threatening impression of a vast "community of believers" infiltrating and endangering the "community of individuals". By projecting this figure on the "alien elements" of the State, it creates the supposedly uncontrollable *public* enemy (as opposed to the controllable *private* individual). And with a new enemy comes concomitantly a new strategy to defeat and *subjugate* (meaning *subjectivly*) it. All this creates the paradoxical situation of a secular state, which through the theologization of the enemy adopts its very characteristics; a state that becomes more and more theological – *divine* – itself.

Doesn't this remind us of recent developments in today's spectrum of right to far-right wing Europe? Isn't one of its dominant tropes the dissociation from Islam (i.e. Turkey's long time wait for membership), not only to the outside but also to the inside? Isn't it striking that in the last few months, thousands of Germans have gathered for weekly protests against the alleged "Islamization of the Occident", under the name of "PEDIGA" (meaning: "Patriotic Europeans against the Islamization of Occident") – and has been growing into a popular mass-movement with the participation of the far-right wing parties?

It seems to me – and this is the "speculative part" of my talk – that the difficult question of the European identity has become a question of legitimacy more than a question of legality. Furthermore, this legitimacy has been found in the depths of the alleged Judeo-Christian heritage. Europe's – and especially Western Europe's – members seemingly require an *arch-foundation*, namely a new theological-political *Urstiftung*. This need, however, is derived from the nature of the theologized enemy who – according to

<sup>4</sup> Cf. BALIBAR, *op. cit.*, pp. 37-39.

Balibar<sup>5</sup> – is projected on the cultural, sociological and historical differences in our diversified societies. In other words: Europe has begun to derive its legitimacy from the illegality of its enemy.

It is here that I would like to introduce the very peculiar theological-political concept of the *katechon*.<sup>6</sup> The concept appears in a personal and an impersonal sense in the second letter to the Thessalonians, c. 2, v. 3-9. I would like to quote the entire passage (in its modernized translation):

“Don’t let anyone deceive you in any way, for that day will not come until the rebellion occurs and the man of lawlessness („a-nomos“) is revealed, the man doomed to destruction. He will oppose and will exalt himself over everything that is called God or is worshiped, so that he sets himself up in God’s temple, proclaiming himself to be God.

Don’t you remember that when I was with you I used to tell you these things? And now you know what is holding him back („to katechon“), so that he may be revealed at the proper time. For the secret power of lawlessness is already at work; but the one who now holds it back („ho katechon“) will continue to do so till he is taken out of the way. And then the lawless one will be revealed, whom the Lord Jesus will overthrow with the breath of his mouth and destroy by the splendor of his coming. The coming of the lawless one will be in accordance with how Satan works.“

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As we see, the *katechon* is the principle that stands against the apocalypse, meaning here the revealing of the Wicked (the “a-nomos”), who will have the power of Satan. Grippingly, the *a-nomos* is already amongst us, but has not yet begun to function: the nature of the apocalypse is unknown, but the “illegality” is already at work (“amongst us”). The *katechon* can thus be defined as he who “detains”, who “slows down” the apocalypse by “holding back” (*Zurückhalten*) the *a-nomos*. According to Carl Schmitt, the belief in a katechontical power is the centerpiece of every truly Christian conception of history. It is the *bridge* between our world and the world after God’s judgment. As a worldly power with a heavenly function, it is what dynamizes history and overcomes the “eschatological paralysis”<sup>7</sup>. The *katechon* is thus part of the theological answer to a situation of *crisis* (in the sense of *Ent-zweiung*) – and, in a certain way, “bears the tension” (*die Spannung aushalten*). Schmitt now integrates this figure into history, claiming that this function has been occupied by several powers (or persons) throughout the ages, (for instance the Holy Roman Empire, holding back the ottoman conquerors).

<sup>5</sup> Cf. *Ibid.*, p. 37.

<sup>6</sup> In fact, Balibar’s article begins with the mention of the concept of *Katechon*, and his conception of a State that has constantly to hold up the revolution through the identification of the inner enemy is a concrete definition of the concept in the current political situation.

<sup>7</sup> SCHMITT, C., “Drei Möglichkeiten eines christlichen Geschichtsbildes”, in: *H. Blumenberg – C Schmitt, Briefwechsel*, Frankfurt a. M.: Suhrkamp, 2007, p. 164.

This highly problematic historicization of the *katechon* is a sign for the craftiness of political theology: the katechontical function does not, in fact, emerge out of a complex play of power-relations, but has simply to be occupied, to be “seized”. The position has its own legitimacy. But in the “secularized” and politicized version of the story, the eschatological fear has definitively lost its potency: what remains are the *katechon* and the *a-nomos*, the legitimacy and the illegality. Not only does the *katechon* lose its defusing intention, but perpetuates and aggravates the original *crisis* that can only be resolved by God’s universal judgment, by his *Ent-scheidung* (de-cision).<sup>8</sup> In other words: the *katechon* exists in and through the permanent crisis, meaning the permanent inability to decide – the eternal *indecision*. Deprived from the tension between here and “there” (*Aushalten*), the holding back (*Zurückhalten*) changes into repression and subjugation (*Niederhalten*). Furthermore, the time-conception has changed: the hopeful waiting for the End-times is – in Schmitt’s – transformed into an anti-dialectical standstill between enemy and friend.

Since we lack the idea of an eternal and universal salvation, since – in the post-modern political conjuncture – it is not about *all or nothing* anymore, katechontical politics – and this is my point – provides the illusion of decision (and thus dynamism) where there can only be eternal delay. Its *mission*, although “legitimate” from an alleged higher standpoint, is an infinite one *sans* real historical progress. This is why Giorgio Agamben has opted for a re-insertion of the *mysterium iniquitatis* into an eschatological, *historical* context, urging every single actor of the katechontical drama to take his responsibility towards the future, thus freeing the “a-nomos” from the timelessness and amorality of its theological institutionalization.<sup>9</sup> Hans Blumenberg – in his correspondence with Schmitt – understands the *katechon* on the contrary not as a lever for eschatological belief, but as its pure negation, as a strategy to cope with the frustration resulting from the long overdue apocalypse. The Agambian concept of an “incessant drama” (*unablässig abspielendes Drama*), the bearing of an infinite tension, is incompatible with Blumenberg’s revalorization of the “humane” dimension of historical and political action.

In conclusion, a last question: Could it be that with the new search for legitimacy amongst European nations, that with the reference to our “original values” and the alleged *Leitkultur* comes the will to take over a new role in history, to “find back” into history – and this in the form of a new understanding of the *katechon*? In order to answer to this, we would have to more clearly define this procedure of “taking over a role” (a conscious or an unconscious process, etc.). Nevertheless, the tendency in Europe’s foreign policy to redefine the nature of its borders, the popular mass-movements, kindled by the right wing parties (whose cry for a “stronger”, more decisive government might even be understood

<sup>8</sup> Cf. AGAMBEN, G., *Pilate et Jésus*, Paris : Rivages, 2013, p. 98.

<sup>9</sup> Cf. AGAMBEN, G., *Das Geheimnis des Bösen. Benedikt XVI und das Ende der Zeiten*, Berlin: Matthes & Seitz, 2015, pp. 57-59.

as a cry for the final judgment), the tendency to define a common enemy – namely the Islamic belief – and to project it into the inside of Europe, finally the State’s inability to handle its “alien elements” on a strictly legal level and to find legitimacy not in the discontinuity of the future – meaning essentially an EU as a community of social justice – but in an undead concept of nationality and “cultural identity” – all these moments can be seen as signs of a certain return of theological concepts into politics.

# The Burqa Ban's Dark Side. Uncovering Face Covering Bans

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*At times in the evenings a face  
Looks at us out of the depths of a mirror  
Art should be like that mirror  
Which reveals to us our own face.*

Jorge Louis Borges

## Introduction

The presence of the so-called Islamic headscarf in the European public sphere epitomizes probably one of the most interesting contemporary conflicts in the human rights universe. The appearance of visibly veiled women in public places in Europe has been greeted with hostility. In the European public space, we find different ways of accommodating the presence of the veil, they do vary amongst different member states and such differences to a large extent reflect their constitutional and political traditions. There is the laïcist solution in France banning (all) religious symbols, at the other end of this axis, we find Britain, which allows the presence of religious symbols in the public sphere without significant restrictions. The symbolic and political stakes of the legislation that has been passed on the account of the presence of the veil in the European public sphere are undoubtedly high. The presence of the veil and the responding laws adopted in many European states raise fundamental questions about European identity, the concept of secularism, gender as well as touching upon the legacy of colonialism. In a nutshell, it provides a space for critical reflections about the politics of ethnicity, gender and religion in Europe. It has gradually become an arena of strident debates and passionate clashes. Wearing the veil has predominantly been interpreted as an expression of anti-Western and anti-modern attitudes. The veil tends to be framed as a threat to public order and to the secular order of liberal democracies.

Unfortunately the discussion about the multitude of cultures in Europe, about the European project and its identity and the place of emerging cultures and (their) values is often reduced to simplistic debates such as “hijab: to ban or not to ban?” or “the construction of Minarets: to ban or not to ban?” The reductive tone of these debates, which

run along simplified trajectories laid down by the still dominant liberal discourse signified by the popular assumption about the qualities of the liberal public sphere and the values which form it, is received as an affirmation of the dominance of the traditional norms and values which govern the use of public reason. In the following pages, I put forward, against this received paradigm, arguments showing that the ensuing liberal theory of minority rights, which goes hand in hand with the afore-mentioned understanding of the public sphere, in fact not only reduces the issues that emerge with the presence of the “other”, as represented i.e. by the veil, but that it, hand in hand with the liberal rights discourse, tends to remove certain considerations from the debates we lead in Europe, a tendency, most visibly represented by disputes over religious symbolism. What the language and structure of universal human rights (i.e. represented by the European Convention on Human Rights), through which these issues are problematized, achieves is to put aside the “*unspoken, implicit borders and the stigmatizing exclusionary power structure of the secular public sphere.*”<sup>1</sup> What are the questions that should be posed and what the social costs and shortcomings at stake are here, is the main focus of this paper.

## Boundaries and Bodies

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The way in which the on-going discourses which touch upon the issue of the veil, have evolved, reflects the quite recent pronouncements by governmental leaders in Germany, Britain, and France, which state that the adopted policies of multiculturalism have “failed”, in the famous words of Angela Merkel “*This [multicultural] approach has failed, utterly failed.*” With the recent developments we can detect a market shift, in the public, political and judicial discourse in the perception of the veil, which has gone from a religious symbol to a political metaphor *par excellence* for the refusal of the newly emerging minorities to embrace European values as well as their determination to assert the visible presence of Islam in Europe. The dynamic that we witness almost everyday in the mass media fit quite well with what Claude Levi-Strauss describes as “hot moments”. These moments do not automatically emerge as objective realities, but instead “*result from the individuals and groups whose discourses assign meanings and social significance to events regarded as benchmark moments or historically notable occasions*”.<sup>2</sup> In other words they illustrate significant instants in the narration through which different groups in the social order, be it the nation as a whole or different dominant cultural, political or religious groups, re-invent and assert their own positions. This effort is propelled by the inherent propensity of such domineering groups, operating at different levels of the social strata

<sup>1</sup> GÖLE, N., “Islam in Public: New Visibilities and New Imaginaries,” *Public Culture* 14 (2002), pp. 173-190.

<sup>2</sup> LEVI-STRAUSS, C., *The Savage Mind*, Chicago: University of Chicago Press, 1966, p. 259.

and across the social order in place, to re-appropriate the dominant ideological conceptualization of the public sphere. In this way, the collective body as well as every individual subject part-taking in the process of observing the presented “moments”, contribute significantly to the formation and representation of the meaning ascribed to the hijab and its position *vis-à-vis* the imagined European community.

Anthony Giddens writes about a people’s identity as “a narrative about themselves”. Identity is a story one tells to one-self and as well as to others. Notice the double bind Giddens is presenting us with. Narratives not only serve to create an image, that is an idea about the storyteller in the eyes of the spectator, but also help the storyteller to assume her own identity as well. That story is partly objective and real, partly imagined and subjective. Identity is indeed a narrative, but in order to be credible to others, it often refers to content, which reflects the existing and available particles we find in the public discourse. Therefore, regardless of whether it reflects truth or expresses it, identities as constructs refer to the array of underlying structure available in the fabric of the society and as such clearly indicate the purpose to establish a pattern, a structure, which is accepted by those who they share the public sphere with. Just as personal identities both reveal and conceal the depths of human subjectivity and serve as a way to connect to the existing grid of the larger framework of available identities (heterosexual, European, queer etc.) that make up the polis, so do these identities we turn towards, reveal and conceal our intentions, needs and histories. And if narratives both reside within individuals and emerge at the same time from their subjectivity in larger framework of the polis, they too exert their dominance across many aspects of our lives, by imposing external boundaries, particularly by re-inscribing our singular actions into larger narratives and signifiers.

Another aspect of the role and function of identity to be mentioned before we can move on is the *performative* aspects of identity.<sup>3</sup> The public sphere represent a primary forum, where identities are formed as well as dispersed, through performances of subjectivities and their visual displays as well as through validation and authorization by the audience. But, Muslims emerging in the European public sphere perform new forms of subjectivity with reference to different collective memory and identity; immigrants are culturally distinct from traditional European cultures, values and perceptions.<sup>4</sup> Discursively constructed boundaries retain significance which goes beyond the traditional confines of nation states and in a sense go much deeper, connecting to the very fabric of European identity. What becomes more crucial than policing boundaries of states or even communities and their rights, is the struggle for what we could call “discursive power”, the

<sup>3</sup> BUTLER, J., *Bodies that Matter: On the Discursive Limits of "Sex"*, Routledge, 1993, p. 12.

<sup>4</sup> SAINT BLANCHAT, Ch., „Islam in Diaspora: Between Reterritorialization and Extraterritoriality“, *International Journal of Urban and Regional Research*, Vol. 26, No. 1 (2002), p. 138-151.

power to decide, who defines the meaning and extent of rights of a given 'community', how is such a community constructed, which narratives become foundational and why certain other narratives are left out. The power relations that are inscribed in the relationship between audience and narrator create not only the content of particular identities but also their position in the wider scale of liberal society. Boundaries of this kind make, of course, some things visible and other invisible. Rancière explains, "*Politics revolves around what is seen and what can be said about it, around who has the ability to see and the talent to speak, around the properties of spaces and the possibilities of time.*"<sup>5</sup> This brings us back to the question of authority and to the question of who has the authority to interpret meanings. In this sense, the public spaces themselves become constitutive features of the manner in which identities are defined, both the (successful or unsuccessful) reproduction of social values or norms and the emergence of new ways of seeing and thinking through patterns of identity formation.<sup>6</sup> On this reading, politics is first of all the configuration of a given space as political and polemical, which has the capacity to frame a specific sphere of experience as well as the positioning of identities, stories and modes of argumentation as "common" as well as of the subjects who are recognized as having the capacity to discuss them.<sup>7</sup>

Western Orientalist discourse, in times of colonization, rendered Muslim women, who were veiled, as exotic and installed the veiled faces as a centre of exoticism. In *Orientalism*<sup>8</sup> Said shows both i) how Orientalism as an institutionalized discourse was created to provide knowledge about the Orient and the Oriental in order to have power over this 'Other' and ii) how the knowledge of the Other was created out of an ideological construction combining fear towards the 'Other' with an imperialistic outlook of the Oriental domain. The veil thus became a space within which the Western Orientalist narratives could be played out and through which the meaning of the veil as well as the emerging (other) identities could be looked at, seen and its meaning could be occupied with supposedly universal validity.<sup>9</sup>

The conceptualization of the so called *l'affaire du foulard* has, over the years, passed through an evolution of arguments, ranging from the questions of the separation of the church from the state to the respect and equality for women. It was only later, given the recent geo-political development in the world that the *la question du foulard islamique* has been interpolated as a 'negative identity'; Muslim women's bodies and their attire now bear the brunt of a more generalised anxiety about fundamentalism, somehow, in the popular imaginary, the veils and terrorist acts have become inseparable from one another

<sup>5</sup> RANCIÈRE, J. *Politics of Aesthetics*: New York: Continuum, 2006, p. 8.

<sup>6</sup> Ibidem, p. 12 -20.

<sup>7</sup> RANCIÈRE, J. *On the Shores of Politics*, London/New York: Verso, 2007, p. 54.

<sup>8</sup> SAID, E., *Orientalism*. New York: Pantheon, 1978.

<sup>9</sup> VIVIAN, B., "The veil and the visible", *Western Journal of Communications* 63 (2): 115- 139. p. 122.

- the laws forbidding the niqab and burka in public places, are a culmination of the gradual hardening of public and political attitudes towards veil dressing in general. An examination of the veil bans serves to map the terrain of European politics, and the veil a site of bio-political control in the construction of public space, formulated as a wish to preserve the existing dominant narratives in place.

## The Conditions of Human Rights Law

If societies communicate their meanings through the formation of social imaginings, than these are also shaped in relation to other significant modes of communication. Such interactions take place within a more generalized and collective history, in which particular memories are privileged and preserved, while others are cast away and forgotten. Those, which gain wide acceptance, become widely available for the meaning making of the present discourse. As Lewis says: “*this ‘pre-existing library of meanings’ that are held within culture might equally be understood as the invisible ‘boundary’ which shapes, and is shaped by, the individual and collective consciousness of a given social group.*” Lewis also uses Bourdieu and how he highlighted the ability of the dominant social groups to read their values and meanings into the particular practices of the wider public sphere.<sup>10</sup> Thus identities which are the product of collective imagination, never come to be as neutral entities, they are always laden with meaning and reinforce the distinctions that are implied in the process of producing meaning, images and signs and as such take over the imaginative faculties of the polis. Meaning thus created and their audience, are engaged in complex processes of social and political exchange, at the end of which, one meaning which is representative of a certain narrative, emerges as one which becomes privileged over others. Public sphere and its inventions as well identities we found there, different communities and their foundational values, they all result from the interrelations with and between others – other identities, other communities and other values – and as such the identities and elements we find floating in the public space are co-constitutive of the wider framework as well as the dominant meanings.<sup>11</sup>

This note can perhaps capture some of the importance of the ‘visual claim’ made by the presence of Islamic artefacts in the public space, sometimes called Islamization, which represents temporary conjunctions of the previously unrelated elements.<sup>12</sup> Bourdieu notes and this is an important point to be made here, that different groups have greater and lesser access to the properties of construction and dissemination of such images, a point to which we return later in the text. Therefore, that which is habitually called,

<sup>10</sup> LEWIS, J., *Cultural Studies. The Basics*, Los Angeles/London: Sage, 2008, p. 5.

<sup>11</sup> MASSEY, D. *For Space*, London: Sage (2005), pp. 9-10.

<sup>12</sup> *Ibid*, p. 141.

“Islamization” of European public sphere is perhaps better described as a process of ‘(re-)inscription’ of ‘old’ space with ‘new’ (Islamic) meanings<sup>13</sup> While it is certainly the case that not all veil wearers have political intentions, they do, by their very presence in the public space, challenge the normative “regime of visibility,” as Rancière puts it. The veil is not necessarily a visible object; rather, it is rendered visible through a particular one way of seeing.<sup>14</sup>

The citizens of the polis create and define their polis through deliberative debate and creative performance in the present, but the city invariably testifies to the presence of the past by its contemporary form. The manner in which and how these traces of other times and different spaces become relevant, depends mostly on how the spaces of debate get constructed and what constitutes them. The foundational myths of (political) communities are forged from common stories, memories and grounds on which the polis can build their self-perception and self-description as well as the classification of the newly emerging narratives and identities. Those meanings cannot be observed directly as they are located in people's heads and get actively created in the social interactions and relationships which are formed and expressed by various forms of (symbolic) modes of expression.

Various interpretations are available for framing the matter as cultural, religious, racial and/or gendered. One of the most natural methods and languages for addressing *l'affaire du foulard* is the language of European Convention on Human Rights (“ECHR” or “Convention”), more specifically its article 9. As a space for both the production of meaning and social interaction, human rights form an important terrain in which various modes of agency, identity, and values are subject to negotiation and struggle, and open for creating new democratic transformations. The language of human rights through which contemporary cultural diversity is often described, has, however, become increasingly problematic as a dominant tool in addressing these issues, particularly because migrant minorities tend to be variously incorporated, licensed, excluded, or assimilated within the existing symbolic boundaries of the polis, using the very same language which is said to be the major tool of recognition. Therefore, we need to search for vocabulary capable of capturing the changing cartography of the multicultural polis.

However, translating social issues into legal claims has an own dynamics. Translating social issues into legal cases may modify them in more or less profound way. Law can only process a social issue it is presented with if it is translated on law’s own terms and conditions - that is in legal terms and with reference to the dominant narratives effective within the legal discourse. The law typically never contests the givens of the

<sup>13</sup> MCLOUGHLIN, S. “Mosques and the public space: conflict and cooperation in Bradford”, *Journal of Ethnic and Migration Studies*, 31(6): 1045-1066: p. 1045.

<sup>14</sup> VIVIAN, B., *The veil and the visible*, p. 130.

situation, or what Rancière calls the “partition of the sensible”. What the law can provide is mostly a debate on how certain rights should be implemented.

Interpretation of the law is powered by its interaction with the existing system of beliefs and underlying scheme of intelligibility.<sup>15</sup> There are diverse means through which individuals and groups can engage actively in the contestation and remaking of the dominant order of the polis. In that way, the presence of different narratives contests the routine models of government in place and as such disturb the existing distribution of the weight, which is assigned to different narratives found in the public sphere. Rancière calls that particular distribution the ‘police’. The police provides an institutionalization and distribution of systems of language, systems of behaviour, and systems of hierarchy as constantly self-legitimizing entities. The police order is more than the uniformed officers of the state: it includes everything from the media and social mores, to theological values and cultural practices. Indeed, the “*essence of the police ... is not repression but rather a certain distribution of the sensible...*”<sup>16</sup> What is important here is that the police order is dependent upon the pre-defined and pre-existent forms.<sup>17</sup> The police order is based on stability, which effectively restricts our perception to legitimated ways of thinking, ways of speaking, ways of seeing, and ways of being. Every society is constructed upon a “*system of self-evident facts of sense perception that simultaneously discloses the existence of something in common and the delimitations that define the respective parts and positions within it*”<sup>18</sup>.

## Narrated bodies and veiling

The veil is an instant problematization of the body, because it presents the (covered) body to the world as a predicament. The hijab does not tuck the woman away completely and absolutely – it displays her body, while at the same time keeping her under wraps, covered. This traumatizes the viewer with its unapproachability, in which the experience of interaction is marked by the absence of a (present) face, for the face has been historically considered the repository of identity and selfhood. The face does not simply stand for the assortment of features that organize our faces (and more importantly lend them their unique difference) but is rather a signifying space, which acts as an anchorage for the intersubjective relations it enters into.<sup>19</sup> A nun’s habit does not arouse the same

<sup>15</sup> DAVIDSON, D., *Belief and the Basis of Meaning, in Inquiries into Truth and Interpretation*. Oxford: Clarendon Press, 1984, pp. 141-54, pp. 183-98, pp. 245-64.

<sup>16</sup> RANCIÈRE, J., *The Politics of Aesthetics*, p. 89.

<sup>17</sup> “*There are those who play the game of forms (the vindication of rights, the battle for representation, etc.) and those who direct the actions designed to eradicate this play of forms.*” RANCIÈRE, J., *Disagreement: Politics and Philosophy*, Minneapolis: University of Minnesota Press (1999), p. 87.

<sup>18</sup> RANCIÈRE, J., *The Politics of Aesthetics*, p. 12.

<sup>19</sup> ŽIŽEK, S., *The Plague of Fantasies*, London: Verso (2008), pp. 86 -127.

kind of anxiety because it has the one meaning which is accessible to our imaginary horizons, its meaning has been settled. Roland Barthes explains that, "*the wearing of an item of clothing is fundamentally an act of meaning that goes beyond modesty, ornamentation and protection. It is an act of signification and therefore a profoundly social act right at the very dialectic of society*".<sup>20</sup> Dress and fashion are considered the ultimate expression of modern freedom and yet this particular piece of dress – the veil – is forbidden, "*it is precisely the normative connections that are, in the final instance, the vehicle of meaning. Dress is essentially part of the axiological order*"<sup>21</sup> The notion of signification is quite central to any social/religious/cultural interpretation of hijab. Gail Lewis argues that in the European context, the immigrant woman symbolizes the archetypal non-European subjectivity that threatens the imaginary of Europe and its compactness.<sup>22</sup> This is an important factor in the reception of the presence of the veil, particularly against the backdrop of the recent development in Europe in which the presence of visibly non-European woman (non-white/non-Western/non-Judeo-Christian) imposes itself upon the prevalent symbolic imaginary and thus disrupting the existing order of things.<sup>23</sup>

Humans make personal and social meanings and identities by constructing stories that allow for the plurality of elements to gain some form.<sup>24</sup> And as such, the nature and content of such story making is not arbitrary. Rather, it relies on the structures of narrative (in place) to which individuals are exposed and the way in which individuals make meaning of the social and political through the construction of such stories. "*Self-understanding is an interpretation; interpretation of the self, in turn, finds in the narrative, among other signs and symbols, a privileged form of mediation; the latter borrows from history as well as from fiction, making a life story a fictional history or, if one prefers, a historical fiction, interweaving the historiographic style of biographies with the novelistic style of autobiographies.*"<sup>25</sup> Identity forged, established and expressed via narratives thus occupies a middle ground between neutral description and ethical prescription.<sup>26</sup> The complaining veiled woman is not merely the one who tells the story, or merely the one about whom the story is told, but she "*appears both as a reader and the writer*" of her life.<sup>27</sup> Thus, the individual is the interpreter and the interpreted, as well as the recipient of the relevant interpretations. Human rights are also always a politics of fantasy – like religion,

<sup>20</sup> BARTHES, R., *The Language of Fashion*. Translated by Andy Stafford. Edited by Andy Stafford and Michael Carter. Berg/Power Publications, 2006, p. 97.

<sup>21</sup> *Ibidem* p. 7.

<sup>22</sup> LEWIS, G., Imaginaries of Europe, Technologies of Gender, Economies of Power, *European Journal of Women's Studies*, 13(2), Spring (2006), pp. 87-102.

<sup>23</sup> *Ibidem*.

<sup>24</sup> BRUNER, J., *Making Stories: Law, Literature, Life*, Harvard University Press 1990.

<sup>25</sup> RICOEUR, P., *Oneself as Another*, The University of Chicago Press: Chicago 1992, p. 114.

<sup>26</sup> *Ibidem*, pp. 114-115, pp. 152-168.

<sup>27</sup> RICOEUR, P., *Time and Narrative III*. The University of Chicago Press: Chicago 1987, p. 246.

'the assumptions that determine our political regulations [are] illusions'.<sup>28</sup> So human rights also and always dwell in the realm of fantasy, of the imaginary. The next question concerns the precise role of narratives (such as human rights) vis-à-vis audience. Is the role of human rights to interpret the problems societies face and facilitate a ready-made recipe? Or is the concept of human rights, rather, an incentive, something that activates the polis and is therefore promoting concrete social change?

## Normalising Fictions

Social life is storied; stories or narratives are crucial to that process. The networks through which social life is storied are constituted through stories and action in relation to times, the selves and the settings. Some narratives of course carry more weight than others; Butler<sup>29</sup> refers to these dominant narratives as 'normalising fictions'. Such stories actively shape (and are in turn shaped by) particular understandings of the world, which are prevalent in the polis and as such are prioritised over other stories, when it comes to the creation of self-identity. Thus privileging of certain perspectives defines realities for some people, constructs identities and affects the way people enter the public sphere and are perceived by others<sup>30</sup>.

There is a marked tendency in the discussions about the role of the veil, the emerging identities and narratives to fetishize the law, as the ultimate answer to the received predicament. All kinds of public figures and academics love these 'cases' and those 'rights' since they lend structure, meaning and sense of identity. The result of this enthusiasm is that we tend to discuss the 'cases' rather than the totality of the issue at hand. The great advantage of the law and human rights law in particular reduce the complex social issues into a human rights dispute in which the right to X is discussed. Human rights and the Strasbourg system represent a widely accepted narrative about Europe and its values. Such reference to values which are predominantly accepted as universally valid, even though they represent only a particular historical experience and normative discourse nonetheless allow for the ambivalent, shifting, contextual reality of contemporary Europe to take shape which fits within the dominant narrative. Human rights law instantly invokes (human) 'rights', which are treated as a consistent representation of universally valid rights, rather than as a set of contested norms, which to a large extent represent the than dominant narrative. Human rights cases bring with them the tendency to reduce the multitude of the case into a seemingly clear statement of a (moral) issue, with a tendency to ignore the complexities - since the law has a tendency to

<sup>28</sup> FREUD, S., *The Future of An Illusion* (1927), Volume xxi, p. 34.

<sup>29</sup> BUTLER, J., *Gender trouble*. New York: Routledge, 1990.

<sup>30</sup> WARNER, M., *Publics and Counterpublics*, New York: Zone Books, 2002, pp. 121-22.

subsume the world within its limited remit and not vice versa. Paradoxically, human rights allow for justifying the status quo in Europe against the backdrop of interests, positions, needs, all grounded in a plurality of legitimate perspectives, because they are commonly perceived as universally valid and transcending precisely these particular elements – they express important part of our identity.

To give an example, the 'case', which is subject to a court decision, is not the same as the topic of the minaret prohibition in the Swiss constitutional amendment referendum. To understand such disputes we need to understand the specific political, regulatory, or judicial procedures, the politics therein, the regulatory schemes around it, the actors involved, the discourses and the governance arrangements. Human rights law thus reduces the presence of the veil in the public domain to an abstract narrative of “key facts” and “the law” applicable thereto. The facts of the case are already the filtered version, which lawyers and judges construct. Suddenly there is only the case of the one particular veil, translated into the language of the liberal paradigm of human rights as mostly negative entitlements, saturated by Euro-centric identity which privileges certain expression of subjectivity over others. Conflicts in human or fundamental constitutional rights are always also sites of struggle, not just a statement of conflicting principles or rights.

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The relationship between the visible presence of the veil and the dominant narratives in the public sphere is necessarily concerned with what Rancière calls the *distribution of the sensible* and is defined by the “*delimitation of ... the visible and the invisible ...*”<sup>31</sup> The word “sensible” relates to what is seen but also to what is enabled; it refers to the actions or expressions a society finds acceptable – it encompasses a wide array of modes of operation. It effectively distributes “*ways of being and ways of doing, ways of feeling and ways of thinking, with nothing left over*”<sup>32</sup> “*by performing an imitation of politics in negating it.*”<sup>33</sup>

Rancière reminds the reader, that the dynamics that propel the workings of democracy necessarily “*revolves around what is seen*”.<sup>34</sup> The act of veiling is for all to see – it disorders sedimented appearances and makes some things appear different from the way they appeared before. Whereas Rancière's police defines the polis as unified and whole, the emergence of the veil and the symbolic message it carries, contests the very notion of the prevalent definition of the community. These emerging narratives than in turn engage the paradigm in place and engage it on many different levels - thinking, speaking, and acting. And it is precisely their difference, presented in the public sphere,

<sup>31</sup> RANCIÈRE, J., *Disagreement: Politics And Philosophy*, p. 13.

<sup>32</sup> *Ibidem*, p. 68.

<sup>33</sup> *Ibidem*, p. 65.

<sup>34</sup> *Ibidem*, p. 13.

which verifies them as equal subjects and helps to reconfigure the existing social coordinates.<sup>35</sup>

The visible presence of the veil can than be, with Rancière, captured as a process of subjectification: when those occluded from the political community constitute themselves as equal subjects and in turn disarticulate and reconfigure the dominant narrative.<sup>36</sup> To better understand this, it is perhaps a good idea to step back a little and consult one the most influential intellectual aspiration of Rancière - Arendt's notion of plurality and its correspondence with action. Arendt explains, "*Plurality is the condition of human action because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives, or will live.*"<sup>37</sup> And further, Arendt says: "*Human plurality, the basic condition of both action and speech, has the twofold character of equality and distinction.*"<sup>38</sup> We are all equal but distinct as well. Arendt shows that the need for speech and action to be understood and communicated with others as one of the basic foundational elements of the "human condition".

## Conclusion: Unexpected Meaning

Doctrinal answers to conflicts around the issue of the Islamic veil differ less on the level of the law and more on the level of whether and what kind of socio-cultural aspects are employed in the concrete legal decision. Much of the controversy surrounding the veil is the result of how the image of the veil gets interpreted in the public domain. The veil, as a polysemic sign, often elicits strong reactions for a variety of reasons, largely depending on the individual or group doing the interpretation. Jacques Lacan, in his famous essay, "*The Agency of the Letter in the Unconscious or Reason since Freud*,"<sup>39</sup> demonstrates how symbols with conventional meaning can be transformed, in order to further precisely the societal consequences it has come to signify in the first place. To demonstrate this, Lacan shows how public (Western) bathrooms always have two doors, one with a silhouette of a woman, and the other with that of a man. The original denotative significance of the male and female shapes was originally designed to designate which sex should use which toilet. However, Lacan expounds on the meaning of these signs to show how they have over time been expanded to include a larger societal meaning. Effectively, these signs become larger

<sup>35</sup> "*politics exists because those who have no right to be counted as speaking beings make themselves of some account, setting up a community by the fact of placing in common a wrong that is nothing more than this confrontation, the contradiction of two worlds in a single world: the world where they are and the world where they are not*" in *Disagreement: Politics and Philosophy*, p. 27.

<sup>36</sup> RANCIÈRE, J., *Hatred of Democracy*, London: Verso, 2006, p. 13.

<sup>37</sup> ARENDT, H., *The Human Condition*. Chicago: University of Chicago Press, 1958, p. 8.

<sup>38</sup> *Ibidem*, p. 175.

<sup>39</sup> LACAN, J., *The Agency of the Letter in the Unconscious or Reason since Freud*, in: LACAN, J., *Ecrits: A Selection*, W.W. Norton & Co., New York 1977, p. 150.

than their original denotative meaning, which (only) assigned each sex different public restroom. Such “foundational” gesture later evolved to include the representativeness of culture and gender.<sup>40</sup>

Regulation of veiling thus plays an important symbolic role in defining dominant identities. In a number of rulings on the issue of the veil, the European Court of Human Rights has allowed that their appearance and visibility might legitimately be restricted by member states. What is distinctive is that out of so many of the fundamental elements which enter the question of the presence of the veil in public (discourse) the process of adjudication revolved primarily around the topic of the regulation of women, gender, sexuality and the family. Women and their bodies have become the crucial symbolic moment in constructing group identity not only of the so called immigrant minorities but also of the dominant modes of perception and (self-) identification which can use this in order to further the dominance of their values.<sup>41</sup> This in turn invites a defensive response to the increasing pressures of assimilation and secularization, leading the communities of newcomers to define their collective identity in uncompromising terms that portray any “unorthodox” interpretation of the tradition threatening the very survival of the identity of such group. Under such conditions, the veil becomes a contribution in communicating and establishing a group’s “culture” and a symbol of group’s integrity. It is crucial to understand this dynamic in order to better comprehend the pressures that are imposed on women within such minority cultures. Images of gender, sexuality, and the family frequently become symbols of such groups’ “authentic” cultural identity.

The Woman has once again become the paramount symbol articulating the social and political tensions. Women legal status figures as a pivotal concern, serving as a political axe to execute competing power rivalries. The bans are one example among many of the struggles between social and political forces seeking to transform (or preserve) the balance (or imbalance) of power. Interestingly, the construction of “us” and “them”, the struggle over identity, is in these cases linked to the struggle over gender identity.<sup>42</sup> Suddenly gender roles demarcate the line between “them” and “us” – and the veil: The dominant narrative constructs the modern, gender-egalitarian “us” against the pre-modern, sexist and patriarchal “them”. On the other hand, the Muslim minority cultures in Western Europe construct the “us” using the veil against the “decadent” “them”. From this perspective how the national courts as well as the European Court of Human rights were not deciding primarily about the empowerment of women and securing gender equality. It seems that the decisions were designed to make a clear distinction in the dispute about

<sup>40</sup> Ibid., p. 151.

<sup>41</sup> SHACHAR, A., *Multicultural Jurisdictions: Cultural Differences and Women’s Rights*, Cambridge University Press (2001), pp. 45-62

<sup>42</sup> BENHABIB, S., “Borders, Boundaries, and Citizenship”, *Political Science and Politics*, Vol. 38, No. 4 (Oct., 2005), pp. 673-677.

competing worldviews and political, institutional, ideological, cultural, and religious power contest.

All humans are natural storytellers. We have been telling stories since the beginning of time as a way of passing down beliefs, traditions and history to future generations. However, narratives are not just vehicles for informing about how events transpired in the past, it is also a vehicle for constituting reality and of conferring meaning on experience. Paul Ricoeur, reflecting on Walter Benjamin's essay "*The Storyteller*" writes: "*The art of storytelling is the art of exchanging experiences; by experiences, [Benjamin] means not scientific observations but the popular exercise of practical wisdom. This wisdom never fails to include estimations, evaluations that fall under the teleological and deontological categories...in the exchange of experiences which the narrative performs, actions are always subject to approval or disapproval and agents to praise or blame.*"<sup>43</sup> Writing and sharing stories is an exercise of discursive power. In creating narratives we transfer and create a new judgments of actions and characters of others, of those who play part in our stories. As such, telling a story has two dimensions - it is descriptive and normative. Since the stories through which we form our symbolic world are linked to other people, we become frightfully dependent on the decisions and desires of others who tell their stories.

Let's close this paper with the introductory words of Hannah Arendt to her book *The Human Condition*: "*What I propose in the following is a reconsideration of the human condition from the vantage point of our newest experiences and our most recent fears. This, obviously, is a matter of thought, and thoughtlessness – the heedless recklessness or hopeless confusion or complacent repetition of "truths" which have become trivial and empty – seems to me among the outstanding characteristics of our time. What I propose, therefore, is very simple: it is nothing more than to think what we are doing.*"

<sup>43</sup> RICOEUR, *Oneself as Another*, p. 164.

## Bringing Fraternity back in to Europe. Learning from Rawls

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### Introduction

The French Revolution inaugurated a new paradigm in political theory and political science, by inventing new concepts and reshaping reality. The great dichotomies of left and right, the ideals of equality, freedom and fraternity, which became symbols of democracy and democratization, were invented at the heart of Europe. Since then, any democratic project has relied on this theoretical apparatus. Popular sovereignty, which was firstly embraced, even if not with successful results, during the French Revolution, became a problem in the 20<sup>th</sup> century. After overcoming – even if only to some extent – the experiences of totalitarianism and fascism in Europe, this new political subject – Europe as a whole – had to reinvent modern democracy.

The project of the European union was a result of a set of very clear commitments to political and social ideals: on the one hand, embracing democracy as chosen and preferable political model, as way of guarantying peace among states<sup>1</sup>; on the other hand, endorsing the liberal modern vision of fundamental individual rights.

The *Charter of the European Union* (2000) rests upon an articulation of liberal and republican elements: it is built upon a discourse of individual rights, while assuming shared values, which are the ground for the construction of the European community. This European project must rely on the interdependence between the ideals of liberty, equality, but also, the ideal of fraternity, which today appears as ‘solidarity’, insofar the creation of a community must encompass economic, social, political and cultural dimensions.

Although the main political documents of the European Union embraces the ideals of liberty, equality and fraternity, European practices seem to neglect or having forgotten what the ideal of fraternity really means. Any discourse on solidarity appears as a set of beautiful words with no content, or, if they have content, this is generally considered ‘utopian’ and inefficient. The ideal of equality has also been neglected: only a part of the concept – its ‘formal’ and ‘legal’ side, linked to the freedom of the market, free circulation of persons, goods and capital and competition – is promoted, while the ‘social’ and

<sup>1</sup> See DAHL, R., *On Democracy*. Yale University Press, 2000.

substantive part of it is seen as an obstacle to achieve in a sustainable manner specific economic and financial goals.

In this paper I want to argue that *if* we want to rescue the European project we must activate and translate into practices the articulation between these three ideals, having as larger background a strong conception of justice, which cannot be defined in a strictly legalist manner. In order to do so, I will start by presenting Rawls' account of the importance of the ideal of fraternity, an ideal which is the necessary (even if not sufficient) condition for the consolidation of a democratic project; I will then move to a critical analysis of current European state-of-affairs that suspend the fraternity ideal, therefore putting in check the success of the European project; finally, I will reflect upon recent challenges Europe faces today and look for its possible (re-)solutions.

## I. Liberty, equality and fraternity in Rawls

Rawls' theory combines a defense of personal freedom with political equality, with a strong recognition that these values can only be accomplished and realized within a set of social, political, legal and economic structures. By articulating the private/personal sphere of individual rights with the public sphere as horizon where individuals shape themselves and find the conditions to constitute their own subjectivity in an ideally autonomous manner, Rawls introduces a rupture in the discourse of justice. Contrary to the social contract tradition from which Rawls departs, namely, Locke, Rousseau and Kant, which approached justice through the individual perspective (i.e., 'justice' applied to particular actions of individuals), Rawls considers justice as the necessary condition that shapes the basic structure of society – its institutions – and which consequently set the boundaries between what is 'just' and what is not in a community.

In *A Theory of Justice* (TJ) Rawls starts from the assumption that human beings are social creatures; therefore, the defense of individual rights must be made from the point of view of a fair system of social cooperation, which guarantees the basic settings for a decent life. But what constitutes a decent life? Clearly, Rawls does not want to tell us what is the life worth living; instead, he defends the priority of justice over the good. Why? First of all, because 'justice is the first virtue of social institutions, as truth is of systems of thought.'<sup>2</sup> Given that 'each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override'<sup>3</sup>, justice transcends the disputations about different conceptions of the good life. Justice is the virtue that creates the space

<sup>2</sup> RAWLS, J., *A Theory of Justice* (from now on TJ), Cambridge, Mass.: Harvard University Press, 1999, p. 3.

<sup>3</sup> Idem.

where different concepts of the good can emerge, meet and dialogue. This position eradicates any theory of justice grounded on utilitarian arguments, given that nobody can be sacrificed in the name of the ‘welfare of society’. But what would be a good theory of justice? Clearly one that is capable of affirming itself through the self-evidence of its principles. In order to accomplish this Rawls proposes us a hypothetical situation – the social contract taken to a more abstract form: Imagine that you don’t know anything about yourself – you don’t know if you’re a man or woman, rich or poor, talented or stupid, with or without a disability. Under such conditions (of the veil of ignorance) in this hypothetical ‘original position’ (the methodologically equivalent to the ‘state of nature’), what principles of justice would you choose in order to set the basic structure of society?

I will not enter into Rawls’ detailed account of this process. The important point to retain is that these principles that will be chosen – or *recognized* as valid and legitimate – are principles that can and will be shared by individuals with different conceptions of good. A community – in the strongest sense, namely, embracing the political, cultural, economic and social dimensions – can only be viable, stable and efficient if there is a basic but strong agreement regarding the foundational principles that support its own (re-)construction.

Therefore, the primary subject of justice – social justice – is the basic structure of society, i.e., ‘the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.’<sup>4</sup>

Rawls understood that it is impossible to disentangle rights/duties from distributive aspects. Since the French Revolution and during the 19<sup>th</sup> century, for instance, equality and freedom were parts of the same coin: fraternity pointed to a strong republican conception of citizenship, as translating the (today’s lost) ideal of the *general will*. Between the 19<sup>th</sup> and the 20<sup>th</sup> century many structural transformations happened in Europe, perhaps the greatest of all the introduction, development and consolidation of capitalism. While the 19<sup>th</sup> century was committed to the Enlightenment project of human emancipation, capitalism in its advanced form brought these expectations down to earth. The ideals – and their respective ideologies – of freedom and equality became progressively more apart, and freedom turned out to be a nice word that covered new forms of individual and collective exploitation, a more ‘civilized’ slavery, which produced radical inequalities in distribution of wealth, but also of primary goods. Therefore, Rawls understands that in order to rescue the Enlightenment project (even if that was not his specific agenda), in order to rescue the discourse of modernity, even if by transforming it, it was crucial to re-conceptualize the relationship between the ideals of freedom, equality

<sup>4</sup> TJ p. 6

and fraternity, on the one hand, and to envision a practical way of translating this reconfiguration in a system of social institutions and social practices.

The conditions set by Rawls – the original position and the veil of ignorance – assure that human beings are equal ‘... as moral persons, as creatures having a conception of their good and capable of a sense of justice.’<sup>5</sup> These conditions allow us to bring light upon the kind of agreement and principles that we would, in fact, accept. These principles are:

“First, each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.

Second, social and economic inequalities are to be arranged so that they are both a) reasonably expected to be to everyone’s advantage and b) attached to positions and offices open to all.”<sup>6</sup>

The first principle – of equal basic liberties – has priority over the second principle, which means that freedom cannot be sacrificed for the sake of economic advantages, for instance. This is what Rawls refers as serial order with the first principle prior to the second.

Rawls insists on this serial order and argues that these two principles express an egalitarian conception of justice.<sup>7</sup> Unlike the system of natural liberty, which is regulated by the principle of efficiency (i.e., assuring that the total amount is fully distributed, regardless of how this distribution is made), and starts from the initial natural and social assets allowing both to create radical inequalities; and unlike the liberal system, which tries to mitigate the influence of social contingencies by imposing certain requirements (for instance, formal equality in accessing careers) but is incapable of addressing the problem of natural inequalities, Rawls advances a democratic interpretation of freedom, which is translated in the *difference principle*.

As the author says ‘... the intuitive idea is that the social order is not to establish and secure the more attractive prospects of those better-off unless doing so is to the advantage of those less fortunate’<sup>8</sup>. This means that, in the first place, nobody ‘deserves’ to be talented or born in a nice family, ‘the natural distribution is neither just nor unjust ...’.<sup>9</sup> Since nobody is entitled to the privileges one is born with, there is a (moral) duty to understand talents, skills, strengths, as belonging to the ‘common good’, i.e., to the society as a whole. Rawls clearly says that ‘... the difference principle represents, in effect, an agreement to regard the distribution of natural talents as in some respects a *common asset*

<sup>5</sup> TJ p.17

<sup>6</sup> TJ p. 53

<sup>7</sup> TJ p. 86

<sup>8</sup> TJ p. 65

<sup>9</sup> TJ p. 87

and to share in the greater social and economic benefits made possible by the complementarities of this distribution.’<sup>10</sup> That means also, and this is our second point, inequalities will exist *but* these inequalities must be articulated insofar it improves the life of the worse-off. For instance, the naturally advantaged can gain more as long as they also cover the costs ‘... of training and education and for using their endowments in ways that help the less fortunate as well.’<sup>11</sup>

This leads us to recognize that ‘... in justice as fairness men agree to avail themselves of the accidents of nature and social circumstance only when doing so is for the common benefit.’<sup>12</sup> The difference principle expresses a strong conception of reciprocity: it is a principle of mutual benefit.

Under this light we see how the *difference principle* allows us to revisit and replace the principle of fraternity back on the table of democratic theory. Rawls acknowledges that this ideal has taken a secondary place in democratic discourse and practices, mainly because it points to ideas or values that are difficult to describe, explain or even justify. Fraternity, as it was advanced during the French revolution, has a primary meaning of equality, as a radical commitment to a common ground, eliminating modes of servility. It also points to ‘a sense of civic friendship’ and ‘social solidarity’. But this ‘civic friendship’ sometimes appears as too demanding; and ‘social solidarity’ is easily reduced to a political slogan with little content. Rawls wants to rescue this ideal, which, according to him, refers us to ‘... the idea of not wanting to have greater advantages unless this is to the benefit of others who are less well-off.’<sup>13</sup> The principle of difference accomplishes this task, it gives content to an almost lost ideal, and it directs us to a redefinition of our current political and social institutions, having as its concern the distribution of social and economic advantages only.

As such, the articulation of the two principles of justice, in its three-fold manner, brings the recognition that there can only be freedom and equality *if* the ideal of fraternity is also guaranteed. The difference principle accomplishes this task, i.e., it tells us that there is no way of justifying the moral arbitrariness in distribution of wealth, race or gender. The fact that I am born a woman, white, poor or rich, should not determinate which goods of society I will have or not have access to. Since citizens are fundamentally equal, it is required that institutions guarantee an equal distribution of goods to all, unless an unequal distribution proves to be more advantageous to the worst-off. Therefore, the concept that underlines Rawls’ articulation between the principles and regulative ideals of

<sup>10</sup> TJ p. 87 my italics.

<sup>11</sup> Ibidem.

<sup>12</sup> TJ p. 88

<sup>13</sup> TJ p. 90

equality and freedom is the concept of reciprocity: reciprocity in freedom and in equality and conceived as fraternity.

Let us see how the democratic ideals, first advanced by the French Revolution and then recovered by Rawls, find their way in the European project.

## II. Europe and its Ideals

The previous section had one specific goal: to show how the revolutionary ideals of freedom, equality and fraternity are a necessary condition to defend a democratic project, and should be taken as three parts of the same totality. My argument is that if one is committed to democracy, one cannot simply embrace the liberal ideal of 'freedom' without committing oneself to the ideal of 'equality' and 'fraternity', and this not only in a formal, but also in a substantive way. As I tried to show, Rawls has been the philosopher in the 20<sup>th</sup> century to bring light to the interdependence of these ideals.

The goal of this section is to take into account Rawls' position and relate it to the European project. In order to do so, I will start by offering an account of the discourses through which Europe commits itself with this set of ideals; second, I will identify the progressive abandonment of the fraternity ideal and argue that by doing so Europe may be jeopardizing its own future.

To begin with, we must acknowledge that Rawls' concern was with democratic liberal states. The search for principles of justice is necessary in order to recognize objective criteria that allow one to determine what is just and what not in a fair cooperation system. Of course, the deliberative process in the original position starts from the assumption that there is a common political culture – and here Rawls is thinking of a 'democratic culture' – and the principles are to be applied to a democratic society. As Cohen puts it

Justice as fairness is "for a democratic society", then, first because it assigns to individuals an equal right to participate and thus requires a democratic regime as a matter of basic justice. Second, it is addressed to a society of equals, and the content of its principles are shaped by that public understanding. Finally, it is intended to guide the political reasoning and judgment of the members of a democratic society in their exercise of their political rights.<sup>14</sup>

Sharing a common background makes easier to identify principles that can be accepted by all and this means that the foundation provided by the two principles of

<sup>14</sup> COHEN, J., "For a democratic society" in Freeman, S. (ed.) *The Cambridge Companion to Rawls*, Cambridge University Press, 2003, p.87.

justice allows a wide range of reasonable, even if mutually incompatible comprehensive views. Even if *TJ* is not a theory of democracy, it tells us a lot about democratic thought and ultimately the reasoning behind democratic politics. The principles set the boundary between what is and what is not reasonable – a boundary that becomes evident once we subsume different conceptions of the good under the requirement of reciprocity.

These principles are key to design a democratic constitution and democratic institutions in general; however, they should not be understood in an instrumental manner. Justice as fairness is a substantive conception of justice because it is concerned not only with the procedures, but also with the outcomes of justice. As Cohen says “[J]ustice of process is defined by the rights and liberties included in the first principle; justice of outcomes is assessed by reference to the second principle.”<sup>15</sup>

Thinking about the relationship between Rawls’ proposal and the European Union is challenging. One could argue that there is no way of doing so given the Europe is not a ‘democratic nation’, therefore, one cannot demand from Europe the kind of response that one can demand from one’s national state. Although this certainly is Rawls’ position, there is no reason why not to question and try to identify the conditions, which can make Europe a fairer system of cooperation, taking Rawlsian principles of justice as guidance.

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Europe is not a nation nor a federation as the US. It is a new political experiment, a supra-national constellation, still under construction, that has no definitive political contours – even if it has all the political institutions in place, such as the European Parliament, European Commission, etc. However, Europe became only possible because it shares a common culture. Now, this too could be attacked: after all, Europe is full of contrasts and diversities, between different languages, local cultures, political backgrounds and so forth. This ‘common’ culture refers not so much to what there ‘is’ in Europe – in all its multiplicities – but more to what European nations want to ‘become’. Clearly: democracy is the common link. But, which democracy?

I take democracy in the European union as a commitment to create a new community grounded on a set of democratic political regimes *but also* a great *democratic society*. Since Tocqueville democracy has been associated simultaneously with the political and the social dimensions. Unifying both dimensions is the commitment with the ideal of equality – democracy is a ‘society of equals’, who by the nature of their equality have the same capacity to judge, participate, deliberate, and also to constitute their individual subjectivity in an inter-subjective horizon of interdependence, recognition and mutual respect.

<sup>15</sup> idem p.93

The origins of the European Union were marked by a commitment to the three ideals of freedom, equality and fraternity: to harmonize the search for peace, with a respect for fundamental individual rights and political equality and to assure a common ground for solidarity among States.

Let us see how the European project is translated in the charter of Fundamental Rights (2000).

The preamble starts by saying that “The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.”<sup>16</sup> These common values belong to six blocs: dignity, freedoms, equality, solidarity, citizens’ rights and justice. Let us take a closer look.

Chapter 1 affirms the intrinsic value of dignity (article 1 to article 5), which encompasses the right to life, the right to the integrity of the person, the prohibition of torture and degrading treatment and the prohibition of slavery and forced labor. Chapter 2 defines the freedoms that the EU is committed to protect: right to liberty and security (article 6); respect for private and family life (article 7); protection of personal data (article 8); right to marry and right to found a family (article 9); freedom of thought, conscience and religion (article 10); freedom of expression and information (article 11); freedom of assembly and of association (article 12); freedom of the arts and sciences (article 13); right to education (article 14); freedom to choose an occupation and right to engage in work (article 15); freedom to conduct a business (article 16); right to property (article 17); right to asylum (article 18) and protection in the event of removal, expulsion or extradition (article 19).

Chapter III defines equality: equality before the law (article 20); non-discrimination (article 21); affirmation of cultural, religious and linguistic diversity (Article 22); equality of gender (article 23); as well as the recognition of the rights of the child (Article 24); the rights of the elderly (article 25) and the integration of persons with disabilities (article 26).

Chapter IV defines solidarity. This value is approached from the angle of labor rights (workers’ right to information; right of collective bargaining and action; protection against unjustified dismissal; fair and just working conditions – article 31); from the angle of social security and social assistance; from the angle of health care, access to services and consumer protection.<sup>17</sup>

<sup>16</sup> *Charter of Fundamental Rights*, 2000, p.8

<sup>17</sup> In article 34 p.3 it is written “In order to combat social exclusion and poverty, the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence

Chapter V is dedicated to expose citizens' rights (right to vote, right to petition, etc.). Chapter VI is devoted to 'justice'. Justice is clearly treated in its legal and juridical dimension: right to an effective remedy and to a fair trial (article 47); presumption of innocence and right of defense (article 48).

From this we see that the principle of basic liberties is set forward in chapter 2, the principle of equality in chapter 3, in its double angle: formal equality and the demand for measures that could be taken as the difference principle: for instance, if we take article 21 'non-discrimination' as conducing to positive measures that compensate for existing inequalities which compromise the value of human dignity (chapter 1). Curiously, chapter 4 on solidarity approaches the fraternity ideal from the labor-angle. Although it is understandable given the specific premises, which supported the beginning of the European Union – namely, of starting with an economic and monetary project first, rather than political – it becomes obvious that in doing so it amputated, or at least suspended, a significant part of the European body, necessary for the strengthening of 'common values'. Given that individuals are not only commodities in exchange in the job-market field, but moral equal persons, how to turn Europe into a 'society of equals'?

Rawls is clear saying that only formal equality of opportunities it not enough to make a society just: the community needs to assure a just economic order, and to support social capital, by granting equal opportunities of education, culture, equal opportunities in economic activities, avoiding monopolies and granting a social minimum. Again, one could argue that Rawls' proposal is targeted to nation-states, and not to the European supra-national experiment, therefore, these opportunities should be granted by European nations, individually considered. However, our point is simply to show that a) if Europe represents a social contract between different States, b) if it is committed to democratic ideals, c) if democracy has as its pillars liberty, equality and fraternity; d) if equality is granted through the equal right of free movement; then, e) Europe must rethink the content of the three foundational concepts as well as their relationship – therefore, it is necessary to bring fraternity back. The three ideals go hand in hand. But what would fraternity mean in today's context?

To start with, the idea of fraternity points to two different directions: it points *inwards* to those who share a common way of life (within each nation or region) *and* it points *outwards* to those who adopt different ways of life (different regions, nations, world). Fraternity appears as a *matter of fact* – among individuals within nations or between nations – but also as a *normative standard* according to which one can apply the difference principle, i.e., one can arrive at just outcomes in the distribution. Fraternity

for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.”

imposes the particular attitude *vis-à-vis* the individual(s), and assumes the universal horizon of commonality. Why is it important to rescue fraternity in the European context?

Europe is living a crisis of legitimacy: the European union can no longer sustain a practical commitment with the principles it endorses. While Europe had its existence justified after World War II, today the legitimacy of its rule is being contested on several grounds. I will not enter into details here – I would probably need to start by providing an account of the ‘crisis’ of liberal democracy or democracy *tout court*. For our purpose I want to mention two challenges, which seem to compromise the European project as a whole and the stability of coexistence between European nations. First, Europe is observing the rise of nationalist and populist movements that spread discord and conflict across the continent. Second, this new political dynamics exacerbates Europe’s abyss between North and South, on the one hand; and it also brings to light the problem of sovereignty of democratic states.

Regarding the first challenge, one observes several shifts in political discourses across Europe, which simultaneously brings to evidence the large political vacuum in Europe (or the truly ‘political’ problem of Europe) *and* the conflict between alternative modes of thinking and doing politics. From Finland to France, extreme-right parties capture a great percentage of populations’ support. Throughout Europe one sees discourses that foster ‘solidarity’ and ‘fraternity’ among themselves, excluding the ‘other’ – regardless if the ‘other’ is an equal European citizen or and outsider/ immigrant.

On the other side of the spectrum, we have countries like Bulgaria, Greece, Spain, where we observe the increasing visibility of new political voices – Greece, for instance, has a new prime-minister Alexis Tsipras, from Syriza Party, which is a radical left-wing oriented party. The fact that he won the last elections was initially seen as a victory for politics insofar it created a rupture in the European mainstream political spectrum, where everything tended to converge to the center. Tsipras represented the hope that it is/was possible to do politics differently; it also forced Europe to rethink the legitimacy of its decisions under the light of justice.<sup>18</sup> Another example of rupture in Europe is *Podemos* in Spain. Both movements represent(ed) the hope for reinvention of political dialogue in Europe. It is interesting to observe the rise of opposite movements: extreme-right and the revival of the Left. The first thing to do is to try to understand why this is happening. People are not ‘irrational’ in supporting right or left; people have wants, needs, frustrations, and these parties are able to capitalize on that and create a discourse that reflects their aspirations and resolves their anxieties. This rise shows that the parties/movements involved are capable to fill out the political void that exists in Europe.

<sup>18</sup> This hope was recently challenged, given that Tsipras, despite his effort to transform political negotiations in Europe, was forced to accept more austerity measures.

They provide a social guidance, a social orientation that Europe as a whole has dismissed. In other words, these parties, or movements, right to left, give content and meaning to the concept of fraternity and they bring out to the table the need to address social injustices (unemployment, exclusion, discrimination, lack of opportunities, etc.).

Second, related to this legitimacy crisis that creates the propitious environment for the revival of old discourses (anti-European) or the creation of new ones, one needs to address the impact of the gap between economic, social and political measures, since this gap compromises any pretension to arrive at a just society, or even more radically put, a large 'society of equals'. Austerity packages that were imposed across different nations (Greece, Portugal, Ireland) had serious consequences for these countries and Europe as a whole. On the one hand, it exacerbated the abyss between North and South but also between Europe as a whole and each nation in particular. In doing so it also put into question the sovereignty of the state and the democratic regime and culture of each nation. By being forced to accept Troika's impositions, each country was deprived of its foundation: its sovereignty was stripped out and the relationship between representatives and represented became meaningless. I will not go into details, for the debate is well known. The point I want to make is that by contesting the democratic ground of each nation, by promoting technocracy over politics, Europe was seen on a different light, and the question emerged: is the European project doomed to failure? After all, what reasons do citizens have to comply with the rules (and by 'rules' I also mean 'democratic rules') if reciprocity seems to converge with exploitation and domination instead of justice?

### III. European Challenges

Europe can only become a fair system of cooperation *if* a) rescues a set of ideals – democratic ideals of equality, liberty and fraternity; b) creates measures to apply these ideals in the system of practices; c) creates a new discourse and narrative. In this section I will go back to Rawls and try to explain why I consider these three elements as necessary condition for Europe's survival. In order to do so, I will look at two other challenges Europe is facing today: the problem of unemployment (at domestic level but also at the 'union' level since it impacts dynamics of migration within the common space); second, the problem brought by 'European citizenship'.

In the description of the original position, Rawls takes rational individuals, equals as moral persons, as the starting-point. These individuals are committed to reciprocity insofar it is assumed that individuals recognize each other as equals. Without this supposition reciprocal exchange would be impossible. Therefore, it is clear that rationality in Rawls assumes a horizon of reciprocity to start with, in order to find the principles that can guarantee a mutually advantageous cooperation. Reciprocity affirms itself in a positive way – fostering social cohesion and justice as fairness – but also negatively, insofar it can

impose asymmetrical demands upon the relationship between individuals, mediated by institutions.

The difference principle, as we have seen, is a principle of reciprocity; it incarnates the revolutionary ideal of fraternity, which involves an improvement of the worse-off with respect to the initial 'arrangement of equality'. The strongest argument for reciprocity, however, is the argument of stability. The entire point of making this movement of suspending one's identity and identifying the principles of justice is to assure that one will comply to the rules, it will obey authority, it will have a standard that will allow one to distinguish the just from the unjust. Once the basic structure of society is set according to these principles it will embody the ideal of equality from its inception (as 'equal moral persons') and have a set of strategies that will allow institutions to deal with natural and social inequalities. This, of course, will impact the ways in which rights and duties are assigned to each, through institutions. Reciprocity is the *invisible hand* that is always working but which to some extent cannot be pinpointed.

As we have seen Europe does not fit into the closed society of a domestic state required for the *TJ*, therefore the question is not how to make Rawls' conception of justice work in European context. However, it originally stands for a system of cooperation between nations. All nations share democratic assumptions, despite the fact that each country has its specific constitution. But this cooperation translates itself in a limited concept of freedom (to exchange, to buy, to move), and a thin concept of equality (dependent on freedom's definition). Consequently, this system of cooperation is only partial: it does not aim, in practice, at creating a common, integrative, inclusive, reciprocal community; it is hostage of its hybrid condition of not wanting to become a federation, nor wanting to be reduced to a set of nations. A 'society of equals' in such context is simply impossible. So, actually the question should be: How to transform actual Europe in a system of *fair* cooperation?

If one looks at the situation of unemployment today, one can easily identify how far Europe still is from an egalitarian and just society.

According to Eurostat, in February 2015 Europe has approximately 24 million people unemployed, however the distribution of unemployment is unequal across the 28 countries: Germany had the lowest unemployment rates (4,8%), followed by Austria (5,3%), while Greece had the highest rates (26%) as well as Spain (23,2%).<sup>19</sup> If one looks at youth unemployment trends, the number increases significantly, reaching 24%, distributed in the following way: Greece, with 58,3%, Spain with 55,5%, Croatia with 49,7%, Italy with 40%, Cyprus with 38,9%, Portugal with 37,7%. Germany and Austria

<sup>19</sup> [http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics). Access on April 28<sup>th</sup> 2015

were the only member states with a youth unemployment rate below 10% (7,9% and 9,2% respectively).

If one analyses these numbers in the light of income distribution in Europe, it becomes clearer that Europe is far from being a just society. According to the European commission

“In the EU in 2011, the income share of the richest 10% of the population was largest in Portugal and Latvia (where the top 10% had 27% of total income), while in Cyprus, the UK, Bulgaria and France the top 10% had 25-26% of income.”

And

“In the EU, the value of the Gini coefficient in 2011 ranged from 0.24 (in Slovenia) to 0.35 (in Latvia). Other countries at the top of the ranking were Portugal (0.34) together with another four countries, where the value of the Gini coefficient was around 0.33, Romania, Greece, Bulgaria, and Spain. At the bottom of the country ranking, Sweden, Czech Republic, and the Netherlands have Ginis that are only slightly higher than Slovenia's (around 0.25). Other countries can be broadly divided into two groups, with France, the UK and Ireland, some of the Southern European countries and the EU13 countries having Ginis of between 0.30 and 0.33, and other EU15 countries together with Malta, Slovakia and Hungary having values of between 0.25 and 0.29.”<sup>20</sup>

Portugal and Latvia are the countries with highest inequality in income distribution. Of course this is only part of the picture: to this one must look at the wealth: who has it and how society distributes it.

Rawls argued that a fair society must rely on an appropriate scheme of institutions, where social and economic processes are thought through political and legal institutions. In many occasions Rawls argues that a society is just if and when can counterbalance the tendency of too much accumulation of wealth in the hands of the few, while assuring a social minimum for all citizens.<sup>21</sup> The point of Rawls is to show that a society is only fair when it is capable of addressing and correcting the distribution of wealth and ‘to prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity.’<sup>22</sup>

<sup>20</sup> <http://ec.europa.eu/social/main.jsp?catId=1050&intPageId=1870&langId=en>. Access on April 28<sup>th</sup> 2015.

<sup>21</sup> Rawls says ‘... the government guarantees a social minimum either by Family allowances and special payments for sickness and employment, or more systematically by such devices as a graded income supplement (a so-called negative income tax).’ TJ, p.243

<sup>22</sup> TJ, p.245

However, Europe faces another challenge, which is a structural problem from within: individuals who belong to member-States define their 'European citizenship' via the freedom of movement, i.e., the freedom to move and live in any European country. The opening of frontiers brought new rights to individuals (the right of circulation), and it created a common ground that eradicated 'immigration' policies, for instance. Kochenov tells us that

By granting EU citizens free movement rights, the Treaties *de facto* and also *de jure* made it largely impossible for the Member States to have any 'immigration' policy concerning EU citizens. In other words, modern EU states cannot give preference to their own nationals compared with other EU citizens and are not entitled to stand in the way of EU citizens exercising their Treaty rights.<sup>23</sup>

What this means is that officially no European citizen is immigrant in any EU nation. However, once we try to flesh out the content of 'European citizenship' we face theoretical and practical obstacles. Theoretical, because there is no European constitution that actually defines the rights and duties of citizens. Practical, because individuals still define themselves mainly through the angle of 'national citizenship'; and the rights 'European citizenship' grants can only be accomplished at the expense of concrete democratic rights (political rights in particular). Do European citizens have the same political rights regardless of the country they live in? Not really. For instance, citizens who reside in a country different from their nationality cannot vote for national elections. This simply does not seem fair:

Should being European in Europe not entitle you to have a say in the way the part of Europe you live, work, and pay taxes is governed? ... Should their lack of a possibility to use the democratic process in order to influence policies by which they will be directly affected not be construed as a potential obstruction to mobility? Who wants to go and live in a country without being able to exercise full democratic rights?<sup>24</sup>

Taking this into account one sees that while formally the existence of many 'peoples' and nations in Europe does not – and cannot entail – any kind of immigration or discrimination policies, and despite the fact that every European citizen is 'equal' to every other, formally speaking, one could argue that there is another type of discrimination taking place: most individuals, given the pressure of the labor market, in order to escape the trap of unemployment, willingly make the trade-off for jobs in exchange of political, social and even cultural autonomy.<sup>25</sup> What a closer observation of migration dynamics in Europe tells us is that there is only a 'formal European citizenship', but which has no

<sup>23</sup> KOCHENOV, D., "What's in a people? Social facts, individual choice and the European Union" in Jeffers, Kristen (Ed.) *Inclusive Democracy in Europe*, European University Institute, 2012, p. 84

<sup>24</sup> CAYLA, Ph. and SETH, C., "Kick-Off contribution" in: JEFFERS, K. (Ed.) *Inclusive Democracy in Europe*, European University Institute, 2012, p. 67

<sup>25</sup> COSTA, M. N., "Europe, what future?" in *Res Publica*, vol. 18, n.1, 2015, p. 161.

substantive content. As I argued elsewhere, as long ‘as Europe remains hostage of neoliberal ‘politics’ [...] Europe is doomed to fail, because neoliberalism is incompatible with democracy and with Politics.’<sup>26</sup>

#### IV. Concluding Remarks

To conclude I must say that Europe has to reinvent itself if it wants to survive. An economic union – with its discourse of freedom and equality reduced to the labor-market – is clearly not sufficient; in fact, it appears to be a growing motive for discontentment and disenchantment with European politics. It is important to go back to Rawls for two reasons: First, Europe was the product of a commitment with democratic ideals. In order to survive, Europe must change and reinvent its discourse and produce a new narrative, reinforcing its historical commitment with freedom, equality and fraternity. Rawls shows that these three dimensions are interdependent. It remains the challenge of transforming this narrative in a new set of practices. This leads us to our second reason. Rawls shows the importance and even symbolic significance of creating a Constitution according to principles of justice. Only a European constitution can foster the necessary sense of belonging of individuals and nations to this *common* project. As Rawls says ‘the constitution establishes a secure common status of equal citizenship and realizes political justice’<sup>27</sup> and ‘... the basic structure is regulated by a just constitution that secures the liberties of equal citizenship.’<sup>28</sup> Only then can a true ‘solidarity among states’ begin to flourish.

Given the pluralism and diversity in European space, the difference principle is a key element in fostering a common sense of belonging to something, which is still new – and a sense of reciprocity between individuals from different states. The difference principle creates a solid ground for fraternity’s return in political discourse and institutional design.<sup>29</sup> Europe must be courageous enough to give this step and dare to re-conceptualize its institutions according to the difference principle – the principle that embodies

<sup>26</sup> Idem, p.163

<sup>27</sup> TJ, p.175

<sup>28</sup> Idem, p. 243

<sup>29</sup> For instance, confronting the challenge of unemployment today, and in trying to arrive at a criterion that allows to determinate the ‘social minimum’ in Europe, one could take Rawls statement as guide: ‘Once the difference principle is accepted ... it follows that the minimum is to be set at that point which, taking wages into account, maximizes the expectations of the least advantaged group. By adjusting the amount of transfers ... it is possible to increase or decrease the prospects of the more disadvantaged, their index of primary goods ... so as to achieve the desired result.’ (TJ, p. 252) A social minimum does not imply scaling down from the greater wealth until everyone has nearly the same income. It simply implies that adjustments are made as to improve ‘the long-term prospects of the least favored extending over future generations.’ (idem)

practices of solidarity and which is capable of establishing a system of cooperation that is mutually advantaged and capable of dealing with several forms of domination. Only then 'European citizens' will be able to conquer a truly significant ontological and political status.