

## ON LEGITIMACY

Today there is a great deal of discussion about human rights. We speak of them in reference to totalitarian regimes but also in reference to Western democracies, which is a sign, it seems, of a reconsideration of the legitimacy of the power of the State and the conception of law on which this legitimacy rests. However, we had thought this question had been settled for a long time, at least in democratic countries: a legitimate government is one elected by the people, whose sovereign will it expresses through elected representatives, retained or replaced periodically, who make the laws. In other words, the people are sovereign, and the exercise of this sovereignty is governed by a constitution, according to laws that permit the legitimacy of the State (*Rechtsstaat*) to be expressed concretely. The doubts that arise concerning human rights in many areas of the world would thus be signs of either a rupture between the sovereign people and the executive or legislative power, to which the people delegate the care of their interests and will, or of a resignation of the popular will, reduced to the condition of a sort of do-nothing king, doubting his own legitimacy and handing his

Translated by Jeanne Ferguson

power over to his clerks. In both cases, there is a crisis of confidence and perhaps more: a fundamental skepticism toward the very notion of legitimacy as it is usually presented, that is, as the expression of the will of the people: a capricious will, sometimes docile and sometimes rebellious, of an amorphous sovereign (*rex otiosus*) that it is difficult to identify in the features of its representatives, (congress, parliament or national assembly) or in the form of a ballot. In any case, the citizen, holder of a small particle of popular sovereignty, feels alienated from the State and its institutions, contrary to what we find in texts before the 18th century, when institutions were surrounded by an apparent, if not always sincere, respect and when the social hierarchy was accepted as a matter of fact.

When we say “legitimacy” we have said “power,” because those who govern us—with the exception of usurpers and conquerors, at least in the beginning—are supposed to act in the interest of the *common good*, which confers legitimacy on their actions. Now, today’s State seems to tend to lose sight of that consideration or at least to confuse it with the satisfaction, especially material, of all private or particular interests. As this is an impossible task, a more and more important fraction of the active population rejects the power that theoretically belongs to it: passively, by abstaining to vote and take an interest in public affairs,<sup>1</sup> actively, by resorting to an almost continuous protest: strikes, violence, organized terrorism like a counter-State within the State.<sup>2</sup>

The reason for this indifferent or hostile attitude—and as such contrary to the hopes of the founding fathers of modern democracy—is a sense of defeat, admitted or tacit, that would have contemporary legitimacy somehow *gratuitous*, since it lacks a

<sup>1</sup> It is easy to calculate that the chiefs of state and the representatives of the people in our democracies are elected by a fraction of the electorate that is about 25-28 percent, abstentions around 40-45 percent not being rare. In these conditions, can we still speak of the “popular will”?

<sup>2</sup> We had thought the phenomenon was limited to the republics of Latin America or the people of the Balkans, but now we have the Red Brigades, Black Panthers, Red Army Faction, The Greens, the GRAPO, proving that it exists also in Europe and North America. The existence of these terrorist organizations, armed and politicized, brings about the formation of antagonist groups—groups of self-defence that, faced with the insufficiency of the State, claim to protect the security of the citizens.

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juridical base that is solid enough to inspire confidence. Even a moment's reflection shows that the decisions of power—laws, decrees or ordinances—lack the support of deeper foundations than popular will. They have for bases only a *pyramid of abstractions*, an arbitrary construction.

1. At the top of the pyramid, we find the *law-makers*: less “representatives”, spokesmen (*personae*) of the people, than a political caste quite removed from the sovereign people, the only source for legitimacy. According to the eternal rules of politics, these law-makers, ministers and high servants of the State concentrate more and more power around themselves and make up political factions that have the means of cooptation and exclusion to a greater degree than the *vulgum pecus*. On the other hand, we could not imagine the existence of the factions themselves without the intervention of interest and pressure groups that form a sort of shadowy region around the political class and are the natural extension of it. This symbiosis is inseparable from the modern State, but whereas it would not be shocking in a regime in which sovereignty proceeds from above to below, for us it creates a certain uneasiness between the base and the summit for the simple reason that the sovereign people do not have adequate means of control over the decisions made in their name by power.<sup>3</sup>

2. Below the “law-makers”—and we have just seen that at their level a very strong oligarchic element enters into the democratic system—is *public opinion*. Theoretically, it serves to reestablish the equilibrium of power in favor of the people: the press and other media, even culture at a certain level, are thus seen as so many authentic expressions of the *vox populi*, the point of view of the legitimate sovereign faced with the abuse of his faithless servants.

<sup>3</sup> The United States offers us the perfected example of a political class living in symbiosis with interest groups through the intermediary of very powerful business or corporation lawyers. If the phenomenon of lobbies does not bring about serious reactions, it is because the myth of the self-made man is still more powerful. The inheritance of the founding fathers, this myth would also have it that these essentially ephemeral interest groups are set up for the profit of their associates, not for political influence, which would endanger the institutions of the Republic if it were durable. It is thought, without saying so out loud, that the country is better governed by an oligarchy.

But far from being the expression of what an ineffectual people think, “public opinion” has become the incarnation of the thought of those who govern us. Of course, we can also see in it a concern for staying in contact with the popular consciousness through surveys and polls, but this is less to gain the true sentiment than to frame and fashion it. As Janine Chanteur says, the political thought of Plato is still true today: “A great amount of information that is not controlled but, contrary to all wisdom, itself controls the opinion it forms, is proper to a great number of listeners.”<sup>4</sup>

It is claimed that the public opinion of today, such as we have briefly mentioned, is an improved version of the ancient usage of popular “participation.” The great difference is that, in Greece as in Rome and in all of medieval Europe, the ancient politicians understood it as a structured expression of the *vox populi*, in other words, a vote articulated through committees, orders or states. It was a way to associate the people, who were not at all sovereign but whose counsel was heeded, to political enterprise. But at that time—differently from what we see today, when each gives his personal opinion of the public good according to the inspiration of the moment, all opinions blended together in an amorphous crucible whose expression is arbitrary and confused—, it was a matter of taking the advice of the constituted bodies, who divided political space into concrete and responsible groups. In the best of hypotheses, we draw from our consultations only statistical data, extracts from our inquiries and our surveys; at the worst, as we have seen, there are only strikes, violence and an alienation that has become militant.

3. At the bottom of the “pyramid of abstractions” we find a rationalist conception of natural rights. Why rationalist? Because it is no longer a matter of the *status creaturae* of man in the nature of which Creation would have drawn the major lines of individual conduct and social behavior; rather, it is a matter, since the Renaissance and even before, or to be specific and give authors’ names, from William of Ockham to Kant, of the autonomy of pure

<sup>4</sup> J. Chanteur, *Platon, le désir et la cité*, Sirey, 1980, p. 47. Let us not forget the participation of public opinion in the previously-mentioned symbiosis: political class, interest groups and media are the three branches of popular sovereignty in modern democracies.

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reason, the supreme source of morality and politics, and therefore of legitimacy. Natural law, in its classical and medieval meaning, recognizes a certain number of constants in human nature and thus of moral and political obligations toward the community of men: the laws of God and the State, the family and children, a certain liberty of political space, right to own property, to speak, to practice religion. Public manifestation or exercise of these rights may vary from one country to another, from one civilization to another, and it is precisely these differences that create diversity within areas of culture. However, there is no doubt that taken all together they make up a common substratum defining the necessary conditions for a legitimate government, conditions before which legislators and sovereigns are obliged to bow in the exercise of power at all its various levels. It is a matter of the ultimate foundation of politics, a foundation that must remain exterior to them as a system of reference, order or model. Without that, we fall into the doctrine of the primacy of politics, the doctrine of Machiavelli and, earlier, that of Thrasymachus.

Modern philosophy brings a decisive modification to the interpretation of natural law and, consequently, legitimacy. Previously, any regime subjected to the constants of human nature was considered legitimate; moreover, whether the regime was or was not Christian.<sup>5</sup> With the Renaissance and the Reform, the theories of absolutism of divine right, Cartesianism, and other factors, we see an almost complete overturning of traditional order. To the *communitas*, qualified by St. Thomas Aquinas as *perfectissima*, in conformity with the principle of divine creation and thus ordered from high to low, succeeded a legitimacy of individual reason, following an inverse order. Here we must not underestimate the contribution of Protestantism, from Luther to Karl Barth. According to this doctrine, original sin<sup>6</sup> destroyed

<sup>5</sup> Medieval jurists, imbued with Roman law, put themselves at the service of the emperor or the kings of France beginning with the 12th century and fought the papacy in the name of the legitimacy of the pagan emperors. For them, this legitimacy was recognized by Jesus himself and his apostles, the early Christians paid their taxes and St. Paul, a Roman citizen, had himself sent to Rome to be judged. The *Letter to Diognetus* (circa 130 A.D.) shows that the daily life of the early Christians was perfectly integrated into the life of the other citizens.

man's intelligence and will: the Christian, as such, thus cannot understand the finality of political institution nor regulate his behavior on the norms of the civic community. He sees in the State either the work of the Devil or the scourge of God. The political community, Calvin wrote, is "rats on a pile of straw"; and for Karl Barth, referring to the Second World War, "It is Mr. Truman's affair; it does not concern us." In short, the State is neither rational nor good.<sup>7</sup> The Christian belongs only to the *communitas fidelium*; he abstains from political matters; the very idea of the legitimacy of the State seems contradictory to him. The only legitimacy belongs to God.

So much for the theory. But in practice, the Protestant torn between feeling the absence of a divine plan in politics and his very real belonging to a constituted community ends up, as a citizen, by making his own judgment the sole criterion for the legitimacy of a regime or its laws. The *Sollen* of Kant sums up this individualist position. As Marcel Prelot says in his preface to Vlachos' *La Pensée politique de Kant*: "Since democracy must have regulation and since this cannot come from an external restraint, from a supreme authority dictating his will or from a social hierarchy imposing its privileges, it has to be sought in the individual conscience."<sup>8</sup> From then on it is a matter of a philosophical justification for the intervention of individual judgment in governing the affairs of the State. To *causality*, a principle of nature, Kant will say corresponds *normality*, in free actions. The norm, that I finally take on myself, is the foundation of human sciences in general and of the Law in particular.<sup>9</sup> Moral or social "duty," any more than physical "cause," does not exist in itself, in a reality outside of man and as such unknowable. They are two categories of practical reason; in the last analysis, two phenomena inherent in human thought, which is subjective.

Simone Goyard-Fabre sees Kant's influence on Hans Kelsen, the

<sup>7</sup> Let us note that in the Thomist doctrine, taken from Aristotle, the State helps man to fulfill himself; it is thus, in this sense, a "secondary" divine creation. Man could not live fully without the help of the State.

<sup>8</sup> Vlachos, G., *La pensée politique de Kant*, P.U.F., 1962. Preface by Marcel Prelot, p. X.

<sup>9</sup> See "L'inspiration kantienne de Hans Kelsen" by Simone Goyard-Fabre, *Revue de métaphysique et de morale*, April-June 1978.

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20th-century exponent of the theory of natural law, revised and corrected by the philosopher of Koenigsburg. We would think ourselves taken back to the golden age of Greek philosophy, at the time of the Sophists. Here is what Protagoras says in *Theetete*: “In politics as in justice ... whatever a city believes as such and legally decrees as such for itself, is such in truth for each one ... Even if in general we legislate for the future it is for the time that the opinion of the group endures that the city is held to obey its laws.”<sup>10</sup> Protagoras bases his conviction on the presuppositions that Thomas Hobbes will also adopt and that Immanuel Kant will correct, without changing the general meaning.

What is this “general meaning”? We read in Protagoras as well as in Hobbes that man “in a natural state” is a savage creature, delivered up to his passions, ignoring virtue, lacking in everything that could make a moral and political being of him. Hobbes grants him only cupidity and the desire to avoid death,<sup>11</sup> in the “war of everybody against everybody” that is the common lot of humanity. Thus these creatures are totally without the image of God in their souls, of an interior order, of a sense of proportion. Their nature is such that there is no correspondence between what they think and feel and external reality.

“Pleasure, love, appetite, desire, are the various words we use to designate the same thing seen differently (more particularly, movement of molecules in what we call “soul.”)<sup>12</sup> However, these beings that everything separates, who are only the products of their sensations, unite at the onset of fear; they work out a contract through which they engage themselves to respect one among themselves, the king, from then on guardian of the order that will oversee that transactions inspired by cupidity are carried out in an orderly way. The social contract thus becomes the only formal source of laws, which are no longer founded on individual and changeable interest, without regard to the common good. Or, better, the common good is a useful fiction, a myth, a convention which may be set aside if a means to satisfy one’s interests at a lower cost is found elsewhere. Let us remember in this regard what

<sup>10</sup> *Theetete*, 176, conversation between Socrates and Theodorus.

<sup>11</sup> *De Cive*, Ed. Sirey, 1981, presentation by Raymond Polin.

<sup>12</sup> *De la nature humaine*, Vrin, 1971, p. 66. “Conceptions are only a stimulated movement in an interior substance of the head.” (*Idem.*, p. 64).

we said about the modern State, seeing the “common good” as the satisfaction of all private interests.

Evidently, that was a construction that was too fragile and too basely materialistic to satisfy the methodical spirit of Kant. The notion of “normativity” allows the foundation of the theories of natural law and social contract on other bases, by correcting the anarchy of words and objects in Hobbes. When we say “normativity” we mean that human behavior must conform to rules decreed by reason, which has its own laws.<sup>13</sup> In the end, we see that we are not so far away from Hobbes and that at the most we have replaced the notion of contract, *deus ex machina* that anarchy throttles, with reason dictating its moral but also gratuitous categories. The subject becomes more clear when we read that “the principle of obligation must not be looked for in man’s nature ... but *a priori* only in concepts of pure reason.”<sup>14</sup> Thus the validity of the law is not all inscribed in a divine-human substratum; it comes from the Kantian category of *Sollen*, a sentiment of duty under the severe eye of reason.

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After Kant, we come to the relativization of the concept of law, which is no longer “natural” but “subjective”. Again, we must grant him a semblance of general validity. This is what Hans Kelsen attacks. We must say that the starting points, inspired by Kant, are very fragile. “Normativity,” writes Simone Goyard-Fabre, “that inspires the acts of human behavior with juridicity ... has an objective reality to the exact degree in which it corresponds to the phenomenal world as an object of pure reason in its practical use.”<sup>15</sup> Begging the question, *petitio principii*, which while attempting to demonstrate the “objective” validity draws a tight circle around it. Basically, it is the same for Kelsen as for Kant: to present an arbitrary convention of normativity, from which he, like

<sup>13</sup> “Laws”: not in the sense of their applicability in the world of nature but in the world of behavior and action, laws of practical reason.

<sup>14</sup> *Fondements de la métaphysique des mœurs*, Delagrave, 1971, p. 78.

<sup>15</sup> Goyard-Fabre, *loc. cit.*, p. 211.



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Kant, deduces the conformity of phenomena to the norm and the validity of all norms belonging to this convention. The circularity of this thought only becomes evident when we summarize it as follows:

1) there is nothing real in the universe that we can know; 2) however, practical life (moral and social) obliges us to draw a little circle around our reason; 3) this perimeter is thus a matter of convention, since we have arbitrarily drawn it; 4) we organize and articulate the interior of this circle as we like, since we have declared ourselves masters of it in advance; 5) consequently, we proclaim its practical validity, and since no one can contradict us in the exercise of our arbitration except in the name of another arbitration, we also proclaim its theoretical value.

Once the arbitration of the process is put into evidence, everything is simple for Kelsen: the law, he writes, regulates its own creation, because the procedure extends its own norms as far as the fundamental norm; the application of the law is at the same time a creation of the law (*Théorie pure du droit*). As with Kant, understanding “legislates” on nature, as with Kelsen, the supreme norm is tributary of reason that remains the necessary and sufficient foundation of all possible juridical normativity.

Let us add that the Kelsenian direction is the very one that most human sciences have adopted. Declaring themselves “agnostic” with respect to the real world, they are reduced to circling around within the phenomenal world. To have a good conscience, they proclaim that there is nothing real but phenomena; rules imposed by subjectivity are the only valid rules, being by definition the only ones we can know.

We find Kelsen in this modern perspective: the validity of positive law, he writes, is independent of its relationship with a norm of whatever justice; it resides in a fundamental hypothetical norm, conforming or not to a norm of a given justice.<sup>16</sup> It is logical that Kelsen should go even further, denying any validity to natural law. His course, again, follows the modern conventionalism since, he says, to assume that we may deduce the rules of human behavior from unalterable norms inscribed in human nature, which is not

<sup>16</sup> “Justice et droit naturel,” *Annales de philosophie politique*, III. *Le Droit naturel*, P.U.F., 1959, p. 67.

evident, we expose ourselves to the objection of deducing, beginning with the order of being, the *Seins-Regeln*, the norms of duty, the *Soll-Normen*. In other words, we go from the positive to the normative without warning. The essential course of classical thought is thus challenged, because this latter presents as primary evidence 1) the intelligibility of the being; and 2) the epistemological and moral application of what intelligence has discovered. We think we are hearing Protagoras when Kelsen writes: "For the validity of law it is not necessary to know if its content, as it has been determined in the process of positive law, is just or unjust. The fundamental norm of a positive juridical order is not a norm of justice. Also, positive law, that is, an order or constraint created by legislation or custom and in general efficacious, can never be in contradiction with its fundamental norm, only with the natural law that presents itself as the just law."<sup>17</sup>

The fragility of the system—from Protagoras to Kelsen and including Hobbes and Kant—appears all the more, since the zeal of these four thinkers was animated by the desire to assure a solid basis and irrefutable principles for the juridical and political expression of the State. Reality and the supreme good being inaccessible, what line of thought can guarantee order and justice in a human community? From all evidence, they think, the one that does not depend on the real, which is problematical in any case, but on a rational system, based on what appears to be our only point in common: enlightened self-interest. A firm belief in that is sufficient for it to pass into custom, in short, to become a *useful myth*, so that it becomes a second nature more strongly rooted in us than nature itself. In a way, modern society has also forged an artificial world that seems more authentic to us than one that pre-industrial societies knew. It appears to us as a network of

<sup>17</sup> Kelsen, *op. cit.*, p. 122. Two things are to be noted here: 1) Kelsen's conception agrees with no matter what "juridical order," because it forbids its being criticized; 2) it may also proceed to its own liquidation and decree that from then on such or such a society no longer needs a juridical order (positive) given the fact that the citizens have become good (reasonable) and it is no longer necessary to subject them to the restraints of the law. This Utopian view is glimpsed in the Kelsenian system, which presupposes that human nature is not unchangeable when confronted by the law and the law, always adaptable to circumstance, may someday find itself in a situation that does not need restraint.

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phenomena soliciting from us other rational systems that express its *sui generis* character. Modern society would thus itself be an ensemble of arbitrary conventions, without reference to the slightest external criterion that would serve as justification.

Hans Kelsen, and he is not alone, puts his finger on this problematic when he evokes “the authoritarian State of the Greeks that imposed its model on the cosmos,” creating a belief in “the analogy between nature and society.”<sup>18</sup> According to Kelsen, the idea itself of a natural law comes in a straight line from the postulate of a divine creation and an ideal society in which transcendental norms, operating without hindrance, inspired the laws. In this hypothesis, the laws governing human societies would thus be the expression of the divine will, whereas for Kant they drew their strength from human will. To accept the legitimacy of natural law, according to Kelsen, is to postulate the existence of two societies, in a sort of Platonian vision revised and corrected by St. Augustine; an ideal society, the city of God and a human society, bringing with them two systems of retribution. Modern thought has done justice to this duality, continues Kelsen, “by emancipating the causality of the normative interpretation of nature,” so well that the “natural,” in the expression “natural law” has no privileged status with regard to the positive juridical order. From an objective, scientific point of view, society is part of nature. It is subjected to the laws of causality. The norms of an order corresponding to a hypothetical society have no application here.

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Thus we better understand the origin of the faults through which skepticism with regard to the State penetrates: without always being able to identify its symptoms, the citizen is conscious of being made a fool of, cheated, hoaxed, by a society saturated with goods and services (information, consumer products, communication ...) and of laws granted as soon as they are called

<sup>18</sup> *Society and Nature, a Sociological Inquiry*, University of Chicago Press, 1943, p. 233.

for but never sufficient—and he begins to look for a higher allegiance that would give a richer and deeper meaning to his vote, to polls and market research. In short, he is not satisfied with a State that says to him, with Protagoras, “To be just, for the citizen as for the city, is to obey the law that men have decided on together, in a consensus in which each participates because men are as equal to make the law as they are before the law, with no specific knowledge of politics being required.”<sup>19</sup> A comforting and flattering proposition, if it were not confuted by a philosopher much closer to us in time, Immanuel Kant, who says in *Notes posthumes*: “By electing their representatives (effective sovereign) the people alienate their rights ... Legitimacy destroys the masses and fuses law and force within an indivisible sovereignty, incarnated by the holders of supreme power.”<sup>20</sup> Under these conditions, why should it be surprising that the citizen asks himself questions ...? If Protagoras was right, and Hobbes, and Kant, and Kelsen after him, then I take the law unto myself and I dictate it to the group of which I am a member. Now, these last few decades have not ceased repeating that my “inner self” is a heap of impulses, violence, suppressed bursts of energy that only wait for an occasion to leap on their prey, while my “outer self” is made up of contradictions, sordid interests and false appearances. How can the reason which, in me, is legitimate be reconciled with my condition of slave with regard to class interests and racial prejudices? How can I believe the public discourse, inherited from the 19th century and founded on confidence in the validity of critical judgment and, at the same time, witness my present insignificance as an anonymous piece of machinery in the crushing structure of contemporary society?

Confused, each of us asks himself these questions while few actually formulate them. There is no coherent answer to them in present political discourse. They simply testify to the cultural erosion we are witnessing. The impossibility of finding an answer in the framework of the presuppositions of modernity indicates a parallel change in our political conception of legitimacy, which calls for a more intimate and concrete definition of the

<sup>19</sup> Chanteur, *op. cit.*, p. 64.

<sup>20</sup> Vlachos, *op. cit.*, p. 544.

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relationships between the citizen, the State and a principle that transcends both. As we have seen, for about two centuries this principle has been natural law, conceived uniquely by reason, and the positive law that derives from it. However, it is remarkable that at the very time Kantism found its consecration in juridical and moral thought, optimism concerning “legitimizing and legislative” reason received its first shocks. Shocks that came not only from Nietzsche and the *profondeur* psychologists but also, and especially, from historians like Fustel de Coulanges and ethnographers like Frazer. Through the breach thus opened, and up until today, archaeologists, anthropologists and historians of religion were soon to be engulfed: Guénon, Eliade, Campbell, Girard, as well as the *profondeur* sociologists Dupuy, Baudrillard, Illitch, Foucault. This is a current of thought that we do not have the pretension to sum up in a few words but whose tendency we must nevertheless try to disengage to the measure in which it also affects the problematics of legitimacy.

Fustel, Eliade and others have shown us how not only the ancient city but, even earlier, the archaic community organized its existence around the sacred, which articulated its space, time and actions. Far from being free and heedless (Rousseau) savage and lawless (Hobbes), the “first men” lived in highly-structured communities, because they were placed under the immediate authority of the gods, they themselves integrated into the eternal cosmos. Legitimacy within these groups (tribes, villages and cities) thus belonged to those whom Ferrero calls “the invisible spirits of the city.” These gods served as intermediaries between transcendent reality and the human group, which allowed the chief of the tribe, later the priest-king, to be himself a “god” and to thus attach his community to the beneficent forces emanating from the cosmos by chasing away the evil spirits.<sup>21</sup>

What brings the question of legitimacy into this history is not so much the detail, which is of interest only to specialists in various disciplines; it is the general recognition of the fact that up until the

<sup>21</sup> The modalities of this attachment are multiple, going from the kings of India, being mutilated in frightful rites and sacrificing themselves to the spirits, to the Emperors of China and the Germanic Holy Roman Empire, linking their earthly empire to the source of transcendental perfection.

Kantian conception of the State the final source of legitimacy was found outside and beyond the community. This in itself does not question the dogma of popular sovereignty; what is questioned, even as far as shaking the very notion of sovereignty, is the postulate that, since Hobbes, would have the human community rest on a contract between parties who are motivated only by fear of violence and cupidity. The response of J. Chanteur to this is a quotation from Plato, who has Socrates say in the *Republic*: “Perhaps there is a paradigm in heaven for whoever cares to contemplate it and regulate his government on it ... It matters little whether this city is realized ... it is the only one whose laws the wise man will obey.”<sup>22</sup>

In short, men who have their personal religion, their beliefs, their own way of following an ideal, feel uneasy when they are told that as citizens they are attached only to conventions suspended over an abyss and that at the very heart of these conventions they must yield to the will of the “holders of power,” as Kant says. How could their conscience not rebel when Hans Kelsen makes a clean sweep of God, Heaven and natural law: they are just so many concepts, he tells us, projected by society on the screen of its self-justification—Hobbes would have said of its fear. If there is no sacred element to sanction the legitimacy of power or justify the origin of laws; if lawmakers only execute the clauses of a contract that is revocable; if natural law is only a “normativity” that reason gives itself—then the citizen risks being seized with anxiety, faced with the accumulation of so much that is arbitrary and also risks being overcome by the vertigo of anarchy. Why appeal to such a heavy bureaucratic apparatus when it is a matter of making the laws myself, collectively, as the interpreter of my own sovereignty? Why not wipe out with one gesture all this Statist superstructure that has no other object than registering and executing my will? And why, once rid of this weighty machine, should I not take the law directly into my own hands?<sup>23</sup>

<sup>22</sup> Chanteur, *op. cit.*, p. 11.

<sup>23</sup> Rousseau well understood the logic of this reasoning and believed to remedy it by calling on the postulate of “general will.” He forbids the citizen to hold a similar anarchical discourse by asserting that once his freedom to decide is sacrificed on the altar of general will, the citizen is incorporated into it and loses the right to criticize magistrates, the executors of the social contract.

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Here we are back to Hobbes but perhaps with better perspectives than the drawing-up of a new social contract. Instead of the contractual theory, which in the opinion of Hobbes and Kelsen is purely arbitrary, why not choose a different arbitration, one that would have the legitimacy of laws and sovereignty divinely decreed. Kelsen speaks of the projection of laws on the screen of an imaginary Heaven. Now, if it is true that all societies, from the most “primitive” to the most “evolved”, have had their heaven-screen on which to project their invisible spirits, are we not correct in suspecting modern civilization, unique in its kind, and without precedent in history, of slipping its moorings and being out of control? Because if peoples have always and everywhere tried as an accepted rule to discover the secret of their origin and their structure in an external support, cosmic or divine, we find ourselves with a general law. Of course, this has nothing to do with the *a priori* categories of Kantian reason. However, this universal fact, a post-Kantian discovery from a long line of erudite men, gives us something to think about if we wish to broaden the definition of reason or introduce other speculative faculties. In fact, not only is the speculative necessity of so-called “pure” reason undemonstrable, but all contemporary reflection exerts itself to show its uselessness and fragility. From Gadamer to Foucault, from Jung to Lévi-Strauss, each one sustains that reason is not as universal as Kant thought and that it actually drifts in a magma of impulses, archtypes and presuppositions.

But let us be careful to avoid the temptation of basing legitimacy on the irrational. Let us rather broaden the “limits of human understanding,” too narrowly conceived for two or three centuries. In this new light, if we have so much as learned something about the disciplines widening our knowledge of other peoples and other civilizations, it appears that each community sees itself as the reflection of a superior reality. This reality, order of the universe, divine hierarchy, permanence of nature, serves at the same time as explanation of origins, justification for institutions and model for rules of conduct. All this is not as abstract as it may seem. The image that society and the State have of themselves is necessarily the reflection of a reality/model, which puts enough distance between image and reality for there to be room for self-comprehension, justification for interior order and self-esteem.

In addition, this articulated image becomes a necessary component of the formulation of the common good, which we expect to transcend private interests and permit the situating of the group in rapport with reality and the values of the community. Having become the guarantee of the collective solidarity, the common good becomes at the same time a check on popular sovereignty and a signal for what is permitted and what is not.

The serious malaise from which legitimacy suffers in our day thus lies in the fact that we do not know its final objective. Legitimacy of what, of whom, for what? The State itself is conceived as a provisional cadre of a multitude subject to chance like a sack of marbles that left to itself would roll down the slope that was the steepest. We pretend not to know that the State is an organic unity, a network of interactions endowed with a global meaning that transcends each of them. On the contrary, we represent it as a mask of rationality pasted over an anarchy.

The degradation of the concept of the common good serves as a cause for the people to protest differentiation, indispensable for a healthy social body, as we have known since Menenius Agrippa. For classical and medieval thought, the *socius* is one who fulfills a function with the confidence that the others will fulfill theirs. It is not a contractual arrangement; this quasi-certainty flows from the sense of the common good, a principle of the social order. Now, as J.-P. Dupuy has shown<sup>24</sup> a society that gives itself its final definition and does not attach itself to any extra-social mooring never accepts articulation according to State duties, division of tasks and functions, nor the inequalities that result from them. Even more: when everything is contingency, citizens consider what they do not like as arbitrary, that is, whatever does not bring them immediate satisfaction. Not only do they denounce the contingency of the State—and therefore laws, institutions, mediations—but their worst suspicions are confirmed by public discourse, in its increasing effort to demythify political and social relationships.<sup>25</sup> Thus we witness the erosion of the founding myth

<sup>24</sup> *Ordre et désordres*, inquiry into a new paradigm, Seuil, 1982.

<sup>25</sup> A curious symptom of this demystification was the assassination attempt on President Reagan by young John Hinckley in 1982. The affair had no follow-up, as if the assassination of a chief of state had less importance than an ordinary assassination. The absence of sanction shows to what point the presidential function is desacralized in the United States, which is presented today as a model society.



### *On Legitimacy*

and emergence of a new kind of disorder: the aggressiveness of self-made men who think everything is permitted them because all the goods and rights of this world have become accessible to them, at least in theory, through the sole means of the will to conquer. A final illustration, carried to its absurd consequences, of the Kantian thesis.

How, under these conditions, can legitimacy continue to have meaning? Dupuy observes that when modern attention is focused on traditional social order, it is astonished by a reference to a good that is not accessible to all, that remains the measure of the rights and duties of each (pp. 169-170). We answer that ultimate political reality is not defined by the holders of power, as today, when it is denied or scoffed at and with it the authentic sources of legitimacy. Human rights end by detaching the individual from the common good, becoming causes of antagonisms. What we then call *consensus*—a pale substitute for the common good—is no longer anything but an ephemeral statistical fact, the product of an automatism unleashed by some resounding slogan.

Our societies that call themselves “open” are in reality closed in upon themselves by a sort of implosion, an analogy to what astronomers call “black holes.” A closed society means a society that sees itself as autonomous, the only absolute point of reference for itself, furnishing its living space as it sees fit and doubtlessly authorized by Kantian postulates. In appearance, it is a fortunate society that has exorcized its demons, substituting them with the light of reason. However, in chasing out the demons it has at the same time discarded any sacred dimension and any reference to the ultimate source of meanings. From then on, these will come from the play of interests (the “invisible hand” of the classical economists), thus from something highly unstable, shifting, subject to the caprices of chance. What one thought to have gained from this is absolute rationality, self-management by all the citizens, their openness with each other. What actually happens in this demystification of the social, this negation of any external point of reference, is that all the weight that was previously put on the sacred is now put on the social. The problems of the collectivity become the new idols of the tribe,<sup>26</sup> because we have abolished the

<sup>26</sup> What is called the “American way of life” is in sum only the absolute value

wholesome distance that alone allows us to reflect on them. We have lost sight of the sense of proportion that puts things in place with regard to the common and legitimate good. The politicization and ideologization of the problems of the moment are nothing other than their elevation to the rank of idols. Everything is urgent; everything requires an immediate solution, because in the name of what could we make each citizen wait for what he considers his due, in the name of what signification could we declare something impossible, unrealizable, inopportune or merely contrary to the national interest?

Only a few words are necessary to end these observations. The contractual theory of society, based on the hypothesis that reality is unknowable, finds in pure reason another base on which to establish political legitimacy. A fragile base because it is gratuitous: the citizen feels confusedly that laws that rest only on private interest are without a legitimate, justifying foundation; we could speak of a *juridical solipsism* in which Kant and Kelsen enclose us.

Through logical consequence, the result is a more or less contained anarchy, by a more or less ephemeral and more or less general prosperity, at the end of this 20th century. Take away this possibility and society explodes. The citizen who already "takes the law on himself" through the means of democratic institutions is tempted to "make the law" without going through the intermediary of State and bureaucratic structures.

In the last analysis, the State, juridical and social system, can only find its equilibrium in terms of an external and transcendental reference as a support and whose norms permit it to act in judgment on itself.

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accorded to things and events of daily life, in a society that has lost the meaning of any external reference. All efforts, all resources are bent in more and more futile gestures, up to the idolization of the daily, the routine, automatism.