SHIFT OF SOVEREIGNTY, ELEVATION OF EMPOWERMENT, AND ABSENCE OF AUTHORITY IN HANS KELSEN – ANSWERED, REFUSED, OMITTED, AND UNSETTLED QUESTIONS WITHIN THE DOCTRINE OF SOVEREIGNTY

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Instead of a foreword : Heinrich Lenz, "Autorität und Demokratie"

Instead of a preface, a piece of historical criticism to the concept of authority in Hans Kelsen shall be given. It was Heinrich Lenz who opted for "Authority and democracy within the General Theory of the State in Kelsen" as his challanging topic to elaborate his inaugural dissertation; what is interesting is the fact that he has to be counted among the pupils of Carl Schmitt, at that time professor at the University of Bonn (Germany), who implicitely criticised the Pure Theory of Law without ever citing or refering to Kelsen. What should however be remembered is that the following extract of criticism needs careful interpretation in the light of the theory of sovereignty put foreward by Schmitt, a concept that characterises his approach to legal theory overall.[2]

"Trotz der Verbannung des Wirklichen, des Seienden, oder wie immer man es nennen will, aus dem Recht ist seinem System die Autorität nicht fremd; es macht nur eine gewisse Schwierigkeit, herauszufinden, was Kelsen jeweils meint, wenn er von Autorität spricht, denn er benutzt den gleichen Ausdruck für verschiedene Bedeutungen. 'Verpflichtende oder berechtigende Autorität' und Autorität, die im 'faktischen Funktionieren' der staatlichen Organe besteht, sind verschiedene, ja gegensätzliche Bedeutungen, wenn man sie von der Kelsenschen Voraussetzung aus sieht. Einmal liegt sie im Bereich des Sollens, das andere Mal in dem des Seins.

"Im Bereich des Sollens liegende Autorität, das heisst Autorität, die verpflichten kann, die Normen begründen kann, obwohl sie selbst Sein ist, dürfte in Kelsens System nicht möglich sein. Sie findet sich beispielsweise in dem Ausdruck, dass der Wille der Mehrheit 'rechtserzeugende Autorität' habe. Man darf nicht einwenden, dass der Ausdruck 'Wille der Mehrheit' der anthropomorphe Ausdruck für etwas Geistiges sei, also nicht etwas Seiendes bezeichne (hier wieder unter dem Gesichtspunkt der Gegensätzlichkeit von Sein und Sollen betrachtet). Es handelt sich dabei um eine psychologisch erfassbare Realität, um etwas, was nach dem oben Dargestellten von Kelsen nicht als Normatives, sondern als Materielles angesehen werden würde. Nimmt man das zum Ausgangspunkt, einerseits also den Gegensatz von Sein und Sollen, und andererseits die Feststellung, dass Wille der Mehrheit nicht Sollen sei, dann kann die Autorität der Mehrheit nicht im Sollensgebiet liegen. Nimmt man Autorität als Seiendes, dann kann sie nicht im Normativen liegen. Wenn Sein und Sollen sich ausschliessende Gegensätze sind, kann sodann Autorität nicht Normen erzeugen. Sie bleibt dem Sollensgebiet fremd, liegt im Sein und zeigt sich dort als blosse Macht. Ausserdem ist in Kelsens System ausgeschlossen, dass eine Person für eine andere Pflichten begründen könne. Spricht Kelsen dann noch von einer rechtsetzenden Autorität, dann kann man nicht umhin, anzunehmen dass es sich dabei doch um den Vorgang der Pflichtbegründung, der Normsetzung handelt. Wie sollte der Ausspruch anders verstanden werden, als dass die Autorität für die Rechtsperson Pflichten statuieren und dass sie generelle Normen setzen kann ? Aber Kelsen erkennt selbst, dass damit seine Grundvoraussetzungen aufgegeben sein würden. [...].

"Kelsen kennt also einen Autoritätsbegriff, der die Sollbegründungsmacht einer seienden Stelle zum Wesen hat; der Macht habende Staat diktiert den Rechtssatz. Daneben bezeichnet er aber Autorität mit faktischem Funktionieren, sieht er Autorität als reines Sein. Und es fehlt nicht viel mehr an einer Gleichsetzung dieser beiden sich strikt widersprechenden Bedeutungen, wenn er die 'normativ verpflichtende Wirkung der Staatsordnung', und die 'psychisch bindende, weil motivierende Wirkung der Ordnungsvorstellung' beide als 'Herrschaft des Staates' in einem Satze durch ein 'oder' miteinander verbindet. Ist nun Herrschaft des Staates die normative Verpflichtung durch Sollsätze oder die motivierende Wirkung der Ordnungsvorstellung ? Von

den Voraussetzungen Kelsens gesehen kann nur eine Bedeutung möglich sein und angenommen werden : die erste. Denn die letzte gehört nicht in das Recht, weil sie ausserhalb des normativen Gebietes liegt, sodass als staatliche Autorität die Sollsetzungsmacht der Organe angenommen werden kann. Ein *argumentum e contrario* liefert den Beweis für die Richtigkeit dieser Annahme : Kelsen betont ausdrücklich, dass diese Normsetzungsmacht nicht den Organen selbst zukommt, sondern nur den Normen. 'So zeigt sich, dass der Sinn der Staatsgewalt oder Staatsherrschaft nicht der ist, dass ein Mensch anderen Menschen, sondern dass Menschen Normen unterworfen sind, wenn es auch Menschen sind, die – dabei selbst wieder Normen unterworfen – diese Normen setzen'. Darum hat die Grundnorm den Inhalt, dass man verpflichtet sei, den Befehlen des Monarchen zu gehorchen. Nicht den Monarchen, dem Parlament undsofort muss man gehorchen, sondern der Ursprungsnorm, zu deren Geltung stillschweigend die andere hinzuzudenken ist, dass man der Ursprungsnorm zu gehorchen habe. Denn darin besteht die Voraussetzung Kelsens, im Falle der Ursprungsnorm nicht weiter zu fragen, warum sie zu befolgen sei; sie soll einfach befolgt werden. Das Sein einer Stelle, die in ihren Sätzen Normen erzeugt – das Wesen der Autorität –, steht also an der Spitze des Kelsenschen Systems und wird noch durch die aus sich geltende Ursprungsnorm in ihrer Unabhängigkeit bestätigt. Weder sachlich noch logisch formal ist diese Stelle abhängig von der Ursprungsnorm. Dagegen ist die Ursprungsnorm bloss hypothetisch unabhängig; in Wirklichkeit hängt sie wieder von anderen Normen ab. So dass in dieser Stelle der Primat des Seins vor dem Sollen sich verkörpert und dazu noch in einem System, das die radikale Ausschliessung alles Seienden aus dem Rechte als oberstes Prinzip verkündet hat. Ohne die oberste Stelle von sich abhängen zu lassen, erklärt die Ursprungsnorm die unbeschränkte Mache dieser Stelle. Damit ist der Primat des Seins begründet.

"Die eine Stelle, an der das Recht in die Wirklichkeit einmündet, im Akte der Gesetzgebung, bestätigt also, dass das in sich geschlossene System des Rechtes doch der Verbindung mit dem Faktischen bedarf. Die Ursprungsnorm versteckt die aus Kelsens System ausdrücklich ausgewiesene Autorität. Die andere Stelle, an der das Recht in die Wirklichkeit des sozialen Lebens einmündet im Falle der Anwendung auf den einzelnen Fall, enthält auch Autorität. Bei der gänzlichen Trennung von Sein und Sollen und der Behauptung, dass ein Zustand niemals gesollt sein könne, ist es eigentlich nicht möglich, Recht auf Tatbestände anzuwenden. Es kann dabei auf die oben erfolgte Darstellung hingewiesen werden, aus der ersichtlich geworden ist, dass Kelsen die Verbindung von Sein und Sollen zu dem Urteil, dass ein Zustand rechtmässig sei, als falsch bezeichnet. Es müsste bei konsequenter Durchführung der systematischen Voraussetzungen seiner Untersuchungen für Kelsen der Übergang des Rechts auf einzelne Fälle ein unmögliches Beginnen sind. Dazu kommt nun noch, dass, selbst wenn ein solches Übergehen vom Sollen zum Sein als möglich zugegeben wird, sich aus dem Sollen allein doch nicht ohne weiteres ergibt, ob ein Sein sollgemäss ist, weil das Sollen sich in einem generellen Satz darbietet. Darauf beruht die grundlegende und treffende Kritik von Carl Schmitt. In jeder Entscheidung liege ein konstitutives Element, ohne welches niemals eine Norm zu einem Urteil führen könne. Ein etwas, das noch nicht in der Norm liegt, das neu gesetzt werden muss, tritt zwischen Norm und Urteil. Und dieses Etwas stammt aus der Autorität, das heisst ist nicht abgeleitet. Die Richtigkeit dieser Anschauung ist von Kelsen bestätigt worden : 'Ohne das Urteil könnte das abstrakte Recht nicht konkrete Gestalt annehmen'. 'Darum ist das Urteil, das den gesetzlichen Tatbestand im konkreten Fall für gegeben erklärt und eine konkrete gesetzliche Rechtsfolge ausspricht, nichts anderes als eine individuelle Rechtsnorm, die Individualisierung und Konkretisierung der generellen oder abstrakten Rechtsnorm'. Wissenschaftlicher Sprachgebrauch pflegt mit dem Begriff der Norm ein Generelles zu bezeichnen. Es widerspricht ihren Grundvoraussetzungen, Einzelfälle und Allgemeinfälle, *species* und *genus*, zu identifizieren, ein Verfahren, dessen Einschlagen Kelsen vorbehalten geblieben ist, um in seinem System die Anwendung der Rechtsnorm auf das Rechtsleben zu ermöglichen. Genau wie vorher bei der Ursprungsnorm

muss auch hier eine Identifikation helfen. Die Anwendung der Norm auf das Sein wird selbst wieder Norm genannt, um unter diesem Worte zu verstecken, dass doch die Normgemässheit eines Seins möglich ist. Ist denn das Rechtsgeschäft etwas anderes als das normgemässe Setzen von Seinstatbeständen (hier also Verbindung von Sollen und Sein) ? Rechtsgeschäfte sind nach Kelsens Wort auch solche Konkretisierungen der Norm wie die 'individuelle Norm'. Vielleicht sind sie auch Normen ?

"Jedenfalls, 'so wie die beiden Tatbestände der Rechtsbedingung und Rechtsfolge im Bereich des Generellen durch das Gesetz, müssen sie im Bereich des Individuellen durch das richterliche Urteil allererst verknüpft werden. Die Verknüpfung im Gesetz macht die im Urteil nicht überflüssig'. Positiv ausgedrückt müsste der letzte Gedanke lauten : Im Urteil muss eine neue Verknüpfung zwischen Norm und Einzelfall bei der Feststellung des Tatbestandes vorgenommen werden. Das ist autoritäres Handeln. Fand sich Autorität schon an der Spitze des Rechtssystembaues, so findet sie sich hier an der Basis in jeder Entscheidung einzelner Fälle.

"In den beiden entscheidenden Punkten stellt sich also die Autorität wieder ein. In beiden Fällen, indenen ein direkter, sprungloser Übergang vom Sein zum Sollen nicht vorgenommen werden kann, muss die Autorität von sich aus Eigenes setzen, muss es setzen aus eigener Kraft, aus eigenem Fond, nicht aus der Norm oder dem vorliegenden Falle. Bei der Normsetzung wie bei der Urteilsentscheidung setzt die Autorität ein Neues, aus eigener Entscheidung. Kelsen will das durch die Norm ausgeschaltet wissen. Aber für die beiden Hauptfälle ist die Unmöglichkeit des Ausscheidens der Autorität nachgewiesen.

"Der massgebende Begriff, der die Stelle der Autorität einnehmen soll, ist die Zurechnung. Wenn man von einem Sprachgebrauch dieses Wortes reden wollte, würde man wohl mit Verantwortlichmachen das Richtige treffen. Durch die Entscheidung im Urteil wird die Verantwortlichkeit, die Zurechenbarkeit ausgesprochen. Darum bedarf – soll die Voraussetzung [von] Kelsens Trennung von Sollen und Sein, Recht frei vom Materiellen – Zurechnung nicht in diesem Akt liegen. Liegt sie doch örtlich mit diesem autoritären Akt zusammen, dann muss sie im Wesen von ihm unterschieden werden. Und das geschieht dadurch, dass das Materielle, das was vorhin das Neue, das Konstitutive genannt wurde, aus der Zurechnung gestrichen wird. Dann bleibt vom Verantwortlichmachen und dem die Verantwortlichkeit aussprechenden Urteil jeweils nur das Formelle übrig : vom Urteil die Normgemässheit".[3]

To be honest, I should add, that I did not know this passage nor the existence of the cited work, when I elaborated the following critique of the concept of authority within the pure theory of law, because the dissertation written by Lenz is virtually unknown – although it was approved by Schmitt, so to say the adversary to Kelsen in that respect. However, there was another eminent contribution latent in my mind, when I decided to treat the subject of authority and sovereignty in Kelsen, namely that of Bertrand de Jouvenel, where he puts both concepts into relation to the political good.[4] Furtherone, references to this masterpiece of political theory must nevertheless be omitted, even if one should continuously pay attention to the distinguished solutions provided by the french author.

> "Es gehört zur Bildung, auf jedem Gebiet nur den Grad von Exaktheit zu erwarten, den die Natur des Gegenstandes gestattet".[5]
> (ARISTOTLE)

Lecture :

I do not count myself to the Hans Kelsen scholars, *i.e.* the subject of the *Reine Rechtslehre* is not my favourite topic, I confess; however, I have learned a lot when coping with the *Reine Rechtslehre* and especially when dealing with the concept of sovereignty in "*Das Problem der Souveränität und die Theorie des Völkerrechts*" as one of the basic concepts of it. In my lecture, I do not intend to provide an internal reconstruction of the interdependence of the related concepts of sovereignty, empowerment and authority; rather, I would like to provide a criticism of the conceptions from outside the theory-building of positivism and confront the decisions of the *Reine Rechtslehre* to some of the philosophical insights by Giuseppe Capograssi, Pietro Piovani, Harlod J. Laski, Hermann Heller, Wilhelm Dilthey, Wolfgang Fikentscher, Friedrich Müller, among others. In doing so, I shall criticise the abstination of legal positivism from all scientific treatment of judgments of values and I shall investigate theories that rely on the possibility to experience moral or legal norms within the consciousness of human beings. In consequence, I will escape the sceptic or relativistic background of liberal theories of legal positivism in particular of the *Reine Rechtslehre*, that hold in general moral and political judgments as irrational and improper objects to be treated by the human sciences – without converting to the tradition of communitarianism, I promise. Globally, it will turn out that Wilhelm Dilthey was right when he suggested

> "dass die methodische Frage keineswegs so einfach liegt, als man heute annimmt, und dass die gegenwärtige völlige Verurteilung des Naturrechts vielleicht voreiliger als billig war".[6]

In a similar context, he explained further, what was his conviction : "*Das Problem, welches sich das Naturrecht stellte, ist nur lösbar im Zusammenhang der positiven Wissenschaften des Rechts. [...] Hieraus folgt, dass es eine besondere Philosophie des Rechts nicht gibt, dass vielmehr ihre Aufgabe dem philosophisch begründeten Zusammenhang der positiven Wissenschaften des Geistes wird anheimfallen müssen*".[7] All of us will experience that the frontiers between legal positivism and natural law theories can not be outdrawn at all and that we should revise our prejudices about that question in order to overcome the paradoxical and ideological confrontation.

My lecture shall not only concentrate on the distinction and correlation between sovereignty and authority, but it will go beyond and introduce the following other pairs of concepts into the debate : validity – obligingness, validity – effectiveness, delegation – autonomy/ independence and consistency – coherence of legal norms or of legal orders. The main argumentation will culminate in establishing an important difference between sovereignty of law, rule of law, and authority of law (or rather : authority in law); in order to achieve this aim/ task, it is inevitable to include a broader context into the debate to be able to discuss and to decide several option in general jurisprudence : *i.e.* the theory of human conduct, the sociology of law, the analysis of legal practice and an investigation into the mental faculties. By choosing that ambitious strategy, I adopt partly the highly differentiated standpoint of the so-called "integrative jurisprudence" [8] and propose to classify jurisprudence as a human science in general and as a social science, too.[9]

Partly because I had at my disposal the papers of the colloquium, when I started to elaborate my own paper – this statement does not count for Stanley L. Paulson's paper –, frequent cross-references to the papers presented by Hans Lindahl, Bert van Roermund, Michael

Baurmann and Bruno Celano are evident, but they could not always enter the footnotes;[10] maybe I have to stress, however, that the plot of the argumentation together with the key sentences have been prepared before I took notice from the abovementioned papers (only this double confession can explain to You the twillight of an autonomous seminar paper and the illusion of key-notes). Apart from a reconstruction and reconception of the positions of the *Reine Rechtslehre*, I decided to confront You by two concurring counterparts, as You may have already noticed : first, I shall contrast the theory of sovereignty in Harold J. Laski to that in Kelsen (section II.); and second, I shall give a short introduction to the performance of general aesthetic theory in legal reasoning (section V.).

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I. [*Introduction : a variety of positivisms faced to the effectiveness of legal claims and faced to legal experience.*] – The various versions of logicisms all pretend that there is no historical or social experience science could rely on and that therefore one should reduce the objects of science to the structures of logics that can be axiomaticised. The opposite position can be identified mainly in historicism, phenomenology and existentialism that suppose the possibility of scientific investigation into practical knowledge, consciousness and experience (in Giuseppe Capograssi, Pietro Piovani, Luis Legas y Lacambra und Widar Cesarini Sforza it reads in our context *conoscenza morale*, *conoscenza iuridica*, in general *conoscienza normativa*, or *esperienza comune*).[11] Methodologies of that type follow the hope expressed by Giovanni Battista Vico that the knowledge of subjects belonging to the historico-social world have an advantage with respect to that of natural phenomenons, insofar that the human spirit makes an integrated part of the scientifically investigated objects of that world (*verum et factum convertuntur*).[12] In my forthcoming book, I provide an overview as well as a systematic reconstruction of the advantages of aporetical approaches to the subjects of law and of the state; the point is that these approaches to the lasting questions of general jurisprudence and of the general theory of the state do not depend on hypothetical options in order to treat their subjects scienfitically, but on historical, phenomenological or existentialistic experience (see *infra*, section V.). In regard to the *Reine Rechtslehre*, I shall emphasize that in Kelsen we find the difference between Ought and Is transformed to an oldfashioned dichotomy of reality and hypotheticy; that is why Kelsen can find the key to the theory of law in a compound of conceptual identities.[13] Now, to render validity hypothetical and related means to condition an Ought by an Is, whereas validity should be understood simply as the being of prescriptions, according to me. In consequence, the restriction of jurisprudence to be an exlusive *Normwissenschaft* by the Pure Theory of Law directly leads into an aporetical contradiction : within this system, a norm cannot be positive (nor *gesetzt*, nor *gesatzt*), because the Ought contradicts the Being-Posited (*Gesetzt-Sein, or Gegeben-Sein*). It has been reproached to Kelsen, that his scientific option rendered incomprehensible the positivity of law [14] and I would like to conclude that the identification of positivity and effectiveness of the law must be accepted, indeed; furthermore, I hold that, whenever Kelsen refers to posited law, he does not mean the laws posited by a political community – *i.e.* the law as a work of human imperfection –, instead he makes reference to the idea of law – *i.e.* to the law in its ideal logical structure (in doing so, Kelsen does not take seriously his qualification of the law as *Menschenwerk*). In that light, the *Reine Rechtslehre* should be classified as a natural law theory and not a version of legal positivism (*i.e.* Kelsen would practice a kind of philosophy of law, rather than a theory of law or a theory of jurisprudence); only such a radical correction could moreover explain, why Kelsen claimed to practice a "*geisteswissenschaftlicher Zugang*" [15] in dealing with the law and the state and why he rejected Logical Empirism [16] (the problem how naturalism can be avoided remains, however). That is why an Italian translation of the anthology "*Gott und Staat*" reads in its second title : "*La giurisprudenza come scienza dello spirito*".[17]

a) [*The validity of law faced to its effectiveness, Normativity confronted to Reality.*] Theory-building cannot escape to be confronted with pre-scientific practice that takes place in the field of its subjects; accordingly, a theory of law is faced to the effectiveness of everyday legal practice in and outside the courts. To me, the crucial point and the key question is, whether a sound concept of validity (*Geltung*) necessarily includes elements of effectiveness (*Wirksamkeit*) ? If that be the case, a pure theory of law (reine *Rechtslehre*) in the litteral sense would prove impossible; however, Kelsen tried to include effectiveness into his system of the *Reine Rechtslehre* (in the second edition) and hereby admitted that effectiveness be an element of validity.[18] Pietro Piovani – together with his master Giuseppe Capograssi one of the earliest connaisseurs of the works of Kelsen –, in his essayistic monography "*Il significato del principio di effettività*", suggested that effectiveness could and should be integrated into the system of the *Reine Rechtslehre* without causing any damages. He even titulated Kelsen as the "father of the general principle of effectiveness" in legal theory and explained the embarassment caused by introducing effectiveness into the *reine Normwissenschaft* in function to the incertainty about the concept of the *Grundnorm*, "*deren Natur immer ungewiss sein wird : ob formal, logisch-hypothetisch oder auch positiv-historisch*" (*infra*, in section III.; we shall see, however, that Kelsen did not manage to tackle the problem, thouroughly).[19] In effect, Kelsen approaches his *Reine Rechtslehre* nearby the position held by the legal theory of the Scandinavian realists, namely the so-called school of Uppsala (*i.e.* Anders Sandøe Ørsted, Axel Hägerstrøm, Anders Vilhelm Lundstedt, Stig Jørgensen, Alf Ross and Carl Olivecrona [20]); a tendency of the *Reine Rechtslehre* to converge to this position has even be admitted in Kelsen's "*Allgemeine Theorie der Normen*". What we can reproach to Kelsen in this context is, however, that he did not come to the conclusions of this admission, namely that a normative science of law cannot retire to an isolated treatment of questions of Ought (*Sollen*) but cannot help also to include questions of Is (*Sein*). The change from a static to a dynamic system in handle the production of the law does not overcome the difficulties and does not solve the problems; to perform a purely normative approach to normativity, namely, would necessarily rest static. This sketchy overview can comprehend that the provided reconstructions of the philosophical basements of the *Reine Rechtslehre* oscillate from Neo-Kantianism (of both, the Marburg and southwestgerman school) to Logical (Neo-)Empirism.

b) [*The validity of law faced to its effectiveness, Normativity confronted to Reality (continued).*] In that place, I shall promote my overall thesis that sovereignty goes together with validity (and legality), whereas authority goes together with effectiveness (and legitimacy). Effectiveness and coherence of a legal order can only be seen as an expression of its material authority and autonomy, whereas validity and consistency of legal order merely depend upon the formal elements of sovereignty and delegation (this reflects a separation of Rechtstheorie and Rechtsphilosophie that I intend to overcome, however). In detail, Hans Kelsen holds the following connection of Ought and Is :

> "Setzung und Wirksamkeit sind in der Grundnorm zur Bedingung der Geltung gemacht; Wirksamkeit in dem Sinne, dass sie zur Setzung hinzutreten muss, damit die Rechtsordnung als Ganzes ebenso wie die einzelne Rechtsnorm ihre Geltung nicht verliere. Eine Bedingung kann mit dem von ihr Bedingten nicht identisch sein".[21]

This purification of moral and legal theory by a distinction between the condition and the conditioned is a persistent topic of Neo-Kantianism : remember only Hermann Cohen's "*reine Rechtsphilosophie*", grounded on an "*Ethik des reinen Willens*", and Rudolf Stammler's "*reine Rechtslehre*".[22] In his "*Theorie der Rechtswissenschaft*" of 1911 – and it is interesting to notice that this means at the same time as appeared the first edition of Kelsen's "*Hauptprobleme der Staatsrechtslehre*" –, Stammler undertakes to found an enterprise of a "*reine Rechtslehre*" and postulates to leave aside every "*Bezugnahme auf die mögliche allgemeine Anerkennung bei der Begriffsbestimmung des*

Allgemeingültigen".[23] Such a strategy was enabled by one of the most misunderstood thesis of the Kantian Criticism : that it be the method that makes the subjects to be trated scientifically. Hence, it is the aim of the *Reine Rechtslehre*, "*die Jurisprudenz, die – offen oder verdeckt – in rechtspolitischem Raisonnement fast völlig aufging, auf die Höhe einer echten Wissenschaft, einer Geistes-Wissenschaft zu heben*" [24] – that is how Kelsen puts it in the foreword to the first edition of his "*Reine Rechtslehre*". Despite of this remarkable difference to all approaches within the Neo-Kantian philosophy of law, Kelsen has been classified to belong to this corner in theory-building by his critics; accidentally, the unreflected transfer of the conditions of knowledge as they have been layed down by Immanuel Kant in his (first) "*Kritik der reinen Vernunft*" to subjects that count to the problems treated within the fields of practical reason or even of judgment is one of the most radical criticisms to the address of the Neo-Kantians and, at the same time, formulates a quality of the *Reine Rechtslehre*, uncontestably.

c) [*The validity of law faced to its effectiveness, Normativity confronted to Reality (continued).*] I would like to address several critics of the *Grundnorm* in Kelsen in detail, as this illustrates the outstanding importance of the problem of effectiveness within the *Reine Rechtslehre* : The conclusion of Dieter Kühne that the *Grundnorm* be "*nicht nur Geltungsgrund, sondern letztlich auch Geltungsinhalt der Rechtsnormen*" [25] must be wrong, but is informative, however. Mario G. Losano offers a tentative explanation to the fact that Kelsen does not extensively treats the function of effevtiveness : "*Die Reine Rechtslehre muss [...] das Problem der Geltung analysieren und es klar von dem der Wirksamkeit unterscheiden. Letztere, der Welt des Seins zugehörig, soll Gegenstand anderer, von der Rechtswissenschaft verschiedenen Disziplinen sein. So erklärt sich, warum Kelsen nur äusserst sparsam auf die Wirksamkeit eingeht : jeder Schritt in diese Richtung würde eine Abweichung von den als Grundlage der Reinen Rechtslehre aufgestellten methodologischen Grundsätzen bedeuten*".[26] I remind You of the thesis held by Pietro Piovani and qualify the opposite consequence as wrong, too. Rudolf Thienel introduced the question of effectiveness into the context of empowerment, *i.e.* the conditions set to qualify a given norm as valid law; he faces the thesis of the *Reine Rechtslehre* that effectiveness be the condition (*Bedingung*) but not the cause (*Grund*) of the legal order to Herbert Lionel Adolphus Hart's supreme rule of knowledge as the source of valitiy concerning the complex structure of jurisprudence : "*Es erscheint zweckmässig, nur solche Ordnungen als geltend zu betrachten, die – im grossen und ganzen – wirksam sind. Die Wirksamkeit ist in diesem Sinne also eine Bedingung für die Geltung einer Rechtsordnung, nicht jedoch der Grund für die Geltung: dieser ist die – vorausgesetzte – Grundnorm. Wenig zweckmässig erscheint es hingegen, die Geltung jeder einzelnen Norm von ihrer Wirksamkeit abhängig zu machen. Zweckmässiger erscheint es, die Geltung der einzelnen Normen nur nach den Erzeugungsbedingungen der Rechtsordnung zu beurteilen*".[27] In my opinion, the conflict between validity and effectiveness can only be solved by a teleological method of reconciling the norm claimed valid with the deviation of obedience; that is why I follow René Marcic who settles this "*Aporie*" by relating it to that of Ought and Is and who postulates to overcome it by means of a teleological element :

> "Die Norm hat die Struktur des Zieles oder Sinnes, ist angelegt auf das Endglied, worauf hin sie, vom Anfangsglied aus, sich spannt. [...] Die Norm gilt mit der Anwartschaft auf Sinnerfüllung. [...] Also : die Wirksamkeit ist ein konstitutives Strukturelement der Rechtsnorm, ein innerer Bestimmungsgrund ihrer Geltung. Eine Norm gilt nur unter der Bedingung, dass sie einen Sinn hat, den der Mensch, auf den sie gerichtet ist, versteht. Unter diesem Gesichtspunkt gibt sie sich als apriorische Bedingung der Geltung zu erkennen".[28]

This important role of teleology, however, should somehow be structured by a general concept, as it was suggested by Rudolf von Ihering;[29] I shall propose some concepts of hermeneutics and of aesthetics to fulfill this task (see *infra*, section V.).

d) [*Modes of legal positivism and their approach to authority.*] Let me give a short overview of modes legal positivism deals with the problems of effectivity and authority to provide the basis for further discussion : In the "Lectures of Jurisprudence" by John Austin we find the concepts of sovereign und subject correlated in such a manner that rendered impossible any distinction of sovereignty and authority (of course, this results from the utilitarianism he practices) :

> "If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent".[30]

In the "Concept of Law" by Herbert Lionel Adolphus Hart, we can identify an allusion to the same theory of command, under the influence of which also the *Reine Rechtslehre* has to be estimated :

> "To command is characteristically to exercise authority over men, not power to inflict harm, and though it may be combined with threats of harm a command is primarily an appeal not to fear but to respect for authority".[31]

Furtheron, Austin recognized an authority of the legislator and states the separation of authority and power, which leads to the acceptance of the influence of morality on law; however : "the dichotomy of 'law based merely on power' and 'law which is accepted as morally binding' is not exhaustive" (this statement shall stand as a caution).[32] In XIXth Century Germany, Carl Friedrich von Gerber and Paul Laband practiced a naïve approach of legal positivism, as they ended up with an encyklopaedic collection and incoherent interpretation of the then widespread legal acts of the *Länder* and of the small legislation of the *Kaiserreich*. From all that, we have to come to the negative conclusion that we cannot expect any help of any of the variety of legal positivisms to decide the identified question about the relation of validity and effectiveness, if not of the *Reine Rechtslehre*. The reason for this hope is that only the *Reine Rechtslehre* provides a non-reductive version of legal positivism, as it has been demonstrated by Stanley L. Paulson.[33]

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If I should give a brief summary and focus on the crucial problem how to relate normativity and positivity of law as well as validity and effectiveness of law, I would paraphrase the aphoristic formula provided by Blaise Pascal : It means justice that we follow the just command; at the same time, it is necessary that we obey authoritative power. For, justice without power is ineffective, power without justice means tyranny. [...] Now, justice is subjected to dispute, whereas power is reasonable and therefore not to contradict. Hence, one cannot deliver power to justice, because power has offended to justice by arguing that justice was unjust and that it was power that was just. Consequently, because one could not render justice powerful, power has been made just.[34] The predominant questions are all addressed hereby, however, binding solutions could not be found; that is perfectly why an exhaustive definition of the concepts of sovereignty and authority as well as a differentiated description of the relation between the two concepts seem indipensable.

II. [*From the classical doctrine locating unlimited and undividable power within a political community to the founding axiomatic concept of legal positivism : the shift of the concept of sovereignty in Kelsen.*] – Similar as the separation of national and international sovereignty, a second separation of political and legal sovereignty has developed, was generally accepted and approved within the English-speaking world. In my paper, I shall refer to the field of the second division and treat several lasting sociological and juridical aspects of national sovereignty, *i.e.* the concept of sovereignty as an element of any general theory of the state and as a necessary element of general jurisprudence;

rather, I shall also touch some relevant questions of the concept of sovereignty in international law. There have been proposed a number of alternatives to the victorious division into political and legal sovereignty : I would like to address the "Working theory of sovereignty" by John Dickinson and the theory of the "*normative Kraft des Faktischen*" in Georg Jellinek's "*Allgemeiner Staatslehre*".[35] These concurring approaches may prove that sovereignty is not merely a matter of empirical or historical investigation into the place where power has or had to be located; rather it is a matter of conceptualising some basic notions in the theory of the state and in general jurisprudence. Sovereignty is not a given fact but an artefact of political and legal imagination. Thus, we can understand "sovereignty as a social [or legal] construct" and it has in particular been outlined that the ideal of state sovereignty was a product of social construction and reproduction.[36]

a) [*The rise and decline of national sovereignty.*] If I shall only treat some important issues in legal philosophy – or in the theory of jurisprudence or legal science, if You prefer –, let me nevertheless have a brief look on the classical doctrine (*dogma*) of sovereignty, in order to rectify at least two of the all too common misunderstandings : First, if one adopts the historical perspective and concludes in the thesis of a rise and decline/ fall of sovereignty,[37] the object of reference is always the concentration of law-enforcing or -coercive power within the borders of a nation state; Paul Valéry, however, held that this context was not at all essential to the concept of Sovereignty : "*Le lien de la souverainté avec le territoire-nation est accidentiel*".[38] If You remember the massive attacks to the concept of sovereignty from all directions in the last decades of the XIXth Century, lasting to the First World War, they had not chosen the vanishing national power as their target but they were all directed to certain conceptions of legal reasoning. Second, the substantial content of the classical dogma of sovereignty has always been formulated as highest and undiviseable power (*potestas legibus soluta et indivisa*); but this turns out not to be true when ideological prejudgment is abolished and philological accurancy is practiced. None of the well-known authors ever held the thesis of sovereignty not to be bound by any higher instance and to be undiviseable; instead, they all had a notion of sovereignty as a model for political or legal thinking (and not so far from Kelsen's view, as it will be shown *infra*). In his "*Six livres de la République*" Jean Bodin, one of the early fathers of scientifically treatment of sovereignty never had in his mind to legitimate absolutist power, but to give an explanation of the indispensable binding force of the contractual duties of one personally identified king to his successor, *i.e.* to explain the permanance of governmental obligations.[39] And even in the late tradition of the theory of natural and international law, in the work "*Le droit des gens ou principes de la loi naturelle*" by Emer de Vattel for instance we find a triumphal culmination of the dogma of sovereignty, however not of unconditioned sovereignty : for he treats obligations and duties of the sovereign that deduce from historical and socio-economic conditions, from general principles and – last not least – from the Constitution.[40] As it can be proved, all concepts of sovereignty do somehow limit sovereign power rather than unleash it; in particular they do not coincide with the theories that are based on a conception of the state's reason ("*raggione dello Stato*" in Niccoló Macchiavelli or "*Staatsräson*" in Friedrich Meinecke). This tendency can be interpreted as a sign, that the absolute monopoly of coercive power within the borders of a territory has never been achieved, neighter physically nor conceptually.

b) [*About the diffusion of traditional sovereignty into the axiomatic structure of legal science.*] I now invite You to forget about sovereignty as we are all used to conceptualise it and enter the field of legal theory : In my dissertation, I intended to give a compared introduction to the three theories of sovereignty by the eminent *Staatsrechtslehrer* of the German Republic of Weimar, *i.e.* by Hans Kelsen, Carl Schmitt, and Hermann Heller; their books that are related to the subject in question appeared all within a short period (namely from 1920 to 1927).[41] The persistent differences

neglected, we find a characeristic diffusion of the dogma of sovereignty as a compound of certain problems in practico-political philosophy and we can identify a corresponding entrance of some of the aspects of sovereignty into the foundations of the respective legal theories.[42] There, I argue that the problem of location and limitation of the power in the nation state – altogether with the question of sovereignty – diffused into and was absorbed by the axiomatics of modern positivist jurisprudence and was taken away from practical reasoning within the philosophical disciplines. Sovereignty no longer stands for the accumulation of power, rather it turns into a place outside the polical and legal system, in order to enable power to be limited and conditioned (*i.e.* power no longer remains invested from inside, but depends from outside, if not physically, then at least mentally); by means of this operation, legal order can be understood immanently, *i.e.* without reference to transcendence, and it can constructed inductively/ abductively from particular normativity, *i.e.* without reference to general/ universal claims.[43] With reference to the *Reine Rechtslehre*, in a operation by the virtuouso Hans Kelsen, sovereignty undergoes a process of transformation and establishes as the focus of quite a few axiomatical options; eventually, sovereignty advances to the focus of all kind of definitions and equations of identity and represents a number of traditional ideas that are to be opted out of a pure theory of law. In detail, sovereignty advances to the name for the following patterns :

- sovereignty enables the state to be identified with the positivity of its legal order and it ensures identification of law and the state;
- the notion of sovereignty and the *Grundnorm* both mark the culmination of validity within a legal order (*Stufenbau der Rechtsordnung*);
- sovereignty is the key argument in unifying national and international law and secures the monism of one single legal order (*Primat des Völkerrechts*);
- sovereignty works as a kind of warranty for the deductive approach to questions of consistency within a legal order (*Widerspruchsfreiheit*);
- the problem of sovereignty coincides with the balance of centralisation and decentralisation within a federal state;
- sovereignty operates as a substitute for the personality of the state and its organs (*Staatspersönlichkeit*, *Rechtspersönlichkeit*) and therefore stands for all institutional aspects;
- sovereignty permits the separation between the form of government and the formal aspects of the law (*Staatssouveränität*, *Rechtssouveränität*); and – last not least –
- sovereignty secures the separation-thesis between moral and legal normativity (*Trennung von Recht und Moral*).

This catalogue does not claim to be exhaustive, but it could nonetheless be significant and renders comprehensible my key thesis, that is important to remember : the sovereignty of the state – especially in its reduction to the positivity of the legal order – diffuses into very small particals – it hereby actually vanishes – in order to enter the axiomatic structure of the Pure Theory of Law. In doing so, the concept of sovereignty resolves the constitutive tension between normativity and facticity, between regulative intensions and functioning actions in a society; and this tension is settled in favour of pure normativity, which is important to notice. All questions about the relation between formal-logical validity of the legal order on the one hand side and the real effectiveness of intentional commands of collective/ social order on the other hand can no more be asked nor answered without offending the axiomatic basement of the *Reine Rechtslehre*. That may be the most important significance of the insight that sovereignty in its traditional dogmatic sense has in effect vanished and at the same time advanced to the central axiom of Kelsen's "legal positivism".

c) [*The problem of customary law to be qualified as valid and the question of* consuetudo/ desuetudo.] In that place, I would like to address one of the lasting unsolved problems within the *Reine Rechtslehre* : If sovereignty and validity as one of its implications are fully isolated from the consent or approbation of the subjects of legal order, one can hardly give any reasons for the validity of non-posited norms. Within this context, the problem of the validity of customary law reveals an important question : if qualified *consuetudo* can validate the law, how should we treat the phenomenon of *desuetudo* of a posited norm ? Kelsen was not capable of tackling this hard case. He argues :

> "Eine Rechtsordnung verliert nicht dadurch ihre Geltung, dass eine einzelne Rechtsnorm ihre Wirksamkeit verliert, das heisst überhaupt nicht oder in einzelnen Fällen nicht angewendet wird. [...] Und auch eine einzelne Rechtsnorm verliert ihre Geltung nicht, wenn sie nur in einzlenen Fällen nicht wirksam ist, das heisst nicht befolgt oder angewendet wird, obgleich sie befolgt oder angewendet werden soll. [...] Andererseits wird aber auch eine Norm nicht als gültig angesehen, die niemals befolgt oder angewendet wird. Und in der Tat kann eine Rechtsnorm dadurch, dass sie dauernd unangewendet oder unbefolgt bleibt, das heisst durch sogenannte *desuetudo*, ihre Gültigkeit verlieren. *Desuetudo* ist eine gleichsam negative Gewohnheit, deren wesentliche Funktion darin besteht, die Geltung einer bestehenden Norm aufzuheben. Ist Gewohnheit überhaupt ein rechtserzeugender Tatbestand, dann kann auch gesatztem Recht durch Gewohnheit derogiert werden. Ist Wirksamkeit [...] Bedingung der Geltung nicht nur der Rechtsordnung als einem Ganzen, sondern auch der einzelnen Rechtsnorm, dann kann die rechtserzeugende Funktion der Gewohnheit zumindest insoweit durch Satzung nicht ausgeschlossen werden, als die negative Funktion der *desuetudo* in Betracht kommt".[44]

In this passage of the second edition of the *Reine Rechtslehre*, Kelsen admits not only that there is valid law that is only backed by custom, but – *horribile dictu* – posited law that can be invalidated by a lack of custom. What is the positive legal order, then ? And what is the degree of deviance that can invalidate and what is the degree of acceptance that can validate a norm, then ? To me, the main question, however, is : whatever can sociological facts – as acceptance, refuse, custom, and so on contestedly are – tell us about the law ? To this key passage has already been referred and the dominant problem has been addressed in the first section, above. By questioning only the problem of *consuetudo*, beware that we abstract from the second element in the qualification of customary law, *i.e. opinio iuris et necessitatis*; nevertheless this second element could it be and not the first that would be able to provide the solution to the qualification of customary law as valid law. The provided "solution" to the possibility of customary law consequently is to accept normative implications of sociological facts; this answer, however, marks an essential deviance of the separation of Ought and Is. Nevertheless, this "solution" seems to be confirmed in the essay "*Recht und Logik*" :

> "Kein Sollen, das eine Norm ist, ohne ein Wollen, dessen Sinn dieses Sollen ist. [...] Keine Norm ohne einen normsetzenden Willen, das heisst keine Norm ohne eine normsetzende Autorität".[45]

To me, it seems that there is a manifest inconsequence in opting sovereignty out of the system of the Pure Theory of Law just to enter another voluntarist element into the theory of the sources of the law. One cannot explain the inconsistency of the system of the *Reine Rechtslehre* by the chronological difference of the two statements within Kelsen's œuvre, because the absense of will in the first edition of the "*Reine Rechtslehre*" coincides with a neo-kantian affinity to voluntaristic elements in legal reasoning, whereas the later affirmation to include will into the system already has the movement of logical empirism as its context. The fact that the problem in question has been unsettled, leads to the conclusion that in Kelsen the decision on validity of a given norm is not determined by its promulgation as part of the formal legal order, but by judging its coherent integration into a pre-integrated legal order that has its existence only due to scientifical reasons.

d) [*Heller's criticism of Kelsen's reconception of sovereignty.*] In my dissertation, I clearly favoured Hermann Heller's reconception of the classical doctrine of sovereignty. Instead of introducing You to his legal thinking – which would be impossible with respect to place and time –, I would like, however, to address his criticism to the *Reine Rechtslehre*. Above all, the dispute may be very informative in our context, because it concerns the function of sovereign will for legal reasoning. Let me consider the main points : Heller accuses Kelsen ...

- to practice a general theory of the state without an object;
- to provide no positive substantial answers under the cover of his concepts;
- to confuse the normativity that represents an Ought to that of a Must and in doing so to neglect the component of human will;
- to ground legal positivism within the limits of an *ordre naturel* as it was content of the natural law doctrines in the Age of Enlightenment;
- to replace substantial normativity through apriori forms claimed to be pure but reflecting a relativistic idea of human will; and
- not to accept the necessity that a fruitful legal science has to deal both with the concepts of Ought and Is, because these ideas are relational;

Heller's main criticism to Kelsen, however, concerned the notion of the positivity of law itself :

> "Es mag paradox klingen, ist aber lautere Wahrheit : die Existenz oder Positivität einer Rechtsordnung ist bedingt durch die Existenz oder Faktizität einer jene Rechtsordnung gegebenenfalls auch verletzenden Entscheidungseinheit. [...] Jene, das Recht durch ihre Entscheidungen in Geltung setzende und erhaltende Willenseinheit ist zwar ihrerseits durch Rechtsgrundsätze bedingt, den Rechtssätzen gegenüber ist und bleibt sie aber unweigerlich das Bedingende".[46]

It is evident that in Heller the positivity of law is firmly linked to the authority of a sovereign will. In order to compensate the immense power of the sovereign will, he adopted the notion of general legal principles that form the condition of the posited law (*Rechtsgrundsätze*, in contrast to *Rechtssätze*, to translate with : 'principles' or 'rules'); I used to qualify this strategy as "*Entfesselung und Limitierung der Souveränität* (unleash and limitation of sovereignty)" at the same time. It is important to notice that constitutional jurisdiction as well as constitution-making generally followed this path, rather than stressing delegation, power-conferring, or empowerment. Heller defines the task of legal reasoning by asking the following question : "Welche hinzunehmenden soziologischen und teleologischen Gehalte erzeugen erst die juristische Methode und was ist als Ergebnis der juristischen Methode in Relationsbegriffe auflösbar ?" [47]

e) [*Laski's perspective on sovereignty and authority.*] With the intention to provide a strong alternative to Kelsen's treatment of sovereignty, I would like to give an introduction into the theory of sovereignty (and authority, too) in Harold J. Laski, as a counterpart, so to speak : It is significant to Laski's theory of the state that its criticism of the dogma of sovereignty is historically founded : "its starting point is the belief that in such a theory, the problem of sovereignty is fundamental, and that only in the light of its conception can any satisfactory attitude be adopted".[48] In Laski's realistic perspective, the personality of the state is existing in reality; therefore, the concept of sovereignty that unifies the state cannot be neglected.[49] In fact, the dogma of sovereignty seems to be inverted because it stands no longer for the idea of deducting all theoretically significant acts from the power of the state; instead, it grounds inductively the dependence of all that power on social acceptance.

> "We have to find the true meaning of sovereignty not in the coercive power possessed by its instrument, but in the fused good-will for which it stands. [...] But then law clearly is not a command. It is simply a rule of convenience. Its goodness consists in its consequences. It has to prove itself. [...] Where sovereignty prevails, where the State acts, it acts by the consent of mens".[50]

Laski's view of sovereignty converges with a concept of sovereignty that characterizes the tension between facts and normativity,[51] as it is proposed in my monography. However, the essence of Laski's theory of sovereignty arises of a detailed analysis of both the historical foundation and the subsequent development of the dogma of sovereignty, only; therefore, the above conclusion may be premature.

Laski develops the basis of his theory of sovereignty on the confrontation of the early history of the respective dogma and the medieval image of the world. Within the frame of the idea of an *ordo mundi*, every concept of an independent territorial institution remains impossible because of the predominant universalism. The Middle Ages are characterized by a number of co-existing normative orders that concur each other, and that each regulate a community of persons without respecting any territories (*status personalis*). Laski stresses that the church in general and more specifically the Reformation played a key role in shaping the dogma of the sovereign profane state. Sovereignty arises from a complex situation in the Middle Ages, when several legal orders had altogether validity, and when the teleological concept of the community as an institution to the purpose of perfection of individuals – corresponding with Aristotelian philosophy and christian theology – was abandoned. "The state becomes self-sufficing, therefore to the state the unique allegiance of the individual is due. It ceases to think of superiority as existent outside itself. The state is that which has no superior, wherefore all other forms of social organization, as guides for example, are subject to its control. The dawning sense of nationalism was at hand to give that concept an enviable sharpness of definition".[52] Laski argues that Jean Bodin's theory of sovereignty was not directed against metaphysic implications of state theory, but that it was designed to support the demands of the author himself. In the following, the dogma of sovereignty changed to a successful technique and improved the never intended autonomy of the mechanics of politics from the social conditions of state community.

> "That is why the legal theory of sovereignty can never offer a basis for a working philosophy of the state. For a legal theory of sovereignty takes its stand upon the beatification of order; and it does not inquire – it ist not its business to inquire – into the purposes for which order is maintained. The fundations of sovereignty must strike deeper roots if they are to give us a true philosophy".[53]

In this passage, Laski argues to separate the problem of sovereignty from questions about legitimacy of the state order; on the other hand, he concedes that there is great danger to identify them.[54] Laski identifies that danger in the fact that the sovereign state is in relation to political theory what the absolute in respect to metaphysics.[55] He undresses the concept of sovereignty of its claimed technical unlimitedness, when he is confronted with popular sovereignty and transforms the latter to a true limit of state power.

> "Sovereignty, after all, is no more than the name we give to a certain special will that can count upon unwanted strength for its purposes. There is nothing sacred or mysterious about it; and, if the sense is to be at all meaning, it can secure obedience only within limits. We cannot, indeed, with any certainty predict or define them, though we can indicate political unwisdom deep enough to traverse their boundaries".[56]

In connection with the concept of popular sovereignty, especially, Laski criticises Bernard Bosanquet who defines sovereignty as "the relation in which each factor of the constitution stands to the whole" for his "Rousseauism".[57] In his pluralistic attitude, Laski comes out against the totalitarian connotations of the political theories of Jean-Jacques Rousseau and Bosanquet and initiates a new area to the interpretation of Rousseau. According to Laski, the state does not depend on a constituing homogeneity; the danger of resistance at any time has though to be acknowledged as a basis of the state :

> "We shall make the basis of our State consent to disagreement. Therein shall we ensure its deepest harmony".[58]

The will of the state is not to be a general will (*volonté générale*) but is always standing in concurrence with conflicting other wills; political community is defined as pluralistic. State authority can only depend on the wills of the individuals belonging to the community; this will can be named sovereign "by consent transformed into impotence by disagreement".[59] Laski teaches that popular sovereignty demands representation of the pluralistic community. To this end, there is a necessity of political morality – I tend to interpret : civil society – which has to ground in historical experience to be useful :

> "Certainly the history of popular sovereignty will teach its students that the announcement of its desirability in nowise coincides with the attainment of its substance".[60]

f) [*Laski's perspective on sovereignty and authority (continued).*] Up to this point it may appear as if Laski did not divise sovereignty and authority in a sound way because he calls 'sovereignty' what we would tend to call 'authority'; that is why we should further develop the relation between the juridical concept of sovereignty and the political one of authority. In his contribution to the situation of his time, entitled "The Sovereignty of the State", Harold J. Laski binds the validity of law as well as the sovereign power of the state to the acceptance by the subjected individuals. He argues that obedience to the law will always be uncertain because it depends on following other than legal rules :

> "For that rule will depend for its validity upon the opinion of the members of the State, and they belong to other groups to which such rule may be obnoxious. [...] We have, therefore, to find the true meaning of sovereignty in the coercive power possessed by its instrument, but in the fused good-will for which it stands".[61]

Therefore, Laski holds that it is the best approach to discuss inobedience in order to give a philosophical criticism of the state : in his view, opposition is the richest source of every understanding of the state.[62] At this point, the central objection against juridical theories of sovereignty attaches : Laski reproaches the monistic theories of the state for contradicting to one of the firmest convictions of men,[63] *i.e.* the link between power and acceptance of the subjected :

> "The sovereignty of legal theory is far too simple to admit of acceptance. The sovereign is the person in the State who can get his will accepted, who so dominates over his fellows as to blend their wills with his. Clearly there is nothing absolute and unqualified about it. It is a matter of degree and not of kind that the State should find for its decrees more usual acceptance than those of any other association. It is not because of the force that lies behind its will, but because men know that the group could not endure if every disagreement meant a secession, that they agree to accept its will as made manifest for the most part in its law. Here at any rate, we clear the air of fictions. We do not bestow upon our State attributes it does not possess. We hold it entitled to ask from its members that which conduces to the achievement of its purpose not because it has the force to exact their consent, but because what it asks will in the event prove conductive to that end. Further than this we can not go".[64]

According to this remarks, sovereignty is not absolute and unqualified but demands in the highest degree theological, moral, and sociological conditions which lead the subjected to adopt a certain point of view towards positive law. Legal order, in consequence, shows a teleological moment, *i.e.* it has to challenge the values of the state community.[65] As do all other institutions, the state has to be measured in what is his effectiveness.[66] 'Sovereignty' no longer remains attributed to original state quality but advances to be a tool for critical political philosophy.

To complete his "Studies in the Problem of Sovereignty", Laski published two annexes where he points out the connection between the concept of sovereignty on the one hand and federalism and centralization on the other hand that happen to be of great interest for us. This debate stands under the political circumstances of the United Kingdom and offers a notion of corporate personality that differs from any association of private law. In this difference, Laski recognizes the brake through of a pragmatic juridical theory of sovereignty that could overcome the theory of John Austin.[67] With reference to the foundation of the american Union State, Laski names the lasting problems of all understandings of sovereignty in the context of a federal state : the idea of two sovereignties that have to be co-ordinated to a common end.

> "Men found it difficult to understand that two jurisdictions largely co-ordinate can work towards a similar end. They imagine that co-ordination meant antithesis, and drew a distinction between State and Nation".[68]

g) [*Laski's perspective on sovereignty and authority (continued).*] In the preface of his book "Authority in the Modern State", Laski identified the problem of sovereignty as a special case of the larger question about state authority.[69] That his criticism turns into positive aspects is signalized by shifting to the concept of authority. Laski deals with the theories of Louis-Gabriel-Ambroise de Bonald, Bernard Lamennais, Pierre Royer-Collard and the (french) syndicalists, but he offers the outline of limitation of state power, in a general partition. First, Laski remembers the limitation of sovereignty as the essence of "The Sovereignty of the State"; then, he continues that power is conditioned by a system of conventions that deal with the legitimation of state power.[70] Laski defines "political right" as a social need that comes into the mind and rests essential for the achievement of the tasks of the state.

> "It is a right natural in the sense that the given conditions of society at the particular time require its recognition. It is not justified on grounds of history. It is not justified on grounds of any abstract or absolute ethic. It is simply insisted that if, in a given condition of society, power is so exerted as to refuse the recognition of that right, resistance is bound to be encountered".[71]

This passage gives substantial precision to Laski's pluralistic theory of sovereignty insofar as the function of the "political right" points out that there is no need for a transcendental connection in order to limit the power of the sovereign state; this relationship can immanently be discussed within politics. Pluralism necessarily means relativism; this is not to be understood in the sense of a renounciation of all founding values, however, of a uniform set of values. Laski holds that several normative orders can co-exist; they cannot be logically derived because of their different ontological grounds, but they become interactive in the motivation of norm-based and teleological action. The state as political community is so to speak the frame of this interference. The state gains strong authority only if he respects the relative needs of the political community – I tend to interpret : civil society, as I did *supra.*

> "If authority is subject to exploitation, it must be subject to limitation also. It can act without restraint only where its end is in fact coincident with its ideal object. Its policy, that is to say, is only sovereign where it is serving the sovereign purpose".[72]

What is described here by Laski is nothing inferior than the co-ordination between state authority qua sovereign state power and popular sovereignty in a democratic and pluralistic understanding. In the Swiss "*Zeitschrift für öffentliches Recht*" in 1931, Laski published a comprehensive abstract of his thoughts concerning the theory of sovereignty, entitled "*Das Recht und der Staat*". He argues that a critical confrontation with the concept of sovereignty could only take place if the state is identified as historically conditioned and not as something permanent or at least everlasting. Any

juridical theory of the state claims to explain the validity of legal order under formal acpects, his argument begins.

> "Aber eine Philosophie des Staates kann sich mit den Axiomen der formalen Jurisprudenz nicht zufriedengeben. Sie muss fragen, warum sie aufgestellt wurden und welche Folge ihre Annahme hat. Sie muss eine Brücke zwischen der rein logischen Welt idealer Begriffe, in der allein die juristische Theorie vom Staat sich bewegt, und der wirklichen Welt um uns suchen, in der die Staaten, die wir kennen, ihre Funktion erfüllen".[73]

The institution of the state can only be justified through its ability to satisfy present needs; in consequence, legal philosophy must explain the moral right of the rulers to demand obedience, according to Laski : "Sie muss erklären, wie die Souveränität des Staates mit einer Welt vereinbar ist, in der das Hinterland zwischen den Staaten durchorganisiert ist; sie muss also zeigen, wie ein Staat, der das Subjekt einer grossen Masse bestimmter Verpflichtungen ist, keinem Willen als seinem eigenen unterworfen sein und doch unter dem Zwang stehen kann seine Verpflichtungen zu erfüllen".[74] In this case, the appropiate treatment of the problem of sovereignty by legal philosophy is clearly designed. The validity of law is not qualified by derivation of the state power qua sovereign source of law but by obedience of the subjected, Laski argues.[75] The idea of sovereignty seems to be lead to an abyss where it loses definitively its right. Sovereignty is reduced to utilitarian needs and the right to sovereign decision corresponds to the duty to decide according to the present needs :

> "Ein Recht zur Souveränität besteht nicht um der Souveränität selbst willen : es besteht für die Zwecke, denen die Souveränität zu dienen hat. Ein Recht zur Souveränität muss korrelativ sein mit der Pflicht zur Verwirklichung dieser Zwecke. Diese sind in ihrer Gesamtheit das Maximum an möglicher Erfüllung von Wünschen. Der logische Schluss würde darum von einem Recht der Souveränität zu der Pflicht führen, die souveräne Gewalt so zu organisieren, dass sie die Ziele erreicht, für die sie besteht".[76]

If we now combine the analysis of the early history of the dogma of sovereignty and Laski's demands for a synthesis, we must concede that the period of unlimited and unseparable sovereignty only represents an episode in philosophical-historical terms. Absolutism and even more the enlightened legal positivism that grounds on popular sovereignty appear as an unlegitimate predominance of law over all other normative orders; the natural law, then, is nothing else than a certain technique to project moral claims onto the ontological status of the validity of positive law. It is the merit of Laski to reconstruct the interdependencies that were not fully recognized by the enlightened secularization of politics. However, I would tend to draw the line between sovereignty and authority exactly where Laski differs the legal order and "political rights" and count the latter to the realm of political authority.

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Alltogether with the diffusion of the classical doctrine of sovereignty that rendered the very idea of sovereignty unnecessary, the ideas of legitimacy, of legal authority or an authority of Law alltogether become unthinkable. On the other side, Laski's temptation to introduce the concept of sovereignty into legal and political philosophy tends to convert – or maybe : pervert – sovereign will altogether with its emanation of legal order to communitarian authority that penetrates the concepts of sovereignty and validity. Nevertheless, in criticising Kelsen – following my conviction – the central concept is sovereignty and not authority; since sovereignty stands for the abovementioned set of axiomatic claims it is rather a tautology than a substantive concept within the system of the *Reine Rechtslehre*. Up to this point, the Pure Theory of Law only seems to hold an oldfashioned concept of sovereignty of law (*Rechtssouveränität*) – being an early theory of

the rule of law in XIXth Century Germany –, in contrast to reconceptions of an authority of law or of legal authority.

III. [*Refusing the penetration of questions about legitimacy into the scientific treatment of a given system of law : the absence of the concept of authority within the system of the* Reine Rechtslehre.] – Generally, it is not contested that the validity of each norm within the system of a legal order should be determined not by evaluation of its content, but in function whether it has been posited in accordance with the validation criteria stated by a norm of some higher order (validity in that sense determines only the qualification of each norm as an integrative part of the system [77]). If this be the case, it is due to the feeling, that *prima facie* the thesis is more or less a description of what constitutional courts do when they applicate general legal principles to judge upon an inferior legal order or of what lawyers do when they investigate the legal qualification in a given case in the light of a higher legal order relative to the act in question. Nevertheless, the lack of certainty included in the process of application of the posited law could suppose, that competence-according law must not necessarily be valid, or that posited norms do not undoubtly determine the decision of any given case without the ingredience of supplementary reason. Why do judges and lawyers then rely on the delegation of competences and why do they not call upon authority ? Later on, I will argue that this approach results of the implications of reflective judgment in the process of relating the abstract to the concrete; previously, I shall treat the relations between sovereignty and authority, then between sovereignty and empowerment, respectively, in Kelsen :[78] generally speaking, we can presuppose a shift from the aggregate of themes bundled in the concept of sovereignty to the concept of authority in the development of Kelsen's thought.[79]

a) [*Is there an authority of law or legal authority ?*] If You follow the of one of the eminent professors at Oxford University, Joseph Raz, the essence of legal positivism is to accept the "Authority of Law", or with equal meaning : legal authority (in fact, this is the title of one of his anthologies).[80] This alone is presumptive evidence enough to identify a growing tendency in legal positivism to confound validity and authority or sovereignty and authority, respectively. According to me, authority can never refer to the legislator as an author or as the source of the posited law, because the importance of authorship is minimal and the autonomy of the text is predominant in intepreting the law (*i.e.* the quest for *interpretatio auctoris* can not stand for authority).[81] This conviction should be a common place in continental legal thinking – in German-speaking general jurisprudence it is even impossible to overcome, in fact –, within the tradition of hermeneutics; in that case, authority can only refer to legitimacy, *i.e.* authority can never been understood as a product of logical superposition but as a reference to a material quality and therefore as a reference to social facts.[82]

b) [*Kelsen on authority and authorisation.*] To me, it is one of the foremost merits of the *Reine Rechtslehre* that it avoids to identify validity and authority of law and that it locates authority outside the struggle about legitimacy; this statement only has the status of a thesis, of course, and to judge the strategic division in Kelsen a subtile and wise distinction presupposes a careful reading of what Kelsen has written on the relation between the *Grundnorm* and authority in the second edition of the *Reine Rechtslehre* of 1960 :

> "Die Grundnorm beschränkt sich darauf, eine normsetzende Autorität zu delegieren, das heisst eine Regel aufzustellen, nach der die Normen dieses Systems zu erzeugen sind".[83]

In that passage, authority appears to be an option, even if the *Grundnorm* – always according to Kelsen – is not "*das Produkt freier Erfindung*". In a subsequent key passage, authority is not attributed to the legal order or to the law, but rather to the corporation that adopts the

constitution (to the "*verfassunggebenden Körperschaft*", *i.e.* to the "*normsetzenden Autorität*" in the sense of "*der das Recht positivierenden Autorität*"). It reads as follows : *die Grundnorm ist jene Norm*

> "die vorausgesetzt wird, wenn die Gewohnheit, durch die die Verfassung zustandegekommen ist, oder wenn der von bestimmten Menschen bewusst gesetzte, verfassunggebende Akt objektiv als ein normsetzender Tatbestand gedeutet wird; wenn – im letzteren Fall – das Individuum oder die Versammlung von Individuen, die die Verfassung errichtet haben, auf der die Rechtsordnung beruht, als normsetzende Autorität angesehen werden. [...] Die Grundnorm ist keine gesetzte, durch Gewohnheit oder durch den Akt eines Rechtsorgans gesetzte, keine positive, sondern eine vorausgesetzte Norm, sofern die verfassunggebende Instanz als eine höchste Autorität angesehen wird und daher durch keine von einer höheren Autorität gesetzte Norm als zur Verfassunggebung ermächtigt angesehen werden kann".[84]

The *Grundnorm* does not claim authority that would have the power to give/ issue the law in an truly authoritative way (valid law in the sense of effective or powerful law) : "*Da die Grundnorm keine gewollte, auch nicht von der Rechtswissenschaft gewollte, sondern nur gedachte Norm ist, arrogiert die Rechtswissenschaft mit der Feststellung der Grundnorm keine normsetzende Autorität. Sie schreibt nicht vor, dass man den Befehlen des Verfassunggebers gehorchen soll*".[85] In retaining from all aspects of effectiveness, or authoritative power, Kelsen follows a anti-metaphysical strategy that is constitutive for the *Reine Rechtslehre*; it is one of the ways to attribute validity to the legal order, "*ohne die Geltung der normativen Rechtsordnung auf eine höhere, meta-rechtliche – das heisst : auf eine von einer der Rechtsautorität übergeordneten Autorität gesetzte – Norm zurückzuführen*".[86] Within the given context, *Rechtsautorität* does not mean *Autorität des Rechts*, but always : *Autorität des normsetzenden Organs*; hence, we can conclude : in Kelsen we cannot use the notion of authority of law or legal authority, rather should we speak of the authorisation of the legislator.[87] This solution derives from an unconscious intention of the *Reine Rechtslehre* to enlighten the mythical concept of *pouvoir constituant* as the last source of law or the transcendental ground of the Constitution;[88] it is therefore also directed against the idea of competence-competence (*Kompetenz-Kompetenz*), stringently thinking. Moreover – and that will be the intermediate conclusion of our reflections on the *Reine Rechtslehre* – the *Grundnorm* is destinated to make the law sovereign or to institute the rule of law in its merely formal aspects, as already was the conclusion of the second section; in that perspective, authorisation shows as a strategy to diffuse sovereignty (the *summa* of competences) in a shifted legal order according to the separation of powers (and will always be *Organkompetenz*) or in a federal state (and therefore turns out to be a matter of centralisation and decentralisation).

c) [*The difference between validity and obligingness.*] Sovereignty – once attached to the concept of the basic norm – can be interpreted as the culmination of a legal order, where the validity of law transcends into the authority of individuals or of groups of individuals (and *vice versa*). To adopt such a view implies to establish a difference between validity in a narrower sense (*Geltung*) and obligingness or the obligatory nature (*Verbindlichkeit*) of law (as two aspects of 'validity' in a broader sense); and it establishes also a coincidence with the separation of legal and moral obligations/ claims. In that understanding, the authority of the law would imply unquestioned importance of the law or unconditional obey to the commands of the law; it is one of the eminent deficiencies of the theory of command, indeed, that it does not respect the possibility of wrong-doing, that it cannot cope with the freedom of every actor to deny the normative prescription in a particular situation, and that it presupposes the legal norm to determine human actions directly (any sound theory of legal norms must therefore respect the distinction between validity and obligingness). The "normativity" of lawful behaviour would then not correspond to an Ought – *i.e.* it would not guide human actions –, rather it would resemble a Must – *i.e.* it would determine human actions;[89] in order to avoid this consequence, one has to shift from the theory of command to an understanding of normativity as related to normality and

define the norm as a general rule that does not include its application or fulfilling by judgment, in contrast to the command that does necessarily refer to a concrete situation (*i.e.* the law 'rules', the courts 'applicate' the law in a 'judgement', and the police 'commands'). Empirically however, the law often does not even influence human actions, because most people decide to act without knowing their action to be "determined" by the law; even where there is knowledge of the law, it enters in concurrence with multiple other sources of motivation – *i.e.* with morality (living *Moralität*, not morals [*Moral*]), with custom, and so on – and the action can turn against legal consciousness. If one investigates the reasons "why people obey the law", science is rejected to the possibility to measure indications of legitimacy and legal authority.[90] In the essence, the lesson is this : there is no moral obligation to obey the law.[91] This seems me to be a very essential claim, directly leading to the distinction between validity and obligingness. In respecting this insight, the *Reine Rechtslehre* enables the permanent change of positive law by means of changing political preferences and it enables civil disobedience and so forth. Whenever 'authority' stands for legitimacy, there is no place for it in legal positivism.

d) [*Intrinsic relation to authority in legal reasoning postulated.*] Even if one admits this in general, one may feel the necessity to accept the penetration of legal thinking by all kind of arguments in the name of authority. In opposition to Kelsen, Carl Joachim Friedrich holds, "*dass kein juristisches Argument verzichten kann auf eine überzeugende Bezugnahme auf Autorität. Richterliche Entscheidungen und Gesetze wie andere rechtswirksame Akte berufen sich auf frühere Entscheidungen und Gesetzgebung. Daher ist ein Verständnis von Autorität entscheidend für das Verständnis für* legal reasoning". Constantly, Friedrich deals with an exact definition of the notion of authority : "*besonders stehen im Mittelpunkt die Verwendungen dieses Begriffs bei Theoretikern der Politik*". Finally, Friedrich comes to the conclusion,

> "dass die 'Autorität', auf die sich *legal reasoning* beruft, nicht jenseits der Vernunft zu suchen ist, sondern selbst auf Vernunft basiert. Entscheidungen und Gesetze werden dann als 'autoritativ' angesehen, wenn sie auf Vernunft gegründet sind. In Wirklichkeit ist alle Autorität in der Fähigkeit zur vernünftigen Begründung zu suchen. Daher ist die Verbindung von Vernunft und Autorität entscheidend für jedes juristische Argument oder [für jeden] legislativen Akt".[92]

In short : Kelsen does not settle the question of authority mainly because he did not elaborate a concept of legitimacy within his theory of the *Reine Rechtslehre*, which would be wholly distinct from that of legality.[93]

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It is one of the central virtues of the *Reine Rechtslehre* that Kelsen does not allow uncontrolled references to human reason in general nor to social authority in particular. Hereby, the option of the *Reinen Rechtslehre* is simple : validity has to be conceptioned as the response to the ontological question of the being of the law (*Geltung* as the *Seinsfrage* of law). This answer excludes all references to authority in my understanding. Several persisting problems remain, however : if "*lex facit regem*" and if therefore power can not automatically be accepted as an authority by any pure legal theory, where should reside authority, how can it be attached to the legal order, and by what means can it be located ?

IV. [*About the question of how to organise multiple sources of law by means of the delegation of competences or by means of empowerment : the predominance of power-conferring rules in order to unify legal reasoning.*] – In every complex structure of multiple sources of law, we can find situations where the author that decides on a legal act and the delegating norm that validates a legal act do not coincide. This fact allone could suggest to separate the problem of authority from questions about delegation and

validity, respectively. In adopting Adolf J. Merkl's "*Stufenbau der Rechtsordnung*",[94] Kelsen located the main field of application of the idea of empowerment in relating different legal orders to the legal system as a whole and suggested hereby a parallelism between empowerment and the *Grundnorm*. Another related problem is to harmonize national and international legal order that is solved by the *Primat des Völkerrechts* as part of the doctrine of sovereignty (the alternative seems to be Georg Wilhelm Friedrich Hegel's understanding of international law as "*äusseres Staatsrecht* [outer national law]" [95]). I do decidedly contest that these two applications of the notion of power-conferring or empowerment be adequate nor representative. In my opinion, the idea of delegating entire legal orders is a highly misleading issue, because the confer of competences normally does not ensure coherence of the whole order in itself (but merely formal consistency); actually, I confess to be sceptic about the possibility to establish a hierarchical relationship between specific norms (and similar also about the decision on apriori conflictingness of two norms, be it at the levels of national and international law, or be it on the levels of constitutional law and the rest of the legal order). Once accepted the different sources of law, one has to constate that the law cannot be understood as homogeneous material, but shows in its structure enormous differences in nature and character. What I intend is to show that the gain of harmony can only be accomplished in the way of application, according to legal conscoiusness/ experience and following the analysis of legal practice (see *infra*, part V.)

a) [*Remark to the Swiss federal constitutional practice in the case of conferring power.*] You may allow a reminiscence to the highly complex structured legal order in Switzerland that is a federal state. In Swiss federal constitutional law, there is a practice – or should I call it : theory ? – that makes invalid all temptatives to delegate a competence without further specification; this specification must include the general principles according to which the empowered organ will have to legislate and provide even more precise advice, where it comes to conflicts with fundamental rights and individual liberties, among other conditions that only can make the power-confer perfect. I am not going to make You familiar with Swiss specialties in constitutional law; however, to me, this does not seem to be a special case, but a rather normal, natural, intelligent and reasonable way to deal with the idea of delegation. For this legal experience makes us aware that in the discussion about empowerment and delegation within the framework of the *Reine Rechtslehre* all scholars constantly refer to blank power-conferring (*Blankett*) whereas in practice delegation has always been moderated by material normative substance (in Kelsen, the concept of empowerment should refer to *Organkompetenz*, never to *Sachkompetenz*). Having analysed this difference by topics, I would conclude as follows : Suppose that A who is sovereign and an authority delegates all commands to B ("do what B says you have to do"); here competence can be delegated, but not authority (nor responsibility), be it political or legal. To me, the general conclusion seems to be the following : in function to delegation, the validity of law differs in function only of its obligingness; consequently, competence/ empowerment seem to be strategies to achieve a sort of limited sovereignty. The insight that empowerment can never transfer authority or responsibility can be formulated in a traditional conceptualisation : unalienability of popular sovereignty as the source of legitimacy (*i.e. Volkssouveränität*). To remember : authority turns to be a concept restricted to persons that goes together with legitimacy and responsibility.

b) [*The problem of autonomous, not delegated sources of valid law – Legal pluralism, legal realism and institutional theories.*] There are a lot of examples, where the competence to set valid law cannot be interpreted as delegated, and where its validity results of the author's own "sovereignty" (or if You prefer : "authority"); all autonomous statutes and the whole field of private law for instance cannot be understood as delegated by the state's legal order, *i.e.* by constitutional guarantees of the freedom of contract.[96] Independently of theory-building, there is historical evidence that

there exist autonomous powers/ authorities that can validate law.[97] Nevertheless, this situation does not seem to present a danger to the state's sovereignty (even if it does to its authority) and we have to record that the monopoly of the state to validate the law that happens to be accepted as binding before the courts has never been fully accomplished; however, this situation does remember us also that the *Reine Rechtslehre* does not really fit to the needs of legal practice. There are many different behaviours, in order to face the so-to-speak normal state of affairs concerning the validation of law; they all accept as a fact that there is no more given consistent order (remind the *ordo mundis* as a basis for natural law teories) and, by accepting the incoherent and spontaneous chaos, they are confronted with the pluralistic universe (William James). It was Harold J. Laski that theorized as one of the first legal philosophers about the plurality of legal orders that do not depend on each other, followed by Alf Ross who was preceded by the Scandinavian realists. Some theories react to the vanishing security of knowledge by postulating the phenomenon of contingency (Richard Rorty); others rely on existential experiences or historical consciousness. Also the institutional approach (Santi Romano, Maurice Hauriou) as well as the theory of systems (Niklas Luhmann) can be seen as a reaction to the changing situation.

c) [*Legal concepts and system-building as the sedes materiae of the addressed problems.*] In the contexts of the philosophy of history and of the philosophy of the sciences, there are no reasons why one should adopt one and reject another theory, for it has always been the task of theory-building to adapt a traditional set of concepts to social change. That is to say, the profession of every man of science lies in providing sound reconceptions and to criticize unhealthy concepts; in addition, it is the lasting task to rebuild and reshape systematically that knowledge that has been generally approved by the scientific community in a particular discipline (and therefore, it will always remain dogmatic knowledge). With respect to jurisprudence, this has been spelled out by Hermann Heller :

> "Juristische Konstruktion und Systembildung ist stets ein produktives vervollständigendes Nachdenken der positiven Rechtsbestimmungen eines Rechtsinstituts oder der ganzen Rechtsordnung unter der normativen Herrschaft von substantiellen Rechtsgrundsätzen".[98]

Having all possible options, one cannot only vote for or against the *Reine Rechtslehre* as it was proposed by Kelsen, but we all have the freedom to modify it. In this light, it is surprising that criticism has concentrated mainly on the underlying dualism between Ought and Is,[99] because this dualism is founded by the antinomies in criticist idealism (compare the deconstruction by Gregor Edlin in his "*Scheinprobleme*", for instance [100]). Despite of the number of attacks to the *Reine Rechtslehre*, it has been a success to the extent that it provided a lasting treatment of some of the foremost legal concepts within a sophisticated system.

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In order to come back to the concepts of empowerment and delegation, I would summarize my reflections to the claim that each decision to validate a norm means an authoritative act of legislation – even if the necessity is approved to derive the competence to posit valid law from a higher legal order, and even if the law-giving organ – in his paper, Stanley L. Paulson translates it : "the law-issuing authority" – as such is empowered to act. In adopting this perspective, I am aware, however, of the constant danger (or could it not be a chance !) that, in the way of application of the positive law, legal acts have to be judged invalid, because they have not been set in substantial harmony with its legal surroundings.

V. [*Establishing a substantial systematicy of legal order : the contribution of legal judgment to the ends of consistency and coherence.*] – In order to compensate the outlined deficiencies, I shall now propose a tentative answer to the difficulties to relate sovereignty and authority, effectiveness and normativity, validity and obligingness, and so on : I would suggest an orientation towards the references between theory and practice, stressing the question of the application instead of that of the production of law.[101] Here, I will come to the conclusion that to make the law posited means a sort of reverse articulation or inverse pointing.[102] In Hermann Heller, normativity refers to normality and states a rule, it does not issue a command; commands do not have to be interpreted but to be obeyed and followed (that is one of the main deficiencies of the *Befehlstheorie*, indeed), whereas rules have to be adapted and applicated to a specific situation;[103] in this perspective, to posit the law means to objectivate a pre-given, but not self-fulfilling normative order, however, it does not necessary mean to shift to a natural law theory. That is the case because, generally speaking, legal system-building means, according to Santi Romano : "*der Jurist hat nicht die Wirklichkeit seinen Begriffen unterzuordnen, sondern diese der Wirklichkeit*" (leading to the idea of an emulation of the real subjects by means of scientific concepts).[104] Such an enterprise can be successful under a twofold condition, at least : fist, one has to face the hermeneutic tradition (in that point, Kelsen was criticised by Edgar Bodenheimer to suggest an "interpretative nihilism" [105]); second, one has to dissociate the text of the laws and the applied norms of decision and follow the theories of the *Fallnorm* provided by Friedrich Müller or that of the *Entscheidungsnorm* in Wolfgang Fikentscher (in that point, Kelsen did not have any sensibility, at all). To fulfill this huge task, I shall depend on my forthcoming book, entitled "Law and State as Objectivations of the Spirit in History – Foundations of general jurisprudence and the general theory of the state as human sciences".[106]

a) [*The tension between general normativity and situative peculiarity of the law.*] In terms of logics, the problem seem to be the following : How can we bridge the gap between the general and abstract norm and the concrete situation and how can we describe this operation as an applicative performance of judgment ? This question of logics – how to apply a pure norm to the dirty reality – has been identified and intensified by Léon Brunschvicg, when he investigated the modalities of the copula within the practical legal judgments : he reproaches jurisprudence not to provide a universal principle, in order to apply the aequivocal and indetermined rules of the law to the individual and situative reality; faced to this analysis, he suggested the solution to construct a second legal reality.[107] This strategy, however, rendered impossible to esablish any correspondance between the real dates and the legal judgment in terms of logics. That is where You may ask too much from deontic logics; I would suggest that harmony and collision, respectively, can only be judged in the way of the application of a norm to a given situation, therefore (it was Carl August Emge who theorized the tie between the singular situation and the application of a legal norm [108]). The consequence of all this seems to be that one has to accept the dissociation of the text that has been posited as valid law and the set of prepositions that are suitable as a basis for application.

b) [*Enlarge the reductive modalities of legal hermeneutics (explanation and explication) by application and epidigmatics.*] As an alternative to subsumtion, I shall suggest the notion of articulation in the sense of "*verdichtend ersteigernder Zuspitzung*" and of "*energetischer Bedeutungs(nach)vollzug*". In Hans-Georg Gadamer we find as a starting point the pietistic unity of *subtilitas intelligendi*, *subtilitas explicandi* and *subtilitas applicandi* that are separated in classical hermeneutics, however partly united by romanticism. Application is identified as a non-reductive, *i.e.* productive mode of *Verstehen* that do not reduce complexity, but increase it; the task of jurisprudence to concreticise legal norms render it worthy to search an adequate interpretation of the judicial judgment in that direction. The ultimate aim of such an investigation into the performances of human faculties that found

legal science may be to explain what the shift from legitimation to autonomy of the legal order could signify. In order not to be forced to reduce the two volumes of my forthcoming book [109] to a mere nonsense, I shall only provide a brief insight in the shape of a german *excursus*, at this place and at that time.

aa) In seiner Reflexion "über einige Grundbegriffe einer Philosophie der Geisteswissenschaften" hat Frithjof Rodi die Überwindung des Verstehen/ Erklären-Dualismus gefordert und erste Marken gesetzt auf dem Weg hin zu einer erweiterten Typologie der Interpretation : Er unterscheidet explanatorische, explikative, applikative und epidigmatische Interpretationen.[110] In den Blick rücken somit die sprachphilosophischen Arbeiten von Georg Misch, Hans Lipps, Josef König und Otto Friedrich Bollnow. Wenn wir uns jedoch Friedrich Carl von Savignys Forderungen nach Anschauung der Rechtsinstitute und nach am Rechtsbewusstsein geübter Urteilskraft vergegenwärtigen, erscheint der Fortgang der juristischen Interpretation vom Modell der Applikation zu demjenigen der epidigmatischen Konkretisierung irgendwie schon da vorgezeichnet. Eine nicht zu vernachlässigende Problematik besteht für die Transformation in das Gebiet des Rechtsdiskurses dann nur noch in der scheinbaren Duplizität der zu "applizierenden" Autoritäten, die da sind : Gesetzestext und juridische Handlungspraxis beziehungsweise Lebenspraxis.

bb) Applikation kann mit Misch auch verstanden werden als energetischer Bedeutungsvollzug im Sinne einer "produktiv objektivierenden Artikulation"; Die Rechtspraxis würde denn gewissermassen zum Richter sprechen und dieser hätte nur die in der Normalität (in der kollektiven Handlungspraxis) enthalte intrinsische Normativität, die in Rechtsbeziehungen beziehungsweise Rechtsinstituten und Institutionen enthalten ist, deutlich zu vernehmen. Das Geschäft der Auslegung von Normen wäre erweitert zu einer Kunst der Artikulation von Normen, die aus der geordneten politischen Gemeinschaft "zu uns sprechen";[111] Der Richter wie übrigens auch der Gesetzgeber (!) hätten nur noch Akzente zu setzen (Akzentuierung) und mittels Pointierungen hervorzuheben. Rodi hat zum besseren Verständnis der Struktur der Akzentuierung die Begriffe von "Vernehmen", "Aufnehmen", "Entsprechen" und "Erfüllen" eingeführt, um dem Begriff der Zuspitzung in der energetischen Bedeutungstheorie von Lipps aufzufangen : Entsprechen meint dabei nicht das Befolgen im handlungstheoretischen Sinn, sondern eher ein Realisieren als Verbindung von Vernehmen und Aufnehmen, von passivem Verstehen (von Resonanzbereitschaft für einen pointierten Sinnzusammenhang) und aktivem Erfassen des gesprochenen Worts wie auch der Situation, von passivem Zugänglich-Sein für das addressierte Wort und pragmatischem Damit-Etwas-Anfangen-Können.[112] Solche Kennzeichnung ist nun aber eine exzellente Charakterisierung der Subtilitäten der richterlichen Konkretisierungsaufgabe mit Bezug sowohl zum Gesetzestext wie auch zur gepflegten Rechtspraxis. Rodis Interpretation der Begrifflichkeit bei Lipps :

> "Das Wort 'Zuspitzung' spielt in der Sprachtheorie von Lipps eine ähnliche Rolle wie die [...] operativen Begriffe 'Vernehmen', 'Aufnehmen', 'Entsprechen' und 'Erfüllen'. Keiner dieser Begriffe wird terminologisch eingeführt oder gar definiert. Sie werden selbst 'aufgenommen' und sollen dem Leser eine Sichtweise ermöglichen, in deren 'Erfüllung' sich überhaupt erst rückstrahlend zeigt, wovon der Autor bewegt ist. Insofern nimmt sich der Sprachphilosoph selbst beim Wort und entlässt uns an keiner Stelle aus einem Bedeutungsvollzug, der etwas durchaus Suggestives hat. Die [...] von der Interpretation aufzunehmenden Wörter 'Zuspitzung', 'zuspitzende Fassung', 'gestaltende Fassung', 'Spannung der Fassung', allesamt Implikate des neutralen Begriffs 'Artikulation', schliessen sich also wie Glieder einer Kette an die anderen Begriffe an".[113]

cc) Die sprachliche Struktur, die König in seinem epochalen Werk "die Natur der ästhetischen Wirkung" beschreibt,[114] das heisst der ästhetische Einschlag des epidigmatischen Verstehens, wäre nun von Gegenständen der schönen Künste zu übertragen auf solche Werke, die

Objektivationen des Lebens darstellen (hier insbesondere : Recht, Staat, Institutionen) und damit letztlich Gemeinschaftswerke sind. Dabei käme der Beschreibung der Praxis eine zentrale Rolle zu, die einer Analyse des Umgangs mit rechtlichen Ansprüchen nämlich, woraus der Anspruch selbst, das ist das Recht, deutlicher erkennbar würde; Bollnow hat dafür das Stichwort "artikulierende Beschreibung" verwendet.[115] Das die gesamte traditionelle Logik weit überschreitende Problem ist, dass es nicht um ein Demonstrieren eines bereits Erkannten geht, nicht nur um ein Bewusstwerden und -machen eines bereits Gewussten, sondern um ein Evozieren eines spontanen neuen Gedankeninhalts mittels Pointierung oder Witz; es sei hier nur darauf hingewiesen, dass wir schon in der Anthropologie von Immanuel Kant den Mutterwitz als subjektiv-allgemeines begriffliches Beurteilungsvermögen finden. Die grosse Aufgabe wäre nun, all das Angesprochene zu übertragen auf das Verstehen der Konfrontation des Menschen mit normativen Ansprüchen des Rechts aber auch der Moral.

c) [*Several philosophical concepts of general aesthetics in their relation to legal reasoning.*] With the forthcoming monography about the aesthetic political philosophy of the modern democratically legitimated state, I shall try not to surrender the steadfast values that legitimate the state to theoretical relativism and not to rely on the success of the fittest theory of the state but to open the underlying problems to further debate; this could only happen under the aspect of political culture of a self-sufficient, *i.e.* fully secularized, political community. Coping with the democratic structure of political community, this culture can only be adequately understood as an aesthetic one because the subjected to the reigning order are all the same actors when it comes about to shape this order. Aesthetics are a concept to found immanent claims of general validity, it is a scientific method to explain obligations by means of exemplary experience and to found steadfast norms within an systematic order that stands alone, *i.e.* that does not refer to transcendental values. The fact that aesthetics were first applied to the fine arts, cannot deceive that the concept has universal qualities : simply, the beauty in the sphere of the fine arts was the first human order that definitely leaved the religious context. Within the process of secularization of the political sphere, the transcendental foundation of moral order as well as of the validity of law seems to be an intermediate solution, so to speak : categories are settled in another ontological level in order to understand the structures of community as collective actions, *i.e.* as both secular and as orientated towards values. Steadfast and undisposable values may interimistically be founded on an immanent order by means of aesthetic theory; secularization can be perfected and the process of Enlightenment can be continued without a loss of obligatory values. The last consequence of this development will be to transfer dogmatic jurisprudence into a human science that is embedded in a sort of philosophy of history; hence, aesthetics only play the role to overcome the bungled situation and to solve the methodological crisis within the theories of law and of the state. Only this way can alternatives to the muddled opposition between legal positivism and natural law and can strategies against relativism and indifference in the theory of the state be formulated.[116] Finally, the method of aesthetics presents as an interimistic solution on the way from a dogmatic science towards a philosophy of history in the sense of a critique of historical reason. When historical reason takes the place of dogmatic sciences, aesthetics play a predominant role, Odo Marquard argues :

> "Ästhetik wird angesichts der Aporie des emanzipierten Menschen gebraucht als Ausweg dort, wo das wissenschaftliche Denken nicht mehr und das geschichtliche Denken noch nicht trägt. [...] Der Zug zur Ästhetik entsteht aus der Hemmung des Verlaufs der Wende von der Wissenschaftsphilosophie zur Geschichtsphilosophie".[117]

If we intend a general theory of states, the concept of political judgment that resembles the concept of aesthetic judgment moves to the center of scientific interest.[118]

For a political philosophy that is orientated towards democracy, the key problem is to render compatible the immanence of democratic legitimation with the transcendence of criteria in order to judge the legitimacy of positive law. This basic necessity cannot be fulfilled by political theories that do not accept the plurality of existing normative orders,[119] nor by theories of democracy that concentrate on the business of explaining the modalities of democratic participation.[120] Meeting the demands of the theory of knowledge, a methodological structure would be desirable that could overcome the distance between the citizens as subjected and the state as a object of scientific interest but that could maintain the criteria that validate the positive law as an outcome of the democratic process, however. Such a perspective could enable us to co-ordinate generic and interpretative aspects of an adequate understanding of the law and of the state and it could offer a view of democracy as both participatory and connecting with the authority of law. In the place of dichotomy of political theory and political philosophy that seems unable to be overcome,[121] there should come a new discipline grounding on political judgment. Judgment has its basements in the aesthetic faculty of human mind that is a veritable common sense; it grounds a sphere where not objective but, nevertheless, general (=omnilateral) validity of the judgments about the public order of state and international communities reigns. To discuss this general but subjective moment has ever been the function of aesthetics, since Immanuel Kant's "*Kritik der Urteilskraft*".[122] The general character of the aesthetic judgment derives from the fact that one can argue-but not dispute-about the subject in question-in contrast to the mere pleasure; the same texture as aesthetically judged works of fine arts, however, shows the sphere of the political :[123] reflective judgment proves as a capacity of human mind to judge the phenomenal, the mundane, and the particular contingent. The formation of aesthetic judgment is conditioned by sensual experience and refers therefore to the pre-scientific practice of life. The starting point of the political judgment is an understanding of sense and meaning that relates on the state and history; the task is not to follow the subjective feelings but to interpret the objectivated reason of the institutions in history.

d) [*Several philosophical concepts of general aesthetics in their relation to legal reasoning (continued).*] The adequate methodology for this kind of general theory of the state cannot be a straight normative nor an empirical and analytical one but should be reflective and aesthetic and it could be compared with dialectics and criticism; it should continue the efforts of critical theory and of structuralism into the direction of the human sciences ("*geisteswissenschaftliche Methode*").[124] To describe the practice of life in terms of science aesthetically – as Klaus Beyme criticizes the postmodern aesthetical revolt against the rationalism of science – is not intended, however.[125] In the place of aestheticizing politics that is not backed by rational knowledge, and that practices a view of things which shows a romantic approach [126] or that derives from cynic modernism,[127] I intend a political philosophy based on aesthetics that is based in the science of knowledge. We shall not take as starting point the thesis that the knowledge of the possible determines rational political will – as did Thomas Hobbes in his political philosophy.[128] The spheres of knowledge and of political decision should rather be understood as complements of the Kantian idea of autonomy; only such an approach can understand the decision as both taken in accountability and as an outcome of free democratic will. The question of aesthetics then is to co-ordinate the knowledge based reign and the practical political sphere that is theoretically based on action. The inaugurated method should be constituted as human science and consequently be directed against the concept of causation in the natural sciences as well as against positivism that unlegitimately expands the methods of the natural sciences to the fields of non-hypothetical human life. Concerning the social sphere one does not have to propone a hypothesis to gain profound knowledge; reference to the totality of life could rather replace an a priori basement for science.

The relationship between Kant's "*Kritik der Urteilskraft*" and his moral philosophy respectively his theory of practical reason – *i.e.* the relationship between aesthetics and morals – has recently been raised by members of the philosophical science community, most prominently by Paul Guyer in his collection of essays.[129] It seems to be the strategy of Kantian theory of the state and of law to keep them both free of moral arguments;[130] in consequence, it turns out a crucial question how to separate and co-ordinate inductive generation of categories and maxims where the leading concept is the categorical imperative (practical philosophy) on the one hand and theoretical philosophy that follows the cosmological concepts on the other hand (deduction of ideas). Obviously, Kant overcomes the metaphysics of the period of Enlightenment as well as the structure of legitimation in his practical philosophical thinking and offers a concept of practical – moral, political, and historical – judgment at their place.[131] Even if this ist not generally approved, Kantian practical philosophy is not merely orientated towards aprioric ideal structures but inclines to the concrete circumstances of life by means of category-building and maxime-building and therefore overcomes the idea of reason that is held determining and reigning by rationalism. The latest contributions to the questioned theme show an increasing tendence into that direction : Urs Thurnherr shows the importance of maxime-building for practical philosophy [132] and Andreas Gunkel takes the Kantian philosophy of freedom seriously and discusses the concepts of spontaneity and moral autonomy,[133] whereas Dirk Effertz examines the image of the world in theoretical reason and confronts it with that outlined in Kant's "*Kritik der Urteilskraft*".[134]

Characterizing the aesthetic judgment as a subjective conclusion with general validity [135] – containing the moments of pleasure without any interest,[136] of general validity,[137] of finalitiy without any causal end,[138] and of subjective necessity [139] – also gives a true description of the immanent political : political judgment, consequently, demands abstraction of personal interests, general validity, finality without a simple idea of causation and subjective necessity. Aesthetic judgment cannot derive from a transcendental idea as does the conclusion by means of reason in moral philosophy; therefore, it is without any ideal concept and aesthetic experience can only be exemplificatory, *i.e.* it is linked to the existence of an object.[140] These remarks represent the key for the intended attempt to identify the possibility of a theory of the state that is based on knowledge, and that stands under the sign of democratic legitimacy; they also give sense to the special ontology of law, that takes an intermediate place in the Kantian system of mind (*Verstand*) and reason qua *common sense* (*Vernunft*).[141] With respect to questions of system and of criticism, aesthetic judgment structures the co-ordination between practical reason (maxims of action) and transcendental theory of knowledge (empirical sensual experience).[142] Thus, if aesthetics co-ordinate the relations between natural (moral) rights and the order of positive law in Kantian critical philosophy, they are destined to play a key role in a general theory of the state that overcomes the dichotomy of theory and practice and that of positivism and natural law.[143]

e) [*Several philosophical concepts of general aesthetics in their relation to legal reasoning (continued).*] As a second guide for an aesthetic philosophy of the democratically legitimated state, there is an important project of general methodology of the human sciences in Wilhelm Dilthey. This significant but generally neglected approach to a system of the "Geisteswissenschaften" is so to speak asserted with aesthetic concepts as it was thoroughly elaborated by Rudolf A. Makkreel in his monography on Dilthey.[144] Hence, Dilthey developed his thoughts on the basis of Kant's late works, continuing and partly overcoming his predecessor's positions;[145] in fact, Dilthey may be seen as closer to Kant's philosophy as the whole movement of neo-Kantianism. The examined philosophy of the human sciences shows a significant inclination to aesthetics and tends to argue psychologically; however, it does not shift to psychologism.

> "Der konstruierten Auffassung diskursiver Vernunft waren durch die reflektierende Urteilskraft jene Beschränkungen auferlegt worden, die Dilthey im Zuge seiner Suche nach einer Methodologie der Geisteswissenschaften und insbesondere nach einer beschreibenden und zergliedernden Psychologie immer wieder festgestellt hatte. Als Kant daher von der Möglichkeit einer psychologischen Darstellung ästhetischen Bewusstseins sprach, antizipierte er auf bemerkenswerte Weise Diltheys Ruf nach Beschreibung, die die allzu häufig nicht überprüfbaren, erklärenden Hypothesen ersetzen sollte".[146]

Dilthey's attempt to found a method in order to criticize historical reason is characterized by a specific position of reflective judgment in the human sciences : as it is the case in matters of aesthetic appreciation, we are invited to understand the world around us and its manifold sensual appearances in their historical existence and we have to focus them by means of reflection to an imaginary point and to qualify them by means of our capacity to judge; in doing so, we manage to guide our will and our actions according to what is appropriate to our surroundings. The project is to interpret historicity respectively contingence in the context of public political action as an aesthetic quality,[147] directly connects Dilthey's with the Kantian political philosophy : Hegelian historical reason is replaced by interpreting history in the reflective aesthetic judgment; discerning mind as well as normative reason are replaced by the human capacity to reflext subjective but nonetheless general validity, *i.e.* the aesthetic.[148] Prima facie, the inclination of Dilthey's philosophy towards hermeneutics presumes that this method could be applied to jurisprudence because this subject-along with theology-is deeply influenced by textual dogmas and is therefore open to hermeneutic inquiry; even when there is no theory of the state in Dilthey, actually,[149] the project of a general introduction to the human sciences offers a ground to the subjects of law, of state, and of history, nevertheless.

Dilthey's theory of the human sciences initiated so to speak several philosophical schools-phenomenology, hermeneutics, and anthropology-that all delivered differentiated but generally neglected contributions to the philosophy of history, to political philosophy, and to jurisprudence. The approach of the human sciences developed in relation to the Historism of the XIXth century, as Erich Rothacker pointed out.[150] Subsequently – when Hegel had definitely syntheticized freedom of action in the "*Weltgeist*" –, the approach that was psychologically orientated, and that took the historicity of man and of the institutions of the political community seriously, was further developed and objectivated into two directions : Ernst Cassirer discovered in the concept of symbols a true objectivation of the historical basements of human thinking and acting that was a designated subject of reflection, and he integrated aesthetics into his theoretical system, too;[151] later on, Hans-Georg Gadamer stressed the hermeneutic dimension of historical knowledge.[152] However, these two continuations of the Diltheyan project of human science have unlegitimately enfavoured receptive to generic aspects of community-building and have abandoned the original equilibrium between contemplation and activity in Dilthey's philosophy.

The approach I propose to follow does not really continue the tradition of the methodologies of the human sciences and of the cultural sciences. (The spirit of the Weimar Republic with its sensible philosophers of life – Theodor Litt, Hans Freyer, among others – influenced the general theory of the state in Rudolf Smend's theory of integration,[153] was adapted in the demand for a cultural state that completed the rule of law and the social state by Ernst Rudolf Huber,[154] and was finally continued by Peter Häberle's quest for cultural theory of the state.[155]) What I intend is to continue the debate on the theory of konwledge at the end of the XIXth century and to reconstruct the establishment of the general theory of the state in the context of the human sciences in order to renew the methodological tradition of the human sciences that is full of gaps :[156] the guidelines to follow this program shall be the system of human sciences in Dilthey and the references to reason in the theories of the philosophers of life [157] as well as the theories

of other founding thinkers of common sense sociology (not only that of Max Weber).[158] In contrast to the late position of Hermann Heller who demanded a structural and sociological method, the leading methodology of the intended general theory of the state shall be historical and human scientific.[159] This difference between structure and the human mind, however, could likely be relativated by analyzing the concept of structure in Dilthey and could easily demand a different re-interpretation of the theory of the state in Heller. Eventually, it could be the concept of the psychological human sciences that overcome the dichotomies of theory of the state and sociology, of empirical sciences and human sciences, and of structural and historical sciences; this approach could therefore be destined to integrate several positivistic tendencies to a consistent theory of action [160] that is focused on the real demands of life.[161]

f) [*Several philosophical concepts of general aesthetics in their relation to legal reasoning (continued).*] In my forthcoming monography, I do not intend to found universalism in the context of post-modernism, indeed. Nevertheless, aesthetic theory undertakes to encounter political relativism and scepticism concerning the theory of knowledge; however, it does not follow the strategy to claim a different ontology of a universal principle, as does modern natural law theory. In contrary, all depends on accepting the unbreakable tendency of pluralism by delivering a theory that is founded in the theory of knowledge which does not pretend the possibility of truth in normative matters, but which is based on the intrinsic sense and values within the rule of law.[162] The instrument to fulfill these demands is the concept of aesthetics : it is not objective but only subjective; it is of general validity, however, and therefore accessible to a kind of experience, after all. The aesthetic argument founds inter-subjective obligations and correlative responsibilities that can be compared with the objective knowledge of the measure of good life. The difference between subject and object can be overcome to a certain extent and there is discovered a theoretical concept that seems to be adequate to a theory of democracy as this type of state where the rulers and the subjected, *i.e.* where popular sovereignty and absolute validity of the law, are identified.

After the separation of theology and moral philosophy and even more after the contraction of morals to key positions of comprehensive ethics, theories that orientate towards Aristoelian *bonum commune* became impossible, in tendence; this does not mean that the common goods could not be the measure of individual behaviour, however. Nevertheless, omnilateral obligations of law can hardly be founded on that concept, if we agree that the figure of aims of the state could be incompatible with democratic principles.[163] In fact, natural law may be seen as a strategy to objectivize the criteria of legitimacy of legal duties that pretended that law (normativity) and natural objects (facticity) would be commensurable on a theoretical level; this approach must be judged a failure. In this case, there remains only a principle of tolerance to cope with conflicting claims of validity.[164] Against that, Kant retreated from rationalist and natural law theory of civil contract and only proprietary rights could stringently be legitimated, further, whereas the law of welfare was expelled into the sphere of the ethics of virtues. Aesthetics as a theory of the *sensus communis* offer a method to judge claims that cannot be qualified in terms of morals or of the theory of knowledge; this renders the cognitive value of aesthetics obvious.[165] The aesthetic judgment cannot have determinant character (as in Friedrich von Schiller and Martin Heidegger), it rather is heuristic, *i.e.* it must be qualified as a procedure to discover possible options; consequently, it has a method-building function.[166] Here, the inaugurated approach tends towards anglo-american pragmatism and realism [167] that formed out in social philosophy to the communitarian critique of rationalist political liberalism.We have to attribute to the philosophical communitarianism the insight that the *sensus communis* structures the different spheres of public action according to different principles of justice.

What I have inaugurated in in my forthcoming monography is an aesthetic methodology in the place of an interimistic perspective towards an adequate method for the general theory of states with reference to the philosophy of history and to the human sciences that is based in exemplificatory experience. That means to continue the traditional discipline of the general theory of the state and to renew its method : the projected philosophy of general aesthetics that could be able to found correctly inter-cultural claims to general validity of conflicting norms will resurrect a general theory of states out of the general theory of the state, taking seriously the context of a world of sovereign states that are indispensibly dependent on communication and co-operation. The traditional center of *bonum commune* – common interest as a guidance of political justice – will therefore be replaced by a concept of *sensus communis*, *i.e.* by the humanistic ideal of a political common sense; in the place of knowledge of the nature, and in the place of mythological or religious convictions, political judgment will be challanged. Only with such a foundation and without claiming universal and everlasting truth, the theory of states can legitimately pretend to be a general one. Only in that case, the danger of an ethnocentric and even that of an anthropocentric general theory of the state could be banned and the development of a general theory of states that may claim unilateral validity and that may be compatible with the fact of different cultures seems to be free. Once, such a theory of human community was in the humanist's Giovanni Battista Vico's mind when he wrote his "*Prinzipien einer neuen Wissenschaft über die gemeinsame Natur der Völker*".[168]

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Out of this project, it results the proposition of a new organisation of the scientific disciplines that cope with the objects of the law and the state, respectively : based on reflections on the philosophy of science, I shall establish a separation between the philosophy of the human and social sciences, *i.e.* jurisprudence and the general theory of the state (*Wissenschaftsphilosophie der Jurisprudenz*) and an analytical, inductive (or even better : abductive) theory of the positive law; in consequence, the traditional discipline of the philosophy of law shall disappear. Only such a strategy can deal with the insight that lawyers should differentiate the written text of the laws and the applicated norm of decision (*ratio decidendi*, *Entscheidungsnorm* or *Fallnorm*); it was Karl Larenz who held,

> "dass die ausdrücklich formulierten Rechtssätze nicht den gesamten Umfang des Rechts erschöpfen, sondern stets durch solche Sätze des Rechts ergänzt werden, die ohne Rücksicht auf die Besonderheiten eines positiven Rechts sich aus der 'Natur der Sache' ergeben oder sich 'von selbst verstehen', und dass auch viele der positiven Rechtsnormen selbst nichts anderes sind als ausdrückliche Formulierungen solcher auch ohne dies sich verstehender Sätze".[169]

This approach must not necessarily be grounded in a theory of natural law, it rather enables to reconcile the abstraction of legal positivism with the theory of legal practice and, in doing so, enables a scientific and philosophical treatment of the positive laws.

VI. [*Conclusions : some remarks to the attitude of liberal legal reasoning to the questions of the good life and to that of justice.*] – I would like to precede the conclusions by a brief summary of the key insights of my lecture :

- First, even if Kelsen refused to discuss possible relations between Ought and Is, the *Reine Rechtslehre* cannot escape from being faced to the questions of effectiveness and legal experience;
- Second, validity in the sense of the *Reine Rechtslehre* has to be distinguished from obligingness, and therefore sovereignty and authority as well as consistency and coherence of a legal order have to be separated, too;

- Third, this inherent separation-thesis within the *Reine Rechtslehre* can be transformed into the respective distinctions of legal and moral obligation, of legality and legitimacy, of legal positivism and natural law theories and of legal theory and philosophy of law;
- Fourth, the logical determination of consistency of legal claims on different stages of delegated legal orders (*Stufenbau der Rechtsordnung*) has to be backed – because of its uncertain foundations and in the light of legal practice – by a theory of legal judgment that includes reason into the application of law and that ensures a certain substantial coherence of parallel, pluralistic and autonomous legal orders.

a) [*About the underlying concept of justice and about the thereof resulting relativism of the* Reine Rechtslehre.] In order to direct the paper to a conclusion, I would like to turn the attention to the late Kelsen and stress the importance of his late scepticism and relativism; I am convinced that one cannot abstract from Kelsen's late work in the Sixties, because they reveal clearly his political and ideological disposition. Let us take a brief look at Kelsen's underlying concept of justice, culminating in the Platonic essay "*Was ist Gerechtigkeit* ?", however preceded by some texts dating before the Second World War that deal with the subject of legal positivism versus natural law theories.[170] To provide an accurate setting of Kelsen's ideas, I shall begin with the opposed strong position in situating the concept of justice in legal realism, namely in Edwin N. Garlan :

> "If justice is the objective of society viewed in legal perspective, then its substantive definition would be a complete statement of all the objectives, all the solutions to conflicts of competing interests and ways. Its definition cannot stop short of indicating all possible objectives and methods, and any principle or set of principles which claim to do so will be found to operate symbolically, and their instrumental value turns upon their indicative, formative, and celebrative functions".[171]

In contrast, in Kelsen's essay of 1953, in "*Was ist Gerechtigkeit* ?", we find the classical, plain and simple thesis that pluralism and relativism – now accepted as facts, *sic* – should be placed within the context of tolerance : "*Was ist die Moral der relativistischen Gerechtigkeitsphilosophie ? Hat diese überhaupt eine Moral ? Ist Relativismus nicht amoralisch oder gar unmoralisch, wie manche meinen ? Ich bin nicht dieser Meinung.*

> Das moralische Prinzip, das einer relativistischen Wertlehre zugrundeliegt oder aus ihr gefolgert werden kann, ist das Prinzip der Toleranz, das ist die Forderung, die religiöse oder politische Anschauung anderer wohlwollend zu verstehen, auch wenn man sie nicht teilt, ja gerade, weil man sie nicht teilt, und daher ihre friedliche Äusserungen nicht zu verhindern".[172]

It seems to me that this shift to scepticism and relativism reflects attitudes that have already be present as underlying political and ideological predispositions in the earlier works of the *Reine Rechtslehre*. We only have to remember the oscillation between Marburgian and southwest-german Neo-Kantianism (where cultural relativism is omnipresent in Emil Lask and Heinrich Rickert). Kelsen never claimed to be a universalist nor a monist – rather he contested it – and that comes near to his later neo-positivist attitude to the theory of law : "*Das Recht kann auf sehr verschiedene Weise zum Gegenstand der Erkenntnis gemacht werden*".[173]

b) [*Positivisms and Liberalisms.*] Usually, legal positivism is put together with political liberalism. As there are multiple legal positivisms and a great range of liberal positions, the *Reine Rechtslehre* presents an ambiguous legacy : on the theoretical level, we can constate a paradox of irregularity,[174] and on the level of the political theory of democracy, too.[175] With regard to the autonomy of democracies, sovereignty seems to be the same as is authority related to the heteronomous legal theory of command. If we adopt a modest attitude towards the *Reine Rechtslehre*, we can not even decide, if it belongs to the type of legal positivism or of natural law theories. Hence, Francis Jaeger supposed not only to transcend the separation of national and

international law, but nevertheless to break down the frontier between posited and non-posited, *i.e.* natural law, "*pour être logique et complètement fidèle aux principes de Kelsen lui-même*".[176] It is interesting to notice that this interpretation or reconception of the *Reine Rechtslehre* has been deeply influenced by Kelsen's theory of sovereignty.

c) [*Active preservation of the basements of rule of law prohibited.*] Concerning the conditions of the rule of law, there is a dominant difference between liberals that pretend not to be allowed to support and preserve them and communitarians that pretend it important to include them into theory-bilduing. Within the tratition of political liberalism – and it cannot be defended that Kelsen should not be placed into that *Weltanschauung* –, there is the common opinion that the modern state is founded on conditions he must not promote nor guarantee, in order not to loose its constitution of freedom; this paradox has been constantly addressed by Ernst-Wolfgang Böckenförde – even if he is judged to belong to the conservative corner of political liberalism :

> "Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann. [...] Als freiheitlicher Staat kann er einerseits nur bestehen, wenn sich die Freiheit, die er seinen Bürgern gewährt, von innen her, aus der moralischen Substanz des einzelnen und der Homogenität der Gesellschaft, reguliert. Andererseits kann er diese inneren Regulierungskräfte nicht von sich aus, das heisst mit den Mitteln des Rechtszwangs und autoritativen Gebots, zu garantieren suchen, ohne seine Freiheitlichkeit aufzugeben und – auf säkularisierter Ebene – in jenen Totalitätsanspruch zurückzufallen, aus dem er in den konfessionellen Bürgerkriegen herausgeführt hat".[177]

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Now, I am indebited for having enlarged the confusion instead of having it reduced; but lawyers tend to communicate their insights into their subjects in terms of functions of legal concepts to their context rather than to approach the subjects from their common sense surroundings. It is the everlasting question whether you opt for a pure theory of law that is based on logics and that tends to have certain knowledge of its object or whether you opt for a "dirty" theory of law (I call it : integrative jurisprudence) that is based on historical consciousness and legal experience and that risks to gain only permanently reviseable insights into its object (contestedly, I am in favour of the second alternative). Anyway you should acknowledge that there exist numerous possibilities to practice both approaches in a philosophically controlled manner, *i.e.* as approved sciences.

Abstracts :

Reine Rechtslehre, Hans Kelsen; sovereignty, empowerment, power-coferring rules, delegation, authority, *Grundnorm*; validity of a legal order, obligingness of law, positivity of law, effectiveness of law, sources of law, customary law (*consuetudo*, *desuetudo*); general jurisprudence, general theory of the state (*Allgemeine Staatslehre*), philosophy of the human sciences; liberalism, legal positivism, legal realism, analytical jurisprudence, integrated jurisprudence; Hermann Heller, Harold J. Laski, Pietro Piovani, Santi Romano, Wilhelm Dilthey, Georg Misch, Immanuel Kant, Hans-Georg Gadamer, Karl Larenz, Ernst-Wolfgang Böckenförde, René Marcic, Stanley L. Paulson, Francis Jaeger, Edwin N. Garlan.

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Endnotes :

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[2] *Carl Schmitt*: Die Diktatur – Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Kassenkampf, Berlin: Duncker & Humblot, 5th ed. 1989 (1st ed. 1922); and by the same author: Politische Theologie – Vier Kapitel zur Lehre von der Souveränität, Berlin: Duncker & Humblot, 5th ed. 1990 (1st ed. 1922); and: Soziologie des Souveränitätsbegriffs und politische Theologie, in: Hauptprobleme der Soziologie, Essays in Honour of Max Weber, ed. Melchior Palyi, Berlin: Duncker & Humblot, 1923, vol. 2, pp. 5ss.

[3] *Heinrich Lenz*: Autorität und Demokratie in der Staatslehre von Hans Kelsen, Auszug aus der Inaugural=Dissertation zur Erlangung der Doktorwürde der hohen juristischen Fakultät der Rheinischen Friedrich=Wilhelms=Universität zu Bonn, vorgelegt (Referent Prof. Dr. Carl Schmitt), pp. 93ss. (589ss. in the original pygination), 104ss.; the possible owner of copyrights could eventually not be identified. – With references to *Hans Kelsen*: Allgemeine Staatslehre (Enzyklopädie der Rechts- und Staatswissenschaften, Band 23), Berlin: Julius Springer, 1925 (pp. 322, 98/ 99 and 233); and to the same author: Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre vom Rechtssatze, Tübingen: J. C. B. Mohr, 2nd ed. 1923 (1st ed. 1911) (p. 47); as well as to *Carl Schmitt*: Politische Theologie, op. cit., pp. 30ss.

[4] *Bertrand de Jouvenel*: Sovereignty – An Inquiry Into the Political Good (De la souveraineté – A la recherche du bien politique; Über Souveränität – Auf der Suche nach dem Gemeinwohl), Chicago: University of Chicago Press, 1957 (Paris: Librairie de Médicis, 1955; in: Politica, Abhandlungen und Texte zur politischen Wissenschaft, vol. 9, Neuwied/ Berlin: Luchterhand, 1963), esp. pp. 13ss. and 167ss.

[5]*Aristoteles*: Nikomachische Ethik, in: Philosophische Schriften, ed. Günther Bien, Hamburg: Felix Meiner, 1995, vol. 3, pp. 109 diffusion" in the field of the human sciences as this has been suggested for the field of the social sciences by *Karl Otto Hondrich*: Begrenzte Unbestimmtheit als soziales Organisationsprinzip, in: Kontingenz, Neue Hefte für Philosophie (Göttingen: Vandenhoeck & Ruprecht), ed. by Rüdiger Bubner *et alia*, No. 24/ 25 (1985), pp. 59ss. – Cf. the adoption in the field of jurisprudence by *Rudolf von Ihering*: Ist die Jurisprudenz eine Wissenschaft ? Iherings Wiener Antrittsvorlesung vom 16. Oktober 1868, ed. Okko Behrends, Göttingen : Wallstein, 1998, p. 82: "Es gibt bei allen praktischen Dingen einen Grad der Genauigkeit, wo sie [...] anfängt von Übel zu sein".

[6]*Wilhelm Dilthey*: Die Wissenschaft vom handelnden Menschen, in: Gesammelte Schriften, ed. Helmut Johach and Frithjof Rod Napoli: Morano, 1968, passim; and *Nikolaus Kreissl*: Das Rechtsphänomen in der Philosophie Wilhelm Diltheys (Basler Studien zur Rechtswissenschaft, vol. 93), Basel/ Stuttgart: Helbing & Lichtenhahn, 1970, pp. 76ss.

[7]*Wilhelm Dilthey*: Einleitung in die Geisteswissenschaften – Versuch einer Grundlegung für das Studium der Gesellschaft und de

[8]Cf. *Harold J. Berman*: Towards an Integrative Jurisprudence – Politics, Morality, History, in: California Law Review, vol. 76 (198

[9]Cf. *W. T. Murphy*: The Oldest Social Science ? Configurations on Law and Modernity, Oxford: Clarendon Press, 1997.

[10]Cf. these contributions as they now appeared in print, *Stanley L. Paulson / Bert van Roermund* (ed.): Kelsen, Authority, and Comp

[11]To this tradition of legal reasoning one could compare Oliver Wendell Holmes, Roscoe Pound, Benjamin Nathan Cardozo, Ju

[12]*Giambattista Vico*: Principj di una scienza nuova d'intorno alla communa natura delle nazioni – Per la quale si retruovano i prin wiederhergestellt werden [Philosophische Bibliothek, vol. 418], ed. Vittorio Hösle and Christoph Jaermann, Hamburg: Felix Meiner, 1990); cf. by the same author: Liber metaphysicus – De antiquissima Italorum sapientia liber primus (Die Geistesgeschichte und ihre Methoden vol. 5/ I), München: Wilhelm Fink, 1979 (first published Riposte 1711/ 1712); as well as the works in jurisprudence by the same author: De Universi Iuris uno principio, et fine uno, Liber Unus, Neapoli: Felix Musca, 1720; and: Liber Alter qui est de Constantia Iurisprudentis, Neapoli: Felix Musca, 1721.

[13]Cf. *Agostino Carrino*: Das Problem der Souveränität zwischen Ursprungslogik und positivistischem Mythos, in: Die Normenord *Robilant*: Figure e realtà nella scienza giuridica, in: La teoria generale del diritto – Problemi e tendenze attuali, ed. U. Scarpelli, Milano: Comunità, 1983, pp. 64s.

[14]V. *Bruno Leoni*: Oscurità e incongruenze nella dottrina kelseniana del diritto, in: Scritti di scienza politica e teoria del diritto, p. 2

[15]Maybe I have to remember that this was the classification Kelsen applied to himself; cf. *Hans Kelsen*: Allgemeine Staatslehr (Nachdruck der 2. Auflage, Tübingen: J. C. B. Mohr, 1928), pp. 75ss.

[16]That the *Reine Rechtslehre* can not be related to the movement of Vienna Logical Empirism – there have hardly been any conta und Rechtsphilosophie des frühen logischen Empirismus (Haufe-Schriftenreihe zur rechtswissenschaftlichen Grundlagenforschung, vol. 12), ed. Eric Hilgendorf, Freiburg im Breisgau: Haufe, 1998, pp. 378ss., 405; with reference to *Gerhart Wielinger*: Rechtstheorie in Österreich – Hans Kelsen und die Wiener rechtstheoretische Schule, in: Österreichische Philosophen und ihr Einfluss auf die analytische Philosophie der Gegenwart, Innsbruck 1977, vol. 1, pp. 365ss., 371; and to *Clemens Jabloner*: Kelsen in the Context of the Austrian Culture in the Early Part of the Twentieth Century, in: Journal for International Law, vol. 1998 (forthcoming).

[17]*Hans Kelsen*: Dio e Stato – La giurisprudenza come scienza dello spirito, Napoli: ESI, 1988. The title refers to *Hans Kelsen*: Gott

[18]V. *Michael Walter Hebeisen*: Souveränität in Frage gestellt – Die Souveränitätslehren von Hans Kelsen, Carl Schmitt und Herman

[19]*Pietro Piovani*: Il significato del principio di effettività, Milano: Giuffrè, 1953, pp. 53s.; v. by the same author: Principio di effetiv

[20]In order to represent the scandinavian legal realism based on a comprehensive logics of law, cf. *Alf Niels Christian Ross*: Kritik d historischer Untersuchungen (Wiener Staats- und Rechtswissenschaftliche Studien, vol. 13), Leipzig/ Wien: Franz Deuticke, 1929 (Nachdruck Aalen: Scientia, 1989); Towards a Relativistic Jurisprudence – A Criticism of the Dualism in Law, Aalen: Scientia, 1989 (Nachdruck der Ausgabe Copenhagen 1946); On Law and Justice, Berkeley/ Los Angeles: University of California Press, 1959; Recht und Wirklichkeit, in: Juristische Blätter, vol. 59 (1930), pp. 245ss.; Retskilde- og Metodelære i realistik Belysning (Rechtsquellen- und Methodenlehre in realistischer Beleuchtung), in: Tidsskrift for Retsvidenskap, vol. 44 of the new series (1931), pp. 241ss.; and always by the same author: Virkelighed og Gyldighed i Retslæren (Wirklichkeit und Gültigkeit in der Rechtslehre), in: Tidsskrift for Retsvidenskap, vol. 45 of the new series (1932), pp. 81ss. – Cf. also *Stig Jørgensen*: Pluralis Juris – Towards a Relativistic Theory of Law (Acta Jutlandica, Social Sciences, vol. 46 (1982), No. 14, Århus 1982 (auch in: Archiv für Rechts- und Sozialphilosophie [Stuttgart: Franz Steiner], suppl. vol. 20 of the new series [1984], pp. 13ss.); and by the same author: Law and Society (Ret og samfund), Akademisk Boghandel, 1973 (København: Berlingske Leksikon Bibliotek, 1970); as well as *Anders Vilhelm Lundstedt*: Die Unwissenschaftlichkeit der Rechtswissenschaft, Berlin/ Leipzig: Verlag für Staatswissenschaften und Geschichte, 1932/ 1936; Superstition or Rationality in Action for Peace ? Arguments Against Founding a World Peace on the Common Sense of Justice – A Criticism of Jurisprudence, London 1925; Legal Thinking Revised – My Views on Law, Stockholm: Almqvist & Wiksell, 1956; and always by the same author: Law and Justice, Stockholm 1952. – Scandinavian Legal Realism has been set in contrast to Kelsen's *Reiner Rechtslehre* by *Jes Bjarup*: Legal Realism or Kelsen versus Hägerström, in: Soziologische Jurisprudenz und realistische Theorien des Rechts, ed. Eugene Kamenka et al. (Rechtstheorie, Zeitschrift für Logik, Methodenlehre, Kybernetik und Soziologie des Rechts, suppl. vol. 9), Berlin: Duncker & Humblot, 1986.

[21]*Hans Kelsen*: Reine Rechtslehre – Einleitung in die rechtswissenschaftliche Problematik, Leipzig/ Wien: Franz Deuticke, 2nd, re

[22]*Rudolf Stammler*: Theorie der Rechtswissenschaft, Halle an der Saale: Buchhandlung des Waisenhauses, 1911, introduction, p. 2.

[23]Cf. *Claudius Müller*: Die Rechtsphilosophie des Marburger Neukantianismus – Naturrecht und Rechtspositivismus in der Ausei

[24]*Hans Kelsen*: Reine Rechtslehre – Einleitung in die rechtswissenschaftliche Problematik, Wien/ Leipzig: Franz Deuticke, 1934,

[25]*Dieter Kühne*: Die Grundnorm als inhaltlicher Geltungsgrund der Rechtsordnung, in: Rechtssystem und gesellschaftliche Basis b

[26]*Mario G. Losano*: Das Verhältnis von Geltung und Wirksamkeit in der Reinen Rechtslehre, in: Die Reine Rechtslehre in wissens

[27]*Rudolf Thienel*: Geltung und Wirksamkeit, in: Untersuchungen zur Reinen Rechtslehre (Schriftenreihe des Hans-Kelsen-Instituts

[28]*René Marcic*: Rechtswirksamkeit und Rechtsbegründung – Versuch einer Antwort auf die Sinnfrage des Rechts im Zusammenh

[29] *Rudolf von Ihering*: Der Zweck im Recht, 2 vols., Leipzig: Breitkopf & Härtel, 1877/ 1883.

[30]*John Austin*: The Province of Jurisprudence Determined, in: Lectures on Jurisprudence – Or: The Philosophy of Positive Law,

[31] *Herbert Lionel Adolphus Hart*: The Concept of Law, Oxford: Clarendon Press, 1961, p. 20.

[32] Ibid., pp. 189ss. (citation on p. 198).

[33]Cf. *Stanley L. Paulson*: On the Question of a Cohennian Dimension in Kelsen's Pure Theory of Law – With Attention to Renz Lässt sich die Reine Rechtslehre transzendental begründen ? In: Rechtstheorie, Zeitschrift für Logik, Methodologie, Kybernetik und Soziologie des Rechts (Berlin: Duncker & Humblot), vol. 21 (1990), pp. 155ss.

[34]*Blaise Pascal*: Pensées, ed. Louis Lafuma, Paris: Éditions du Seuil, 1962, no. 103 (no. 298 according to the order proposed by méchants. La force sans la justice est accusée. Il faut donc mettre ensemble la justice et la force, et pour cela faire que ce qui est juste soit fort ou que ce qui est fort soit juste. / La justice est sujette à dispute. La force est très reconnaissable et sans dispute. Ainsi on n'a pu donner la force à la justice, parce que la force a contredit la justice et a dit qu'elle était injuste, et a dit que c'était elle que était juste. / Et ainsi ne pouvant faire que ce qui est juste fût fort on a fait que ce qui est fort fût juste". Cf. *Hermann Geissbühler*: Recht und Macht bei Pascal (Dissertation Universität Bern), Bern: Herbert Lang, 1974; and *Alfred Wicher*: Gerechtigkeit und Gewalt in Pascals "Gedanken", in: Beiträge zur Kultur- und Rechtsphilosophie, Heidelberg: Adolf Rausch, 1948.

[35]Cf. *John Dickinson*: A Working Theory of Sovereignty, New York: Akademy of Political Science, 1928 (first published in: Politic

[36]*Thomas J. Biersteker/ Cynthia Weber* (ed.): State Sovereignty as Social Construct (Cambridge Studies in International Relations, vo

[37]*Joseph A. Camilleri / Jim Falk*: The End of Sovereignty ? The Politics of a Shrinking and Fragmenting World, Aldershot: Edwar

[38]*Paul Valéry*: Histoire-Politique, in: Cahiers (Bibliothèque de la Pléiade), ed. Judith Robinson-Valéry, Paris: Éditions Gallimard,

[39]Cf. *Jean Bodin*: Sechs Bücher über den Staat, ed. Peter Cornelius Mayer-Tasch, München: C. H. Beck, 1981/ 1986, p. 230 for in

[40]*Emer de Vattel*: Le droit de gens ou principes de la loi naturelle – Appliqués à la conduite & aux affaires des nations & des souv

[41]*Hans Kelsen*: Das Problem der Souveränität und die Theorie des Völkerrechts – Beiträge zur Reinen Rechtslehre, Aalen: Scienti in: Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, ed. Viktor Bruns, Berlin/ Leipzig: Walter de Gruyter, 1927, no. 4); and *Carl Schmitt*: Die Diktatur – Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf, Berlin: Duncker & Humblot, 5th ed. 1989 (reprint of the 4th ed. 1978, based upon the 2nd ed. 1928; 1st ed. 1922); and by the same author: Politische Theologie – Ein Beitrag zur Theorie des Staats- und Völkerrecht, Berlin: Duncker & Humblot, 5th ed. 1990 (reprint of the 2nd ed. 1934; 1st ed. 1927).

[42]Subsequently I shall omit all references to the more extensive treatement of the various concepts of sovereignty in my recent Souveränität, in: Die Normenordnung – Staat und Recht in der Lehre Kelsens (Forschungen aus Staat und Recht, vol. 121), Wien/ New York: Springer, 1998, pp. 73ss.; and *David Dyzenhaus*: Legality and Legitimacy – Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar, Oxford: Clarendon Press, 1997, esp. pp. 102ss., 104, whose approach is to ask "why Kelsen should in the first place have wanted a scientific theory of law, one 'purified of all political ideology'", and who shows "how Kelsen's response is driven by a particular position in moral and political philosophy"; "Such an approach is anathema to most Kelsen scholars. It involves understanding the Pure Theory as nested within a wider political philosophy about the justification and proper functioning of liberal democracy".

[43]Cf. *Hans Karl Lindahl*: Sovereignty and Symbolization, in: Rechtstheorie, Zeitschrift für Logik, Methodenlehre, Normentheorie de wet – En opostel over symboolwerking van wetgeving [The Vanishing Point of the Law – An Essay on the Symbolic Form of Legislation], Zwolle: Tjeenk Willink, 1997.

[44]*Hans Kelsen*: Reine Rechtslehre – Einleitung in die rechtswissenschaftliche Problematik, Leipzig/ Wien: Franz Deuticke, 2nd, r 90ss. ("*ex iniuria ius oritur*"); cf. also *Arthur Schopenhauer*, who derived the law from injustice.

[45]*Hans Kelsen*: Recht und Logik, in: Hans Kelsen, Adolf Merkl, Alfred Verdross – Die Wiener rechtstheoretische Schule, ed. Han

[46]*Hermann Heller*: Die Souveränität – Ein Beitrag zur Theorie des Staats- und Völkerrechts, in: Gesammelte Schriften, ed. Christ Hellers Kritik an der Reinen Rechtslehre, in: Der soziale Rechtsstaat – Gedächtnisschrift für Hermann Heller, 1891-1933, ed. Christoph Müller and Ilse Staff, Baden-Baden: Nomos, 1984, pp. 679ss.

[47]*Hermann Heller*: Die Krisis der Staatslehre, in: Gesammelte Schriftn, ed. Christoph Müller, Tübingen: J. C. B. Mohr, 2nd ed. 199

[48]*Harold J. Laski*: Studies in the Problems of Sovereignty, London: Oxford University Press, 1917, preface, p. ix.

[49] Cf. op. cit., p. 4.

[50] Op. cit., pp. 12/ 13.

[51]Cf. *Jürgen Habermas*: Faktizität und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates, Fra

[52]*Harold J. Laski*: Foundations of Sovereignty, in: The Foundation of Sovereignty and Other Essays, London: George & Unwin,

[53] Op. cit., p. 29.

[54]Cf. *Harold J. Laski*: Studies in the Problem of Sovereignty, p. 7 and esp. p. 20: "Is there not a tremendous danger in modern tir

[55] *Harold J. Laski*: Studies in the Problem of Sovereignty, p. 6.

[56]*Harold J. Laski*: The Theory of Popular Sovereignty, in: The Foundation of Sovereignty and Other Essays, London: George &

[57] *Bernard Bosanquet*: The Philosophical Theory of the State, London: MacMillan, 1920, p. 261.

[58]*Harold J. Laski*: The Sovereignty of the State, in: Studies in the Problems of Sovereignty, London: Oxford University Press, 19

[59] Op. cit., p. 14.

[60] Op. cit., p. 231.

[61] Op. cit., p. 12.

[62] Op. cit., p. 16.

[63] Cf. op. cit., p. 21.

[64] Op. cit., p. 17.

[65] Cf. op. cit., p. 18: "Our rights are teleological. They have to prove themselves".

[66] Op. cit., p. 23.

[67]Cf. *Harlod J. Laski*: A Note on Sovereignty and Federalism, in: Studies in the Problems of Sovereignty, London: Oxford Unive

[68]*Harold J. Laski*: Sovereignty and Centralisation, in: Studies in the Problems of Sovereignty, London: Oxford University Press, 1

[69]Cf. *Harold J. Laski*: Authority in the Modern State, New Haven: Yale University Press, 1919, preface, p. ix; cf. also: Liberty in t

[70] Op. cit., p. 42

[71] Op. cit., p. 43.

[72] Op. cit., p. 53.

[73]*Harold J. Laski*: Das Recht und der Staat, in: Zeitschrift für öffentliches Recht, ed. Hans Kelsen, vol. 19 (1931), p. 3. (This cont

[74] Op. cit., p. 6.

[75] Op. cit., p. 8.

[76] Op. cit., p. 17.

[77]I do not agree with the difference of existence and validity established by *Riccardo Guastini* in his paper, no. 3, pp. 4s., because norms is somehow concentrated to higher courts and not permitted to organs on an inferior level of jurisdiction.

[78]Referring to the analysis provided by the paper presented by *Stanley L. Paulson*, I favour the "weak interpretation of authority" i

[79]Legislative bodies that are normally called sovereigns were early titulated as authorites by Kelsen (*Fürstensouveränität*, *Volkss* Rechtsordnung begründende Grund- oder Ursprungsnorm hat zu ihrem typischen Inhalt, dass eine Autorität, eine Rechtsquelle eingesetzt wird, deren Äusserungen als rechtsverbindlich zu gelten haben : Verhaltet euch so wie die Rechtsautorität : der Monarch, die Volksversammlung, das Parlament etc. befiehlt, so lautet – der Deutlichkeit halber vereinfacht – die Grundnorm".

[80] *Joseph Raz*: The Authority of Law – Essays on Law and Morality, Oxford: Clarendon Press, 1979.

[81]Cf. the interpretation of the *Grundnorm* as a shield against hypostatising authority, namely as a warrant of authority without an a

[82] V. the paper presented by *Michael Baurmann*, passim.

[83]*Hans Kelsen*: Reine Rechtslehre – Einleitung in die rechtswissenschaftliche Problematik, Leipzig/ Wien: Franz Deuticke, 2nd, re

[84] Op. cit., pp. 201s.

[85] Op. cit., p. 208.

[86] Op. cit., p. 209.

[87]Cf. *Stanley L. Paulson*: Material and Formal Authorisation in Kelsen's Pure Theory, in: Legal Positivism, ed. Mario Jori, Dartmo thing.

[88]For a critique of legal substantialism, cf. *Bert van Roermund*: Law, Narrative, and Reality – An Essay in Intercepting Politics, Dor

[89]With respect to moral obligations, this interpretation of Ought to represent a Must is held by *Ernst Tugendhat*: Vorlesungen übe

[90] *Tom R. Tyler*: Why People Obey the Law, New Haven/ London: Yale University Press, 1990.

[91]Cf. however the overview on moral reasons to obey the law in *Kent Greenawalt*: Conflicts of Law and Morality (Clarendon Law

[92]*Carl Joachim Friedrich*: The Problem of Authority in Legal Reasoning, in: Archiv für Rechts- und Sozialphilosophie (ARSP; Wies

[93]Cf. in contrast his adversary in the field of the general theory of the state in the period of the *Weimar Republic*, *Carl Schmitt*: Le Baltimore/ London: The John Hopkins University Press, 1995.

[94]Cf. *Adolf J. Merkl*: Prolegomena einer Theorie des rechtlichen Stufenbaus, in: Gesellschaft, Staat und Recht – Untersuchungen

[95]V. *Michael Walter Hebeisen*: Souveränität in Frage gestellt – Die Souveränitätslehren von Hans Kelsen, Carl Schmitt und Herma

[96]V. one of my former teachers who tried to elaborate all claims of private law as delegated empowerment in the light of the *Rei*

[97]To the question whether the distinction of private and public law can make sense or be reasonable, cf. *J. W. F. Allison*: A Cont

[98]*Hermann Heller*: Bemerkungen zur staats- und rechtstheoretischen Situation der Gegenwart, in: Gesammelte Schriften, ed. Chri

[99]In the logics of norms, dualism can be converted into the distinction of prescriptive and descriptive sentences (according to t dualism between Ought and Is can be abolished – this can claim to be valid for syntactical (but not for semantical) explanations of normativity (and it counts therefore for the aspects of logics, at least, but not necessarily for mothodological, ontological and epistemological aspects. – Cf. the careful reconstruction of the development of Kelsen's theory of norms (including an original theory of prescriptive sentences that can stand before the requests of modern deontic logics) in *Carsten Heidemann*: Die Norm als Tatsache – Zur Normentheorie Hans Kelsens (Studien zur Rechtsphilosophie und Rechtstheorie, vol. 13; Dissertation Universität Kiel 1996), Baden-Baden: Nomos, 1997, esp. pp. 324ss. – Against these conceptions, on could oppose that it be a misunderstanding of the norm's claim for validity, that one should characterize the law by its original form of being (validity) not accessible to any truthmakers (and that the abovementioned conceptions of validity fall into the trap of naturalism); within such a reconception, validity could not be interpreted as real ("*es ist so, dass gilt*") – as it is practiced by legal realism –, but should be held as a claim of a situative Ought for validity (together with its concrete motivation to act) that would remain incertain, at the end (because it will come together with other motivations in a given situation).

[100]*Gregor Edlin*: Rechtsphilosophische Scheinprobleme und der Dualismus im Recht, Berlin-Grunewald: Walther Rothschild, 193

[101]The division of theory and practice in the methodology of law is an old one and has never been attempted to overcome, yet Regeln, nach denen Rechte zu bestimmen sind; diese die wirkliche Anwendung der Regeln auf einzelne Fälle. / Die Rechtswissenschaft zerfällt in die theoretische und praktische. Die theoretische Rechtswissenschaft ist die Wissenschaft von den Grundsätzen des Rechts selbst und ihren Gründen; die praktische die Wissenschaft von der Art der Anwendung jener Grundsätze". Within that frame, philosophy is disqualified as a subsidiary discipline, but nevertheless defined as theory of science, p. 25 (§ 57): "Philosophie (Wissenschaftslehre) ist die Wissenschaft von den ersten Gründen alles unseres Wissens".

[102]In his paper, no. 2, 3rd partition ("Representation as the Legal Articulation of a normative Point of View"), *Hans Karl Lindahl* analysis and with the conclusions by Lindahl, but I cannot help to point to the permanent crisis of the political concept of representation since the XIXth Century that makes it resemble an oldfashioned concept of the Middle Ages and of the Age of Absolutism. – V. also *Hans Karl Lindahl*: Sovereignty and Symbolization, in: Rechtstheorie, Zeitschrift für Logik, Methodenlehre, Normentheorie und Soziologie des Rechts (Berlin: Duncker & Humblot), vol. 28 (1997), pp. 347ss., 347: "investing power in political actors within a community requires removing sovereignty to a point beyond that community whence the exercise of power can be conditioned or limited. This double movement of investiture and divestiture reveals that political power mediates absence and presence, transcendence and immanence, generality and particularity". With regard to the *Reine Rechtslehre*, he argues, p. 349, n. 3, *in fine*: "The fundamental shortcoming in Kelsen's analysis of sovereignty, however, is that he justifies the necessity of sovereignty for legal epistemology, but not its function as a political concept".

[103]To the question of the role played by the intentional tie vis-à-vis the authority of law, v. *Heidi M. Hurd*: Interpreting Authoritie

[104]*Santi Romano*: Die Rechtsordnung (L'Ordinamento Giuridico) (Schriften zur Rechtstheorie, vol. 44), ed. Roman Schnur, Berlin

[105]V. *Edgar Bodenheimer*: Jurisprudence – The Philosophy and Method of the Law, Cambridge: Harvard University Press, 1962, p system of empowerment and delegation (*Ermächtigung*, *Stufenbau der Rechtsordnung*), however. V. *Hans Kelsen*: Reine Rechtslehre – Einleitung in die rechtswissenschaftliche Problematik, Leipzig/ Wien: Franz Deuticke, 1934, pp. 90, 95, and 98: "Die Norm höherer Stufe regelt [...] nicht nur das Verfahren, in dem die niedere Norm erzeugt wird, sondern eventuell auch den Inhalt der zu erzeugenden Norm. [...] Dass ein richterliches Urteil im Gesetz begründet ist, bedeutet nicht, dass es *die*, sondern nur, dass es *eine* der individuellen Normen ist, die innerhalb des Rahmens der generellen Norm möglich sind. [...] So wenig man aus der Verfassung durch Interpretation richtige Gesetze, kann man aus dem Gesetz durch Interpretation richtige Urteile gewinnen. [...] Eben darum ist die Gewinnung der individuellen Norm im Verfahren der Gesetzesvollziehung, sofern dabei der Rahmen der generellen Norm erfüllt wird, Willensfunktion". Cf. the shift in the 2nd edition of the "Reine Rechtslehre", §§ 45ss.: "authentische und nicht-authentische Interpretation".

[106]In extenso v. my forthcoming book, *Michael Walter Hebeisen*: Recht und Staat als Objektivationen des Geistes in der Geschicht

[107]*Léon Brunschvicg*: La modalité du jugement, Paris: Félix Alcan, 2nd ed. 1934, pp. 215ss., 219: "Les propositions les plus concrèt s'il faut prolonger le droit en quelque sorte en dehors de lui-même pour le faire coïncider avec le réel, c'est qu'en fait, dès qu'on veut l'appliquer à un cas donné, le jugement de droit apparaît comme équivoque et indéterminé. Bien plus, pour trancher l'équivoque et fixer l'hésitation, la jurisprudence n'a même pas de principe stable et de critérium universel: tantôt c'est à la loi elle-même qu'elle demandera la règle de son application, et cette loi se réduira à la lettre du texte, ou bien elle s'interprétera par rapport à l'esprit qui guidait le législateur; tantôt elle sortira de la loi pour invoquer les principes généraux qui sont en quelque sorte consacrés d'équité que tout homme est réputé posséder. Et ce n'est pas encore tout; la jurisprudence ne suffit pas à rendre le jugement de droit entièrement adéquat au fait particulier et à lui donner ainsi une pleine et incontestable réalité. Un fait particulier est trop complexe et trop original, trop 'unique' pour s'adapter au cadre de la loi. Il ne reste alors au droit qu'une ressource: c'est, au lieu d'approprier le cadre juridique à la réalité concrète, de ne reconnaître comme fait que ce qui rentre dans ce cadre à l'avance défini, de se créer ainsi pour son propre usage une réalité juridique. Le fait punissable ne sera plus celui qui, par son caractère intrinsèque, mérite d'être puni, c'est celui qui a été prévu comme être puni. Mais, par la même, il n'y a plus à espérer de correspondence immédiate entre les faits concrets et le jugement de droit. D'une part, l'objet de ce jugement peut n'être qu'un produit artificiel, sous les fictions légales [...]. Ou bien, par une conséquence inverse, c'est au fait qu'est refusé l'existence juridique".

[108]*Carl August Emge*: Der ethische Fehlgriff nach dem Ganzen – Über einen anscheinend typischen Mangel normativer Theorie Akademie der Wissenschaften und der Literatur in Mainz, Geistes- und sozialwissenschaftliche Klasse, 1966, no. 3, Wiesbaden: Franz Steiner, 1966; Über das Verhältnis von "normativem Rechtsdenken" und "Lebenswirklichkeit", in: Abhandlungen der Akademie der Wissenschaften und der Literatur in Mainz, 1956, no. 4, Wiesbaden: Franz Steiner, 1956; and by the same author: Über den Unterschied zwischen "tugendhaftem", "fortschrittlichem" und "situationsgemässem" Denken – Ein Trilemma der "praktischen Vernunft", in: Abhandlungen der Akademie der Wissenschaften und der Literatur in Mainz, Geistes- und sozialwissenschaftliche Klasse, 1950, no. 5, Wiesbaden: Franz Steiner, 1950; in extenso cf. *Carl August Emge*: Einführung in die Rechtsphilosophie – Anleitung zum philosophischen Nachdenken über das Recht und die Juristen, Frankfurt am Main/ Wien: Humboldt-Verlag, 1955.

[109]This *excursus* will be translated for publication; I would already have done this task, of course, if it were not very difficult to fu

[110]*Frithjof Rodi*: Über einige Grundbegriffe einer Philosophie der Geisteswissenschaften, in: Dilthey-Jahrbuch für Philosophie un

[111] Cf. *Pietro Piovani*: Normatività e società, Napoli: Jovene, 1949.

[112]Cf. the attempt to rectify the frontiers between pragmatics and poetics in *Frithjof Rodi*: Marken und Male – Über die Grenzen matics, in: Research in Phenomenology, vol. 16, pp. 95ss.); v. the following thesis that eventually converges to an epidigmatic approach to *Verstehen*, p. 3 of the separatum: "Unter dem gemeinsamen Dach einer allgemeinen Pragmatik lassen sich (mindestens) zwei Formen zeichenvermittelter Kommunikation untersuchen, die sich hinsichtlich ihrer Struktur grundlegend unterscheiden, ohne mit der Alternative Pragmatik/ Poetik identisch zu sein. Der Bereich derjenigen Kommunikationshandlungen, die nicht mehr mit den Kategorien einer reinen Pragmatik untersucht werden können, reicht weiter, ist komplexer und vielgestaltiger, als der Bereich des Poetischen, der ihm angehört". – Cf. by the same author: Diesseits der Pragmatik – Gedanken zu einer Funktionsbestimmung der hermeneutischen Wissenschaften, in: Zeitschrift für allgemeine Wissenschaftstheorie, vol. 10 (1979), pp. 288ss.

[113]*Frithjof Rodi*: Die energetische Bedeutungstheorie von Hans Lipps, in: Journal of the Faculty of Letters, The University of Tok

[114]*Josef König*: Die Natur der ästhetischen Wirkung (1957), in: Vorträge und Aufsätze, ed. G. Patzig, Freiburg/ München 1978, pp

[115]*Otto Friedrich Bollnow*: Bemerkungen über das evozierende Sprechen in der Logik von Georg Misch (1979), in: Sinn und Gesch
gen: Vandenhock & Ruprecht), ed. Frithjof Rodi, vol. 7 (1990/ 1991), pp. 13ss. – Cf. *Frithjof Rodi*: Hermeneutische
Philosophie im Spätwerk von Otto Friedrich Bollnow, in: Hermeneutische Philosophie und Pädagogik, ed. Friedrich
Kümmel, Freiburg im Breisgau/ München: Karl Alber, 1997, pp. 59ss.

[116]Cf. the latest contributions to this debate in: *Robert P. George* (ed.): Natural Law, Liberalism, and Morality, Contemporary Essa

[117]*Odo Marquard*: Kant und die Wende zur Ästhetik, in: Aesthetica und Anaesthetica – Philosophische Überlegungen, Paderborn

[118]In political theory *Ernst Vollrath* has already choosen political judgment as his starting point; cf. by the same author: Die Rek
by Roland Beiner, Chicago: University of Chicago Press, 1982; and the respective differentiating reaction in *Paul*
Ricoeur: Jugement esthétique et jugement politique selon Hannah Arendt, in: Le juste, Paris: Éditions Esprit, 1995,
pp. 143ss. (first published in: Revue semestrielle d'anthropologie et d'histoire, Paris: L'Harmattan, 1994).

[119]*Hermann Lübbe* showed that this strategy consequently ends in desastrous political moralism in his monography: Politischer M

[120]In respect of political theory symptomatically cf. *Christoph Gusy*: Legitimität im demokratischen Pluralismus, Stuttgart: Franz S
see also *Giovanni Sartori*: The Theory of Democracy Revisited, Chatham: Chatham House Publishers, 1987.

[121]One may try to understand society and community without any reference to morality (cf. *Georg Voruba*: Gemeinschaft ohne
Campus, 1994). Characeristic remains, however, that conflicts within communities are ruled by the concurrence of
moral claims that struggle for acceptance; cf. *Axel Honneth*: Kampf um Anerkennung, Zur moralischen Grammatik
sozialer Konflikte (Suhrkamp Taschenbuch Wissenschaft, vol. 1129), Frankfurt am Main: Suhrkamp, 1992.

[122]Cf. *Jean-François Lyotard*: Sensus communis, Das Subjekt im Entstehen, in: Gemeinschaften, Positionen zu einer Philosophie d
Howard: Zwischen Recht und Gerechtigkeit, Politik der Urteilskraft versus Antipolitik, in: Die Gegenwart der
Gerechtigkeit, Diskurse zwischen Recht, praktischer Philosophie und Politik, ed. Christoph Demmerling and
Thomas Rentsch, Berlin: Akademie-Verlag, 1995, pp. 112ss. In the domain of art theory Kantian aesthetics has lately
been reconstructed in *Marcus Otto*: Ästhetische Wertschätzung, Bausteine zu einer Theorie des Ästhetischen, Berlin:
Akademie-Verlag, 1993.

[123]Cf. the essays in *Günter Figal*: Für eine Philosophie von Freiheit und Streit, Politik, Ästhetik, Metaphysik, Stuttgart/ Weimar: J

[124]Neo-Kantianism tried to actualize aesthetics in the direction of human sciences; this attempt remained restricted to the fine
Main: S. Fischer, 1990). More significantly directed in the favourized direction inclines the attempt, "mit einem Blick
auf den Sinn für das Schöne und seine Reaktion auf einzelne Schönheiten dem Ursprung des Sinnes für Gerechtig-
keit und seiner Reaktionen auf einzelne Gerechtigkeiten einen Schritt näherzukommen" in *Albert A. Ehrenzweig*:
Ästhetik und Rechtsphilosophie, Ein psychologischer Versuch, in: Dimensionen des Rechts, Gedächtnisschrift für
René Marcic, ed. Michael Fischer, Berlin: Duncker & Humblot, 1973, vol. 1, pp. 3ss.; see also by the same author:
Psychoanalytic Jurisprudence, On Ethics, Aesthetics, and "Law", On Crime, Tort, and Procedure, Leiden: A. W.
Sijthoff, 1971.

[125]*Klaus von Beyme*: Theorie der Politik im 20. Jahrhundert, Von der Moderne zur Postmoderne, Frankfurt am Main, Suhrkamp, 1

[126]Romanticism has already outlined the consequences of an aesthetic approach to politics; cf. for example the state theory in *A*
einer theologischen Grundlage der gesamten Staatswissenschaften, Leipzig 1918. Cf. to this subject *Gisela von Busse*:
Die Lehre vom Staat als Organismus, Kritische Untersuchungen zur Staatsphilosophie Adam Müllers, Berlin: Junker
und Dünnhaupt, 1928; *Jakob Baxa*: Einführung in die romantische Staatswissenschaft, Jena: Gustav Fischer, 1934,
pp. 112ss.; and *Benedikt Koehler*: Ästhetik der Politik, Adam Müller und die politische Romantik (dissertation thesis at
the University of Tübingen, 1978), Stuttgart: Klett-Cotta, 1980; in respect to the history of mind cf. *Rudolf Franz*
Künzli: Adam Müllers Ästhetik und Kritik, Ein Versuch zum Problem der Wende der Romantik, 1972.

[127]To th esubject of cynic criticism of modernity cf. *Peter Sloterdijk*: Kritik der zynischen Vernunft, Frankfurt am Main: Suhrkamp

[128]Cf. *Walter Schweidler*: Geistesmacht und Menschenrecht, Der Universalanspruch der Menschenrechte und das Problem der Ers

[129]*Paul Guyer*: Kant and the Experience of Freedom, Essays on Aesthetics and Morality, Cambridge: Cambridge University Press
by *Friedrich Schiller*; cf. *Heinz-G. Schmitz*: Die Glücklichen und die Unglücklichen, Politische Eudämonologie, ästheti-
scher Staat und erhabene Kunst im Werk Friedrich Schillers, Würzburg: Königshausen & Neumann, 1992.

[130]Cf. *Otfried Höffe*: Recht und Moral, Ein kantischer Problemaufriss, in: Neue Hefte für Philosophie, ed. Rüdiger Bubner, Göttin

[131]*Manfred Riedel*: Urteilskraft und Vernunft, Kants ursprüngliche Fragestellung (Suhrkamp Taschenbuch Wissenschaft, vol. 774),

[132]*Urs Tuhrnherr*: Die Ästhetik der Existenz, Über den Begriff der Maxime und die Bildung von Maximen bei Kant (Basler Studie

[133]*Andreas Gunkel*: Spontaneität und moralische Autonomie, Kants Philosophie der Freiheit (Berner Reihe philosophischer Studi

[134]*Dirk Effertz*: Kants Metaphysik, Welt und Freiheit, Zur Transformation des Systems der Ideen in der Kritik der Urteilskraft (S

[135]Cf. the introduction into Kantian aesthetics in *Dieter Teichert*: Immanuel Kants "Kritik der Urteilskraft", Ein einführender Kon

[136]Cf. *Immanuel Kant*: Kritik der Urteilskraft (1790), in: Kants gesammelte Schriften, ed. of the Königlich Preussischen Akademie to the sensual experience of common interests-"volonté générale in Jean-Jacques Rousseau-without any idea of representation.

[137]Op. cit., §§ 6ss.; Kant identifies this mental ability as quantity of the aesthetic judgment that characterizes the inborn quality o

[138]Op. cit., §§ 10ss.; Kant names this the relation of the aesthetic judgment; the "Form der Zweckmässigkeit ohne Vorstellung ei

[139]Op. cit., §§ 18ss.; Kant postulates this as modality of the aesthetic judgment that is not equal to validity in general understandi

[140]This fact expresses that it is the characteristics of aesthetic codes to surpass the semantic meanings by means of significance brought into connection with Kantian aesthetics in *Georg Kohler*: "Ist das noch Kunst?" Oder: Die Permanenz der ästhetischen Erfahrung als Problem, in: Ästhetische Erfahrung und das Wesen der Kunst (Studia Philosophica, vol. 43 [1984]), ed. Helmut Holzhey and Jean-Pierre Leyvraz, Bern/ Stuttgart: Paul Haupt, 1984, pp. 23ss., esp. pp. 35ss. Therefore the aesthetic judgment has been characterized as irrational, cf. *Jules Vuillemin*: Geschmacksurteil und Vernunft, in: Praxis und Ästhetik, Neue Perspektiven im Denken Pierre Bourdieus, ed. Gunter Gebauer and Christoph Wulf, Frankfurt am Main: Suhrkamp, 1993, pp. 33ss.

[141]To this interposition has been pointed recently by *Klaus E. Kaehler*: Die Asymmetrie von apriorischer Rechtslehre und positive

[142]Cf. the respective remarks in *Klaus E. Kaehler*, loc. cit. Kant promises only to give the "Anfangsgründe der Rechtslehre" in his he tends to come nearest to completeness in his "Sittenlehre" ("wenigstens nahe kommen"). Kant holds that the law "eine Verbindlichkeit auferlegt, aber ganz und gar nicht erwartet, noch weniger fordert, dass ich ganz um dieser Verbindlichkeit willen meine Freiheit auf jene Bedingungen selbst einschränken solle, sondern die Vernunft sagt nur, dass sie in ihrer Idee darauf eingeschränkt sei und von andern auch thätlich eingeschränkt werden dürfe; und dieses sagt sie als ein Postulat, welches gar keines Beweises weiter fähig ist" ("Metaphysik der Sitten", vol. 6 of the ed. by the Academy, p. 12).

[143]For an lasting analysis of the structure of the problem see *Immanuel Kant*: Über den Gemeinspruch "Das mag in der Theorie have legitimatory functions and others that concern application; generally cf. *Klaus Günther*: Der Sinn für Angemessenheit, Anwendungsdiskurse in Moral und Recht, Frankfurt am Main: Suhrkamp, 1988. The distinction has also been taken into consideration by *Matthias Kettner*: Warum es Anwendungsfragen aber keine "Anwendungsdiskurse" gibt, in: Jahrbuch für Recht und Ethik (Berlin: Duncker & Humblot), ed. B. Sharon Byrd, vol. 1 [1993], pp. 365ss.

[144]*Rudolf A. Makkreel*: Dilthey, Philosopher of the Human Studies, Princeton: Princeton University Press, 1975, esp. pp. 16ss. of

[145] Op. cit., esp. pp. 270ss. and 280ss. of the german translation.

[146] Op. cit., p. 281 of the german translation.

[147]*Siegfried Kracauer*: History, Last Things Before The Last, Oxford: Oxford University Press, 1969, esp. pp. 189ss. of the german

[148]*Ulrich Beck*: Die Erfindung des Politischen, Zu einer Theorie reflexiver Modernisierung, Frankfurt am Main: Suhrkamp, 1993, flected self-reference is subjected to criticism. *Frederick L. Will*: Beyond Deduction, Ampliative Aspects of Philosophical Reflection, London/ New York: Routledge, 1988, elaborated the function of reflection for the theory of science in contrast to other strategies to rationalize the deduction of norms and principles.

[149]But cf. *Nikolaus Kreissl*: Das Rechtsphänomen in der Philosophie Wilhelm Diltheys (Basler Studien zur Rechtswissenschaft , H

[150]*Erich Rothacker*: Einleitung in die Geisteswissenschaften, Tübingen: J. C. B. Mohr (Paul Siebeck), 2nd ed. 1930 (enl. by a substa

[151]Cf. *Ernst Cassirer*: An Essay on Man, An Introduction to a Philosophy of Human Culture, New Haven: Yale University Press, Fischer Taschenbuch, 1985 (Zürich/ München: Artemis, 1949).

[152]Contributions to aesthetics and poetics by *Hans-Georg Gadamer*, in: Gesammelte Werke, Tübingen: J. C. B. Mohr (Paul Siebeck

[153]*Rudolf Smend*: Verfassung und Verfassungsrecht, München/ Leipzig: Duncker & Humblot, 1928. For further reading cf. *Manfr*

[154]Cf. *Ernst Rudolf Huber*: Zur Problematik des Kulturstaats (Recht und Staat in Geschichte und Gegenwart, no. 212), Tübingen:

[155]Cf. *Peter Häberle*: Verfassungslehre als Kulturwissenschaft (Schriften zum Öffentlichen Recht, vol. 436), Berlin: Duncker & Hu

[156]Completing the main works of the mentioned authors cf. *Günther Holstein*: Von den Aufgaben und Zielen heutiger Staatsrech
[1928] of the new series, pp. 161ss.

[157]See for instance *Georg Misch*: Der Aufbau der Logik auf dem Boden der Philosophie des Lebens, Göttinger Vorlesungen über

[158]See *Max Weber*: Gesammelte Aufsätze zur Wissenschaftslehre, ed. Johannes Winckelmann, Tübingen: J. C. B. Mohr (Paul Sieb

[159]Cf. *Hermann Heller*: Staatslehre, in: Gesammelte Schriften, ed. Christoph Müller, Tübingen: J. C. B. Mohr, 2. A. 1992, vol. 3, p
"geisteswissenschaftliche Methode" proposed by Smends and Holstein. *Jean Barbeyrac*: De dignitate et utilitate juris et historiarum et utriusque disciplinae amica conjunctione, Oratio inauguralis, quam dixit anno domini XIV. Kalend. April M.DCCXI. Joannes Barbeyracus, Juris & Historiarum in Academia Lausannensi Professor ordinarius, Lausanne helvetiorum, Apud Fridericum Gentil & Theophilum Crosat, M.DCCXI, proved the fruitfulness of the combination of historical and juridical methods originally and in an undimished actuality in his inaugural speach at the University of Lausanne.

[160]Cf. *Albrecht Dehnhard*: Dimensionen staatlichen Handelns, Staatstheorie in der Tradition Hermann Hellers, Tübingen: J. C. B.

[161]Cf. the psychological and anthropological approach that turns to be an humanistic one in *Max Imboden*: Die Staatsformen, Ver
rückt, die um die Verankerung alles Institutionellen in der menschlichen Psyche weiss, wird zugleich eine Rückkehr zur klassischen Staatsformenlehre bedeuten. In ihr liegt das grosse verlorene Mass, das keine ihrer humanen Verpflichtung bewusste Sinngebung des Staates zu entbehren vermag".

[162]As a singular attempt to discuss the questioned theme in a methodological way cf. *Alf Ross*: Kritik der sogenannten praktische
schaft, Beiträge zum Problem der Rechtswissenschaft als Realwissenschaft), Leipzig: Felix Meiner, 1929 (reprint Aalen: Scientia, 1970).

[163]Cf. my report to the situation of german-language theory of the aims and tasks of state action, Staatszweck, Staatsziele, Staatsa

[164]*Arthur Kaufmann*: Die Idee der Toleranz aus rechtsphilosophischer Sicht, in: Dialektik, Enzyklopädische Zeitschrift für Philoso

[165]In nominalistic language the function of judgment consists in creatingout of the situations of life socalled categories (unities)

[166] Cf. *Friedrich August von Hayek*: The Constitution of Liberty, London: Routledge & Kegan Paul, 1960.

[167]As a guide we choose the theories of *Charles Sanders Peirce*, *William James* and *John Dewey*; cf. esp. *James*: A Pluralistic Universe, H

[168]Principi di una scienza nuova d'intorno alla communa natura delle nazioni, translation by Vittorio Hösle and Christoph Jerma

[169]*Karl Larenz*: Rechts- und Staatsphilosophie der Gegenwart (Philosophische Forschungsberichte, vol. 9), Berlin: Junker und D
Holmes, Benjamin Nathan Cardozo and Julius Stone, among others.

[170]*Hans Kelsen*: Was ist Gerechtigkeit ? Wien: Franz Deuticke, 1953; cf. *Hans Kelsen*: Das Problem der Gerechtigkeit, appendix in:
phische Vorträge, veröffentlicht von der Kant-Gesellschaft, ed. Paul Menzer and Arthur Liebert, no. 31), Berlin-Charlottenburg: Rolf Heise, 1928.

[171]*Edwin N. Garlan*: Legal Realism and Justice, New York: Columbia University Press, 1941, p. 125. – V. as a single appearance i
Scientia, 1970).

[172] *Hans Kelsen*: Was ist Gerechtigkeit ? Wien: Franz Deuticke, 1953, pp. 40s.

[173]*Hans Kelsen*: Was ist die Reine Rechtslehre ? In: Demokratie und Rechtsstaat, Festgabe zum 60. Geburtstag von Zaccaria Giz
Wesen des Rechts überhaupt, seine typische Struktur, und zwar unabhängig von dem wechselnden Inhalt, untersuchen, den das Recht zu verschiedenen Zeiten und an verschiedenen Orten angenommen hat. Das ist die Aufgabe einer allgemeinen, das heisst nicht auf eine besondere Rechtsordnung oder besondere Rechtsordnungen beschränkten Rechtslehre. Sie hat die spezifische Methode und die Grundbegriffe zu bestimmen, mit denen jedes beliebige Recht geistig erfasst und beschrieben werden kann; und liefert so die theoretische Grundlage für jede auf ein besonderes Recht oder besondere Rechtsinstitutionen gerichtete Betrachtung".

[174] V. no. 28 (p. 36) in the paper presented by *Ulises Schmill Ordoñez*.

[175]In general v. *Horst Dreier*: Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen (Fundamenta Juridica, Hanno

[176]*Francis Jaeger*: Le problème de la souveraineté dans la doctrine de Kelsen – Exposé et critique (thèse à l'Université de Fribourg

[177]*Ernst-Wolfgang Böckenförde*: Die Entstehung des Staates als Vorgang der Säkularisation, in: Recht, Staat, Freiheit – Studien zur F
mer, 1967), pp. 112s.; cf. *Ernst-Wolfgang Böckenförde*: Der Staat als sittlicher Staat (Wissenschaftliche Abhandlungen und Reden zur Philosophie, Politik und Geistesgeschichte), Berlin: Duncker & Humblot, 1978, p. 24; and *Elmar*

Holenstein: Vorstaatliche Voraussetzungen des Verfassungsstaates, in: Zeitschrift für Schweizerisches Recht (Basel: Helbing & Lichtenhahn), vol. 139/ I (1998), no. 2, pp. 119ss., esp. 129ss.

[178]Esp.: Analisi dell'esperienza comune (1930), ibid., vol. 2, pp. 3ss.; Studi sull'esperienza giuridica (1932), ibid., vol. 2, pp. 211ss.

[179]Esp.: Is Positive Law and Expression of Will ? (1916) pp. 17ss.; On the Question of the Notion of Law – The Will-Theory 348ss.

[180]Presentation of reflections published in a study together with *Peter Saladin*: Wozu noch Staaten ? – Zu den Funktionen eines n

[181]Esp. the articles: Autonomia, pp. 14ss.; Decadenza, pp. 46ss.; Diritto e morale, pp. 64ss.; Poteri/ Potestà, pp. 172ss.; Realtà gi