



# THE POLITICS OF MACHINERY - LAW AND AUTHORITY IN THE SOVEREIGNTY GAMES

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*" Oh, God! I could be bounded in a nutshell, and count myself a king of infinite space, were it not that I have bad dreams." - Hamlet, II.ii*

*"...I noticed that the sidewalk billboards around Constitution Plaza were advertising some new brand or other of American cigarettes. The fact pained me, for I realised that the wide and ceaseless universe was already slipping away from her and that this slight change was the first of an endless series. The universe may change but not me, I thought with a certain sad vanity" Jorge Luis Borges - The Aleph*

## TABLE OF CONTENTS

### ACKNOWLEDGES

INTRODUCTION.....	8
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### Chapter I - THE POSTCARD AND THE WRONG ADDRESS.....18

I.1. - To whom Should I Address this Theme .....	19
I.2. - The Political Postcard.....	22
I.2.1 Fragments of Europe.....	23
I.3. - Seeking for Methods to Rationalize a Truth .....	28
I.3.1. - The Case of Margin of Appreciation .....	28
I.3.2 Jumping out.....	28
I.4. - The Case of Caroline von Hannover/Monaco.....	29
I.4.1 - Reverse "solange" .....	30
I.5. - Europe and its Representation of Western Condition.....	32
I.5.1 A kind of Ghost .....	34
I.5.2 Technology.....	35
I.5.2.1 Frustration.....	38
I.5.2.2 Marx and Blanchot.....	39
I.6 - Dilemmas of European Court of Human Rights.....	41
I.6.1 Recalling? .....	42

### Chapter II - TRANSCONSTITUTIONALISM AND MEMORY.....43

II.1 - Some Considerations.....	44
II.1.1 About Neves.....	45
II. 2. A hermeneutical understanding of <i>Transconstitutionalism</i> ...46	
II.2.1 Transconstitutionalism and Exeperience.....	47
II.2.1.1 Conversation.....	48
II.3. Transconstitutionalism and the <i>Trial of Experience</i> : ducking tropes...49	
II.3.1 Transconstitutionalism and Decision-Making.....	51
II.3.2 Transconstitutionalism and the Margin of Appreciation .....	54
II.3.3 The Replication .....	57
II.3.3.1 - The Problem Remaining .....	60
II.4 - Producing Text.....	63
II.4.1 - Reading the Instructions.....	64
II.4.2 - Old New Stuff .....	66
II.4.3 - The Metaphysical Insistence .....	70
II.5 Transversal Rationality.....	72

II.5.1 Disassociations.....	74
II.5.2 Blindness.....	76
II.5.2.1 Transconstitutionalism and the Margin of Appreciation II ...	79
II.5.3 Law's Rhetoric.....	83
 CHAPTER III - THE DISASSOCIATION BETWEEN LAW AND COMMUNITY .....	84
III.1 Separating Things? .....	85
III.1.1 Why do we need concepts?.....	86
III.1.2 The Possibility of Fundamental Rights.....	88
III.2 Uncanny.....	91
III.2.1 The Technical Writing .....	92
III.2.1.1 - Associations.....	94
III.3 The Neighbor.....	95
III.3.1 The Political Dimension of the Neighbor.....	97
III.3.2 Thrownness .....	98
III.3.2.1 The Isolate Decision.....	100
III.3. The Imperatives of a Decision-Making.....	101
III.4 Being in the Human Rights .....	101
III.4.1 Tracking the Essence.....	104
III.4.2 - Mediation.....	105
III.4.3 - Loosing Track.....	107
III.4.3.1 - The Test.....	108
III.5 - Failing.....	110
III.5.1 It is all about text.....	112
III.5.2... Loosing the Other out of Sight .....	114
III.5.2.1...Memory and Reality.....	115
III.5.3...The Weigh of the History.....	117
III.5.3.1...The Many Trial.....	119
III.6 - The Impossible Community?.....	121
III.6.1 Ulysses.....	123
 CHAPTER IV The "Other" and the Western Metaphysical Condition .....	125
IV.1 - The Neutralization .....	126
IV.1.1 The invention of the Other - on Derrida's remarks.....	129
IV.1.1.2 - "Psyche: Invention of the Other.".....	130
IV.2 Humanity and Human's Right and the "Other" .....	135
IV.2.1 The Machine os Reading.....	138
IV.2.1.1 The Sovereign before the Law .....	139

IV.3 The Beasties are chasing Derrida .....	140
IV.3.1 - Leviathan and Schmitt: Politics above everything .....	140
IV.3.1.1 The Artificial Soul.....	142
IV.3.2. - The Fabular Dimension and the Sovereignty .....	144
IV.3.2.1 The Reason of the Strongest.....	145
IV.3.3 - Animals, Beasties, and Humans .....	147
IV.3.4. - The Prince has learned to be a Beast.....	152
IV.3.5. The Beast and the Sovereign among the Neighbor - Who is the Friend?; Who is the Enemy?.....	155
IV.3.5.1 Friend/Enemy Remarks.....	158
IV.4 Considerations on neutrality.....	159
IV.4.1. - On Puppet's Theater and "Thrownness" (Geworvenheit) .....	159
IV.4.2 Without Soul .....	161
IV.4.2.1 - Machine and Repetition.....	163
IV.4.2.2 Machine and Violence .....	166
IV.5. The Authority of Law (Mystical) and Being-with-Other ( <i>miteinander</i> ) .....	168
IV.5.1 Articulations.....	170
IV.5.1.1 Technology and "rule of life" - The Case of Lambert and Others v. France.....	171
IV.5.2 Individual Machines?.....	172
IV.5.2.1 Artificial Techniques .....	176
IV.6. Human and Fundamental Rights and the neutral - The Demand for an Authority..	180
IV.6.1 - The Absolute Power of Autonomy.....	181
VI.6.1.1 The Dwelling of a Friend .....	182
IV.6.1.1.1 - " <i>Oh my friends, there is no friends</i> " .....	182

CHAPTER V - " WE WILL DO AND WE WILL HEAR" [*NA' ASEH VE'NISHMA*] (EXODUS 24:7).....188

V.1.....Justice and Temptation .....	190
V.1.2. - The <i>Autrui</i> .....	191
V.1.2.1 - Who is the <i>autrui II</i> ?.....	194
V.1.2.2 - <i>Rechtswissenschaft</i> and the ethics of the Other...	195
V.1.2.3 - .....The Machine needs to be Trained .....	198
V.2.1 - Levinas: Justice and Truth .....	199
V.2.2 - Derrida and Violence.....	200
V.2.2.1 - "Admiration to Mandela.".....	201
V.2.2.2 - The demand for a repetition.....	205
V.2.2.3 - Benjamin and critical inquiries on justice .....	209

V.3 - Kafka as painter of the Western Condition .....	215
V.3.1 - The Test.....	217
V.3.2. Mandela Before the Law.....	228
V.4. - The mechanization of human and fundamental rights and the end of justice ....	224
V.4.1 - how mechanical is the representation of the decision-making process .	225
V.4.2 - beyond the vain philosophy .....	226
V.4.3 - From Politics of Friendship.....	228
V.4.3.1 - the asymmetry of rights and life.....	229
V.4.3.2 - the mechanical production of decisions.....	229
CONCLUSION.....	230
BIBLIOGRAPHY.....	233

## I. Introduction

And if we were living without rights, without a constitution, and/or without being looking for stability or harmony? I have a slight impression that Constitution and its rights have been concealing an essential instability between words and the events designated by those words. Further, since society acquired its autonomy, the canons of justice and community are foreigners for the law's system and even for the social system.

The genius of Shakespeare gave us the hint of his feeling by designed a character that claimed: "things are out of joint." A man who sought to make justice by his own hand after having summoned whit a gosht (a spirit?). Let's do not forget that the ghost affirmed that he (it) was his father, although did not show his face, leaving it masked by a helm. Derrida brilliant associated this passage with Pre-Socratic Fragments, chiefly Anaximander's Fragment, it was so precious to Heidegger. What all those thinkers had in common? Basically, they were in the loop that the way of the West is characterized by the secrecy in language and its undecidability<sup>1</sup>.

Maurice Blanchot in few pages was able to synthesize the writings of Heraclitus. Further, the movement performed between things, and words were always present in Blanchot's writings. We cannot deny that we are not able to think like that, particularly in law's world. We have been conditioned to inference, looking for outcomes, to periods, well-structured arguments. It drove us to the necessity of naming everything<sup>2</sup>.

How could we bring those puzzles to legal thought? It is an outsize challenge Regarding the conventional way which academy has demanding from its scholars, and it is a sort of risk to remain as an outsider. Most of my arguments and the writers that I am going to employ are foreign to law. We have to take on account that Germans, as usual, are

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<sup>1</sup> Maurice Blanchot, *The Infinite Conversation* (Minneapolis/London: University of Minnesota Press, 1993), p. 87-8. "But it is of great consequence that this severe language, which opens as though for the first time onto the depth of simple words, should reintroduce and reinvent the power of enigma and the part allotted to the sacred in writing; then, equally so, that this obscurity to which all understanding is joined should be affirmed here in this first example as a necessity of mastery, as a sign of rigor and an exigency of the most attentive and most contained speech, supremely balanced between the contraries that it tests, faithful to double meaning, but only out of fidelity to meaning's simplicity, and in this way calling upon us never to be content with a reading that would have a single sense or direction".

<sup>2</sup> Ibidem, p.91. "Fundamentally, what is language for Heraclitus, what speaks essentially in things, in words, and in the crossed or harmonious passage from the one to the other, and finally, in everything that shows itself that hides, is Difference itself; mysterious because always different from what express it, and such that there is nothing that does not say it and in saying does not refer back to it, but such also that everything speaks because of this difference that remains unsayable".

inflexible to accept anything that is not part of their routine. I would add that only a German scholar would have the right to do something that does not follow the conventions.

But I still have not yet begun. I have problems to begin as well I feel myself haunted by the difficulty of being sharp and straight. So many time I was wondering that all the rules set to write a thesis were only part of my imagination. I hear, I read, and I can gaze law, almost every hour. An esthetic of incoherence is the impression of my experience. That is the reason, of course, there are many others, that I refuse to yes to the standards of Law School.

Still, this work seeks out to link the specter of the West to some ordinaries juridical institutions, which have been lacking explanation or they are not so able to win over any reasonable reader. I will not attempt to structure those institutes and cannons and offer a dogmatic justification for them. On the contrary, my goal is to draw a feasible reason for the bog down of juridical thinking. I withdraw those arguments from other sources that are not juridical one, forestalling of falling into prey.

The example that I put forth is the called "Doctrine of the Margin of Appreciation" and its association with fundamental and human rights, and democracy in the European Union. I will not extend any definition to the "margin of appreciation" or to any other institute. We already have sufficient statements of meanings about it.

My hunch is to spark other debate that has been overlooked by the juridical convictions, a sound high and mighty attitude from those who are bearing the inherence of set things. I will take a crack at associating my critics and skepticism about the law to the idea of community. I utterly believe that part of the mysteries and riddles that we have been trying to solve are resting in some scattering. In other words, the dissociation of subjects, following by the artificial association of other ideas, is somehow behind of provoking the instability of modern law.

## **II. Methodology**

It is currently accepted, especially in German, that a dissertation must follow only two methods: normative or empirical. Anything else that does not go toward those methods is not going to be considered science or an academical work. Evidently that this experience

in Germany Legal School has sparked me to bring new arguments to such narrow-minded environment. Although Germans are utter inflexible and inclined to not accept an argument from a lower ranking scholar, naturally there are exceptions, I am going to use a singular method to my madness. But before I get into more detail about my approach inspired in/by Derrida, I shall offer you a few arguments to explain the reason(s) I rejected normative and empirical methods. First of all, working under of some method it would go against my theoretical background, especially with those methods that were formulated under the circumstances of a metaphysical epoch. In other words, normative and empiric were conceived to legitimize a scientific and academic discourse by excluding other forms of observations. Both are forms of an outbreak of violence that insist on affirming that work is only scientific if it follows a particular set of rules.

Against those methods, my inquiries and feelings have always been interrogating if this violence of excluding any other perspective would no be a way of keeping the university ruled by bureaucracy, politician, and dummenheads that are not able to seize any other theory or are just not interesting in getting in touch with a different perspective.

Evidently, those normative and empirical approaches have been produced countless jaw breaking works, and works that have changed the way of thinking of a subjected. What I wish to let clear is that in Legal Department a philosopher, a social scientist or a physical would be shocked with the particular way that researches are conducted, and the discussion of methods is almost permanently closed.

It has been quasi a consensus that normative analyses must formulate its arguments by managing arguments and reasons within a normative frame. All the same, there is a jumble between theoretical approach and normative. Furthermore, normative perspective is a part of a broad way to debate subjects hypothetically. Notwithstanding, not every theory seeks to remain only in theory. The chief feature of normative is to frame a dogmatic perspective, excluding any other perspective which does fit it. Further, to elaborate a critic following this standard, one must employ the same kind of words, reasons, and arguments that have been used since the first assumption. In this particular way of researching, I only could elaborate and address critics to whom has employed the same type of perspective.

The same reason can be applied to an empirical approach. Moreover, empirical has also been equivocally misunderstanding with practice. Evidently, that practice is the focus of an empirical study. However, an empirical research may be grounded in how the Courts have been using some reasons. Thus, it is not so clear when theory and empirical are entirely separated.

Both methods are embedded in a tradition that seeks to organize the reason and to make a unit, roughly speaking. The outcome should be the enlightenment of the problem. So to speak, the question or critic that you have first thought must be written obeying a distinct determined set of commands that are labeled as normative or empirical. On this angle, it would be almost impossible to create a work based on dialectic or a self-referentiality. A notion of truth remains behind the speech of normative and empirical.

To realize how poisonous may be an unreflected association with any methods, it is good to emphasize that most of them were elaborated to a scientific debate that happened within biological and exact sciences. Naturally, it makes more sense if we follow the division of knowledge, to understand how an empirical or normative research can happen in those fields. By lending those methodologies without reflection or a necessary adjustment, it drove the legal reason to blindness. Nowadays, legal reason celebrates more a form of showing than its substance. Again, any reflection that does fit to those corollaries is excluded and labeled as bad science.

A method may reinforce the system of presuppositions. Hence, the law of performative utterance collides with any other way of thinking. Was not by this reason that Austin insisted in barring poetry as a coherent form of an act of speech?<sup>3</sup> Any method that seeks a coherence and a result based exclusively in truth are going to produce injustice before the trial begins. The system of presuppositions hides that the upshot is given with chief problem. Theory or practice can be manipulated since they subject is attached to a very undefinable meaning.

What is the effect that a method can have in work still is not very clear? Since deconstructivism and its followers have been writing works that are not under the traditional

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<sup>3</sup> J. Hillis Miller, *Speech Act in Literature* (Stanford: Stanford University Press, 2001), p. 55-62.

convention, I feel myself inspired by the Frenchs and the Americans to write a work that has not to do organization and imposed language. <sup>4</sup>

I want to avoid (*mich vermeide*) to use the term deconstruction due to its overusing, and it also became a word that brings more confusion than clarity to the readers. Yet I cannot deny that this work as everything to do with the deconstructivism approach, especially with the Yale School of Deconstructionism. By employing this "method," I am looking for a political conclusion rather than a dogmatic or systematic one. By political outcome, I aim to enlighten a debate that had loosed its relevance to idle talk or ambiguity. It has been contaminating mass media and scholars since a while, the affirmation that everything is political. It reduced politics to a meaningless or empty term. To do politics was one essential activity of the *Dasein* and one possible to manifest it.

Deconstruction would please me help to follow a different perspective that has characterized the West Society. It would a way to understand events based on a postcard service, in which I would have to begin by my address, by my individual way to understand the world based on my address, my neighborhood, my city, my country, so forth. Deconstructions allow thinking the problem and the event differently, by focussing in what seems empty. Further, it makes possible to ferry out that the emptiness is, in fact, something which was for some reason kept under the wrap.

The truth is necessary, but it contains a gift. To know the truth or to have access to it is also to unknown its inceptions and what has been covered up. Still and all, what we could do without the truth? On this account, this work looks more for a reflection rather than a conclusion.

#### **IV. Structure**

To wind up the introduction, I will quickly summarize each following chapter and the presented argument. *The Politics of Technicalization* argues that law is a system

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<sup>4</sup> Geoffrey Bennington; Jacques Derrida, *Jacques Derrida* (Chicago/London: The University of Chicago Press, 1993), p.20. "Saying that there is no secure starting point does mean that one starts at random. You always start somewhere, but somewhere is never just anywhere. Denouncing or even demanding a 'just anywhere' is already ruled by a philosophical demand: one can only identify the 'just anywhere' (and therefore the random) on the - at least promised - basis of a true foundation, which alone can make you believe in the freedom or irresponsibility of a 'just anywhere.' The somewhere where you always start is overdetermined by historical, political, philosophical, and phantasmic structures that in principle can never be fully controlled or made explicit."

producing aberrations due to the concealments and flaws. Indeed the aberration that we can realize is nothing else than the Western Society has been reproducing during centuries. The primordial task of the language is to keep the Being in a condition of truth. *The Politics of Technicalization* moots that the juridical system needs to be set within a culture of an organization, or to put things that are not in joint. It would sustain a position that reason is engaged with truth and who can reach it, would be able to dissolve conflicts and paradoxes until a likely harmonization. The most of the theoretical attempts to enlighten and to organize this matter have bogged down due to the same trick that any other juridical literature has been subjected: they believe that chaos is temporary.

Because of the logic of harmonization or adequacy jurists firmly believe that by following a formula or a reason society would be set out. Nevertheless, they have forgotten that the meaning of community is still concealed in obscurity, and it has remained as a trace. The philosophy of Jacques Derrida and Emmanuel Levinas represents, in my opinion, the closest that we could get to unconcealed this subject in the present. Patently, both kept a dialogue with the legacy of Martin Heidegger. Furthermore, literature has also got near to illustrate how justice and law are pretty far to wind their mothball project or goal.

The first chapter describes the ghosts of Europe and the political heritage left from an unknown point of time until the present. It consists of a chapter in which the reader is going to have some doubt especially about what has been teaching. The project aims to track how ideas are "out of joint." Further, it attempts to make clear that any initiative to harmonize the chaos "fails like a prey" in its own trap. By employing Europe's phenomenological idea from Rodolphe Gasché, and the specter surrounding Europe, according to Derrida's jaw breaking book *Specters of Marx*, I seek to introduce an apparently irrelevant subject, comparing it to chief topics that have been studied through phenomenology and deconstructivism approaches.

The doctrine of the margin of appreciation it is a piece of the puzzle that jurists and philosophers have been struggling to work out. In my modest opinion, it is a reflection of bootless methods and reasons that have been elaborated without any creativity or rumination. Following Derrida and the phenomenological school, one possible answer and elucidation for the purpose of those reasons without substance would be how the Western Society was or has been envisaged.

Moreover, for a long time, it has been played up, we live under a circumstance of repetitions of false information and lore. Such condition was warned by Ancient Greeks, and it is one of the main biblical concerning. Heidegger would call it concealment and unconcealment. We have grasped the concepts in a wrong way, or they have not been revealed in its whole totality. It would result in frustration. That is why Heidegger points out that *Dasein* lives the most part of his life in frustration (*Täuschung*).

Hence, concepts like "margin of appreciation," balance, principles are outermost to constructions like justice, democracy, society, so forth. They are tied and tangled, but at the same moment, they have their meaning and identity. To elaborate any argument or reason, there is a sort of a mandatory reasoning demanding law's enforcement through connecting those terms. Supposedly, a satisfactory conclusion, in other words, when those terms are organized according to what has been spread out. The illusion that has been making Westerns to believe that they are living in a situation of truth, and at any moment a decision, an institution or a method will come up with the harmony that we have been waiting for, is going to remain. It is very similar of a Münchhausen's Trilemma, in which any truth cannot be proved because the proof cannot prove of being either truth. In a nutshell, the first chapter sets out the frames that we are going to come across in further chapters.

The second chapter introduces an example of a prominent juridical theory that flunked because it has ignored the symbolic dimension of the way of the West, regarding its influence in almost every thought and identity, as well the misinterpretation of meanings that were elaborated in Ancient Greece. The theory that I have chosen is called "*Transconstitutionalism*." It was embellished by Marcelo Neves, a Brazilian professor who has expressed through his work the way that a province has been affected by this condition.

Roughly speaking, *Transconstitutionalism* has to tack a crack at the definition of the constitutional's structure and its semantic. In this perspective, a constitution cannot only be described as being the highest national law, which sets the justification of any other law and juridical agency. Further, due to the observation that the constitutional's semantics has been expanding beyond the frontiers, and similar constitutional's issues have been noticed in different types of courts and juridical levels, it would be necessary to set up a way that could make the dialogue between courts possible. To Marcelo Neves, if we do not frame a way, society could fall into a hazard situation, in which any court could give a different rejoinder to the same problem.

*Transconstitutionalism* plays up the structural level, and in my point of view, it has left aside utter philosophical questions that could better structure the theory in question. For instance, the deed of writing a decision could be compared to any ordinary act of writing. It would implicate that the biography and signature of the judge has an uttermost importance. Moreover, some cornerstones of juridical thinking are still present in the *Transconstitutionalism*, for example, the neutral and it has assumed that repetition is what law has been thinking what it is.

Although *Transconstitutionalism* is a quite well structured and bold work, it "fell prey" to what Søren Kierkegaard called attention almost two hundred years ago, to the mixing up between repetition and memory. Likewise, it slights to the fact that even in the case of a well successful dialogue between or among legal orders, human and fundamental rights, as well the meaning of the constitution, are still going to be concealed. In other words, *Transconstitutionalism* does not provide any light to our wrong grasped from concepts. Still, by stressed the structure level, it does not go to the bottom, in which remain one the most sensitive issue, the in which every single constitutional question is reproduced. So to speak, it has not investigated how *Transconstiuttionalism* could bear upon the "being-with-one-another."

The third chapter brief structures the notion of community. It is important to offer a reader a notion of community and its challenges. Moreover, it seeks to illustrate how the idea of community is somehow opposite to the way that positive law has been taking a track of the issues that are paradoxlize by the modernity.

As well, it prepares the reader to both next chapters. So to speak, it has the goal to keep in the reader's mind a notion, even vague, about the secrecy of being a community and how detached law's system and machinery is from the neighbor's love hornet's nest.

The fourth chapter seeks to bring how the sovereignty presence of the other turmoils the concept of fundamental and human rights. To be more clear, modern rights were conceived as a reflection of the self, without being thought of the Other. The Other remains the same of the self without any differentiation. This idea comes toward to what Levinas called the "face"; as the "face" of the other being the limits of my actions and thoughts.

The Other could be shown as a face that emphasizes the mortal and finitude. This particularity could turn the experience of "being-with-one-other" to the experience of the

Other as an absolute. The political-juridical tradition has been striving to solve this question by working with the concept of political-theology and the neighbor. Although I bring up some of the issues concerning the neighbor, my assumption in this chapter is how the idea of community cannot be reached by the current way of thinking the law. Not only because of the problem of the neutral and the Other, as well the outside challenge to track and bound sovereignty.

Things get more puzzle by introducing Derrida's sovereignty notion, especially grew in his last works and seminars. We could state that there is a dialogue between Derrida and Levinas, just like Blanchot had had with Bataille. Levinas made explicit that his philosophy is rooted in his biblical understandings, and also was an attempt to go beyond Heidegger radical ontology. On the other hand, Derrida began in the later 80's to keep a distance with Heidegger, though he would always come back to some of Heidegger's rumination, for example, the notion of world-finitude-solitude in *The Beast & the Sovereign Vol. II*. During the later 80's until his death, Derrida began a project about responsibility, which bound to religious narrative to comprehend the Western Society. We could say that Derrida employed his style to reveal his quarrels about the Occident, opposing Levinas exegetical way to address his apprehensions, much influenced by the methods employed by the rabbis to comment the Thora.

Thus, the penultimate chapter aims to clarify that the concept of rights that we have been working faces this worldly, but still enigmatic condition of sovereignty. Further, this is the core of the community's problem or how to reach neighbor's love is still a simulacrum.

The last chapter sets up a possible inference of the failure of neighbor's love to law. I will briefly describe the notion of justice according to Levinas, and I will detail the idea of justice formulated by Derrida. To have a better feeling about what I am trying to talk, both philosophers had in mind that justice cannot be without violence.

I think it is possible to link both descriptions to our preliminary question, or the implication of the concealment. The autonomy, supposedly acquired by the law after the American Independency and the French Revolution, should have been observed with a certain parsimony. The autonomy also has a negative side, using a Luhmann's lexicon. By re-introducing the difference according to its programs and limits, it winds up to metabolize the concealment.

Furthermore, law's machinery is somehow responsible for including in our imaginary the possibility of justice. It has been parroted and whispered that things should follow a particular path and cannons so that order would be set in our society. We have the vague idea that the King of God could be organized in our realm because now we reached the enlightenment through the rationality, and we have a Constitution that would marshal our juridical and political order, and by chance the ethical dimension too. Divine justice would not be no more necessary or expected because people have been able to learn with its mistakes and to cope with any extreme or absurd context, for instance, in the case of civil war.

All the same, we still have been caught by our arrangements and inventions. It seems that we may have loose sight about the intuition or feelings on justice, and we do not pinpoint exactly what we mean by modern justice. Love's neighbor or the beginning of a communitarian project has bogged down due to our insistence in restricting our language to rational standards without knowing the denotation of reasoning. We have abandoned the spiritual thoughts on community and justice. By spiritual I do not mean that we should be embedded to the transcendence of a God, but I will follow the notion brought by Walter Benjamin and Rosenzweig. To wind up the tension between rights and community is the result of absence between of the excess of rational yardsticks.

## CHAPTER I - THE POSTCARD AND THE WRONG ADDRESS

A book recently written by Geoffrey Bennington<sup>5</sup> has seized my attention to the fact that obvious flaw, ambiguity, idle talk, or even tropes can be duplicated over and over though centuries. Such condition was subject of Greek's philosophers concerning, from Pre-Socratic up to Aristotle. Basically, it is how a word may be distorted, finding no match with its origin, and even though, as a machine, this crookedness keeps up without stopping. Ignoring Heidegger past and his association with Nazi regime, and the over interpretation that every comma and period that he had written, proved his willing to be a Nazi, his puzzled and convoluted writing brought back the attention for this problem, once suggested by the Greeks.

Heidegger claimed, in a nutshell, that since *Dasein*<sup>6</sup> is in constantly frustration (*Trug und Täuschung*) it due to the disassociation between concealment and unconcealment that happens between the event and its course. The frustration comes from the result that *Dasein* present itself by being in condition of truth and never presents itself in condition of being false. In other words, our primary way to interact with the given world and with the other (*miteinander*) is to hold ourselves in a condition that the given is truth and was formulated or created to seek the truth. All the same, we tend to ignore that when we are in a condition of interaction, by performing rhetoric, for instance, tropes, figure of language, ambiguity, so forth, may outcome in *pseudos*<sup>7</sup>.

The task of the philosophy would to zone off those asymmetries and to reveal that what is behind the curtains are not necessary what we have been thinking about, since philosophy is essentially engaged with the seeking of the truth. As Heidegger had suggested, this question was already concerning Anaximander, who supposedly wrote the oldest fragment of writing in the West.

What I have been putting forward is that in law, all those disassociations have taking place either. Constitution, freedom, equality, interpretation, so on, has acquired a meaning that may not be corresponding to their real significance, and because of that the West is

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<sup>5</sup> Geoffrey Bennington, *Scatter I - The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p. 1-9.

<sup>6</sup> I will not translate *Dasein* as "Being" or "Beying" according many translations have done. In my opinion it is not a translatable word, since even in German it has not a frame.

<sup>7</sup> Geoffrey Bennington, *Scatter I - The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p. 48-102.

under a condition of distrust with politics and with legal system. A plenty of terms and jargons have been used to persuade and to give to speeches, decisions, books, a political and humanitarian style that turns the society blind to real fact that we have been living in a context of manipulation, idle talk, and aberrations produced by different sources. One of them is the law's system, and about I will present my argument throughout this work.

Disassociation has been lately one of the most disturbed subjects in philosophy. Law has avoided to nudge the subject, and pivoting its attention in methodology and balance (*Abwägung*), whatsoever. It is undeniable that concealment and unconcealment is a tortuous and puzzled topic, even in philosophy. Due to I am going only to scratch the surface. It is possible that I can do in the moment.

Typically, looking for an answer that would satisfy the audience is what we have basically experiencing in the academy. For the main problem of this work, roughly speaking, how a community is possible, regarding the way of law's system operates, many scholars believes that Teubner has already given the solution by claiming that the dissolution of paradoxes rises the possibility of other paradoxes; or Karl-Heinz Ladeur by stating that it is just a matter of culture. Both perspectives do not hold any water if we regard that the rise of the constitution and the autonomy of law's system in late 18th introduced a new symbolic dimension of rights and society, but it was never enough to promote solidarity or to clarify what rights and responsibility has to with society. Unless you believe that the task of scholar and tribunals is to organize the things and to wait for a "new same issue" to come, and it is how the world is, both liberal theories of thinking on law cannot be follow by who believes that the figure of the community and the Other has been ignored most of the law's theories.

### **I.1. - To whom Should I Address this Theme**

As Gasché<sup>8</sup> advocates, Europe is not only a matter of geographical reason, but it could be interpreted as an idea, even though a puzzled one. On this account to grasp and pinpoint the idea of Europe can mean an enormous challenge, whereas Gasché seeks through Husserl, Heidegger, Patocka and Derrida a common point, a harmonious outcome is

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<sup>8</sup> Rodolphe Gasché, *Europe, or the Infinite Task. A Study of a Philosophical Concept* (Stanford: University of Stanford Press, 2009), p.1-20. See also Jan Patocka, *Plato and Europe* (Stanford: Stanford University Press, 2002), p.88-97. Jean-Luc Nancy, "La naissance continuée de l'Europe". In. *Le désir d' Europe* (Strasbourg: Carrefour des Littératures de Strasbourg, 1992), p.235-55.

unlikely. Be as it may, Europe or may refer it as being Western Society addresses plenty of particular problems due to its past that is still in some form being repeated. Political-theology (Christian-Jewish) is a recurrent subject that is blamed to be responsible for an institutional distortion. On the other hand, modern political questions may be on the spot for not having to deal with theological questions or to put too much faith that the rationalism brought by the *Aufklärung* or *Illuminism's* has inaugurated an age of reason, in which miracles have gradually received less attention<sup>9</sup>.

Academically speaking, scholars in Western have been teaching and learning through a dogmatism and moralism that have canonized the speech and now we begin to bear the outcome of this "methodology." Hence, it was established a juxtaposition between transcendental principal and metaphysic with the burden of ideologies. So to speak, knowledge is dependent (*Abhängig*) from concepts, which may be empirical or potential to dwell. Jurists since their first day in College must learn to deal with subjects keeping it free from ideology and politics. To turn it within reach a technology of language must be introduced. Evidently, it is not a conspiracy or an utter elaborated plan drew by the devil himself. The question concerning the politics of technology remains in the field of concealment and unconcealment .

On the one hand, framing concepts sought to drive society for a common understanding and safeguard of predictable knowledge. On the contrary, law as legal science or *Rechtswissenschaft* sets up a natural essence of terminologies that jurists or the official interpreter have to work with, beforehand it describes the coherent path that further must be employed, though, in contrast with natural sciences, legal science does not necessary report whether their ideas are working or not.

Evidently, law ideas have a trial of experience different from other sciences or systems. Kelsen disagrees peremptorily from Schmitt, in one of the most famous debates of modern law. All the same, the trial of law ideas in the world takes a different path if we carefully read Kafka or Camus. Law itself is nothing technological, nor it is a machine, strictly speaking. But, it is what jurists and official interpreters are going to use to think and

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<sup>9</sup> Franz Rosenzweig, *The Star of Redemption* (Madison: University of Wisconsin Press, 2005), p. 18-51. See also Eric Santner, "Miracles Happen: Benjamin, Rosenzweig, Freud, and the Matter of Neighbor". In. Kenneth Reinhard; Eric Santner; Slavoj Zizek, *The Neighbor - Three Inquiries in Political Theology* (Chicago/London: Chicago University Press, 2005), p.76-9.

operate to make law resembles as it was machinery and its grammar has also hijacked a form of technological organization.

Heidegger<sup>10</sup> would state exactly this way that legal science and legal practice became, in his vocabulary, what was destined to. So, it could be further accessible because it has become within reach by a form of representation. Hence, it would be without question legal science, or even legal philosophy (if that exists), to take up concealment and unconcealment of legal science and legal reasoning., and what it would latently reveal.

By working with juridical concepts and decisions from the European Court of Human Rights, I seek to gather some assumptions from law's imaginary and conjuring with inquiries, regarding a philosophical and critical literary line which question the technological feature of Western Society.

In doing a religious association with Heidegger's conception of technology and our aim, we can challenge some convictions in the world of law. Heidegger seeks to show an existing gap between "techne," conceived by the Greeks, and modern technology. Albeit, Heidegger is on his individual journey to prove the essence of the being, and its connection with freedom is always related to his interpretation of destiny and history<sup>11</sup>.

In the present, after more than a century of astonish debate about the concept and essence of law, for example, the Historical School, Living Law, Jurisprudence of Interests, Jurisprudence of Concepts, and so many others, an idea of law's enforcement based on the supremacy of constitution and international law, which uses "balance" and exegesis as a standard to concretize the legal text has been framed.

In some way, even using questionable conceptions and methods, the modern law has a purpose -perhaps a secret one - to reveal the essence of law through those methods. And by doing it that would also explain the nature of the State and its people. However, the unconcealment aspect would lie in the fact that a secularism or a functional differentiation among social systems cuts off any odds to associate law and rights with a communitarian past, or theological-political frame of reference or background.

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<sup>10</sup> Martin Heidegger, *The Question Concerning Technology and Other Essays* (New York/London/Toronto/Sydney/New Delhi/Auckland: Harper & Row Publishers, 1977), p.24-35. See also Jan Patočka, "Is Technological Civilization Decatend ,and Why?". In. *Heretical Essays in the Philosophy of History* (Chicago: Open Court, 1966), p. 95-118.

<sup>11</sup> Ibidem. "Always the unconcealment of that which goes upon a way of revealing. Always the destining of revealing holds complete sway over man. But that destining in never a fate that compels. For man becomes truly free only insofar as he belongs to the realm of destining and so becomes one who listens and hears (*Hörender*) and not one who is merely constrained to obey (*Höriger*).

## I.2. - The Political Postcard<sup>12</sup>

Irrespective of what we seek to prove or to test during this work, a political notion is going to chase it. Even when some jurists strive to frame the rules which rule law and its condition, giving rise to a dogmatism, in the moment of a decision, which is set between a nexus of madness and a puzzled repetition, the politics of deconstruction (Destruktion - see Sein und Zeit chap. 6) or the thrownness (Geworfenheit) will reinstate.

Albeit we live under certain conditions that were previously constituted by a notion of rights and a form of law, it does not mean that the times are not out of joint - to use a Shakespearean and Marxist jargon. It also remains as a task of a jurist to dig up a factual and persistent failure of the Western institution to carry out its project of modernism.

The best current example would be the European Union, - besides the United States, though in this case, the cultural-political clash is not so intense as it occurs in Europe - which has been struggling with wars, civil and foreign, throughout its history. The very idea of a European Union came across not only as an economical strategy but also as a political one to reduce or cope with it loomed over a past of civil and continental war.

In a bold and dogmatic fashion, Ulrich Everling defines what anyone should keep in mind as being the matrix of the EU,

Over five decades, a European order has gradually emerged that more or less intensely comprehends, or at least touches upon, most areas of public and private life of the Member States and their citizens. The Member States support this order on the one hand as founders and central actors and are, on the contrary, subject to this order as members and addressees of the law. The citizens of the Member State are immediately connected to the Union and its law by direct rights and obligations<sup>13</sup>

An organized and structured order seeks to materialize peace and union at the supranational level. Still and all, this novelty is only able to come true whereby a reorganization and reinterpretation of a pre-existent knowledge (this affirmation will be detailed in the fourth chapter). So to speak, the political remains embedded in the technological thinking by means of a substantial achievement of a sheer functional differentiation is only feasible in literature.

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<sup>12</sup> Jacques Derrida, *Le carte postale de Socrate à Freud et au-delà* (Paris: Aubier-Flammrion, 1980a), p. 3-34.

<sup>13</sup> Ulrich Everling, "The European Union Between Community and National Policies and Legal Orders." In: Armin von Bogdandy; Jürgen Bast (ed.), *Principles of European Constitutional Law* (Oxford/Portland: Hart Publishing, 2005), p. 677.

In other words, a project and a concretization of a European Community may be seen as fate (*Schicksal*) that is going to bear upon the "the being with other" (*miteinander*). Additionally, any project has its inception in a political moment (*Augenblick*), roughly speaking, which means that the "moment" of foundation is nothing else than a restoration of a dispersed spectral<sup>14</sup>.

### **I.2.1 - Fragments of Europe**

It became commonplace to read and hear that European Union crisis is not only due its economy, but we should attribute it to a legitimacy and governance crisis<sup>15</sup>. Those crude affirmations are the outcome how things were established to thinking in the Western. Crisis and tensions are part of the history of being. The way to deal with it or the solutions were different - between war and peace. Besides it, talking about a crisis of identity, legitimacy, governance, whatsoever, illustrates a temptation of giving to it a more political aspect than juridical, whether we take into account that those authors follow an idea of law's unity and system. It constitutes a form of thinking in which the answers are already given in a dogmatic form. To set the things in the correct place, it would be enough to follow a pre-existent formula.

Nonetheless, even such dogmatic thinking becomes materialized in jurisprudence description, and prescription are twisted with performative language, not necessarily a rhetorical one in the sense of persuasion, but within a meaning that the knowledge must be organized and structured in a certain way that must always express the truth. In other words, every decision, juridical, the decision to set up a European Community, a decision to affirm that crisis is in fact due to a legitimacy crisis, and so on, is trespassed by the performative, which can mean that all decision may be potentially cursed to repeat the past, and consequently to fail.

This is in an certain way close to Bennington's definition of "politics of politics", "is the name for the persistence of the political in the face of all attempted philosophical

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<sup>14</sup> Geoffrey Bennington, *Scatter I - The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p. 238-49.

<sup>15</sup> J. H. H. Weiler, "Deciphering the Political and Legal DNA of European Integration. An Exploratory Essay". In: Julie Dickson; Pavlos Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press, 2012), p.137-58.

resolutions of it and indeed for its ability to turn them (and all other philosophical enterprises) into so many rhetoric-political gestures in spite of themselves"<sup>16</sup>.

To set things in their correct place, now and then, theories and methods arise. It would be the case of the "margin of appreciation," balance (*Abwägung*), "reverse *solange*," and so forth. Speaking in other terms, the image brought by those doctrines or methodologies would be a recurrent way to solve of matter of the neighbor<sup>17</sup>. But modernity has damned the West to think on a rational basis, and any temptation to get to the bottom of legal issues by drawing an argumentation whereby a political-theology would be on top, it would be refuted in almost any debate.

Following the steps from Bennington<sup>18</sup>, the structured world is a form of affirming the end of political in the sense that *pseudos* and *parrhesia* are out of the rational utterance, it is somehow to endorse that metaphysical thinking is going to conceal the world when every action and speech are submitted to a metaphysical logic. There is no way that it may work. The madness or foolish of the decision<sup>19</sup> are recurrent. The persuasive and coherent speaking as a form of demand from the rational thinking can avoid the rhetorical figures and tropes.

For this reason, the matters of a deconstructive thinking are to oppose it to the metaphysical thinking in a way that the future is not given as a feasible conceivable world, which is come to be structured and organized as it follows the rules and protocols established in the present, but in fact, it is nothing else than an agglutination of fragments from the past. Hence, as I have mentioned about legal science, it was not a desire to conceal the clatters motivated by the modern form of secularism at the end of the 18th century by bringing back the Roman way of law thinking reformulated according to a metaphysical form. In this account, we could even state that the Kantian thinking is still guiding the way that law has been operating in the West.

As a result, it also formalizes that the being must remain at the core of law's thinking or reasoning. It means that every plurality or the neighbor is going to be thinking and

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<sup>16</sup> Geoffrey Bennington, *Scatter I - The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p. 241. See also Jacques Derrida, *Politiques de l'amitié* (Paris: Galilée, 1994), p. 3-27.

<sup>17</sup> Eric Santner, "Miracles Happen: Benjamin, Rosenzweig, Freud, and the Matter of Neighbor." In. Kenneth Reinhard; Eric Santner; Slavoj Zizek, *The Neighbor - Three Inquiries in Political Theology* (Chicago/London: Chicago University Press, 2005), p.76.

<sup>18</sup> Geoffrey Bennington, *Scatter I - The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p. 241-4.

<sup>19</sup> See Chapter IV.

dealing according to a law that tears up the substance of the communitarian, as presented in the holy texts, and keeping the form of dispute. The way latter is going to be fulfilled regarding the interest of the "people" and what has remained from the king's two bodies<sup>20</sup>.

### **I.3. - Seeking for Methods to Rationalize a Truth**

#### **I.3.1. - The Case of Margin of Appreciation**

The Doctrine of the Margin of Appreciation might be one of the the best examples to illustrate how methodology and its connection to human rights and fundamental rights are somehow distant from clarity by jurists. The ECHR analyses the question of the Margin of Appreciation as a fuzzy form that seems perfectly reasonable to them. Roughly speaking, the Margin of Appreciation seeks to set up a double trial to decide if the State member violated the European Convention on Human Rights.

The broader question between the relation between the State member constitution and European Convention on Human Rights lies over the fact that a decision at the national level that reduces the individual rights of someone to safeguard a collective interest should not be so strict that may have been against the Convention. This filter aims to leave a significant level of sovereignty to the State member, which includes an extensive and undefined sense of interpretation on the rights and cultural practices of each State member.

Further, the Margin of Appreciation<sup>21</sup> has never been legally outlined before its first appearance in the ECHR, or it was not a rule established by the Convention. Without question, it raises up in State level degree, and its citizens are engaged in a communitarian project. Still, it introduces another utter delicate point, which would be that even within the state's frontiers the theme of neighbor (*Nebensmensche*) and being-with-others (*miteinander Dasein*) far cries to be tempered.

#### **I.3.2 - Jumping out**

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<sup>20</sup> Eric L. Santner, *The Royal Remains. The People's Two Bodies and the Endgames of Sovereignty* (Chicago/London: The University of Chicago Press, 2011), p.63-88.

<sup>21</sup> See Application No. 176/56 (Greece v. the United Kingdom,"Cyprus"), 2 Yearbook of the European Convention 1958-1959.

It is believed that a prescribed rule and a framed definition would be enough to gather the signs of cultural fragmentation and the enigmatic condition that the presence of the other and the neighbor triggers a behavior of deliberate discourtesy. In a topic that we are to analyze more carefully during chapter IV, Derrida states that the sovereign is an outlaw or someone that can call himself above the law. It is not necessary the fact of ignoring the law or believing that the law is addressed only to a particular category of people, but as sovereignty is also an individual attribute, we may interpret that being an outlaw includes the dimension that the presence of the other potentially sets him as one that should not be underpinned by the law and rights. Furthermore, there is no guarantee that the filter employed by the ECHR is going to be used in order to change this symbolic dimension that constitutes the kernel of individual conflicts.

In this sense, Carl Schmitt suggests that jurisprudence would be similar to the aspect of a miracle in modernity<sup>22</sup>. I do not intend to go deeper on this debate, on which Rosenzweig and Freud gave us many insights, however, if jurisprudence has assumed the task of a miracle, it could be addressed by only those who are engaged with Western culture, which now has taken on the Christianity vest; at least, in some issue on religious matter, that they feel that someone may have an opinion on it. On the other hand, some advocate that the "Margin" would have a similar task from Constitutional Courts that would be the protection of minorities<sup>23</sup>. Theoretically it may be correct, but it is not what the ECHR has demonstrated across many decades - we shall analyze it on further chapters. The practice to protect majorities would not be precisely the function of a miracle. Otherwise, the ECHR would be deciding in favor of minorities to enlighten majorities the real aim of the rights.

Evidently, Schmitt was thinking only on national courts when he wrote such an assumption. In the same book, he posits himself against humanism to justify the important and polemical concept of friend/enemy<sup>24</sup> on which the humanist way of thinking could hazard the State due to the "despolitization." In my opinion, "politics" cannot be just vanished due to humanization. Any kind of decision, legal or not, carries a political trace. Moreover, as we are going to see further, Schmitt had a misunderstanding about this matter.

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<sup>22</sup> Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von Souveränität* (Berlin: Duncker & Humblot, 2015a), p. 1-20. See also Eric Santner, "Miracles Happen: Benjamin, Rosenzweig, Freud, and the Matter of Neighbor." In. Kenneth Reinhard; Eric Santner; Slavoj Žižek, *The Neighbor - Three Inquiries in Political Theology* (Chicago/London: Chicago University Press, 2005), p.102-3.

<sup>23</sup> Émile Benvenisti, *Dictionary of Indo-European Concepts and Society* (Chicago: HAU Books, 2016), p. 61-74. See also Jacques Derrida, *Politiques de l'amitié* (Paris: Galilée, 1994), p. 3-31.

<sup>24</sup> See Chapter IV for more detail on this question,

Still, some sustain the idea that with the "Margin" the ECHR should seek a consensus. An idea of consensus, particularly regarding law's conflicts may be crude. First, the historical task of law was never to aim an agreement; otherwise, it would cause blindness in the law. In a brilliant work Marcelo Neves<sup>25</sup> defending the idea that the task of the law is to work with dissensus, attempting to curtail the clash of plurality in the public sphere. Since the beginning of the modernity, which would have start with a function differentiation of the social systems, one feature of the society is the concurrent numbers of different narratives about the same object, on which there is not only one matrix that could state which is one correct. So to speak, a decision is always occasional, and the dissensus would not disappear after the decision, rather, it would come back on other issues. Hence, it would be naïve in a certain way to sustain that "the margin of appreciation" could work out with a possibility of consensus, especially because the modern law is law grounded on subjective freedom, which reflects how it was currently conceived<sup>26</sup>.

Furthermore, if you wish to play with Schmitt's assumption, maybe you should also bring what his friend, Jacob Taubes wrote about Paul, "he clammers out of the consensus between Greek-Jewish-Hellenistic mission-theology, a consensus that, it seems to me, was very, very widespread"<sup>27</sup>. As you may see, perhaps in God's trial, seeking for consensus is not something that can be realized, but it may be accepted as unlikely, though there is a biblical demand to go in pursuing it, like many other mysteries of the holy text.

#### **I.4. - The Case of Caroline von Hannover/Monaco**

Over this work cases from the European Court of Human Rights will serve as an example of an inherent tension between the whole concept of human and fundamental rights and political theology of modernity, particularly the cases that the method (?) of the margin of appreciation was employed. For example, the case of Caroline von Monaco/Hannover;

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<sup>25</sup> Marcelo Neves, *Entre Têmis e Leviatã: uma Relação Difícil - O Estado de Direito a partir e além de Luhmann e Habermas* (São Paulo: Martins Fontes, 2006), p. 102-38.

<sup>26</sup> Thomas Vesting, "Nachbarschaft. Grundrechte und Grundrechtstheorie ind Kultur der Netzwerke", in: Thomas Vesting, Stefan Koriath, Ino Augsberg (org.), *Grundrechte als Phänomene Kollektiver Ordnung* (Tübingen: Mohr Siebeck, 2014), p. 57-86. See also Christoph Menke, *Kritik der Rechte* (Berlin: Suhrkamp, 2015), p. 106-41.

<sup>27</sup> Jacob Taubes, *The Political Theology of Paul* (Stanford: Stanford University Press, 2004), p.24. "This transvaluation turns Jewish-Roman-Hellenistic upper-class theology on its head, the whole mishmash of Hellenism. Sure, Paul is also universal, but by the 'eye of the needle' of the crucified one, which means: transvaluation of all the values of this world".

the case concerning the teaching of French in Belgium; the prohibition of wearing a veil in Switzerland; and so forth.

To get a better feel on what I am attempting to address those cases are illustrations of a flawed understanding of what justice and truth are. As we are going to see soon, such distortion represents a profound impact in the question of communitarian relation, notably on the command of "neighbor love." Furthermore, will of knowledge entail the transformation of law in using methods of technology. First of all, those methods would allow "repetition"; though the idea of repetition advocated by law's system is utter remote from Kierkegaard's lessons of repetitions. In other words, the law system has produced aberrations based on a false comprehension of repetition. Second, law's autonomy has spawned a significant distortion about individuality, and by consequence, it has left the question upon sovereignty forgotten. Thus, the forthcoming chapters will deal with this disjunction making a stab at throwing light on this ghost of the West.

The Case of Caroline von Hannover/Monaco I and II is one that demonstrates more evidences that any sort of reconciliation and seeking for dignity is just a matter of rhetoric or language figure<sup>28</sup>. I will return to this issue with more detail on the next chapter, but it is relevant to keep in mind that in a gap of ten years, the same issue judged in different way by German Tribunal and the European Court of Human Rights. All the same, this case is filled with so many contradictions, ambiguities and idle talks, it has sparked the inconsistency of the way that civil and fundamental rights has been thinking.

Evidently that were countless issues that demonstrated that law system was made up to be unjust. But, the case of Caroline von Hannover/Monaco is the one that even an outsider could detected that something may be quite confusing with law and justice.

#### **I.4.1. - Reverse "solange"**

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<sup>28</sup> Paul de Man, *Allegories of Reading: Figural Language in Rousseau, Nietzsche, Rilke and Proust* (New Haven: Yale University Press, 1982), p. 3-24.

Reverse "solange" as the name explicitly addresses to a new "perspective" of the famous *Solange I* and *II* case, which involved Germany in 1974<sup>29</sup> and 1986<sup>30</sup>. Such doctrine developed by researchers connects to Max Planck Institute from Heidelberg "aims to empower individuals to challenge domestic exercises of public authority which deprive him or her of the substance of a fundamental right in cases of systemic deficiency.<sup>8</sup> The core idea is to open up 'respect for human rights' provided by Article 2 TEU for individual legal actions via Union citizens "<sup>31</sup>.

Although it is a doctrine addressed to the European Court of Justice, it seeks to protect the core of individual rights in the case that a State cannot do it through its juridical practices. Similar to the "Margin of Appreciation Doctrine, Reverse *solange* can also be read as a filter. The critics addressed to the first may be repeated in this topic, particularly on the misreading about what is political, the concept of the rule of law, and to assign the issues of European Community to the economic crisis<sup>32</sup>.

### **I.5. - Europe and its Representation of Western Condition**

European Community is an expression that has nothing to do with the traditional concept of community. Strictly speaking, it is only a pedagogical and dogmatic way to distinct it from International Law<sup>33</sup>. The treaties have taken the same form of international treaties, though its goal it to set a supranational system<sup>34</sup>.

Notwithstanding, analyzing the issues of ECHR and political questions the traditional meaning of community and its dilemmas remain. But which traditional sense? A

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<sup>29</sup> BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß. See also E R. Lanier, "Solange, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities as Lawful Judge", 11 B.C. Int'l & Comp. L. Rev. 1 (1988), <http://lawdigitalcommons.bc.edu/iclr/vol11/iss1/>. Bill Davies, "Resistance to European Law and Constitutional Identity in Germany: Herbert Kraus and Solange in its Intellectual Context" (European Law Journal, Vol. 21, No. 4, July 2015), p. 434–459.

<sup>30</sup> Solange II, BVerfGE 73, 339. See also Christoph U. Schmid, "All Bark no Bite: Notes on the Federal Constitutional Court's 'Bananas Decision' (European Law Journal Vol.7 n.1, March 2001), p.95-113.

<sup>31</sup> Armin von Bogdandy; Carlino Antpöhler; Michael Ioannidis, "Protecting EU values Reverse *Solange* and the Rule of Law Framework". *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-04*. Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2771311](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2771311). Accessed 01.02.2017.

<sup>32</sup> To a correct perspective about political crises triggered by economy see Christian Joerges, "Integration through law and the crisis of law in Europe's emergency", in: Damian Chalmers; Markus Jachtenfuchs; Christian Joerges (eds.), *The End of the Eurocrats' Dream* (Cambridge: Cambridge University Press, 2016), p. 299-331.

<sup>33</sup> TC Hartley, *The Foundations of European Community Law* (Oxford: Oxford University Press, 2007, 6th edition), p. 83.

<sup>34</sup> *Ibidem*, p.83, "Though the Community Treaties are treaties under international law, they are treaties of a particular character. They are treaties that create a new international organization of the supranational kind. They also create a new legal system. For this reason, they may be regarded as a kind of constitution, though that term should not be considered as calling into question their status as treaties".

theological or a communist, or maybe it would be the combination of both? With no doubt, even with a liberal and conservative inclination of ECHR in its interpretations, both the ghost of Marx and Christian concepts of neighbor still haunt those interpretations, always bringing questions and doubts on the particular point of view of the ECHR.

For Derrida, "Haunting would mark the very existence of Europe"<sup>35</sup>. That is because, since Hamlet, Europe has been haunted by the presence of the stranger (*Unheimlich*), not only foreign but after being Europe it has frontiers, delimitations of inside and outside. For Paul Valéry, who is also calling for Hamlet, the within and the outside is haunted by the crisis of the politics<sup>36</sup>. It is significant to recall that Schmitt also wrote a short book on Hamlet<sup>37</sup>

If anyone intends to speak on cultural issues that should be mediate, there is no other way than going to the bottom of political point of disagreement. And what would be this European spirit (could we also call it political, instead of spirit?). Derrida, following the path of Paul Valéry, states that spirit and specter would not be the same thing<sup>38</sup>. When Marx is waring cry on the specter of communism in Europe, it would not mean the same of talking on spirit (*Geist*)<sup>39</sup>. Besides, *Specters of Marx* has a sort of invisible dialogue with Heidegger.

If we intend to talk about a European Law or convention, although the "Margin of Appreciation" and "Reverse 'solange'" aims to keep up a cultural identity and a constitutional essence as intact as possible, there is a common element that ECHR and ECJ assume that is upon a political-legal stake. It would be something close to what Derrida has a quote from Paul Valéry, and it is supposed to remain aloof from any national having a bear on it.

### 1.5.1 A kind of Ghost

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<sup>35</sup> Jacques Derrida, *Specters of Marx. The State of the Debt, the Work of Mourning and the New International* (New York/London: Routledge Classics, 2006), p.3

<sup>36</sup> Ibidem, p.4.

<sup>37</sup> Carl Schmitt, *Hamlet oder Hekuba: Der Einbruch der Zeit in das Spiel* (Stuttgart: Klett-Cotta, 2008), p. 3-15.

<sup>38</sup> Jacques Derrida, *Specters of Marx. The State of the Debt, the Work of Mourning and the New International* (New York/London: Routledge Classics, 2006), p.5." as Marx himself spells out, and we will get yo this, the specter is a paradoxical incorporation, the becoming body, a certain phenomenal and carnal form of the spirit. It becomes, rather, some 'thing' that is difficult to name: neither soul nor body, and both one and the other. For it is flesh and phenomenality that give to the spirit its spectral apparition, but which disappeared right away in the apparition, in the very coming of the 'revenant' or the return of the specter".

<sup>39</sup> Jacques Derrida, *Of Sprit - Heidegger and the Question* (Chicago: University of Chicago Press, 1991), p.5-46.

Speaking in a crude way, as the ghost of Hamlet's father, whose presence was noted only because he (or it) was under armor, he provided Hamlet with a daunting task. In other words, Hamlet inherits a duty without having asked for it, or because of his flesh and blood. Similar to the law-making process, the one who makes the law cannot be seen by anyone, "who delivers the injunction"<sup>40</sup>, drives the "people," or the citizens, by the echoes of the rule. When the first generation of Europeans has committed themselves to European Law, and following treaties, consequently all next generations are committed to it.

As Derrida points out, no one can be entirely sure whether the ghost was King Hamlet, because his vest prevented anyone from seeing his face (why does a ghost need an armor, whatsoever?). Additionally, the illustration of the armor represents an emblematic relation to the addressees. It keeps and covers the speaker, but at the same time, it allows the ghost to speak<sup>41</sup>. In the play, King Hamlet speaks with an undistinguished authority, though, Prince Hamlet, Horacio or the public cannot be sure if it is the real ghost of the dead King. It is what Derrida calls "helmet effect"<sup>42</sup>, giving the power of seeing without being seen. Neither of the people has such power, if they have any<sup>43</sup>.

Derrida followed the line of Paul Valéry and affirmed that "three things" constitute the spirit (we shall see it again in the III and IV chapter): the mourning because everything becomes a matter of interpretation, "ontologization," philosophy. Nothing can be forgotten, and many ghosts since the Pre-Socratics haunt Europe; the singular language and voice embedded in the skull, that once gave a command to the next generations; and the skill of "work", that in Derrida and Valéry mean to repeat the past in the present looking alike it was a novelty.

To summarize, Hamlet follows a ghost, without knowing the real origin of the spirit, until he hears from the ghost himself that it is his own father's ghost. The same logic bears upon to the Marxist's specter and its follow spirit that has taken shape in Europe and the

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<sup>40</sup>Jacques Derrida, *Specters of Marx. The State of the Debt, the Work of Mourning and the New International* (New York/London: Routledge Classics, 2006), p.7.

<sup>41</sup> Ibidem, p.7.

<sup>42</sup> Ibidem, p.7-8, "For the helmet effect, it suffices that a visor is 'possible' and that one play with it. Even when it is raised, 'in fact,' its possibility continues to signify that someone, beneath armor, can safely see without being seen or without being identified".

<sup>43</sup> See Ferdinand Lassalle, *Über Verfassungswesen: Reden am 16. April 1862. Mir einem Essay von Ekkehart Krippendorf* (Hamburg: Europäische Verlagsanstalt, 1993, p.1-60. See also Hauke Brunkhorst, "Rights and the Sovereignty of the People in the Crisis of the National State" Hauke Brunkhorst, "Kollektiver Bonapartismus? – Demokratie in der europäischen Krise", in: *Blätter für deutsche und internationale Politik* 4/ 2012a, 83-93. Hauke Brunkhorst, "Recht und Revolution. Der Kantian mindset als normativer Constraint evolutionärer Anpassung", in: Julia König/ Sabine Seichter, Hg.: *Menschenrechte. Demokratie. Geschichte. Transdisziplinäre Herausforderungen an die Pädagogik*, (Weinheim: Beltz 2014a), 75-94.

Western, even in the USA, as for instance, social and labors rights, syndicates, even a Marxist perspective of the holy text and spiritual practices, as Pope Francisco performs.

Nonetheless, any specter and ghost are possible to remain in the Western without the figure of repetition<sup>44</sup>. "Repetition 'and' the first time, but also repetition 'and' the last time. Since the singularity of any 'first time,' makes of it also a 'last time'"<sup>45</sup>. In law, it turns to be reading or re-interpretation of traditional ideas of law, as, the Historical School brings back many notions, concepts, and institutions from Roman Law; or how theology would remain in the political institutions or even in the idea of rights.

### **I.5.2 - Technology**

The technological form of law, prevailing since the 19th century, was the way chosen to make repetition look similar to something new. In a non-scientific form, Derrida describes the assignment of the teacher, the intellectual way to deal with the ghost. Lecturers do not believe in ghosts or specters; thereof they do not engage in any dialogue with them. The technological form can withhold any speech or reasoning untouched by dichotomies as real and unreal, for instance<sup>46</sup>.

Following Derrida's line of thought, those considerations are linked to present and non-present. Evidently, it is connected with *Of Grammatology*, and it corresponds to a characteristic of any text. Besides, it is part of his emblematic dialogue with Heidegger whereby his looking for his version of concealment and unconcealment. The medium of text is also an inherence that every civilization and community has to come across. But at this moment, what is relevant is the legacy of the *Communist Manifesto* and its specter.

Derrida, as much as Blanchot and Jean-Luc Nancy have the position that since Marx a future can be announced, or future is always to come. It is with some clarity that sounds strange because scatology and the doom's day have been announced much before Marx. However, what it is on stage here is that with Marx a sensation of nostalgia and a promise of future remain. Thereof, the possibility of a community, if not in Marxist terms, but in many

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<sup>44</sup> See Chapter V. Jacques Derrida, *Specters of Marx. The State of the Debt, the Work of Mourning and the New International* (New York/London: Routledge Classics, 2006), p.10.

<sup>45</sup> Ibidem, p.10. "'Hamlet' already began with the expected return of the dead King. After the end of history, the spirit comes by 'coming back' ('revenant'), it figures 'both' a dead man who comes back and a ghost whose expected return repeats itself, again and again".

<sup>46</sup> Ibidem, p.12.

aspects that a community represents. Albeit, it is always a community to come. The juxtaposition between Marx and Hamlet shows that the later seeks justice by relocating the law to its right place, but the law is the law of time<sup>47</sup>. He was destined to it. Due to that he curses time.

Hamlet is a sort of metaphor that since an unknown age things were out of joint, out of its real time. It would be the curse to Europe as an idea. Time and place haunt Europe, and there is always an urgency to reorganize the order of its own time. One possible conclusion that we are allowed to draw would be that law, according to the Jewish-European heritage, comes across with good and evil. Derrida performs an intentional (?) leaping in his text. Further, what Derrida intends to introduce is the jaw-breaking connection between Hamlet and Anaximander, regarding what has been considered the oldest fragment of the Western thinking, according to Heidegger<sup>48</sup>. One of the possible translations of this fragment is: "But that from which things arise also gives rise to their passing away, according to what is necessary; for things render justice and pay the penalty to one another for their injustice, according to the ordinance of time"<sup>49</sup>.

Further, Heidegger is going to bound this fragment to the emergent present concerning that the "time is out of joint." After describing the outsize challenge to translate such fragment and how should we be engaged in the time context in order to grasp a feasible meaning, Heidegger reflected upon the relation between "injustice" (according to the literal translation of the fragment) and how could something in presence be regarded unjust ("How is what lingers awhile in presence unjust?")?.

Heidegger heeds the advice that if we follow our juridical-moral convictions and experiences, we will come to the conclusion that right would be not present in the case, so injustice remains. Still and all, he alerts that the fragment addresses a different message. "The fragment clearly says that what is present is unjust, i.e. is out of joint"<sup>50</sup>. Heidegger claims that it means that what is present is out of joint, whatsoever<sup>51</sup>. Only the presence of the presence of whatever may be turning things out of joint. Moreover, it is connected to moment (*Augenblick* that we shall read with more details during chapter 5). Presence is an

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<sup>47</sup> Ibidem, p.23.

<sup>48</sup> Martin Heidegger, "The Anaximander Fragment". In. Martin Heidegger, *Earlier Greek Thinking - The Dawn of Western Philosophy* (San Francisco: Harper, 1985), p. 13-40.

<sup>49</sup> Ibidem, p.584.

<sup>50</sup> Ibidem, p.608.

<sup>51</sup> Ibidem, p.608.

outcome of coming and withdraw. The joining of whatever is, occurs during this moment of presence<sup>52</sup>.

### **I.5.2.1 - Frustration**

Following Heidegger's convoluted insights, he interprets that whatever comes to presence in the jointure of the moment it also lays down this jointure. The result would be that what is organized in jointure is out of joint. According to Heidegger's word, "Thus, standing in disjunction would be the essence of all that is present. And so in this early fragment of thinking the pessimism of the Greek experience of being would come to the fore"<sup>53</sup>. So to speak, anything that comes to presence and pursues its ongoing will be disjoint because it lies over the principle of continuance<sup>54</sup>. "Continuance asserts itself in presence as such, which lets each present be linger awhile in the expanse of unconcealment"<sup>55</sup>.

During the ongoing presence turns to be a "presence without"<sup>56</sup> and disjoint. One way to get to the bottom of it would be bounding it to the property of "giving"<sup>57</sup>. Heidegger claims that this "giving" is to give its original property to another. Further, Heidegger draws the conclusion that this relation is a relation to the order. Puzzled, he links it to the experience of the being that turns to be the experience of language. Heidegger admitted that this was an interpretation beyond the fragment into question.

For us, what is relevant is understanding the time of presence and its ongoing results in disorder, or what is disorder<sup>58</sup>. How would it come to disorder? Regarding the essence of being to persist in presence, it ends their order to belong to another.

If what present grants order, it happens in this manner: as beings linger awhile, they give reck to one another. The surmounting of disorder properly occurs through the letting-belong of reck. It means that essential process of the disorder of non-reck, occurs in payment or punishable; they let order belong, and thereby also reck, to one another (in the surmounting) of disorder<sup>59</sup>.

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<sup>52</sup> Ibidem, p.608, "The while comes to presence between approach and withdrawal. Between this twofold absence the presencing of all that lingers occurs. In this 'between' whatever lingers awhile is joined. This 'between' is the jointure in accordance with which whatever lingers is joined, from its emergence here to its departure away from here. The presencing of whatever lingers obtrudes into the 'here' of its coming, as into 'away' of its going. In both directions presenting is conjointly disposed toward absence. Presencing comes about in such a jointure. What is present emerges by approaching and passes away by departing; it does both at the same time, indeed because its lingers."

<sup>53</sup> Ibidem, p.609.

<sup>54</sup> Ibidem, p.609.

<sup>55</sup> Ibidem, p.609.

<sup>56</sup> Ibidem, p.609.

<sup>57</sup> Ibidem, p.610.

<sup>58</sup> Ibidem, p.612.

<sup>59</sup> Ibidem, p.614.

For Derrida, Heidegger does not seek to state that Greeks were a pessimist or neither the opposite. Surprisingly, Heidegger associated it with a meaning of tragedy, close to the association that Derrida attempts to make between Marx and Hamlet. If we follow Nietzsche's translation, which Heidegger does not do, he will translate the *Spruch* of Anaximander as "be judged for their injustice"<sup>60</sup>; instead, Heidegger translated it as "along the lines of usage; for they let order and thereby also belong to one another (in the surmounting) of disorder"<sup>61</sup>.

Hence, presence is scattered in a double movement. The coming and going are structured as the present. According to the fragment (*Spruch*), it results in injustice, as a given injustice<sup>62</sup>. Whether justice is a given, the outcome would be the impossibility of calculation and right. It would be a dissociation between justice and act. For this reason, Heidegger advocates an idea of avenger, following the logic of Hamlet<sup>63</sup>.

The gift of justice would be more than anyone could bear. It would be "too much" in the present as a moment. Moreover, as Derrida criticizes Heidegger by translating Dike as justice, it would mean that Dike could only be thinking of the being as presence<sup>64</sup>. Through such understanding, justice would say that justice is a proper gift to someone who does not have it. Justice is a gift that makes the jointure of time possible (*ermögliche*). Injustice would be out of joint.

### 1.5.2.2 - Marx and Blanchot

Leaving Derrida/Heidegger discussion aside, what matters to us is how the West could support the gift of justice and how it winds up into disjointure. Whether justice is a gift which remains beyond right, the evil and injustice are always present and possible. The possibility to perform injustice to the other is an assumption (*voraussetzung*) of justice<sup>65</sup>. By taking Heidegger considerations on "dike" seriously, the presence would miss the

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<sup>60</sup> Ibidem, p. 576. Jacques Derrida, *Specters of Marx. The State of the Debt, the Work of Mourning and the New International* (New York/London: Routledge Classics, 2006), p.29.

<sup>61</sup> Martin Heidegger, "The Anaximander Fragment". In. Martin Heidegger, *Earlier Greek Thinking - The Dawn of Western Philosophy* (San Francisco: Harper, 1985), p.625.

<sup>62</sup> Jacques Derrida, *Specters of Marx. The State of the Debt, the Work of Mourning and the New International* (New York/London: Routledge Classics, 2006), p.30. "There is first of all gifts without restitution, without calculation, without accountability. Heidegger thus removes such gift from any horizon of culpability, of debt, of right, and even, perhaps, of duty".

<sup>63</sup> Ibidem, p.30.

<sup>64</sup> Ibidem, p.31.

<sup>65</sup> Ibidem, p.31.

opportunity to think further. It misses out to portrait the coming of the other as a messiah walking in the desert due to recognizing dike as being as presence; it corresponds to think justice as organizing the time according to the demand of the present, according to one's conscious.

The figure of the desert is essential to Blanchot<sup>66</sup> and Camus<sup>67</sup>. "The messianic: the coming of the other, the absolute and unpredictable singularity of the '*arrivant*' as justice"<sup>68</sup>. Moreover, the messianic would bring some sort of heritage, an expecting of the messiah. "Otherwise justice risks being reduced once again to legal-moral rules, or representations, within an inevitable totalizing horizon (movement of adequate restitution, expiation, or reappropriation)"<sup>69</sup>.

We do not know almost anything about Claudius. In the very beginning of the play, he seems to be a skillful diplomat and tries to help Hamlet with his issues. After the appearing of the ghost and Hamlet's oath, a turning happens. He plots against Hamlet at the same time he gives the impression of being regretful of his sins. All the same, there is no certainty that his death will set things right again. Moreover, we cannot be so certain that things were not out joint before the event that culminates with Hamlet's father assassination.

Recalling, Blanchot's "Marx's three voices" (logos, political and scientific - all juxtaposed), every voice are connected by a fragile link, almost an impossible relation, because they are opposed and juxtaposed; and only a "disparity" can maintain those voices together<sup>70</sup>. And such "disparity" brings the dilemma of the future, or whether the communism based on Marx's vision, without any previous experience will set things out, things that since Marx are out of joint. For Blanchot, the communist voice is fragmentary, although "tacit and violent." It is a sound close to the features of the writing. However, communism must live with this inner tension, so to speak, thinking as a communist one must incorporate the tension among those voices<sup>71</sup>.

Blanchot through his peculiar style translates Marxism as between the devil and the deep blue sea. According to my impression, Marxism translates into its particular language

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<sup>66</sup> Maurice Blanchot, *The Infinite Conversation* (Minneapolis/London: Minnesota University Press, 1993), p.85-92.

<sup>67</sup> Albert Camus, *The Plague* (London: Penguin Modern Classics, 2013), p. 1-50.

<sup>68</sup> Jacques Derrida, *Specters of Marx. The State of the Debt, the Work of Mourning and the New International* (New York/London: Routledge Classics, 2006), p. 33.

<sup>69</sup> Ibidem, p.34.

<sup>70</sup> Maurice Blanchot, "Marx's three voices", *New Political Science* Vol. 7, Issue 1, 1986, p. 17-20 Jacques Derrida, *Specters of Marx. The State of the Debt, the Work of Mourning and the New International* (New York/London: Routledge Classics, 2006), p. 34-5.

<sup>71</sup> Ibidem.

the heritage of modernity. Heritage is a form to access memory and to be surrounded by ghosts. The political voice oaths that the revolution is about to come, and it promises that only through its inherent violence the rupture may be achieved. Nonetheless, the voice invoking violence is featured by performativity which does not match with any other pre-convention. Further, the outcome of violence is to give birth to a new order<sup>72</sup>.

"The future can only be for ghosts"<sup>73</sup>. Through this way, the specter of communism has haunted Europe. Notwithstanding, Europe as an idea, has been haunted by many specters that are still to come. Some promised ideas were much older than communism, for instance, the question of the neighbor. Let's say that somehow communism incorporates the fate of the neighbor in its particular language or voice.

The hornets' nest of future does not only cause some agonizing over Marxism, as Derrida points out. Marxism had to elaborate a speech that represents a certainty about the future to come<sup>74</sup>. But the promised land has also given the order raised up in the late 18th century. Many ghosts were left to the West. St. Paul, Marx, and many others remain haunting the West. Liberal or social ideologies gather those pieces together, reassuring the past in the form of a new promise.

Derrida makes a sort of recommendation to Marx<sup>75</sup>, alerting him that in French he could have employed the noun "conjunction." Despite the many possible means presented, the one which fits us best would be "evoke." Due to the fact that Marx invokes many thinkers, as does Hamlet, we also follow suit the idea that all those "conjunctions" end up by legitimatizing, in a rhetorical or performative way, the idea of the West, though, those invocations are typically destined to fight shy of many other themes. That is how legitimation works, by ducking itself from quarrels.

Further, "conjunction" entails exorcism<sup>76</sup>. For that, an alliance must be provided, a political alliance to prevent any specter or ghost to influence the legitimacy order. In our case, not only the specter of Marxism (one of the most powerful specters) but any specter or

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<sup>72</sup> Jacques Derrida, *Specters of Marx. The State of the Debt, the Work of Mourning and the New International* (New York/London: Routledge Classics, 2006), p. 36-7. "the originary performativity conform to preexisting conventions, unlike all the performatives analyzed by theoreticians of speech acts, but whose force of 'rupture' produces the institution or the constitution, the law itself, which is to say also the meaning that appears to, that ought to, or that appears to have to guarantee it in return. 'Violence' of the law before the law and before meaning, violence that interrupts time, disarticulates it, dislodges it, displaces it out of its natural lodging: 'out of joint'".

<sup>73</sup> Ibidem, p.45.

<sup>74</sup> Ibidem, p.47.

<sup>75</sup> Ibidem, p.50.

<sup>76</sup> Ibidem, p.58.

ghost can possess the way of the West<sup>77</sup>. All those theories of European Union, which brings together the necessity of human rights and communitarian speech, may be regarded as a responsibility to the West.

## **I.6 - Dilemmas of European Court of Human Rights**

Nonetheless, the rise of the European Court of Human Rights did not bring the stability which was its original goal. Many possible explanations could be given for it. The failure of the law's autonomy that is not able to make a perfect link between systems; someone could state that the rationalization of law is still in progress; a Marxist critic affirming that modern law is a product destined to serve the capitalism's end.

Most critics praise that what we have been calling law's system can work whether things were not out of joint. All the same, analyses toward the inception are rare. I would add, that critics persist in starting from a juridical perspective, avoiding any political or philosophical pundit. Needless to say that law is a product of other thoughts that are not legal. Consequently, the "trace" of that reasoning remain.

One has attained my attention. Kierkegaard's "Repetition and Philosophical Crumbs" may be one of the best hints to prove that law is driven by memories and not by repetition. Although, systems have a demand of repetition to be a system. Otherwise, it would be something else. However, what has happened is a confusion between the concept of memories and repetition, even in works from Niklas Luhmann<sup>78</sup>.

"Repetition is really that which has mistakenly been referred to as mediation"<sup>79</sup>. Moreover, "the dialectic of repetition is easy because that which is repeated has been. Otherwise, it could not be repeated; but precisely this that it has been making repetition something new"<sup>80</sup>. But, what has been happening through legal decisions is a firm belief that a hypothetical situation can be reproduced through the decision's authority. Further, this imaginary is supposed to have taken place. Usually, judges make reference to other decisions, assuming that situations are similar or playing with the logic of analogy.

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<sup>77</sup> Ibidem, p.59. "In the occult society, either individuals or collective, represent forces and ally themselves together in the name of common interests to combat a dreaded political adversary, that is, also to conjure it away. For to conjure means 'also' to exorcise: to attempt both to destroy and to disavow a malignant, demonized, diabolized force, most often an evil-doing spirit, a specter, a kind of ghost who comes back or who still risks coming back 'post mortem'".

<sup>78</sup> Niklas Luhmann, *The Reality of Mass Media* (Stanford: Stanford University Press, 1996), p.77-87.

<sup>79</sup> Søren Kierkegaard, *Repetition and Philosophical Crumbs* (Oxford: Oxford University Press, 2009), p.18.

<sup>80</sup> Ibidem, p.18.

Sometimes, there is a vain illusion that the order being sought through a decision came to pass, so to speak, this order must be reestablished because things are "out of join."

Be that as it may, the choice for repetition is nothing else than a moment of decision, overwhelmed by madness<sup>81</sup>. The choice can be driven by memories. Edward F. Mooney wrote in the Introduction to "Repetition and Philosophical Crumbs" that repetition has a close meaning to "Job Discourse"<sup>82</sup>. In a nutshell, Job had no other choice than accepting what was about to come. "The moral is that when caught in despair, there is, at the limit, no 'autonomous choice' by which one lurches out of the muck. One is remade and saved (if one is) by an intervention of the other, as it were<sup>83</sup>."

Thereof, as the events that took place in Job 38: 12,14<sup>84</sup>, the new was nothing else than the past. The truth is not something that has never been experienced before. Legal decisions as well as legal technics has this broad sense of capturing the signals of the facts and by inference turn them into a new order that has already happened before, thought as an effect of a Kantian tradition. Kierkegaard proves that repetition is not what the common sense still preaches, making the same happens again in an identical way. By using his pseudonym Constantine Constantius, he describes his experience in Berlin of making the same steps that once he has already done. He fails to succeed because what he was doing was playing with his present and memories.

### **I.6.1 - Recalling?**

For Kierkegaard repetition and memory are two different resorts. There is always a feeling that repetition is an impossible process that we could only grasp later of occurring, though the office of the repetition is a demand of a legal system to reach unity. But the law does not know what has been seeking through the office of repetition. Repetition, as we roughly scanned, is not the mere act of bringing the past events to the present hoping to reproduce them again (*noch einmal*). Still, as Kierkegaard points out through the allegory of Job and Abraham, both have faith that things would come back exactly as they were.

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<sup>81</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 228-98.

<sup>82</sup> Edward F. Mooney "Kierkegaard's Job Discourse: Getting Back the World" (International Journal for Philosophy of Religion, Vol. 34, No. 3 (Dec., 1993), p.153.

<sup>83</sup> Ibidem.

<sup>84</sup> Job 38: 12,14. "Hast thou commanded the morning since thy days, and caused the dayspring to know his place; That it might take hold of the ends of the earth, that the wicked might be shaken out of it?It is turned as clay to the seal, and they stand as a garment." (King's James Version)

On this account, the idea that law's unity is possible over repetition may put it over on our firm belief that the concept of system and how it operates can restore things that are "out of joint." Restoration through legal decisions may sound as a bad joke. In modernity, we have lost our faith in miracles<sup>85</sup>, and more recently even philosophy has been considered a form of existential relief<sup>86</sup> contrary to how Hegel, Kant, Heidegger or the Greeks used to speak of it.

There are plenty of instances that can be introduced to the wonder of return. In law's realm, most of the techniques and even the concept of unity have been expressing the mistake of modern law in believing that repetition cannot be something else than "sameness." Repetition is engaged in an acquisition.

Kierkegaard makes it essential that repetition not annul or erase the initial perception. For example, the increase in understanding that may occur in hearing the story of Abraham or Job over and over does not replace the story with something else (for example, an abstract philosophical doctrine or theoretical interpretation), but contrary to Hegel, at least as Kierkegaard adds him, when meaning is deepened (rather than trivialized) by repetition, this supplement is conferred by something transcending the first, now increased experience - not by an uncovering of what was immanent all along in the experience. Repetition brings out supervenient qualities in the look and the reality of things. It names an uncoercible recognition as some unnamed force crystallizes a new richness in something familiar and entirely accurate: this face before me, this melody or mountain pool<sup>87</sup>.

Ruling fundamental and human rights by it has being done only proved that a structured dimension of justice and consistency is based on a sort of wrong conviction which winds up producing aberrations. As we are going to see from the start to finish of this work the way of the West together with modernity has been giving birth to aberrations, according to a terminology often employed by Paul de Man.

I choose to examine some decisions from the European Court of Human Rights due to the impact and sway over not only in the States members but also over to South American. To boot, the decisions from ECHR have plenty of contradictions and aberrations due to flaws brought by a wrong grasp of concepts and ideas. The outcome could not be other than the impossibility of repetition and to fulfill the promises of modernity, especially the command of "neighbor love."

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<sup>85</sup> Franz Rosenzweig, *The Star of Redemption* (Madison: University of Wisconsin Press, 2005), p. 18-51.

<sup>86</sup> Saul Bellow, *Mr. Sammler's World* (New York/London: Penguin Press, 2004), p.1-100.

<sup>87</sup> Edward F. Mooney, "Kierkegaard's Job Discourse: Getting Back the World" (*International Journal for Philosophy of Religion*, Vol. 34, No. 3 (Dec., 1993), p.153.

## CHAPTER II - TRANSCONSTITUTIONALISM AND MEMORY

Alexander Somek <sup>88</sup>is not just a voice crying out in the desert. He is most of all a spokesman concerned with the lack of concepts which should guide the observer to describe the law. On the one hand, borrowing thoughts and re-introducing them is the easiest path to making any sort of representation. The unity of law has teased observers to find out some coherence between praxis and theory and everywhere jurists are – to a certain extent unconsciously - adopting traditional oral methodology and enforcing terms, often used to portrait and explain national state, inquiry describes inter, supra and transnational conflicts.

On the other hand, albeit the legal and political concepts are still being fabricated into the states, the clashes among legal orders demand new reasons and descriptions. That's a context characterized by ideas of such entangled hierarchies of legal orders and conflicts (Douglas Hofstadter) and electronic age (Marshall McLuhan) when territorial bounds have lost its prestige. "The right to be forgotten," a leading case involving Google and the European Union, for example, represents a dispute between the sovereignty of flesh and "flesh" against the digital sovereignty - therefore one of the many opportunities to create new ways to describe the law.

The holy aspect of the sovereign and its political face, centered in the relationship between State and Church is part of this anachronistic description of society. In a certain way, *King Lear's* delegation of its authority can be understood as a metaphor for the practice of sovereignty and legitimacy. According to Marshall McLuhan, "*King Lear is a presentation of the new strategy of culture and power as its affects the state, the family, and the individual psyche.*" In the modern complex society, such metaphor can be invoked to understand how the unity of law can unleash many paradoxes and produce some inaccurate uses. The legal methodology highlights the question on a state-based decision. New forms of law conflicts have raised up vesting the logic of a special reason. In modern times, the power is delegated by a plurality of legal orders, private entertaining, the internet, and so forth. Despite the fact that some jurists are not pursuing new conceptions or even to give them a new meaning, it seems evident that a new semantic is needed.

The period of transition between hierarchical law to the heterarchical law is still

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<sup>88</sup> Alexander Somek, "Europe: political, not cosmopolitan" in. *European Law Journal* 20 (2014), 142-163.

flagged by confusion and obliterated by a conflict between structure and language. In other words, although the evidence of a potpourri of law's institutions to decide on the same issues, the majority of jurists minds is affected yet by an inference model of thinking. When inference has any clue about how to conclude, law's principle, simulating a scientific endeavor. This tension between province and cosmopolite reflects on both ways to describe the law of the society, as well as, in the form of thinking about solutions. During the next paragraphs, I will introduce one of the most notable works, from someone who came from the province but deems toward the protocols of an ordinary legal reasoning. The name of the author is Marcelo Neves, and his innovative work is the *Transconstitutionalism*.

## II.1 - Some Considerations

In a groundbreaking article, *The Rise of World Constitutional Constitutionalism*, Bruce Ackerman spares no effort to describe a new global constitutional's era. Jurists should pay more attention to what is going on in constitutional courts around the world to try to adequate the domestic constitutional decisions and, as far as possible, and they should avoid *staying in the provinces*. In this recent turning, which jumped off in the second half of the last century, Constitutional and International courts are ignoring, now and then, the territorial bounds and grasping new pieces of information and bits of knowledge due to a need to produce more robust decisions, and perhaps, depositing a new understanding of global constitutional order. Although global constitutionalism has failed so many times, a new machinery of ideas and terminologies has risen up. We could point out that those new theories and methods are more persuasive.

Nevertheless, the rhetoric aspect persists reemerging over and over. The performative language unveils the meaning and texture of the technological language. Perhaps, one the most prominent projects to deviate the stumble of the performative's intrusion is the *Transconstitutionalism*. During this exposition, I'll link the very idea of *Transconstitutionalism*, elaborated by Marcelo Neves with some of the global constitutional conflicts.

In a nutshell, *Transconstitutionalism* parries for the sheer sense of urgency to set up a more legal criteria due to the necessity to build an adequately law's decision. Thus, *Transconstitutionalims* happens when a tangled hierarchy bounds constitutional issues

among legal orders. The institution in charge of the decision has to go further the ordinary conventions to unfold a possible blind spot. Otherwise, it would fall off into a dangerous state of affairs, in which a decision could hazard or jeopardize the legal order. *Transconstitutionalism* orbits around the conflict among legal orders, particularly when a court is jammed on by its rationality. Hence, it needs to *see what the other can see*.

Furthermore, I claim that Neves's crucial insight cannot be barely analyzed from a structural perspective. Behind it, there is a space of disruption, which leads the law to a permanent situation of instability by metabolizing the freedom of was not so explored without a proper *trial of experience* (Maurice Blanchot). Consequently, although the presence of new forms of descriptions on law's conflict, *Transconstitutionalism* is not engaged with the source of such disagreement.

Last but not least, the following exposition seizes that the global constitutional conflicts still need to submit themselves to the "reality-testing" (*Realitätsprüfung* - Freud). *The test calls for the disruption of blissful certainty* (Avital Ronell). In this Kafkian context, *Transconstitutionalism* and its subjects nudge on the scene of legal reasoning, trespassing the boundary of a hierarchical state of affairs, by showing how hermeneutics must be blossoming out to break down the logic of the happenings.

### **II.1.1 - About Neves**

Marcelo Neves, the most devoted Luhmannian, tests the German and the Brazilian way of thinking. Since he was still a master student, believing in Brazilian political analysis on constitutional's matters did not belong to his temper. Everything was quite superficial, sheer wrong, lacking thinking that could weave a pure legal thought, whiteout by the urgency to dip into a journalistic way of describing the events. Niklas Luhmann stressed out the evolutionary achievement of the society until it reached autonomy through differentiation and organization aspects....

Anyhow, even the whole organizational aspects of the social system were not enough for Marcelo Neves to stand back from such genuine and stubborn German way of thinking. His *promotion* was a sharp critic on the touchstone of Luhmann's theory. This time, using Brazil as an example to lay out how Germans can also be wrong. A man from the province or from the periphery was calling out the most influential and cosmopolitan 20<sup>th</sup>

century culture with a rumble. Hitting the German pride resulted in a *magnum cum lauda* grade.

Neves's work is hallmarked by the absence of a preponderant culture-bound. If you try to be the best, I can show you someone or something better than you, although he or it are not either. Neves is a spokesman of the jurist inability to perform their own labor. He hits it all back with the seminal work of *Transconstitutionalism*.

## **II.2 A hermeneutical understanding of *Transconstitutionalism***

The need of an intellectual who has lived in more than five different countries and speaks six languages is to demonstrate that parochialism is good to be remembered only in the past. When a tribunal confuses itself with the lack of culture of its citizens, it could only strike a chord of injustice to the law system and to a semantic concept of constitution.

A harsh critic against the contemporary notion of constitution has been opened up by *Neves Transconstitutionalism*. Striking out Rainer Wahl and his strives to demonstrate the range of the term constitution by comparing it to a metaphor. To Wahl, the constitution could be a sort of metaphor since it could be invoked in an immense number of contexts, not only in law, but also in politics, and so forth. In his "Festschrift," Hasso Hofman points out the relevant contribution from Wahl to the development of constitutionalism ("Konstitutionalisierung")<sup>89</sup>. Without taking much care with the use of such expressions like constitution as a metaphor, jurists aim to bring the technological language close to the ordinary by using such kind of terminology, which is frequently employed in philosophical and linguistic books. However, how could a conciliation between constitution and metaphor be possible? And how the constitution could be a metaphor?

Metaphors have been used in philosophical language, for instance, Rousseau and its "social contract," to create a minimalistic understanding of the term, although such metaphor would, in theory, keep the entire meaning of the analyzed context. For a long time law strives toward political and common sense speeches to be taken seriously. It is possible to illustrate countless examples linking law to politics.

The choice of a metaphor assumes that it can be understood by anyone and also that

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<sup>89</sup> Hasso Hofmann, *Das Recht des Recht, das Recht der Herrschaft und die Einheit der Verfassung* (Berlin: Dunckel & Humblot, 1998), p. 20-60.

metaphors are useful to our knowledge. Nevertheless, my concern at this point is to portray those canonic projects and ideologies, which nudges on law's scene slightly, under the utterance of a "new era."

By refusing such analysis, Neves brings into play Niklas Luhmann. He demands sharpness and clarity to frame the constitutional meaning. Otherwise, it would become a *Sinn*, not a *Bedeutung*, using now de Man's words.

Neve's enthusiasm came from after coming across with an article written by Bruce Ackerman, *The Rise of World Constitutionalism*. Ackerman emphasizes the question of remaining parochial. My belief is that the engagement of Neves with provincial's question is still linked with theories resulting from the modern condition.

### **II.2.1 - Transconstitutionalism and Experience**

Although Transconstitutionalism is one of the most well-shaped theories at the present, it is still oriented by a way of understanding the Constitution, fundamental rights and decision-making processes from a perspective settled into a legal reasoning and *Rechtswissenschaft* analysis contaminated with the mistakes of a lack of *trial of experience*.

Transconstitutionalism converts the confidence of a security logic on how cases are decided into an aim for the experience of flying colors. According to Neves, Transconstitutionalism: "the problem consists in delineating the forms of relationship between different legal orders. In other words, the distinct legal orders that proliferate within one and the same functional system of modern world society, law, are all subordinated to the same binary code (legal/illegal) but with different programs and criteria".

Contesting metaphysics and supporting an evolutionary achievement Transconstitutionalism begins at the point that all legal order is under the same binary code (legal/illegal). Thus, when what we have been calling a transconstitutional conflict is about to happen, two (or more) legal orders are entangled. Each one is at the same time center and periphery of each other.

Although Transconstitutionalism is regarded as one of the most ambitious projects to create a protocol against the supremacy of a legal order, tracking some constitutional

problems may take us to another “frontier”<sup>90</sup>. To pass away the concept of constitution problems for both sides, more the idea of fundamental rights, and a legitimate method of interpretation compromises any efforts to construct a unity or universal standard to resolve issues by exchanging pieces of information. To set up a transconstitutional frontier would be mandatory to set up a clearer concept of shared constitutional problems, without any allegory, figural language or rhetoric, whatsoever.

### **II.2.1.1 - Conversation**

There is no doubt about how the word constitution has been reproduced as a common sense concept or as given. Even in the cases in which a tangle between legal orders happens, I argue with the limits of knowledge and with the "rhetoric of the tropes." It is a particular situation that Neves's work does not touch.

Clashes among legal orders are always something about to draw a “frontier” or a “horizon,” paraphrasing Derrida. In this philosophical way, I would purpose the “reading” of the Transconstitutionalism and the opening space of a “trial of experience.” Stepping further the structural analysis that Neves is engaged with in his seminal work, I wish to investigate the statements of learning to decide on transconstitutional cases. A transconstitutional collision falls out “when issues of fundamental or human rights are submitted to concrete legal treatment across different legal orders, a constitutional ‘conversation’ is indispensable.”

In principle, Transconstitutionalism saves no efforts to establish a normative expectation between the dispute among legal orders. It seeks to create a space of dialogue, disregarding hierarchy and borders. Strictly speaking, the necessity of setting up a "bridges of transactions" makes clear the existence of an abysm, putting it into Derrida's words. Notwithstanding the temptation to establish a permanent bridge, following the law's machinery of ascertaining dogmas, speaking on Transconstituoalism would deviate it from, especially because of the way that bridges are framed up: by employing a “transversal rationality.” We will see it further with more details.

Neves states: “In this sense, there is said to be a ‘conversation’ or ‘dialogue’ between courts, which can take place on various ‘levels’: for example, between the European Court

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<sup>90</sup> Geoffrey Bennington, "Aberrations: de Man (and) the Machine", in. Geoffrey Bennington, *Legislation - The Politics of Deconstruction* (London/New York: Verso, 1994), p. 137-58.

of Justice (supranational) and the courts of the Member States, between the European Court of Human Rights (international) and national courts or the ECJ, between the domestic courts and so on. This 'conversation' (which strictly speaking consists of transversal communications across frontiers between legal orders) should not lead to an idea of permanent cooperation between legal orders since conflicts between legal perspectives are frequent. In the last instance, any 'conversation' between courts can potentially lead to a dispute. The problem is how to settle such disputes without top-down imposition in the relations among orders”.

Going further in this matter, framing Transconstitutionalism is not an easy task. At this point would be prudent to portrait how ingress of the Transconstitutionalism is a puzzling question. Coming back to *Caroline von Monaco/Hannover* and all the turmoil and confusion made by ECH is an obvious example that courts need, at least theoretically, a bridge of conversations, but there is much more to take into consideration before creating it and using such metaphor. The European Court of Human Rights acts in enough simplicity, abusing of clichés, believing its methodology brings out legal certainty and treating every reader (unconsciously) as puerile and innocent.

Let's take a close look at the arguments of the ECH in both cases, *Caroline von Monaco/Hannover I* and *II*, and the historical decision, zoning off the nonconsensual. But before it, I shall make a detour, tracking the disturbance of the reading of a legal decision. As Neves points out, Transconstitutionalism has not yet yield interpretive insights. It means that there is not a proper method to undercover Transconstitutionalism from its own dilemmas.

### **II.3. Transconstitutionalism and the *Trial of Experience*: ducking tropes**

Many jurists have exposed the failure of the balance or “Abwägung.” So did Neves and his Ph.D.'s supervisor Karl-Heinz Ladeur. But still talking about Transconstitutionalism and its questions, it has opened a great opportunity to duck some canonic projects, which emphasize a naive idea entirely rationality and postulates that everything will be set up after a rational decision. Furthermore, Robert Alexy and his disciples claim the universality of such method, earlier defended by another German, Bernhard Schlink.

The European Court of Human Rights has shown a predilection on the

abovementioned method. It is the safeguard of the "Margin of Appreciation Doctrine." It is true that the "Abwägung" has spread up across countries, believing it is the deepest and also a definitive method for law's solutions. Reproduced by all sort of scholars, there are no limits for Alexy's famous formula. What is most cabal as opposition is the apparent lack of knowledge on other theories or methods from whom it persists to disclose the "Abwägung."

Transconstitutionalism assumes a method that rejects hierarchy or a horizontal state of affairs. In a Luhmann's fashion, it would require a "double contingency"<sup>91</sup> channel, which would make a circular exchanging of legal information possible, without legal orders ruling other legal orders. This peculiarity calls attention in the sphere of law. Getting used to authority and hierarchy, even a model as formulated by Robert Alexy, benefits the isolation of a judge in his world, increasing his sovereignty and power of legislation. This is a quite relevant matter that I shall bring back further. As Neves picks apart from the "Abwägung" method: "The tendency to 'optimize' in relations between radically different 'constitutional identities' may lead not just to illusions but also to reciprocal 'narcissistic' paralysis"<sup>92</sup>.

*Carolina von Hannover/Monaco* case is full of examples which show the failure of the adequate method to set a "bridge" between frontiers. It is not only about losing track on "constitutional dialogue," but in spite of it, to understand relevant meanings that will turn to be paradigms to law and society. The European Court of Human Rights seems to have deciphered what "general interest" and "circumstances" really are.

Finding out the signature, trying to interpret the court's will based on an irreconcilable dogma would take us to another work. Through a meaningless speech, the two decisions together disobey the logical principle of non-contradiction, or speaking in legal terms, breaks the chains that would make an instant of unity possible. The own European Court of Human Right strikes with itself to shape a justification and ends in contradiction. In *Carolina I*, the state "considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos

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<sup>91</sup> Marcelo Neves, *Transconstitutionalism* (Oxford/Portland: Hart, 2013), p. 169. Double contingency means that ego takes into account that the actions of *altering* can be different from what he expects and vice versa. Although there can be no such thing as 'pure double contingency' - because of the conditioning of interaction and the 'absorption of uncertain' with the aid of 'establishing expectations' - '[a]ny attempt to calculate the other will inevitably fail.' The entails the mutual assumption of 'degrees of freedom' (an alter's actions may be entirely different from those expected by ego and vice versa), which converts behavior into action: 'Behavior becomes action if it is found free to be determined differently.' And double contingency itself as a 'catalytic agent' of the 'autocatalysis of social systems' assumes reciprocal self-referential circle: 'I do not allow myself to be determined by you if you do not permit yourself to be defined by me.' Hence double contingency involves a combination of non-identity: 'ego experiences alter as alter ego. But along with the *nonidentity of perspectives*, ego also undergoes the *identity of this experiences on both sides*.'

<sup>92</sup> Ibidem.

and articles make to a debate of general interest. It is evident in the instant case that they made no such contribution since the applicant exercises no official function and the photos and articles related exclusively to details of her private life.” Astonishing, in *Carolina II*, the Court overruled its earlier arguments, The Court takes note of the changes made by the Federal Court of Justice to its previous case-law following the Von Hannover judgment. That court stated, among other things, that in the future importance had to be attached to whether the report in question contributed to a genuine debate and whether its content went beyond a mere desire to satisfy public curiosity. It observed in that connection that the greater the value of the information for the public, the greater the interest of a person to being protected against its publication had to yield, and vice versa. Whilst pointing out that the freedom of expression also included the entertainment press, it stated that the reader’s interest in being entertained carried less weight than the interest in protecting the private sphere.”

Albeit Transconstitutionalism may be one the most prominent projects of modernity to notice common constitutional problems, strictly in positive law speaking, we have to give a step further to draw a critical thinking in this personification idea of constitutionalism. My modest suggestion is to use the teachings of Derrida conjugated with the legal perspective from Karl-Heinz Ladeur in addition to the critical literature.

### **II.3.1 - Transconstitutionalism and Decision-Making**

The decision-making process requires a calling. Normally, what comes after it is an utterance in the form of written text, expressing something that the judges believe to be the truth, to be the right thing. And the whole metaphysic of law, systematically organized, as Kant proposed, gives a sort of legitimacy to the law’s machinery to keep working like that. So to speak, the way that law is embedded in our language it is already shown to be dubious.

In my modest opinion, Transconstitutionalism may be more useful as a tool to find out where the decision-making process has become so tyrannical, and then we cannot speak longer that it is a law. To be tyrannical does not need to be an extreme situation as Neves describes in the Suruwaha’s question when an entire historical cultural can be destroyed by a crude method of making law decisions.

Although the decision from *Caroline I* has privileged the privacy due to the tragic

happening of Lady Diana, the decision was never able to be completely fulfilled. The place of such decision remains uncertain. In *Caroline II* the decision could be transplanted to the first page of a gossip's magazine and could have been signed by the editor. It wouldn't have made any difference. The absence that marks the first *Caroline*, setting it in other terms, it is the same absence that has been hallmarking law since the inflationary use of principle, values, policies, and imprecise use of language.

Strictly speaking, what would be legal language without legal terms? And without such terms who would be the addressed one? Judges take on the position of the translator, making a sort of economy to describe what lies behind the legal terms and what comes with it. Rubbing off the legal terms from *I and II*, the so contradictory decision, what would remain in this case is only rhetoric. Paraphrasing Paul de Man, what is left for the European Union is a "rhetoric of tropes." If we read it with accurately attention some statements of those decisions only shock sentiment on what it is legal argumentation and fundamental rights for the European Court of Human Rights. Take a look on how they build a reasoning: "the definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court nevertheless considers it useful to point out that it has recognized the existence of such an interest not only where the publication concerned political issues or crimes (see *White*, cited above, § 29; *Egeland and Hanseid v. Norway*, no. 34438/04, § 58, 16 April 2009; and *Leempoel & S.A. ED. Ciné Revue*, cited above, § 72), but also where it concerned sporting issues or performing artists".<sup>93</sup> The use of the adverb is quite disturbing, demonstrating that the court disagrees with the first statement. Although, the first statement is so vague and unclear that it is impossible for the best reader to define what is a "subject of general interest" and what should we understand according to the "circumstances." Connecting this statement with article 8 of the Convention is a sheer exercise of imagination. Providing a reader with a superficial scan. Law School does not teach anyone how to read a decision. The graduate becomes that sort of reader that only reproduces what he has just finished reading. Naturally, the judges belong to such categories of readers.

The adverb is more powerful than any legal form, it changes the meaning of a legal text, agglutinating a new utterance, a new reason. Starting from an individual case and

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<sup>93</sup> *Von Hannover v. Germany* [2004] ECHR 294 (24 June 2004). See also *von Hannover v. Germany No. 2* (application no. 40660/08), adjudicated in February, 2012, p. 34-5.

taking a path to generalization. There is no doubt that the court had thought it in the end, and had a particular idea about the consequences. Furthermore, it saves the Court from doing an exercise of justifying the sudden turning of such expression. Checking *Carolina I*: the Court notes at the outset that in the present case the photos of the applicant in the various German magazines show her in scenes from her daily life, thus involving activities of purely private nature such as engaging in sports, walking, leaving a restaurant or on holiday. The photos, in which the applicant sometimes appears alone and sometimes accompanied, illustrate a series of articles with innocuous titles such as “Pure happiness,” “Caroline... a woman returning to life”, “Out and about with Princess Caroline in Paris” and “The kiss. Or: they are not hiding anymore”<sup>94</sup>.

The place of “subject of general interest” remains uncertain. Only an informed reader would believe that the expression reaches its references concretely. It suspended any possible way to practice an empirical approach, illustrating a simulacrum of rights. “General interest” is a fiction which does not coincide with the real world. How is it possible to suppose it to integrate the European Community? According to the scientific way of law’s reasoning to seek for veracity, bringing a fiction that stimulates a new behavior on political privacy it is unquestionably fragile. How could a term enforced by the Court be so accurate to point out every single interest of the European citizen? How is it possible to suppose that the people of Europe are reading Court’s statements?

### **II.3.2.- Transconstitutionalism and the Margin of Appreciation**

The perfectibility that the EUCH seeks through a language is expressed by a particular case, which would turn the general notion. It is a kind of economy of language that only authority is able to do.

In another part, concerning the “Margin of Appreciation,” it is a turmoil and an exercise of obviousness. It started with: “There are different ways of ensuring respect for private life.” and the nature of the State’s obligation will depend on the particular aspect of privacy that is at issue.” After that, it comes to all conjunctions and sub-junctions possible in the English language, zoning off a deceptive practice of ideality. Finishing by setting the

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<sup>94</sup> Von Hannover v. Germany [2004] ECHR 294 (24 June 2004). See also von Hannover v. Germany No. 2 (application no. 40660/08), adjudicated in February, 2012.

balance and reasons, walking in the line between a military austerity and a naive rhetoric.

The controversial aspect of the “margin” comes from its very first invocation. In 1976, the ECHR pulled the trigger. Hitherto no one has assumed the task to create a reference for the “margin”. Without a linguistic reference, the successiveness of incongruent conclusions trips up the most qualified jurist. Any decision that the “margin” is used is part of a permanent puzzle, where the expression does not indicate its horizons or even has no orientation to a physical representation. The ECHR and its followers found reasons to inflate its lyrical determinations. Legal reasoning, legal philosophy, and *Rechtswissenschaft* have not so much say about the “margin.”

Coming back to 1976, the “margin” was declared: "Consequently, Article 10 para. 2 (art. 10-2) leaves the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, legal amongst others, that are called upon to interpret and apply the laws in force."<sup>95</sup> "This margin," which one should be the margin? What this “margin” corresponds to? It is sheer evident that the Court was not aware of the consequences to create a concept, to work as a legislator.

First of all, the formula of “margin of appreciation” does not seem to be logical. We only appreciate a margin, if we follow the meaning of the German word “Wertschätzung.” It would be an estimation that always comes with a subjective evaluation. What exactly intended the Court by using such controversy and enigmatic term?

Charged with subjectivism, is that what appreciation refers to in ordinary language. Any decision from ECHR indicates a possible convergence of appreciation to a legal end. The use of two self-contradicting words, separated by a preposition can only produce an aberration, in de Man’s sense (*Bedeutung*)<sup>96</sup>. The term “margin” is usually employed in economic language and accounting to show that some results may not be precise. But “margin” is the physical board that contains a center and also an abysm.

The cannon of “margin of appreciation” and its sake remains uncertain. Let’s remember that even the ECHR confirmed that it would not be possible to identify when the

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<sup>95</sup> Article 10 – Freedom of expression: 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>96</sup> Geoffrey Bennington, "Aberrations: de Man (and) the Machine", in. Geoffrey Bennington, *Legislation - The Politics of Deconstruction* (London/New York: Verso, 1994), p. 137-58.

"margin" can be enforced. Or even a precise definition of "margin" is out of question. Reading a re-reading of the decisions plays with language something that jurists have missed along at the time: a rhetoric authority of the law's language and the failure of its prescriptive demands. Misplacing the quote from Paul de Man, but being aware that it shall help us to understand such delicate question: "The question is precise whether a literary text is 'about' that which it describes, represents, or states"<sup>97</sup>. What possible meaning can be grasped by "margin of appreciation," regarding that any decision points out to what it is?

The European Council writes the following:

"The term "margin of appreciation" refers to the space for maneuver that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights (the Convention)<sup>1</sup>. The legal basis of the doctrine may be found in jurisprudence, not only that of the French Conseil d'état, which has used the term "marge d'appréciation, but also that of the administrative law system within every civil jurisdiction. The most sophisticated and complex doctrines of administrative discretion have been developed in Germany<sup>2</sup>, but the German theory of administrative discretion (Ermessensspielraum) is much narrower than the margin of appreciation as used in the Convention and EC law."<sup>98</sup>

The "margin" nudges on the scene of law, as *à pas de loup*, without any signature. From the very first moment that someone reads it, there is no clarity of what a "margin" is doing in the middle of a decision. Legal decisions have provided the world with this aberration. Expressions of an unmeasured force which were never experienced before its enforcement. The "margin" was never theorized in legal ways before.

A decision to be accorded correctly should have always been experienced before. No one has the totality of language that the decision seeks to lay out. A judge in the very moment of decision, where justice is suspended<sup>99</sup>, triggers his comprehension. He is alone in the world. The authority of law only speaks through the judge's pen. And it is not anymore the same authority that was laid by the law. Now, it is an authority given by the judge<sup>100</sup>. Afterwards, the decision is autonomous and has its authority; it has its own body to be comprehended. The signature does not matter anymore.

The speech and its further acts were something which did not receive the duly attention from the Transconstitutionalism. Without this caution, the metaphor "bridges of

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<sup>97</sup> Ibidem. This quotation refers to the problem of the major work from Proust, *A la recherche du temps perdu*, regarding what Proust's work can teach us about the act of reading.

<sup>98</sup> See the definition of the Margin of the Appreciation according to the Council of Europe: [http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp). See also *Handyside v. The United Kingdom*, judgment of 7.12.1976, § 48-49.

<sup>99</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In: Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 228-98.

<sup>100</sup> See Maurice Blanchot, *The Infinite Conversation* (Minneapolis: Minnesota University Press, 1993) p. 25 "The writer seems to be the master of his pen; he can become capable of great mastery over words and over what he wants to make them express. But his mastery only succeeds in putting him, keeping him in contact with the fundamental passivity where the word, no longer anything but its appearance - the shadow of a word - never can be mastered or even grasped. It remains the ungraspable: the indecisive moment of fascination."

transitions” turns to be only figurative. It does not show a real path to solve dilemmas. The very nature of Transconstitutionalism remains uncanny. When Luhmann speaks through Marcelo’s hand, it is obvious that the breaking with any net-Kantian tendency it is in the match. Whereas, Transconstitutionalism has not yet demonstrated how courts can be engaged with it. It is running the risk of being sucked by the tropes and its rhetoric’s<sup>101</sup>. The metaphorical employing jeopardizes any project of standard solutions, which is an imperative to law’s unity.

Falling back up to easy comparing or quotes that appears to contain the entire complex and totality of global constitutional dilemmas has been lately the strategy of some professionals as Mathias Kumm, Nico Krisch, Günther Teubner, among others. They allow that the metaphor or quotations apparently reconcile with the object, hiding the rhetoric aspect. By using a charming written style, it leads the reader to believe in the totality of the figure and embraces the whole problem of the global constitutional law. It is not the same issue of the Transconstitutionalism, which I believe, besides the Networks from Karl-Heinz Ladeur, one the most prominent projects of modernity to enlighten the world of constitutional conflicts. Although, it has to get to grip with some questions.

### **II.3.3 - The Replication**

Hitherto, any map out of limiting the freedom of judges has turned up into trumps. Freedom on this matter cannot be confused with the right to freedom, although there is a connection that it is not interesting to us at the moment. What is the form of freedom to write a decision? When the EUCH puts itself in the place of both litigants, it grasped, from somewhere, a reason to the right of freedom, or should be, at this moment we state that the public interest has the right to know. How is it possible to connect it with freedom by all means?

According to Neves’s purpose, the EUCH should have reconstructed what the *Bundesverfassungsgericht* (German Constitutional Court) designed as freedom of opinion (*Meinungsfreiheit*), looking for a “blind spot,” or a failure of cognition, a miscomprehension about freedom, that would be hypothetically impossible for justice (*Bundesgerichter*) to

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<sup>101</sup> Paul de Man, *Allegories of Reading: Figural Language in Rousseau, Nietzsche, Rilke and Proust* (New Haven: Yale University Press, 1982), p. 3-24.

grasp. To reconstruct it would clear up the freedom of opinion to the European Community, at least to issues involving paparazzi and famous people in particular circumstances. By reconstructing the way of thinking, it is impossible to deny, that some expressions, reflections, or the rhetorical efficacy of the German Constitutional Court could involve Grand Chamber in some way the text elaborated by the EUCH just repeated, in other words, the tropes from the first decision.

Transconstitutionalism is profoundly concerned with the rupture of a hierarchical or horizontal layout when a standard constitutional question concerning two legal orders raises up. There is a technological feature in Transconstitutionalism that Neves would definitely reject. But the mechanical function of the “bridges of transition” and “the other can see your blind spot,” are nothing else than a theory of technology, embedded with the rhetorical aspects of human rights or/and fundamental rights. Reading Luhmann through Neves’s pencil, taking us to magistrate a spin. Since Kant’s “Perpetual Peace,” the positive law seeks for a conciliation among national and international law. Neves suggests a circular fashion of thinking, which at the same time, jumps beyond the territorial borders, knocking out the insecurity of parochialism, and finalizing it by coming back to the bottom of the province.

The circular decision would change the province. It should go to the bottom, where main facets of the province remain and twist out every single facet of parochial thinking. Reversing settled values and convictions, breaking the consensual of hierarchy, and ducking the balance (*Abwägung*) into the past history of an indefinite time of legal reasoning.

Notwithstanding, Neves was not able to see the blind spot of his brilliant work. How could an exchanging of information and learning tear up the remaining of the province if we take into account that the law’s unity and law’s language reflects the province? Regarding that the province is embedded in our language, writing a decision would be the way to put the province out. How could Transconstitutionalism get attached to the writing? Transconstitutionalism is not a metaphysical speech, which our conscious could only grasp. The absence between the “bridges,” or even the “margin,” does not show itself undoubtedly. To see your blind spot does not necessary mean that someone is working on the bottom of the absence. Moreover, how are we sure that after the blind spot is founded, the answer will

satisfy whoever is waiting for it or will it be adequate? <sup>102</sup>.

"But why two? Why two instances of speech to say the same thing? Because the one who says it is always the other"<sup>103</sup>. Historically without a trace, the hidden rule of multiple instances is something it was forgotten by the jurists. It is an imperative for the Rule of Law or *Rechtsstaat*. Whereas, in the past 50 years new matrix of courts decisions arises in the new global order scenario. Full of enthusiasm, it came to inaugurate the conciliation of law with globalization and with the playful of a new era of human rights, which would be incorporated by private companies and it would ensure that the national and international legal order would follow the imperative of human and fundamental rights. Going by Freud's "reality-testing," jurists interrogate what is not present, "but which tirelessly summon us to seek the materiality that remains out of our grasp"<sup>104</sup>.

*Caroline II* and the Transconstitutionalism (constitutional conflict between national and supranational legal orders) it is one of the examples of how the engineer and technology of law's language bring forth an allegory which suggests the necessity of a test. The experimentalism of law can be compared to new forms of American criticism on literature. However, the law has this enigmatic component, *the mystical foundation of authority*<sup>105</sup>. But still, at the level of the texts, jurisprudence or law books, *the l'infame machine* of metaphors and other allegories are the way found to bring the law close to reality.

"Along with its capacity to mine and produce anxiety, however, allegory disturbs the very possibility of hermeneutic reflection"<sup>106</sup>. The "bridges of transition," as so the "margin of appreciation," as both allegories:

"intercepting and interrupting, repeatedly calling a foul on intention, allegory puts up a stop sign before the promise of transcendence attached to the symbolic and aesthetic aspects of the literary work. Defying what it sees as the sham of reappropriation, allegory, moreover, is related to mourning. And shares the tendency of 'true mourning' to accept incomprehension, to leave a for it"<sup>107</sup>

Maybe, only a few jurists have detected senseless moments of rupture between the production of jurisprudence and reality, without appealing to allegories. The oeuvres from Karl-Heinz Ladeur, Ino Augsberg, and Thomas Vesting represent a moment of lucidity.

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<sup>102</sup> We should keep in our mind this fascinating statement from Maurice Blanchot, *The Infinite Conversation* (Minneapolis: Minnesota University Press, 1993), p.15.: "In other words, when we arrive at the end-point that is the question of everything, this issue once again dissimulates itself in the question of knowing whether the problem of the whole is the most profound."

<sup>103</sup> Stéphane Mallarmé, *Collected Poems and Other Verses* (Oxford: Oxford University Press, 2008), p. 89-90.

<sup>104</sup> Avital Ronell, *Stupidity* (Chicago: Illinois University Press, 2002), p.107

<sup>105</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 228-98.

<sup>106</sup> Avital Ronell, *Stupidity* (Chicago: Illinois University Press, 2002), p.107

<sup>107</sup> *Ibidem*, 108.

But what it is striking, in Heideggerian terms, law's language cannot address what it demands. There is no representation of any allegory or fundamental rights which have been hallmarking what many have been calling modern law. The articles of the European Convention, which can be framed by the "margin," are not a detailed protocol that can be directly followed by anyone without any disagreement. Transconstitutionalism indicates a path for the clash between the readers and the writers (interpreters), but without showing how to break with those protocols of writing and reading. Well, the project of Transconstitutionalism is still engaged with what Niklas Luhmann correctly affirms, the modern law describes itself as positive law. Niklas Luhmann and his most obedient follower, Marcelo Neves, are not keen on an "engaged literature" or in the function of reading and writing. But, my belief is that the technological aspects of law's text and language, with the addition of the "allegories of language" provokes aberrations in law's realm, the same meaning that Paul de Man described as the aberrations on reading<sup>108</sup>.

### **II.3.3.1 - The Problem Remaining**

Reading and writing come with experience. But what exactly is this experience? We have to be aware that law seeks a unity through the repetition and generalization of decision-making processes. Judges speak through decisions. But how exactly this speaking comes from and puts itself in the form of writing. Furthermore, how this writing could reach a permanent presence in everyday language and be embedded in our acts. This sovereignty from the legal decision was not so explored by legal philosophers. Only philosophy and literature could show us a possible path to understanding the space of law in worldwide community scenario. But such kind of investigation does not come without a high risk. It is always possible that we are not talking about the law during an speculation. The risk is a permanent detour to leave the question without any conclusion.

Comparing the two decisions on *Caroline*, a tricky question comes around. What has changed? Both issues are identical, the violations filed in the Courts as well. The gap between both decisions is less than ten 10 years. Thus, we are not talking about freedom of Nixon's era and freedom now. But, the court's chamber composition apparently has changed. It is assigned. And what signature can tell us about it? A machine is not supposed to be

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<sup>108</sup> Paul de Man, *Allegories of Reading: Figural Language in Rousseau, Nietzsche, Rilke and Proust* (New Haven: Yale University Press, 1982), p. 3-24.

influenced by a signature. Law should operate like a machine, in its mechanical and economic aspects. It should generate, as Pascal's machine, a simplicity from the complexity. And it should be much more accurate, replacing freedom, by following the authority of law and its procedures<sup>109</sup>.

That laws create a smooth legitimation through its utterance, is not something new. Nonetheless, judges' knowledge (experience) supplies the absence and space between facts/rules. With good reason, the interference of the judge should be only a logical consequence about what lies behind the rules. The judges' mind would grasp the essence of the rule, and it would extend it in the form of writing. So to speak, the experience that we are talking about is not only an experience to understand the rule and the facts, but is a prior experience on how the interference should be done.

The interference originates a new text, a new rule. Interpretation is nothing else than legislation<sup>110</sup>. At this very particular moment, which Derrida called the instant of calculation, any reference to rule/fact is suspended by the judge/legislator. Such as, any theory or methodology is suspended, and what turns to be dominant is the performance language employed by the judges/legislator. Positive law cannot space from this intrusion. The prescriptive character of the law is cloudy by the performativity. The machine, now, is operating not according to the will of its founders, but follows the autonomy of the third person, by its subjectivity and rhetoric.

This rhetoric aspect assigned by law is only found outside law. As you may have realized, it is a matter of legitimacy of whom and of what is introduced by the machine. Many of the most recent theories of law's interpretation, or law's hermeneutic, save no efforts to bring forth a phenomenological theory to be able to spin the elements that make part of a creation of a new text. But again we fall down into an old question. Would it be possible to gather all minds to the same theory? The answer is obvious. The dilemma remains in the essence (*Wesen*) of the law since the nitty-gritty is no more graspable. So to speak, jurists have buried in smoothies' totalities, and the machine's project is to produce a

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<sup>109</sup> Geoffrey Bennington, "Aberrations: de Man (and) the Machine", in. Geoffrey Bennington, *Legislation - The Politics of Deconstruction* (London/New York: Verso, 1994), p. 137-58.

<sup>110</sup> Ibidem .p.141. This passage is related to Bennington pleasant description on de Man's idea. "The machine is thus both text and text-productive; conversely, the text is a machine and produces further machines. It follows that Pascal's machine is an 'allegory' of writing and/or reading, that writing and/or reading involve a complex of conflictual components or non-dialectical 'moments' which simultaneously dispossess the 'subject' of writing/ reading and set up the drive to signature as a means of legislating for that 'subject' and its 'legitimacy' against such dispossession. The text as the machine is thus both the life and the death, the life-death of anything like a subject, be that subject determined as 'author' or 'reader,' 'inventor' or 'user'".

superb economy. The machine, also known as the law's system, grails to reach the most ignorant (*Dummkopf*) of men, and has to be operated by someone who does intend to get rid of it.

The machine supplies the system with rules (*Gesetz*) and jurisprudence to be reproduced by the operator. The operator, as already mentioned, performs a text, combining rules and the law case. Transconstitutionalism can also be read as text-producer. Concerning Luhmann, the text will be laid out to the second order observer. Prior to the reading, the transconstitutional's clash has to give an answer<sup>111</sup>. The answer to a text, is the text. To identify what is a transconstitutional's decision we have to obey the logical aspects determined by the creator. Seizing the meaningless speech of Luhmann's lexicon, Transconstitutionalism demonstrates no attunement. But what Neves named as Transconstitutionalism has to be produced by the machine's supplement. Transconstitutionalism has no metaphysic project to be someday questioned as solitude or infinitude<sup>112</sup>. It is not a law's universal issue. There is no Transconstitutional's court.

Neves spots, in a structural level, some of the obstacles that transconstitutionalism has to face<sup>113</sup>. He does not deny that transconstitutionalism can only happen in a very particular moment. He attributes it to "negative empirical conditions"<sup>114</sup>. But, what is relevant to transconstitutionalism and the present work is the following Neves's statement: "...from the legal order's internal standpoint, transconstitutionalism is self-blocked by asymmetries of the forms of law, although these asymmetries are conditioned by the above-mentioned external factors"<sup>115</sup>. The project of the transconstitutionalism is to set out criteria to offer a possible answer to constitutional dilemmas, when moments of disruptions take place, fading away from the vertical and horizontal limits of legal reasoning.

My belief is, although transconstitutionalism opens up an opportunity for "dialogue" among legal orders, the improbability of reach of a common language, a common cognition, may take it the transconstitutionalism to the same problem that afflicts other descriptions of

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<sup>111</sup> Niklas Luhmann, "The Third Question: The Creative Use of Paradoxes in Law and Legal History", *Journal of Law and Society* Vol. 15 n.2 (Summer, 1988b), p.153-65.

<sup>112</sup> Martin Heidegger, *The Fundamental Concepts of Metaphysics: World, Finitude, Solitude* (Bloomington/Indianapolis: Indiana University Press, 1993), p. 160-4.

<sup>113</sup> Marcelo Neves, *Transconstitutionalism* (Oxford/Portland: Hart, 2013), p.177.

<sup>114</sup> *Ibidem*.174

<sup>115</sup> *Ibidem*. The whole statement is: "it can also be said that transconstitutionalism bears within itself a positive dimension, the development of transversal rationality among legal orders, and a negative dimension, the blocking and destructive relations among them. Thus, its limits are not only determined from outside the legal system via the superimposition or 'colonization' of legal orders by social systems that instrumentalise the law".

the world constitutional issues, at the end of the decision-making process would remain only the unknowing and the uncanny of a legal decision. That's because transconstitutionalism fails in the same matter of other theories, it does not seek for a new language. Moreover, as already indicated, to be realizable, transconstitutionalism has to uphold itself in allegories, bringing every single interruption on cognition that an allegory is able to do, and jeopardizing the possibility of ruptures and insight that would change the understanding of law.

#### **II.4 - Producing Text**

To Luhmann, as well as to Neves, language is just a fact of transporting information. It is important to hallmark that they consider the improbability of understanding and many problems that writing and phonetic bear. However, in transconstitutionalism strategy, there is a sort of assumption that the judge will follow it when the moment of breaking down comes up when the real moment of transconstitutionalism shows itself in front of the magistrate. Transconstitutionalism is already a text, an unfinished book that must be understood by its readers. Furthermore, transconstitutional issues are also texts, which were read by Neves as transconstitutionalism. There is of course, as you can see, a juxtaposition of texts that must be vowed. But the problem is not only in this so-called structure of legal orders. As I have tried to demonstrate over this chapter, there is a problem with language, especially when allegories and performative language rules the scenario. And then, it turns to be a question of writing and reading.

Even when Neves correctly moves away from the perspective of the Constitution as a metaphor, what he ends to set up as transconstitutionalism is a potential machine, which still generates rhetoric and allegories, disturbing the possible cognition of the events and blurring the turning for a new representativeness of law to society.

As I've stressed over the chapter, both cases of *Caroline of Monaco/Hannover*, are possible to read as transconstitutional. Nonetheless, the performativity of the text creates a simulacrum about what fundamental rights could really be. That is another significant point that shall be discussed if a Luhmann's circular and structural fashion to understand fundamental rights is truly able to perform a change on standards and misconceptions, which are embedded in our language. The learning-making process and the exchanging of

information among legal orders are not necessarily a learning to men. The wisdom to changing goes beyond of "seeing what the other cannot see." Getting the picture of the limits of experience and analyzing law in considerably different angles, bringing close to the parse of art, of literature and how writers are engaged to some realistic turning on the space of reparation and what the other represents in our mind, is a sort of experimentalism that law has never ventured out. The experimentalism in law is the experimentalism of the vague concept of law's science and its function.

The "limit-experience," as Blanchot points out, means:

"The limit-experience is the response that man encounters when he has decided to put himself radically in question. The decision involving all being expresses the impossibility of ever stopping, whether it be some consolation or some truth, at the interesting or the results of an action, or with certitudes of knowledge and belief"<sup>116</sup>

Strictly speaking on the decision-making process, slowing stepping to no cross the frontier between literature (Blanchot) and law, the way of engagement of the judge with his own decision should arise some kind of disturbance. The judge is not who will be punished or suffer the consequences of the law's enforcement. We could assume with a high degree of certainty that he has never experienced the enforcement. And even if he had suffered from it, the issue that he has been called to decide, it is a new one, even if the rule and facts are identical to the one that took him to be punished. It is always different. Although, this quite authoritarian word, called "reason," makes a cut in the law. The legal reasoning demands a unity, an organization, a repetition of the arguments, of the supplements, to set up an imaginary guarantee of stabilization of normative expectative.

The judge has a demand, an unpleasant task. He is the third. And he has no experience. He never had. He is acquaintance with the law, with the jurisprudence. He has been assigned countless decisions. But he still has no experience. Moreover, he is by himself in this demand that he has to serve. Perhaps, his scientific knowledge will provide a truth. The anxiety which comes from of the decision's moment becomes a victory. His task has ended. His conscious, responsibility, his signature does not matter anymore. Now, only a text has remained. It is supposed to be bound with human rights, fundamental rights, with a constitutional essence, always privileging freedom and equality.

The produced text was already there, a long time before its creation. A long time before the possibility of transconstitutionalism. If the judge has never been close to experiencing the situation that he has been called upon to decide on, it does not matter. This

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<sup>116</sup> Maurice Blanchot, *The Infinite Conversation* (Minneapolis: Minnesota University Press, 1993), p. 203-4.

text has lost its history before his existence. It always looks like a new idea, a new outcome that follows the logic of the other texts and conventions. It has a very selective memory.

Following a restrictive chain of logical events is a quite relevant aspect of the decision. Fragmentary writing is out of the question. Logic simulates how our mind produces thinking and rationality concerning the organization. Logic should be the clearest way to represent the truth of our language, in the moment when we externalize it through writing. Again (*noch einmal*), the absence between when this mandatory aspect of legal decision triggered the imperative of logical aspects of the decision and when it became the standard, it is considerably unclear. By logical perspective, in a very smooth way, we have to understand not only how the decision is showed to us, but also the writing, its grammar, and selection of words and expressions. We hear a lot that law creates its own language. It would generate its own rules of language if such expression allows us to think in such a broad way. It is important to hallmark that I do not mean a self-referential state of affairs.

Since an interdisciplinary approach became the spirit of times, the analysis of writing and speaking in law's realm has been faded away, as if every ordinary issue from the law's language has been already a solution acted and now only matters the searching to law's adequacy. The strict formalism employed by law helps to hide out the performative aspect of law's language, a phenomenon which is completely ignored by sociological observation, and it does not seem to awake any interest in transconstitutional debates and its keens. Even the "internal" theories ignore the essence of writing and speaking. They are keen on the debate of the pragmatic aspects of law's language<sup>117</sup> or questions of inference. The same issue is continuously repeated in law and literature. Literature is more likely a source of inspiration or a reference of what law ought to be than a path to demonstrate the problem of writing and speaking, whatsoever<sup>118</sup>.

But in the scene of literature and philosophy, a debate on deconstruction and tropes is evident since the 70s'. Philosophy and literature can master its own critics; they need prove that cognition is merely an invention. At least, a considerable part of the literary and philosophical studies. In law, theories and methodologies show itself as if all the problems of law have been acted a solution, as so the judges and jurists. You follow the line of

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<sup>117</sup> Aulis Aarnio, *The Rational as Reasonable: A Treatise on Legal Justification* (Dordrecht: D. Reidel Publishing, 1987), p. 47-100.

<sup>118</sup> Ino Augsberg, *Die Leserbarkeit des Recht: Texttheoretische Lektionen für eine postmoderne juristische Methodologie* (Weilerswist-Metternich : Velbrück, 2009), p.78-121.

rationality, and the addressed has to assume that the calculation and economy of a decision are correct, and representing a sort of social will. In a certain way, law was tamed to not question the law.

#### **II.4.1 - Reading the Instructions**

Human and fundamental rights provided a step beyond law's formalism. Discursively opened, those categories would guide the law to run away from its own conspicuous overbearing nature. The smooth legitimation is linked to history, always connecting principles and rules to a recent past of genocide, exploration, inequality, and promises. If something comes up due to a given situation, how it finds its own legitimacy to be extended to any realm of law, to be embedded in our everyday speech, to not be contested under any circumstances, it is much more than a simple inquiry. We cannot ask anymore for what those concepts surround us. Fundamental rights and human rights have no memories. Without a shape, it comes to be there, affirming to be the consequence of all humanity sadistic and malevolent nature. According to Christoph Menke, the Declaration would be responsible for jeopardizing the political action, and the police act was responsible for the Declaration. For Thomas Vesting, fundamental rights articulate the distance among neighbors. They are rights that offer a subjective right to fill an issue. The form of fundamental rights is not a form to bring neighbors close to each other.

Law cannot be political. Law should be reduced to law, seeking its own form, narrative, and field of experimentation. Described with scientific and methodological rigor, a law cannot be influenced by anything external. Whereas, the closure is not an ending process, if it would not become an autistic system, the "opening" does not bring any guarantee of changing. It is how sociologists strategically describe how methods, concepts, and theories are incorporated into the law in its very own way. Although all this equation to keep the idea of law distance of any human intervention, humor, or demonstration of stupidity, Hans Kelsen admitted, going against his own description of law, that the activity of decision is not able to ensure the law's conception. The realm of literature has already faced the question of a possibility of a pure narrative to exist, especially after the writing of

Proust<sup>119</sup>. To the law, its books and jurisprudence, everything happens as if it conceived by law's imaginary, as if there were no other possible reality, and every single rustle would be harmonized in the end as the law has once imagined. Of course, this perspective is a consequence of the Kantian invasion in law's realm.

The *mythical authority* encounters its form in the writing of an official interpret. No one is better to manipulate the facts and concepts according to their wills than judges. That is the way a machine provokes aberrations in its own system. This is only possible to happen in its correct form, a liturgy that leaves to interpret the possibility to manage the employed arguments. The boundary between authority and society is unmeasurable. However, the decision may also be read and recognizable as an empty poignant narrative, which takes the reader only to the task of confirming what has been written by the judges.

#### II.4.2 - Old New Stuff

In part, transconstitutionalism is keen to only recognizing the frame where an event, same constitutional problems is happening between legal orders. Same rituals and protocols were other sorts of rights have been setting in dispute. Thus, Marcelo's strategy is to re-read those conflicts through a new scope. This should not surprise the reader who is familiar with Marcelo's oeuvre. In *Zwischen Themis und Leviathan* he concludes arguing that the biggest challenge of the social system and public sphere is to deal with forms of disagreement among a plurality of groups. In *Entre Hydra e Hércules* after analyzing the difference between rules and principles, the interpreter should use this form of differentiation to adequate the decision on law's paradoxes. The core of his oeuvre spins around differentiation, inclusion, and adequacy and how positive law could give a fitly about those issues. Nonetheless, framing the constitutional meaning in those circumstances may be a wrong strategy, because it would induce (or confuse) the reader to wrongly believe in his signature. The very idea of the Constitution of transconstitutionalism imposes a quite particular perspective on law and rights. Is there a moment of transconstitutionalism?

When the transconstitutional question begins to take shape, it commences with a traditional interpretation, balance, *Abwägung*, a vertical and horizontal overview on

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<sup>119</sup> Maurice Blanchot, *The Infinite Conversation* (Minneapolis: Minnesota University Press, 1993), p. 203-4. Paul de Man, *Allegories of Reading: Figural Language in Rousseau, Nietzsche, Rilke and Proust* (New Haven: Yale University Press, 1982), p. 3-24.

fundamental rights, violation of conventions and treaties, so to speak, there was a conservative, parochial element before a transconstitutional issue. But when the ordinary perspective becomes a transconstitutional one? What does allow the interpreter to make such radical turning? Is he conscious of it?

Up to now most of scholars recognize that courts around the world strive to reach what they call an adequate solution<sup>120</sup>. It is unquestionable that constitutional doctrine has made a pact with international law. Since then, each has reproduced the other in its doctrine and decisions. It is a very convenient pact, which brings a smooth legitimacy to a decision. A covenant which has come without any prior notice, without any preview scientific studying. Nowadays, who dares to contest it? Fundamental rights and human rights are so radically persuasive that any joint or connection made by them escape from any self or alter - approval. The necessity of this pact is unknown, it just happened. But, as once constitution is another where it is not constitution anymore. The hazard resides in this emblematic situation. The assimilation of an original idea of the Constitution and its fundamental rights for other legal order just comes to be possible by a performative use of language, which takes the "bad reader" to an induced belief and manipulation of knowledge.

For more than fifty years, most critics of law followed by inoperative solutions or utopian bids. The edge of experimental time took place at the end of 19<sup>th</sup> century until the beginning of the World War II. After that, few jurists dared to propose some new model of thinking based on external sources. The rest plays of interpretation with what already has been given by scholars. The fear of interruption and failing out with the tradition has brought aberrations to law's imaginary.

The model of differentiation as if a pure narrative was possible, does not take into account many of the inherent aspects of human behavior, especially the multiplicity of a person's character. When the sense of urgency of this pure model is notably reproduced in acts, Luhmann and Neves called it "code sabotage" or "systemic corruption"<sup>121</sup>. Whereas,

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<sup>120</sup> Anne-Marie Slaughter, *A New World Order* (Princeton/Oxford: Princeton University Press, 2005), p. 69-78.

<sup>121</sup> Marcelo Neves, *Transconstitutionalism* (Oxford/Portland: Hart, 2013), p. 19, Transversal rationality, like structural coupling, is a two-sided form. The downside of structural coupling is the reciprocal blocking of systemic autonomy via corruption of the systems involved. Here the code of one of the systems is sabotaged by the code of another system so that the former loses its ability to reproduce consistently. Thus, if the code 'having/not having' (economics) corrupts the rules of the democratic game, via the electoral process or taxation, directly sabotaging the code of politics (the democratically constructed difference between government and opposition), systemic corruption will follow if the political system proves unable to react negative superimposition by economy, in accordance with its own criteria and programmes (sic). Conversely, however, subsidies politically granted to inefficient economic groups who support the government may be seen as a political corruption of the economy, amounting to political sabotage of the economic code.

how could a judge be responsible for "systemic corruption," if the own system desired by Luhmann, so well the transconstitutionalism, allows performative language, tropes, rhetoric, and it does not show the shore to reproducing the system? Beyond it, why "systemic corruption" cannot be considered an unusual event for the law? Perhaps, it would be the unique way to provoke moments of enlightenment and breakdown within the "system."

The "duty" (*Verpflichtung*) to be loyal to a perfect reproduction of the system has never been thought negatively (in the Hegelian sense). Even jurists as Teubner<sup>122</sup> and Lescano<sup>123</sup>, when they formulate an allegedly new perspective on thinking about the law by bringing Derrida, Adorno, and so forth to the stage, they assume that those thinkers would share the idea on law's conflict in the same way that it is employed by Teubner and Lescano.

### II.4.3 - The Metaphysical Insistence

Evidently, I am not defending the "corruption" of who "has" against who "does not." My belief here is to shape a reflection on the impossibility of a perfect reproduction of the code, and regarding this relevant aspect, the negative side could pivot to construct moments of anarchical thinking inside the system, messing with the order of things. However, the despair<sup>124</sup> of Neves, is to recreate a space of absolute fairness, where inclusion/exclusion would always be calculated by the same standard criteria in everywhere (*überall*). No tales, no tropes, no political engagement, no deconstruction, no revolution, no theology can step in into a sheer program of rights and its destiny to calculate non-consensual facts, and always reach "adequacy."

"Adequacy" is a word which appears quite often in Neves's oeuvre. It is also a Luhmannian vocabulary. It seeks to reduce an inherent tension among systems and environment, claiming that any answer given in a complex society will always come together with contingency, or with other virtual solutions. Words and expressions as "adequacy" lead to a mistakable convincing of the reader. Such term is so arbitrarily

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<sup>122</sup> Günther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2014), p. 88-101. Hauke Brunkhorst, "Democracy and World Law: On the problem of Global Constitutionalism", in: Barbara Bukinx/ Jonathan Trejo-Mathys/ Timothy Waligore, Ed: *Domination and Global political Justice*, London: Routledge 2015a, pp. 313-344. Günther Teubner, "Alter Pars Audiatur: Das Recht in der Kollision anderer Universalitätsansprüche". In: Hans-Martin Pawlowski und Gerd Roellecke (Hrsg.) *Der Universalitätsanspruch des demokratischen Rechtsstaates*. ARSP Beiheft 65, Steiner, Stuttgart 1996a, 199-220.

<sup>123</sup> Andreas Fischer-Lescano; Günther Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Frankfurt am Main: Suhrkamp, 2006), p. 41-7.

<sup>124</sup> Maurice Blanchot. *The Space of Literature* (Lincoln: University of Nebraska Press, 1989) p.57.

valorized by Luhmann and its followers that everyone who confronts it can be chastised as not capable of learning from Luhmann.

However, an "adequacy" solution coming from the law's system would be the one which would satisfy both parties of issues and, moreover, it would not provoke any or almost no disturbance on law's environment. Coming back to *Caroline von Monaco/Hannover* issue, as an example, a transconstitutional perspective claims that the noise provoked by the applicants and the German Courts make the European Court of Human Rights lead the way to the very idea of "European integration"<sup>125</sup> (we shall see the impossibility of integration with more details on the forthcoming chapter). To keep going with the project of integration, a widespread method had to be employed, the infamous *Abwägung*. So, unclear words and nebulous methods are the way how transconstitutionalism found to justify itself, immunizing itself and to vouch that all transconstitutional issues set forth a circular pattern. If *Caroline* case is singular or not, what should be at stake is the disastrous simplicity that the courts ushered to the point, creating a "hermeneutic of stupidity"<sup>126</sup>.

The primary audience of law are the jurists themselves. To be honest, is not the most prepared audience. Law School is a factory to training repeaters, who shall only repeat the law (*Gesetz*). No in-depth interpretation, no questioning, no profound reflection on society and its problems are mandatory terms to get a bachelors degree. And the student has to be "practical," whatever it means. It is relevant to hallmark the rugged complicity between students and institutions. Kafka understood it better than no one else. In the short story, "The Test," it may be one of the most standout works about the mastery's relationship. The *Diener* (servant) must be prepared for the test. At any moment, he can be called by an authority.

All we know is that the examinee is a servant without work. His essence is to serve, but he has no one, no house, no

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<sup>125</sup> Marcelo Neves, *Transconstitutionalism* (Oxford/Portland: Hart, 2014) p. 88. "Moreover, the German Federal Constitutional Court - whose ruling in *Caroline von Monaco II* (15 December 1999) (sic.) emphasising freedom of the press at the expense of privacy (in an application for an injunction to prevent publication of photographs) was overruled by the ECtHR in *Caroline von Hannover v Germany* (24 June 2004), which found that the right to privacy outweighed the public's right to information in this case - consolidated in *Görgülü* (14 October 2004) its position with regard to the establishment of limits to the internal application of ECtHR decisions, considering the hypothesis that they may be contrary to fundamental rights and the principle of the rule of law established in the German Constitution: the German Federal Constitutional Court must take ECtHR decisions into account but is not bound by them (...) However, narcissistic denial of the norms of ECtHR decisions by state courts does not seem acceptable in the context of European integration. Hence the indispensability, also for national is not supposed involved in the solution of human rights cases, of developing a transversal rationality concerning the legal order of the European Convention on Human Rights. Any unilaterally may have destructive or irrational effects on European integration in the sphere of human and fundamental rights."

<sup>126</sup> Avital Ronell, *Stupidity* (Chicago: Illinois University Press, 2002), p. 17 "the only thing that the stupid have over the smart is mechanical memory. They can memorize anything, as long as they don't have to produce their own thoughts or images. Whoever can't think for himself cannot think the other, cannot grasp what others think".

institution in the present to serve. He serves time. Predisposed to being called, he waits. Being a servant without a job, without wages, appears to signify that his servitude is absolute. There is no exchange system, no graspable assignment, to relieve him of the burden of waiting on... well, he does not know for and whom he is waiting. In the meantime, the time of the narration, he waits his calling<sup>127</sup>.

Regarding the brilliance of Foucaultian's analysis on bodies control, my assumptions do not go in the same way, although a possible linking can be done. The crucial point to law spins around legitimacy. Who is prepared to this call? And why the law was elected to it? Naturally, it is a question which should be answered by Heidegger and his "mit sein" thinking. Nevertheless, scanning the superficialities of the problem, transconstitutional clashes are a-historical, or we have to assume that the only history possible is the schematized by Luhmann and how the constitution achieved its sake<sup>128</sup>. Are jurists prepared to the duty? Now and then, I think that an act of decision is an act of relief. The obligation to decide was fulfilled. Naturally, it may have many critics related to its matter. But, the final decision is still there, and we have to follow it. Contrary to what happens in literature and philosophy, the law's servant is not on the stake of the critics, but only his production will suffer with it. He does not need to sell his decision, as a writer has to sell his books to survive. The judge has no master. And the judge does not have the same background of a thinker. He is not called to think, and he was not domesticated to it. His work demands quotations. He needs to quote the rule and use as simplistic as possible performative arguments. It does not matter how it will end. Thus, we have to follow *Caroline II*, at least in the European Union.

What transconstitutionalism can teach to the *bad reader*? Is the "bad reader" able to understand the title? Distorting the title to his own purpose would create a hazard by ignoring the performative aspect of law and to wedge it hopping into a structural perspective. The title "transconstitutionalism" stirs the bad reader to philosophizing about the world and interdisciplinarity, without being conscious about what he is accurately doing. In contrast to the literature, which its engagement to find out an answer or to prove that there is not a possible explanation by using all tools affordable with a high degree of accuracy and aesthetically free, law chooses another path. Linked to a scientific language and moving

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<sup>127</sup> Avital Ronell, *The Test Driver* (Chicago: University of Illinois Press, 2007), p. 72..." there is a double movement consisting of sheer being-called and being called upon to answer. Both events occur without properly taking place. When the test is administered, there is a call for him to answer. By not answering he in a sense remains faithful to his essence: he remains a servant or, let say, he disowns the possibility of knowing, he refuses to assume the function of mastery. Nonetheless, by refusing mastery, he passes the test. One is tempted to write "The Test," for Kafka submits the servant to another order of testing. The test, more reminiscent of the dilemmas of Cordelia and Bartleby than those of Perceval or Wilhelm Meister, involves subjection without redemption, an itinerary without telos - no need to keep our eyes on the prize because the test will have taken place without your knowledge. This other test is not about faltering, about the sheer torment of being called on to answer and affirm - and in the end, it marks the simple impossibility, in this case, of stepping forward or starting up for yourself or asserting anything

<sup>128</sup> Niklas Luhmann, "Verfassung als evolutionäre Errungenschaft", (1990) *Rechtshistorisches Journal* 9, p. 176-205.

away from deep reflection and complicated speculations, law, and its dogmatism have not yet found a place to a sharp compression outside its boundaries.

However, when such terms as "adequacy" or even the title "transconstitutionalism" is inserted into law's space of representation, regarding the thin line that separates what "adequacy" and "non-adequacy" is, the fragile perception that jurists are able to fulfill their demand ducks together with the decision's elegant style that only jurists can see.

In sum, it is all about the economic created by a text, that is sharply ignored by most specialists of global constitutional conflicts, transnationalism, transconstitutionalism, European law, and so forth. Law is a machine which speaks through text. Any sort of mistake generated by the machine is almost unrepairable. The decision of *Caroline II* will remain until *Caroline III* comes up or a revolution begins in Europe.

The highest challenge is to insert a new language inside the law, turning the law to be something else. There is a space between who writes a decision and the text. It would be better to call it abysm, because Derrida would call it in this way, perhaps. In this abysm resides the "other." This "other" will attempt to be grasped by who assumes the position of a reader and, of course, this space belongs to the *Gewalt*. However, this other was already there before. In the form of other languages. In the instant that the judge wrote the decision, the other has risen with a mystical significance. But, it was a sort of conjecture between personal experience and education of the servant that is responsible for the shape of this "other." The "other" of the writer is not the writer himself. He was demanded to write the decision, and there is nothing new in the decision.

Concepts like "adequacy" and "bridge of transition" are useful to create a new reality to the writer and to whom it has been a challenge to grasp what the "other" has kept in secret. In addition to the rules and principles, jurists use as guiding manuals, articles, and books to seek for a better understanding of their world. However, the activity of the writer is not submitted to someone's else writing, or the "other" from "other." The movement between conscious and writing is already dialectical and somehow allows a free experience that is not possible while we are speaking, or even reading. When we read, the limit of our knowledge and the anxiety to understanding takes the activity of reading to a mystery question: do we understand it? Thus, figures of languages, allegories, tropes, and so on, provoke a sense of understanding to the reader.

As claimed by Blanchot:

The reader, without knowing it, is engaged in a profound struggle with the author. Whatever intimacy may subsist today between the book and the writer, and however sharply the figure, the presence, the history of the author may be brought into focus by the circumstances of the book's circulation (circumstances which, while not arbitrary, are perhaps already somewhat anachronistic) - despite all this, every reading where consideration of the writer seems to play so great a role is an attack which annihilates him in order to give the work back to itself: back to its anonymous presence, to the violent, impersonal affirmation that it is<sup>129</sup>.

So to speak, through the reading of *Caroline I/II*, the passages that I claim to be rhetoric, somehow, will pass quickly in front of the reader's eyes. But, the significant problem is the repetition of those parts or the essence of those parts. This rhetoric movement without a dialectic, or without being antagonized, because a legal decision can only be changed by the own body responsible and prescribed by law to it, is dramatically outlined by a naive definition of law's aim: controlling behaviors. This sort of definition has remained for a long time inside law's imaginary. The jurist firmly believes that this is the goal of law. Thus, when a so relevant decision as *Caroline* comes up, the person is already shaped to do what he has to do.

The reading will give to the decision existence. Be as that it may, how should I read *Caroline von Monaco/Hannover* in assent with transconstitutionalism? Would it change anything? Regarding the a-political face of transconstitutionalism and it does not bring any Joycean turning to law's language, as well a new subject, how is it supposed to be read in line with past decisions? Does transconstitutionalism will change the future of those decisions? Because "reading, in the literary sense, is not even a pure movement of comprehension"<sup>130</sup>.

## II.5 - Transversal Rationality

In a vague conclusion, transconstitutionalism is part of a performative machine, quite similar to the one conceived by Pascal<sup>131</sup>. Its operation and materialization, following Neves's conceptualization, would only be possible by a mechanism denominated by "transversal rationality." In Neves's words:

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<sup>129</sup> Maurice Blanchot. *The Space of Literature* (Lincoln: University of Nebraska Press, 1989) p.193, The reader is himself always mainly unidentified. He is any reader, none in particular, unique but transparent. He does add his name to the book (as our fathers did long ago); rather, he erases every name from it by his nameless presence, his modest, passive gaze, interchangeable and insignificant, under whose light pressure the book appears written, separate from everything and everyone.

<sup>130</sup> Ibidem, p. 196.

<sup>131</sup> Geoffrey Bennington, "Aberrations: de Man (and) the Machine", in. Geoffrey Bennington, *Legislation - The Politics of Deconstruction* (London/New York: Verso, 1994),

The concept of transversal rationality I am using derives from that of the transversal reason proposed by Wolfgang Iser, but here it is reconstructed in light of other theoretical presuppositions. According to Lyotard, Iser considers multicentric society from the standpoint of the heterogeneity of 'language games.' This means there is no supra ordered discourse imposed on the others as a regulator. Imposition of one of the fields of language games on the others would mean the destruction of the heterogeneity of the discursive spheres and the respective communication systems. However, he does not accept the postmodern idea that there is no metadiscourse or metanarrative which serves as a yardstick for particular discourses, especially in relations among them<sup>132</sup>.

It would be a modest turning in Luhmann's conception of structural coupling<sup>133</sup>. The calling out would be how "transversal rationality" works in terms to avoid aberrations. "Transversal rationality" is crude and the observation on decisions only achieves a willingness from the reader. For a reader accustomed to the language of juridical books, everything that sounds extravagant may be acceptable without any objection. Furthermore, when someone else very familiar with Luhmannian's vocabulary has any kind of intention to provoke a rupture. "Transversal rationality" has any sort of will to upside-down or reverse the aberrations caused by vagueness and allegories. It stirs up the sentiment that a complex and technological language legitimizes the employment of terms as "margin of appreciation" and every metaphor or vague expression put on by an authority. Such technology glossed over by philosophical language triggers the play of rhetoric and performative language.

Following along with the concept of structural couplings, transconstitutionalism has demonstrated a difficulty of matching the polo of structural level and the instance of writing, almost the same sort of paralysis committed by the Kantians. This remark indicates the difficulty to put it into work. "Transversal rationality" also suffers from the pathology of "bridges of transition." Framing rationality, if we regard that it dwells in our mind, cannot be seen as through a historical achievement or even an analytical aspect. When its *modus operandi* is placed before it, a new supplement to rationality is given. It empties out the dispute about the reason within, albeit it is not immune to external criticism.

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<sup>132</sup> Marcelo Neves, *Transconstitutionalism* (Oxford/Portland: Hart, 2014), p. 28.

<sup>133</sup> Ibidem. "Structural couplings are fundamental mechanisms of concentrated and lasting 'interpenetration' between social systems. In the context of Luhmannian theory, interpenetrations merely enable each system to place disorder complexity reciprocally at the disposal of the other's self-construction. In other words, 'the complexity each system makes available is an incomprehensible complexity - that is, disorder - for the receiving system.' Thus, there is no possibility that, reciprocally, the 'preordered complexity' and the very rationality processed by one of the systems can be placed at the disposal of the other, which would make them accessible to it as the receiving system. This is what permits the construction of a transversal rationality between autonomous spheres of communication in a world society. Here are not dealing with mere 'operative' 'interferences' as defined by Teubner, but rather with 'structural' mechanisms that enable experiences to be constructively exchanged by various partial rationalities. The replacement will vary intensely in form and content under the type and singularity of the respective systems or discourses and their particular relations. Thus, in a sense used here, the concept of transversal rationality and structural coupling are closely related, since affirmation of the former supposes the existence of the latter. However, the notion of transversal rationality entails a plus concerning that of structural coupling." See also Günther Teubner, "Alienating Justice: On the Social Surplus Value of the Twelfth Camel." In: David Nelken and Jiri Pribán (Hrsg.) *Law's New Boundaries: Consequences of Legal Autopoiesis*. Ashgate, Aldershot 2001, 21-44.

## II.5.1 - Disassociations

In moving to read a transconstitutional decision, the rhetoric aspect dulls to show up over and over again, making any legal theory or methodology to go by the board. In *Caroline II*, after a long and tedious description of what was currently happening, the European Court of Human Rights begins the calculation or what should be regarded as a calculation. But instead, playing with words is consistently employed by the Court's members. Everything under the narrow idea of a "balance." After the balance, what remains is whether it is possible to grasp of the original concepts used by the Court. The short describing of the meaning of such words can be understood that the Court thinks that everyone shares the same idea of significance.

For instance, the part which is argued the *subject of a report*, in the second paragraph the Court states:

While in the former case the press exercises its role of "public watchdog" in a democracy by imparting information and ideas on matters of public interest, that position appears less relevant in the latter case. Similarly, although in certain exceptional circumstances the public's right to be informed can even extend to aspects of the private life of public figures, especially when politicians are concerned, this will not be the case – despite the person involved being well known to the public – where the published photos and accompanying commentaries relate exclusively to details of the person's private life and have the sole aim of satisfying public curiosity in that respect (see *Von Hannover*, cited above, § 65 with the references cited therein, and *Standard Verlags GmbH*, supra, § 53; see also point 8 of the Resolution of the Parliamentary Assembly – paragraph 71 above). In the latter case, freedom of expression calls for a narrower interpretation (see *Von Hannover*, cited above, § 66; *Hachette Filipacchi Associés (ICI PARIS)*, cited above, § 40; and *MGN Limited*, cited above, § 143).

Expressions like "special circumstances," "public interest," "narrow interpretation," at this stake, the Court never considered a possibility of negation by the reading of such expressions. To this extent, the Court had to untie the complex logic of public interest with the significance of privacy. Nonetheless, a "narrow interpretation" does not exist. Interpretation, as a book, is always unfinished. Furthermore, for any kind of argument, the rules must be set before it begins. But, remains only in the superficial literal meaning of "narrow interoperation," it is already confusing if it essays to measure what should a narrow interpretation be.

The narrative employed by the Court raises up a paradox. The performative speech of a decision, such like this one, has no memory, no future. The logical machine by the Court to put every element and facts in order, demanding lightness, does not underwrite any certainty that the meaning of the decision will be grasped. The way that such words were expressed, at first sight, shall not represent any after of sort.

The blindness insight (Paul de Man) of the transconstitutionalism elucidates a muddle which invariably happens in law's realm. The wall of separation between politics and law and legal orders should remain adamant in every occasion. However, relentlessly this imaginary division baffles due to the very impossibility of the "smooth technological legitimation" (Geoffrey Bennington) stamps the law. By analyzing law's operation only through a structural state of affairs, it blocks out an opportunity to criticize and reveal a crisis (Paul de Man).

Allow me to trace a parallel with Paul de Man's statement, a thinker that I am very engaged with in this work:

We have, to a large extent, lost interest in the actual event that Mallarmé was describing as a crisis, but we have not at all lost interest in a text that pretends to designate a crisis when it is, in fact, itself to which it refers. For here, as in all of Mallarmé later prose and poetic works, the act of writing reflects indeed upon its own origin and opens up a cycle of questions that none of his real successors have been allowed to forget. We can speak of crisis when a "separation" takes places, by self-reflection, between what, in literature, is in conformity with the original intent and what has irrevocably fallen away from his source. Our question concerning contemporary criticism then becomes: Is criticism indeed engaged in scrutinizing itself to the point of reflecting on its own origin? Is it asking whether it is necessary for the act of criticism to take place?<sup>134</sup>

Although, to highlight criticism drew by transconstitutionalism against other attempts to outline the global constitutional conflicts through a predominant and almost exclusively overview from the law is able to make us think that many convictions are misplaced. Yet, without being aware of the confusions of a legal decision and its formalistic claim, and, moreover, not moving beyond the setting of definitions and functions of fundamental rights and human rights, as it was already an inviolable achievement, transconstitutionalism shall be doomed to make a wrong movement inside the backdrop. What I mean by "the wrong movement" may be understood would be to draw an illusionary idea that the state of affairs between law and consciousness, and law and legal order, are able to begin a new evolutionary operation (in Luhmannian terms, which means that the impossible can become possible). And with the transconstitutionalism, the "bridges of transition" would be responsible to temper the inherent tension among the system and its environment.

In another passage of the text the European Court of Human Rights states the following:

Admittedly, the Federal Court of Justice based its reasoning on the premise that the applicants were well-known public

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<sup>134</sup> Paul de Man, *The Messenger Lectures* 1983, available <http://backdoorbroadcasting.net/2013/10/paul-de-man-the-messenger-lectures-1983>. "When the French poet Stéphane Mallarmé visited Oxford in 1984 to deliver a lecture entitled *La Musique et les lettres* and dealing with the state of French poetry at the time, he exclaimed, with mock sensationalism: 'I am indeed bringing you news. The most surprising news ever. Nothing like it ever happened before. They have tempered with rules of verse... *On a touché au vers*'".

figures who particularly attracted public attention, without going into their reasons for reaching that conclusion. The Court considers, nonetheless, that irrespective of the question whether and to what extent the first applicant assumes official functions on behalf of the Principality of Monaco, it cannot be claimed that the claimants, who are undeniably very well known, are ordinary private individuals. They must, on the contrary, be regarded as public figures (see *Gurguenidze*, cited above, § 40; *Sciacca*, supra, § 27; *Reklos and Davourlis*, supra, § 38; and *Giorgi Nikolaishvili v. Georgia*, no. 37048/04, § 123, 13 January 2009).<sup>135</sup>

To find out a dialogue or a "bridge of transition" a striving exercise from the reader must be done by displacing the significance of dialogue or through a broad interpretation on "bridge of transition." The reading of this passage reveals no scientific work or even a supplement of law. If we place such statement in a newspaper's advertisement, probably, most of the readers would think that it would belong to an opinion and thereof it would not affect a reasoning by law.

## II.5.2 - Blindness

So to speak, transconstitutionalism blindness against the rhetorical aspect from those "common constitutional conflicts" and how it jeopardize any kind of project of "adequacy." The "reasoning" shows up its force constantly along the decision. But, what would be a reason? Does something like a good or bad reason actually exist or it is just another very human creation, those kinds of inventions that Nietzsche enjoys to mock and to point out how we, men of science, are stupid. Law's decisions are consistently misread. In a nutshell, most of the logical and hermeneutical theory are keen on demonstrating the path to grasp the essence of a rule and its relation to conscious facts.

At this moment, it is even hard to find out what would be the aim of the transconstitutionalism and what differentiates its purpose from the other group of jurists that are striving to find out how to set out the phoneme of the constitutional boom, especially in the Western society. All those theories and methodologies are driven by an economic rule or an endeavor to reduce the complexity (Luhmann; Teubner), which due to focus only on a

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<sup>135</sup> Von Hannover v. Germany [2004] ECHR 294 (24 June 2004). See also von Hannover v. Germany No. 2 (application no. 40660/08), adjudicated in February, 2012. The Federal Court of Justice then examined the question whether the photos had been taken in the circumstances unfavorable to the applicants. The Government submitted that the fact that the photos had been taken without the applicants' knowledge did not necessarily mean that they had VON HANNOVER v. GERMANY (No. 2) JUDGMENT 39 been taken surreptitiously in conditions unfavorable to the claimants. The latter, for their part, alleged that the photos had been taken in a climate of general harassment with which they were continually confronted.

122. The Court observes that the Federal Court of Justice concluded that the applicants had not adduced evidence of unfavorable circumstances in that connection and that there was nothing to indicate that the photos had been taken surreptitiously or by equivalent secret means such as to render their publication illegal. The Federal Constitutional Court, for its part, stated that the publishing company concerned had provided details of how the photo that had appeared in the *Frau im Spiegel* magazine had been taken, but that the first applicant had neither complained before the civil courts that those details were inadequate nor submitted that the photo in question had been taken in conditions that were unfavourable to her.

supposedly central problem and leaving the other issues to a marginal space.

It enhances that a book or even an idea has no end (Blanchot), it is impossible to embrace all sort of questions, and most of the jurists are not aware of that. Almost an economic strategy that does save those theories to enter in contradiction with themselves. However, such economy is undoubtedly relievable to those who have assumed the role of a servant (*Diener*), as already showed in Kafka's story *The Test*.

Anyhow the economy employed by the transconstitutionalism and its reading on the scenario of common constitutional problems vanishes the contradiction inside the law's system when a decision like *Caroline II* comes up. It is a very similar association used by Paul de Man when trying to demonstrate the question of criticism in some critical:

No contradiction or dialectical movement could develop because a fundamental difference in the level of explicitness prevented both statements from meeting on a standard level of discourse; the one always lay hidden within the other as the sun lies hidden within a shadow, or truth within error. The insight seems instead to have been gained from a negative movement that animates the critic's thought, an unstated principle that leads his language away from its asserted stand, perverting and dissolving his stated commitment to the point where it becomes emptied of substance, as if the very possibility of assertion has been put into question. Yet it is this negative, apparently destructive labor that led to what could be called insight<sup>136</sup>

As Neves points out:

There are relevant negative empirical conditions for the realization of transconstitutionalism in today's world society. It can also be said that transconstitutionalism bears within itself a positive dimension, the development of transversal rationality among legal orders, and a negative dimension, the blocking and destructive relations among them. Thus, its limits are not only determined from outside the legal system via the superimposition or 'colonization' of legal order social systems that instrumentalise the law. Also, from the legal order's internal standpoint, transconstitutionalism is self-blocked by the asymmetries of the forms of law, although these asymmetries are conditioned by the above-mentioned external factors<sup>137</sup>.

But the own transconstitutionalism is responsible for creating its contradictions. Again, the metaphor "bridge of transition" does not contemplate that the external factors shall appear in writing, inasmuch as a mind does make any kind of division between external and internal factors. If the reader and the writer are keen on the clash among legal orders and for that they need to seek for a solution in dimension of transversal rationality, only an extreme economic process could make it seem a genuine example of transconstitutionalism, notwithstanding, this pureness is polluted by the transversal reason, so to speak, transconstitutionalism has sabotaged itself.

The self cannot be vanished along with the process of writing. In this respect, Blanchot strived to demonstrate how the self-contaminates a writing and how the self should

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<sup>136</sup> Paul de Man, *The Messenger Lectures* 1983, available <http://backdoorbroadcasting.net/2013/10/paul-de-man-the-messenger-lectures-1983/>.

<sup>137</sup> Marcelo Neves, *Transconstitutionalism* (Oxford/Protland: Hart, 2014) , p. 33-6. See also Democracy and World Law: On the problem of Global Constitutionalism, in: Barbara Bukinx/ Jonathan Trejo-Mathys/ Timothy Waligore, Ed: Domination and Global political Justice, London: Routledge 2015a, pp. 313-344.

have faded through the institutionalization of a new language. What should be original, as transconstitutionalism claims to be, fails because every new element that is trying to connect with it is indeed not new? The idea of constitution, "Bridges of transition," "transversal constitution," "adequacy solutions symmetry and asymmetry, all of those expressions are constantly under roaster.

Transconstitutionalism attempts to embrace its memory by creating its rules. Whereas it brings together so many signatures together that memory which saves no efforts to hide its weakness ends to be undergoing in the same exposure of those signatures. Only something or someone without biography or signature is not bound to deconstruction<sup>138</sup>.

### II.5.2.1 Transconstitutionalism and the Margin of Appreciation II

What could transconstitutionalism tell us about the "margin of appreciation"? This question is apparently naive, but transconstitutionalism would only happen in many law's cases in Europe, after the European Court of Human Rights makes use of this expression. Some bad reader would say that it would be the negative side of transconstitutionalism, and a negative dimension, *the blocking and destructive relations among them*. But, the case of *Caroline von Monaco/Hannover I and II* is considered a successful example of transconstitutionalism, because the other level has followed the very idea of human rights and fundamental rights from another level.

The margin of appreciation allows the judges to perform a summation of fundamental and human rights matters<sup>139</sup>. The implications of such authorization permits

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<sup>138</sup> See Jacques Derrida, *Archive Fever: A Freudian Impression* (Chicago: University of Chicago Press, 1998a), p.3. "The concept of archive shelters I itself, of course, this memory of the name *arkhe*. But it also *shelters* itself from this memory which it shelters: which comes down to also saying that it forget it. There is nothing accidental or surprising about this. Contrary to the impression one often has, such a concept is not easy to archive. One has trouble, and for essential reasons, establishing it and interpreting it in the document it delivers to us, here in the word which names it, that is the "archive."

<sup>139</sup> Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards, (1999), *International Law and Politics* Vol. 31, p. 844. Margin of appreciation, with its principled recognition of moral relativism, is at odds with the concept of the universality of human rights. If applied liberally, this doctrine can undermine seriously the promise of international enforcement of human rights that overcomes national policies. Moreover, its use may compromise the credibility of the applying international organ. Inconsistent applications in seemingly similar cases due to different margins allowed by the court might raise concerns about judicial double standards.<sup>4</sup> Even more importantly, the rhetoric of supporting national margin of appreciation and the lack of the corresponding emphasis on universal values and standards may lead national institutions to resist external review altogether, claiming that they are the better judges of their particular domestic constraints and hence the final arbiters of their appropriate margin. Thus, not only would universal standards be undermined, but also the very authority of international human rights bodies to develop such standards in the long run also may be compromised. See also Hauke Brunkhorst, "Democracy and World Law: On the problem of Global Constitutionalism", in: Barbara Bukinx/ Jonathan Trejo-Mathys/ Timothy Waligore, Ed: *Domination and Global political Justice*, London: Routledge 2015a, pp. 313-344.

judges to move beyond the formal shape of law and European convention. With such level of confidence, now lawyers can move freely to the external environment to regulate democracy and freedom. Let's keep in our minds that margin is always related to a political issue, especially what concerns the idea of a European integration and how democratic is an act and decision took by a national court. So to speak, any supranational issue that invokes the margin of appreciation would be already contaminated by the negative side of transconstitutionalism. Whereas, the "blocking" does not happen because those decisions are somehow incorporate by the institutions.

The intrinsic critic of law has been losing its validity and the inside language of law would only find relevance if it is conditioned by external factors or if its reference comes from the outside<sup>140</sup>. The margin, as described in a later chapter, has any source inside law's rationality. So to speak, in this very particular case, transconstitutionalism only works through an aberration. It assumes the possibility of a "transversal reason" by enforcing an irreconcilable expression, which has no match inside law's language. The margin was a quasi-political tool used by the French administration to give an answer to cases related to discretion.

The mystery remains in the way of working transconstitutionalism. Employing the word "constitutionalism" brings the attraction to a solution which would be given more legitimacy than the enforcement of an exegetical method, or only and frankly the use of inference. But, as Neves points out if the negative side of the transconstitutionalism is undergone to the opening of the legal system to its environment. Albeit, transconstitutionalism is an opportunity to the reconciliation of human and fundamental rights and different types of legal orders, the truth is that the reading of those rights is an aberration through allegories as "margin of appreciation." The anxiety for the right answer is a source of attraction to false models of expression as "margin of appreciation," "bridges of transition," or "transversal reason."

The binary position of system/environment; input/output is so puzzling to the reader, that any answer which offers the discourse of both sides may apparently be the correct

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<sup>140</sup> See the critic drew by Paul de Man p.3 about the problem of critical literature, "Hence the emphasis on hybrid texts considered to be partly literally and partly referential, on popular fictions deliberately aimed towards social and psychological gratification, on literal autobiography as a key to the understanding of the self, and so on. We speak as if, with the problems of literary form resolved once and forever, and with the techniques of structural analysis refined to near-perfection, we could now move 'beyond formalism' towards the questions that really interest us and reap, at last, the fruits of the ascetic concentration on techniques that prepared us for this decisive step.

answer. The tenacious of a reading derived from more than one perspective can be quite cunning, and in a certain way cozy. Even though, transconstitutionalism does not have a stab at what it is hiding at the surface of the writing and rhetorical use of expressions. The authority can be very tenacious in manipulating the terms as "margin of appreciation." However, if such manipulation is covered by a dialogue among legal orders, following the ritual of the transconstitutionalism, the denouement is not able to be immediately comprehended.

The literal dimension of a transconstitutional decision, based on the enforcement of the margin shall be demonstrated, in the future, how pernicious is the submission of a reasoning without critic against the authority of reference, or the one who initially provided the text to society. The considerable influence which Niklas Luhmann exercises on transconstitutionalism and in Neves oeuvre obscures the investigation and analyses of many of the consequences, especially, the one that is not liable to be described through the glass of a binary and structural economy of words. Any negative dialectical or deconstruction fashion is rejected by a Luhmann's disciple, who regularly claims the imprecision and subjectivity of such *Weltanschauung* (perspective; view of the world).

The beauty of administrating justice with a representational dialogue between legal orders, in a moment that a circular fashion or reason show its faces, removing the tyrannical horizontal and vertical methodology of the authority, and replacing it by a "transversal reason," which turns out to be circular. The aftermath is unthinkable when we are to attend the accurate use of words and expressions. Furthermore, the high level of abstractions of a Luhmannian's vocabulary as usually is not reconcilable with the poignant anxiety of the facts.

The matter becomes even more complicated insofar as transconstitutionalism does not recognize or does not investigate how the authority of law works or even speculates over it. In law's imaginary space we got used to the increase of information<sup>141</sup>, methods, and theories which are daily incorporated. A sublime parameter to escape the test, to run away from trial, is the very possibility of having an audience of bad readers, who will never go to contest the protocols of how the figure of a "transversal reason" can be possible or even well-heeled. Furthermore, for this audience, the best master is the one who will never go to make you sink, since you do not walk outside the lines.

The difficult lies especially when system's theory analysis seeks to be engaged with a state of affairs which breaks out with a Kantian tradition. But the way that Luhmann has to choose seems to be not so coherent. Every analysis or investigation from his perspectives ends up with a true or false statement. As much as the "transversal reason," which seems to be more abstract than any being can reach it, and it submits the reader and the writer to a pure role of seeking to follow up the protocols of law and what Niklas Luhmann claims to be fundamental and human rights.

To sum up, in contrast to what transconstitutionalism pleads to be, it is more likely to be a rhetoric stratagem to writers. The tortuous schema that a decision has to follow up in or to be labeled as a transconstitutional decision overlays the crude utterance that lies behind the writing on freedom and democracy in an integrated community.

The boundary between the State's positive and negative obligations under Article 8 does not lend itself to precise definition; the applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the relevant competing interests (see *White v. Sweden*, no. 42435/02, § 20, 19 September 2006, and *Gurguenidze*, cited above, § 38).

### **II.5.3 - Law's Rhetoric**

In the lines above, when the European Court of Human Rights is trying to enforce the principle concerning private life, the own Court states that a precise definition is impossible to withdraw from the arguments. If we follow a principle of non-contradiction, or better, if we wish to avoid any contradiction, words like "similar" and "fair balance" should be vanished from a legal dictionary. With a sheer degree of imprecision, "transversal reason" would only be useful if we assume that it is only possible to operate on rhetoric's feature. According to Paul de Man:

And since this aberration is not necessarily intentional but grounded in the structure of rhetorical tropes, it cannot be equated with consciousness, nor proven to be right or wrong. It cannot be refuted, but we can be made aware of the rhetorical substratum and of a subsequent possibility of error that escapes our control<sup>142</sup>.

So to speak, if we try to go further on any attempt to set a precise language, those aberrations can tackle any working or trial. Niklas Luhmann did not explicit expressed that his whole theory was set up by using an imprecise understanding on interdisciplinary. Such

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<sup>142</sup> Paul de Man, *Allegories of Reading: Figural Language in Rousseau, Nietzsche, Rilke and Proust* (New Haven: Yale University Press, 1982), p.123 Allegories...in this specific assertion, de Man explains the rhetorical degree in Nietzsche's work. "For the text goes well beyond the statement that claims to know is just an unwarranted totalization of the claim to receive and to feel. Elsewhere, Nietzsche will devote considerable energy to questioning the epistemological authority of perception and of eudaemonic patterns of experience. But here he has other objectives. The unwarranted substitution of knowledge for mere sensation becomes paradigmatic for an extensive set of aberrations all linked to the positional power of language in general, and allowing for the radical possibility that all being, as the ground for entities, may be linguistical "gesetzt," a correlative speech acts."

fuzziness was surely forgotten by most of his readers, maybe because it complicated the attraction that Luhmann strived to draw from society. But, evidently that the imprecision, which transfers a high level of accuracy to the reader, contaminated beyond repair further observations on law. Not to mention, it has doomed a talented generation to reject other fields of knowledge.

The next statement from the European Court of Human Rights indicates the high risk of a structural observation:

106. In cases such as the present one, which require the right to respect for private life to be balanced against the right to freedom of expression, the Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the article, or under Article 10 by the publisher. Indeed, as a matter of principle these rights deserve equal respect (see *Hachette Filipacchi Associés (ICI PARIS)*, cited above, § 41; *Timciuc v. Romania* (dec.), no. 28999/03, § 144, 12 October 2010; and *Mosley v. the United Kingdom*, no. 48009/08, § 111, 10 May 2011; see also point 11 of the Resolution of the Parliamentary Assembly – paragraph 71 above). Accordingly, the margin of appreciation should, in theory, be the same in both cases.

107. Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *MGN Limited v. the United Kingdom*, no. 39401/04, §§ 150 and 155, 18 January 2011, and *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 57, ECHR 2011).<sup>143</sup>

The later citation refers to the use of the margin. The use of margin through a presumed "bridges of transition" can just be understood as a theatrically. The seductive power of the expression "bridges of transition" or "transversal reason" caves in after being confronted with the assertive pulled out by the European Court of Human Rights. Hence, where an aberration as a margin of appreciation can kick around, any allegory to self-legitimize an idea is destined to support the aberration or to be blotted out.

A margin is a figural language without any legal or natural definition. On that account, if transconstitutionalism bucks to prove its existence, it must be admitted that the "bridges of transition" supports aberration, and, consequently, it is inconsistent to warrant that the legal consistency and social adequacy cannot be reached, at least at the supranational level, by the transconstitutionalism.

We must keep to our attention that one of the possibilities of the transconstitutionalism comes around was a quite stimulating statement wrote by Douglas Hofstadter. The book *Transconstitutionalism* opens with this statement as a sort of prelude, and the final chapter would be a material proof of the observation. Now, we are talking

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<sup>143</sup> Von Hannover v. Germany [2004] ECHR 294 (24 June 2004). See also von Hannover v. Germany No. 2 (application no. 40660/08), adjudicated in February, 2012.

about the "hierarchical tangled"<sup>144</sup>.

By affirming that transconstitutionalism is a representation of a tangled hierarchy, it would assure that we are dealing only with a fictional illustration about the overlapping of a "bottom down" interpretation. Nonetheless, transconstitutionalism spares no efforts to prove its consistency. But, in the introduction and elaborate the first chapter of Hofstadter's book, at the moment that Kurt Gödel is mentioned, the author makes the reader aware of what is his intention. So to speak, using issues to prove the being of transconstitutionalism it is already a demonstration that transconstitutionalism is inconsistent, paraphrasing Gödel.

At the end of his book, Neves points out:

In this sense, it constitutes an 'inviolable level' (the Constitution) (in Hofstadter's sense) of the legal order of the constitutional state. But in the dynamic constitutional game the 'inviolable level' may be involved (tangled) which other levels, forming a 'super tangled level.' In our context, this means that although the constitutions of constitutional states normatively bind their interpreters, especially constitutional courts and judges, they are permanently reconstructed via interpretation and application by those same interpreters. This the paradox of tangled hierarchies: a constitutional ruling is normatively subordinated to the Constitution and affirms what is constitutional by concretising the constitution.

But again, the paradox is only able to be materialized when the formalism of the language is replaced by allegories and rhetoric as an instrumental help out of a language that is was already born with a high degree of pathology, for instance, "bridges of transition." What is argued in the latter quotation cannot surprise any reader with some familiar point with hermeneutic. Hofstadter was trying to prove that even in the most consistent system, like the one formulated by Bertrand Russel, strangers loops are very likely to happen.

The so mentioned case *Caroline II*, before any sort of descriptive manipulation if a strange loop was presented at that time, it is beyond a case of aberration. Employing a fuzzy narrative, the European Court of Human Rights distorts facts by using a rhetoric strategy to reach a conclusion. The decision is inflated with likely consequences, like this one:

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<sup>144</sup> Douglas Hofstadter, *Gödel, Escher and Bach: an Eternal Golden Braid. A metaphorical fugue on minds and machines in the spirit of Lewis Carroll* (New York: Basic Books, 1999), p .See Marcelo Neves Marcelo Neves, *Transconstitutionalism* (Oxford/Protland: Hart, 2014). There is an Inviolable level - let's call it I-level - on which the interpretation conventions reside; there is also a Tangled level - the T - level - on which the Tangled Hierarchy resides. So these two levels are still hierarchical: the I-level governs what happens on the T-level, but the T-level does not and cannot affect the I-level. No matter that the T-level itself is a Tangled Hierarchy - it is still governed by a set of conventions outside of itself. And that is the important point.

As you have no doubt imagined, there is nothing to stop us from doing the 'impossible - namely, tangling the I-level and T-level by making the interpretation conventions themselves subjects to revision, according to the position on the chess board. But in order to carry out such a 'super tangling', you'd have to agree with your opponent on some further conventions connecting the two levels - and the act of doing so would create a new level, a new sort of inviolable level on top of the 'super tangled' level (or underneath it, if you prefer). And this could continue going on and on. In fact, the 'jumps' which are being made are very similar to those charted in the 'Birthday Cantatata,' and in the repeated Gödelization applied to various improvements on TNT. Each time you think you have reached the end, there is some new variation on the theme of jumping out the system which requires a kind of creativity spot."

119. In so far as the applicants complained of a risk that the media would circumvent the conditions laid down by the Federal Court of Justice by using any event of contemporary society as a pretext to justify the publication of photos of them, the Court notes that it is not its task, in the context of the present applications, to rule on the conformity with the Convention of any future publication of photos of the applicants. Should that happen, it will be open to them to bring proceedings in the appropriate national courts. The Court also observes that the Federal Constitutional Court stated in its judgment that where an article was merely a pretext for publishing a photo of a prominent person, no contribution was thereby made to the formation of public opinion and there were, therefore, no grounds for allowing the interest in publication to prevail over the protection of personality rights.

A blindness insight that only demonstrates a dialogue among courts, if I can call it a dialogue, but a refusal to dialoguing with the subject. Transconstitutionalism reveals, without intention, anything else than how authoritarian the legal system is or how Niklas Luhmann adores the autonomy but forgets the consequences of the autonomy. Niklas Luhmann is systemically misreading. His followers keep a distance of any hermeneutical or critical reading debate. Every ordinary analyst has to observe as an indicative result about how the system operates. But Luhmann ignores the ambivalence of the system that he shaped. Most likely, his followers are engaged in this cause and forget that writing and reading are unable to set up a consistency, unless a new protocol of reading and writing energy disguised as a wolf.

### CHAPTER III - THE DISASSOCIATION BETWEEN LAW AND COMMUNITY

Are the Europeans really aware of what a wish of integration through a community means? To be more clear, the supranational level, at which the European Court of Human Rights performs, would offer an instance to tear up the old codes of the European society, which always played against a virtual idea of human and fundamental rights. It means that the project of a European Union (community) began decades before its formalization. The idea of a foundation and epic battles with a contribution of gods and heroes can be surely assumed to be an abstraction embedded in the language of the Western society.

However, there are many relevant points that law has never been worried to deal with it. A community only is possible with an association of a group of men. This statement seems to be quite obvious, but going to a deeper investigation, in the link between the word "community" and the meaning that it brings together with it, so to speak, its significance would share a figment of equality that would be quite impossible to reach regarding the sordid military codes, which are impregnated in our manners and gestures, and the machismo that the Western society never was able to give up completely. Those are only some instances that have to be taken into account in an acute reflection. Some other questions include the metaphysic and the transcendental illusions as well as how the political theology has some impact on the understanding of the behavior of the integrants of a community if the European Union is a community and not only a word with empty significance. Nancy points this out:

Behind the theme of the individual, but beyond it, lurks the question of the singularity. What is a body, a face, a voice, a death, a writing, - not indivisible, but singular? What is their singular necessity in the sharing that divides and that puts in communication bodies, voices, and writings in general and in totally? In sum, this question would be exactly the reverse of the question of the absolute<sup>145</sup>.

At this instant, it is not the proper moment to write about cosmopolitanism, shared by Kant. Instead, I rather perform a jump to the environment of the First War and talk about *Ulysses* by James Joyce. Few writers had the ability to grasp the contrast of the idea of greatness and opaqueness that has surrounded the poor metaphysics of Western society. Even law and justice has to describe in a performative way, making references to the epoch of the Greeks. It seems to be that only those grand narratives can legitimate the law's

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<sup>145</sup> Jean-Luc Nancy, *The Inoperative Community* (London/Minneapolis: Minneapolis University Press 1991), p.6. See also Ernst Behler, "Flamme, Glut und weisse Asche: Jacques Derrida wandelt auf Martin Heideggers Pfaden, Vom Geist", in *Frankfurter Allgemeine Zeitung* (December 18, 1989). Drucilla Cornell, "Post-structuralism, the Ethical Relation, and the Law," *Cardozo Law Review* no. 6 (August, 1988), p. 1587-1628.

utterance and a vague and misunderstanding of legal reasoning. Many jurists and philosophers, now and then, fall back upon Greek tragedy to explain the actual condition of the law and rights.

However, in some sort of mundane enigma, the abysses of an enemy, the existence of the man project by Joyce would be as hazard as its absence, or even its worse. The famous statement from Carl Schmitt in his book "*The Concept of the Political*", "The specific political distinction to which political actions and motives can be reduced is that between friend and enemy", is somehow persistent to leave out the European scenario. Even the highest political figure, the sovereign<sup>146</sup>. This idea was spread throughout the European Parliament, and a likely declaration of "exception" only is possible via a strict system of control between the national and supranational level.

### **III.1- Separating Things?**

Even the political or juridical space of representation was not able to grasp the emblematic distinction among law, rights, politics, nationality, identity, history, language, and so forth. Again, we are dealing with the downside of the system autonomy and the narrowness of its opening. Of course, if the opening is too wide, it could be a high risk to the system, a self-destructive dilemma that Niklas Luhmann was aware of, in my opinion, after he tried to explain how a system makes efforts to reduce the complexity of its environment and question concerning the contingency. If you have not yet realized, I am using the social system as a starting point, a strategical play only to begin with my dialogue with myself. So to speak, I am saying, okay, let's assume that the systems have autonomy, but what should be the consequences of such autonomy?

The political order that the European Union seeks to set, first in economical aspects rather than political and solidarity among the nations and neighbors, deeply disregards some complexity of the Western society, and this issues has a strong impact on the Human Rights Courts, as already demonstrated in the latter chapters and the case that we will investigate in

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<sup>146</sup> Richard Kenneth, "Toward a Political Theology of the Neighbor", in. Slavoj Zizek; Eric Santner; Richard Kenneth, *The Neighbor: Three Inquiries in Political Theology*, Chicago/London: Chicago University Press, 2005) p. 10-2. p. 10-11. According to Richard Kenneth, "The structural analogy of sovereignty to deity that grants the sovereign God's authority to decree an exception also suggests that the sovereign's legitimacy derives in part from the divine claim to the fidelity of love: 'you shall love the Lord your God with all your heart and with all your soul and with all your might'(Deut. 6:5). For the political theology tradition represented by Machiavelli, the key question may be whether it is better for the sovereign to be loved or feared."

the following lines. My hunch is that without a language rupture (*Bruch*) with what Heidegger called *mit sein, mit einander*, the decisions concerning human and fundamental rights in the supranational level have a tremendous chance to be only symbolic, without any substance or to be entire misinterpreted due to different cultural and language issues. The challenge for a European political and solidarity is bigger than anyone has thought in the past, because many peaces of the puzzle were not placed in the board. The groundbreaking question that Emmanuel Levinas placed to the world in his magnum opus, *Totality and Infinity*, was not taken so seriously and has been taken yet by the political, economical and juridical authorities from the European Union, so to speak, scanning the surface of Levinas though, "What are the conditions of this form of relation to the other and to the world?"<sup>147</sup>

We are not free for choices, for speeches; we are free to understanding equality. Would be possible to the European Union provides a worldly experience of human rights? Christopher Fynsk in his understanding on Levinas point out that, the Western men "want to explore the universe and know both good and evil. At the same time, however, they also want to preserve their security and their independence"<sup>148</sup>. Despite the law's system has reached its autonomy, the men of law and the ordinary Western men have other subordination<sup>149</sup>. We are already born under a subordination. Europeans are europeans since the nativity and all law's, rights, moral duties, language, have no free acceptance <sup>150</sup>.

The European Union saves no efforts to curb and restrain the thinking of a national identity, which caused so many catastrophic events in the past. However, it is not due to a worldly foundation that would prevent the Union from a crisis, teasers, posers, pons asinorum, or even a Gordian knot. By suppressing the frontiers, the European Union induces a clash of narratives, neighborhood, and spiritual existence. The following statement from

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<sup>147</sup> Christopher Fynsk, *Last steps. Maurice Blanchot's exilic writing* (New York:Fordham University Press, 2013), p.17. See also Jacques Derrida, "Fatih and Knowledge: the two sources of 'Religion' at the limits of Reason alone", in. Jaques Derrida; Gianni Vattimo (eds.), *Religion* (Stanford: Stanford University Press, 1998d), p. 1-78. Michael Nass,. "Introduction: Miraculum Ex Machina." In *Miracle and Machine: Jacques Derrida and the Two Sources of Religion, Science, and the Media*, 1-12. New York: Fordham University, 2012. <http://www.jstor.org/stable/j.ctt1c5ck0n.5..>

<sup>148</sup> Ibidem, p.18.

<sup>149</sup> Ibidem, p.19.

<sup>150</sup> Ibidem, p.19-20. At this point, I am drawing a parallel between the born from European Union (community) and the origin from the "sabbatical existence" from Levinas. According to Fynsk, "The tractate to which Levinas turns in his commentary approaches the phrase by asking, first, whether revelation is not inherently a violent imposition of a message that can only be received freely if freedom is only consequent upon its event? How could the people of Israel have had any choice at Sinai, and how, therefore, are we to understand the character of their adherence? Is the possibility of responsibility something one can choose responsibility, and if not, what is the nature of the assumed responsibility? The Talmudic tractate goes right to the point by offering a literal translation of the sentence from 'Exodus' (19:17) whereby 'and they stopped at the foot of the mountain' becomes: 'and they stopped under the mountain'".

Geoffrey Bennington elucidates in a quite exciting way the central questions of a nation (not yet resolved before the creation of the European Union):

Which should be enough to inspire suspicion; our own drive to find the centre and the origin has created its own myth of the origin - namely that at the origin has a myth. In this story, narration comes too easy, too soon; investigating the nations the nation is here complicit with the nation's own story. The problem is no doubt a result of the pretension to reach the centre directly, whereas such access is in general illusory: the approach to the nation implies borders, policing, suspicion, and crossing (or refusal of entry) - try to enter a country at the centre (by flying in, say), and the border is still there to be crossed, the frontier shifted from periphery to centre<sup>151</sup>.

### III.1.1 - Why do we need concepts?

The enemy should not be more the enemy. Such a premise is valid to every single citizen who circulates inside Europe and European Union has to live with this expectation. The task of a global community is linked, or at least the Western society is associated to the supreme imperative. That would not claim for experience from the States. Citizens and *outsiders* are under a condition that the even without the inner deserter experience from the past, each country and being would be easily engaged with a supreme good, and the "other" (country, neighbor, or outsider) would no longer be a threat or an uncanny (*Unheimlich*) being. We have to keep in our mind that in the American Continent also sets an Inter-American Court of Human Rights, which seeks the enforcement and respect of the American Convention of Human Rights<sup>152</sup>.

As claimed by Brunkhorst:

The existing concept (for example of egalitarian freedom or modern individualism) is not only a concept for the scientific observer of history but also for social actors themselves. As an expression of their self-understanding, and especially if it is embodied in legal institutions, the concept itself is an essential moment within social reality. Even if its original meaning has been distorted, abused, perverted, and misrepresented, in the course of a history of ever new forms of domination—Hegel calls it *Schlachtbank* (slaughter bench)—it operates in history as an existing contradiction (*daseiender Widerspruch*) that contradicts the “whole that is the wrong” (Adorno) from within the whole. Normative constraints of evolutionary adaptation operate in history as existing contradictions<sup>153</sup>.

Writing through Brunkhorst's claiming, including the expansion of law's unity, as the Luhmann's followers assign the paradoxes of the human rights and global constitutional

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<sup>151</sup> Geoffrey Bennington, "Postal Politics and the Institution of the Nation", (1986), in: Geoffrey Bennington, *Legislations. The Politics of Deconstruction* (London/New York: Verso, 1994), p. 240. See also Jean-Michael Oliver, "La Carte postale - De Socrate à Freud et au delà, de Jacques Derrida" in: *Actuels* (1980a), p. 12-3.

<sup>152</sup> Pact of San Jose of Rich Cost, Article 1: Nature and Legal Organization: The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights. The Court exercises its functions in accordance with the provisions of the aforementioned Convention and the present statute.

<sup>153</sup> Hauke Brunkhorst "Constitutional Evolution in the Crisis of the Early Twenty-First Century", *Social Research*: 2014b vol:81 iss:3 p.519 -I. See also Hauke Brunkhorst, "Solidarität in der Krise: Ist Europa am Ende", in: *Leviathan* 4/ 2011, 459-478-57. See also Hauke Brunkhorst, "Kollektiver Bonapartismus? – Demokratie in der europäischen Krise", in: *Blätter für deutsche und internationale Politik* 4/ 2012a, 83-93.

dilemmas, the experience without an experience of the disaster<sup>154</sup>, of the past events that lead the men of many nations to transform the utterances and imperatives into the form of a rule, is only experienced through an experience of non-experience. We promise that such events never are going to happen again. If they don't come up again, what should be the utility of the those rights?

However, we recreate by assembling facts of the horror and the disaster. New forms of disappointment, new sensations of stunning mind us, and toward the assembling, we reproduce the speech and the writing, connecting the rules and principles of human and fundamental rights, filling our experience of a disaster that has not affected us with the sentiment of fulfilling. In law, every rare exception, any experience of writing, is based on the assumption that every single experience is excelled by knowing the normative order, by the ability to operate an inference between the fact and norms inside us even if we had suffered physically and mentally with the disaster.

During a decision-making process, a judge had to assume his task. This is demanding, but at the same time, he is performing a writing activity. He is doing an economy of history, a calculation of facts and experience. Indeed, he has to assume that he has experience, and such a play must be demonstrated in writing. He is writing. He is endowed with a supreme freedom. Even the rules and principle do not tackle a freedom because they can be manipulated through the writing. The reader is touched by the human rights issues<sup>155</sup>.

Human and fundamental rights are the linchpins in the claim of the law to break the walls between "the other", and to perform a sort of ending of the inference in the law's thinking. The pragmatism in law, the "Age of Rousseau" and Derrida's book *Grammatology*<sup>156</sup> in law, coincides with the rise of the human rights and Karl-Heinz Ladeur

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<sup>154</sup> Maurice Blanchot, *The Writing of the Disaster* (Lincoln: University of Nebraska Press, 1995), p. 21-62. See also Susan Handelman, "Reb Derrida's Scripture", in *The Slayers of Moses: The Emergence of Rabbinic Interpretation in Modern Literary Theory* (New York: State of New York University Press, 1982), p. 161-76.

<sup>155</sup> *Ibidem*, p. 1. The groundbreaking first paragraph of the book could be a great teaching about writing and its subject. "The disaster ruins everything, all the while leaving everything intact. It does not touch anyone in particular; 'I' am not threatened by it, but spared, left aside. It is this way that I am threatened; it is in this way that the disaster threatens in me that which is exterior to me - an other than I who passively become other. There is no reaching the disaster. Out of reach is he whom it threaten, whether from afar or close up, it is impossible to say: the infiniteness of the threat has in some way broken every limit. We are on the edge of disaster without being able to situate it in the future: it is rather always already in the past, and yet we are on the edge or under the threat, all formulations which would imply the future - that which is yet to come - if the disaster were not that which does not come, that which has put a stop to every arrival. To think the disaster (if this is possible, and it is not possible inasmuch as we suspect that the disaster is thought) is to have no longer any future in which to think it.

<sup>156</sup> Jacques Derrida, *Of Grammatology* (Baltimore: John Hopkins University Press, 1998c), p. 1-26.

post-structural<sup>157</sup>. The decision based on Human Rights aims to place the things and events in the natural order again. Furthermore, it has to prevent a future hazard. Managed time separates the thinking on law and the singularity. After human rights flukes out, the same rules shall persist, but anything that was vanished by the violation of the rules will not be the same or even replaceable.

Deciding about human rights sets the judge at the edge. He is indifferent, and at the same time he invokes human rights, he is placing the events as it was agreed upon a long time ago through a smooth consensus. So, he is not more neutral; there is no neutrality; he always decides according to human rights; he has the economy of the language and the technology of its significance; his signature is only protocol. By the convention, he is not writing a letter, although, his decision has an addressee.

### **III.1.2 - The Possibility of Fundamental Rights**

Are fundamental and human rights responsible by those events? Who are they? Do we really know what are they doing in the paper of the decision? Are those words passive in the text, so to speak, why do they have to be showing up in the text? But the writer masters his writing and has any responsibility for that. Decision is a madness because it comes through the form of the writing<sup>158</sup>. The judge has no other option, whatsoever.

Yet, could we assume that a decision, in a supranational level, would have any task to the integration? In a very economical way, a decision is an answer to a quarrel, in which only one has the right to hold the truth<sup>159</sup>. How it would ensure a possibility of integration through the human and fundamental rights? According to the article 19 from the European Convention of Human Rights, which establishes the Court:

Article 19. To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

In a quite similar way the Inter-American Court of Human Rights was set, in reference to the article 1 of its statute:

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<sup>158</sup> Maurice Blanchot, *The Writing of the Disaster* (Lincoln: University of Nebraska Press, 1995), p. 43, "When Kafka allows a friend to understand that he writes because otherwise he would go mad, he knows that writing is madness already, his madness, a kind of vigilance, unrelated to any wakefulness save sleep's: insomnia. Madness against madness, then".

<sup>159</sup> Niklas Luhmann, "The Third Question: The Creative Use of Paradoxes in Law and Legal History", *Journal of Law and Society* Vol. 15 n.2 (Summer, 1988b), p.153-65.

Article 1. Nature and Legal Organization. The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights. The Court exercises its functions in accordance with the provisions of the aforementioned Convention and the present Statute.

The war, the disaster, the media, overturned a solid bravura that was embedded in the nationalism. A man from the 20th century, although it is a man who went to war, is also a man who becomes aware of the horror and tragedy. It is evident that distrust on the theoretical basis of the integration and in the perception of "the other," as a grammarology friend and not an enemy, was spooking the idealists of the both Courts of Human Rights in the West.

It is obvious that the men of Western Society had no conscious about his lack of freedom of choice. I have no intention of investigating such reasons or even to basing my thesis in a Nietzschean's fashion. However, in a more narrative or literally supplement, there is this whisper telling me about "the unavowable community"<sup>160</sup>. Due to every stanchion that backs up our notions of friendship and community, every narrative or utterance that somehow supports the very idea of a society based on principles of human and fundamental rights, in the backstage there is an inception, a key and powerful idea in its genesis. It is thinking that remains only in traces but at the same time was also responsible for the horrors and tragedies. So to speak, these are the two faces of Janus. This unrecognizable matrix binds at the same time the reason for a tragedy and a cause for a sense of peace. How can it be possible?

The thought of a friendly and cosmopolitan Western society would demand its externalization in the form of writing. However, the notion of a world in which the "other" no longer represents the uncanny requires writing that breaks with the conventions and goes beyond the order of significance. Here, we have to hallmark that the significance remains in the realm of the representation, which was set by the Western society.

How must the Western Society deal with religion? To be more specific, how can the "margin" take the question of religion out of the center of focus? Is that possible? In writing, I would affirm, everything is possible. However, it is feasible to reach a full-blown and worldly experience without religious tension, without dimity to the "other." Religion plays an important role in reaffirming who the "other" is. The task of fundamental human rights is to offer an adequate answer to this dilemma, without being rhetoric and performative, imposing the force of a machine pressure over the issues. I would say it is another example

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<sup>160</sup> Maurice Blanchot, *The Unavowable Community* (New York: Station Hill Press, 1998), p. 4-22.

showing that the autonomy of law and its machinery are, somehow, losing power and legitimacy due to its own autonomy.

It is evident that this dilemma is also part of the responsibility of the secularism and political theology. Eventually, legal reasoning can perform a simplistic rhetoric that makes most of the citizens believe that religion and democracy can share the same space. Regarding the fact that Western religion has been more private in the realm of individuality, there is no contesting that, at the same time, the official vanishing of religion has also brought new issues to society, like the political weight on the individual<sup>161</sup>, and there is a remaining of the religious abstraction in our institutions and agencies<sup>162</sup>.

So to speak, the "margin"<sup>163</sup> can offer any reasoning (political and juridical reasoning) to point out if the State is filling or not its undertakings. This smooth legitimation of the supranational level and this pointless principle of freedom of religion bamboozles any writer or reader without a critical formation. Again, the law has missed its path by devoting too much of itself to a technological aspect because it cannot bring any revelation through its words and labor. The material from the law is the manipulated only by its rhetorical and performative aspects, and it is not bound to a difference between the mystical and the art of the facts.

During this chapter, I will analyse the relation between the "margin" and the decision that deals with religious matters. My hunch is that the language of the law, I mean, its performative utterance, is empty and useless to bring any sort of integration in the supranational aspect of the society<sup>164</sup>. To bring it some light to this debate, I'll base my arguments in the article from Thomas Vesting, *Nachbarschaft - Grundrechte und Grundrechtstheorie in der*

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<sup>161</sup> Eric L. Santner, *The Royal Remains. The People's Two Bodies and the Endgames of Sovereignty* (Chicago/London: The University of Chicago Press, 2011), p.63-88. See also Ernst Kantorowicz, *The King's Two Bodies. A Study in Medieval Political Theology* (Princeton: Princeton University Press, 2016), p., 385-450.

<sup>162</sup> Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von Souveränität* (Berlin: Duncker & Humblot, 2015a), p. 1-20. Leo Strauss *Jewish Philosophy and The Crisis of Modernity. Essays and Lectures in Modern Jewish Thought* (New York: State University of New York, 1997), p. 431-46. Hans Blumenberg, *Die Legitimität der Neuzeit* (Frankfurt am Main: Suhrkamp, 1996), p. 590-640.

<sup>163</sup>K. A. Kavanaugh, "Policing The Margins: Rights Protection And The European Court Of Human Rights", in. E.H.R.L.R. 2006, 4, p. 422-444. Rasilla del Mortal, "The Increasingly Marginal Appreciation of the Margin of Appreciation Doctrine", in. German Law Journal, vol. 7, no. 6/ 1 June 2006, p.611-24.

<sup>164</sup> See Marcel Gauchet, *The Disenchantment of the World. A political History of Religion* (New Jersey: Princeton University Press, 1997), p.162-3, "First, reducing otherness does not mean restoring transparent human identity but rather secularly restructuring difference, separation, and human conflict. The departure from religion does not signal the disappearance of every type of religious experience. It does mean freeing up the organization of collective reality from the other's viewpoint, but the subjective experience of the other remains as a possibly irreducible anthropological residual".

*Kultur der Netzwerke*<sup>165</sup>, starting from the assumption about a political theology of the neighbor, further, it collides with the core of the fundamental and human rights, not only in Europe, but in the entire Western Society.

It is a way to demonstrate that the writing on fundamental and human rights still carries with itself the question of *logocentrism*, and a very idea of individualism that is against of any project of solidarity<sup>166</sup> and the community. Furthermore, I wish to bear out that the touchstone of the integration and a project of peace is unconciliate with a project based on the hegemony of the human and fundamental rights. For that, I will use the same method employed in the latter chapter, so to speak, a theoretical reflection through a case.

### **III.2 - Uncanny**

You are private of your freedom due to a crime. Years go by, and a wall between the space of democracy and the small pokey, where you are, represents not only the price that you have to pay for your crimes but also the price that you to pay for being someone that you choose to be or someone who accepts this part of identity. Frequently, religious beliefs are choices that connect the parents with a community, physically or mentally. Eventually, after you grow up, you may have a choice which spiritual path you wish to follow.

But the punishment goes beyond its physical aspect; it breaks and interrupts your beliefs. You are, at the same time, 'the self' of one of the most brutal crimes, and you are 'the self' who has ethical and spiritual patterns to follow, otherwise, mainly, your soul shall be condemned, too. The prison constructed by the men has also put your soul into a trial, perhaps a more severe trial. The flesh and bone may go back to its spiritual form, but your soul is eternal, and the doubt of a divine pardon shall resist until the end of your days.

Now, you are in a trial, and more than one trial. You live in Western society, the place where the freedom of the moderns was born. Secularism has to be present in a single contemporary constitution, whereas you are still flesh, fat, and bone. Of course, you have your own sovereignty. Yet, the stranger cannot mess up with Hellenic and bourgeois

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<sup>165</sup> Thomas Vesting, "Nachbarschaft. Grundrechte und Grundrechtstheorie ind Kultur der Netzwerke", in: Thomas Vesting, Stefan Koriath, Ino Augsburg (org.), *Grundrechte als Phänomene Kollektiver Ordnung* (Tübingen: Mohr Siebeck, 2014), p. 57-86.

<sup>166</sup> Hauke Brunkhorst, "Der Bonapartismus am Ende der Souveränität. Thesen zur Verfassungskrise der Europäischen Union", in: Helge Hoibraaten/ Jochen Hille, Hg.: *Northern Europe and the Future of the EU*, Berlin (Berlin:Berliner Wissenschaftsverlag 2011), p. 199-210.

standards and values. You are using their system of justice; you are getting in touch with the administration of justice from Western civilization.

"We find the latter scene of encounter staged at numerous points in 'The Infinite Conversation', though Blanchot draws out the alternative of speaking or killing in a distinctive way. The dialogue, 'Keeping to Words', for example, introduces the encounter as 'something terrible' by reason of its radical character inasmuch as 'nothing' stands between the individual and the naked present of 'autrui'. We speak to the other or we kill because nothing upholds the reaction prior to our act. In worldly affairs, what Heidegger named 'Mitdasein', relations are always mediated, be they of rivalry or cooperation. But in the moment of encounter, the mediation barriers fall...<sup>167</sup>"

The flesh-and-bone object has a self-conscious, an "I" (ich), which differentiates itself from the non-I. Lacan claims that 'the Other' raises an uncanny feeling the moment when we express our sense to negate what we do not want to be. It brings up the secret familiar traumas that constitute part of our personality, and it goes beyond the dichotomy of friend/enemy<sup>168</sup>. In very naïve sense, the outsider will be judged. It means that any unfamiliar traces that the "I'strange" carries with himself and how he presents himself is a possible event that can be placed under an evaluation and judgement.

### III.2.1 - The Technical Writing

Fundamental and human rights should have the aim or task to cut off the externalization of this personal view, at least. However, then remains the traces of the history of fundamental and human rights. The absence of a signature and biography, so the mythologization of the human and fundamental rights, as well as the technicalization of the methodology to enforce them, hides an ambivalent characteristic of those rights. The form of writing in which rights are introduced through a political institution, named parliament or congress, hold their significance in the way the I understands itself or has a self-consciousness of what he is. The economy of a rule or a principle, moreover, the law's authority, does not permit filling of the absence of the other when a juridical issue is its natural course.

So to speak, the human's sovereign expressed in form of writing, in the particular case of the law, thematized into a space of political representation, which was constituted

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<sup>167</sup> Christopher Fynsk, *Last steps. Maurice Blanchot's exilic writing* (New York:Fordham University Press, 2013), p. 3-31.

<sup>168</sup> Richard Kenneth, "Toward a Political Theology of the Neighbor", in Slavoj Žižek; Eric Santner; Richard Kenneth, *The Neighbor. Three Inquiries in Political Theology*, Chicago/London: Chicago University Press, 2005) p. 10-2., p.30, "Lacan defines 'das Ding' as the encounter with something in the other that is completely alien - an intrusive foreignness that goes beyond the composition of self and other, and their politicizations as 'friend' and 'enemy'. The Thing materializes the constitutive ambiguity of the primal object, the trauma of its uncertain disposition between excessive presence and radical absence".

much before the juridical issue has happened, is engaged with the rights, but at the same time is linked with the self-conscious and the way that this self-conscious appears to the world. The judge, vested with his robe and invested with the sovereign of the writing, shall declare the significance of the rights. We strongly believe in his neutrality or we are induced by our self-conscious and our fear of our neighbor to believe that the judge is expressing through his writing only the significance of the rights, that is under a universal conscious and universal representation of justice, I mean, Western justice.

Thus, after the friend/enemy dichotomy has been vanished due to a cosmopolitan and secular project of peace, every uncanny fact or representation is no longer represented as an enemy unless in the extreme case of terrorism, for instance, but frequently is designed as incompatible with Western values under the legitimation of the human rights utterance and the pretentious technicality to enforce them. I shall demonstrate it by analyzing the following cases from the European Court of Human Rights.

She is and she is not European. She was born in Switzerland and converted herself to Islam. The reason for it was not considered relevant to the trial. Dahlab became a primary school teacher. The decision mentions only a "spiritual soul search." Dahlia made the decision to strictly follow the Muslim's corollaries, and she married an Algerian. She became a primary school teacher, wearing an Islamic headscarf due to imperatives from the Koran, in which a woman can only unfold her head to her husband and male sons.

During the year of 1995, a broke in her logic happened when the school inspector informed his superior about her unusual way of dressing in front of her students; however, no one had ever complained about it. In June of 1996, the little authority, the kind that Freud described as the suffering of the neuroses, decided that Dahlia had to stop wearing a headscarf during her professional duties in the school. Dahlia tried to revert this decision in every administrative level and also to the juridical body of Switzerland. She lost in every level or instance, always having to read that the wearing of a potent religious symbol would be incompatible with her duties, and the freedom of religion had to be restrained, although she could continue to follow her religion outside the school's boundary.

As Avital Ronell claims, "butting up against a herded edge, stupidly itself has not attracted a hermeneutics that would ensure or restrict its limits". Jumping ahead to end of the this case, Dahlab was depraved from her religious duty by the European Court of Human

Rights. The assumption from Ronnel fits after you reading one of the many the reasons that Court bestowed. So, the European Court credits the difficult to the following reasons:

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.<sup>169</sup>

Fuzzy would be a good adjective for this above paragraph. Once, Niklas Luhmann brought to the light, in very precise a way, how the paradoxes of the non liquet influence the decision making. It would be something like that, the law cannot predict everything. However, it has to decide about everything Niklas Luhmann, *Das Recht der Gesellschaft*, etc. Undoubtedly, it is a door to aberrations. Law assumes how its operators are ready to perform the necessary technique to bring to the light, to make invasions, to insert the logic of the world in the society. The young Derrida would blame the logos for that.

### **III.2.1.1 - Associations**

Yet, striking speaking on revelations, at least the worldly ones, the function of writing in the decision-making process is to conciliate the law with the right. Nonetheless, the law has adopted the writing as science; evidently, I am referring to the positive age. But, reaching it, law appropriates from terms and expression as well as, now and then, from utterances. There is a predictable speech within the law's reason and argument, just like a movie in which everybody is conscious of what is going to happen in the next minute. Tracking the object that lies behind the decision would be an activity similar to interpreting dreams. Oddly, the decision legislates the future on meanings and rules. It states what is relevant for a communitarian's project and how we should feel about children being influenced by someone wearing an uncanny object. Without any research and without making any inquiries to a specialist, the judge masters the basic fact that we should "love our neighbors as we love ourselves"<sup>170</sup>.

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<sup>169</sup> Dahlab v. Switzerland, judgment of 15.02.2001

<sup>170</sup> Leviticus 19:18.

If the European Union is an undertaking intended to create peace in the West and continue the initial idea raised by Kant, a "perpetual peace" among nations under the coordination of a league is not shedding a black light on our representations that the European Court of Human Rights will make any sort of contribution. As I affirmed in the last chapter, the difficulty in deconstructing the odd logic of the decision-making process lies in understanding how to track the emptiness of the signatures. The names on the bottom of the paper do not mean anything; they are only a ritual that was followed according to processual law. This turns every supplement into a definitive statement, and any criticism of the reasons is just political and reserved to talk around a table at a pub. Even if the decision is monitoring human behavior, it makes itself and the system of law ridiculous and perpetuates a contradictory notion about the communitarian experience and how to think about the other.

### **III.3 - The Neighbor**

Kafka can be situated somewhere along this line of argument. Coincidentally, when the idea of a League of Nations was being shaped, he wrote with a mathematical precision and with a clear consciousness about the absurdity of the condition of the other, the strange ("I-strange"). He wrote his oeuvre in a foreign language, and he was a Jew who grew up in the epoch of a violent intolerance, depriving him so many times of coming across his beloved in Vienna. Moreover, he was strange in his intimate circle, in his office; he was a strange to himself and to those who dedicated a life to bureaucracy and paper machines. As Eric Santner points out, "Joseph K. is forever trying to translate the inconstancies of the legal bureaucracy into a set of demands that would allow for some sort of meaningful negotiation. Kafka's novel goes so far as to suggest that these inconsistencies are quite literally correlative to an obscene sexuality, that Joseph K.'s dilemma is indeed one of overproximity to the desire of the Other"<sup>171</sup>.

According to Freud and Lacan, the other, or the neighbor (Nebenmensch), is the object of the paranoia. The judge elaborates an utterance on the unknown person and subject as it was evidently described in the decision. Could it be that the regional symbol and the Western woman, who abdicated from her culture, is the object of paranoia? It should not

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<sup>171</sup> Eric L. Santner, *The Royal Remains. The People's Two Bodies and the Endgames of Sovereignty* (Chicago/London: The University of Chicago Press, 2011), p. 3-32.

completely be ignored, because, in other famous issues, the European Court did not follow the same reasoning. I am referring to the *Lautsi case*<sup>172</sup> and what the European Court pointed out about keeping a cross inside a classroom. Naturally, the margin of appreciation was there again.

58. Secondly, the Court emphasises that the supporters of secularism are able to lay claim to views attaining the “level of cogency, seriousness, cohesion and importance” required for them to be considered “convictions” within the meaning of Articles 9 of the Convention and 2 of Protocol No. 1 (see *Campbell and Cosans v. the United Kingdom*, 25 February 1982, § 36, Series A no. 48). More precisely, their views must be regarded as “philosophical convictions”, within the meaning of the second sentence of Article 2 of Protocol No. 1, given that they are worthy of “respect ‘in a democratic society’”, are not incompatible with human dignity and do not conflict with the fundamental right of the child to education (ibid.)<sup>173</sup>.

Perhaps, the Court writes aside the truth. Concealment is out of the question. The parochialism that turns Europe into a large province is the horizon of the Court. There is a sort of marginalization of the themes that the Court does not subdue. Ignoring the details and oversizing the power of the reason is a strategy enforced by whom is not prepared to a debate and has authority to put an end on it. Likely, the legal reason depends of a certain degree of simplicity, hidied by an inability to write according to the modern culture and without any talent to express itself with coherence and clear style. The aesthetic of juridical writing must be awkward. The significance of the words and expression can only debunked by the jurists or for whom have an unmeasured patience or some sort of inclination to masochism.

The unknown, as a literary and theological experience, has to be keeping away from the juridical writing. There has never been any decision that the writing opens to, without the uncertainty of the relations and events. In contrast to that, the writing of the juridical decision states a substantial rightness, although the days will show how smooth are the reasons that the judges are so convinced to detail.

On the other hand, literature and poetry seeks what Bataille calls the "inner experience', or at least it should go after it. The signature of the writer and the poetry may represent the conditions in which the writing was made. There is a biographical speculations that surrounds the artist and the writer. However, nothing that is consider in the time to make predicts about the adjudication.

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<sup>172</sup> *Lautsi v. Italy Application no. 30814/06* (decision 18.03.2011).

<sup>173</sup> *Ibidem*, In addition, the applicants did not assert that the presence of the crucifix in classrooms had encouraged the development of teaching practices with a proselytising tendency, or claim that the second and third applicants had ever experienced a tendentious reference to that presence by a teacher in the exercise of his or her functions. (...) 75. Lastly, the Court notes that the first applicant retained in full her right as a parent to enlighten and advise her children, to exercise in their regard her natural functions as educator and to guide them on a path in line with her own philosophical convictions (see, in particular, *Kjeldsen, Busk Madsen and Pedersen* and *Valsamis*, cited above, §§ 54 and 31 respectively).

A superficial scan in laws manuals will demonstrate that a law student has to perform a calculation and type it on a paper. The calculation consists of a select or find a rule which matches to a law's fact. Then it is mandatory to justify such choice, and finally, the result is the "best result" or the only one<sup>174</sup>. Some jurists believe that there a powerful imperative called principle, but the fuzzy explanation is not worthy a detour.

The relevant fact here is the analysis of the juridical literature. It is the way students are tailored to this end. It is important to hallmark that these assumptions are not thinking of the evil power of the institutions and their program to keep the order of the things. My hunch is the interlacing between positivism's era with the raising of the experimental realm in which the society became after the king became unclothed<sup>175</sup>.

### **III.3.1 - The Political Dimension of the Neighbor**

The argumentation aspect of law, which was labored before, remained in the form of the justification. Even the inference has to be justified at some point in the decision. This is how performance nudges on the scene, vested with a prescriptive intimidation, begin not by the metaphysical Kant's project, although, even in his lessons on the law, he was demonstrating how the jurist should think without any consciousness that the economy of the writing can always be exceeded and the meaning can be manipulated. Positive law was shaped and bounded during the period of the Enlightenment, Aufklärung, when Phaedrus joined Rousseau and theologian<sup>176</sup>.

Niklas Luhmann, one of the most misinterpreted sociologists, was well-heelled to organize and reduce the complexity of his own language and vocabulary in how the law describes itself as positive law. Although reading Luhmann resembles reading cartography, gathering the performative of the law as a social system indicates the bond between the writing of positive law and how the machine operates. Luhmann rejected any primary influence that the writing and logos could bring to bear in our society. Of course, he assumes the importance of the writing to his evolutionary draft, but it was never his intention to affirm how it shaped Western society.

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<sup>174</sup> Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press of Harvard University Press, 1986), p.176-224.

<sup>175</sup> Eric L. Santner, *The Royal Remains. The People's Two Bodies and the Endgames of Sovereignty* (Chicago/London: The University of Chicago Press, 2011), p. 3-32.

<sup>176</sup> Jacques Derrida, *Of Grammatology* (Baltimore: John Hopkins University Press, 1998c), p. 1-26.

Coming back to the decision; secularism is an expression which emerged during the 12th century. Nowadays, and somewhat losing track of its inception, secularism is mainly associated with two relevant events: "the king is naked"<sup>177</sup>, and the political theology of the modernity<sup>178</sup>. Linking secularism to the law and taking the legal reasoning (*Voraussetzung*) that a secular state of affairs junctures the legal argumentation with neutrality wrecks havoc on an already smooth legitimation of law's writing.

The political theology of the other, or the "political theology of the neighbor," does not recognize the simplicity of economical secularism expressed by the European Court of Human Rights (ECHR). Society assumes that there is a "wall of separation" between political and religious matters. The "enemy" is marked with the uncanny, i.e. it is difficult to understand why the body and the soul can be part of a cosmopolitan society, or community, without risking someone else's freedom.

### III.3.2 - Thrownness

Basically, the principle of the question is related to a reasonable idea of Western society. The triumph of rationalism over faith, mysticism, phenomenology, and so forth, push Western society to Derrida's worst dream designed as logocentrism, such as the failure of submitting a judgment or a thinking other than dual knowledge, for instance, right/wrong; good/evil; beautiful/ugly, and so forth.

I would like to link the assumption of the last paragraph with the lucid's words of Eric Santner:

Thinking becomes a mode of attentiveness to a peculiar sort of address or apostrophe - to a 'signifying stress' - immanent to our creaturely life. To use Heideggerian locution, our 'thrownness' into the world does not simply mean that we always find ourselves in the midst of a social formation that we did not choose (our language, our family, our society, our class, our gender, and so on); it means, more importantly, that this social formation in which we find ourselves immersed is itself permeated by inconsistency and incompleteness, is itself haunted by a lack by which we are, in some peculiar way, addressed, 'excited', to which we are in some fashion answerable<sup>179</sup>.

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<sup>177</sup> Eric L. Santner, *The Royal Remains. The People's Two Bodies and the Endgames of Sovereignty* (Chicago/London: The University of Chicago Press, 2011), p.63-88. See also Ernst Kantorowicz, *The King's Two Bodies. A Study in Medieval Political Theology* (Princeton: Princeton University Press, 2016), p., 385-450.

<sup>178</sup> Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von Souveränität* (Berlin: Duncker & Humblot, 2015a), p. 1-20. Leo Strauss *Jewish Philosophy and The Crisis of Modernity. Essays and Lectures in Modern Jewish Thought* (New York: State University of New York, 1997), p. 431-46. Hans Blumenberg, *Die Legitimität der Neuzeit* (Frankfurt am Main: Suhrkamp, 1996), p. 590-640. Hauke Brunkhorst, "Legitimationsverhältnisse – Eine Replik auf Ingeborg Maus", in: Oliver Eberl, Hg: *Transnationalisierung der Volkssouveränität. Radikale Demokratie diesseits und jenseits des Staates*, (Stuttgart: Steiner 2011a), 317-350.

<sup>179</sup> Eric Santner, "Miracles Happen: Benjamin, Rosenzweig, Freud, and the Matter of Neighbor." In: Kenneth Reinhard; Eric Santner; Slavoj Žižek, *The Neighbor - Three Inquiries in Political Theology* (Chicago/London: Chicago University Press, 2005), p. 86.

The ECHR ignores the fact that, to shape a community, the uncertainty and frustrations have to be steady elements. The referred Court seeks only a weak truth by its performative power and its prerogative to use violence (not physical). This tendency noted in Court to ignore a narrative which is not law bespeaks a tradition which jurists are still embedded. Inference and truth would be the method par excellence to reach a decision. Although the introduction of principles in what is designed as a system, to bring the law closer to reality, what happens is the absence of the language of the theory, the thinking, and the Being and its writing, the way that inner experience and will be given to the world.

Karl-Heinz Ladeur claims that debate should take another frame, it would be the lack of concepts that would introduce a new realm of significance to space of representation. To Ladeur, there is an inherent inconsistency in deal with a notion of state based on pre-political and pre-cultural operating together with the thinking of supranationalism<sup>180</sup>. Ladeur's appraising can be associated with some circumstances that lead the ECHR to a conservative and anti-communitarian pivot.

Under such conditions, the spirit of the times is not moving toward a space of friendliness. My hunch is that any work that stresses the symbolic dimension of the uncanny will remain untouchable by law. Despite the performative aspect of the decisions, what is in the tray faces the ambivalence of the man who was shaped to decide and shows how scientific concepts of law are not under the trial of a reasoning engaged with a project of justice and solidarity<sup>181</sup>.

It is important to combine the insight from Ladeur with the Heideggerian reading on Hegel from Alexandre Kojève<sup>182</sup>. The very nature of a juridical decision is still an enigma, specially nowadays. We only know that we have to follow it and there is an encounter with a *mystical authority*. Because decisions and argumentations are based on concepts, the significance and the manipulation of the concepts has to be taken in consideration, specially

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<sup>180</sup> Karl-Heinz Ladeur, "Towards a Legal Theory of Supranationality - The Viability of the Network Concept" *European Law Journal*, Vol 3., no.1 (March 1997), p. 33-54. "In the following it will accordingly be argued that a debate which has largely been founded upon as unreflective recourse to and ideological identification with the concept of a 'unitary personal substrata' has failed to question the pivotal role played by the modern state in the gradual creation of a conceptual framework in which notions of unity and sovereignty were to become inextricably entwined. The debate has thus remained trapped within traditional state-determined discourse, with the unfortunate consequence that it might only ever envisage the EU as a territorial extension of existing political orders".

<sup>181</sup> Hauke Brunkhorst, "State and Constitution – A Reply to Scheuerman", in: Camil Ungureanu/ Christian Joerges/ Klaus Günther, Hg.: *Jürgen Habermas Vol. 2*, Farnham: Ashgate 2011b, 359-369 (Wiederabdruck aus: *Constellations* 15, 4/2008, 493-501, s. u.).

<sup>182</sup> Alexandre Kojève, *Introduction to the Reading of Hegel: Lectures on the Phenomenology of Spirit* (Cornell: Cornell University Press, 1980), p. 31-70.

due to the constant production of aberrations<sup>183</sup> performed by the Law's system, as demonstrated during the later chapter.

### III.3.2.1- The Isolate Decision

Our 'thrownness' into the world is, somehow, responsible for producing a double movement in our mind. In a quite oversimplified fashion, we are self-conscious about our tasks and calling. For that, there is always a word representing our duty in a very precise moment. However, the external world has a symbolic representation, which is in constant conflict with our inner conscience. The double movement consistently places the mind into externalizing an understanding of the significance, which does the necessary matches with the significance that was set before. Nonetheless, the primordial consequence, striking, speaking on law's authority, can be curled, manipulated, or misunderstood during the writing of the decision-making process. So to speak, the concept which the decision has been grounded on is not a thought anymore because a new thought was established. This new concept is enforced only in a single and particular decision, becoming at odds with the generalization, and congruently understating<sup>184</sup> impossible or a mere simulacrum.

Thus, the relationship between the decision and its world, or the reality that it becomes part of, is already dead. Every decision born is dead. It is unchangeable. But, as a corpse that represents a signification from the other, the dead writing of a decision undergoes the same manipulation and re-recreation process. In this never-ceasing work, the unity of law will never reach its goal. However, as unity depends on us, every single word of law accumulates to create an inner experience of conflict in the individual writing the decision and the individual reading the decision. I would like to add that we are not only submitted to these words and concepts shaped by law, but to every word, symbol, and signal of our worldly experience.

Hence, the law is presumed to have autonomy—within itself and externally—it is subjected to a permanent trial and doomed to never be itself due to the freedom of the interpreter (reader and author). This results in the relation of law as intermediate, It is the calculator machine that gathers the utterances, ideas, and concepts, and provides an

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<sup>183</sup> Paul de Man, *Allegories of Reading: Figural Language in Rousseau, Nietzsche, Rilke and Proust* (New Haven: Yale University Press, 1982), p. 77-94.

<sup>184</sup> Niklas Luhmann, *A Sociological Theory of Law* (Abingdon: Routledge, 2016), p.73-82.

economical result that should be followed. However, what happens between the result and the sequence of the events does not necessarily follow the script.

The power to write a decision is ambiguous and may be dangerous if not left in good hands. The activity of writing is intrinsically connected with freedom, and it is, in modern times, the path to justice. This, of course, is a broad sense of writing. As I have mentioned over and over during this work, in Law the exercise of writing a decision opens the feasibility a dilemma. While writing is the activity of refusing mastery, the decision-making process is the activity par excellence to take mastery of a shape. For that, it is important to underline that mastery does not have the exact meaning (*Begriff*), it is a representation. Law has force. Thereof, the very activity to write a decision is to address this force, this mastery to someone<sup>185</sup>. Pascal claims that, "Justice, Force - It is right that what is just should be followed; it is necessary that what is strongest should be followed"<sup>186</sup>. This assumption would be increasing of complexity by adding the thinking of La Fontaine, "The reason of the strongest is always the best; As we shall shortly show"<sup>187</sup>. I shall come back to this linking in the last chapter. In the moment, what is relevant to us is to keep in mind that a clear definition of mastery and for of law does not indwell, and only pictures, frames, poetry, fables, so on, are able to shed some light in those concepts without a meaning.

### **III.3.The Imperatives of a Decision-Making**

The judge has to construct an imperative, at the same time and circumstances he is under an imperative<sup>188</sup>. All the same, he ought to (*Sollen*) forget it. The calling and the mastery through writing must remain concealed. It is a matter of legitimacy and mysticism<sup>189</sup>. Evidently, the writing on Human and Fundamental Rights attracts a different kind of perspective on writing . It is a writing on disaster. Its inception still undermines what can be mapping out in the 19th century or much before it. It would be a supplement<sup>190</sup> of natural law. It would be the presence of natural law without being presence. So to speak, any

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<sup>185</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 228-98.

<sup>186</sup> See Blaise Pascal, "Justice Force"; available <http://www.penseesdepascal.fr/Raisons/Raisons20-moderne.php>. Accessed 07.08.2016. Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 228-98.

<sup>187</sup> Jean de La Fontaine, *The Wolf and the Lamb...* See also Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p. 1-31.

<sup>188</sup> Maurice Blanchot, *The Infinite Conversation* (Minneapolis: Minnesota University Press, 1993), p.66-74.

<sup>189</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p. 1-31.

<sup>190</sup> Jacques Derrida, *Of Grammatology* (Baltimore: John Hopkins University Press, 1998c), p. 40-56.

judge constructs a relation with the concept of human rights and with the facts. It is how the strategy of keep a neutrality was thought. However, it brings an ambiguity to the nature of writing. Writing cannot be neutral because is expressing an inner experience that indicates a preference. Niklas Luhmann<sup>191</sup> demonstrates this assumption that judge has always to take a position and I add that a neutral position does not exist.

In one of the greatest philosophical and literal experiences, a written dialogue made by Blanchot and Bataille breaks with tradition and the zoning of literary and philosophical space. At the end will last only the "yes" and the "no," and both represent an experience to come, and that might be unexpected. There is a sheer erosion on the decision-making process based on traditional distinctions between norms and facts, seeking a reasonable answer.

In both cases that I brought to the discussion, the "yes" would represent a decrease of freedom of religion to Christians and add to the experience suffering by being in constant contact with the difference, with the uncanny. However, the "no" is a refusal of dialogue, a refusal to be with the other (mit einander). Evidently, this not the way that the court expresses itself through a decision. There is always an insistent logic to enforce rules and principles that show us a smooth truth. Writing a decision marks out only a permanent reasoning already given by the society and selected by the legislator. The subject of science has actively remained in law without a reality test.

#### **III.4 - Being in the Human Rights**

Once more, to experience what the other has been facing, only someone who was on both sides could be able to describe to us their odd comprehension. However, 'the Being' changes, and so many times, that even those who have changed do not know the real reason. 'The Being' is on a never-ending test. So to speak, to link the essence of Being in both decisions, the ECHR refuses a possible test of the Being. Were they afraid of the end of Western history? Although there is supremacy of the secularism, it is captivating how theological issues still raise up the unintelligibility of the future.

There is a Being who is working on the decision, based on legal reasoning. Legal reasoning follows up the need for it to be recognized as science, it has to reach a universal

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<sup>191</sup> Niklas Luhmann, *A Sociological Theory of Law* (Abingdon: Routledge, 2016), p. 206-16.

truth. A decision cannot be considered truth, even in its contingency aspect, as it would oddly pick a distrust in the public sphere. Furthermore, the legal decision has to assume that both sides of the issue would be resigned to it.

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One of the challenges of the decision-making process is to be engaged with the law's unity. This daunting task must assume a conversation or dialogue between the Being and the Being with. However, the form of law and its textualization represents the opposite to this conciliation. To wreak havoc, in my modest intuition, is to lose sight of the age of science and the insistent seeking of a truth hidden at the back of a text and the amalgam of neutrality and Being. The Being and the Being with cannot be neutral and undergo the principle of reason. As you may read throughout the decision, the will to construct an integration by decisions based on human rights is beyond the law's sovereignty and responsibility.

Although it is easy to grasp a sort of idealism about human rights' utterance, the structure of its utterance as well its matter are unable to dig up what lies in the background of the problems. Frequently, human rights are engaged with past suffering and a vague notion of dignity. Human rights still work to correct the past. However, it has assumed a messianic aim by changing the worldly divergences through the modification of how law should be thought of in conflicts concerning an abuse of the integrity and dignity of a human being, especially when the State is the actor of the abuse or it has abstained itself to be the law's eyes.

However, human rights as a pure concept were not well-shaped in relation to time. According to Kojève, a concept can only be a concept if it is engaged with time and revelation. First of all, before being a concept, there the "thing" and the event, and through the idea, it would be possible to organize and explain the definition of the thing, the fact, or the event. This skin-deep explanation of the concept is enough to raise two trivial questions about human rights as a concept: (1) What exactly do human rights reveal as an essence? (2) and, regarding the assumption of a human right essence, would the nub of human rights be strong enough to reach its grail?

### **III.4.1 - Tracking the Essence**

The inception of human rights is, somehow, tangled with the rise of the age of positive and natural law. Further, the mulling over disasters drove the law to an intrinsic turning in its relation to worldly events. Those simple facts are not yet the essence or matter that could be linked with the words "human rights."

Would it be possible to define or describe the essence of human rights? Regarding that positive law is engaged with scientific thought, anything which does not follow the protocols of the laws of science would have smooth legitimacy. Be that as it may, human rights is, and was, conceived without the temptation of premises and hypotheses. Human rights address an unfolding truth, and he who dares to be opposed to it may be a man without a soul.

It is evident that a margin of appreciation is figurative and symbolic. If you jump off the section or paragraph which refers to it, it will not make any kind of difference, but I am still going to show it. The germane for our conclusion right now is to draw on a possible essence of human rights, and how it would be bound to a possible communitarian project, mediated by a Human Rights Court.

A mediation by human rights without a significance, appropriating the assumptions from fundamental rights and natural law, creating a space where the representation is suspended and any argument that comes across human rights is potentially valid. The representation of human rights is opposed to justice. Human rights does not represent

violence<sup>192</sup> or avenger<sup>193</sup>. The representation of human rights must every draw a notion of peace and coexistence among people. Nonetheless, it is by far paradoxical that the provision of human rights is only through a juridical decision and, in some cases, with assistance of an army.

Peace and coexistence would be only achievable, in Western culture, by virtue of its own past values, in my modest opinion. Let me be more clear: A model of coexistence, as claiming by Levinas, would be the real test for the Western civilization in order to bring up peace and political stabilization. Since the writing of "Otherwise than Being", Levinas believes, and I share it, that the subordination of the act to theory "stems the inability to recognize the other person ('autrui') as other person, as outside all calculation, as neighbor, as first come"<sup>194</sup>.

The question turns to be where could we find out the issue of the other or neighbor in the essence of human right, mediated by a court? Levinas tracked the Western condition under the assumption of *being jewish*<sup>195</sup>. Being jewish is to be attached to the Torah, without freedom of choice, and at the same time, is to be recognize as Jewish by a neighbor, and not as an uncanny, as a shallow explanation. So to speak, *being jewish* deals, first of all, with a command issued prior to the Legislative Law. "We will do and we will hear"<sup>196</sup>.

This detail of action may not seem so relevant, but it goes against the weak metaphysics of human rights, based specially on Kant's keynote.

### III.4.2 - Mediation

In the brilliant explanation of Christopher Fynsk, "The 'difficult freedom' of being Jewish is a choice between the Torah or death, and thus not much of a freedom at all. For again, the teaching, which the Torah is, cannot be accepted after deliberation"<sup>197</sup>. Hence, to

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<sup>192</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 228-98.

<sup>193</sup> Christoph Menke, *Kritik der Rechte* (Berlin: Suhrkamp, 2015), p. 106-41.

<sup>194</sup> Emmanuel Levinas, *Totality and Infinity - An Essay on Exteriority* (Pittsburg: Duquesne, 1991), p. 33-52.

<sup>195</sup> Ibidem. See also Maurice Blanchot, *The Infinite Conversation* (Minneapolis: Minnesota University Press, 1993), p. 11-24.

<sup>196</sup> Exodus 24:7.

<sup>197</sup> Christopher Fynsk, *Last steps. Maurice Blanchot's exilic writing* (New York:Fordham University Press, 2013) p.20.. Further, Fynsk explains that Levinas, "He puts this motif aside to follow the tractate and to explore the nature of the alternative expressed in the phrase, 'the Torah or death'. The tractate, as Levinas reads it, insinuates that death is to be understood as historical existence without the Torah and it suggests, further, that even the Torah itself is menaced since the Law says 'no' to violence of history and is preserved only in the rail human conscience" (p. 20-1).

translate this demand of peace and allow a submitted freedom, the form of law (*Rechtsform*) should break with historical imposition of rationalization and work with a new sphere of language and ends. I do not mean that law has to stop making decisions. It is a duty that law has received and has no other choice. Paraphrasing Levinas, law has to choice between a decision-making process or death.

When law assumes the task of mediation, it uses language to bring up its motif, but also to know which are the pledges of the involved, the necessity that they cry out, and so forth. Regardless of how difficult to turn the mediation into a conversation. First of all, the rules are made in lying on the ground of a bourgeois society. Human and fundamental rights are in their inception rights given to the person to protect himself or herself. So to speak, they are not rights that follow a narrative of conversation or a political and theological though on the other as in the command from Leviticus: "You shall love your neighbor as you love yourself" (Leviticus 19,18)<sup>198</sup>.

The pureness of rationality, with the adamant belief of a sheer separation between the *Geist* and the systems, merges into the shape of a man who consists only of unity and solitude (*Einheit und Einsamkeit*), without having the Other and the neighbor as the wideness of our *Geist*. There is no perspective to solve this hydra, at least in the realm of the Law. The pureness is evident in law's books and decisions, even regarding the performative act of speech, which is everywhere. As Maurice Blnachot predicted more than half century ago, only overcoming the division between philosophy and literature, and the engagement of literature as a political actor could give us a new horizon.

Allow me to show the dazzle of Blanchot's intention by using the lesson of Christopher Fynsk:

The Infinite Conversation' returns repeatedly to the thesis that it is in language, in certain speech (where speaking, as Blanchot notes elliptically, becomes writing; IC 77/109) that relation with the immeasurable other - and first of all, the alterity, the neutral presence of 'autrui' - is given. The task of 'The Infinite Conversation', to put things in the simplest terms possible, is to bring that speech (and the exigency it communicates) to the fore - multiply. When Blanchot draws that exigency forth from Bataille's speech in the essay under consideration here, he gives us the means to link his account of conversation with Bataille to the long dialogical presentation pursued in reference to Levinas in the first part of 'The Infinite Conversation', his mediation on the infinite set of relations that open between 'the two men there in a

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<sup>198</sup> Thomas Vesting, "Nachbarschaft. Grundrechte und Grundrechtstheorie ind Kultur der Netzwerke", in. Thomas Vesting, Stefan Koriath, Ino Augsburg (org.), *Grundrechte als Phänomene Kollektiver Ordnung* (Tübingen: Mohr Siebeck, 2014), p. 57-86. See also Richard Kenneth, "Toward a Political Theology of the Neighbor", in. Slavoj Zizek; Eric Santner; Richard Kenneth, *The Neighbor. Three Inquiries in Political Theology*, Chicago/London: Chicago University Press, 2005) p. 10-2.

room' (IC 73/104). Bataille's thought of 'the inner experience' and the affirmation at stake there is thus firmly brought into communication with that presence of the neutral/ the neutre that Blanchot attributes to the relation with 'autrui'<sup>199</sup>.

In my hunch, assuming the operational function of a self-fundament it needs a "man" who fits the task of perform the operation. The pureness of thought, which would be better expressed through the organization of law's books and has to in its pages only what is regarding to law, reaches its best performance by assuming the neutral aspect of the law and consequently, by the decision-maker. Hans Kelsen, Alf Ross, Hart, and other thinker of legal reasoning intensively struggled to organize this assumption and link is to how decision-making was/is prescribed. Without question, the influence of Kant is present in the organization and the form of the decision-making process.

### III.4.3 - Loosing Track

The Kantian intrusion over the contemporary man points to an ontological truth<sup>200</sup> turning the decision-making in to a dilemma because the positive law allows subjectivity (intuition) to influence the decision (performative meddling). This condition of positive law, laying on the ground of a self-reference and self-description<sup>201</sup>, evidently entails a conscious (mind) organized not by the assumption of a theological non-difference between otherness, but it presupposes (*Voraussetzen*) and committed to the enigmatic significance of reason.

Hence, the commitment with justice is warded off from the any rational activity, as justice is intuition and a sense that cannot be expressed otherwise through force or violence. So to speak, a decision-making process is pursued only with the rule (Law) and not with the essence or lying the ground for justice. The foundation of the justice has lose its matter, since it cannot be deducted and bounded by the truth. Of course that justice is Western society turned to be a question much complex than indicate the failure of a Kantian's era.

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<sup>199</sup> Christopher Fynsk, *Last Steps - Maurice Blanchot's Exilic Writing* (New York: Fordham University Press, 2013), p. 79. The following paragraphs written by Fynsk are very elucidative. "Thus it would be quite misleading to suggest that exchanges with Bataille brought to theoretical exposition in 'The Limit-Experience' give us the key to the conversation that opens 'The Infinite Conversation'. They allow an invaluable perspectives on its conditions and its site, however. Regarding its site, Blanchot underscores that its possibility opens at that limit where the project of meaning has consummated itself, where all making and doing have produced or at least projected their end (with the production of 'man' himself). This prospect of an end of history is where there appears the strange surplus of an 'infinite interstice' (IC 207/307) that creates the exigency of another speaking. Accordingly, the host in the conversation we are approaching feels he has something he must try to bring to speech ('il lui faut parler'). The exigency itself, however, cannot be produced as such, and the task cannot be fulfilled by any work or project. Requiring a fidelity of an impossible kind, it will be known in a debilitating fatigue. (...) The 'conditions' includes a commitment and a decision that Blanchot recognized in the singular character of Bataille's unique power of speaking; his power of bringing his own presence into speech, and by this presence prompting the attention of thought. See also Blanchot, *The Infinite Conversations* (Minneapolis: Minnesota University Press, 1993), p. 3-11.

<sup>200</sup> Martin Heidegger, *Kant and The Problem of Metaphysics* (Bloomington: Indiana University Press, 1997) p.89-120.

<sup>201</sup> Niklas Luhmann, *Kontingenz und Recht* (Frankfurt am Main: Suhrkamp, 2013), p.126-39.

Pascal tripped up the dilemma of a "fuzzy justice", which begins in one territory and ends on the other place<sup>202</sup>. I will come back with this discussion during the last chapter.

To speak to the point, the characterization and organization of a subjective right and, consequently, by theming the individualizations and subjectivity under the premisses of the law, which only can be exposed via a legitimate decision-making process, any commitment with the other, the difference, the uncanny is hazard, if it does not also turns to be a theme from subjective right.

Niklas Luhmann brilliant description of the evolutionary process that lead law to be describe itself as positive law focus on the mumpsimus of unity of law entails and stresses the law's system into a journey of construct and appropriation of schemata and methodological designs, which entails ward off any sort of madness. Karl-Heinz Ladeur insight of this question, regarding a possible methodology of European Law is quite eloquent on this matter:

On the other hand, the Continental European model - particularly the German version - has stressed the importance of 'scientific dogmatics', which can be fitted into practice of 'interpretation' of the will of the legislator. Linguistic and systematic interpretation, or in turn theological interpretation (which are the goals of the legislator which did not find their expression in the text of the law itself), can thus be associated with the immanent rationality and universality of the law. Even more recent legal hermeneutics which stress - beyond the focus on the text itself - the importance of the linguistic horizon as both a basis and a limit of our experience, is based on the maintenance of continuity and unity of the legal tradition founded by the state institutions<sup>203</sup>.

My hunch is that not only the concepts and languages based on the state institutions are somehow behind with the creation and manipulation of concepts and languages. I claim that the Western culture plays a significant role in every utterance and narrative, besides the inexorably introduction and manipulation of concepts. However, even legal hermeneutics, as Ladeur correctly points out, use the concepts and the language that were already given to settle the issues between text and language's horizons.

### III.4.3.1 - The Test

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<sup>202</sup> Blaise Pascal, "Justice Force"; available <http://www.penseesdepascal.fr/Raisons/Raisons20-moderne.php>. Accessed 07.08.2016. See also Günther Teubner, "De collisione discursuum: Communicative Rationalities in Law, Morality and Politics". *Cardozo Law Review* 17, 1996b, 901-918 und in: Michel Rosenfeld und Andrew Arato (Hrsg.) *Habermas on Law and Democracy: Critical Exchanges* University of ( California Press, Berkeley 1998, 173-189 und in: Roger Cotterrell (Hrsg.) *Law in Social Theory: International Library of Essays in Law and Society* (Ashgate, Aldershot 2006), 269-86.

<sup>203</sup> Karl-Heinz Ladeur, 1988, p.241-82. 'Perspectives on a Post-Modern Theory of Law: A Critique of Niklas Luhmann, 'The Unity of Legal Systems'', in. Günther Teubner, *Autopietic Law: A New Approach to Law and Society* (Berlin: New York: Walter de Gruyter, 1988).

Karl-Heinz Ladeur's insights over the new turnings inside society link the assertion between law and language, and how uncertainty pops out, irritating and challenging the traditional perspective and the "man of reason". "At the same time, differences also emerge here between the more practically oriented observation of language usage in situations, and the search for a connection founded in the history of rational ideas, associated with the notions of the subject and culminating in the state"<sup>204</sup>.

Karl-Heinz Ladeur tips us off since the 80's about the delicate question between theory/practice and the constellation of happening that the official language and methods are incapable to grasp<sup>205</sup>. "The crisis of the structure-oriented model of interpretation was unavoidable as the tasks of the state increased such that the relatively simple basic assumptions on which the system-construction of jurisprudence and the practice of law was built proved themselves to be too narrow because they allowed too few possibilities"<sup>206</sup>.

I would add, following the concerning from Avital Ronell<sup>207</sup>, that the necessity of a test, which arose up after matching hypothesis and proof methods of a scientific test with the purpose of uncover the truth behind an object. Pursuing this fuzzy-logic between dogmatism and reality-test, law has now translated its authority to text, even if law's text is not able to formulate its own experimental test. "Rechtswissenschaft" and hermeneutics were stressed by the legal decision<sup>208</sup>.

Woefully embedded with a form of language and a blind belief of texts and reasons, human rights and fundamental rights were not fated to mediate the space among law and consciousness. As I already pointed out, by being no longer able to express its original essence, human rights can be easily manipulated for any kind of political purpose. The manipulation to which I am referring here is evidently the one seized through rhetoric and allegories.

The representation of rightness via organized statements, which would reproduce the issue with accuracy from the external world in our inner world, topping off with

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<sup>204</sup> Ibidem, p. 241-50.

<sup>205</sup> Karl-Heinz Ladeur, 1988, p.241-82. 'Perspectives on a Post-Modern Theory of Law: A Critique of Niklas Luhmann, 'The Unity of Legal Systems'', in. Günther Teubner, *Autopietic Law: A New Approach to Law and Society* (Berlin: New York: Walter de Gruyter, 1988).

<sup>206</sup> Ibidem, p. 245-6.

<sup>207</sup> Avital Ronell, *The Test Drive* (Urbana/Chicago: University of Illinois Press, 2005), p. 23

<sup>208</sup> Karl-Heinz Ladeur, 'Perspectives on a Post-Modern Theory of Law: A Critique of Niklas Luhmann, 'The Unity of Legal Systems'', in. Günther Teubner, *Autopietic Law: A New Approach to Law and Society* (Berlin: New York: Walter de Gruyter, 1988), p.270. The critic that Karl-Heinz Ladeur has made against the consequence of law's autonomy claimed by Niklas Luhmann is, somehow, close to my efforts in order to show how autonomy has also a negative side.

submission through the consensus of the non-consensus, is a rough drawing vested with scientific value, and conduced the man shaped by the *Erklärung*, who is able to classify and hive off art from reason.

At the bottom, human rights has always a text, which is constructed and defined in every single occasion. Laying down this text or reason in every single event where it has to be employed, and repeating the reason would be the only way to assure the success of law's unity. To keep its unity, the inception has to be forgotten. In other words, by hashing out if the reasoning or the overture of a right could repeated over and over, it would potentially set the law's unity into a trap; a trap made by its own logic or autonomy. Or, strictly speaking about self-referential systems, it would be impracticable. Determined to keep up the law's unity, and by consequence, the social system and a system of meaning, great skill is required to maintain its organization and expectations through an adamant meaning of every sort of text. Saving the operators of suffering and put themselves and the rights into a constantly trial. The significance of a right has to be upheld, although it i always pivoting and almost devoured by ruptures. Nevertheless, employing *basanos* and *techne* is totally out of the plans. Technic is a way to maintain the self-reference and cannot be used with the temptation of a new enterprise (*Versuch*)<sup>209</sup>.

Furthermore, how is law bound to community and democracy? If the writing of law seeks out to be only self-referential, and to reduce the complexity of its environment, then if projecting a text which could only means law, or anything other than that it would be regarded as code sabotage or as an unskillfulness of the system of meaning to be sheerly engaged with the social system.

### **III.5 - Failing**

Science and techniques, even in the law of realm, is outlined by the same structural experience and implications from the state between science and politic that welled up in the 19th century. In the accurate description written by Avital Ronell, concerning the political and philosophical upshots, she furnishes us with delightful regarding the perspective on this matter draw by Nietzsche and Derrida:

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<sup>209</sup> Avital Ronell, *The Test Drive* (Urbana/Chicago: University of Illinois Press, 2005), p. 6. "In German, 'Versuch' unites test with temptation - a semantic merger of which Nietzsche makes good use. The devil is the visible mark of a permanent testing apparatus. It is one name for an operation that engages the frazzled subject in a radical way".

Let us bring our focus to an aspect of science that Nietzsche more or less discovered, implemented, posited, and which he links to an affirmable democracy - that is to say, so the experimental culture from which his work takes off. Thus even though Nietzsche can be seen as an antidemocratic, a largely unprobed dimension of his thought provides a rigorous grid for evaluating political formations and exigencies. The conduit for establishing a progressive political science in Nietzsche is circuted through his understanding of scientific structures and their material implications. Nietzsche set up a lab in 'Beyond Good and Evil' rather explicitly. A number of his other works pivot on the 'experimental disposition' and treat themselves as experimental efforts. Nietzsche's text incorporates the history of lab culture, which is linked to political innovation. As Derrida has elsewhere argued, there is a Nietzsche of the left and of the right, just as there is a Hegel - or Marx - of the left and of the right. Democracy is itself viewed in terms of a trial, a perpetual test case, never off the hook of its purposed levels of achievement. If democracy increasingly depends upon an understanding of incessant tryouts and continual self-testing, reactionary modernity, too, has made us of experimental practice and the tropes of testing. The rhetoric and practice of testing go far beyond what one was willing to see. Politically constellated atrocity fastened onto the technological grid. Nietzsche, alone in his desert, was already picking up signal from a future pockmarked by Nazi experimentation, part of whose devastation consisted in setting up the camps as massively unrestricted laboratories - the most unregulated scientific sites in modern history. To this day, ethical questions arise concerning the usability of results stemming from these experiments. Nietzsche, with characteristic ambivalence, saw at least three sides of the coin and tried to navigate between the horror and fascination that experimental culture provoked in him<sup>210</sup>.

Hence, the imperative became not only the technalization of philosophy and democracy but also of every written idea that is not literature or theology. Although, even in theology, perhaps unconsciously, the inference is employed to proof the footprint of theological remains in the political<sup>211</sup>. Speaking on freedom and equality, as well as of human and fundamental rights, is somehow measuring the narrative on democracy on a knife-edge.

What I call the narrative of democracy does not necessary need to be understood on a post-modernistic way as claimed by Lyotard. Indeed, I rather refer to a space of imagination and agency where our action and thoughts are illustrated by the believing in a democratically constituted space. Naturally, this condition assumes an enigmatic aspect, and also limits every utterance that touches on the political sphere.

As I am going to show you, these decisions has many interruptions, and come to end in an abrupt way. Indeed, methodologies and techniques employed are not even close to be a technique. In my hunch, what should be exposed is an organization from the utterance that jeopardizes an odds-on blissful experience of find out that the being is under a test, on the bottom of a trial of experience.

Paradoxically, the bulk of writings, which analyse human rights's matters, are not going toward a debate that moves away from superficial moral imperatives, as if is the only inner problem of the issues. To be more didactical, the studies on human rights are involved,

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<sup>210</sup> Ibidem, p. 135-6.

<sup>211</sup> Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von Souveränität* (Berlin: Duncker & Humblot, 2015)a, p. 1-20 Hans Blumenberg, *Die Legitimität der Neuzeit* (Frankfurt am Main: Suhrkamp, 1996), p. 590-640. Eric L. Santner, *The Royal Remains. The People's Two Bodies and the Endgames of Sovereignty* (Chicago/London: The University of Chicago Press, 2011), p.63-88.

regarding few expiations, to judge (*Urteil*) and with the attachment (*Anhang*) between a being and supreme imperatives values.

In his astonishing text on literature, Semiology, and Rhetoric, in which he blows the whistle about the misdirection of critical literature, it is my assumption that, regarding legal reasoning and human rights, this is even more alarming.

There is a sort of pretentiousness (*Anspruchvoll*) air on how issues has lately been debating on supranational matters, which evidently, shows the inconsistency of how the inner methodologies and arguments produces a false imagination from the outside's world. Briefly speaking, the arguing on methodologies and legal reasoning has remained motionless over the past 30 years, when the figure as of balance and *Abwägung*, or pragmatism seems to have triumphed. Further, the conclusion, based on a technical language (legal language), finds no match with the out space of representation.

### **III.5.1 - It is all about text**

Returning to Paul de Man, his accurately words on critical literature's wrong conviction is quite pertinent to be employed on supranational debate:

On the one hand, literature cannot merely be received as a definite unit of referential meaning that can be decoded without leaving a residue. The code is unusually conspicuous, complex, and enigmatic; it attracts an inordinate amount of attention to itself, and this attention has to acquire the rigor of a method. The structural moment of concentration on the code for its own sake cannot be avoided, and literature necessarily breeds its won formalism. Technical innovations in the methodical study of literature only occurs when this kind of innovation predominates<sup>212</sup>.

Memories and convergency with text should be the linchpin to first think on a conciliation betwixt and between the potential of the words which are organized in the legal and text, and the words that shall be organized in a legal-decision. However, legal decision is an end of a self-reference operation.

Thus, how is possible to set up an engaged law with a compromise to shape it into a political space where the "autrui" is not an uncanny or the "Nebenmensch", considering that the Law has any concrete representation or allusion to what should be an essence of a conflict, of human rights, of a being with ("miteinander"), or to be subordinated to a condition which would take the being ("Sein"), to be in compassion with the "Nebenmensch".

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<sup>212</sup> Ibidem.

As a rule human and fundamental rights represents a conflict or a collision among beings<sup>213</sup>, regimes<sup>214</sup>, or legal orders<sup>215</sup>. The self-referential system unfolds historically in the same way that law, in its more reductional representation, does through a conflict. After law has reached its autonomy, during the Revolutionary epoch, between the Independency of the 13th Colonies, French Revolution, 18 of Brumaire, and the Constitution of the German Empire, it was consolidate, at least in the literally dimension, that anyone who wants to write of law must organize the text following specific protocols, which at the of the activity the protocol shall or shall not authorize it is a law's text<sup>216</sup>.

So to speak, law is not only about decisions, which comes from an authorized interpreter, in addition with a legal text that can be changed by a political-making process. It goes further from that. There is, of course, a space of juridical texts, a juridical pedagogy, a juridical man, which builds a house of cards, and, in very trope way, draws a space (I's rather call it space than system), which is almost immune to the demanding of a history and the outside. Law must affirm what the demands of the history are, and it must play up its legitimacy to do it according its own baselines<sup>217</sup>.

And, does law have any basic idea on what human and fundamental rights are? It would be such a so disturbing revelation if those rights were an empty form. I would add that it would not be impossible, because if a communication or a dialogue is happening, some form of experience has been shared, and the experience of oblivion haunts the being, it is part of the being and the experience with the other and with the intermediation.

Naturally there is an utter relent equation to be resolved. Historically, the law was always called to resolve a conflict, to give a final position to a clash or dispute, based on

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<sup>213</sup> Thomas Vesting, "Nachbarschaft. Grundrechte und Grundrechtstheorie ind Kultur der Netzwerke", in: Thomas Vesting, Stefan Koriath, Ino Augsberg (org.), *Grundrechte als Phänomene Kollektiver Ordnung* (Tübingen: Mohr Siebeck, 2014), p. 57-86.

<sup>214</sup> Andreas Fischer-Lescano; Günther Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Frankfurt am Main: Suhrkamp, 2006), p. 41-7. See also Günther Teubner, "Des Königs viele Leiber: Die Selbstdekonstruktion der Hierarchie des Rechts". *Soziale Systeme* 2, 1996c, 229-256 und in: Hauke Brunkhorst und Matthias Kettner (Hrsg.) *Globalisierung und Demokratie: Wirtschaft, Recht, Medien* (Frankfurt am Main: Suhrkamp, 2000) p. 240-273.

<sup>215</sup> Marcelo Neves, *Transconstitutionalism* (Oxford/Portland: Hart, 2014), p. 3-38.

<sup>216</sup> Christoph Menke, *Kritik der Rechte* (Berlin: Suhrkamp, 2015), p. 106-41.

<sup>217</sup> For Niklas Luhmann, "Closure and Openness: On Reality in the World of Law", in: Günther Teubner, *Autopoietic Law: A New Approach to Law and Society* (Berlin: New York: Walter de Gruyter, 1988a), p.335-48. The theory (Autopoietic) discusses system and environment as if there were only one type of case. It is true that the distinction between system and environment makes it clear that a solipsist position is being avoided. A system can reproduce itself only in an environment. If it were not continually irritated, stimulated, disturbed and faced with changes in the environment, it would after a short time terminate its own operations, cease its autopoiesis. But all that that it to remove a classical objection that even Kant no longer needed to take too seriously. The question remains 'how' the environment impinges on the system, and what relevance this has for the system's self-reproduction, for the continuation of its own operation" ..

written documents, costumes, experiences, divine or kinship's will. To go a step beyond it, as I am slightly suggesting, it would represent a new age in law or something close to it. The separation between law and other narratives has never been so evident since the second half of the last century. At least, the literature on law strives to demonstrate it. Although, I have a slight notion that the performative speech does a job on this ambitious project.

### **III.5.2 - Loosing the Other out of Sigh**

The turning would be a new language inside the law, and what function human and fundamental rights should assume to deal with the daunting challenge to make law and justice to be bound with a community project bears upon on freedom and justice<sup>218</sup>. Why should not law, as a text, bid to us to an experience of tasting death, for instance? The other, the neighbor, the friendship, are, many times, more present in their death.

In law's own texts, I meaning, law's decision are the strongest way of law to express its force, its violence. There is a distressful detail, the decision lying on human rights has no intention to bring the subject in dispute close to each other. In the present society, only after the other has been vanished, by suffering or death, we would feel the responsibility to overcoming the uncanny and to think of other. After death, the Other somehow becomes present to us. It is a selective presence, where our minds can guide us according to the object with which we are dealing. Even considering the possibility that it is a mind trick of the mind, the physical absence to the other wil matter in the moment of his death.

For Blanchot, death is the most radical question. Death is necessary. "To remain present in the proximity of another who by dying removes himself definitively, to take upon myself another's death as the only death that concerns me, this is what puts me beside myself, this is the only separation that can open me, in its very impossibility, to the Openness of a community<sup>219</sup>."

In his very peculiar and enigmatic way of turning the order of the things around, Blanchot surprises us with the joy of humanity's finitude and compassion, relying on a

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<sup>218</sup>Emmanuel Levinas, *Totality and Infinity - An Essay on Exteriority* (Pittsburg: Duquesne, 1991), p. 33-52.

<sup>219</sup> Maurice Blanchot, *The Unavowable Community* (New York: Station Hill Press, 1998), p.9

simple exchanges of the words "yes" and "no"<sup>220</sup>. It is pertinent to set off that being-with to Blanchot is so important as dying-with....

It is also important to stress the "moment" of death because the picture we have of this event in our minds. We need our mind and our experience to delight events, to understand, and so forth. However, it also means that oblivion is part of us, is also a permanent part our being, which can present in the moment of the writing. Oblivion is always present. Every book, every single text, every law's decision is involved by the figure of oblivion. Oblivion is also part of the death. We forget that someone close to us has passed away with not only the presence of this someone, but the feeling of the moment of the death. The feeling of mourning and the feeling of the instant of the death are not "recreateable". The same sentiment which awakes when we watched the Charlie Hebdo's raid, followed by the manifestation "Je sui Charlie", cannot be recreated in our being anymore.

### III.5.2.1 - Memory and Reality

Only Funes, the Memorious<sup>221</sup>, one of the most remarkable characters of modern literature, was able to reconstructed every single event of a day after he had suffer an accident on horse.

With one quick look, you and I perceive three wineglasses on a table; Funes perceived every grape that been pressed into the wine and all the stalks and tendrils of its vineyard. He knew the forms of the clouds compare them in his memory with the veins in the marbled binding of a book he had seen only once, or with feathers of spray lifted by an oar on the Rio Negro on the eve of the Battle of Quebracho. Nor were those memories simple - every visual image was linked to muscular sensations, thermal sensations, and so on<sup>222</sup>.

The possibility of community, so to speak, must be also engaged with forgetfulness; even the memory will be lost forever or its recreation will not be as perfect as the original echo. But, in spite of the eminence of the tendency to forget, in which way we could

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<sup>220</sup> Maurice Blanchot, *The Infinite Conversation* (Minneapolis: Minnesota University Press, 1993), p.264-87. Christopher Fynsk, *Last Steps - Maurice Blanchot's Exilic Writing* (New York: Fordham University Press, 2013), p. 80-94.

<sup>221</sup> Jorge Luis Borges, "Funes, the Memorious", in. Jorge Luis Borges, *Labyrinths* (New York: New Directions Books, 2007), p. 59-66.

<sup>222</sup> Ibidem.. "He was able to reconstruct every dream, every daydream he had ever had. Two or three times he had reconstructed an entire day; he had never once erred or faltered, but each reconstruction had itself taken an entire day. 'I, myself, alone, have more memories than all mankind since the world began', he said to me. And also: 'My dreams are like other people's waking hours'. And again, toward dawn: 'My memories, sir, is like a garbage heap'. A circle drawn on a blackboard, a right triangle, a rhombus - all these are forms we can fully intuit; Irene could do the same with stormy mane of a young colt, a small herd of cattle on a mountainside, a flickering fire and its uncountable ashes, and the many faces of a dead man at a wake. I have no idea how many stars he saw in the sky."

selected has to be forgotten. To be get direct to the point, how will the reconstruction of the primal instance, which was forgotten, cause one to be overwhelmed by further events?

The spider's web, which shapes every fragment of memory and connects it to an illogical chain, denominating reason, shall appear as behind the lines of a text. But, the though on enlightenment, that the standard of a text an idea, which some will call a consensus, is a something that represents a truth; however even if we were able to track the mystical aspect which lies behind every final statement, we would be unable to grasp the whole understanding of its inception. The though which comes to be a text, indeed, are ashes of multiple-burned origins, even the one day ago's origin.

The curse of modernity is to believe strongly in science and the truth that it reveals. We are inclined to rely on the final answer of the decision-making process. Although we are able to criticize it, the final statement is always according to the system of law, which is yet another clue that the possibility of contingency exist. The important things are not to disappoint their expectations and to warn them that every decision could be different because texts can be interpreted in many different ways and laws can be changed.

In sum, everything remains the same, because we sit tightly subordinated to the Western condition. Furthermore, any contingency could modify it. This yoked state of affairs is necessary must to make society possible. That which makes us fully believe in freedom and equality under the Rule of Law, that which guarantee that any enforced law will be always compromised with freedom and equality, must be reproduced in form of a text, wherein science must be interlaced with utterance.

In the representation of the community, any space where people will be engaged with each other, even when the uncanny the "Nebensmensch" is present, must be regulated by law's authority. I will write more about this indestructible presence of the *autrui*. During the decision-making process, the absolute knowledge is present by the limitlessness of the legal reasoning. In every facts details, the horizons hided behind the law's text and must come by itself, and it ought to be present in the text. However, the absolute knowledge, in legal decisions, remains absolute due to sovereign and legal authority.

The decision-making process, in itself, pivots to its own experience, regarding that any experience of the wasteland could jeopardize the legal reasoning, entailing a not desirable end to society. Every external knowledge must be decoded by the absolute

knowledge of the legal reasoning. The puzzling question is, and about, the negative knowledge, the very comprehension that, at the begging, we do not know nothing, we are walking in the desert and only the desert can teach us something.

### III.5.3 - The Weigh of the History

By all odds, the knowledge which shall come through the text, typographed, in the decision-making process, does not obey the laws of science. However, in every moment, the decision is under a test. The law's decision put itself in this dilemma, the "mystical authority" on the one hand, and on the other hand, it is under a trial sullen of inversions. By tracing a weak parallel with Hegel's master/slavery relationship, in which self-conscious and recognition would rise up, I would suggest that laws and the official interpreter, in the blindness of authority and ruled by duties, protocols and mastery is remotely related to a social adequacy. The decision-making process is only a mastery without a slavery due to there is no possibility to a negative-negativity in law's system and the form of law's self-description.

Kojève, in his peculiar and brilliant Hegel's Heideggerian interpretation, claims that the aim of the master/slaver relationship is such that:

Man achieves his true autonomy, his authentic freedom, only after passing through Slavery, after surmounting fear of death by work performed in the service of another (who, for him, is the incarnation of that fear). Work that frees man is hence necessarily, in the beginning, the forced work of a Slave who serves an all-powerful Master, the holder of all real power<sup>223</sup>.

Through these lines, we could argue that if the law was not once submitted to political and theological legitimacy power, before it reached its autonomy. However, I would like to reflect that, according to this submission, to be a slaver could not be interpreted in other way. The autonomy does not necessary means freedom, instead it also means an alliance with political and theological systems. To be free, law should have be, for an instant, without external connections, being autistic for a short period, then waiting for a trial. Moreover, let us be reminded that our mind, what is designed as a system, is a liability to oblivion. Hence, law can forget to bury slavery's condition politically and theologically, and by consequence, reproduces both traces of that condition (*Zustand*), emulates the old master, and addresses over another.

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<sup>223</sup> Alexandre Kojève, *Introduction to the Reading of Hegel: Lectures on the Phenomenology of Spirit* (Cornell: Cornell University Press, 1980), p.27.

We need the law; we need that something is called to give us an answer. The necessity for a mediation has been present since the very beginning of history, or, what we know as history. Nonetheless, we do not know what could be the society's destiny could have been without mediation. We have some illustrations or infinite speculations. We have so many wolves hating our imagination. Hobbes, La Fontaine, Freud, and so on, illustrate, in the same way, the fear that we have of our own sovereign. We cannot forget other mystical representations, such as the Leviathan and the werewolf, or even other animals<sup>224</sup>.

The law's bailiwick, perhaps, cannot be changed. The law's mediation has to remain in this apparently tension of mastery and submission with politics, economics, science, so on. If law's essence undercover or in question, why do we need mediation answered? The essence could be manipulated in its origin, and law would perish with its realm and domains. Have we every tried to be wolves? Did the trials of some remote age teach us that being human was better than being a wolf?

The riddle remains. Why do we submit ourselves to the mystical authority of law? The system of meaning has never been in the position of mastery - or at least, that is what out limitless experience tells us. What would happen if we inverted the rules? Maybe, someone is trying to deliver us a message in a bottle from "Before the Law"<sup>225</sup>.

We are endowed of language and with an organism, both dictate different prescriptions. My organism has practically or theoretical the same task as every human being. But my mind is ruled by my unconscious and my conscious together, both with and outside a world that already existed before I was born. My mind was undergo changes and shaped to be bound to an unchanged World.

The essential question would be what takes us to a form of interaction needs mediation? One form of mediation would be law, for instance. The fundamental relation with the other calls, at some point, for a third to give an answer. Even so, this answer does not necessary mean relief or the final action. And it is not even close to bring the other close. The multiplicity of our being (*Dasein*) is represented on the possible multiplicity of the word, and the multiplicity of the other being (*Dasein*).

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<sup>224</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p. 1-33.

<sup>225</sup> Franz Kafka, *Before the Law*. Available at the site <http://www.kafka-online.info/before-the-law.html>. Accessed 05.08.2016.

Law's authority and justice do not represent peace or engagement with community. In the Old Testament, the imperatives were addressed to a mimetic experience of God's will, which would end up into an inner experience and with a possible community's experience. Bataille calls inner experience the following:

By inner experience I understand that which one usually calls mystical experience: the states of ecstasy, of rupture, at least of mediate emotion. But I am thinking less of confessional experience, to which one has had to adhere up to now, than of an experience laid bare, free of ties, even an origin, of any confession whatever. This is why I don't like the mystical. Nor do I like narrow definitions. Inner experience responds to the necessity in which I find myself - human existence with me - of challenging everything (of putting everything into question) without permissible rest. This necessity was at work despite religious beliefs, but it has even more far-reaching consequences if one does not have these beliefs. Dogmatic presuppositions have provided experience with undue limits: he who already knows cannot go beyond a known horizon<sup>226</sup>.

Even though Bataille strives to move away from religious vulnerability, our Western condition, or the way we have been constructed our subject in Western Society, has an evident trace of a communitarian commitment. Although this commitment is blind, which many times remains in the world of thoughts, diverges from another world, and is the one raised by the own man since the beginning of the language, it is a concurrent master to our worldly experience (Western); thereof, it has a meaningful role to suffrage, to hospitality, and to friendship, even if the police form dictate those deeds.

### III.5.3.1 - The Many Trial

Both experiences, the experience of being submitted to law's authority and the experience to be with yourself inside a community were not born based on knowledge. Levinas dedicated almost his entire oeuvre to part of this question. To this inquiry, Robert Fynsk notes his belief of what that Levinas' intentions are:

The answer will come via commentary, that is to say, commentary on commentary addressed to the phrase from Exodus that the rabbinical tradition has used to characterize the Jewish response to revelation: "We will do and we will hear" ["na'aseh ve' nishma"] (Exodus 24:7). Levinas will try to show us that this is not the simple reverse of the Western ordering of understanding and action.

The tractate to which Levinas turns in his commentary approaches the phrase by asking, first, whether revelation is not inherently a violent imposition of a message that can only be received in submissive acceptance. How could revelation be received freely if freedom is only consequent upon its event? How could people of Israel have had any choice at Sinai, and how, therefore, are we to understand the character of their adherence? Is the possibility of responsibility something one can choose responsibly, and if not, what is the nature of the assumed responsibility? The Talmudic tractate goes right to the point by offering a literal translation of the sentence from "Exodus" (19:17) whereby "and they stopped at the foot of the mountain" becomes: "and they stopped under the mountain"<sup>227</sup>.

Could law or rights provide any sort of inner experience, regarding the violent aspect of their imposition? Instead of the subjective responsibility furnished by a Western

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<sup>226</sup> George Bataille, *Inner Experience* (New York: State University of New York, 2014), p.3.

<sup>227</sup> Christopher Fynsk, *Last Steps - Maurice Blanchot's Exilic Writing* (New York: Fordham University Press, 2013), p. 19-20

culture and we accept it in a submissive way, law and rights are only recognized as form of outside experience, after we are conscious (Bewusstsein) that an act against them shall be punished, narrowing our freedom, physical and property belong.

Despite this, the freedom and property took away by the force of law, even if we talk about capital punishment, are neither an outgrowth of the crude faith and belief in the verses of Talmud nor to act as Giovannini, which repeats every identity over and over, an individual and plural at the same time. It occurs to me that law, in its ways and form, seeks to reduce and to narrow the personality. When compared to the stunning movie "Fight's Club", based on the book with same title, we are thrown into a universe which brings our personality down. We are thrown into a world without the catches to choice who we are going. The next day is already determined: our clothes, our manners, our food, our haircuts, even what we are have to study to become a lawyer. Our shaped personalities have no freedom of choice. The concept of Western Society, was accurately described by Levinas.

Tangled up in a world, where self-conscious is not hetero-conscious, and alterity still exists, a smooth link to being close to the other and not being afraid of the uncanny. Being surrounded by an image or simulacrum of be close is to be akin to our neighbor (Nebensmesch), and the forms and procedures of the law, legislation, and customs, bids all beings under the same criteria, methodologies, and reasons, without any chance of reconciliation and damned by Western Society, which is a space trapped without knowing it by its own past. We are aware, and we hear our duties to the other, and we do not why, and we do not know how to act. Would it be against the being (Dasein)? Our "throwness" to the world does represent a sheer sacrifice of ourselves since we learn to verbalize what was forced to our mind. Moreover, we are bound to an organic body, which also drives us and gives us sovereignty. Regarding laws and rights, we know that we need them, but we do not know why.

Many glances are in dispute. One of them, we could illustrate as being the search for nonpower and refusal of the "mystical authority". On the other hand, it would be the "theologicalization of science", as it is behind the lines of Freud, and

Rosenzweig<sup>228</sup>, and undoubtedly, in law's self-description, especially after the Second World War.

Rosenzweig celebrates the age of "Aufklärung" (enlightenment) and the modern man unbound from his past history of mysticism and lack of reasoning. Only separating faith and tradition from the seeking of the modern man would be able to expand its horizons, because of dogma and a constituted past. The past cannot be changed, but it can be sharply criticized<sup>229</sup>.

Further, not only the thrownness - "Geworfenheit" - is responsible for our condition that we are not able to understand the world that surround us but the reality is only a word deprived of a mirror or a dreamlike world that could explain what reality really is. A considerable number of social transformations and political engagements are rarely grasped by law. Jurists remained looking for a weak metaphysical base for every idea the concerns the law's system.

### **III.6 - The Impossible Community?**

However, to build up a community<sup>230</sup> based at the very same time on shared values and ethics compromises a plurality of heteronomous identities. Eric Santner by illustrating one of the many questions of political theology by comparing and linking the work from Rosenzweig and Benjamin, writes in a very elegant way one of the teaser that the community and self-understanding has to face :

To get a better feel for this structure of temporization and the ethical and political transformation it entails, I'd like to return to a work I discussed some years ago in a rather different context. There I suggested that Christa Wolf's important novel about coming of age during the Nazi period, "A Model Childhood", was in large measure organized around the development of what we might call, which Benjamin, a weak messianic power on the part of the narrator as she comes to acquire a capacity to read the symptoms plaguing the members of her family (herself included). What the narrator discovers is that such symptoms - headaches, anxiety attacks, a sudden pallor, fits of rage - form a sort of virtual archive. What is registered there are not so much forgotten deeds, but rather forgotten failures to act. In the course of the

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<sup>228</sup> See Eric Santer, "Miracles Happen: Benjamin, Rosenzweig, Freud, and the Matter of Neighbor". In. Kenneth Reinhard; Eric Santner; Slavoj Zizek, *The Neighbor - Three Inquiries in Political Theology* (Chicago/London: Chicago University Press, 2005). As I understand it, Rosenzweig's project was dedicated to elaborating an entirely new conception of the 'demonic' - as well of 'miracle' - that would allow theology to move beyond the limits of historicism without thereby succumbing to the irrationalism - the fanatical, quasi-mystical 'Schwarmerei' - or any sort of 'Lebensphilosophie', p.81

<sup>229</sup> Ibidem, p.79. "In secular culture, the break with dogmatic hold of tradition opened a new confidence in human capacities to understand and master the recalcitrance of the natural world and the social, moral, and political obstacles to a rational organization of society".

<sup>230</sup> Alexander Somek, "What is Political Union", in: *German Law Journal* 14 (2013), 561-580.

novel, Wolf suggests that such failures can, at least in part, be understood as failures to suspend the force of the social bond - call it the dominant ideology - inhibiting acts of solidarity with society's 'others'<sup>231</sup>.

The form of law, since its politic-making process, until being enforced through a calculation or an economy of experience, does not recognize or does not take into account any other reality. One may think that a libidinal involvement between law and society could ultimately end into end law's kinship.

A possible turning of the relationship between law and society, or law and meaning, may happen in philosophy and literature texts. When rules and its literally meaning (*Begriff*) are warded off by the freedom of the writer, a just and fair horizon is opened up by our imaginations. Remarkably, it cannot be mulled over as part of an artistic movement. The writer and the philosopher have a peculiar way of grasping an understanding. Such understanding does not come from nothingness or it is not only a private thought or pure subjectiveness.

The conciliation between philosophy and literature also concerns a challenging on what law and right can possible mean. It comes to our attention that the use of force is always present in the relation between law and right. However, the crucial point remains in how the relation between law and rights play a role in the formation of the self, and by consequence, of the community.

The existence of a community, strictly speaking, calls for a law that can be equally enforced to everyone and does not collides with moral or divine imperatives. This is a theme already intensively showed since the Greek's tragedy, as Antigone or Ajax. But, even with the rising of reason and proceduralization of law, a community is "inoperative"<sup>232</sup>. Nonetheless, the mystical and uncanny nature of the law and justice raises up a paradox. At the same time it interrupts infinite freedom of animal's sovereignty, and on the other hand, it may also jams off the odds of a learning with tragedy.

Jacques Derrida claims that,

"Social animal" does not necessarily mean political animal; every 'law' is not necessarily ethical, juridical, or political. So it is the concept of 'law', and with it that of contract, authority, credit, and therefore many, many others that will be at the heart of our reflection. Is the law that reigns (in a way that is moreover differentiated and heterogeneous) in all the

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<sup>231</sup> Ibidem, p. 89-90. In the novel, these symptoms become legible - or as Benjamin puts it, readable in the now of their recognizability - as indices of missed opportunities to intervene on behalf of the oppressed during the Nazi regime, even missed opportunities for empathy with the victims. The novel suggests that adaptation to the social reality of everyday life during the Nazi period involved forming pockets of congealed moral and social energies manifested as psychic perturbations, as a symptomatic torsion of one's being in the world, or what I have called signifying stress. Miracles happen when, upon registering their 'historical truth', we are able to act, to intervene into these symptoms and enter the space of possibilities opened thereby".

<sup>232</sup> Jean-Luc Nancy, *The Inoperative Community* (London/Minneapolis: Minneapolis University Press), 1991, p.6-25.

so called animal societies a law of the same nature as what we understand by law in human right and human politics? And is the complex, although relatively short, history of the concept of sovereignty in the West (a concept that is itself an institution that we shall try to study as well as we can) the history of a law, or is it not, the structure of which is or is not, also to be found in the laws that organize the hierarchized relations of authority, hegemony, force, power, power of life and death in so-called animal societies?<sup>233</sup>

The very nature of law that masters our community and intermediates our relations with the other is the same that also intermediates collisions and conflicts with the other (*gegeneinander*). Not only the other as a person, but also a state, a region, a province, a company, and so forth, are administered by a law that often is the reason of the conflict. Law itself has an unknown source and we are sheer ignorant about the real reason related to the question of why do we obey and follow the law of law.

### III.6.1 - Ulysses

Without any myths, any great warriors or narratives, what were left was the disasters and rough ideas about a new world order, like, for instance, the vague and contradictory book about a Cosmopolitan Society written by Kant<sup>234</sup>. So to speak, even after the Age of Enlightenment and *Aufklärung* Western Society, he is thoroughly sure that it has been awaked to the truth, so it can cry out for the best position to shape the truth.

Retuning to Ulysses, by James Joyce, the end of mythos also stands for the sheer insignificance of a day's life. Any kind of struggle, since the end of kinship is followed by society's autonomy, to address reason is, in sum, artificial. Hans Blumenberg comments on Ulysses, he regards this point:

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<sup>233</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009) p. 16.

<sup>234</sup> Hauke Brunkhorst...When Kant proposed the 'cosmopolitan condition' of linking nations together on the grounds that in modern times 'a violation of rights in one part of the world is felt everywhere' (Kant, 1996), his notion of *world* (concerning the political world in contrast to the *globe*, which for Kant was only a transcendental scheme) was more or less reduced to Europe and the European system of states. Also Hegel's claim of the 'infinite importance' that 'a human being counts as such because he is a human being, not because he is a Jew, Catholic, Protestant, German, Italian, etc.' (Hegel, 1991, § 209) is relativised by his reductionist understanding of the legal meaning of human rights as applicable to male citizens, biblical religions, and European nations only. He also explicitly limits human rights to national civil law (of the *bürgerliche Gesellschaft* and its *lex mercatoria*), and this law loses its validity when confronted with the essential concerns of the executive administration of the state and its particular relations of power (*besondere Gewaltverhältnisse, justizfreie Hoheitsakte*). Hegel therefore condemns any 'cosmopolitanism' that is opposed to the concrete ethical practices (*Sittlichkeit*) of the state. See also Hauke Brunkhorst, "Die Französische Revolution und die Erklärung der Rechte des Menschen und des Bürgers von 1789", in: Arndt Pollmann/ Georg Lohmann, Ed.: *Menschenrechte – Ein interdisziplinäres Handbuch*, Stuttgart: Metzler 2012b, 99-105. Hauke Brunkhorst, "Die Amerikanische Unabhängigkeitserklärung und die Virginia Declaration of Human Rights", in: Arndt Pollmann/ Georg Lohmann, Ed.: *Menschenrechte – Ein interdisziplinäres Handbuch*, Stuttgart: Metzler 2012c, 91-98. Hauke Brunkhorst, "Recht und Revolution. Der Kantian mindset als normativer Constraint evolutionärer Anpassung", in: Julia König/ Sabine Seichter, Hg.: *Menschenrechte. Demokratie. Geschichte. Transdisziplinäre Herausforderungen an die Pädagogik*, Weinheim: Beltz 2014a, 75-94.

At the end, the Odyssey of triviality that Leopold Bloom transverses in that single day even refutes the closed circle as a pattern of meaning. His return home is the least important and consequential station of all and concludes with the internal monologue of Molly Bloom, expressing her unaffectedness by this return home. (...) The day's tour of this Odysseus is not even turned into an adventure of the imagination. A scenery of literally allusions and establishments of references, outside the 'Odyssey' as well, surrounds Bloom's movements and the places where he stops. The hero has no need for expansion, whether deriving from desire or from boredom, that can resist the shrinking of time and banalizing of the world<sup>235</sup>.

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<sup>235</sup> Hans Blumenberg, *Work on Mythos* ( Cambridge: The MIT Press, 1988) p.81-2. See also Claude Jacquet, "'Nes. Yo' in Joyce, Oui-Rire Derrida", in. B. Benstock (ed.), *James Joyce Literary Fragment* (Miami: Uni Miami, November 1987), p.

## CHAPTER IV - THE "OTHER" AND THE WESTERN METAPHYSICAL CONDITION

It is not by a good reason that Levinas' inquiries on the transcendental condition of awaking after the world was shocked by the revelation of the Holocaust, and an attempt to punishing the plotters were in an intensive debate, as much as the organization of the United Nations, following the struck by the League of Nations. Furthermore, the settlement of Jewish people in Palestine, and the physical creation of the Sian was in a hasty elaboration.

*Totalite et Infini* was a commitment not only to being Jewish in the Western but an effort to succeed Hurssel's phenomenologies and Heidegger's radical ontology. Albeit such serious debate on Western thought, my engagement will follow Levinas' and Derrida's insight on the West. Keenly on both perspective, sometimes alike, most of the times unwoven, my goal throughout this chapter is to interpret the condition of justice, assuming its inclusion in a community and the difficulties of being in a community as I explained in the last chapter.

The elucidation of the position of the being in relation to the other acquires importance, regarding that human rights and fundamental rights were formulated without thinking on the closeness and space between each other. Since the transcendence of human and fundamental rights were set up, a "procedimentalization" to make those rights concrete also filled up the legal agenda.

By being aware of this dilemma, wherein a transcendental separation between the rights and duties respecting a given system of law and principles, and space in which the conciliation has been left to moral and ethical agencies, a neutral position was arranged. A neutral or the Neutral that is not allowed to bring up ethical and moral considerations to the decision-making process, and a natural that has to see the other only as a being, as a corpus and a conscious that should be bound to the transcendence beforehand organized according to the reason and humanitarian ordeal.

Be that as it may, the condition that forms the relation with the other, that is to say, the circumstance that creates our space of relationship with the other and the world that we were thrown into<sup>236</sup>. Law fails to grasp what is at issue by transforming law into a

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<sup>236</sup> Christopher Fynsk, *Last Steps - Maurice Blanchot's Exilic Writing* (New York: Fordham University Press, 2013), p. 17. See also Hauke Brunkhorst, "Solidarity in Times of Crisis: Constitutional Revolution and Europe", in: Arto Laitinen/ Anne Birgitta Pessi, Ed.: *Solidarity: Theory and Practice*, (New York:New York Lexington, 2015b), p. 178-237.

technological and mechanological age. The subject of law cannot be the same subject that lies under the relation with the other; otherwise, it would succumb to the identity of being the law. Unless law overwhelms the worldly experience among the "others" in metaphysical and transcendental and bounding it to a neutral authority that has the right to say yes and no, the worldly experience has any pertinence.

Modern law, as designed and self-description by the own law, achieved metaphysical features, in which any relation with any reference to the being must be projected as a transcendental connection. Understanding law is, thereof, sharpness on the conditions of transcendence. To know and to act is already formulated in our conscious, even with the full absence of representation for us. Thus, any sort of representation of the Other, in strictly legal aspects, is, beforehand an arbitrary reduction elaborated by a metaphysical thinking (*Denken*), entailing a narrow manifestation of our freedom. It is suitable to tress that our freedom is also an ontological house-raising.

Levinas claims that "Western philosophy has most often been an ontology: a reduction of the other to the same interposition of a middle and neutral term that ensures the comprehension of the being"<sup>237</sup>.

#### **IV.1 - The Neutralization**

The other, in pure metaphysical and ontological fashion, is an object of thematization. I only can think of the other once I have grasped what we could call the essence of the other. Roughly speaking, we do not learn to think on the other as being endowed by a particular conscious and experience, locked up in flesh and bone, that makes any being unique as its physical constitution.

We profess the impossibility of grasping and understanding the being without intermediation. The other must be understood as a concept, as a term<sup>238</sup>. However, this concept has never been immune from interferences, and its canonic project, to mediate the society through a layout of logical of predictable structure, has not ferried out a cognitive match. We resemble our understanding about the other regulating in what we have learned about the concept of the other. Consequently, it culminates into a smooth understanding of

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<sup>237</sup> Emmanuel Levinas, *Totality and Infinity - An Essay on Exteriority* (Pittsburg: Duquesne, 1991), p. 43.

<sup>238</sup> *Ibidem*, p.44.

the other. The other is an ontological invention<sup>239</sup>, as well as the being. The being cannot exist without the other, demanding complementation. But the metaphysical organization makes possible the confirmation of being inasmuch as can be reflected in the theme of the other.

First of all, how could the concept of the other be freely associated, if the notion of the other is received as a consequence of the events of conceptualization of the other? How a community and its offspring can conciliate a life of temptation<sup>240</sup> to a metaphysical idea of the other. Roughly speaking, negativity and transcendence are unsuitable.

As stated by Levinas, "Transcendence designates a relation with a reality infinitely distant from my own reality, yet without this distance destroying this distance, as would happen with relations within the same;"<sup>241</sup>. Consequently, the metaphysical realm, when it comes first touching an invention (*Empfinden*) and settling of imperatives, it roots out any odds of otherness.

It happens because in metaphysical terms, to know is first of all to select an object and grasp it within as much as imaginable. So to speak, we learn, and we hear what has been offered to us, without being open up to the freedom of ignorance. We learn what the other is before knowing who is the other. Basically, metaphysical thinking (*Metaphysik Denken*) deals with what (*Was*), whatsoever<sup>242</sup>.

Notwithstanding, ontology was designated in Western Society as the strategic space to understand the being. A being, the concept of the being to be more careful, already set by a metaphysical order. Thus, ontology investigation is an inquiry of the metaphysical concept of the being<sup>243</sup>.

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<sup>239</sup> Jacques Derrida, *Psyche: Invention of the Other Vol I* (Stanford: Stanford University Press, 2007a), p.1. "An invention always presupposes some illegality, the breaking of an implicit contract; it inserts a disorder into the peaceful ordering of things, it disregards the proprieties."

<sup>240</sup> Emmanuel Levinas, "The Temptation of temptation," in. *Nine Talmudic Reading*. Levinas, Emmanuel (Bloomington: Indiana University Press, 1994), p.37.

<sup>241</sup> Emmanuel Levinas, *Totality and Infinity - An Essay on Exteriority* (Pittsburg: Duquesne, 1991), p.41. Levinas keeps affirming, "this relation does not require an implantation in the other and confusion with him, does not affect the very identity of the same, its ipseity, does not silence the 'apology,' does not become apostasy and ecstasy."

<sup>242</sup> *Ibidem*, p.43.

<sup>243</sup> *Ibidem*, p.43.

To attune both legacies of Western Thinking, critique has been brought to stage, the name of critique<sup>244</sup>. Ethical thinking would be an emergency of setting the same order that I self-reflect, and the sameness that the other self-reflect, as cross-transcendence of the same<sup>245</sup>.

In a nutshell, this has been the history of the way of the West. In my impression, it is not only how philosophy was shaped, but it is how our personality has been bounded to the notion of representation and identification. "The knowing being remains separated from the known being"<sup>246</sup>. For Levinas, the "exteriority" of the being is manifested through an idea of infinite, in which only the being can have access to it. However, to not be drained by the notion of infinite and to yield it, desires sneaks into the scenario. A desire that manifests itself without sake.

All the same, the presence of the presence, in its space of significance, represents a negativity movement. The other is not embedded in our language, and his presence is always followed by the uncanny and puzzling of our ego. As Levinas claims,

For the presence before a face, my orientation toward the Other, can lose the avidity proper to the gaze only by turning into generosity, incapable of approaching the other with empty hands. This relationship established over the things henceforth possibly common, that is, susceptible of being said, is the relationship of conversation<sup>247</sup>.

Thus, our worldly experience is fabricated following what is given to us. Albeit our personality is in an eternal moment of tugging, being opposite to what we have grasped and learned. The exteriority works as a narrative, a narrative of the neutral. Its distance is incumbent of being the house of primordial meaning and intermediate our speech. Even when we speak, throwing out our possible ideas, our speech carries the neutral. Not the neutral of my idea, but the neutral of the speech because the meaning of the word spoken must remain neutral. I can be a different person from my idea; I can be excused by my idea; I can keep myself distant from the speech that I have once performed<sup>248</sup>.

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<sup>244</sup> Ibidem, p.43. "Its critical intention then leads it beyond theory and ontology: critique does not reduce the other to the same as does ontology, but calls into question the exercise of the same. A calling into question of the same - is brought about by other. We name this calling into of my spontaneity by the presence of the Other ethics. The strangeness of the Other, his irreducibility to the I, to my thoughts and my possessions, is precisely as a calling into question of my spontaneity, as ethics".

<sup>245</sup> Ibidem, p.43.

<sup>246</sup> Ibidem, p.48. "The distance between me and God, radical and necessary, is produced in being itself."

<sup>247</sup> Ibidem, p.50. It is also relevant to hallmark this chunk, "The notion of the face, to which we will refer throughout this work, opens other perspectives: it brings us to a consciousness of mining prior to my 'Sinngebung' and thus independent of my initiative and my power. It signifies the philosophical priority of the existent over Being, an exteriority that does not call for power or possession, an exteriority that is not reducible, as with Plato, to the interiority of memory, and yet maintains the I who welcomes it.

<sup>248</sup> Maurice Blanchot, *The Infinite Conversation* (Minneapolis: Minnesota University Press, 1993), p. 380-1. "The experience of the disenchanted world that Don Quixote introduced into literature is the experience that dissipates the 'story' by contrasting it to the banality of the real; this is how realism seizes on the form of the novel that for a long time to come will be the most effective genre of the developing bourgeoisie".

#### IV.1.1 The invention of the Other - on Derrida's remarks

What is the ethical dimension? What could we profess to be an ethical dimension? Very roughly, and following Levinas' assumptions, the ethic is determined by the face of the other, or at least, it should be the way that our relation with the other had to be bounded. Notwithstanding, "their 'otherness' is thereby reabsorbed into my own identity as a thinker or possessor. The metaphysical desire tends toward 'something else entirely,' toward the 'absolutely other'"<sup>249</sup>.

All the same, a question has to be addressed to Levinas' inquiries: does the animal-beast, the zoo-political dimension of the man, "the animal before I am"<sup>250</sup>, has an ethical dimension? Further, Levinas postulates that the first command should be, "you should not kill"<sup>251</sup>. But, should we not kill even, so the other is an animal or a marionette? The other as an animal and as a marionette are the fable dimension of the humanity or the political. In the following lines, I bring this subject that is very related to Derrida<sup>252</sup>.

If the Face is a condition to peace, therefore to reach peace and a life in which the love of neighbor is implicit, sovereign or the Leviathan, the mechanical beast recreated by the men to organize the society by a reign or fear and love, it would take the edge off. Forgetting the structural investigation, which predominates in political science, Derrida goes beyond by drawing the zoo-political.

The conciliation between zoo-political and face, if we take every slant into account, is beyond the bounds of plausibility. Be as it may, it calls me to a sort of calculation, that makes me try to conciliate the engagement with the *autrui*, and traces the line of zoo-political that meddles in the odds of a community tied up with the good and peace. Previously to this attempt, I regard quite relevant to describe Derrida's idea wherein the Other - as he assumes to be an invention. Yet, it is my task to forewarn you that the zoo-political came years later after Derrida's lecture at Cornell University, which took place in 1984. Therefore, I am going to perform my own interpretation about the Other, the *autrui*,

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<sup>249</sup> Emmanuel Levinas, *Totality and Infinity - An Essay on Exteriority* (Pittsburg: Duquesne, 1991), p.33.

<sup>250</sup> Jacques Derrida, *The Animal Before I Am* (New York: Fordham University Press, 2008a), p. 3-22.

<sup>251</sup> Emmanuel Levinas, *Totality and Infinity - An Essay on Exteriority* (Pittsburg: Duquesne, 1991), p. 33-52.

<sup>252</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p.237. "and you know that for Lévinas, the other, of its ethical dimension, is what he calls a face, a 'face', the face being not only what or what sees, but also what speaks, what hears speech, and therefore it's a face that our ethical responsibility is addressed, it's a face that it receives from the other, and therefore it's a face that our ethical responsibility is addressed, from a face that it receives something from the other, that I receive the imperative: 'Thou shalt not kill'".

and the zoo-political. Afterward, my queries are to conciliate this association into a communitarian level, and how the modern law has not the knowledge (*Erkenntnis*) to intermediate and to give/offer a solution to the issues, mainly concerning human rights and fundamental rights.

#### IV.1.1.2 - "Psyche: Invention of the Other."

In one of his ground-breaking lectures, Derrida did a tribute to Paul de Man, by utilizing his concepts of allegories and the oscillation between performative and constative using of language. This lecture was at the same time a tribute to de Man, in the way of de Man and Derrida converges, but also Derrida speaking by himself.

"An invention always presupposes some illegality, the breaking of an implicit contract; it inserts a disorder into the peaceful ordering of things, it disregards the proprieties"<sup>253</sup>. It was in this way that Cicero invited "oratorical" art. Cicero by teaching to his son how to manage the power of being orator affirms,

given that the orator's special power, his "vis", consists in the things he deals with (idea, themes, objects), as well as in the words he uses, "invention" has to be distinguished from "disposition"; invention finds or discover things, while disposition places or localizes them, positions them while arranging them: "res et verba invenienda sunt et collocanda." Yet invention is "properly" applied to ideas, to the things one is talking about, and not to elocution or verbal forms<sup>254</sup>.

As Derrida suggests, for de Man, the invention would be a variety of allegory, "as myth or fable"<sup>255</sup>. An invention demands a signature, as the originality of other needs a signature that legitimates the truth that the other has invented. In our position, who could legitimate the *autrui*? As we are going to see soon, narratives are empty, and neutrality of the institutions does not privilege an ethical command, as Levinas suggests. The question remains, who is going to legitimate a demanding for recognizing the finitude of a face?

All the same, Derrida points out that an invention, in its rhetorical peculiarities, excludes something or someone. As the inventiveness takes shape, and off-the-cut it has been reproduced and disseminated. Then and there, someone feels wronged because the invention or something overwhelms him.

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<sup>253</sup> Jacques Derrida, *Psyche: Invention of the Other Vol I* (Stanford: Stanford University Press, 2007a), p.1, in. *Psyche: Invention of the Other*.

<sup>254</sup> Ibidem, p.2.

<sup>255</sup> Ibidem, p.3 See Paul de Man, "Pascal's Allegory of Persuasion", in. Paul de Man, *Aesthetic Ideology* (Minneapolis: University of Minnesota Press, 1996), p.51-69.

The aspect of the language, particularly its grammatical, performative and constative forms, are able to be manipulated, and any term, word, or even an idea, could be manipulated in this scenario of incertitude. This is de Man's obsession<sup>256</sup>, to prove how language and its grammar can concoct us.

So to speak, could be the "other" an invention, *creation, Erpfingund?* The "other" was not there, but only a being (*Dasein*). Naturally, if we seek for a scientific feedback, it would be quite obvious that the "other" would be a kind of nonsense word that would expose the fragility of our memory and it would lie in de Man's bound to hallmark the impossibility of knowledge (*Erkentiness*). Due to the implications of a world built on science as art, Derrida leaps into a provocative bailiwick, recuperating the fable's dimension.

Roughly speaking, a fable looks for a moral result, the only truth to be pursued. Anyhow, some fables can make reference to a moral lesson by using a subtle irony to uncover a virtuous behind common sense and costumes (*Sitten*), as La Fontaine with magistracy and elegance wrote in his fables. Derrida takes the irony of a fable to another level, by making reference to a poem called "Fable," wrote by Francis Ponge<sup>257</sup>.

The spectacular language of the poem that introduces us to the illogical of the language and turns over the order of the things. A fable is able to be self-referent, zoning off its own rules and grammar. According to the conventions, a fable is allowed to play with reality and to break the protocols of truth, by creating its own truth, no matter how absurd it could be.

A fable is authorized to fly in the face of absurdity without being absurd. It elaborates its own legitimization without the need to asking for it. The engineer could claim a fabular reasoning instead of a scientific logic to prove the matters of the invention. Why would it be not legitimate? Albeit science dictates the agenda of knowing nowadays, science has no idea of what does the other mean.

A fable can formulate the status of truth to a human invention, and by the same time, it elaborates a narrative of a mystical geniality to the engineer. The mechanical utterance which predominates in law refuses to accept anything that has not taken the shape of a scientific speech. Speaking of the "other" can be a thematization, whereas law appropriates

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<sup>256</sup> Paul de Man, *Allegories of Reading: Figural Language in Rousseau, Nietzsche, Rilke and Proust* (New Haven: Yale University Press, 1982), p. 3-24.

<sup>257</sup> Jacques Derrida, *Psyche: Invention of the Other Vol I* (Stanford: Stanford University Press, 2007a), p.7-23.

only part of the question of the "other." Every appropriation is a narcissistic process. The "other" is a blind spot to the law. Yet, I am inclined to say that it is a conscious blind spot. There is not any jurisprudence or law manual that goes deeper into this question. One exception is a well-structured study made recently by Thomas Vesting<sup>258</sup>.

To get a better feel on this debate, law translates the "other" as an immigrant, refugees, citizenship and so forth. It is through the process of translation and by written statute that law can manipulate the invention of the "other" and to avoid to make any comment on it. And through inventions, not of the "other," however by inventing machines that law can dodge any thematization. Derrida's crucial insight explains that after the 17th century in Europe only two sorts of inventions were authorized. Consequently, they are legitimized as: stories and machines<sup>259</sup>.

So to speak, "margin of appreciation," "reverse 'solange,'" "balance" are, as I am insisting along this work, technologies. All the same, they are not an invention from law's inventiveness but manipulation. What we do must keep in our mind and we can draw the following conclusion from Derrida's text is that what has been called invention is not another thing than an appropriation with a start. The machine runs on after an inaugural text or speech. By selecting its own topics and assisted by a constative language, which further is going to be proved that it is a performative language.

It is such sort of manipulation and avoidances (*Vermeidung*) that evidently come up through decisions from the European Court of Human Rights. Using a familiar expression to readers from Paul de Man, the Court brings forth aberration. To pay a sort of of tribute to de Man, I am eager to bring the notorious case of *The Laws on the use of language in Education in Belgium vs. Belgium*<sup>260</sup>. I bring this case maybe because it tangles nationality, language, and the issue took place in de Man's country. However, is there anything else that can scatter us other than language?

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<sup>258</sup> Thomas Vesting, "Nachbarschaft. Grundrechte und Grundrechtstheorie ind Kultur der Netzwerke", in: Thomas Vesting, Stefan Koriath, Ino Augsberg (org.), *Grundrechte als Phänomene Kollektiver Ordnung* (Tübingen: Mohr Siebeck, 2014), p. 57-86.

<sup>259</sup> Jacques Derrida, *Psyche: Invention of the Other Vol I* (Stanford: Stanford University Press, 2007a) p.10, in: *Psyche: Invention of the Other*. "and on the other hand people invent 'machines,' technical devices or mechanisms, in the broadest sense of the word. Someone may invent by fabulation, by producing narratives to which is no corresponding reality outside the narrative (an alibi, for example), or else one may invent by producing a new operational possibility (such as printing or nuclear weaponry, and I am purposely associating these two examples, since the politics of invention is always at one and the same time a politics of culture and a politics of war)."

<sup>260</sup> *The Laws on the use of language in Education in Belgium vs. Belgium* or Belgian Linguistic case (No. 2) (1968) 1 EHRR 252. See also Kjeldsen, Busk, Madsen and Pedersen v Denmark (1976) 1 EHRR 711; Campbell and Cosans v United Kingdom (1982) 4 EHRR 293; Ali (FC) v Headteacher and Governors of Lord Grey School [2006] UKHL 14

The facts grounding the case are quite simply, a complete mismatch between the openness from Belgium history until the Act of 14th of July, by including the term "territoriality," which entailed the scattering of unilingual and bilingual regions within Belgium. Roughly speaking, the unilingual region the study of a second language was not mandatory.

The case gloomy introduces the politics of unity rather than an effort of living with a difference. Bias as language, color or creed, on the 19<sup>th</sup> century, it became a subject of the law. All the same, the matter involves whether a State has to provide a particular type of education<sup>261</sup>. During the 60's, the balance method had not been spread beyond Germany. Positive and negative obligations were at the spot. A theory which was stressed by Georg Jellinek at the end of the 19th century.

The decision portraits nothing else than a matter of responsibility and obligations. In this way, any identity is left for a metaphysical project. It is something that all parts involved in the issue, parents, State, and court, are looking for something beyond of the space of meaning. The sort of mediation provided by the law's text, related to the cultural right to education, implicates directly to the scattering between self-identity and a national identity, which are expected to always match. On this account, the discussion is confined to a narrow range. Although, its further conclusion can drastically change over the complete specter of a community, not a particular community, but from the European community.

Although, all the efforts made to separate narratives, at the end law has to make use of performative and mixed up any possible narrative until it gets an appearance of only one reasoning: the legal reasoning. It is an unrealistic task to pinpoint state why did law turn to be legitimate to mediate any issue, at least at a scientific level. Still and all, law's mediation comes together with an urgency, anxiety for a prompt solution. There is no time to wait for another solution than the one which law can give. Perhaps, this anxiety and the lack of a communitarian ground, set the law to be only legitimate corpus to solve it rather than politics<sup>262</sup>.

On page 28 of the decision, the European Court of Human Rights comes across with the following assignment, it has to say "yes" or "no." By saying "yes," it would declare that children have the right to have at any place classes taught in their own mother language. By

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<sup>261</sup> Ibidem, p. 17-18.

<sup>262</sup> Geoffrey Bennington, *Scatter 1 - The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p. 3-8.

saying "no," it would agree with the currently Belgium legislation. Notwithstanding, such matter is only the surface of the issue, but the rules only allow the Court to keep the argumentation on the surface. The reasoning used by the Court is the same reason used to decide whether a wall building violates the city's legislation on construction.

The mother language precedes any self-identity. A mother language or a monolingualism gives a hint about anyone's culture and bounds any person to it. Before the reader withdraws any hasty conclusion, I am taking any part side or affirming that the contracting State should provide such benefit. My motivation is to indicate the contrast between an idea of community and what has been decided by law. Further, it shows that the question of identity is still bounded by an utter dogmatic assumption.

Seemingly that belonging to a particular State, by consequence, holding a citizenship does not define an identity<sup>263</sup>. Nonetheless, being a citizen entitles anyone to be restrained from rights in a brutal way by the State, oddly in some circumstances. It is not a novelty to Derrida's readers that he was forbidden to go to school when he was 12 years old because he was Jewish at the time Algeria was under Nazi control. Further, he got a French citizenship even before he had stepped in France<sup>264</sup>. Additionally, French derogated the citizenship from Jew-Algerians later. This is only to illustrate how sensible is the question on language and citizenship.

Hence, what this singular case in Belgium has demonstrated to us, and only on the 60's, this is still a relevant subject, is that the language is the language of the other. Derrida claims that language although is a property, it cannot be alienated. So to speak, the master/slave relationship gets deeper compromised, whether a slaver cannot dispose of or alienate his properties. The language affects any issues concerning authority. For this reason, there is a sort of urgency to control it through universal rules, rules that are not able to detail every particularity of a language's case. Language can spook any country. Whereas, it would be the only way of being with one other<sup>265</sup>.

Having a "right to education" does not pinpoint what it bears. What is properly to education? Besides, the Court did not put this question forward and related it to the question

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<sup>263</sup> Jacques Derrida, *Monolingualism of the Other or The Prosthesis of Origin*, (Stanford: Stanford University Press, 1998b), p.14-5. "In order to present myself as a Franco-Maghrebian, I made an allusion to 'citizenship.' As we know, citizenship does not define a cultural, linguistic, or, in general, historical participation. It does not cover all these modes of belonging. But it is not some superficial or superstructural predicate floating on the surface of experience".

<sup>264</sup> *Ibidem*, p.16.

<sup>265</sup> Jean-Luc Nancy, *Being Singular Plural* (Stanford: Stanford University Press, 2000), p.1-12.

of European Community, though, it is relevant to hallmark, even the particular point about the connection between language, education, and family life was not adequately answered. Still, I firmly believe that judges are, sometimes, hazardously bound to a matter of freedom and equality. To get a better feel for what I am trying to address, freedom and equality intermediate most of the answers. Consequently, it might frame any further and flourishing argument. So to speak, the question of language is not only a subject of equality or freedom. It wraps a matter of sovereignty and, as a result, it is a fact concerning hospitality<sup>266</sup>. Yet, not only the judges are bound with those corollaries, but also the other parts who are involved. I would say, possibly every person in Europe, who was living in Europe, was and is still inflicted by the question of the language.

To sum up, the decision is attached to stereotypes. It is linked to injunctions from elsewhere. The decision assumes that language is a unity, and after someone grasped it, a person could manage to overcome any threat. Language is always associated with the other because it comes from the other.

Evidently that the arguing rests only on the school system and future homologation from certificates from those, who had studied in non-official schools. Nevertheless, I expect to insist that every single part of this issue is tied to some limits that the metaphysics of a communitarian concept has not occupied a place outside from its boundaries. It is feasible to link up this question with a theology of the speaking. Logically it is connected to a political reason, notably after the raising of the modern state.

The "other" through its creation, has its own demands. Nonetheless, would be the "other" always right, or by contrast, the "other" would be violating the protocols of hospitality that are not mediated by legal norms? Obvious there is some sort of friendship's structure that a legal decision-making process cannot overpass<sup>267</sup>. On the forthcoming topics, I intend to approach the legal dilemma, which is densely tangled with the question of sovereignty and ethics. In my opinion, the invention of the "other," although is a proposition that can fill a humanistic thought with structured and coherent arguments, on the other hand, it is an innovation flourished from a narcissistic conjecture.

## **IV.2 Humanity and Human's Right and the "Other"**

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<sup>266</sup> Jacques Derrida, *Of Hospitality. Anne Dufourmantelle Invites Jacques Derrida to Respond*, (Stanford: Stanford University Press, 2000), p.15.

<sup>267</sup> Jacques Derrida, *The Politics of Friendship* (London/New York: Verso, 2005), p.234-66.

The "other" cannot be an applicant, or the "other" has not the same feature of a claimant. Fraternity entails something that modern law cannot provide. A critic has a suggestive element and who criticizes has always a privileged position without question. It is quite simple to manipulate arguments and to give a participant the privilege of being right.

Our question is to introduce the way of the West, and barely hard applicants and judges will carry the benefits of being right or to carry the truth. Moreover, this way of the West can only likely exist whether a reproduction of the flaw occurs, and further, it comes to pass almost in a sneak way.

To get a better feel about what I am attempting to write about, it is relevant to introduce another case concerning human rights. The case of *Otto-Preminger-Institut against Austria*<sup>268</sup> can shed some light on how a right can be manipulated, remarkably in a case whereby rules and principles do not match with the facts, bringing the judges to use a performative speech, or better, an unframed act of speech.

The issue is related to a movie exhibition in the city of Innsbruck. The film which was announced was "Das Liebeskonzil" by Werner Schroeter<sup>269</sup>. The disassociation between credos and the meaning of freedom conduces law's authority to calculations the object coming from the "other" is abruptly suspended. Evidently, there is not a community or society in which every single person or group shares the same understanding of credos and

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<sup>268</sup> *Otto-Preminger-Institut v. Austria*, App no 13470/87, 20.09.1994.

<sup>269</sup> *Ibidem*, p.6-7." 20. The play on which the film is based was written by Oskar Panizza and published in 1894. In 1895 Panizza was found guilty by the Munich Assize Court (Schwurgericht) of "crimes against religion" and sentenced to a term of imprisonment. The play was banned in Germany although it continued in print elsewhere. In print elsewhere.

21. The play portrays God the Father as old, infirm and ineffective, Jesus Christ as a "mummy's boy" of low intelligence and the Virgin Mary, who is obviously in charge, as an unprincipled wanton. Together they decide that mankind must be punished for its immorality. They reject the possibility of outright destruction in favor of a form of punishment which will leave it both "in need of salvation" and "capable of redemption." Being unable to think of a penalty by themselves, they decide to call on the Devil for help. The Devil suggests the idea of a sexually transmitted affliction so that men and women will infect one another without realizing it; he procreates with Salome to produce a daughter who will spread it among mankind. The symptoms as described by the Devil are those of syphilis. As his reward, the Devil claims freedom of thought; Mary says that she will "think about it." The Devil then dispatches his daughter to do her work, first among those who represent worldly power, then to the court of the Pope, to the bishops, to the convents and monasteries and finally to the ordinary people. 22. The film, directed by Werner Schroeter, was released in 1981. It begins and ends with scenes purporting to be taken from the trial of Panizza in 1895. In between, it shows a performance of the play by the Teatro Belli in Rome. The film portrays the God of the Jewish religion, the Christian religion and the Islamic faith as an apparently senile old man prostrating himself before the Devil with whom he exchanges a deep kiss and calling the Devil his friend. He is also portrayed as swearing by the Devil. Other scenes show the Virgin Mary permitting an obscene story to be read to her and the manifestation of a degree of erotic tension between the Virgin Mary and the Devil. The adult Jesus Christ is portrayed as a low grade mental defective and in one scene is shown lasciviously attempting to fondle and kiss his mother's breasts, which she is shown as permitting. God, the Virgin Mary and Christ are shown in the film applauding the Devil."

other meanings. In this particular issue, the "other" does not come from outside. The "other" shares the same language and culture.

The decision to overrule the first and following judgments came from a supranational court. Any judge from the ECHR on that particular occasion were not from Austria. However, there is an uncrushable doubt that the reason is beyond any cultural and political performative. The idea of law's science and legal reasoning is contaminated by the same destiny of general science or its misunderstood<sup>270</sup>. To withhold exactness, a language charged of technological argumentation is poured in the decision. Nonetheless, any critical reading will suggest that the decision is not another thing than a game of opinions.

Law's science and its methodology have been used to guarantee or to pull in rights<sup>271</sup>. Such law's mechanization does not reproduce common understanding of freedom. On the contrary, it metabolizes a naïve notion of freedom. All in all, the ECHR, as well other courts, replicates the ontological inference of freedom<sup>272</sup>, which entails every person with an unlimited freedom until he "collides" with the other's freedom.

Nevertheless, subjectivity is before everything a representation or a simulacrum. The West has set up its world by constituting symbols, which are permitted to be linked to a prominent thematization<sup>273</sup>. I shall come back on this topic on the forthcoming chapter. However, there are two perspectives I would have to introduce to enlighten this debate. The first is Derrida's insight on how sovereignty was transmitted or projected through a narrative based on the figurative animality and bestiality of man. Derrida's last seminar entitled "The Beast & the Sovereign"<sup>274</sup> gave continuity to his last projects, focusing on the question between the death penalty and the State<sup>275</sup>. According to Derrida, the figure of the animal and the beast, which have appeared over and over in books about political philosophy.

Rather, for Derrida, those characters could only be interpreted whereby a fabular dimension or by a poetical way of seizing some enigmas. Animals and beasties were not a mere or convenient choice, if Derrida's assumptions are correct. Indeed, in my impression,

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<sup>270</sup> Avital Ronell, *The Test Drive* (Urbana/Chicago: University of Illinois Press, 2005), p. 22-45. See also Rodolphe Gasché, *Europe, or the Infinite Task. A Study of a Philosophical Concept* (Stanford/ Stanford University Press, 2009), p. 64-93.

<sup>271</sup> Jean-Luc Nancy, *The Experience of Freedom* (Stanford: Stanford University Press, 1998), p. 2-22.

<sup>272</sup> Ibidem, p.4 "In the ontology of subjectivity, being is posited as the 'subjectum' of representation, in which, by this fact, the appearing of all things is converted."

<sup>273</sup> Ibidem, p.5, "For the ontology of subjectivity, freedom is the act (which also means the being) of (re)presenting oneself as the potential for (re)presentation (of oneself and 'therefore' of the world). It is a free representation (where I accede sovereignly to myself) of free representation (which depends only on my will)".

<sup>274</sup> Jacques Derrida, *The Beast & The Sovereign, Vol I*, (Chicago/London: Chicago University Press, 2009), p. 66-92.

<sup>275</sup> Jacques Derrida, *The Death Penalty Vol. I* (Chicago/London: Chicago University Press, 2013), p.97-122.

Derrida is striving to bear out an old dilemma surrounding the West and its philosophy, which has ended up stubbornly in the identity of the West. Evidently, I am calling attention to the fact that, in an ontological fashion, freedom and its metaphorical representation has grounded almost every selection and utterance in the West. Even so, this figure (freedom) cannot be set as a wrong choice or a misinterpretation. Derrida and some other political, philosophical writers, particularly Jewish ones, deem that this distortion gave a false idea of representation and legitimacy to the West, that culminated on a politic of animality, or a legitimate illegitimacy mode of governance, which has always placed some hierarchical structure to conduct freedom.

#### **IV.2.1 - The Machine os Reading**

Returning our attentions to *Otto-Preminger-Institut v. Austria*, the decision brings up another issue concerning freedom of religion and proselytism<sup>276</sup>. I intend to enter upon briefly on this fact because it involves a religion issue between neighbors. At the center of ECHR's decision, we might find out how a performative speech gets involved in a sort of mirror game whereby it provokes paradoxes as a result. Furthermore, it portrays an internal tension in the Western society, in which plenty of ethical imperatives demand that you should love your neighbor as you love yourself.

Evidently that law, particularly after French and American Revolution<sup>277</sup> appropriate itself of a mediation whereby its form of proceduralialization is assumed (*Vorausgesetzt*) to be adequate to maintaining a meaning of rights intact. Right is right if its form is translated through a legal decision. The legal making process is a pattern of translation that should grasp any meaning remaining in the backdrop related to the issue. It is presumed that rights are lived, and they should be embedded in our language and performs. When rights cannot come through by our action, the decision-making process is called to enlighten our reason.

It is assumed that rights, particularly individual rights, was a rational construction and they should be embedded in every single mind which habits a modern society. By stressing such jargon, and consequently by making rules justified from individual rights a

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<sup>276</sup> Case of *Kokkinakis v. Greece*, Application no. 14307/88, 25.05.1994.

<sup>277</sup> Niklas Luhmann, "Verfassung als evolutionäre Errungenschaft", (1990) *Rechtshistorisches Journal* 9, p. 176-205 See also Dieter Grimm, *Die Zukunft der Verfassung II. Auswirkungen von Europäisierung und Globalisierung* (Frankfurt am Main: Suhrkamp, 2012), p. 34-93. Bruce Ackerman, "The Rise of World Constitutionalism" (1996), *Occasional Papers*, available at [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1128&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1128&context=fss_papers), Accessed 11.10.2016.

new form of symbolic dimension of our sphere of will and action took shape in the Western's mind. Albeit, every individuality has a virtual right of freedom and equality, parallel to it, the sense of responsibility and communitarianism were not stressed in the public sphere.

Plainly, the moment of the decision-making process refers to the very question between Heidegger - "the moment" or *Augenblick*<sup>278</sup> - and Derrida "a leap in the dark"<sup>279</sup>, in which the judge is authorized to suspend justice and a right to innovate whereby a performative legal argumentation that cannot seem to be new. Judges are virtually engaged with a framework of rights, under the terms of which they have to conciliate their decisions. So to speak, according to my reading of Derrida's justice concept, any juridical decision is an ongoing project to perpetuate the legitimate violence that inaugurated a new order, and now such force remains only as a trace<sup>280</sup>.

Albeit, some jurists show some keenness about new theories and ideologies, chiefly in Germany, particularly by introducing a notion on Derrida's insight, Teutons do not break with the adamant German awareness system and law's enforcement. Their mistake is believing that the only text that Derrida wrote about the law was *Force de Loi* and forgot or simply rejected Derrida's crucial text on sovereignty and hospitality. On the further topic, I will introduce some of the most important Derrida's work related to law to demonstrate that way that jurists are fabricated is only possible to wind up into the same chain of truisms that have been parroted, particularly after the World War II.

#### **IV.2.1.1 The Sovereign before the Law**

In the view condensed in Bloom's cryptic remarks, the 'transference', this central feature of psychic life and therapeutic efficacy, ultimately revolves around the enigmatic process and procedure whereby a human becomes authorized, placed in relation to the resources of value and legitimacy that constitute the very 'stuff' of sovereignty<sup>281</sup>.

To link communitarian with law's dilemmas and to attempt to figure out the reason why law suffers from the same crisis as European science, a crisis based on the very notion of reason and truth I am going to introduce Derrida's idea of sovereignty, which widely diverges from the impression that we got used to by reading Public Law books or legal decisions.

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<sup>278</sup> Martin Heidegger, *Being and Time* (New York/London: Harper Perennial Modern Thought, 2008b), p. 225-63.

<sup>279</sup> Jacques Derrida, *La voix et le phénomène - Introduction au problème du signe dans le phénoménologie de Husserl* (Paris: Presses Universitaires de France, 1967), 9-45.

<sup>280</sup> Jacques Derrida, "Force of Law - The "Mystical Foundation of Authority."" In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 285-6. See also Geoffrey Bennington, *Scatter I. The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p.187-237.

<sup>281</sup> Eric L. Santner, *On the Psychotheology of Everyday Life. Reflections on Freud and Rosenzweig*, (Chicago/London: The University of Chicago Press, 2001), p. 26-7.

On his last seminar delivered on 2001 and 2002, Derrida was keen on introducing how the relation between the "beast," commonly a feminine noun, and the sovereign, a masculine noun. Not only difference, but also how this fragile alliance reached achievements. For that, Derrida read between the lines of some of the most famous works on political philosophy and also poems and romances. Whereas, the last part of the seminar has concentrated on a sharp reading of the widely known book from Heidegger, "The Fundamental Concepts of Metaphysics - World, Finitude and Solitude", on which Heidegger introduced his famous notions of being bored and what is to be alone in world<sup>282</sup>.

On the further topics, I am going to briefly describe Derrida's interpretation on some of the thinkers who were studied in the first part of this brilliant seminar, as well as some concepts that are utterly relevant to understand Derrida and his peculiar way of thinking. Afterward, I am going to link it with our crucial point, or how the very question structured by Derrida could be related to the crisis of law's technology and its repercussion on Western society.

### **IV.3 The Beasties are chasing Derrida**

Long before law's authority comes out, we are able to go off the track of a crucial subject raised up by Derrida in many of his seminars: why do we have for a considerable length of time make an association of our political behavior with the figure of an animal? Further, beasts also show up in this fuzzy context. During the last seminar delivered by Derrida in his life, "The Beast & The Sovereign", this association among men, animals and beasts result to be much more prolific than a scientific and constructive discourse, which seeks for a truth lied in our observation. Widely employing those figures in a fabular dimension fashion, the constellation of animals that have been representing our political standards are incredibly huge.

On the next topics I will concentrate my thoughts on some of Derrida's examples, which I regard more relevant to our investigation. I am not necessarily following Derrida's seminar disposal.

#### **IV.3.1 - Leviathan and Schmitt: Politics above everything**

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<sup>282</sup> Martin Heidegger, *The Fundamental Concepts of Metaphysics - World, Finitude and Solitude* (Indiana University Press, 2008a), p. 124-175.

Fear and love dictate politics. Fear and love dictate our connection with God. Fear and love dictate our relation with our father. Fear and love dictate our compliance to Law. Love and fear dictate our relationship with the *autrui*. Always a dichotomy insists on repeating itself, reducing our choices, and coming out as our identity. We love, or we kill. Blanchot said, "We speak, or we kill"<sup>283</sup>, pursuing another inquiry on the present Western's condition.

The zero ground of the way of the West is an unrealistic dream. We cannot assume with full certainty where it has begun. Clues were left. Texts and traces<sup>284</sup> are the remaining material to track our identity and answer inquiries, like why do we need intermediation? In regards to Derrida's concern on what we ask ourselves about who is the other and why do we need a third to intermediate our togetherness, first of all, we must seize, into a quasi-mystical or artistically sense, why do we had to give up part of our own sovereignty to a prosthetics state, which has the right to rule the fear and by fear<sup>285</sup>. A beast that can only exist beyond our imagination. We follow it, and we reproduce love and fear through the Leviathan.

Bearing on the Leviathan, Derrida keens on the asymmetry between God's work and human's work. In Hobbesian's tradition, only God is able to draw a perfect art to mastery his world. And he created the men to follow his desires and wills to kingship the world. Only people could organize the world in the way of God's will. Men are the example of God's completeness<sup>286</sup>.

Linking the matter of sovereign with a project that lies on the ground of a divine state. It is not by accident that we can interpret many of the bible's parts as a trial of God through fear. The Leviathan that Hobbes mentions was cited in the Book of Job 3:8, "Let them curse it that curse the day, who are ready to raise up their mourning"<sup>287</sup>. The religion

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<sup>283</sup> Maurice Blanchot, *The Infinite Conversation* (Minneapolis: Minnesota University Press, 1993), p.314-7.

<sup>284</sup> Jacques Derrida, *Of Grammatology* (Baltimore: John Hopkins University Press, 1998c), p. 141-55.

<sup>285</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009) p.39-40.

<sup>286</sup> Thomas Hobbes, *The Leviathan* (New York/London: Penguin Classics, 1982), p. 223-302. See Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p.47.

<sup>287</sup> Book of Job 3:8 (King James Version). See also Book of Job 41:1, "Canst thou draw out leviathan with a hook? Or his tongue with a cord which thou lettest down?"; Amos 9:3, "And though they hide themselves in the top of Carmel, I will search and take them out thence; and though they hide from my sight at the bottom of the sea, thence will I command the serpent, and he shall bite them..."; Isaiah 27:1, "In that day the Lord with his sore and great strong sword shall punish leviathan the piercing serpent, even leviathan that crooked serpent; and he shall slay the dragon that is in the sea"; Psalm 74:14, "Thou brakest the heads of leviathan in pieces, and gavest him to be meat to the people inhabiting the wilderness"; Psalm 104:26, "There go the ships: there is that leviathan, whom thou hast made to play therein".

grounds the beast that must bring fear and organize the society. Citizens are compelling to give over part of their own sovereignty to whom that shall protect them from themselves and from external perils.

The Leviathan, the mechanical beast, masters through fear and terror. The man loves the law that he fears. The law protects him against threats and against himself. Law is beloved due to its property to cause awe even before its violation. Fear and love for the law cannot be something represented in a concrete way. To be more effective (*Wirksamkeit*), it would be better to take the form of a metaphor (remember that a metaphor suspends any possible signification); "what causes fear is never fully present nor fully corporeal, in the sense that the purely corporeal is supposed to be saturated with presence"<sup>288</sup>.

#### **IV.3.1.1 - The Artificial Soul**

Roughly speaking, according to Hobbes, fear is the artificial soul of the state. It is artificial because it only lasts while the law exists. Hobbes mentions the word protection. Since the men must be protected, the state needs a law. There is no law without fear, and there is no law that does not correspond to protection.

The last paragraph can be associated with the far-famed fragment from Pascal:

Justice, Might.—It is right that what is just should be obeyed; it is necessary that what is strongest should be obeyed. Justice without might is helpless; might without justice is tyrannical. Justice without might is gainsaid because there are always offenders; might without justice is condemned. We must then combine justice and might, and for this end make what is just strong, or what is strong just. Justice is subject to dispute; might is easily recognized and is not disputed. So we cannot give might to justice, because might has gainsaid justice, and has declared that it is she who is just. And thus being unable to make what is just strong, we have made what is strong just<sup>289</sup>.

Although the multiplicity of interpretation that quotes aloft is able to offer, my intention is to follow Derrida's<sup>290</sup> insight and ties it in with the fear and love that the Leviathan brings to the scenario. It is not a waste of time to state that the Leviathan is a representation of God's unmeasurable strength, and its mechanical body and soul seeks the suspension of the war, so to speak, a new winner which could jeopardize God's will. The fable's dimension from the Leviathan seeks to protect the citizens against any other

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<sup>288</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p.41. "Fear always exceeds corporeal presence, and this is why it also the passion correlative to the law; fear is thus both the origin of the law and of the transgression of the law, the origin of both law and crime." See Thomas Hobbes, *The Leviathan* (New York/London: Penguin Classics, 1982), p. 223-302.

<sup>289</sup> Blaise Pascal, "Justice Force"; available <http://www.penseesdepascal.fr/Raisons/Raisons20-moderne.php>. Accessed 07.08.2016.

<sup>290</sup> Jacques Derrida, "Force of Law - The "Mystical Foundation of Authority."" In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 228-98.

legitimation, not only from pagans but from the animality carried by every single man, that is also opposite to God's will.

Sovereignty without authority is useless. I shall employ the reasoning that links justice and force in Pascal's thoughts<sup>291</sup>. There are many resemblances between both agreements. Lack of representation, absence, disconnection and discontinuity between what it should symbolize and the anxiety that it provokes when it is there, and it is not there. For sure, Derrida also would add on the zoological and "theo-anthropo-zoological" aspect that are present in text on those matters, or even, perhaps, the sexual aspects that a pact bears.

Would it be possible to have a community without sovereignty and authority or law without force? Would be possible to imagine a community with a law that does not hold a force? If it gives a step further on those inquiries, is there a man without sovereignty? Would exist a person that would give up the authority, unmaking the master-slavery relationship, not a historical class situation, but the master-slavery condition inherent to our conscious, almost a condition of our existence?

The law of a community or the law for the community, and all techniques and methodologies that are inherent with a law to assure, chiefly (uberhaupt), freedom and equality, needs to use or been enforced by violence (Gewalt)<sup>292</sup>. Moreover, law and community have a fuzzy relation. Hobbes resembles the community of men as a community of beasts, and due to it a desideratum to recreate an artificial animal, a prosthetic master<sup>293</sup> to bring fear and frame the carnivorous and voracity temptations of the wolf-man.

The turnover on the community and its law, especially regarding its inception and the need for an abstract lever to regulate behaviors and reduce the possibility of frustration is still a sphinx-like undergoing to a vex that does not bring any summing-up. Even the

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<sup>291</sup> Blaise Pascal, "Justice Force"; available <http://www.penseesdepascal.fr/Raisons/Raisons20-moderne.php>. Accessed 07.08.2016. "Justice, force". It is just that what is just be followed; it is necessary that what is strongest be followed. Justice without force is impotent; force without justice is tyrannical. Justice without force is contradicted because there are always bad people; force without justice stands accused. So justice and force must be put together; and to do so make what is just, strong and what is strong, just. (...) Justice is subject to dispute; force is easy to recognize and indisputable. And so one could no give force to justice, because force contradicted justice and said that it was unjust, and assumed that it was a force that was just. And thus not being able to make is just, strong; one made what is strong, just.

<sup>292</sup> Jacques Derrida, "Force of Law - The "Mystical Foundation of Authority." In Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 228-98. Walter Benjamin, "Critique of Violence," in Walter Benjamin, *Selected Writings Vol. 1, 1913-1926* (Cambridge/London: Belknap Press, 1996a), p.251-2. See also, Christoph Menke, *Kritik der Rechte* (Berlin: Suhrkamp, 2015), p. 106-41.

<sup>293</sup> Thomas Hobbes, *The Leviathan* (New York/London: Penguin Classics, 1982), p. 223-302. See also Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p.41. Carl Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes: Sinn und Fehlschlag eines politischen Symbols* (Berlin: Klett-Cotta, 2015c), p.1-34.

accounts on Leviathan and Social Contract comes with a smooth and weak convincing to readers.

There is no sovereign without authority; there is no law without authority. In a ground-breaking book, Jacques Derrida claims that the sovereign takes the form of a beast, or better, the sovereign is the beast and the beast is the sovereign. A sexual difference, regarding the translation from French, *La bete et le souverain*, which will be a couple, a copula, to mastery and to rule, law and rights, politics and patriarchal relation, to rule whatever comes to draw a difference between human and animals.

#### **IV.3.2. - The Fabular Dimension and the Sovereignty**

This Ph.D. is trying to work its hypothesis based on a fable. Could I find out a convention about it? Is there a convention about what a hypothesis is? During his last seminar, Derrida works with fables. He was Jacques Derrida. He had the permission (*erlaubnis*) to do it. He also brought the question of the fable over and over during his oeuvre. For what reason? Would it be only to rip into scientific conventions or protocols of knowledge? Once again (*noch einmal*), 'The Beast & the Sovereign' is full of examples of fables. Not only the ones straight declared on being written as a fable, as La Fontaine or von Kleist, but also those philosophical-political thinkers, like Machiavelli, or even Hobbes and Rousseau. Could we not take their lessons so seriously because of the fable dimension clearly present in their writings?

The aim of a fable is ordinarily to drive a short text towards a moral conclusion, and as a rule is addressed to children. Furthermore, genres were not created to be mixed<sup>294</sup>. Which genres? Female and male (feminine and masculine)? Fables and novels? Fable and Political? Genres have created their own law, and it has to be obeyed. You are going to be disapproved if you refuse to follow the law of genres. It haunts the narrator, the writer. It could get the wind-up and makes the text meaningless to the audience or to the reader, whatsoever.

Yet, how could we deal with the Leviathan, with wolves, with doves, with foxes, and with the entire "zoo-political" examples which insist to appear on traditional political works. It is relevant to highlight that those works were also related to law. How could we

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<sup>294</sup> Jacques Derrida, "Law of Genre" (Summer 1980b), *Critical Inquiry* Vol 7. n.1, *On Narrative*, p.55-81.

systematically and in detail analyze those quite remarkable texts only by our methods? Undeniably these texts have been performing a germane position on the present political-legal thought. It is a sheer non-achievement discredit to the essential lessons on the fable dimension. It is a challenge to quote the Leviathan as a scientific argument and to claim that the genres were not mixed.

#### **IV.3.2.1 The Reason of the Strongest**

"The reason of the strongest is always the best; As we shall shortly show"<sup>295</sup>. The structure of a fable is beforehand a confrontation to logic. The conclusion, the summary is given in the first lines and seeks a moral performed by animals that act like humans. Animals that can speak like humans. Animals and humans have the same skills of speaking in the fable's genre. Would it be more attractive, perhaps?

The fabular dimension would also, beyond the sayings, writings, and images, determine the political actions, military operations, the sound of arms, the din of explosions and killings, puttings-to-death of military and civilians, so-called acts of war or of terrorism, or civil or international war, the war partisans, etc., with or without condemnations to death according to law (...) What is fabulous in the fable does not only depends on its linguistic nature on the fact that the fable is made up of words. The fabulous also engaged act, gesture, action, if only the operation that consists in producing a narrative, in organizing, disposing of discourse in such way as to recount, to put living beings on stage, to accredit interpretation of a narrative...<sup>296</sup>

After this pedagogical explanation from Derrida, let me return to La Fontaine. "The Wolf and the Lamb," a fable which Derrida keeps himself during his seminar, concentrated on the very first sentence which I must write again: "The reason of the strongest is always the best; As we shall shortly show." The reason of the strongest, his arguments, his ideas, his rules, will beat any other reason. Reason would be vertical, it's vertical. The reason among equals is no reason, or it is irrelevant.

There are countless slopes that we can appraise. A reason which comes from a state or judgment deriving from an ordinary man. It could also mull over the reasoning which arrives from a decision-making process. There are many reasons in our society. Each of them can be filled with a different meaning or significance. Metaphysically, we could ask ourselves: what is a reason? But, we would not be able to go further.

Lacan claims that animals have no reason. They act as a trivial machine. Although reason is responsible for giving humanity the prerogative of acting in a cruel way, and to

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<sup>295</sup> Jean de La Fontaine, "The Wolf and the Lamb"...See Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p. 68-103.

<sup>296</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009) p.35-6.

finding an objective reason to justify cruelty. We could set as an example how the USA has been keeping Guantanamo, or all the arrangements and violations it did to kill Osama bin Laden. The latter case was celebrated by most countries, cultures, and people. It was a clear case in which the reason of the strongest was the best, no matter what it had to be done, even to set international conventions and sovereignty of Pakistan suspended for a while to fulfill the American assignment.

Calling the USA as an example is always easy to organize an argument and to reach a consistent conclusion. I will always have the reason when I mention the USA. Being for it or being against it. The Nazi regime is also another easy example. "The Wolf and Lamb" offers this characteristic, the strongest will always have the reason, even if I say that the other is right. He has the prerogative to say who is right. He can give up of his rightness because in his reason, his own reason, in his judgment, the other is right. The strongest cannot be convinced. They calculate and invite their own reason to point out who has the right to be right.

The representation of the wolf in La Fontaine's cannot be understood only by its physical aspect. The strongest are the ones who do not need to justify or apologize for their acts. Have you every read a Court declaring that its reason was wrong and ask for an apology? So to speak, what is a good judgment?

However, my intentions are to be concerned in the relation between the being, the other, and the law (Law). And the reason of the strongest is part of this association. In which way the understanding of the most powerful overwhelms any other right, suspends the law, ignores the other? Besides from the far context described by Schmitt, as the situation of war or civil war, it is in ordinary circumstances and daily life routines that we should strengthen our efforts to find out how authority is so present in our language, stiffness, and perspectives.

In my humble understanding, logic and legal science are not able to give a consistent answer. Any conclusion seeking to express itself through a statement, it may bring only a critic towards himself and any contribution to grasp this mysterious phenomenon of authority. So to speak, Derrida fleshes out his investigation by attaining himself to this particular aspect of the political, which was set aside in modernity. I am referring to the role of the animals or zoo-politics and the genres. For Derrida, to a canvas, the condition of sovereignty and authority is a daunting task that needs to give a step further of some

conventions and protocols. Being under the conformity of the rules elaborated under the practices of Academia does not bring us anything else than common sense.

The question of animals and its metaphorical and associative meaning brings to our imaginary this word, which has no representation, the uncanny (*Unheimlich*). Freud associated the term with the neighbor (*Nebensmensch*). The neighbor (I'd rather call the outsider) is someone, who may trigger our disillusion, and by consequence may suffer the utterance from it. The neighbor is the object which symbolizes the absence between the imaginary and the symbolic. Kenneth Reinhard describes those standards with accuracy:

It is as if Freud's allusion to the commandment to love the neighbor instantiates the proper symbolic relationship to the other, as a talisman against the appearance of the neighbor in the real: be sure to love your neighbor as yourself, because if you don't, you risk the rise of the 'delusion' of the neighbor in its place, as a horrific holophrasis of the failed social that will the place of yourself<sup>297</sup>.

How could the fable and the neighbor theater be associated with the issue of sovereignty? We could follow Hegel and his ground-breaking theory on master/slavery relationship that bounds our identity and kinship with the world and others being<sup>298</sup>. We could also go deeper in the Lacan/Freud investigations on the matter of the neighbor. But I wish to perform a test, inserting Freud's assumption as a detour to establish a link with Derrida's insights.

### **IV.3.3 - Animals, Beasties, and Humans**

I could spring this topic as humans, animals, and beasties, whatsoever. I must, I ought to put down to a little leap which I am going to make to organize (?) my cogitations. Derrida's epical seminar *The Beast & the Sovereign* has a rather eloquent session in comparing to the other. In my humble understanding, it is a session that summarizes Derrida's worrisome on the relation among those figures and with the world. The ninth

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<sup>297</sup>Richard Kenneth, "Toward a Political Theology of the Neighbor", in. Slavoj Žižek; Eric Santner; Richard Kenneth, *The Neighbor: Three Inquiries in Political Theology*, Chicago/London: Chicago University Press, 2005), p.29. See p. 31, "According to Freud, cognition emerges literally 'vis-à-vis' the *Nebensmensch*: some strange 'Zug' (feature or trait, but equally line or stroke) in the neighbor's face both initiates and limits the comparison of its attributes with traces of earlier memories through the linked process Freud distinguishes as 'judging' and 'remembering'. According to Freud, judgment is the act of 'dissection' which cuts away unfamiliar, hence uncategorizable, components of the *Nebensmensch* from familiar ones, establishing a correlation between *Nebensmensch* and the subject's first ambivalent experience of an object. Memory, on the other hand, shifts and collates the attributes which have emerged from judgment and, by comparing them with mnemonic traces of the subject's experience of his or her body, introduces the second similarity, now between the *Nebensmensch* and the subject. See also Thomas Vesting, "Nachbarschaft. Grundrechte und Grundrechtstheorie ind Kultur der Netzwerke", in. Thomas Vesting, Stefan Koriath, Ino Augsburg (org.), *Grundrechte als Phänomene Kollektiver Ordnung* (Tübingen: Mohr Siebeck, 2014), p. 57-86.

<sup>298</sup>Alexandre Kojève, *The Notion of Authority (A brief Representation)*, (London: Verso, 2014), p.16-28.

session realized on February 27th of 2002, Derrida gave over the whole session to a poem from D.H. Lawrence, "Snakes"<sup>299</sup>.

Without any question, such animal recalls the holy text and provokes a profound and irrational fear for plenty of humans, and at the same time, a sneaking admiration in so many others. I have a deliberate intention to include in this passage, fully believing that the reader is going to think back on this topic. It stands to ground that the forthcoming chapter converses closely with Levinas sophisticated comprehension of the *autrui*<sup>300</sup>. All the same, this session involves a coherent strategy at this moment due to the particular experience or naked truth that it links a fable-poetry, picturing what Derrida bears on his writings on the ethic of animality or zoo-political.

Levinas' elemental inquiries are to reformulate the overall concepts of neutrality and being by intending to implement the notion of the "other" (*autrui*). The other is the face that any other face should share an ethical responsibility<sup>301</sup>. Whatsoever, strictly speaking on zoo-political, what should we regard as a face?

All the symbolic representations produced in the political scenario, for instance, wolfs, lambs, foxes, lions, doves, and even dolphins, each of those animals have a different kind of face and represents a semantic of how zoo-political animals operate. I must emphasize this particular point due to the symbolic meaning that the figures of the animals have added up to engineer our political character. Moreover, it triggers the following challenging question concerning what is proper to a man (regarding the differences between genders) and what is conventional to an animal (and each animal a correct characteristic)?

A snake, a snake's face, is an extension of its body, with a slight difference from its tail. Hence, how should we act before a Thing whose face is hard to be recognized, and at the same time, we know it brings us a potential hazardous. Lets keep going with the poem, on which D.H. Lawrence call the snake by "he," and not by "it."

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<sup>299</sup> D.H. Lawrence, *Birds, Beasts and Flowers! Poems*, (London: Martin Secker, 1923), p.113-16.

<sup>300</sup> Emmanuel Levinas, *Totality and Infinity - An Essay on Exteriority* (Pittsburg: Duquesne, 1991), p. 33-52.

<sup>301</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009) p. 237. "and you that for Lévinas, the other, in its ethical dimension, is what he calls a face, a 'face', the face being not only what is seen or what sees, but also what speaks, what has speech, and therefore it's to a face that our ethical responsibility is addressed, it's from a face that it receives from the other, and therefore it's to a face that our ethical responsibility is addressed, from a face that it receive something from the other, that I receive the imperative: 'Thou shalt not kill', which, for Lévinas is the first command". See also Emmanuel Levinas, *Totality and Infinity - An Essay on Exteriority* (Pittsburg: Duquesne, 1991), p. 33-52.

A poetry of a man, a landlord, that on a hot sunny day, during the first hours after his awaking, comes across with a snake drinking water on his "water-through" ("A snake came to my water-through"). As follows, the man had to wait for this uninvited guest to quench his thirst. And "he" drank the water from this private property taking his time, or as the following idiom, "at a snail's pace." The guest (or the outsider) was not carrying about the presence of the landlord<sup>302</sup>. Upon those circumstances, an imperative overwhelms my personality, "I shall wait," because someone is there heretofore.

Unexacting, the snake, raises "his" head, "as cattle do,"<sup>303</sup>. His conduct compared with a "cattle." A cattle are claimed by Derrida as being "a set of the beast" despite being also a community of animals of the same species, tragically fated to be served to human consumption<sup>304</sup>. The step further was wordless and still staring at the landlord. Then, he repeated the gentle act of drinking water.

This passage from the poem is utter relevant: "The voice of my education said to me/ He must be killed,/ For in Sicily"<sup>305</sup>. The landlord mentions Sicily due to black snakes have no trace of poison there, while the gold snakes are "venomous." So to speak, he looks on common sense, turning it into his personal truth and an underlying motive to eliminate his guest. Evidently, it is a matter of hospitality<sup>306</sup>. A command which is set, establish before me, and without my agreement, without a pure consensus. We have accepted those imperatives, and now our *superego* is driven by it. Consequently, I must live totally overwhelmed by an imposed responsibility<sup>307</sup>.

The other, this neighbor, who I have not encouraged to come inside my home, my land, my country, and now he or she is in front of me dictating my old habits, turning my head in a tangled mess, pushing me to interrogate myself under a corollary of imperatives, which I have no hint about where those commands come from, whether I must patiently remain soundless, struggling to control all the anxiety that the presence of an outsider raises,

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<sup>302</sup> Ibidem, p.239. "The other is there before me, and I receive the order from the other who precedes me. That is the situation when faced with the other, and he not only goes ahead of me, must go ahead of me, but is there before me". In the poem "Snake", p. 113"Someone was before me at my water-through./ And I, like a second comer, waiting."

<sup>303</sup> D.H. Lawrence, "Snake," p. 113, in. D.H. Lawrence, "*Birds, Beasts and Flowers! Poems*," (London: Martin Secker, 1923), p.113-16.

<sup>304</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009) p.239.

<sup>305</sup> D.H. Lawrence, "Snake," p. 113, in. D.H. Lawrence, "*Birds, Beasts and Flowers! Poems*," (London: Martin Secker, 1923), p.113-16.

<sup>306</sup> Jacques Derrida, *Of Hospitality. Anne Dufourmantelle Invites Jacques Derrida to Respond*, (Stanford: Stanford University Press, 2000), p. 15-32.

<sup>307</sup> Jacques Derrida, *The Gift of Death and Literature in Secret* (Chicago/London: University of Chicago Press, 2007b), p.3-36.

or should I wound my guest in order to relieve the symptoms of my unknown paranoia, however, showing to my visitor my sovereignty<sup>308</sup>.

To better structure the poem with Derrida's individual insight, the narrator comes out with the following strenuously assertion: "And voices in me said," indicates a plurality of voices inside his head<sup>309</sup>. Prompting Maurice Blanchot for his biblical fashion, you speak, or you kill<sup>310</sup>, regarding the inception of the action of putting words out, it still the Western's event of a potential community. My overwhelming desire to speak with my neighbor<sup>311</sup>.

In the Western, basically, we have for leading sources to seize the condition of being a neighbor, a "Nebensmensch," holy texts, literature, psychoanalyzes and philosophy. As a result, we are undergoing a profoundly modeled by the knowledge which comes from those sources. Evidently, as a performative source, struggling to grasp our world and to firmly convince or add up a so heterogeneous group of people, dealing with all sorts of contingency, scanning the surface of our identity, we could, at least, have it ourselves as a temptation of exploring the world<sup>312</sup>, without being aware that good and evil surrounds us and are also within us.

All of sudden, the snake, in a slow motion, turns its head and begin to withdraw into a "horrid black hole"<sup>313</sup>. The narrator is captured by a feeling of horror, leading him to grasp a "clumsy log" and angrily throw it against the snake. After being clear he had hit his guest, "And immediately I regretted it."<sup>314</sup>. The voices, the various commands inside his head, "you shall not kill your neighbor," and "you shall kill your neighbor," make grow the heartfelt feelings about guilt.

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<sup>308</sup> Eric Santer, "Miracles Happen: Benjamin, Rosenzweig, Freud, and the Matter of Neighbor". In. Kenneth Reinhard; Eric Santner; Slavoj Zizek, *The Neighbor - Three Inquiries in Political Theology* (Chicago/London: Chicago University Press, 2005), p. 70-110 See also Thomas Vesting, "Nachbarschaft. Grundrechte und Grundrechtstheorie ind Kultur der Netzwerke", in. Thomas Vesting, Stefan Koriath, Ino Augsburg (org.), *Grundrechte als Phänomene Kollektiver Ordnung* (Tübingen: Mohr Siebeck, 2014), p. 57-86.

<sup>309</sup> D.H. Lawrence, "Snake", p. 114. in. D.H. Lawrence, *Birds, Beasts and Flowers! Poems*, (London: Martin Secker, 1923), p.113-16. Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009) p. 240.

<sup>310</sup> Maurice Blanchot, *Infinite Conversations* (Minneapolis: Minnesota University Press, 1993), p. 3-10.

<sup>311</sup> D.H. Lawrence, Snakes, p. 114, in. D.H. Lawrence, *Birds, Beasts and Flowers! Poems*, (London: Martin Secker, 1923), p.113-16."How glad I was he had come like a guest in quiet, to drink at my water-through/ And depart peacefully, pacified, and thankless,/ Into the burning bowels of this earth?! Was it cowardice, that I dared not kill him?! Was it perversity, that I longed to talk to him?". Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009) p. 241.

<sup>312</sup> Emmanuel Levinas, "The Temptation of temptation," in. Nine Talmudic Reading. Levinas, Emmanuel (Bloomington: Indiana University Press, 1994), p.37.

<sup>313</sup> D.H. Lawrence, "Snake," p. 115, in. D.H. Lawrence, *Birds, Beasts and Flowers! Poems*, (London: Martin Secker, 1923), p.113-16.

<sup>314</sup> Ibidem.

The snake has gone, perhaps, forever. The guiltiness of death turns the snake into a sovereign. "And I wished he would come back, my snake"<sup>315</sup>. The using of a possessive verb is proper to declare the beast as a sovereign, "my king," "my president," "your majesty," and so forth. Concomitantly, the snake, virtually, takes possession of a territory. There are countless examples, of an outsider after being dead becomes a sovereign, like Christ, the Jewish people killed during the Holocaust, afterward, dictates and haunts Western society.

The command, the imperative, "you shall not kill," is addressed to whom or to what? For Derrida, the exceptional poem is apparently portraying an ordinary context of hospitality. Rather, it demonstrates with a significant accuracy the point at issues which ethical imperatives were originally conceived. To be more specific and following Derrida's insight over the poem, an ethical imperative was already set up before the coming of the outsider, before his presence. Further, as a set of rules, "strange loops" or tangled hierarchies<sup>316</sup> always are going to be possible. Only the infinite can be filled and can predict anything.

Furthermore, and that is the issue related to Derrida's inquiries, by giving up my sovereignty, which automatically leads to make the other to become, to be metamorphosed into my sovereign, I am coming after any ethical statement? By not killing or wounding my neighbor, do I have to be submitted to his sovereignty<sup>317</sup>? The violence of the outset must lie as a blurred memory, eventually, uttered as a fable or a myth.

Still, the moral law can offer forgiveness. But, and the legal law? The law made by institutions to avoid civil war, therefore to keep the state in peace; or to give a contract a ruling status. Could legal law offer an exception to whom violates it? Should legal be adamant? Such outside and puzzle question is in practice already answered, by tribunals which sometimes offer up benefits. An exception coming from legal law is proper positive law. As a matter of fact, bringing an exception to our topic is to evoke the name of Schmitt, and his theological conception of law and political (which we are going to come across very soon). But, before I detail political theology, it is relevant to link law's authority with the matter of the neighbor. Let's not forget how the European Court of Human Rights distinctly

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<sup>315</sup> Ibidem.

<sup>316</sup> Douglas Hofstadter, *Gödel, Escher and Bach: an Eternal Golden Braid. A metaphorical fugue on minds and machines in the spirit of Lewis Carrol* (New York: Basic Books, 1999), p

<sup>317</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009) p.244-5. "Of course, as ethics as such, the formalization of ethics clearly appears after the fact, i.e. after the transgression of ethics, after the murder, after he tries to kill the snake, the question is that of knowing if the origin of the moral law is linked or not to a murder or to remorse".

treated two issues concerning the religious dispute. For Italy, the law offered an expiation, a pardon, for hanging crosses all over classrooms<sup>318</sup>. On the other hand, a school teacher, who had converted herself to Islamism, was forbidden to wear a veil while she was teaching her pupils<sup>319</sup>.

The poem settles with the narrator claiming for the returning of the snake that "seemed to me again like a king"<sup>320</sup>. The snake, as the biblical scene, went to exile and shall return as a king. In the words of Derrida: "because he is in exile, he's a king not exercising power, a king without power, a king dethroned in some sense - and the scene of exile, unmistakably, is consonant with the exhibition of hospitality ( they go together, exile and hospitality, those asking for hospitality are exiled)"<sup>321</sup>. The consequence of such situation is to provoke the feeling of being always a stranger (l'estrangé)<sup>322</sup>, to be unfamiliar with everything and everyone, to raise the feelings of *unheimlich*<sup>323</sup>.

The fundamental allegorical character of law, which delivery is not assented to calculate emotions and he or she is not educated to examine his fellow. The legal law is produced to treat everyone with the same standard; however, it is allowed to make exceptions. To whom law can provide exceptions? Such puzzled question must be slowly answered. First of all, I am going to introduce the very puzzle of sovereignty according to Derrida's lessons that I am particularly engaged with. We need to grasp the reason Derrida gives so much attention to sovereignty and zoo-political-anthropology to seize the causes of an impossible community intermediated by law. Later on, we shall analyze and understand how modern law reproduces the flaws from the West, impairing a possible community. On the forthcoming topics, I am going to expose one the two most quoted political philosophers from the West, inspired on Derrida's fashion.

#### **IV.3.4. - The Prince has learned to be a Beast**

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<sup>318</sup> Case of...

<sup>319</sup> Case of....

<sup>320</sup> D.H. Lawrence, "Snakes", p. 116, in. D.H. Lawrence, "*Birds, Beasts and Flowers! Poems*," (London: Martin Secker, 1923), p.113-16.

<sup>321</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009) p.246.

<sup>322</sup> Albert Camus, *The Outsider* (New York/ London: Penguin Classic, 2013), p. 1-60. See Maurice Blanchot, *The Infinite Conversation* (Minneapolis: Minnesota University Press, 1993), p.171-93.

<sup>323</sup> Ibidem. Eric Santer, "Miracles Happen: Benjamin, Rosenzweig, Freud, and the Matter of Neighbor". In. Kenneth Reinhard; Eric Santner; Slavoj Zizek, *The Neighbor - Three Inquiries in Political Theology* (Chicago/London: Chicago University Press, 2005), 100-12 Sigmund Freud, *Civilization and its Discontents* (London/New York: Penguin Classics, 2002), p. Franks Kafka, *Amerika - The Man Who Disappear* (London/New York, Penguin Classics, 2007), p. 1-100.

The juxtaposition of the two genres (remind that genres were not made to be mixed up) is responsible for creating this odd creature, a beast that can mastery a state, a society, the world. But, in my impression, Derrida also has the ambition to describe something bigger. The juxtaposition of genres, of speeches, can be brilliant or can generate aberrations<sup>324</sup>. Acts of speeches, language, writing, the production of a text are in part, not a subjective standard as we usually have thought about it. We developed language in the same way we did settled cities, or we created weapons or instruments to be used in our everyday life. The consequences of those acquiring can be responsible for making us being distant from animals. On the other hand, techniques to use, to manipulate or to seize instruments may be also (sic) oriented to cruelty. Lacan claims that "This very cruelty implies humanity. It is directed at a fellow even in a being of another species"<sup>325</sup>.

Machiavelli has made an excellent teaching of the fable at the time he has written *The Prince*<sup>326</sup>. He was able to seize traces between fables and political actions and to address it to Lorenzo di Medici. Derrida highlights the Chapter 18 *How to Princes Should Honour their Word*. In this particular chapter, Machiavelli postulates that the Prince must be cunning to reach his goals and how to make an appropriate use of his words to be seen as an honest man.

In this extraordinary lesson of how to do politics, one of Machiavelli's insights has called singular attention from Derrida, "You must understand, therefore, that are two ways of fighting: by law or by force. The first way is natural to men, and second to beasts"<sup>327</sup>. It would be of extreme importance the way the prince manages to make the proper use of them. The prince to be well-heeled must be able to do both, man and beast, but cunning to not show that he is acting like a man or a beast. To come through it, Machiavelli emphasizes that the prince must learn and understand how to act like a lion and a fox. But before Machiavelli stresses this sharp point he mentions this curious figure from mythology, the centaur. He only does not make mention of the centaur, but he brings up the name of one of them: Chiron, who taught Achilles, the son of King Peleus in the art of war and other abilities. For Machiavelli, it would be a matter of resemblance.

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<sup>324</sup> Paul de Man, *Allegories of Reading: Figural Language in Rousseau, Nietzsche, Rilke and Proust* (New Haven: Yale University Press, 1982), p. 3-24.

<sup>325</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p. 97-135.

<sup>326</sup> Nicola Machiavelli, *The Prince* (London/New York: Penguin Classics, 2011), Chapter XVIII. See also Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p. 97-135.

<sup>327</sup> Ibidem.

Derrida reminds us that the centaurs, besides being half echinus and half man, they are endowed with tremendous strength and savagery, but they are also very skilled with musical instruments and know medicine. So to speak, the centaurs know how to use both, law and force. They are this representation of a beast, that can kill with brutality and no mercy, but also they can play a harp, which demands delicateness. Let's not forget that centaurs can also heal, because they are accurate in medical skills.

Further, we could understand Derrida analyses with being a lion and being a fox, and by consequence as being a man that cannot demonstrate the traces of being a beast or an animal. The mention and association with the lion seem to be obvious, regarding the voracity and its properties. To act like a fox is to be cunning as one. Cunning means the ability to be wiliness, trickery, and prettily appealing. Notwithstanding, the lion can intimate the wolves. Machiavelli links the figure of the wolves to enemies.

However, Machiavelli states that lions have to frighten off the wolves and not eliminate them. "Therefore one must be a fox to recognize traps, and a lion to frighten off wolves"<sup>328</sup>. The enemies must be kept alive. Why? This quite puzzling statement could be read in the way that Carl Schmitt thinks on the concept of political. So to speak, without an enemy, without the eminency of war, a possible conflict, the political would not exist, and without the political, the State and the Leviathan would be meaningless. In the worst of the situations that the State could face, a civil war could come up in this scenario of no enemies. Schmitt does not spare criticism against the humanization of the law and society. To Schmitt, eliminating the enemy through the humanization would be a terrible mistake, because the enemy would be still there, preparing to assault.

The prince must also be cunning as a fox due to many traps that his opponents can set up. In the very beginning of the book, *The Beast & the Sovereign*, Derrida bestows us with many idiomatic expressions from French which involves the figure of the wolf. One is "When you speak of the wolf, you see its tail"<sup>329</sup>, which means that someone can suddenly show up at the right moment when we are talking about this person. Or the expression *à pas de loup*, suggesting that the wolf moves silently and imperceptibly. Derrida explains that "Which is to say that where things are looming 'à pas de loup,' the wolf is not there yet, no real wolf, no so-called natural wolf, no literal wolf. There is no wolf yet when things are

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<sup>328</sup> Ibidem.

<sup>329</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009) p.5

looming 'à pas de loup.' There is only word, a spoken word, a fable..."<sup>330</sup>. Thus, as the fox, the prince must be cunning to perceive that the wolf may be close or someone that acts like a wolf is preparing a trap. Moreover, the fox is not faithful, while the only is not sharp enough and performs only by his instinct.

The prince, the man, must go after this association between the lion and the fox. To be a man and not only a lion-fox or a beast, but the prince must also (*sollen*) be able to use the "force of law"<sup>331</sup>. Machiavelli suggests in the beginning of the XVIII Chapter the prince should know how to use the force when the law cannot be effective anymore. However, the true skill of a fox is to use the law with force, but without physical force, but in its performing way, manipulative. "The fox is the animal that knows how to lie"<sup>332</sup>, Derrida points out. By lying, the prince pretends to sweep under the rug that he is this metamorphose, that he can be forsworn and to pull strings<sup>333</sup>.

I would like to employ Derrida's insight to connect it with the size of the other or the *Nebensmensch* (neighbor) and to add it to the statements from Carl Schmitt about the Concept of Political. I lay claim that the tangle of this brainstorm would clear up some significant issues of the West Society.

#### **IV.3.5. The Beast and the Sovereign among the Neighbor - Who is the Friend?; Who is the Enemy?**

When Schmitt asserts the depoliticization would bring the enemy, the wolf to the State or to the neighborhood he did not just quarrel with a possible changing of values (*Wert*) and costumes (*Sitten*), but also he was eating on with the end of the sovereignty in his dwell. By analyzing Machiavelli quoting on centaurs, Derrida brings up a fable of the son Athamas, the son Aeolus, who was driven insane by the god due to his intention to murder some of his children. Wandering around during his trial, he came across the city of the

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<sup>330</sup> Ibidem, p.5.

<sup>331</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 285-6.

<sup>332</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p.90.

<sup>333</sup> Ibidem, p.91. "This ability to pretend, this power of simulacrum, is what the prince must acquire in order to take on the qualities of both fox and lion. The metamorphosis itself is a piece of human cunning, ruse of the fox-man that must pretend not be a ruse. That is the essence of lie, fable, or simulacrum, namely to present itself as truth or veracity, to swear that one is faithful, which will always be the condition of infidelity. The prince must be a fox not only in order to be cunning like the fox, (sic) but in order to pretend to be what he is not and not be what he is. Thus to pretend not to be a fox, when in truth he is a fox. It is the condition that he be a fox or that he become a fox or like a fox that the prince will be to be both man and beast, lion and fox".

wolves. Without offering him, in a formal way, hospitality, he joined the wolves while they were eating the carcass of a lamb. Athamas became wolver than the wolfs. Due to the act of hospitality, the wolves lost their sovereignty by letting Athamas sit at the table. Consequently, according to the narrative, the social bond was dissolved. In the brilliant interpretation of Derrida, "As though hospitality led to the end of the social bond for the hospitable city, which, by giving up on itself, as it were, by dissolving itself, abdicates into the hands of the guest who becomes sovereign. This is also the move from beast to what is proper to man"<sup>334</sup>.

Following Schmitt's assumptions and bringing it to present days, where human rights, humanitarian law and action, and human dignity are playing a significant role not only inside courts and tribunals but also in everyday language. At this formal and singular narrative, which concerns to law, the act of according to a primacy of rights that were elaborated to serve the dignity of the human, would place the political, in Schmittian terms, in a hazard. Linking up the hospitality and a "politic of friendship," it would prevent us to recognize the enemy in the other or in our neighbor.

Roughly speaking, a cosmopolitan society would be possible only theoretically or in utterance. Notwithstanding, the emblematic burdens from Schmitt if taken on account his writings, for instance, *Politische Theologie*<sup>335</sup>, the sovereign and his faculty on deciding in the exception (in the case of War, for example) would be deduced from God's sovereignty or be analogous to it<sup>336</sup>. Kenneth Reinhard is eloquent to describe Schmitt's pleading:

Schmitt claims that the essential logic of the political lies in the opposition between the categories of 'friend' and 'enemy,' an antithesis not of pathos but of 'ethos.' The polis requires the ever-present 'real possibility' of war for the concepts friends and enemy to retain their validity, and the exceptional decision to go to war constitutes the purest manifestation of the political as such.<sup>337</sup>

Stressing this hypothesis, the sovereign could also suspend the law or act that declares someone an enemy. The sovereign would have performed without demonstrating his real intentions. However, even if we interpret this assumption, it would be not possible to

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<sup>334</sup> Ibidem, p.86-7.

<sup>335</sup> Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von Souveränität* (Berlin: Duncker & Humblot, 2015a), p. 1-20

<sup>336</sup> Richard Kenneth, "Toward a Political Theology of the Neighbor", in. Slavoj Zizek; Eric Santner; Richard Kenneth, *The Neighbor. Three Inquiries in Political Theology*, Chicago/London: Chicago University Press, 2005) p. 10-2.

<sup>337</sup> Ibidem, p.14-5.

reach another conclusion that the statements from Schmitt can only remain at a theoretical level. Politics entails action<sup>338</sup> and ontological construction of the subjectivity.

To find out a benchmark in order to put one's finger on who is an enemy is not even possible in theoretical remarks. The foreign enemy, the stranger, the outsider, can only be distinguished by the physical and cultural aspects, but never by the intentions. Derrida contradicts Schmitt's ideas by stultifying the naïve mention that Schmitt makes use to given some support to his assumptions.

The friend/enemy distinction follows the same logic of good/evil, peace/war. Derrida asserts it would be part of another logic of West Civilization, and terms it as a "hyperbole"<sup>339</sup>. Friend and enemy always have to refer to each other, sharing contexts, and significances that can only be attributed in this frame of reference. "The purity of the distinction between 'stásis' and 'polémos' remains in the Republic a 'paradigm' accessible' only to discourse"<sup>340</sup>.

Schmitt is haunted not only by a difference between this two inexplicable entities but also to perform a trial to link theory and reality. Although he is bound to purely political speech, without being concerned with roots and experiences, he was struggling to lay this distinction (friend/enemy)<sup>341</sup>. Through the topology of political, Schmitt claims to be a thinker of the worldly, a realistic person, as well remembered by Derrida<sup>342</sup>.

This statement is related to how Schmitt bids to associate the political with everyday language, and it would a sensible question because political is attached and attracts a "controversial sense," as Schmitt calls it<sup>343</sup>. Although Schmitt adamantly insists on bonding the concept of political and friend/enemy with pureness.

It is not necessary to go further to conclude how fragile is the pretension from Schmitt. By externalizing the word political and friend/enemy in every day, it becomes quite

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<sup>338</sup> Jacques Derrida, *The Politics of Friendship* (London/New York: Verso, 2005), p.112-22. "The concept of the political undoubtedly corresponds, as a concept, to what the ideal discourse can 'want' to state most rigorously on the ideality of the political. But no politics has ever been adequate to its concept. No political event can be correctly described or defined with recourse to these concepts. And this inadequate is not accidental, since politics is essentially a 'práxis,' As Schmitt himself implies in his ever-so-insistent reliance on the notion of 'real, present possibility' or 'eventuality' in his analyses of the formal structures of the political".

<sup>339</sup> Ibidem, p.112.

<sup>340</sup> Ibidem., p.114.

<sup>341</sup> Ibidem, p. 115. "The assigned task, the duty, is to frame and to enflame (*encadrieren*), to put into order (*Order*), to propose 'a theoretical framework for a measureless problem.'Hence a framework (*ein Rahmen*) had to given also (sic) to the problematic of the theory of right, to order its 'entwined thematic,' and to discover 'topology of its concepts'".

<sup>342</sup> Ibidem.

<sup>343</sup> Ibidem., p.115-6. See Carl Schmitt, *Der Begriff der Politische. Text von 1932 min einem Vorwort und Drei Corollarien* (Berlin: Duncker & Humblot, 2015b), p.1-21.

evident that those terms are not only associated with sovereignty, war, or to a strict concept that is only employed in certain circumstances. Roughly speaking, the inflationary use of the terms and the range of possibilities of invoking them, turns their significance oscillated and unframed.

On the other, Schmitt was a legal-political-theological-savvy, a person who would not throw up words without a preliminary consonant investigation. *Der Begriff der Politische* and *Political Theologie* (as also the Theory of the Partisan) were both written before the II Great War. It is relevant to add that Schmitt was a kind of writer who was not keen or concerned to explain his expressions to the reader, and many times those expressions could be understood as rhetoric (but it is only a speculation). Going further, Derrida suggests that it could a diagnosis performed by Schmitt, about the consequence of the depoliticization and a calling for a decision.

#### IV.3.5.1 - Friend/Enemy Remark

Schmitt also raises another utterance on political endowed of presupposition (*Voraussetzung*), including the aspects of a founding community or a private judgment (*Urteil*). Further, it would pinpoint an instance of pluralism, and make it impossible to neutralize and to reach a consensus on what political and friend/enemy really is, taking into account a cosmopolitan society.

For Derrida,

This is the strategy of presupposition (*Voraussetzung*). In some of its features, it could be analogous to Heidegger's existential analytic. This said, it always demands that the presupposition of 'real possibility' or 'eventuality' be 'present' in a determined (*vorhanden*) mode. And this presupposed presence is that of political decision: the decision deciding who the enemy is. The question 'who' is at the heart of the principle, it summons and commands [*mande et commande*]. The major moments of political decision are those of the response to the question: 'who is the enemy?'<sup>344</sup>

In a case of war, the state would be called to have the most drastic decision, and by consequence, it has to decide who is the enemy and who is the friend<sup>345</sup>. However, without proper preparation, this decision may be innocuous. The act of killing your enemy instead of speaking with him entails a lack of compassion, you are demanded to forget that once your political enemy once was your neighbor.

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<sup>344</sup> Ibidem, p.125.

<sup>345</sup> Ibidem., p. 128. "The decision discriminates, we will say, recalling that in Latin *discrimen* is at once separation, distinction, difference and the moment of decision, *instance* (sic) in the two senses of the term. Schmitt plays with words 'Ernstfall' in inverted commas when he says that 'yet today' the case of war is the 'case of war'".

But I have to remain attached to Derrida's insights. According to his interpretation of political in Schmitt, the world without enemies or without war would not be the world, because the political would have faded away in everyday life. The world without friend/enemy would become a world without politics. Therefore, it would be the world that the act of killing would have to create another semantic meaning, and new the techniques to shed blood would have to be find out.

Finally, what Schmitt performed was a real exercise of predicting the consequences of neutralization and humanization. War, roughly speaking, is the "real" possibility to separate friends/enemies through a political way, and not by any other form, like religion<sup>346</sup>. Schmitt gazes the situations as they are, and their consequences. He is not keen on sources or myths, or changing the reality. For him, the reality is how it presents itself to him. However, we are also called to avoid this situation, even nowadays that the dichotomy friend/enemy has never been so unclear. Since September 11<sup>th</sup>, and what the USA has been calling "rogue States," and the terrorist attacks around the world are placing the concept of solidarity, humanization and human rights against the wall. Those concepts are under trial.

#### **IV.4 Considerations on neutrality**

Semantically and in the level of analytical structure of a sentence, the neutral always remains achievable. This is one of most relevant concerns which modern society has to take into account, regarding the impossibility of neutrality in the branch of actions (*Handeln*) or being in an inner experience.

##### **IV.4.1. - On Puppet's Theater and "Thrownness" (Geworvenheit)**

A marionette is a machine, the most evident expression of the technicalization of art. Marionettes are "living dead"<sup>347</sup> beasties, animals, and now marionettes are introduced by Derrida. The art of a puppet's theater is uncanny (*Unheimlich*). Yet, the marionette portraits the art of living in technology<sup>348</sup>, as a supplement, as a cell from Hobbes's Leviathan, a mechanical beast made by men.

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<sup>346</sup> Ibidem., p.131.

<sup>347</sup>Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p. 187.

<sup>348</sup> See Martin Heidegger, *The Question Concerning Technology and Other Essays* (New York/London: Harperperennial Modern Thought, 2013), p.3-35.

Celan, Valery, and Kleist are the signature ferried out by Derrida to draw the teaching from Heidegger about technology. Marionettes bespeak the matter of being an invention under the conditions of the human's *tèchne*.

Talking on puppets, the famous "Concept on History" from Benjamin comes over and over, by warning us that a puppet - "historical materialism - being the master of a dwarf - theology - is fated to "win all the time"<sup>349</sup>. Roughly speaking, according to Benjamin, the past of our past, has a claim, which Benjamin calls a "weak messianic power," bringing round by our redemption in our relation with time.

All the same, Benjamin's troublesome fragment on history regards with scatology, I would suggest reading it with the same perspective as Eric Santner and his assumption on the matter of the neighbor<sup>350</sup>. Into the bargain, I would include Derrida's brilliant insight on how to kill a marionette. It is what I am going to describe on the next further paragraphs.

On my modest interpretation, it would be possible to seize Western's condoning about the intimidation that makes a distance among neighbors by stressing the texts that I've mentioned. Since I am not seeking for the truth or to formulate rocket science. As you have already taken notice, the style of the present work (?) is much nearer a dialogue from Pierre le Fou - and by dialogue I mean between the character and his audience - than the traditional way of Germany to test unshakable beliefs, just because there is an agreement between a student and a *Doktorvater* about a method, a protocol of how a good work should be<sup>351</sup>.

Coming after Derrida's zoo-political, my inkling is not just that the relation between a puppet and a dwarf happens by managing historical materialism. But, the *bête* has been mastering for centuries what is proper to man. By nailing only a bond between theology and historical materialism, it would be likely to conclude that the disappearances of such ties can offer a new horizon on Western society.

Naturally, Benjamin does not draw an upshot so fast. His main concern is "Then we will clearly see that it is our task to bring about a real state of emergency, and this will

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<sup>349</sup> Walter Benjamin, "On the Concept of History," p.389

<sup>350</sup> Eric Santner, "Miracles Happen: Benjamin, Rosenzweig, Freud, and the Matter of Neighbor". In. Kenneth Reinhard; Eric Santner; Slavoj Zizek, *The Neighbor - Three Inquiries in Political Theology* (Chicago/London: Chicago University Press, 2005), p.79-118.

<sup>351</sup> I am strictly speaking about Law's context in Germany and how it was contained by a stupid believe on method. It is not by accident that Dostoyevsky wrote with his genuine cleanness what he thought about Germans. He was not just due to his generalization. However, Law's faculty, particularly in Germany, is dominated by the narrowness and lack of creativity, boosted up by an unquestionable authority of a *Doktorvater*.

improve our position in the struggle against fascism. One reason fascism has a chance is that, in the name of progress, its opponents treat it as a historical norm"<sup>352</sup>.

Notwithstanding, we could picture the puppet - historical materialism - manipulating pieces of chess, or manipulating another sort of marionette, pulling it by strings, and without a "system of mirrors." Coming back from our detour, the very question is about "the technology of the living being"<sup>353</sup>.

As Derrida states,

What we named, on the basis of Hobbes's 'Leviathan,' 'prosthetics' sent us down this track, in which was no longer possible to avoid the figure of a prosthetic 'supplement,' which comes to replace, imitate, relay, and augment the living being. Which is what any marionette seems to do. And any art of the marionette, for, let's never forget this fact, it's a question of art, of 'tekhne' as an art of or 'tekhne' between art and technique, and between life and politics<sup>354</sup>.

Monsieur Teste speaks about himself, about his double, his marionette<sup>355</sup>. The puppet's master is aware of any performance that his puppet can do - well, at least is what we have always held on to. Derrida highlights the fascination of Monsieur Teste on his marionette, a kind of Freudian's obsession, although, he is plotting to eliminate his own marionette.

Even so, what to the letter means to kill a puppet, to dismiss my "bête," which inhabit within myself, binding me to submit myself to protocols, rituals, and conventions that I am not allowed to question or do away with. For all that, Derrida raises a relevant inquiry, suggesting that uncertainty lies on the essence of a marionette.

How can one kill a marionette, we are asking last time, without assuming it has some life, and therefore some psyche, some animality, some animate desire, and some stubborn, obstinate movement to remain in life? Is a marionette that one wishes to kill still a marionette? Is a marionette of which one can only get rid oneself by condemning it to death, by removing its life, still a marionette? A mere marionette? What is a marionette? To have to kill it, even it is inanimate, it must be already another<sup>356</sup>.

Our pact at the foot of the mountain (Exodus 19:17), or our bond to a mechanical beast, named Leviathan, could be responsible for hiding our "bêtise" like a violent being attempting to cover its traces; thus a new order could set a stage for modernity? And now, what could happen if a massive movement to kill marionettes takes the first step, just the way Monsieur Teste drops a hint?

#### **IV.4.2 - Without Soul**

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<sup>352</sup> Ibidem, p.392.

<sup>353</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009) I, p.187.

<sup>354</sup> Ibidem, p.187.

<sup>355</sup> Paul Valéry, *Monsieur Teste*, (Princeton: Princeton University Press, 1989) p.8-21.

<sup>356</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009) .,p.191.

Getting rid of the marionette would be same of stamp out the mechanical or mechanism that "mark of the self-affirmation of free sovereignty over the social body and one's own body"<sup>357</sup>. Though, is Monsieur Teste able to measure the aftermath of eliminating his marionette? Needless to say, there is an idea of political behind the lines that allow us to drawn to a close that getting rid with my own marionette does not necessarily mean to break up with the impossibility of a sharing community.

Is artificial law elaborated to guarantee us fundamental and human rights, addressed to the marionette? We don't feel a right, we don't touch a right. Rights have no taste or have no power to trigger us feelings. A law is only if it has the authority and force<sup>358</sup>. Because of that, it is artificial, it comes together with progress when reason reached the ability to averting its gaze to theology and mystery. As Rosenzweig points out, illumination has happened in many different periods of time, and not only just once as conventional has been thinking<sup>359</sup>.

Modern law has been for decades wrongly interpreted, or maybe misunderstood. To whom is the law addressed, and what is law, what is the Law, it was never a question close to a determination. As a matter of fact, the jurist of modern law must be a man of science. Fetching Rosenzweig to our reflections, his inquiries on philosophy at the earlier decades of the 20th century can be reproduced on law's thought due to its inability to go further some central assumptions. From outside, the law can be accused of an insufficiency to survey beyond its own domains or system. As we have analyzed during this work, the comprehension of a lawsuit, as technique and never were seized by jurists, with some idiosyncrasy.

In consequence, a negative theology is set out around law's imaginary. Not knowing a pinpoint definition of law and its aim, allow jurists to ferret out assertions, incorporating technology, assuming the legitimacy of a multiple source or criteria to define what is law. Countless works have denounced law's inefficiency. Negative theology is an expression which would allow us to amalgamate the scientific goals from jurists, particularly the Germans, and a mystical element of the law. This is a theme I shall keep up on the next chapter.

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<sup>357</sup> Ibidem, p. 194.

<sup>358</sup> Blaise Pascal, "Justice Force"; available <http://www.penseesdepascal.fr/Raisons/Raisons20-moderne.php>. Accessed 07.08.2016.

<sup>359</sup> Franz Rosenzweig, *The Star of Redemption* (Madison: University of Wisconsin Press, 2005), p. 18-51.

Still and all, we seek for a scientific reason to give us a positive confidence in our actions and performances, filling out the emptiness reality of law with tropes and performative language. Law casts about unity<sup>360</sup>. Law's unity is heralded as a reproduction of its differentiation by referring to itself, roughly speaking<sup>361</sup>. Evidently, without what Luhmann's termed as environment and minds, the reproduction of law's unity would be only a matter of fiction. Thus, a conscious must be able to replicate the unity as an operation and differentiate law from others systems.

#### **IV.4.2.1 - Machine and Repetition**

As a machine, without a sovereign, as an automat, condemned to repetition, recreating the unity over the social, maintaining institutions, States, social systems, positions, offices, behaviors, the symbolic semantic of Western of imposing its validity and legitimacy safe and sound. Plainly, only a step outside from what we have been calling scientific explanation and reason can shed some instants of bliss out due to its faculty of provoking the crash of what have bearing out our world. In this situation, we would be thrown to the plenitude of contingency's power.

On the other hand, killing a machine or a marionette does not necessary will change our world into a better place. Derrida admonishes us about a possible consequence of killing a marionette, of destroying my own marionette, "But the paradoxical effect of this duel with the marionette is that it can transform the winner himself into a machine that wants to play the angel - and therefore plays the beast"<sup>362</sup>.

I call for von Kleist and his "On the Marionette Theater"<sup>363</sup>. A close analysis in both marionettes it is essential, Kleist and Valéry, regarding that Kleist's marionettes can be outstanding teachers. Although the Unheimlichkeit." Movements are coordinate through manipulation, the puppeteer must complete or command their actions by locating the

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<sup>360</sup> Niklas Luhmann, *A Sociological Theory of Law* (Abingdon: Routledge, 2016), p. 206-16. Günther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2014), p. 88-101

<sup>361</sup> Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main: Surhkamp, 1995), p. 98-140.

<sup>362</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009) p.194. And Derrida keeps stating, "Monsieur Teste acts though he didn't have a body, or again, given that this 'as if' can only be an untenable fiction, a fable, he acts like someone who, analogous in this absolute monarch, has two bodies, the king's two bodies, one of which is purely immaterial, angelic body, asexual besides, which rises freely above the other one, the mortal marionette or the living animal, which remains on the ground, eats badly, and screws badly...".

<sup>363</sup> Heinrich von Kleist, "On the Marionette Theater.". Available at <http://www.southerncrossreview.org/9/kleist.htm>. Accessed at 08.10.2016.

gravity's center and, moreover, by playing the strings with his own fingers, linking the marionettes with his own motions. Notwithstanding, at a certain point, the last vestige of humanity shall break up, and a marionette is going to grow into an automat<sup>364</sup>.

On his short essay about puppets, von Kleist aims to demonstrate the identification between puppet and puppeteer. It should not come as a surprise that on political writings we can pinpoint the art of emulating and strive to hide any symptom of sagging. Furthermore, the very act of mirroring can be defined as something without an essence, only with a form. Are the marionettes human beings? Do they have "Dasein"?<sup>365</sup> So to speak, our world or representation, a mimetically world, would be nothing else than a bad imitation from our past's ideas. Would it be similar to a "weak messianic power," which is related to Benjamin's view on historical materialism? Does the winner always write the history together with a mystical force?<sup>366</sup>

In my view, an automat would not be sufficient to keep a political zoo-political order and an ethics of bestiality unshakable. Under those circumstances, the duality and multiplicity, he doubles, and the watchman, a multiplicity of marionettes, of automats, under a different sort of machines, machines that are engaged with each other must work with or without perfection. As Valéry bears out, this multiplicity of agencies is that the truth could not come by oneself, or by itself.

According to the brilliant Derrida's understanding of Valéry's marionettes existence and its theater of operations:

There's certainly politics here because there's what I amuse myself by calling a multipli-city, a city as multipli-city of agencies or a plurality of worlds and of 'selves' ('moi'), of subjects of who, like countable citizens, share out and fight over the truth, nothing less than truth, argue about a truth, but a received truth, a truth always received: but this politics, this apparently internal politics, this inner multipli-city, this multipli-city of self, here reaches its high point not only because it is full, fulfilled, accomplished, saturated, but because since it's a matter of the other in the self, and of the other in the self of whom one is forever jealous, this internal politics reaches its high point in excess that exceeds and un-counts it, namely the other and the outsider<sup>367</sup>.

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<sup>364</sup> Ibidem....

<sup>365</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p.199.

<sup>366</sup> Christopher Fynsk, *Last Steps - Maurice Blanchot's Exilic Writing* (New York: Fordham University Press, 2013), p. 21. The relation of which Fynsk makes between Levinas and Blanchot dovetails with my insight, "One might recall Benjamin, once again, for illumination of what Levinas is claiming here: specifically his protest against passive acceptance of the given order that is always underwritten by the history of the victorious and assertion that this is how it had to be. One might recognize, further, that the history unredeemed by the conscience that embraces Torah is nothing other than the history faced by Benjamin's disconcerted angel who is driven backward by an avalanche of catastrophic events. Of course, Benjamin's appeal to something he calls a 'weak messianic power' in the past's claim upon the present diverges considerably from Levinas's prophetic eschatology since it is embedded in Benjamin's own vision of dialectical materialism.

<sup>367</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p.201.

By bringing up the last quotation, which is politically inflected, my running starts, I hear a whisper from Kafka. In this outside challenge in articulating Kafka's thought, as well exposed by Walter Benjamin, who accredits Kafka's raw talent to his skill of sensing "pre-historical forces" (*Vorweltlich Gewalten*)<sup>368</sup>. One example beyond doubt demonstrates in *Beim Bau der Chinesischen Mauer* when Kafka offers his version of such remarkable event of human history. Benjamin fully believes and stresses the point that Kafka's biography is the retelling in his writings.

Those "pre-historical forces" represent Kafka's protagonists to seize and clarify the stubborn events which haunt the protagonists and challenge any logical inference or valid organizational order. As I have mentioned, following Derrida's perspective on ethics, ethics to be valid, is already there settled and established before the events fall out. Evidently, there was a previous event, an inception, as a rule, a violent event, which triggered our duty to a new order.

Kafka's protagonists are witnesses or observers, and at the same moment, subjects of an overwhelming and disturbing reality, which in part was built before the very existence of each individual, who is a portrayal of the scene<sup>369</sup>. As well as the looming of characters labeled as "prototype of distortion" or "hunched back" by Benjamin<sup>370</sup>, or suggested by being "neighbors," according to Eric Santner<sup>371</sup>.

It is deemed relevant and worth to mention Benjamin's breakthrough:

On the other hand, who vegetates, somnolent and unkempt, in a remote, inaccessible room, is an ancestor of those holders of power in Kafka's works who live in the attics as judges or in the castle as secretaries. No matter how highly placed they may be, they are always fallen or falling men, although even the lowest and seediest of them, the doorkeepers and the decrepit officials, may abruptly and strikingly appear in the fullness of their power<sup>372</sup>.

Further, Benjamin highlights that are not only Kafka's main characters that are under the weight of the day but also those personages are carrying over their shoulders an eminent

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<sup>368</sup> Walter Benjamin, "Franz Kafka: On the Tenth Anniversary of His Death," in. *Selecting Writings, vol. 2, 1927-34* (Cambridge: Belknap Press, 2005a) p.804.

<sup>369</sup> Walter Benjamin, "Franz Kafka: *Beim Bau der Chinesischen Mauer*," in. *Selecting Writings, Vol.2, part 2, 1931-34* (Cambridge: Belknap Press, 2005b) p.495. "Doubtless, it is impossible to refute the assertion that in his novel 'Das Schloss' Kafka wished to depict the higher powers, the realm of grace, whereas in 'Der Prozess' [The Trial] his aim was to portray the lower world of the law courts, and in his last great work, 'Amerika', he described earthly existence - all of these topics to be understood in a theological sense".

<sup>370</sup>Walter Benjamin, "Franz Kafka: On the Tenth Anniversary of His Death," in. *Selecting Writings, vol. 2, 1927-34*, (Cambridge: Belknap Press, 2005a) p.811.

<sup>371</sup> Eric Santer, "Miracles Happen: Benjamin, Rosenzweig, Freud, and the Matter of Neighbor". In. Kenneth Reinhard; Eric Santner; Slavoj Zizek, *The Neighbor - Three Inquiries in Political Theology* (Chicago/London: Chicago University Press, 2005) p.100.

<sup>372</sup> Walter Benjamin, "Franz Kafka: On the Tenth Anniversary of His Death", in. *Selecting Writings, vol. 2, 1927-34*, (Cambridge: Belknap Press, 2005a), p.795.

duty, maybe, too heavy for any human being to support its weight. Since the ending of the "king's two bodies"<sup>373</sup> epoch, everyone's issues are legitimate to be the most important.

Into the bargain, law, particularly modern law, was drawn to obliterate those "pre-historical forces." Not intentionally, of course, but as everything in Kafka's world has a grim fate, ruled by fathers and bureaucrats, the law comes to be particularly manageable in this disturbing context. As Benjamin sharply analyzes Kafka's world, the realm of books of law is only close at hand to judges. Neither the "doorkeeper," nor the country's men, have any hint about law books content.

Still, as accurately interpreted by Benjamin, organization means destiny to Kafka<sup>374</sup>. This is in absolute conformity to the point I attempt to make with being a marionette, according to Valéry and von Kleist. Putting them together is in agreement with Benjamin's illustration of Kafka: "Kafka's world is a world theater"<sup>375</sup>. While Benjamin assimilates his states with the eligibility to the Nature Theater of Oklahoma, "What the standards for admission are cannot be determined"<sup>376</sup>, I would say that Kafka had already demonstrated his doubts to grasping artificiality in his short essay "The Test"<sup>377</sup>. The character, some jobless loser with an obsessed routine to sit every day in the same pub's chair, is called to answer some questions from someone who was occupying his habitual seat. He was not able to respond to the questions; however, that was the test. He only passed the test because he did not know the answers.

#### **IV.4.2.2 -Machine and Violence**

Benjamin compares Kafka's writings with the Nature Theater of Oklahoma due to "all that is expected of the applicants is the ability to play themselves"<sup>378</sup>. A marionette can only be manipulated. At some point, we do not pay attention to the puppeteer anymore. I could add, for Derrida, the marionette lies between the beast and the sovereign<sup>379</sup>. And there

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<sup>373</sup> Hauke Brunkhorst, "Die Macht der Verfassung im Werk Hannah Arendts", in: Liliane Weissberg/ Fritz Bauer Institut, Hg.: *Affinität wider Willen? Hannah Arendt, Theodor W. Adorno und die Frankfurter Schule* (Frankfurt: Campus 2011c), p. 15-30.

<sup>374</sup> Walter Benjamin, "Franz Kafka: On the Tenth Anniversary of His Death," in. *Selecting Writings*, vol. 2, 1927-34, (Cambridge: Belknap Press, 2005a), p.803.

<sup>375</sup> *Ibidem*, p.804.

<sup>376</sup> *Ibidem*.

<sup>377</sup> Franz Kafka, *The Test...* See also Avital Ronell, *The Test Drive* (Urbana/Chicago: University of Illinois Press, 2005), p.34-67.

<sup>378</sup> Walter Benjamin, "Franz Kafka: On the Tenth Anniversary of His Death," in. *Selecting Writings*, vol. 2, 1927-34, (Cambridge: Belknap Press, 2005a) p.804.

<sup>379</sup> Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p. 206.

is no right without force; or as Kant has already pointed out, force is the mean to the right. Rather, to be enforced and settled, a right must be engaged with force, raising the very question of sovereignty and who is able to perform or to make a just use of the force<sup>380</sup>.

In the "Critique of Violence"<sup>381</sup>, Benjamin grasps the fundamental question of positive law by drawing a difference with natural law, concerning whether the violence can be justified in the realm of means or in its end. I am going to step in this delicate question on the next chapter with more details. By now, read it as if it was a prelude to the end. Making a good appropriation from Derrida's sentence, justice and force right now are coming stealthily as a wolf (*peut-être à pas de loup*). Still, our task remains to think through whether the using of force is proper to a marionette.

With the ending of royalty sovereignty, the modern era is wrapping by the remaining of royal's sovereignty, that was able to perform with a good use the violence as an end; and with a faculty that every single individual is allowed to use, which regularly we refer to as being our "reason", a mean to reach an end. Coming after Valéry and his Monsieur Teste, the multiplicity of beings that one being can play, perform, or act, changes the single being, not in a plenty of who, whereas in a plenty of what, in many marionettes. Strictly speaking, the zenith of this multiplicity, upon my suggestion, is the other and how we are commanded to deal with the already, apropos, the rules of a technological was already there before he had been born.

Albeit, Valéry blames "jealousy" for being in charge of such political conflict with itself and another individual (we have to contextualize his writings and also credit him to follow an artistic perception and not a scientific trial). Derrida credits Valéry's marionette voices to be only vocalizations proper to males. Such information could be connected with the very beginning of this outstanding book, *The Beast & the Sovereign*, with Derrida elucidating that in the French language *le souverain* is masculine ( as well in German, Portuguese, Spanish and Italian, just to remain in a few examples).

Yet, what this male voice does not take into account about the multiplicity, the multiplicity of a being, the being-with-other, or as Derrida argues, "being-at-home-with-the-other"<sup>382</sup>, which Freud attributes to the feeling of *Unheimlichkeit*, or still, this pre-historical

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<sup>380</sup> Jacques Derrida, "Force of Law - The "Mystical Foundation of Authority."" In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 228-98.. See also "The Beast and The Sovereign vol. I, p. 207-12.

<sup>381</sup> Walter Benjamin, "Critique of Violence," in. *Selecting Writings*, vol.1, 1913-26, (Cambridge: Belknap Press, 1996a) p. 236-8.

<sup>382</sup>Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p. 205.

forces that terrorize us, and there is no command or voice to cut it off unless we take it to another level, the level of neutralization. Even so, it is not deemed a neutralization of our horizons or inner voices into an eloquent sense. It would be still thinking into a self-organized world projected in our actions. Roughly speaking, it would be a blind belief that a command emerging from human rights still can manage with every situation or context without cogitating the roots or inception from our perennial riddle.

#### **IV.5. The Authority of Law (Mystical) and Being-with-Other (*miteinander*)**

It is not any blow, or should not be, that since the memorable quotation from Blaise Pascal<sup>383</sup> The relation between justice and the symbol of force were translated into words. Pascal was able to grasp the horizons of justice, which is embedded in our language since an undermined past and turn it into an obscure, but at the same time meticulous query on this indivisible relation. The poetic of Pascal, hence, shades some lights on the political order at that time, which extends until the present days! Who is endowed with the right to claim himself the sovereignty is the one who is going to act with rightness. He, or she, has the legitimacy monopoly of force, the just force that brandishes its sword against who disobeys the order or act as a rogue.

On this account, would be authority properly to law? Would exist a law which is not authoritarian? The artificial law is proper for humans, that is the only certainty. The same is for cruelty. The sources about a need for mediation whereby law are not very well reliable. There is a demand for a reasoning and should we live under a particular condition or under certain commands and imperatives. Nonetheless, science and legal philosophy do not carry the situation to offer a resalable state about why do law is legitimate to perform any mediation.

Moreover, it works as a trigger machine. All of sudden, law regulates everything and has a reason for everything. Law-making process and decision-making process as a fruit of people which has found its path to living under the condition of freedom and equality. All

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<sup>383</sup> Blaise Pascal, "Justice Force"; available <http://www.penseesdepascal.fr/Raisons/Raisons20-moderne.php>. Accessed 07.08.2016., "Justice, Might.—It is right that what is just should be obeyed; it is necessary that what is strongest should be obeyed. Justice without might is helpless; might without justice is tyrannical. Justice without might is gainsaid because there are always offenders; might without justice is condemned. We must then combine justice and might, and for this end make what is just strong, or what is strong just.

Justice is subject to dispute; might is easily recognized and is not disputed. So we cannot give might to justice, because might has gainsaid justice, and has declared that it is she herself who is just. And thus being unable to make what is just strong, we have made what is strong just".

the same, all politics on the backdrop were swept out, remaining only as a trait or something else that reason cannot give so much importance. However, politics, in a broad sense of the term, survived in the form of a speech of manipulation, taking advantage of using a speech-act. If a speech-act initiates under a particular protocol, it can only hold the truth, unless the protocols demonstrate the contrary. So to speak, a juridical decision holds the right to be valid under certain rules and only under determinate circumstances it may overrule, but only the law system has the legitimacy to specify the rules to overrule. Anything else is only critics.

Many of those rules are made by a legislative body. Nonetheless, those rules are able to be interpreted, or new "methodologies" can be introduced by judges, just like the way that the "margin of appreciation" and the "balance" was. As you may see, there is symmetry or harmony between the threshold of powers. Such symmetry can appear only printed on books. Western thoroughly held in a rational project, in which reason would lead us to unity, and by building projects that would guarantee the freedom and equality, justice could be achieved. That is the point where terms such neutrality were determined to make us believe that reason, and its engagement with truth was feasible.

Even Heidegger had manifested some difficult to grasp how technology can operate and be clear to point out what kind of speech and action are embedded with technology and how it may affect the *Dasein*. Geoffrey Bennington successfully identifies this bafflement in Heidegger's oeuvre<sup>384</sup>. Heidegger alleges that Aristotle's *Rhetoric* is the first attempt to organize the "being-with-one-another." On his interpretation, on the one hand, if rhetoric in its pureness aspect is driven towards the truth by self-expressing, on the contrary, it's widely open to disappointment. I am not keen on going further on this detour, but this very aspect of rhetoric has called my attention, and it evidently matches with the technique of legal decisions, although any frustration could be only gotten the wind to be no more disappointed, unless the legislation or the interpretation turns out to come to my understanding in the future.

In fact, Niklas Luhmann<sup>385</sup> efforts to draw a systematically perspective about frustrations (*Enttäuschung*), dividing between normative and cognitive frustrations - it is kind of interesting that he used the noun *Enttäuschung* and not *Täuschung*; perhaps he was

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<sup>384</sup> Geoffrey Bennington, *Scatter 1. The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p.48-77.

<sup>385</sup> Niklas Luhmann, *A Sociological Theory of Law* (Abingdon: Routledge, 2016), p.73-82.

attempting to dodge any philosophical debate and an eventually inaccurate employing of the noun - there is any condition that mediation through law and through decision-making process are not performing manipulations. However, this manipulation, which would sharply affect the whole idea of technique, could no longer be an element of legal decision. Decision-making has a privileged position of never being a technique of manipulation. Perhaps, it is not according to law and principle, thereby a supreme instance is able to put it back on the path, but the supreme instance is never suspected of manipulating the prior manipulation.

Just an inclusion of the possibility of manipulation or a regard to the rhetorical element of a decision-making process could turn an entire dimension of legitimacy and force. By stipulating the decision-making process as a form which does not include distortions, articulations to build an appearance of truth, passing for a faculty that is only connected to the truth. Seemingly, judge's biography never can be taken on the account to dismiss him from his calling. A judge's signature is powerful enough to confer force to a decision. Yet, what marks a semantic distinguishing between rhetoric and decision-making process, the first is not compromised with outcomes, while a decision-making process has a legitimate prerogative of the using of the force<sup>386</sup>. Further, law's decision is endowed with a mystical character of authority<sup>387</sup>, whereas a rhetorical demonstration does not necessary bears authority.

Being a judge does not purchase a noble task, it does not transgress the realm of language that a judge is someone neutral that is prepared to perform a rational decision. We have not testified any authority that has set out to raise questions on what is your real task and what indeed is the responsibility of being a judge. I am comparing the current situation with the trip made by Plato to Syracuse in Sicily, though what pictures on our mind, what has represented the figure of a judge, has been characters performed by Kafka's *The Trial* or Heinrich von Kleist's *The Broken Jug*. Bureaucratic or flubs, it can be both, nowadays, are powered in deciding what is freedom and equality, just to cite a few rights.

#### **IV.5.1 - Articulations**

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<sup>386</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 228-98. See also Jonathan Culler, "Violence and Justice: Baudelaire's 'Assommons Les Pauvres!'", in. *Cardozo Law Review* vol. 13, 1991-1992, p.1229-1236.

<sup>387</sup> *Ibidem*.

In modernity, we have lost the sight of how dominant and supreme is an argumentation, particularly when it comes from someone invested with authority and discretionary power to employ violence (*Gewalt*). What is the difference between writing a decision carrying out the truth that must be obeyed or a futile public speech? Without the prerogative of violence, it would have no difference.

One must believe that a legal decision and its following argumentation must be engaged with a true rational argument. Being clearer, it is supposed that a rule would be the initial point of a decision, and its further argumentation and conclusion would be something extracted from the rule and from the facts. Evidently, that each case must seem similar to another case, in which the same rule is enforced, yet it is impossible to be the same. The close resemblance is the linchpin for it. But, one point must remain in evidence: how do we suppose that a decision about freedom correspond to what freedom is?

A philosophical assignment was to spring up and frame concepts, although it is not compromised with the truth. Evidently, this triggers a dilemma about what should be believed and taken seriously<sup>388</sup>. Taking into account the history of thinking in the West, a legal decision has a privileged position. It can appropriate other ideas, and its arguments can be only effective (*Wirksamkeit*), and validly (*Stichhaltig*) refused within its own frame. Otherwise, it is just a form of critic or opinion.

#### **IV.5.1.1 Technology and "rule of life" - The Case of Lambert and Others v. France**

Not only freedom and equality is at the gist of a text written by a court. States and transnational, international and supranational courts had obtained the right to decide upon each individual's life. This question on life is linked with the "theological-political" pact, which had given the State the right and the duty to regulate and to decide about the capital punishment<sup>389</sup>. I will not detain myself on this question. However, the State has also come

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<sup>388</sup> Geoffrey Bennington, *Scatter 1. The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p. 35. In the following passage where Bennington is presenting the question of the 'Parrhesia' in Foucault's last seminars, he writes with directness the question of philosophy for Ancient philosophers. "Philosophy, in this description, is not 'exactly' telling the truth to power, not only in the tense that it does not accurately tell power to do, provide it with an approved philosophical content (and Foucault is admirably clear about the fact that this misconception is a 'malheur' that has muddied the waters of the philosophy-politics relation), but in that what it is telling power may not in fact be exactly the truth at all but is at least supposed to be what philosopher believes to the truth".

<sup>389</sup> Jacques Derrida, *On Death Penalty Vol. 1*, (Chicago: Chicago University Press, 2014), p...

by the right to decide whether a person could make disposal about its own right by calling it the right to life.

Roughly speaking, the right to life was basically conceived to give an individual protection for a person against a potential harm or mischief from the State or from another person. So to speak, it was not a right to protect the person against self-infliction. At a certain point, it became a theme in which courts should also decide whether assisted suicide was an individual right and States should support it to some degree or at least do not punish who provided assistance or testified the milestone.

The interruption of life, no matter what is the backdrop's reason, before it blames who assisted it, it turns to be a crude moralization whereby the State would protect the society against this episode. Moreover, it would put further practices off. Beyond speculations over reasons and facts, we deal with those cases with the sheer absence of legality wherefore about assisted suicide should be criminalized. Just for as matter of comparison and association, Marcelo Neves takes a further analysis on his book "Transconstitutionalism," a case whereby the practices of suicide goes toward the moral and politics of Brazil<sup>390</sup>. For the Suruahá, suicide is almost a regular practice and very often motivated.

Someone could claim that the end of life carries many cultural aspects and voices dominated by religion. Evidently, we may affirm that the end of life by artificial ways or even by interpreting the will from someone who can't exercise its faculties anymore is going to be embroiled in some sort of scandal. The death and mourning of the other opens a narcissistic wound which grows more complex when it involves the freedom of life, which is just like another sort of freedom artificially imposed and created. I do not intend to bring up a biopolitical discussion and of who has a right over our bodies or our lives, despite the fact that what is wrapping is nothing else than a moment of narcissism.

#### **IV.5.2 - Individual Machines?**

In spite of plenty of debates<sup>391</sup>, the domain of life does not have a core or a matrix that could claim to have the last word concerning what life is and what anyone could do to

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<sup>390</sup> Marcelo Neves, *Transconstitutionalism* (Oxford/Portland:Hart Press, 2013), p. 139.

<sup>391</sup> Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press of Harvard University Press, 1986), p.176-224.

put an end to it. Until now, the right of life, notably concerning the will or wish to end one's own life, was unable to be articulated theoretically.

Even though I have mentioned a matrix's question, which is close to whom is engaged to some degree with Niklas Luhmann oeuvre and its unfolding<sup>392</sup>, I am keen on bringing up the Blanchot's tale *The Madness of the Day*<sup>393</sup>. It is an overwhelming turning in the logic of authority, and perhaps it may shed some light on this very problem about who is legitimate to decide and to interpret the right to life or the right of being alive.

What has called me more attention about this short text is not only the refusal from the narrator in telling what the doctors had asked for but the sheer inversion over Western authority. According to Fynsk's words, what can be grasped from this text is a relation between the sovereign and the no sovereign<sup>394</sup>.

Nearly every single legal text on this subject disregards death as a moment or an instant of a gift. What has been on the surface for legal questioning is a rudimentary knowledge of suffering, and in the case of prolonging someone else's life, it could affect the kernel of the right to life. Evidently, any decision takes into account only an individual perspective. As what happens in the *Madness of the Day*, the doctors that are overseeing the narrator and at the same time are conducting a sort of interrogation that, at the end, they only wish to hear an answer that confirms their assumption, in law's realm, a judge can manipulate the entire cosmological order of rules and legal reason to reach a secret that only he can access. This secret, "Geheimnis," does not lie under the text or is written in a passage from an old law book. Every decision, as I have already said, is as new as an invention, although it is not permitted to be looked as a decision likewise. A decision takes part in the universe of an invention, and it also entails the manipulation of an invention. In this particular scenario, the one who has created it is the only one who can manipulate his own invention.

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<sup>392</sup> See for instance Günther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2014), p. 88-101 Marcelo Neves, *Transconstitutionalism* (Oxford/Portland:Hart Press, 2013), p. 8-44.

<sup>393</sup> Maurice Blanchot, *The Madness of the Day* (Barrytown: Station Hill Press, 1995), p.1-32. See also Christopher Fynsk, *Last Steps - Maurice Blanchot's Exilic Writing* (New York: Fordham University Press, 2013), p. 57-75.

<sup>394</sup> Christopher Fynsk, *Last Steps - Maurice Blanchot's Exilic Writing* (New York: Fordham University Press, 2013), p. 60; "In the apparent commencement, in any case, the narrator affirms pleasure and he affirms a form of knowledge, both the substance of a 'remarkable truth'. Asked for the facts of how things happened 'au juste' - he gives the authorities the essence of what he knows and thus says yes both to what has been and is to come. 'Is my life better than other people's lives?' he asks. A modest response gives way to an assertion of a supreme good. It is not without wry reference to its situation since the narrative required concerns a near-blinding. And to be sure, the narrator is grateful for his sight."

In the same way of which the main narrator from the *Madness of the Day* affirms that the doctors (we could read it as the system) bear the responsibility and the justice by exercising their authority by way of making inquiries. Not tacit, eager or pleasant inquiries, just inquiries vested with a strange sense of neutrality. They demanded the patient to tell them his story. The patient related his story, but it was not the one demanded by the doctors. The patient took the decision to tell the story that he has chosen. The outcome happened to be the end of his life at any moment, whereas the narrator was feeling a sort of joyful pleasure by waiting for the instant of his death.

Evidently, the Western was not taught to face the instant of death in this way. Justice, in its broad sense, was unable to be performed due to the break with tradition made by the narrator. The word justice haunts in some way the plurality of narratives of the West. As Lyotard argues<sup>395</sup>, by mixing narratives, only injustice could remain.

However, the legal order has claimed to be bound by law to replace rights. In the case of *Gross v. Switzerland*<sup>396</sup>, the applicant wished to end her life by requesting doctors from Switzerland to administer a lethal injection<sup>397</sup>. The patient suffered from deep depression and had no physical problem. Her request was dismissed by the Swiss authorities, and her final resort was to file an application to EUHR, pledging that the Swiss authorities had violated the article 8 of the Convention.

Albeit, it is arguable that assisted suicide is right to some people in Switzerland, to access such right much is more emblematic than common sense might suppose. However, even though a multi-level conflict of law is raised up by such delicate issue, I seek to focus on the backdrop. The right to die has not been sheer embraced by the States due to its connection with theology. Suruahá, a local legal order, if we may put in those terms, has a dimension between its religion and its geographical limits. It may occur someone arguing that the Suruahá is not part of the Western culture. Evidently, they are not. But they are evidence that some mysterious power has been restraining someone's desires to end with its own life. A clear answer does not exist.

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<sup>395</sup> Jean-François Lyotard, *The Different. Phrases in Dispute* (Minneapolis: Minnesota University Press, 1989), p. 6-31. See also Ino Augsberg, "Autonomie als soziale Konstruktion. Zur Wiedergewinnung des Individuellen in der gesellschaftlich orientierten Grundrechtstheorie und Grundrechtsdogmatik"; in. Thomas Vesting, Stefan Koriath, Ino Augsberg (org.), *Grundrechte als Phänomene Kollektiver Ordnung* (Tübingen: Mohr Siebeck, 2014), p. 39-56.

<sup>396</sup> *Gross v. Switzerland* Application no. 67810/10 (05/14/2013).

<sup>397</sup> *Ibidem*, "12. On 16 December 2008, the applicant submitted a request to the Health Board of the Canton of Zurich to be provided with 15 grams of sodium pentobarbital for her to commit suicide. She submitted that she could not reasonably be expected to continue her search for a physician who was ready to issue the required medical prescription."

Still, what comes to my mind on this matter is a short text from Benjamin about a train accident. Writing on a train's disaster was a new event at that time, and only likely, on the one hand, due to the advent of the technology; on the contrary, the same technology flawless, somehow, contributed to the tragic event. This example only came about due to one particular noun: technology. The same technology employed by doctors to save lives may also be used to end someone's life. Further, a legislator was not able to predict that one day someone would fill up a law-case to be assisted to die. A broad interpretation it's necessary of the statements to reach a conclusion that the state has a positive obligation to provide and to give support to anyone intending to practice an assisted suicide.

It always comes to be a question concerning technology and its use. On the other side of the mirror, the death penalty has been raising many political and legal debates, not only about its abolishment but also about the cruelty of the methods which are employed<sup>398</sup>. Moreover, on this question also resides the technology of the words or the proper use of the terms. Although the right to life strives to be absolute, following the Universal Declaration of Human Rights from 1948, the following Declarations have determined that the death penalty can be employed in a case of war. So to speak, The International Covenant on Civil and Political Rights from 1976; the European Convention on Human Rights from 1955; and the American Convention on Human Rights from 1978, has pointed out that the freedom to life has an exception<sup>399</sup>. There is no convention that declares or guarantees the right to assisted suicide. I would add that some domestic laws that may facilitate the assisted suicide were not made in countries with an active Christianity influence, for instance, in Switzerland, where its Criminal Code enables the assisted suicide or euthanasia<sup>400</sup>. This very question comes to be more vexed regarding that has happened for a considerable length of time to abolish the death penalty.

Hence, the very question of assisted suicide and euthanasia, for whom supported and even for the ECHR has been showing to be "a leap in the dark"<sup>401</sup>. Insofar as such case does not concern an automation process, a moment (*Augenblick*) which of law would be a pure imperative. Dreyfus in his critic against Derrida affirmed that situations that have not being regulated by a rule could not be regarded as arbitrary. Dreyfus seems to be driven by

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<sup>398</sup> Jacques Derrida, *The Death Penalty Vol. I* (Chicago/London: The University of Chicago Press, 2009), p.72.

<sup>399</sup> *Ibidem*, p.81.

<sup>400</sup> Article 15 from Swiss Criminal Code.

<sup>401</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 228-98.

Dworkin on this matter stating that the decision would elaborate from the judge's individual experience and further legitimacy by the majority<sup>402</sup>.

#### IV.5.2.1 Artificial Techniques

Returning to the case of assisted suicide and its fuzzy logic, if we follow Derrida's insight, it would be correct to affirm that there was no decision at all. Although the ECHR on those cases were attempting to invite the law, the high degree of mechanization of this court is struggling to keep itself according to the legal frame. Albeit, confirming the possibility of an impossible decision, regarding that allowing an assisted suicide is an exception made by the ECHR, it could not be fit in the second aporia from *Force de Loi*, in which Derrida claims that a decision must grieve by the undecidability. At this stake, calculations, techniques, and presence are evident, even though it is haunted by a ghost, the mechanical and performative of law dominates the decisions<sup>403</sup>.

In my opinion, justice according to Derrida cannot be performed in our actual condition. Due to the invasion of a rhetoric of technicalization and the unstoppable grammatical from law's system, which exposes a narrative of inconsistency. The canonic project of courts like ECHR or Inter-American Court of Human Rights reproduces nothing else than the same rhetoric of a Law School or *Staatslehre*. These tribunals were not created to interrupt or to introduce a new form of responsibility or even an apparent responsibility.

By proposing a fragile concept as "margin of appreciation" or techniques as "balance" or "*Abwägung*" without an analytical and elucidative reasoning for institutionalizing those elements. As we saw in the first chapter, the "margin of appreciation" flaws to detail its inception and its meaning. Further, plenty of studies have demonstrated the vulnerability of "balance" and how it could impact the rule of law. However such technique is still preponderant in most Western courts.

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<sup>402</sup> Hubert L. Dreyfus, "Could Anything Be More Intelligible Than Everyday Intelligibility? Reinterpreting Division I of 'Being and Time' in the Light of Division II", in *Approaching Heidegger*, ed. James E. Faulconer and Mark A. Wrathall (Cambridge: Cambridge University Press, 2000), p. 689.

<sup>403</sup> Geoffrey Bennington, *Scatter 1 The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p. 159. "The First aporia, entitled by Derrida 'the *epochè* of the rule', goes as follows: we can only meaningfully talk about a just decision where there has in fact been a decision, and for there to have a decision, there must have been something other than a mechanical or programmable outcome. This much we have seen Dreyfus concede. On the other hand (this is what Dreyfus seems not to have grasped when he claims baldly that Derrida is 'without an understanding of skillful coping'), the freedom that must be in play an action or a decision to be just (or to be a candidate to be judged as just) cannot be pure caprice or arbitrariness (cannot just be 'any' 'leap in the dark') and must nonetheless still have a relation to the law and thereby to a certain calculability.

What could be marked as a fascinating aspect of law is that almost no one gets at the bottom of its techniques and elements. I am not claiming that Derrida is fully right in his efforts to undercover the law's narrative in the West, notwithstanding he has raised plenty of fundamental questions about what a decision could really be and its connection to justice. His famous quotation "the instant of the decision is a madness"<sup>404</sup> is a struggle to insert some doubts into an adamant conviction, albeit Derrida has never detailed what he meant by this quotation.

Geoffrey Bennington connected the dots into a view to shedding some light on Derrida's reference<sup>405</sup>. According to Bennington, the three aporias elaborated by Derrida are related to Kierkegaard's concept of the moment. For Derrida, the moment demands divisibility and the impossibility of decision; consequently, it raises the question of what decision is. Decisions always come through a paradox: after deciding what is not a decision, or what cannot be a decision, the undecidable may be set. A true decision is an impossible decision, as Kierkegaard has pointed out. It is because of a question of knowledge when it is not possible to determine its outcomes. A calculation performed by a judge is not a real decision, and it would be an inference<sup>406</sup>.

Derrida has never made clear what he meant by "madness" (*folie*), though he used to claim that madness and moment are linked to the decision. All the same, for Kierkegaard, as believed by Bennington, the moment of madness is.

to bring out its specifically and stubbornly paradoxical nature: as opposed to the Socratic account of learning (specially in the 'Meno'), which famously resolves the paradox of learning (that one cannot seek what one knows because one already knows it and one cannot explore what one does not know because one does not know what one is soliciting) by the concept of anamnesis, in which the 'occasion' of learning is different, Kierkegaard proposes what he calls a "thought-project" in which that prompting would become significant, indeed 'decisive', because in (sic) that moment the eternal would come into existence in the temporal.<sup>407</sup>

"Moment" and "madness" are key terms to grasp Derrida's account of justice. Nonetheless, Bennington has a slight impression that those denominations were no so well seized by Derrida through his particular reading of Kierkegaard's work. First, it would exist a problem of translation. In the original, "madness" should have to be translated as

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<sup>404</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In: Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 228-98. See also Hauke Brunkhorst, "Solidarität als existierende Gerechtigkeit der Demokratie", in: Axel Tschentscher/ Caroline Lehner/ Matthias Mahlmann/ Anne Kühler, Ed.: *Soziale Gerechtigkeit heute* (Kongress der Schweizerischen Vereinigung für rechts- und Sozialphilosophie, 7. Juni 2013, Universität Bern), ARSP Beiheft 141, Stuttgart/ Sinzheim: Steiner/ Nomos 2015, pp. 15-28.

<sup>405</sup> Geoffrey Bennington, *Scatter 1. The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p.166-86.

<sup>406</sup> Ibidem, p,167-8.

<sup>407</sup> Ibidem, p.171.

"foolish"<sup>408</sup>. Second, Kierkegaard was reversing the Socratic view of learning set by the relation between teacher and learner. The moment of the teacher and the moment of the apprentice would be two distinct moments. The teacher would have the task to recreate the conditions of truth which once were furnished by God. Further, this moment (*Augenblick*) of revelation would be bound to a "madness" or "foolish."

Bennington states that the madness of decision was withdrawn from Kierkegaard, who wrote about the foolish moment that Climacus addressed words to St. Paul which were based on Galatians 4:4<sup>409</sup>. So to speak, the moment of the teacher would recreate the conditions once provided by God whereby the guide also realizes that the teacher does not hold the truth because he must recreate the conditions once furnished by God. For that, the learner must be stand to a break (*Bruch*) with the present and the past, which consequently is a moment of madness<sup>410</sup>. This would leave to a paradox. Rather, it is a paradox about ferreting out something that has not yet been found out (*Empfinden*)<sup>411</sup>.

God would be something that the reason could not grasp or unlikely to determine what it is. The teacher thus is condemned to flunk by putting into words what aesthetically would be god and link it to its existence<sup>412</sup>. The outcome of this demonstration would entail the rising of a "frontier of experience of the unknown"<sup>413</sup>. Moreover, this paradox results in an offense or affront<sup>414</sup>. The offense would be the misreading of the moment, and every offense is suffering. The word offense comes from the Greek *skandalon*<sup>415</sup>. So here we are with the understanding offered or affronted by the paradox of the moment. "This is essentially the moment as seen from the Socratic position with which we began, which has to consider the moment as the mere inessential and vanishing occasion in the dialectical account of teaching and learning as essentially anamnesia"<sup>416</sup>. On this account, whether the moment is not essential and the learner is on his own, the moment is a feature as foolish, "is foolish," and not a moment of foolishness.

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<sup>408</sup> Ibidem, p.172.

<sup>409</sup> Ibidem, p. 172. Galatians 4:4 (King James Version), "But when the fullness of the time came, God sent forth his Son, made of a woman, made under the law, To redeem them that were under the law, that we might receive the adoption of sons."

<sup>410</sup> Ibidem, p.172.

<sup>411</sup> Ibidem, p.173. For Climacus it would be learning what God is.

<sup>412</sup> Ibidem, p.173.

<sup>413</sup> Ibidem, p.173-4.

<sup>414</sup> Ibidem, p.174.

<sup>415</sup> Ibidem, p. 175. See also Soren Kierkegaard, *Philosophical Fragments* (New Jersey: Princeton University Press, 1985), p.50.

<sup>416</sup> Ibidem, p.175.

So among the fact rather differentiated and refined vocabulary of madness, lunacy, craziness, and folly that we have encountered in this first half or so of the 'Philosophical Fragments', it seems that this instance cannot simply be grasped as readily or straightforwardly as we might have thought with the word 'folie', still with the term 'madness', and that complex organization of the text does not at all invite the reader to adopt it as 'truth' about the moment, still less to make of it a slogan be repeated as Kierkegaard's true insight into what he calls 'the moment of decision'<sup>417</sup>.

As Bennington wrote this passage from Kierkegaard is associated with some teachings from St. Paul in which the word foolish has appear not as a depreciative adjective, but it is addressed to whoever is petitioning under the cross and to advise that God has chosen the foolish, and those will be saved<sup>418</sup>. Who are called wise aren't those who do not know about God's existence or don't accept it, according to Paul? Bennington suggests that it represents an inversion of Greek's values due to the election of the foolish as the wise<sup>419</sup>.

Thereof, while reading Derrida's famous quote, we should be aware of the connection of Climacus and Corinthians text, regarding its translation and the complex context in which St. Paul introduces the word foolish<sup>420</sup>. Indeed, it is more likely that St. Paul was referring to them as foolish not as ignorant or naïve, but as people who were not sheer submitted to the will of the Emperor or the wise sacerdotal from Israel. It could have a pitch of irony, perhaps. Notwithstanding, it is utter complex to grasp what St. Paul was intending to address through a translation; even if we could read it in the original, we could probably not understand what his words meant at that time, nor Derrida could have fully grasped it.

Also, we cannot fail to remember that "folie" in Derrida's work is connected to a particular moment, the moment of decision. This moment shall not be read as a "mere occasion," which it would follow a Socratic perspective<sup>421</sup>. As Bennington skillfully links the dots in Derrida's oeuvre, this "moment" has also appeared in *Politique de l'Amitié*, in which Derrida states that a decision is a break, an interruption; however, it is structured under another decision coming from the other in me. It is unmistakably inspired by Blanchot lessons about the other, specifically the other in me who is writing a book or a text.

The instant of the decision is a moment taken by madness or foolishness, maybe, since it is a moment that is beyond the bounds of possibility to be grasped. To Bennington, it

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<sup>417</sup> Ibidem, p. 176.

<sup>418</sup> Ibidem, p. 177-8. See also Corinthians I and 2:1.

<sup>419</sup> Ibidem, p. 178-9.

<sup>420</sup> Ibidem, p. 179. "Confirming what we were saying earlier about translation in this semantic zone, 'moria', the only occurrences of which in the Greek New Testament are in fact to be found here in Corinthians I, is systematically translated, as we have seen, by 'foolishness' in English, by 'Torheit' in German (Luther included), but in Romance languages, by 'folie' in French (be it by Martin, Bovet Bonnet, Crampon, or Segond), by 'locura' in Spanish, and by 'pazzia' in Italian. And by Darskab, the same word Climacus uses in the phrase we have been turning around".

<sup>421</sup> Ibidem, p. 182.

would also be a moment of bestiality. Perhaps, he is connecting it with Derrida's last seminar, which I have spoken earlier, *The Beast & the Sovereign*. It is a position that only could be corrected whether we have taken Heidegger's concept of solitude (*Einsamengkeit*) as being the truth, which Derrida is opposes to<sup>422</sup>.

All the same, as we are going to see on the forthcoming topic, there are many dots to be connected in our search to understand the nature of the politics of technology. Although Bennington<sup>423</sup> affirms that Derrida's quote could fit in any sort of decision, not only in legal decisions provided by the Supreme Court, many regular decisions lack authority and a mystical element<sup>424</sup>.

#### **IV.6. Human and Fundamental Rights and the neutral - The Demand for an Authority**

"The Madness of the Day" is concerned with inverting the natural order of things, or how our life has been organized without our intervention. It is just a matter of a passive assent, which is deprived of inquiring. Even so, where is the authority's source? I am not willing to providing an investigation on authority as Avital Ronell elaborated, linking childhood with a rattle relationship with parents, culminating as "loser" adults that heavily invested their outsized feeling of failure in a project of political power and manipulation through speeches and actions, as for instance in cases such as George W. Bush or Mohammed Atta<sup>425</sup>. Still, I am quite eager to being fired by such startling experimental book to connect her valuable insights to shed some light over such delicate and rather labyrinthine topic.

Kojève efforts to explain the meaning of authority briefly elucidates a sheer difficulty to define and to frame the semantic of authority. Although Kojève<sup>426</sup> is well known for being inspired by Hegel and his slave/master analysis, Kojève reaches the conclusion that Hegel wrote a general (*allgemeine*) theory of authority. For Kojève, it would be relevant to detail different types of authority<sup>427</sup>.

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<sup>422</sup>Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p. 4-43.

<sup>423</sup> Geoffrey Bennington, *Scatter I. The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p.185.

<sup>424</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 228-98.

<sup>425</sup> Avital Ronnel, *Loser Son: Politics and Authority* (Chicago: Illinois University Press, 2013), p. 106-30.

<sup>426</sup> Alexandre Kojève, *The Notion of Authority (A brief Representation)*, (London: Verso, 2014 p.16-28. Alexandre Kojève, *Introduction to the Reading of Hegel: Lectures on the Phenomenology of Spirit* (Cornell: Cornell University Press, 1980), p. 31-70.

<sup>427</sup> Ibidem, p. 16.

Briefly speaking, for Hegel the relation of authority summons in an allegorical relation between a master, which overcame his animalistic condition of fearing death, while the slaver flunks out his trial. As Kojève explains, "Mastery arises from the Struggle to death of 'recognition' (*Anerkennung*)"<sup>428</sup>. So to speak, Hegel's idea of authority is a quite strong example of how a word which is performative, however, it is frequently used to make statements, which, indeed has more allegorical images of authority than a strict concept.

Authority is a crucial element of the law. And law's authority inherently depends on judge's authority. Two different kinds of authority under the same proper name. Kojève assigns judge's authority to a platonic idea of authority, or the only possible reason to explain the source of this kind of authority<sup>429</sup>. Albeit, Kojève adds that the pure concept of a judge's authority also relies on an authorization from the State, because without this authorized and legitimate force the judge couldn't perform his authority, I am inclined to develop further such assumption.

I am acting upon Kafka's oeuvre, confronting any metaphysical ideas or frameworks, which bear upon our consciousness (*Bewusstesein*), and extracting the unwritten protocols of authority, or like Benjamin's startling insight on Kafka pointed out, he was able to bring out "pre-historical forces" to his constellations. It bears authority from fathers, judges, offices and departments, servants, and ushers.

We must recall Derrida's teaching on Hobbes, particularly the passage that Hobbes points out that sovereignty must resemble a family's organization<sup>430</sup>. On the next topic, I will introduce Kafka's translation briefly on authority. It is an appropriate frame of reference that I've been inspired by, and I regarded it a phenomenological illustration of authority. I completely believe that we have been misleading the notion of authority since we began to look for its reason - a scientific one -, instead of appropriating the broad repertoire of art.

#### **IV.6.2 - The Absolute Power of Autonomy**

Talking about authority is talking about memories, intrinsically I mean. Trusting our own memory and believing in a memory laid behind the written history of a nation or of a

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<sup>428</sup> Ibidem, p.17.

<sup>429</sup> Ibidem, p.23-25. "Indeed, the Authority of the Judge cannot be explained other than by Plato's theory. And it is obvious that the principle of Justice or Equity also belongs with (sic) the types of Authority we have listed as variants of the 'pure' type of the Authority of the Judge".

<sup>430</sup>Jacques Derrida, *The Beast & the Sovereign. Vol. I* (Chicago: Chicago University Press, 2009), p.56-62.

constitution has driven moderns and modernity upon a promise of a better future. In spite of such regards, day in, day out, memory widely reproduces aberrations, as Paul de Man would state<sup>431</sup>.

Kafka cosmological writings can interrupt our uncrushable belief in the world's order. Kafka had the exceptional skill to use his own personal experience and translated it to a general feeling that things happen according to Kafka's narrative.

### **VI.6.2.1 The Dwelling of a Friend**

The communitarian and legal share a representation based on knowing the known. To know, however, is to perform a calculation and act as according to protocols. It is still a seasoning based on the "I". It results in some separations, for instance, how law has been used to say who is the friend and who is the enemy.

#### **IV.6.2.1.1 - "*Oh my friends, there is no friends*"**

Friend and enemy, a friend of the other, an enemy of the other, all in all, justice and the right of the community have to be calculated. Let's do not forget the bible's imperative, over and over repeated, "you shall love your neighbor as you love yourself." How to calculate it? How to be far from the other, that is not an enemy but is not a friend, and at the same time, it is uncanny?

As we have already analyzed, the friend/enemy relationship as suggested by Schmitt could only be elaborated in theoretical terms, even so, it is quite difficult to project this distinction nowadays. Outsiders are everywhere. Almost two hundred centuries ago, Karl Marx had already demonstrated the chances to human and fundamental rights to flunk out during its trials. Powered up by a smooth legitimacy, my right, first of all, is to have the conscious that I have a right. A right created to keep off any intervention on my affairs. Mainly concerning the sovereign and its beast's side, calculations are only possible to be executed with existential numbers, and any autonomy or scientific elucidation didn't have the language to transform the bestiality of the neighbor in elements. Preoccupied with the

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<sup>431</sup> Paul de Man, *Allegories of Reading: Figural Language in Rousseau, Nietzsche, Rilke and Proust* (New Haven: Yale University Press, 1982), p. 3-24.

head of the king, even after its decapitation, the ghosts of kingship scared the revolutionaries to death. Thus, in a nutshell, freedom, and humanity were inscribed into a set of strings to get hold of the illusion of a right, which was already in mind. Within our mind was a shamle idea of rights. Our mind was the house of the right.

Following written convention, right was mutate to law. My law to be claimed before a judge. Without a beast, the vacancy had to replaced by the perverse logic of the "unity of our mind." Afterwards, science came up to elucidate our years on faith, miracles and theology. Strangely, our rights to combat the spirit of a decapitated head, one of the "king's body," what became a rational right turns back against my other.

Be as that it may, why should I not have a right against my friend? If I have a right to him or her, are they really my friends? Why friendship matters to law and to a community<sup>432</sup>? According to Derrida, we shall not only ask "who" are our friends, but "what" are friends<sup>433</sup>. What is essential to friendship and what would be its connection with the social system?

Wrestling Leviathan's sovereignty, which still has to remain in the form of territorial states and a chess board, which Benjamin drew as an ugly dwarf called "theology"<sup>434</sup> - guided by the "historical-materialism," the friend (or neighbor), theories are called up to bear out the triumph of freedom over bestial and mechanical sovereignty. In spite of that, the new age does not eliminate much of the political aspect of human bestiality. Roughly speaking, right does not represent a semiotic structure of a historical achievement that comes together with society and with our very mind.

As Santner points out, the flesh and its "surplus" brought about a new form of adaptation in life. On one hand, it came about to vanish the submission to theological-political institutions, carrying off the conjecture of systemic evolution. On the antithesis, the lack or absence of the "king's bodies", is immediately causative to transfer the symbolic authority of the sovereign to our own body, coming down to a dimension of society where the "other' may be subject to my anxieties and to put myself into a permanent position of conflict, which is radically different from the cornerstone that was produced to implement

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<sup>432</sup> Jacques Derrida, *The Politics of Friendship* (London/New York: Verso, 2005), p.9.

<sup>433</sup> Ibidem, p.8.

<sup>434</sup>Walter Benjamin, "On the Concept of History" in. Walter Benjamin, *Selected Writings Vol. 4, 1913-1926* (Cambridge/London: Belknap Press, 2006), p.

human and fundamental rights. From now, the other or my neighbor is the beast, and so am I.

An intermediation through the institution and set of rules based on reason was elaborated to deal with, and modern society testifies the dawn of this new rational institutions and agencies. What would be the purpose of an intermediation? Derrida's relevant insight suggests that the real and perfect idea of friendship falls flat through a reality-test due to "The disposition, the aptitude, even the wish - everything that makes friendship possible and prepares it - does not suffice for friendship, for friendship 'in act'"<sup>435</sup>.

But in fact, it was illustrated on the matter of Schmittian's terminology, the loss of a friend or even the loss of an enemy. In the very essence of democracy, being the people sovereign, how would be the chances of democracy to bring off its imperatives and postulation, if a neighbor is neither a friend nor an enemy? Brushing up Schmitt, the loss of the enemy would be the wind up of the political order. Western society had to summon the figure of the enemy to be able to set off the political.

Tracking Nietzschean's notion of friendship, Derrida raises the following assertion: "Perhaps to his political enemies with whom he would still share that love of war outside the horizon of which, according to Schmitt, there is no state. But perhaps he would also be addressing the enemies of the political, the ultimate enemies, the worst of them all, enemies worse than enemies"<sup>436</sup>.

Therefore, the public enemy, the enemy *par excellence*, the mortal enemy who will battle against the state. Schmitt's efforts to rationalize the concept of the enemy, as a pure definition, that could not be meddled by an individual or private interpretation. Employing the same conventional methodology used for setting the concept of sovereignty, analytical and synthetic, Schmitt aspires for "the rigorous determination of the enemy"<sup>437</sup>.

In this context, I would emphasize Derrida's dazzling about the sharp opposition between the nouns inside the public sphere. In the public domain, the antonym to friendship is hostility and enmity. Derrida highlights the notorious difficult for Schmitt to keep his argument untouchable due to his lack of Greek skills. I am not going to be attached to this question. Summarizing, the distinctions chosen by Schmitt to elaborate his concept of

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<sup>435</sup> Jacques Derrida, *The Politics of Friendship* (London/New York: Verso, 2005), p.17.

<sup>436</sup> *Ibidem*, p.84.

<sup>437</sup> *Ibidem*, p.87.

political are "ideal entities"<sup>438</sup>, and it would be impracticable to transform them into "empirical language," on the authority of Derrida's understanding.

In congruence with Plato's notion of friend/enemy, Derrida points out a relevant distinction, over and over forgotten in Schmitt's book, that is related to *pólemos* and *stásis*<sup>439</sup>. While the first is assigned to the disagreement among Greeks; the later is linked up to contest between foreigners or with foreigners. "*The Greek génos (lineage, race, family, people, etc.) is united by kinship and by original community (oikeion kai suggenés). On these two accounts, it is the foreigner to the barbarian génos (tô de barbaric otheiôn the kai allótrion)*"<sup>440</sup>.

As one might say, a civil war happens only between residents of the same brood. Nonetheless, a sheer conciliation is more reasonable to happen between them. The modern example would be the American Civil War, Russian Civil War, Spanish Civil War<sup>441</sup>, just to remind some of those events. The friendship between people of same race or lineage would be less complicated to be reestablished <sup>442</sup>.

By investigating an extract from "Menexenus" on which Plato straightly makes reference to the very question of the unit boundary of the Greeks, he emphatically states three conditions (*voraussetzung*) to be fulfilled to reach such unity: "necessity of equality"; fraternity; democracy<sup>443</sup>. By "necessity of equality," it means, primary, to cast out for an underlining that would be transmitted in the form of law. We are talking, especially, by an equality which gives standards to a group to be equal, to have the privilege of being equal<sup>444</sup>.

Rather, the "necessity" asserts "obligation" to filiation, and further, it also imposes a "necessity" to protect the brotherhood, the consanguinity, the being abreast the other, which can jeopardize the natural order of the community of equals. The obligation of filiation, as Derrida states, it is related to natural law. Otherwise, the continuity of a lineage could not be

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<sup>438</sup> Ibidem, p.91.

<sup>439</sup> Ibidem, p.91-3.

<sup>440</sup> Ibidem, p. 91.

<sup>441</sup> A lot of studies claim that Bosnian War was a civil war. In this case, only territorial aspect has been taking on the account.

<sup>442</sup> Jacques Derrida, *The Politics of Friendship* (London/New York: Verso, 2005), p.92 again. "But even when Greeks fight and wage war among themselves, we should say that they are no less naturally friends (*phúsei philous einai*). Sickness is what then emerges, an equally natural sickness, an evil naturally affecting nature. Is divided, separate from itself. When such an event occurs, one must speak of a pathology of the community".

<sup>443</sup> Ibidem, p.99-106.

<sup>444</sup> Ibidem, p.99. "Everything called democracy here (or aristo-democracy) founds the social bond, the community, the equality, the friendship of brothers, 'identification qua fraternization', and so forth, in the link between this isonomic and the isogonic tie, the natural bond between 'nómos' and 'phúsis', if you like, the bond between the political and the autochthonous consanguinity".

kept. This question arises due to the double moment brought up by the very present of the foreigner, the outsider. Derrida reinterpreting Benveniste<sup>445</sup> in a crucial insight about hospitality<sup>446</sup>, says, roughly speaking, that although the foreigner demands hospitality, and it involves some rules of hospitality, there is also the rule of the country which can set the outsider into an eminent hazard by not seizing the rules and for not speaking an appropriate language, chiefly the legal language.

On "fraternity" it would be a duty to keep the memory of the dead alive, particularly when the dead come from a war against barbarians. After a civil war, in a case of sharp sense of fraternity, the reconciliation would be rather uncomplicated. Besides, the memory of the dead one maintains their specters. It is necessary to speak that this memory shall haunt the lives, jogging them about the sacrifice made by the dead to preserve the "people"<sup>447</sup>.

The memory of their dead - their fathers of noble birth - recalls nothing less than their truth, their truth 'qua' political truth. This memory inaugurates as much as it recalls or propagates the truth. The obligatory constraint of this bond of memory forms the condition of their political freedom. It is the element of their freedom, the sense of their world as the truth of their freedom. It is their freedom - indeed, for them, the only imaginable freedom. Truth, freedom, necessity, and equality come together in this politics of fraternity.<sup>448</sup>

Last but not least, the "name of 'democracy'"<sup>449</sup> is associated with a number which has to approve the regime, even if this amount is composed only of upper classes. Still, it is the considerable number of friends which differentiates democracy from aristocracy<sup>450</sup>. Further, what has mostly puzzled Derrida, exceeding the numbers that define democracy, is the relation of an old name ("democracy") with the present. On the one hand, Schmitt manifests his particular idea of politics by bringing back Platonic concepts to reconstruct such idea in a new context shadowed by a humanitarian perspective. In such world, Schmitt has claimed, the grave peril of "depoliticization" put the State in a potential jeopardy. On the other hand, "democracy," as laid claim for Derrida, imposes a limit to "deconstruction" ("Desonstruktion")<sup>451</sup>. The name which is very aroused by a rhetorical and performative aspect, utterly bounding every sort of narrative, even theological. Being against democracy is being against everything, acting as a rogue ("Rogue State"). In the name of democracy, the outsider, the foreigner, the neighbor, can be turned into an enemy, and the laws of exception can be enforced against them. Of course, this would create an

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<sup>445</sup> Émile Benvenisti, *Dictionary of Indo-European Concepts and Society* (Chicago: HAU Books, 2016), p. 61-74.

<sup>446</sup> Jacques Derrida, *Of Hospitality. Anne Dufourmantelle Invites Jacques Derrida to Respond*, (Stanford: Stanford University Press, 2000), p.15-27.

<sup>447</sup>Jacques Derrida, *The Politics of Friendship* (London/New York: Verso, 2005), p.100.

<sup>448</sup> Ibidem.

<sup>449</sup> Ibidem, p.101.

<sup>450</sup> Ibidem.

<sup>451</sup> Ibidem, p.105-6.

extreme situation. Strictly speaking on a politics of hospitality in a cosmopolitan world, within a community, the vague and ancient name can be used to justify any tool to control it, as for instances, "margin of appreciation," "solange reverse," "balance," and so forth.

## CHAPTER V - "WE WILL DO AND WE WILL HEAR" [NA' ASEH VE'NISHMA] (EXODUS 24:7)

In "The Temptation of Temptation," Levinas introduces his beliefs about the way of the West and the linchpin to turn the Western's condition into a worldly experience of good instead of waiting for a transcendental answer or idea. The Talmudic tradition points out that only a life given to the lines that remain behind the Torah can be provided the necessary lessons to keep on track and not drop off into temptation.

Levinas claims that the temptation stamps the Western condition. "The temptation of temptation may well describe the condition of Western man. In the first place, it describes his moral attitudes. He is for an open life, eager to try everything, to experience everything (...) What is tempting is this purity in the midst of total compromise or this compromise which leaves your pure. Or, if you wish, the temptation of temptation is the temptation of knowledge"<sup>452</sup>.

All the same, good and evil cannot be torn apart, and knowledge, much more than action, a constant hazard due to its peculiarity of being engaged with the truth. Nowadays, the truth demands knowledge, where superstition and mysticism have no legitimacy<sup>453</sup>. As I have mentioned in the previous chapter, knowledge and truth come across with the question of invention and who owns the legitimacy to drive and point out the protocols and the form that an idea or narrative is endowed with the truth.

West Society calls for a narrative of knowledge before the act takes place or even being able to indwell: "Law and justice were hewing since the age of theological's glosses<sup>454</sup>. Roughly speaking, the threshold of power is elaborated on to preserve a transcendental aspect of knowledge before the action comes to carries out the prior knowledge. Levina's remarks indicate that any act prior to experience would be mostly

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<sup>452</sup>Emmanuel Levinas, "The Temptation of temptation," in. *Nine Talmudic Reading*. Levinas, Emmanuel (Bloomington: Indiana University Press, 1994), p.32-3

<sup>453</sup> Ibidem, p. 35. See also Franz Rosenzweig, *The Star of Redemption* (Madison: University of Wisconsin Press, 2005), p. 18-51. See also Eric Santer, "Miracles Happen: Benjamin, Rosenzweig, Freud, and the Matter of Neighbor". In. Kenneth Reinhard; Eric Santner; Slavoj Zizek, *The Neighbor - Three Inquiries in Political Theology* (Chicago/London: Chicago University Press, 2005), 100. Avital Ronell, *The Test Drive* (Urbana/Chicago: University of Illinois Press, 2005), p.6-21. See also Hauke Brunkhorst, "Solidarität als existierende Gerechtigkeit der Demokratie", in: Axel Tschentscher/ Caroline Lehner/ Matthias Mahlmann/ Anne Kühler, Ed.: *Soziale Gerechtigkeit heute (Kongress der Schweizerischen Vereinigung für rechts- und Sozialphilosophie, 7. Juni 2013, Universität Bern)*, ARSP Beiheft 141, Stuttgart/ Sinzheim: Steiner/ Nomos 2015, pp. 15-28.

<sup>454</sup> Ari Solon, *Os Caminhos da Filosofia e da Ciência do Direito: Conexão Alemã no devir da Justiça* (Curitiba: Editora Prisma, 2015), p.63-4.

naïve, "Any act not preceded by knowledge is considered in an unfavorable light: it is naive. Only philosophy takes away naivete. Nothing else seems to take philosophy's place here. Can one oppose to it the spontaneity whose innocence it is called upon to remove?<sup>455</sup>".

Even Niklas Luhmann<sup>456</sup>, who claims that the *autopoiesis* has moved the misleading from the Western tradition away, works out in a self-reflexive thought that can only be accessed by an observer that is endowed with knowledge, particularly a scientific-technological knowledge. Orientation (*orientieren*) through a normative expectation (*normative Erwartung*) would be an operation performed by the Law's System<sup>457</sup>.

Be that as it may, Western justice is only represented by violence. The transcendental aspect of law entails a contingency feature about justice. So to speak, on the one hand, justice is an allegory of violence, as represented by Michael Kohlhaas or the Greek myth of Niobe<sup>458</sup>. There is no representation of justice as a pure act of friendship or hospitality<sup>459</sup>. Western justice is bloody, and comes together with retaliation and avenger, and without any sight of peace before the crucial moment of justice, the narrative begins with an action against a law or moral, and ends up with tragedy and devastation. Setting out is always violent. Hence, Levinas has explained his impressions about the choice that the Jewish people had to make "at the foot of the mountain"<sup>460</sup>; you accept the Torah or die; it would be the Revelation brought to the people of Israel. "Reason would rest either on violence or on a mode of consent that cannot be reduced to the alternative liberty-violence and whose betrayal would be threatened by violence"<sup>461</sup>.

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<sup>455</sup> Emmanuel Levinas, "The Temptation of temptation," in. *Nine Talmudic Reading*. Levinas, Emmanuel (Bloomington: Indiana University Press, 1994), p.35. See also Emmanuel Levinas, *Totality and Infinity - An Essay on Exteriority* (Pittsburg: Duquesne, 1991), p. 82-3; "The famous suspension of action that is said to make theory possible depends on a reserve of freedom, which does not abandon itself to its drives, to its impulsive movements, and keeps its distances. Theory, in which truth arises, is the attitude of a being that distrusts itself. Knowing becomes knowing of a fact only if it is at the same time critical, if it puts itself into question, goes back beyond its origin - in an unnatural moment to seek higher than one's origin, a movement which evinces or describes a created freedom".

<sup>456</sup> Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main: Surhkamp, 1995), p. 98-140.

<sup>457</sup> *Ibidem.*, p. 202-34.

<sup>458</sup> Walter Benjamin, "Critique of Violence," in. Walter Benjamin, *Selected Writings Vol. 1, 1913-1926* (Cambridge/London: Belknap Press, 1996a), p.239-42.

<sup>459</sup> Jacques Derrida, *Of Hospitality. Anne Dufourmantelle Invites Jacques Derrida to Respond*, (Stanford: Stanford University Press, 2000), Jacques Derrida, *The Politics of Friendship* (London/New York: Verso, 2005), p. 38-64

<sup>460</sup> Emmanuel Levinas, "The Temptation of temptation," in. *Nine Talmudic Reading*. Levinas, Emmanuel (Bloomington: Indiana University Press, 1994), p.37.

<sup>461</sup> *Ibidem.*, p. 35. See on p. 36, "Would the choice between truth and death be a reference to education, the process by which the mind receives training under the master's rod to rise toward comprehension? That the mind needs training suggests the very mystery of violence's anteriority to freedom, suggests the possibility of an the to free examination and prior to temptation. This adherence cannot be considered naive, for naivete is an unawareness of reason in a world dominated by reason. It lags behind. It does not condition."

On the other hand, the law gives us the right to seek for an institutionalized justice, a justice which that has lost its bonds with its inception, yet it has been acquiring the corollary of technique and science along the centuries. However, it still is the right of the being against another being. Therefore, the circle of justice-violence never stops. I could affirm that the proceduralization of the modern law is to bring up the whole idea of justice as violence to a constellation of the State's legitimacy. It is not it that Derrida is trying to admonish us about?<sup>462</sup> I am going to share my insights into Derrida's thoughts on justice later.

## **V.1 - Justice and Temptation**

It is relevant to hallmark that temptation and justice have a tie-in that moves toward the mimetic experience and trials of worldly ordeals. Temptation " is the temptation of an experience: the lure of a life rich with possibility and guided by the assumption that all wisdom is drawn from the trials of history"<sup>463</sup>. For this reason, justice can never score, because in the West moves toward representation<sup>464</sup>. If we could write an autobiography of justice and its relation to law and rights, a sheer estrangement would be the end. All the same, law still posses the prerogative of claiming to bring justice after a conflict. Yet, religion corresponds to justice after the Doomsday. The Westerners need justice until Doomsday.

Justice was theorized through representation of a violent ending. It is the single against the single. Only one must be gifted by justice. So to speak, community, civil society, cosmopolitan culture, and networks move toward collisions and clashes among being. Under those circumstances, the ethical frame that conditions us under certain imperatives comes up with the following question: Must our sovereignty be wrapped due to our bestiality, or did the violent beginning leave us with another choice, so that now, a turning in our ethical responsibility to the other and our sense of justice could bring a new epoch concerning our relation with the other (autrui)?

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<sup>462</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 228-98.

<sup>463</sup> Christopher Fynsk, *Last Steps - Maurice Blanchot's Exilic Writing* (New York: Fordham University Press, 2013), p. 57-75. p. 18.

<sup>464</sup> Avital Ronell, *The Test Drive* (Urbana/Chicago: University of Illinois Press, 2005), p.116. Philippe Lacoue-Labarthe, *Typography*, p.139-207.

We have to keep working out this question that was raised in the last chapter. Still and all, the question of justice and writing that bears upon with freedom and with the other must be an usher in our debate. To conclude this brief introduction, my aim is to tie up the problem of the technicalization of human and fundamental rights with the question of justice, bearing on the other, *autrui*, the *Nebensmesch*.

### V.1.2. - The *Autrui*

On his lecture upon "the Other," called "Toward the Other," Levinas begins by introducing a text from the Tractate Yoma, p.85-a85b. At the very first paragraph states Mishna: "The transgressions of man toward God are forgiven him by Day of Atonement; the transgressions against other people are not forgiven him by the Day of Atonement if he has not first appeased the other person"<sup>465</sup>.

As Levinas further affirms, it is the Talmudic text about forgiveness. God is the absolute other that might forgive me for my mistakes toward him. On the other hand, my neighbor, not so absolute other as God, might not forgive me by the Day of Atonement if he does not take my apologies<sup>466</sup>. Further, any offense toward a neighbor is an offense toward God.

The solution would seem to be very simple if within the Bible, there was not a contradiction such as the text from 1 Samuel 2: "And Hannah prayed, and said, My heart rejoiceth in the LORD, mine horn is exalted in the LORD: my mouth is enlarged over mine enemies; because I rejoice in thy salvation"<sup>467</sup>. According to with the explanation of this verse, God may destroy the enemies of whom has being guided by God. However in Yoma 87a enounces that "Elohim will reconcile"<sup>468</sup>. Elohim is often translated as judge, and for many, it does not stand for God. "Elohim in a general sense that means authority, power, and consequently, very often judge"<sup>469</sup>. Thus, according to Levinas's insight, that would be God's demand for reconciliation and a need for men to create a tribunal to seek reconciliation and justice.

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<sup>465</sup> Emmanuel Levinas, "Toward the Other"; in. Emmanuel Levinas, *Nine Talmudic Readings* (Bloomington: Indiana University Press, 1990), p.12.

<sup>466</sup> *Ibidem*, p.16.

<sup>467</sup> 1 Samuel 2, King James Bible.

<sup>468</sup> Emmanuel Levinas, "Toward the Other"; in. Emmanuel Levinas, *Nine Talmudic Readings* (Bloomington: Indiana University Press, 1990), p.18.

<sup>469</sup> *Ibidem*, p.18.

Still, it does not yet answer our questions about the *autrui*. In the last chapter, Derrida takes this subject as an invention. Moreover, he believes that only through a fabular dimension will we would be able to grasp what the other is. Naturally, Levinas sustains another concept for other, based on Jewish tradition and over his concept of a face. However, I will not hastily introduce Levinas's concept. Rather, to get to the bottom of our question, it makes the crucial link between the *autrui* and the puzzle of worldly justice.

Levinas makes it clear through exhibiting a translation of the demands of a judge by opposing the texts from Rabbi Joseph bar Helbe and Gemara. Consequently, it may get even harder to resolve to resolve this knot<sup>470</sup>. One of the possible messages that Levinas ponders that this dilemma has raised is that language is a gift. To get a better feel of it, only through the gift of language it is possible to insult our neighbor because the only language makes us think. Language is the way to think and where the *Dasein* dwells<sup>471</sup>.

On the other hand, a gift is at the same time poisonous. The word "Gift" in German means poison. So to speak, the gift of language it comes contaminated since it bears responsibility<sup>472</sup>. Responsibility toward the other would be the reading from Levinas regarding the idea of justice. We could go further and ask if in the case of mass murders or cases concerning human rights issues, the task of being a judge is to provide some sort of forgiveness to the parties. If so, then we must accept that the duties of being a judge and bringing justice are misplaced nowadays.

Jewish, Christian, and Greek mythology have transited the messages that justice or its idea was not a human invention, but it was given to humanity to keep with a sacred heritage, notwithstanding the interiorization of a worldly communitarian sense and the idea of justice opposing the event, according to Heidegger, or when the *Dasein* came to be the core question for Western society and provoked what Levinas has over and over insisted was the invention of the neutral.

Furthermore, after centuries, it has become impossible to have it so that the reason of the State and spirituality are very well dissociated<sup>473</sup>. As indicated by Levinas, it would be impossible to slip away from the fate of the State. The kingship described in the holy verses

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<sup>470</sup> Ibidem, p.18-9.

<sup>471</sup> Martin Heidegger, *Introduction to Metaphysics* (New Haven: Yale University Press, 2014), p.82-101.

<sup>472</sup> Emmanuel Levinas, "Toward the Other"; in. Emmanuel Levinas, *Nine Talmudic Readings* (Bloomington: Indiana University Press, 1990), p.20-1. See also Jacques Derrida, *The Gift of Death and Literature in Secret* (Chicago/London: University of Chicago Press, 2007b), p.3-36.

<sup>473</sup> Emmanuel Levinas, "The State of Caesar and the State of David," in. Emmanuel Levinas, *Beyond the Verse. Talmudic Readings and Lectures* (London/New York: Continuum, 2007), p.171.

would express a vague notion of state. As to strength, this idea is a possible interpretation of Deuteronomy 17:14-20 and I Samuel 8 must be taken on account<sup>474</sup>. Astoundingly, after giving some consideration over those passages, Levinas raises the question: "But can an absolute law suspended?"<sup>475</sup>. He comes not straightforwardly with an answer, but he seeks to get across that everything that can be taught can be forgotten<sup>476</sup>. Moreover, the consequences of thinking on an exception come from politics, and only metaphysical thinking could be able to calculate an exception<sup>477</sup>.

So to speak, the metaphysical tradition has dropped the biblical and Talmudic lessons out. Otherwise, the essence of the state should be yoked with holy text, as taught by Levinas,

This political world must, therefore, remain related to the ideal world. The Talmudic apologue becomes remarkably suggestive here: King David wages war and rules during the day, and at night, when men are resting, he devotes himself to the Law: a double life to remake the unity of life. The political action of each passing day begins in an eternal midnight and derives from a nocturnal contact with the Absolute<sup>478</sup>.

All the same, the Talmudic does not exist to insist that a state is also a place of the contradictions, where men can be enslaved or can suffer at the hands of others to be set free later. If Levinas's interpretation is correct, those warnings from the Talmud would be addressed to who ignore the political. By doing it, they rely to contribute to those who corrupt the power<sup>479</sup>. However, since the 18th century, the "the imaginary wall of separation" and secularism became part of the rule of law. Formally and theoretically, a division was set up. On the other hand, the aims and problems of the state have remained almost as the same from those described by Levinas. Nevertheless, having been conscious of this formal separation, including justice, does not mean that the aim of the law and state became bold and conspicuous.

On the contrary, together with the formalization of secularism, *Aufklärung* and technological thinking introjected. The figure of the neutral and focus on being, instead of thinking of the other, were stressed in philosophy, law, and other human sciences. Every solution must follow a rational path, which should go beyond any particularism and inclination. Ethics are only possible with metaphysical thinking and restraint regarding the circumstances.

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<sup>474</sup> Ibidem, p.171-2.

<sup>475</sup> Ibidem, p.172.

<sup>476</sup> Ibidem, p. 173.

<sup>477</sup> Ibidem, p.173.

<sup>478</sup> Ibidem, p.175.

<sup>479</sup> Ibidem, p.178.

*Rechtswissenschaft* (Legal Science) found its inception in Ancient Rome<sup>480</sup>. It was its reception that took place in Germany during the 19th century that has shaped what has been called continental law in a vague sense. Although there are still a plenty of questions about it, there is something that we could call *Rechtswissenschaft* and Legal Philosophy, which has been the cornerstone of law's thinking. Moreover, it has framed how the law must be written and taught, roughly speaking, in an adamant sense of inference. Still and all, it was not the manner in which it was thought by the Romans. On that epoch, strictly speaking, the law was conceived as an art of separation (*Scheidekunst*)<sup>481</sup>. To determine what could be law's subject, there was an endeavor to separate law from religion<sup>482</sup>.

### V.1.2.1 - Who is the *autrui II*?

Through the intricate and beautiful pages from *Totality and Infinite*, Levinas affirms that the face-to-face is nothing else than the continuity of my face and not from my "I." This represents an entire turning on Western metaphysics, which cannot adequately distinguish a being from the other without making differences. Moreover, it would express a sheer difference in how we understand responsibility, because in this sense, killing someone else represents not only a personal responsibility, but also a unitarian responsibility on which time does not have any influence. However, with the existence of the other, the possibility of murder is opened.

In fact, Levinas never defined the Other by isolating it as a concept. He does that through a sort of narrative whereby tips are regularly left. The Other is a face but not necessarily a physical appearance of another person. The face is the horizon that steadily imposes the way of the self. Hence, I would seek for a metaphysical moral or ethic concept to be conscious of how should I should behave; instead, it is the face of the other the dictates it to me, without the necessity of grasping some symbol.

The Other is not someone else with previous features conventionally defined. Any attribute or idiosyncrasy that I point out to someone, it destroys any alterity<sup>483</sup>. It demands us

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<sup>480</sup> Ari Solon, *Os Caminhos da Filosofia e da Ciência do Direito: Conexão Alemã no devir da Justiça* (Curitiba: Editora Prismas, 2015), p. 33-4. See also Rudolph von Jhering, *Geist des Römischen Recht: auf den verschiedenen Stufen seiner Entwicklung...*

<sup>481</sup> Ibidem, p.34.

<sup>482</sup> Ibidem, p.45. Emmanuel Levinas, "The State of Caesar and the State of David," in Emmanuel Levinas, *Beyond the Verse. Talmudic Readings and Lectures* (London/New York: Continuum, 2007), p.179-80.

<sup>483</sup> Emmanuel Levinas, *Totality and Infinite. An Essay on Exteriority* (Pittsburgh: Duquesne University Press, 2015), p. 194.

to forget the master/relation in Hegel and entails a notion of infinity that Levinas appropriated from Descartes that enables us to have an epiphany of a face<sup>484</sup>.

### V.1.2.2 - *Rechtswissenschaft* and the ethics of the Other

At the beginning of the last century, especially in the first quarter, an uphill struggle was made by German jurists to frame what have been called as *Rechtswissenschaft*. Hans Kelsen, for instance, upon what we could call the first stage of his work, elaborated on Kant's theory to come away from the Being (*Sein*) and the "ought to" (*Sollen*). *Sollen* would be a category opposed in a logical way to the *Sein*, due to its utter relevant to withdrawing from any act of will (*Wollen*) in the moment of law's enforcement<sup>485</sup>.

All the same, there are many contradictions that may ferret out on Kelsen's work. He underpins that in the moment of law's enforcement, a frame would be elaborated by the official interpreter that would be fulfilled by his experience through the possibility that a juridical norm might bring in (*freies ermessen*)<sup>486</sup>.

Going a bit further, Hans Kelsen and the Circle of Vienna were keen to set the liberal dogmatism of law from the 19th century. The legal science from the 19th century was regarded as being utterly liberal. Through a dynamical perspective of law, opposing a static conception from the earlier schools of *Rechtswissenschaft*, it was possible to glimpse the social concept of State and politics through the legal decisions<sup>487</sup>. During the 19th century, the methodology of inference was stressed to demand the judges always be attached to the will of the legislator.

According to the new demand, the "principle of legality" would not be a condition for the achievement of the rule of law. The "principle of legality" should drive the interpreter to the matter of the general norm. However, the individual norm cannot be simply dictated by the general norm<sup>488</sup>.

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<sup>484</sup> Ibidem, p.198-9.

<sup>485</sup> Hans Kelsen, *General Theory of Law and State* (Cambridge: The Law Book Exchange, 2007), p. Ari Solon, *Os Caminhos da Filosofia e da Ciência do Direito: Conexão Alemã no devir da Justiça* (Curitiba: Editora Prismas, 2015), p.60-1.

<sup>486</sup> Ibidem, p.. Ari Solon, *Os Caminhos da Filosofia e da Ciência do Direito: Conexão Alemã no devir da Justiça* (Curitiba: Editora Prismas, 2015), p.63.

<sup>487</sup> Ari Solon, *Os Caminhos da Filosofia e da Ciência do Direito: Conexão Alemã no devir da Justiça* (Curitiba: Editora Prismas, 2015), p.63-4.

<sup>488</sup> Ibidem, p. 64-5.

Roughly speaking, we could reach the conclusion that the predominant thinking about jurisprudence and *Rechtswissenschaft* that still are prevalent in universities and in juridical practice have been set upon a conception of society and politics that has grasped an idea of the Other, as Levinas would say about it. Even the common law<sup>489</sup>, which has set the function of jurisprudence aloof of a legal rule, has not embraced or burst with any Western experience.

In my modest opinion, the science of law and the case law were committed to taking the separation of State and church forward. Be that as it may, they stressed the relevance of warding off inclusive of theological thinking that frames somehow the concept of Other. Nonetheless, thinking of other, as *polemos*, or through a humanitarian way, has not stopping being in demand since the 19th century. It was necessary to recreate such "rationality" over legal decisions, in which the subjectivity of the judge should be in fact externalize the reason of the State according to the will of the people and the legislator.

For Rosenzweig and Benjamin law could only reach this feature through repetition of its outcome. Since the 18th century, the compulsion to the repetition was reintroduced by the figure of the state, concretizing its will to become sovereignty. The very exercise of repetition is how law and state can conceal law's foundation. As Rosenzweig points out, this repetition silently sneaks on the scene, and all of sudden it seems that it was always there elaborating on commands and decrees (*fest-gesetzt*)<sup>490</sup>.

The *Rechtswissenschaft* met its inception in Ancient Rome, and it sought to create a new art and experience (*Erlebnins*), regarding the Roman Public Law. They were able to turn it into an everyday praxis, something that did not come to pass in Ancient Greece<sup>491</sup>. Albeit, as Ari Solon emphasizes, with Savigny and its Historical School, the term science was employed without parsimony. It happened because they intended "to emphasize the epistemic feature of the law (framed by a concept withdrew from natural science) instead of tilling the juridical practice was fateful in turning the juridical tekkie into a modern technique, in which frames the man as a *gegeben* (given), as a given and not elaborated"<sup>492</sup>. This thought is linked with what Rosenzweig claimed.

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<sup>489</sup> L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012), p. 79-99.

<sup>490</sup> Franz Rosenzweig, *The Star of Redemption* (Madison: University of Wisconsin Press, 2005), p. 18-51. See also Ari Solon, *Os Caminhos da Filosofia e da Ciência do Direito: Conexão Alemã no devir da Justiça* (Curitiba: Editora Prismas, 2015), p.171.

<sup>491</sup> Ari Solon, *Os Caminhos da Filosofia e da Ciência do Direito: Conexão Alemã no devir da Justiça* (Curitiba: Editora Prismas, 2015), p.172-3.

<sup>492</sup> *Ibidem*, p.174.

Following this path, the figure of the hypothesis, once tailored by Plato until Hermann Cohen yoked it with his comprehension of Protestantism. "From now on the reality of Being must be submitted to proof by scientific method"<sup>493</sup>. Cohen linked the hypothesis and truth, a Platonic tradition, to the figure of being a test. As the jest made by Avital Ronell, Cohen inserts the main figure from the German Idealism by setting back the protest "back to the Protestant"<sup>494</sup>. Thereof, every perception, questionable conviction, or crushing doubt should be fixed on a test.

In the same stroke, Derrida calls to mind that Cohen was also keen on the studying of the being<sup>495</sup>. Germans, in line with Derrida, were in somehow engaged with Greek philosophy and tradition, even calling it a "privileged position." Derrida highlights that Cohen pointed out that it was impracticable to think, as being a Christian, without being engaged with the figure of *logos*, and dissociated the Greek tradition from Germany<sup>496</sup>. Furthermore, whereby an interpretation of an interpreted institutionalized Platonism that made Cohen believed in his insights. For him, the Reformation and the *Aufklärung* were sided-by-side. Regarding that the Reform being opposed to the institutional truths set out by the Roman Church, it gave a reason to German Idealism to discourage any adamant dogmatism<sup>497</sup>.

What is German is not science or the hypothesis. These, as we have seen, are universal. But the inaugural philosophical interpretation, the determination of the Idea as a hypothesis, opening the problematic of scientific knowledge, 'that' is supposed to be Platonic-German; 'that' is the historical event which appropriately institutes and constitutes German spirit in its exemplary mission, hence in its responsibility<sup>498</sup>.

This is a very rigorous idea of philosophy following by almost human sciences, that we should include law. Further, when Husserl writes his critiques of European science, then the law would be still at the stage, as we have seen it in Kelsen, to formulate a theory that wipes out the will (*Wollen*).

The outcome is legal science and legal philosophy that are able to think in the *autrui*, or the laws of hospitality or welcome<sup>499</sup>. As we are going to see further, it sums up to be a form of rational violence that drives law and state to sustain a violence by keeping the

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<sup>493</sup> Avital Ronell, *The Test Drive* (Urbana/Chicago: University of Illinois Press, 2005), p.23.

<sup>494</sup> Ibidem, p.23.

<sup>495</sup> Jacques Derrida, "Interpretations at War - Kant, the Jew, the German." In: Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002a), p. 153-4.

<sup>496</sup> Ibidem, p.154.

<sup>497</sup> Ibidem, p.153. "But this German Reformation would then side by side with, on the side of, the *Aufklärung* - not opposite it. The French Lumières, which ought to be distinguished from the *Aufklärung* in this respect, were not able to oppose the Catholic Church. In allying itself with critical science, with the hypothesis, with doubt, with the history of knowledge, with the putting-in-question of institutional authorities, and so on..."

<sup>498</sup> Ibidem, p. 155.

<sup>499</sup> Jacques Derrida, *Adieu to Emmanuel Levinas* (Stanford: Stanford University Press, 1999), p. 16-33.

founding violence that inaugurates the state and the new legal order out of sight. The differentiation that the German tradition has made is entirely dependent on a metaphysical solidarity.

### **V.1.2.3 - The Machine needs to be Trained**

The differentiation among *Sein*, *Sollen*, and *Wollen* are in fact are the fruit of an abstract strategy to gather the elements of a system together, maintaining its dispersion out of sight. All those meanings are brought back to life by German Idealism, and *Rechtswissenschaft* had to be given beforehand, but they must be introduced as a new event that is going to take care of the future. Indeed, those elements are never present. Moreover, with those prior conceptions on the present, we might have to deal with issues.

Further, to always to ensure a degree of legitimacy without really knowing what it means, the law also must be engaged with other "sciences" or fields of knowledge that must confirm what Emmanuel has said about it. We could even affirm that it is a kind of manipulation. Besides, most of definitions and arguments are usually accepted as being fairly taken.

Hence, a "yes" for the offered texts and doctrines is a form of an occultation of the inception. Critiques and doubts, as they were gradually introduced by the *Aufklärung*, keep the society and community distant or blind to committing itself to a new "yes." Even tough turnings occur somewhat regularly, they are a reinvention of the same (we are going to see that further). Turnings are not necessary a rupture with the original "yes." Assuming that case, we could point out that the original "yes" founds something (*etwas*) social and political. This mark can only be made through a performative act that later, *Rechtswissenschaft* attempts to convert it into descriptive and prescriptive forms.

*Rechtswissenschaft* and its juridical praxis (repetition) can only fruitily succeed whether or not it is concomitantly engaged with a state theory that supports its voice, though this political is undergo by the question of the "yes." For instance, a "social contract," that also inaugurates a new legal order ends upon being a "yes" to another that was never attached to any other social contract before; hence, he could not likely understand what a

social contract means. So to speak, within this environment of naïvety and performance, the state and law are inaugurated and embedded into each other<sup>500</sup>.

Therefore, what Derrida and Bennington call a metaphysical dispersion can ensure that the original violence, the one that establishes the state and law, are earned as a gift whereby the "yes"<sup>501</sup>. To return to the yoke of law and state to conceal a metaphysical dispersion, a formation or description of a unit is required. The unit allows the thinking that any element within the unit is only embedded in itself and not submitted to an exterior source, providing it a legitimacy given rise by itself <sup>502</sup>.

In compliance with Derrida and Bennington, the modern political thought seeks to gather *nomos* with *physis*, in contrast with the traditional political through which the political is elaborated as a "gradual event of departure from nature."<sup>503</sup> It is Inspired by *physis* which projects a law about "regularity and order." Thus, the law is a description and prescription of a natural necessity that demands a regulation.

This type of thinking has the advantage of absorbing into its constative dimension the excess of the first performance of the law: 'good' law would be absolutely constraining and not at all coercive, like laws of nature, which are not even prescriptive. If this desire of political thought were realized, then the polis would disappear into,". This analogy between the political and epistemological constitutes the *Aufklärung* in all progressivity, which there is no reason to denounce or deny: but the analogism can also authorize the worst violence in the name of rationality<sup>504</sup>.

On this matter, evidently, such adamant formulation would leave only an impression that law is static. As we have seen, Hans Kelsen and other jurists strove to formulate a dynamical conception of law. As we are going to see further, a peculiar strategy or concept might be one of the most relevant to yield the alliance between state and law explicitly, which is the exception. One may think the exception would be a figure that paralyzes the reproduction of the sameness. However, it is going attempted to be as a face of theological thinking. It meets the Schmittian thinking which states that every political institution is, in fact, a yield of a Christian institution or thinking.

## V.2.1 - Levinas: Justice and Truth

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<sup>500</sup> Jacques Derrida; Geoffrey Bennington, *Jacques Derrida* (Chicago/London: The University of Chicago Press, 1999), p. 232-4. "An analysis of the American Declaration of Independence shows, 'mutatis mutandis', how the thing is done, via an undecidability of constative and performative values (marked here in the very term 'declaration',but which in fact constitutes the performative as such: there is no performative which does not also involve an at least implicit description of the state of affairs it produces) in a pseudo-present that would be the fiction of the origin-point of the State or the nation, in this precise case, of its independence. One must already be independent to be able to declare oneself such, but this independence is produced only in and through the declaration itself.

<sup>501</sup> Ibidem, p.234.

<sup>502</sup> Ibidem, p. 236. "The whole enigma of the law, which we have so far more or less identified with the gift, is concentrated here."

<sup>503</sup> Ibidem, p.237.

<sup>504</sup> Ibidem, p.237-8.

Back to the start, the dogmatic lessons that a jurist has gotten and has somehow, in a more crude way, transmitted to the society provide a perspective on freedom and justice that is undoubtedly rejected by a deeper philosophical and literary thought. Even a text like the "The Temptation of temptation"<sup>505</sup> furnishes the reader with an astonishing perspective on freedom and justice.

One of the passages of this breathtaking text introduces to us the following puzzle withdraw from Exodus 19:17: "And Moses brought forth the people out of the camp to meet with God; and they stood at the nether part of the mount."<sup>506</sup> Levinas brings in an emblematic question upon different versions of this passage.

All in all, what he aims to bear out is that we were not so free as we had thought. According to a comment from Rav Abimi, a wise man allowed to write his views on the Torah, declares that this passage actually means that if Israel (on the foot of the mountain) does not accept the Torah, there is going to be their grave<sup>507</sup>. Thus, for the freedom of choice on which society would improve during the centuries, this biblical and also fabular dimension, in fact, manifests that our substantial thinking of freedom bogged down. In the violent inception of a community (in this, case Israel), it was violent and never gave to the people on the foot of the mountain a real choice. They were not free to choose!

How would be our paradigms, whether we were reminded about them, be we were not so free?

## **V.2.2 - Derrida and Violence**

Derrida's idea of justice and law, which is described in the later chapter, needs to address other sensible points. Justice, based on Derrida's insight, calls for an outbreak of violence, a sort of performative violence that is embedded in the idiom of justice. Derrida emphasizes that violence must somehow be engaged in its German equivalent, "Gewalt"<sup>508</sup>. In German, "Gewalt" forms compound words that originate new meanings which are

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<sup>505</sup>Emmanuel Levinas, "The Temptation of temptation," in. *Nine Talmudic Reading*. Levinas, Emmanuel (Bloomington: Indiana University Press, 1994), p.35

<sup>506</sup> Exodus 19:17, King's James Bible version.

<sup>507</sup> Emmanuel Levinas, "The Temptation of temptation," in. *Nine Talmudic Reading*. Levinas, Emmanuel (Bloomington: Indiana University Press, 1994), p.37.

<sup>508</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p.234.

associated with public power, social organization, so forth, for example, "Gesetzgebende Gewalt," which means legislative power, or "Polizeigewalt," which signifies the force that a policeman is allowed to enforce in some situations. As you may feel, "Gewalt" may be bound with a natural violence and with institutions<sup>509</sup>. Between the just and unjust use of the force will always reside a shadow of a doubt, if the violence was or is necessary, or if the authority is legitimate to use the violence.

Evidently, it not a simple task to track Derrida's insights about "Force of Law" and all sources consulted to elaborate "Force of Law." Sometimes, I have the slight impression that the title could also be a provocation to the Foucaultian notion of power. Still, Derrida has by leap and bounds mentioned two texts that grasped my attention. One is the remarkable Kafka's species "Vor dem Gesetz." The other is a text signature and countersignature by the own Derrida, "The Laws of Reflection: Nelson Mandela, In Admiration," which is a text barely touched by jurists. Kafka's text has been already stressed in many studies, and also in some parts of this work. As a result, my intention is to link another writer to "Force of Law," in which Derrida has invoked in many of his works, Albert Camus together with Franz Kafka.

### **V.2.2.1 - "Admiration to Mandela."**

The name Mandela speaks for itself. Mandela conducted his desires for social justice in an adamant way that had never been seen in our modern times. Could we state that he were purchasing a communitarian dream, even though he was not a Western citizen whatsoever? To make this dream come true, he is an admirable and dreaded person at the same time. For possessing such features, it is necessary to have some sort of force<sup>510</sup> as described by Derrida.

For Derrida, it is a force of reflection<sup>511</sup>. The proper name that Nelson Mandela brings a reflection involve his past and current experiences. Moreover, it is possible to dissociate his name from cultural and political issues.

But by "force of reflection" something else again may be understood, something which signals toward the literality of the mirror and the scene of speculation. Not so much toward the physical laws of reflections and toward some specular

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<sup>509</sup> Ibidem, p.234.

<sup>510</sup> Jacques Derrida, "Admiration for Nelson Mandela, or The Laws of Reflection," to. *Law & Literature* Vol. 16, No. 1 (London: Routledge, 2014), p.10.

<sup>511</sup> Ibidem, p.10.

paradoxes in the experience of the law. There is no law without a mirror. And in this precisely overturning structure ('cetter structure précisément renversante'), we will never avoid the moment of admiration.<sup>512</sup>

Through this completed and vague declaration, Derrida wants us to understand that there may be much more to catch on than only what a proper name can mean. The physical law, which is inviolable, carries a force that no human can bear, and in this case, the laws of reflection are now on this matter undergoing other reasons or narratives, though "there is no law without a mirror." There is no law that does not bear a literal form and meaning, but it also comes together with reflection. In English, reflection can have three possible meanings: (i) a physical return of something reflected on a particular surface; (ii) an outcome; and (iii) a long thought about. The law that Derrida has mentioned fits the three possible meanings. I would add that we must keep in our mind that Derrida is not making reference to the juridical law, but to laws that demand decisions, as we saw during the last chapter. Further, Derrida comes with a moment, "the moment of admiration." All those three possible means of reflection are endowed with force. Besides, it is not a reflexive force. Force is the property of reflection; there is no reflection without force. Would Derrida suggest that this specific "moment" (*Augenblick*) suspends any protocol and is also a moment of madness or stupidity?

One of the very reasons that made Mandela became admirable is due to also knew how to admire.<sup>513</sup> This fact triggers Derrida to come to another convoluted statement that Mandela made his admiration a force, and he is admirable with all force for having made his skill of admiration a force. And Mandela admired the Law, with capital "L," because it is the law above the laws<sup>514</sup>.

As Derrida shows, one of the things that are praised by Mandela is the Western law's system, which could guarantee freedom and social right. It is a system that formalizes through the separation of powers and a system that has elected the constitution to safeguard democracy. However, it is that same formalization that can keep the apartheid system running, the apartheid that has been the cause of Mandela's life. So to speak, Mandela praises the political heritage from the West. It is relevant to hallmark that entails responsibility for lives to continue with the practice<sup>515</sup>. Heritage is a gift that bids whoever receives it to carry on with it. The dead do not wait or expect to be retributed for this gift.

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<sup>512</sup> Ibidem, p.10.

<sup>513</sup> Ibidem, p.10.

<sup>514</sup> Ibidem, p.11.

<sup>515</sup> Jacques Derrida; Geoffrey Bennington, *Jacques Derrida* (Chicago/London: The University of Chicago Press, 1993), p. 188-203.

The law, which masters the gift, in this event, the law of the legacy, determines the next steps. After the gift has been taken, it no longer is a gift<sup>516</sup>. The gift of democracy, constitution, the threefold division of power, frequently, returns Western's memories to Ancient Greece and Rome. This is another feature of a gift, that is, to accept the gift as demand and by the result of the law.

Was Mandela jealous of Europeans, and also of former Europeans colonies, which took this gifts to, somehow, not break their bonds with Europe altogether? Some European and Anglo-American institutions were settled in South-Africa, and a model of a constitution, was formed in 1955 after a coup of state, which, according to Derrida, was not be able to be re-founded as a legitimate force; on the contrary, it remained as coup of state that only benefited some of the South-Africans<sup>517</sup>. "But legitimacy - indeed, legality - installs itself durably, covers over the originary (sic) violence, and lets itself forget only under in certain conditions"<sup>518</sup>.

In this case, the violence performed and employed in the inception had a different end. The means were the identical to the French Revolution and American Independence though with a different end. The end was to make the politics retains the same "status quo" with a legitimate mechanism. All the same, the violence in countries like South Africa does not seek to remain latent. "Here, the violence of the origin must repeat itself indefinitely and mimic its lawfulness in a legislative apparatus the monstrosity of which fails to disguise itself: a pathological proliferation of juridical prostheses (law, acts, amendments) intended to legalize down to their least detail the most quotidian effects of its fundamental racism, its state racism, the only and last one in the world"<sup>519</sup>.

Mandela has faithfully believed in Rousseau, and he countersigned him on several occasions by fully trusting in the general will. Although Derrida asserts the impracticality of the "general will" through the constitution in states like South Africa, there is no constitution that can assure a "general will" in any country. Such is the case for many reasons, since

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<sup>516</sup> Ibidem, p. 188.

<sup>517</sup> Jacques Derrida, "Admiration for Nelson Mandela, or The Laws of Reflection", in *Law & Literature* Vol. 16, No. 1 (London: Routledge, 2014), p. 12-13.

<sup>518</sup> Ibidem, p.13. See also Jacques Derrida, "Force of Law - The "Mystical Foundation of Authority."" In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 270-81.

<sup>519</sup> Ibidem, p.13.

regarding a Lassalle's<sup>520</sup> insight on what is a constitution is, or a cultural clash exists in countries such as Japan or South Korea.

Over and above this, the original act of instituting a constitution is raised, as I have already mentioned by a physical and illocutionary act of violence. All the same, during this moment (*Augenblick*), in South Africa, an aim for an empirical "general will" never came about it. So to speak, it reflected what a minority group of white people, who came from Europe to be settle in a foreign land, aspires to but never going to be entirely design. "The fundamental law cannot simply proceed, neither by right nor in fact, that which at once institutes and supposes it - projects and reflects it!"<sup>521</sup>. This is because the lack of a biography that could authorize "the people" is not found in a minority of white people. Persons such as George Washington, Robespierre, and Bismarck are always part of the performative and legitimate violence of every inception.

Somehow, the institutionalization of a constitution and new political order passes through a moment of stupidity or madness<sup>522</sup>. That is not only what Derrida believes but also what Carl Schmitt believes<sup>523</sup>. For Schmitt, the inaugural decision is not attached to a previous juridical order. According to Bennington, this decision is "absolutely pure," which metabolizes the relevance of the exception. Indeed, it makes the exception more significant and dominant than the norm, could be the constitution<sup>524</sup>.

After it has being validated, the Constitution of South Africa should play a role against the white minority by setting every South African citizen under the principle of freedom and equality. The major community from South Africa is supposed to incorporate the instruments from the Europeans (white-Christians-males-upper class) the legitimate struggle (*Kampf*), to have the right to be the same in a land that belonged only to them

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<sup>520</sup> Ferdinand Lassalle, *Über Verfassungswesen: Reden am 16. April 1862. Mit einem Essay von Ekkehart Krippendorf* (Hamburg: Europäische Verlagsanstalt, 1993), p.1-60. See also Hauke Brunkhorst, "Democracy and World Law: On the problem of Global Constitutionalism", in: Barbara Bukinx/ Jonathan Trejo-Mathys/ Timothy Waligore, Ed: *Domination and Global political Justice*, London: Routledge 2015a, pp. 313-344.

<sup>521</sup> Jacques Derrida, "Admiration for Nelson Mandela, or The Laws of Reflection," in. *Law & Literature* Vol. 16, No. 1 (London: Routledge, 2014), p. 14.

<sup>522</sup> Geoffrey Bennington, *Scatter 1. The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p.166-86. See also Jacques Derrida, "Force of Law - The "Mystical Foundation of Authority." In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 267-73.

<sup>523</sup> Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von Souveränität* (Berlin: Duncker & Humblot, 2015a), p. 1-20

<sup>524</sup> Geoffrey Bennington, *Scatter 1. The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p.193-4.

before it was invaded by Europeans. Derrida affirms that it is a dissymmetry, "a terrifying dissymmetry"<sup>525</sup>.

### V.2.2.2 - The demand for a repetition

The dissymmetry is revealed by due to two features of the law, with the Western law being more accurate. Demand for Universality<sup>526</sup>, regardless its historical or place. After a new legal order is institutionalized, it prompts a reason whereby it tends to set up our memory to make it accept that the reasons is always progress, and it was occulted by a dominant class. The dissymmetry in South Africa draws another outcome for this event. On the one hand, it would seem like that the "white minority" had kept the secrets of a constitutional essence or spirit in elsewhere. On the other hand, the new constitutional order would be a way to introduce the real rights and humanitarian perspective to the "white minority"<sup>527</sup>.

By being able to be to exist, on the contrary, the law could initiate a process of reflection. "More precisely, it gives to understand that which surpasses the understanding and is accorded only to reason"<sup>528</sup>.

The other dissymmetry is caused by the admiration of the experience of law. Recall that Derrida states that justice is the experience of the impossible<sup>529</sup>. Nonetheless, to admire something it is necessary to have had any previous experience with the phenomena. In the case of Mandela, it would be an admiration for the law, not yet with justice. So to speak, it would an experience with the possible. Further, for Derrida, this admiration on the law from Mandela comes before the settling of the white men in South Africa. Mandela cites the law and its essence as he declares in a letter to the courthouse<sup>530</sup>.

All the same, I would include another Derridian vocabulary on this dissymmetry, the decision. We have already seemed on the later chapter that any decision is mad or stupid. In my opinion, we must take a decision to admire something, too. Perhaps Derrida is on the

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<sup>525</sup> Jacques Derrida, "Admiration for Nelson Mandela, or The Laws of Reflection," in *Law & Literature* Vol. 16, No. 1 (London: Routledge, 2014), p. 15.

<sup>526</sup> *Ibidem*, p. 15-16.

<sup>527</sup> *Ibidem*, p.16.

<sup>528</sup> *Ibidem*, p. 16.

<sup>529</sup> See also Jacques Derrida, "Force of Law - The "Mystical Foundation of Authority." In Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 270-81.

<sup>530</sup> Jacques Derrida, "Admiration for Nelson Mandela, or The Laws of Reflection," in *Law & Literature* Vol. 16, No. 1 (London: Routledge, 2014), p. 15-18.

same track, by introducing in this text some passages from the letter of Mandela. For instance, "from my 'admiration' of the structure and organization of early African societies in this country"<sup>531</sup>, in which Mandela declares that it was ruled under democratic basis.

A decision is yoked to "diakrisis"<sup>532</sup>. As you may recall, a decision follows its logic that is iterated on a further decision. As I have already mentioned about Schmittian exception or the sovereignty, it is significant to say that decision is also at the core of his work. However, to understand the exception character of a decision, it is not as simple as it may look. What would be an exception? And how could we convincingly say that a particular decision is an exception? Bennington gives a good call by reminding us of Heidegger's decision about his filiation on the Nazi party, or how Taubes strives to clarify Schmitt's notion of decision<sup>533</sup>. For Taubes, roughly speaking, the exception is always trying to prove that, in fact, it is the universal because the exception can explain itself and, concomitantly, throw light on the universal while the universal does not have the skill to elucidate the exception.

"If the exception can think itself and the general, this can only be because of its relation to repetition"<sup>534</sup>. A decision, juridical or personal, such as the decision of Mandela to admire the Western political-law system, or of Europe to be a union are singular decisions that might trigger other similar decisions. Repetition is an attribute of a decision.

This is true already both in the Aristotelian construal of 'phronesis', which entails repeated nonidentical judgements in a kind of apprenticeship of prudence, however singular the moment of 'aesthesis' at which deliberation ends and action can begin, and more dramatically in the Pauline version of the moment, which is riddled with repetitions, insofar as the moment of redemption for mankind is figured as a repetition of the resurrection of Christ and the second coming of Christ of the first coming, Christ a spiritualized repetition of earthy Adam<sup>535</sup>.

In many parts of this work, I strove to attract the reader's attention to the fact that, for some reason, demand for intermediation is supposed to be necessary. There would not be mediation without repetition. Repetition is bound to regather the past events and experiences to the present moment<sup>536</sup>. Further, repetition according to Heidegger permits the "Dasein" to grasp experience, and do not waste time by looking to ferret out new experiences and

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<sup>531</sup> Ibidem, p.18.

<sup>532</sup> Geoffrey Bennington, *Scatter 1. The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p.187-207.

<sup>533</sup> Ibidem, 187-207.

<sup>534</sup> Ibidem, p.198.

<sup>535</sup> Ibidem, p. 198-9. "This necessity of repetition (without which reading itself would be impossible) can be construed in various ways, from the 'full' repetition of reinforcement and confirmation to the 'empty' repetition of supposed psittacism. As always in such cases, our claim is that there is no clear-cut distinction to be drawn here but a rather more complex economy".

<sup>536</sup> Ibidem, p.198.

connotations<sup>537</sup>. On the other hand, only the structure and logic of repletion allow something new to occur. Still, it happens this sort of thinking is one of the reasons that people accused Heidegger of a pre-disposal to get engaged with National Socialism. He fastens this particular moment of Dasein and *Miteinander* with fate, which would have been given and framed in the past.

Thus, repetition and decision are bound together at the moment, a moment of madness or stupidity. Hence, the moment that introduced the "margin of appreciation" or that declares that a teacher could not wear a veil are too. On the other hand, if those decisions were different, it also would fit on this concept of the moment. Albeit, the law was also contaminated with a politic of technology in the same way that Heidegger declared that the 20th century was the age of technology. He took a significant advantage of it by incorporating the technological thinking on his philosophy, and the law has appropriated those ideas. Law seems to be the guardian or the doorkeeper, from everything by invoking a reason of its decisions and a politic of its interpretations. So to speak, it does not remain on law system, but if it goes beyond its own borders. I am not affirming that there is a law's hegemony happening. On the contrary, the politics of technologic also makes the law getting exhausted and burden.

A demand of repetition also overwhelms law. Whether a repetition nowadays is a mechanical performance on past possibilities of what was already there<sup>538</sup>. It could be a mechanical repetition of a political choice that has sentenced the Western to be what it is. Still and all, past and present, as Levinas has offered us a hint<sup>539</sup>, on which Westerns were not free as we may think we are, past and present still furnish us with a plenty of possibilities that have not yet been chosen by a decision. Therefore, a decision is not only a repetition of what has remained in our past experiences and horizons, but is also, left outside a relatively broad of possibilities. Consequently, those possibilities are in constant collision with what has been decided.

The politics of technology may also be a reflection on the politics of the repetition, or the politics of choice. Heidegger is one of the most illustrative examples of this politics: he stressed the politics of the moment and the thematization to underpin his political

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<sup>537</sup> Geoffrey Bennington, *Scatter 1. The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p. 207.

<sup>538</sup> *Ibidem*.

<sup>539</sup> Emmanuel Levinas, *Totality and Infinity - An Essay on Exteriority* (Pittsburg: Duquesne, 1991), p. 33-52.

engagement through his philosophy, unconscious or not. However, the interpretation of Heidegger's oeuvre may offer us a tip-off on the political engagements of juridical institutions. My hunch is that a political project is also behind the technology of the law's system - not necessary a National Socialism project, but something similar to what Heidegger has drawn as the fate of the *Miteinnadersein*.

The text about Mandela is not only a text on reflection and dictates but is a text about making a decision according to a Derriderian idiom. On his decision to faithfully believe in the Western legal system, Derrida upheld that Mandela was a "man of law", likening him as the man from the country in "Before the Law" due to his constant appeals to the law; but at the same moment, he set Mandela as someone who had their rights withdraw by the judges<sup>540</sup>.

Derrida seems to be disturbed as Mandela has "always" said, "my people" instead of using "me," bewildering the "I" with the "other." When someone is not familiar with Derrida's work and biography, it would be easy to be convinced that this would not be something thing other than a critique of concepts and biography. Be that as it may, one of the most notorious seminars from Derrida is "Of Spirit - Heidegger and the question<sup>541</sup>," where he performs harsh critics on Heidegger magnums opus "Sein und Zeit", because Heidegger exhaustively employs the word "vermeinden" (to avoid) mainly avoid talking about "Geist," which in German political-philosophical tradition is always related with "Volk" and "Zeit," "das Volkgeist" and "Zeitgeist." So to speak, which is particularly strange to Derrida, are the reasons that took Heidegger avoided discussing on those subjects. Thus, what made Derrida raise this question again must hold our attention, particularly as it is now related to Mandela, a man of peace, of law, of community.

He presents himself in this way. He introduces himself, himself to his people, 'before the law.' Before a law that he challenges, no doubt, but that he challenges in the name of a superior law, the same one that he claims to admire and before which he agrees to 'present himself.' In such a self-representation, he justifies himself in summoning up his history - which he reflects a single focus, a unique and double focus, his history and that of his people. Co-appearance ('comparution'): they appear together, he gathers himself in appearing before the law, which he summons as much as it summons him. But he does not present himself 'in view' of justification that would follow. The self-presentation is not 'in the service' of the law; it is not a means. The deployment of this history is a 'justification,' it is possible and makes sense only before the law. He is what he is, he, Nelson Mandela, he and his people, he is present only in this movement of justice<sup>542</sup>.

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<sup>540</sup> Jacques Derrida, "Admiration for Nelson Mandela, or The Laws of Reflection", in. *Law & Literature* Vol. 16, No. 1 (London: Routledge, 2014), p. 18.

<sup>541</sup> See Jaques Derrida, "Of Spirit - Heidegger and the question"...

<sup>542</sup> Jacques Derrida, "Admiration for Nelson Mandela, or The Laws of Reflection," in. *Law & Literature* Vol. 16, No. 1 (London: Routledge, 2014), p. 19.

Derrida mentions in this passage "means" and justification. It could be only a reference from Benjamin, but Derrida in his famous text "Force of Law" criticizes Benjamin's "Zur Kritik der Gewalt." Would it be a sort of conciliation? In my opinion, it is not.

### V.2.2.3 - Benjamin and critical inquiries on justice

For Benjamin, the question of violence (Gewalt) must be studied through its connection with law and justice<sup>543</sup>. Benjamin suggests that a critique of violence must consider if the use of violence is mean to a just end, a moral mean he says. After this formulation, Benjamin opens up a dichotomy, whether the use of violence goes toward a just end because violence would be something natural. This would be how natural law would gaze at it. Only if the use of violence was to an unjust end, so it would not be fair. Benjamin calls for Spinoza and a sort of "natural-law theory of State"<sup>544</sup> Whereby anyone could use an outbreak of violence before the social construct being set up among the participants.

The other path is the one elaborated by the positive law, in which the use of violence would be a product of history<sup>545</sup>. To link this text with Derrida's text on Mandela it is important to remember that in "Force of Law," Derrida has it that it was a text written to criticize de juridical-political system from Europe, the same that later Mandela is going to admire. Do not forget that Mandela was a man of law, but also commanded a considerable number of violent acts in the name of the law and the state of South Africa. Another thing to add is that, "product of history" is one of the most symbolic expressions that it is possible to draw from Benjamin's work. Let's also recall that Benjamin, in one of most famous texts, "On the Concept of History", comes up with his interpretation on "historical materialism," but in this turn, it would be controlled by the alliance between the theology and the "historical materialism originate such alliance is destined to win all the time<sup>546</sup>.

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<sup>543</sup> Walter Benjamin, "Critique of Violence," in. Walter Benjamin, *Selected Writings Vol. 1, 1913-1926* (Cambridge/London: Belknap Press, 1996a), p.236.

<sup>544</sup> Ibidem, p. 237.

<sup>545</sup> Ibidem, p. 237.

<sup>546</sup> Walter Benjamin, "On the Concept of History" in. Walter Benjamin, *Selected Writings Vol. 4, 1938-1940* (Cambridge/London: Belknap Press, 2006b), p. 401.

The employing of violence between natural and positive law, for Benjamin, has the primary distinction about what methods would be acceptable to use as a means<sup>547</sup>. But, the core of this text is about the founding violence and the violence that preserves the institutions originated by the founding violence<sup>548</sup>. For the reason that we are going to see further, Benjamin insists that any violence as means is engaged with natural law<sup>549</sup>. Natural law would be only acceptable if it has just ended. So to speak, the problem is to elaborate on criteria and confirm whether the end is just or not. On the other hand, for the positive law, the question remains in the sphere of the justification of its means if they are or valid or not.

According to Derrida's reading of Benjamin's text, "at its most fundamental level, European law tends to prohibit individual violence and to condemn it not because it poses a threat to this or that law but because it threatens the juridical order itself"<sup>550</sup>. Yet, Derrida brings up the word "admiration" to elucidate the figure of a great criminal. The famous criminal would be "someone who, in defying the law, lays bare the violence of the juridical order itself"<sup>551</sup>. Is this the kind of fascination that, some years later, binds Derrida to Mandela? I would say no. Although Derrida connects the word "fascination" with the law, in the case of Mandela it would be a kind of blind fascination, guided by a misconception of history and institutional misunderstanding. In this passage, Derrida mentions a lawyer named Jacques Vergès used to contest the legal order to defend his clients. So to speak, Vergès use the legal order to question the same legal order. This would be a tautology that Benjamin and Mandela misread.

Benjamin thinks a tautology is a systematical fashion. Rather, the law claims the monopoly of violence to keep its authority and not to uphold any just end. For Mandela, according to Derrida, the legal order was already there before the law was set by the white minority—through violence—and it is his task to reestablish the legal-political order through

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<sup>547</sup> Walter Benjamin, "Critique of Violence," in. Walter Benjamin, *Selected Writings Vol. 1, 1913-1926* (Cambridge/London: Belknap Press, 1996a), p.236. "On the other hand, the positive theory of law is acceptable as a theoretical basis at the outset of this study, because it undertakes a fundamental distinction between kinds of violence independently of cases of their application. This distinction is between historically acknowledged, so-called sanctioned force and unsanctioned force".

<sup>548</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 264-5. Walter Benjamin, "Critique of Violence," in. Walter Benjamin, *Selected Writings Vol. 1, 1913-1926* (Cambridge/London: Belknap Press, 1996a), p.238.

<sup>549</sup> Walter Benjamin, "Critique of Violence," in. Walter Benjamin, *Selected Writings Vol. 1, 1913-1926* (Cambridge/London: Belknap Press, 1996a), p.243.

<sup>550</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 266.

<sup>551</sup> *Ibidem*, p. 267.

the law that he admires, the law and justice made up by the Western society through violence.

In the case of Mandela, perhaps, what he had been seeking was to paradoxically find a new legal order with the same sort of legal order that was implanted by the white minority in South Africa. The new order is "always"<sup>552</sup> set out through violence, even though, it may not be a bloody violence. Violence can also come through a performative act. Moreover, the violence opinion of Derrida is also introduced in the "moment" (*Augenblick*) of the change.

This is what I am calling the 'mystical.' As Benjamin presents it, this violence is certainly legible, even intelligible since it is not alien to law, no more than 'pólemos' or 'éris' are foreign to all the forms and signification of 'diké' Platonic. But it is, in law, what suspends law. It interrupts the established law to found moment of law is, in law, an instance of no law. But it is also the whole history of law<sup>553</sup>.

Mandela admired the law, not the man who employed the law to destroy it. First of all, he "interiorizes"<sup>554</sup> it, something that Hegel would call as he understood the phantasmagorical aspect of a law's text<sup>555</sup> and the revolutionary spirit that institutionalized it. Concomitantly, a second interiority occurs, in which Derrida refers to Christian West figure<sup>556</sup>, but he does not explain it. I assume that he is referring to the question of responsibility.

The various forms of outbreaks of violence that are perpetrated against the "African community" does not remain only in the realm of physical violence. They stopped to answer Mandela's requests and letters which he has to send in the name of the majority. For Mandela, this is an act typically conducted by an "uncivilized" country. For the white minority, they do not owe an answer to Mandela due to the majority being uncivilized<sup>557</sup>. One regards the other as being "before the law"<sup>558</sup>.

All in all, there is another important connection regarding Derrida's lexicon. For him, Mandela believes that the white minority does not own the right to act as an outlaw since they have used the law to imprison him. So to speak, if one day they used the law, they could not "contempt" the same law<sup>559</sup>. The term "outlaw" or outside the law is valuable for

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<sup>552</sup> Ibidem, p.269.

<sup>553</sup> Ibidem, p.269.

<sup>554</sup> Jacques Derrida, "Admiration for Nelson Mandela, or The Laws of Reflection," in. *Law & Literature* Vol. 16, No. 1 (London: Routledge, 2014), p. 20.

<sup>555</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 278-9.

<sup>556</sup> Jacques Derrida, "Admiration for Nelson Mandela, or The Laws of Reflection," in. *Law & Literature* Vol. 16, No. 1 (London: Routledge, 2014), p. 20.

<sup>557</sup> Ibidem, p.22-3.

<sup>558</sup> Ibidem, p.22-3.

<sup>559</sup> Ibidem, p.23.

Derrida. It appears in "Force of Law," but especially in "The Beast & the Sovereign Vol. I," the noun plays a significant role. In French "loup-garou" may be translated as a werewolf (a beast) and outlaw," the outlaw is the sovereign, or who can be set outside the law<sup>560</sup>.

At the end of the article about Mandela, Derrida highlights the protest written to the court and to his people. Due to the refusal answer his claim, he calls on his people to strike in protest of the policies. A strike is an example illustrated by Benjamin to shed some light on his idea of violence as a means<sup>561</sup>. In Benjamin's insights, a strike is a non-violent right provided by the State to workers to protest against the violence of their bosses. Still, the violence would be inserted as a sort of blackmail. On the other hand, the State may guarantee or deny the right to strike. Mandela could do the same: call on it or make it stop.

Yet, for Benjamin, if the strike occurs under the legal context expected, we could not affirm that the use of a violent means just occurred. But, if the exercise of the strike was used as a means to take the current legal system down, in this situation we could affirm that the violence was deployed by the labor. Would be Derrida liken Mandela to Benjamin?

Derrida thinks that Mandela is involved in some species of contradiction by defying the legal order because he is a man of law. But we must meet it according to the details. By being a man of law, he is at the same time being into in eternal contradiction because paradoxes are within the law. There is no way to define law and justice without falling into contradictions. The exercise and performance of law and justice are to be in constant contradiction. Furthermore, Derrida does not exactly contradict Benjamin's example of the strike, but he makes it clear. For Derrida, "violence is not exterior to the order of law. It threatens law from within law. <sup>562</sup>.

As we have already seen in the previous chapter, the political and judicial walk together, mainly to avoid and to contend any likelihood of a civil war. Hobbes's Leviathan to Schmittan friend/enemy considerations were attempting to theorize the inevitability of state not only to protect their citizens against a foreign menace but also to protect the state any or disorder within the state.

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<sup>560</sup> See Chapter IV.

<sup>561</sup> Walter Benjamin, "Critique of Violence," in. Walter Benjamin, *Selected Writings Vol. 1, 1913-1926* (Cambridge/ London: Belknap Press, 1996a), p. 239-42.

<sup>562</sup> Jacques Derrida, "Force of Law - The "Mystical Foundation of Authority." In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 268.

The founding violence threatens the state because it would be the only sort of violence that could inaugurate a new legal and political order<sup>563</sup>. The founding violence does not recognize any anterior legal and political order as legitimate because it comes to legitimate a further legal and political order. This original violence can be fundamental (*Begründet*) on the further juridical order, but the future order, paradoxically, will be forbidden and control any act that may set up a founding violence. For this reason, Derrida states that it is feasible to make a critique of violence due to violence is not being something foreign to law, by contrast, it belongs to the essence of law<sup>564</sup>.

Hence, Mandela conscious or not is anticipating a founding violence through the strike. He grasped this essence which Derrida called "ontology of ontology"<sup>565</sup>. By being a lawyer, Mandela should be an expert. Thus, he would sneak into his own consciousness and experience to morally justify the very begging of the founding violence. He sights the wanton conduct of the whites to the law and their violation of the law through legal practices. So to speak, as another famous character called by Derrida in "Specters of Marx", Mandela sums that the time are out of joint<sup>566</sup>.

Derrida assumes that Mandela structured his letter or speech toward a "universal tribunal," not a singular court or judge, but as if every tribunal and instances from South Africa are together against and according to the law<sup>567</sup>. He speaks through a letter, in which for Derrida it mirrors a testament <sup>568</sup>. A testament follows a Western Christian tradition according to law and theology.

A testament demands a witness to testify. Mandela is the witness of his testament that later is going into Admiration of the others. However, a witness does not necessarily understand about law. A witness could be anyone. The perfect witness is one who is conscious of the distinction between morals and law. Hence, the circumstances make Mandela the perfect witness<sup>569</sup>. Moreover, Mandela claims to have a high admiration and respect for the law. To prove it, he invokes the example of Bertrand Russel, whom he

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<sup>563</sup> Ibidem, p.268.

<sup>564</sup> Ibidem, p.269.

<sup>565</sup> Jacques Derrida, "Admiration for Nelson Mandela, or The Laws of ReflectionAdmiration in. Law & Literature Vol. 16, No. 1 (London: Routledge, 2014), p. 24.

<sup>566</sup> Jacques Derrida, *Specters of Marx - The State of Debt, the Work of Mourning and the New International* (New York/London: Routledge, 1994), p. 1-34.

<sup>567</sup> Jacques Derrida, "Admiration for Nelson Mandela, or The Laws of Reflection," in. Law & Literature Vol. 16, No. 1 (London: Routledge, 2014), p. 26.

<sup>568</sup> Ibidem, p.27.

<sup>569</sup> Ibidem, p.27.

believes is one "the most respected philosophers of the Western world<sup>570</sup>." He compares himself to Russel. He firmly believes that he living is the by that same motives that Russel was, for respecting the law and for having a moral conscious that gives him enough reason to protest against Great Britain.

To perform a founding violence, it may not just begin from nothing. It also has calculations and a sequence of decisions. First, it is necessary to show respect for the law, just like the strikes that are acting according to law. Suddenly comes the moment, an instant that the law is violated. Still, it is not infracted with violence <sup>571</sup>. It calls on the state to do something, but the act of the state is based on an illegitimate violence. It is found to be illegitimate, therefore any enforcement to keep its monopoly of violence it always going to be not illegitimate.

This tension is, in fact, a representation of the history of the law<sup>572</sup>. It is what Derrida names "epokhé"<sup>573</sup>, or the first aporia. To summarize it, it would be utterly meaningless if one does act according to the law's text, but consciously confirm its value and experience it, by not only accepting the mechanical aspect of law's decision but going beyond it, living according to the rule or the decision before it takes place. This is very close to Jewish tradition regarding their peculiar laws about the Talmudic or Torah.

In my opinion, Derrida sights something similar in Mandela's letter. Mandela strives to be just by following the law's text. But to be just, he must be calling for his past, trying to preserve a scenario in which he believes was justified according to Western law. Although Derrida mentions that this passage is only law's decision, we see in a later chapter that this decision has a broad meaning. Further, demand for repetition to conserve the founding violence and to preserve the past and future is at stake, as I have insisted.

Mandela and the law of reflection portraits not only an inherent tension between law and violence, but it sheds light on our question, about an experience between a law of the state and a feasibility of a community. Derrida had mentioned the double interiority undertook by Mandela. Following, it reflects the tenseness between being accord to the law's text and

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<sup>570</sup> Ibidem, p.28.

<sup>571</sup> Ibidem, p.28-9.

<sup>572</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 269. See also Christoph Menke, *Recht und Gewalt* (Berlin: August Verlag, 2012), p. 3-18.

<sup>573</sup> Ibidem, p.251-2.

machinery and experiencing the heritage of Western-Christian traction, and also Jewish according to Levinas.

### V.3 - Kafka as painter of the Western Condition

Kafka is quite often mentioned by Derrida, especially in "Before the Law." Both "Force of Law"<sup>574</sup> and "Admiration for Nelson Mandela" brings the title as an expression up. Now and then, he uses this expression as jargon, without even detail it. It has been true that Before the Law is Kafka's work that most directly explores the question of justice. As almost every single Kafka's text, is a quite emblematic and convoluted. In my interpretation, Derrida seeks to connect it with two of his most precious elements of law: decision and reflection.

Derrida links the moment that he has been referring to, the moment of the foundation that suspends the law (that is also relevant to Benjamin), "Before the law." Derrida claims that like in Kafka's novel, the law still does not exist, or better, it is "still undetermined"<sup>575</sup>. The man from the country cannot catch up with the law due to its abstraction or transcendence, and, moreover, it is a "comme à venir." Derrida speaks on the transcendence and at the same time an inaugural performative act. This passage needs more attention. It is important to remember that inaugural violence must be repeated in further decisions to keep up the inaugural act of violence out-of-sight.

Further,

"a 'successful' revolution, the 'successful' foundation of a state (in somewhat the same sense that one speaks of a 'felicitous performative speech act') will produce after the fact ('après coup') what it was destined 'in advance' to produce, namely, proper interpretative models to read in return, to give sense, necessity and above all legitimacy to the violence that has produced, among others, the interpretative model in question, that is, the discourse of its self-legitimation"<sup>576</sup>.

Hence, the difference between the founding violence (die rechtsetzende Gewalt) and the institutional figure of preserving the violence (die rechtserhaltende Gewalt) are both,

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<sup>574</sup> Ibidem, p. 270. "And the being 'before the law' that Kafka talks about resembles this situation, both ordinary and terrible, of the man who cannot manage to see or above all to touch, to catch up with the law ('loi'): it is transcendent in the very measure that it is he who must found it, as yet-to-come ('comme à venir'), in violence. One 'touches' here without touching on this extraordinary paradox: the inaccessible transcendence of the law ('loi'), before which and prior to which 'man' stands fast, only appears infinitely transcendent and thus theological to the extent that, nearest to him, it depends only on him, on the performative act by which he institutes it: the law ('loi') is transcendent, violent and nonviolent, because it depends only on who is before it ( and so prior to it), on who produces it, founds it, authorizes it in an absolute performative whose presence always escapes him. The law ('loi') is transcendent and theological, and so always to come, always promised, because it is immanent, finite, and thus already past. Every 'subject' catch up in this anorectic structure in advance."

<sup>575</sup> Ibidem, p. 270.

<sup>576</sup> Ibidem, p.. 270.

despite their difference, performative and also theological. The performative figure does not have to obey; this does not come from inference as a constative. J. L. Austin takes this for granted<sup>577</sup>. This passage explicitly points out that even the further developed methods of interpretation are in fact a performative extension or repetition of the founding violence. The man from the country is, at the same moment, the experienced foundation and preserver of the violence. It is likely that Derrida mentions Kafka's text instead of considering "the process" due to its demonstration, in an utterly abstract way, that the man expects justice or law without actually knowing what he is waiting for. On the other hand, in "the process," Joseph K. knows that the rule should be there somewhere, and the legal interpreters should be aware of it, but it never comes through it.

Additionally, the concept of theology for Derrida cannot be taken as clear. On the one hand, he gets together with Schmitt regarding the suspension of law as a biblical essence. The law can be suspended according to a sovereign will that is going to point out an exception<sup>578</sup>. On the other hand, Derrida says that the transcendental character of the law is theological. To get a better a feel, he asserts "the inaccessible transcendence of the law"<sup>579</sup>. Evidently, it is not clear in this case whether it is making any reference to Kant. Albeit, when Derrida refers to undecidable, it has clearly to do with the second aporia, or "The Haunting of the Undecidable"<sup>580</sup>.

For Kant, briefly speaking, transcendental is any question set that may be connected with a synthetic "a priori" judgment. Thus, transcendental is any reasonable investigation that can ascertain the limits (*Grenzen*) that the mind can formulate valid concepts disregarding any experience. Synthetic "a priori" judgments are propositions that are able to furnish our mind to reach and deliver a verdict on experience. It is relatively clear that Derrida was not bringing Kant's idea of transcendence on this matter.

During the explanation of the second aporia, Derrida affirms that the idea of justice could not be the same or similar to the Kantian idea of regulation, although the Kantian idea also brings the notion of "messianic promise"<sup>581</sup>. On the other hand, just like the man from the country that waits forever for an answer, the idea of justice contains a notion of infinite.

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<sup>577</sup> J. L. Austin, *How to Do Things with Words* (Cambridge: Harvard University Press, 1975), p.67-82.

<sup>578</sup> Jacques Derrida, *The Death Penalty Vol. I* (Chicago/London: The University of Chicago Press, 2014), p.69-96.

<sup>579</sup> Jacques Derrida, 'Force of Law - The "Mystical Foundation of Authority."' In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 270.

<sup>580</sup> *Ibidem*, p. 252-55.

<sup>581</sup> *Ibidem*, p.254.

Moreover, justice in this sense is a mystery in itself, impossible of calculating or measure by reason.

Derrida says that messianic promises are "horizons of the same 'type.'" Both examples are in the plural. For him, the Messiah made more than one promise. Did the Messiah in Derrida's interpretation fulfill these promises? But horizons of the same type are "numerous and competing;" in other words, perhaps the Messiah made contradictory promises. Therefore, he did not fulfill all his promises.

The undecidable is only undecidable when it is decidable under the auspices of a legal system, not just in cases of a conflict between two potential decisions or a mere act of calculation. Furthermore,

once the test and ordeal of the undecidable has passed (if it possible, but this possibility is not pure, it is never like the other possibility: the memory of the undecidability must keep trace that forever marks a decision as such), the decision has again followed a rule, a given, invented or reinvented, and reaffirmed rule: it is no longer 'presently' just, 'fully' just<sup>582</sup>.

Which test would be it?

#### **V.4.1 - The Test**

The concept of the trial was very important to the Greeks, who always associated tests with suffering. In fact, they had a word to describe the process, "basanos"<sup>583</sup>. In a groundbreaking book dedicated only to the figure of the test, Avital Ronell recalls that in Germany, the word Versuch is employed to yoke test with temptation (the same temptation that Levinas had referred to as being a feature of Western Society), and God would not be God without testing everyone's faith<sup>584</sup>.

For Avital Ronell. Kafka is one of the writers who have most abused this knotty figure. For her, the figure of testing in "Before the Law," is the doorkeeper exam, but she is not eager to make any conclusion<sup>585</sup>. All the same, this is the nature of the law, a trial without results. This is because law and justice are undecidable; in other words, they transcend features that are measurable, for they are not evident. The presence of law and justice looms through the presence of judges, prosecutors, law enforcement, so forth<sup>586</sup>.

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<sup>582</sup> Ibidem, p. 253.

<sup>583</sup> Avital Ronell, *The Test Drive* (Urbana/Chicago: University of Illinois Press, 2005), p.5.

<sup>584</sup> Ibidem, p.6.

<sup>585</sup> Ibidem, p.13.

<sup>586</sup> Ibidem, p.13.

Furthermore, the man from the country and the law establishes a relation, a contract, a social contract, whereby this regard demands that the man from the country cannot "touch" the law<sup>587</sup>. That is the very transcendent feature of the law, which Avital Ronell adds, as this relationship without contact is part of the test, though, the man from the country does not know that he is a test<sup>588</sup>.

It is quite relevant that the theological feature of the law is not only about being transcendent, but also of being tested. Being tested, questioned, so forth, as we have already seen, was the Protestant characteristic that Cohen linked with the platonic figure of hypothesis<sup>589</sup>.

### V.3.2. Mandela Before the Law

Returning, with admiration of Mandela, Derrida describes him as being a man before the law<sup>590</sup>. For Derrida, it happens to be due to Mandela addressing himself to his people as a man before the law. What could it possibly mean? And what plausible connection with Kafka's text does it have?

Derrida claims that Mandela's individual narrative cannot be set apart from the history of his people. In this unique interpretation, it would be impossible to state that Mandela and his people have a different history. Further, in this way to introduce himself it is not to make any justification for serving the law, by consequence it is not a mean, summon Derrida's words. Employing history is a justification that might be only be valid before the law<sup>591</sup>. Derrida yokes Kafka with Benjamin, so to speak, to explain Mandela's admiration for the law. But it still does not elucidate his insights sufficiently to associate "Before the law" with the moment of the law's suspension, which is very important for grasping the idea behind "Force of Law."

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<sup>587</sup> Jacques Derrida, "Force of Law - The "Mystical Foundation of Authority."" In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 270.

<sup>588</sup> Avital Ronell, *The Test Drive* (Urbana/Chicago: University of Illinois Press, 2005), p.14. "The man from the country is infinitely patient. He waits. His test consists in not knowing that he is being tested. This man, this hick as concerns the law of testing, could be Odysseus, Rousseau, you or me".

<sup>589</sup> Jacques Derrida, "Interpretations at War - Kant, the Jew, the German." In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002a), p. 153-4.

<sup>590</sup> Jacques Derrida, "Admiration for Nelson Mandela, or The Laws of Reflection," in. *Law & Literature* Vol. 16, No. 1 (London: Routledge, 2014), p.19.

<sup>591</sup> *Ibidem*, p. 19.

Overall, when someone claims to be his own people and share a history with them, any judicial decision would theoretically affect the whole people. In other words, it does not mean that the people will suffer from the law's enforcement, but they will all feel the weight of justice. Therefore, it would be possible to have justice and feel represented, as applied through categorical imperatives.

Anyhow, this interpretation from Derrida would demand that the man from the country as well Mandela, to have a conscious and some degree of familiarity with the law (*conscience et conscience de la loi*). It would be puzzling to know whether or not it is Kafka's message in "Before the Law."

Still and all, being before the law, for Derrida, requires a double interiorization; however, Derrida mixed it up the difference between admiring and being admired. Thus, as previously stated, the principle of interiority is a Western invention, a Christian invention. Perhaps it is also a hint to understanding one of the theological aspects of the law, its necessity of being interiorized.

Returning to "Force of Law", Derrida emphasizes "and being 'before the law' that Kafka talks about resembles this situation, both ordinary and terrible, of the man who cannot manage to see or above all to touch, to catch up with the law (*loi*)<sup>592</sup>." You may know what to expect regarding what law is capable of through experience and knowledge of what law is. It does not mean necessarily being aware of what has been written as law, but to have a sort of conscious understanding that what is right is there, perhaps the same rights that once justified the foundation and was the object of utterance, of which now remains as a trace. To understand without someone else teaching him is close to the same experience as something holy.

The man from the country is the representation, in a quasi-theological aspect, of having a stream of consciousness about the founding violence. As in Kafka's parable, that there is not one doorkeeper, repetition in the place of mediation assures that the founding violence is nothing more than fiction, also making sure that the foundation is preserved through the repetition of the old, which must contain the new. Further, as Derrida gives insight on Benjamin, the founding violence is necessarily destructive due to Niobe being preserved Artemis and Apollo<sup>593</sup>. Evidently, there was blood, just like any other

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<sup>592</sup> Jacques Derrida, "Force of Law - The "Mystical Foundation of Authority"". In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 270.

<sup>593</sup> *Ibidem*, p.287.

representation of justice in Western Society. Westerners do not have any image of justice that does not contain violence<sup>594</sup>.

Blood makes all the difference. For Benjamin, in places that justice demands blood the being may not be taken into consideration. Derrida supports that it would be a Jewish tradition, as Levinas once said that the first command should be "thou shall not kill." Such expression is also finding in Benjamin<sup>595</sup> Due to the first act of killing it would trigger a chain of killing as a mean to reestablish justice.

Benjamin reacts such mythological tradition of killing in the name of justice reminding the reader that in Jewish tradition no one is allowed to kill in self-defense, because killing cannot resist the trial of experience, or in other words, it does not hold water when someone is trying to use killing as a means or end (nonetheless, remember the interpretation that Levinas brings up about how Jewish accepted the Torah. If they had refused to take it, the foot of the mountain would have been their grave. Perhaps, Benjamin would regard it as a case of mythic violence, which is opposite to divine violence<sup>596</sup>).

If divine justice admits killing lives to save life independently of its means. Rather, for Derrida, no one could draw the conclusion that the divine violence is the source of all human crimes.

'Thou shalt not kill' remains an absolute imperative one the principle of destruction divine violence commands the respect of the living being, beyond the law, beyond judgment, for this imperative is followed no judgment. It provides no criterion for judgment; one could not find in its authority to automatically condemn any putting death. The individual or the community must keep the 'responsibility' (the condition of which being the absence of general criteria and automatic rules), must assume their decision in exceptional situations, in extraordinary or unheard cases<sup>597</sup>.

In other words, being responsible, inside Benjamin's mind, calls for a concept of Being (Dasein) that must have the potential to recognize justice and other beings as a gift<sup>598</sup>. Under Derrida, Benjamin follows Talmudic tradition. Additionally, by returning to the question of human nature between mythicism and science, Benjamin follows a growing tendency in the West to wonder about the loss of sacred life and reason. On this point, Benjamin firmly believes that the solution is to reject mythical violence and the violence that preserves it. However, as we saw in Levinas, every beginning must be violent! Even to accept the Torah, Jewish people did not have a choice.

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<sup>594</sup> Ibidem, p. 288.

<sup>595</sup> Walter Benjamin, "Critique of Violence," in. Walter Benjamin, *Selected Writings Vol. 1, 1913-1926* (Cambridge/London: Belknap Press, 1996a), p.250.

<sup>596</sup> Ibidem, p. 250.

<sup>597</sup> Jacques Derrida, "Force of Law - The "Mystical Foundation of Authority."" In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 288.

<sup>598</sup> Ibidem, p.289.

Still, one particular thing that I concur to Benjamin is a likely reduction of private conflicts, whether a communitarian way gets more efficient in the West and comes to think that an age of reason and science is not necessary or flawless in everything<sup>599</sup>. Albeit, Benjamin thinks more about the relocation of ideas, instead of using what his Judaism experience could furnish the way of the West to let up a rational influence in every field. Benjamin claims that Roman law and Old German law did not punish the privates, based on the principle of *ius civile vigilantibus scriptum est*<sup>600</sup>. I do not intend to go further in this debate, but I am not sure whether Benjamin grasped all Private Roman Law. For instance, the institution of obligation (*Verpflichtung*) could punish the debtor (*Schuldern*) with slavery or the loss a body part.

In my opinion, Benjamin put too much faith in the idea and conception of law, instead of changing his investigation and critique forward, and is the reason why Western Society has not improved or moved forward with the notion of neighborhood or community. As we have seen in the later chapter, the turning of sovereignty, be it divine or individual to the state, there needs to be a structure that can spread love and fear, according to Hobbes. Leviathan in itself might not have had such force. On this account, roughly speaking, only a new events or a manifestation of divine violence could dismiss such a notion on the law.

In "Theological-Political Fragments," Benjamin asserts that the secular state should seek grounded on the idea of happiness. Further, he states "the relation of this order to the messianic is one of the essential teachings of the philosophy of history"<sup>601</sup>. It is a pretty short and was written almost twenty years after "Critique of Violence." However, it is my impression that these passages show a slight change of Benjamin's perspective toward the task of violence.

First, by saying that seeking to recreate the King of God on Earth, it would never be an aim, considering that the King of God as the end, not a means toward secularism. Second, and this is the important point, is that the relation between secular and Messianism is "the essential teachings of the philosophy of history"<sup>602</sup>. Albeit, we should take the concept of the philosophy of history as it has to be appropriate from Hegel; though, if there is any

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<sup>599</sup> Ibidem, p.284. Walter Benjamin, "Critique of Violence," in. Walter Benjamin, *Selected Writings Vol. 1, 1913-1926* (Cambridge/London: Belknap Press, 1996)a, p.244-5.

<sup>600</sup> Walter Benjamin, "Critique of Violence," in. Walter Benjamin, *Selected Writings Vol. 1, 1913-1926* (Cambridge/London: Belknap Press, 1996a), p.245.

<sup>601</sup> Walter Benjamin, "Theological-Political Fragments," in. Walter Benjamin, *Selected Writings Vol. 3, 1935-1938* (Cambridge/London: Belknap Press, 2006a), p.305.

<sup>602</sup> Ibidem, p. 305.

sureness about it, Benjamin presented a dialectical reason for it in which he concluded, "The secular, thereof, though not itself a category of this kingdom, is a decisive category of its most unobtrusive approach"<sup>603</sup>. But there is also a possibility of a philosophy of history of being inspired in Kant because "critique" is a notion which Benjamin had appropriate from Kant, likely from *Critique of Pure Reason*. He left some clue of it in a long text, "The Concept of Criticism in German Romanticism," which was written just a few years before "Critique of Violence." He wrote,

The Romantics use the term 'Kritik' in multiple sense. In what follows, it means as the criticism of art, not as an epistemological method and philosophical standpoint. As will be shown below, the word was elevated to the latter meaning at that time in connection with Kant - namely, as esoteric term for the incomparable and completed philosophical standpoint; in ordinary usage, however, it carried only the sense of a well-founded judgment<sup>604</sup>

This represents a turning point with the addition of it in *Critique of Violence*, as it states that it is the only "philosophy of history"<sup>605</sup>. Evidently, dialectical thinking still remains in *Theological-Political Fragment*, though in the latter text he declares that secular and messianism should be the aim of reflection or critique and not violence or mystical violence; in the early text, the critique must toward the violence, particularly the mythical violence, because it is the violence that supposedly preserves the violence of the state until a repressed or latent force may break through it and set a new form of maintaining violence. In this regard, the question is whether the transformational violence comes from within or from without the law. If it comes from outside, it can be regarded as being a form of revolutionary violence, the purest form of violence that humanity can manifest. Be that as it may, only divine violence is just, manifesting itself in a "true war exactly as it does in the crowd's divine judgment on a criminal"<sup>606</sup>.

Derrida's interpretation of these last considerations focusses on the question of decidable and undecidable, of which we have already learned in this chapter. Although Derrida affirms a marked disagreement with Benjamin's insight of Judeo-Greeks, he associates the last words of "Critiques of Violence" with the question of deconstruction. As Derrida believes that deconstruction is only evident in utterance in an impure, bastard

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<sup>603</sup> Ibidem, p. 305. If one arrow points to the goal toward which the secular dynamics acts, and another marks the direction of messianic intensity, then indeed the quest of free humanity for happiness runs counter to the messianic direction. But just as a force, under the path it is moving along, can augment another force on the opposite way, so the secular order - because of its nature as secular - promotes the coming of the Messianic Kingdom".

<sup>604</sup> Walter Benjamin, "The Concept of Criticism in German Romanticism", in. Walter Benjamin, *Selected Writings Vol. 1, 1913-1926* (Cambridge/London: Belknap Press, 1996b), p.117.

<sup>605</sup> Walter Benjamin, "Critique of Violence," in. Walter Benjamin, *Selected Writings Vol. 1, 1913-1926* (Cambridge/London: Belknap Press, 1996a), p.251-2.

<sup>606</sup> Ibidem, p.252.

form, it is a mythical violence: a derivation of the pure and "bastard" violence<sup>607</sup>. Rather, as Benjamin demands that the mystical violence be rejected (Verwerflich) because it is a bastard and preserves legitimate violence, Derrida points out that such a declaration is Benjamin's signature, and, consequently, the question of sovereignty is again pivotal. A signature performs the same role that enunciation does in speech. A signature is driven by its own force of law because the same signature must have the effect on other copies, texts, and contracts. We must seek those notions in "Des Tours de Babel," a text written a year before "Force of Law"<sup>608</sup>, a text in which Derrida is engaged with other Benjamin's text, "The Task of the Translator."

Thereupon, divine justice has the signature of God, the name aloof of all names. Whether it is a question of sovereignty, a question of secret, of keeping the sovereignty in secret, if someone can decode it, it is also going to obtain the power of keeping it in secret. The final lines from "Force of Law" are indeed utterly convoluted to catch on. One hint, maybe the interpretation of literature and God, is given by Derrida<sup>609</sup>. Roughly speaking, the writer recreates the meaning of God as history and violence. Additionally, when someone invokes the name of God, consequently, the use of the proper name is abdicated. Writing is the translation of every thought inside my mind, and the text, aesthetically, belongs only to me. It contains my idiom.

In Genesis 11:9, God punished the descendent of Noah, scattered them to different territories and language. Before the event that took place in Babel, there was only one language. After it, God imposed the impossibility and the necessity of translation. Benjamin somehow makes reference to an exigency of a universal law; though the law holds this feature of being universal, it would only be feasible if all of the citizens could share the same language<sup>610</sup>. If this happened, all confusions, which in Hebrew means Babel, would be eliminated by all accounts. Benjamin believes in language and regards it as a sign, or he considers that language is conceived, as it, in other words, is a means to an end.

Taking language as a sign would be considered bourgeois. In a fabular dimension, Benjamin describes that an initial dialogue would have raised the sphere of good and evil.

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<sup>607</sup> Ibidem, p.252. Jacques Derrida, "Force of Law - The "Mystical Foundation of Authority."" In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 291-3.

<sup>608</sup> Ibidem, p.252. Jacques Derrida, "Des Tours de Babel." In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002c), p. 104-33.

<sup>609</sup> Ibidem, p.

<sup>610</sup> Jacques Derrida, "Force of Law - The "Mystical Foundation of Authority."" In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002b), p. 285-6.

For this reason, judgment (Urteil) came to decide what was good and evil. From this event, the mythical authority of law would rise up. Hence, God is in this situation as much as justice. In summary, for Benjamin lies in the name of God the possibility of justice without being attached to the law. However, in my particular interpretation, this would only be likely if everyone was endowed with a unique language.

So to speak, appealing for the name of God, as much as the event of Babel, both gave birth to literature<sup>611</sup>. "My writing is thus a demand for translation in the double bind which indents it in advance, eternally, toward any reader or translator, while simultaneously indenting this reader"<sup>612</sup>. Ergo, Derrida construes "The Concept of Violence," explicitly in the last few sentences of his text, almost ironizing Benjamin, as a form of literary text, in which Benjamin has set the laws of his text (a translation of Kant). Not to mention, that literature, following Derrida's line, is the correct place to put the political and ethical questions to debate.

#### **V.4. - The mechanization of human and fundamental rights and the end of justice**

Through all those events that have to initiate the functional differentiation, employing Luhmann's lexicon, law, and rights, especially regarding human and fundamental rights, it was since the political events and up to now, not only a form of preserving "mythical violence" for keeps. Benjamin's earlier works are astonishing for identity in plenty of concepts and fields, not strictly how the thing was; he was remarkably skilled in making out how things were conceived to be envisaged. In other words, concepts, even fundamental and human rights concepts, were abundant and followed the necessity of being related to a system. German Romanticism and Aufklärung were the zeniths of this way of set reason.

As we saw, during the 19th century, which re-introduced attempted the notion of "science" established in Ancient Rome, it came concomitantly with Kant's formation of pure reason, even the sociological and psychological design of law kept themselves clear of a bond with the system and concept reasoning (Denken). Likewise, the technical language of law became evident during the 19th century, not only in technical terms but

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<sup>611</sup> Jacques Derrida, "Des Tours de Babel." In. Jacques Derrida, *Acts of Religion* (New York/ London: Routledge, 2002c), p. 104-33.

<sup>612</sup>Jacques Derrida; Geoffrey Bennington, *Jacques Derrida* (Chicago/London: The University of Chicago Press, 1993), p. 180.

also aesthetically speaking. Apparently, subjects such as philosophy or art remained much more open to internal criticism and speculation. On the other hand, law kept political institutions and legal texts almost intact. Usually, the objects of a critic were the ideas and schools from jurists and interpretations, a situation that still remains nowadays. This may be regarded as a form of preserving violence due to every critique over institutions, and legal texts are from outside the law. The law's system has found a way to absorb those critics and deal with its own irritation to preserve itself.

#### **V.4.1 - how mechanical is the representation of the decision-making process**

Any immediate impression over the basis and concepts that any reflection is developed may take anyone to conclude the institutions and the idea on rights and law are flawless, only theories and reflection over it could be a flaw. In the case of human rights in Europe, many techniques have remained in a zone, which makes it difficult to defend an idea of the law's system. For instance, most of the text in "Margin of Appreciation" advocates an idea about cultural relativism, universal standards, and, so forth<sup>613</sup>. Ibeit, some jurists claim that such perspectives are odd and reasonable due to an "open character of the juridical text"<sup>614</sup>, or a cultural exchange through law's principle, such expressions are unworkable on the reason of their crude meaning and how those expressions are commonly taken as being some sort of deep reasoning.

Public law jurists and human rights theorists have an unquestionable doubt in their philosophical knowledge. I have sincere questions on this matter because I have never read Hegel, Kant, Marx, Benjamin, Heidegger, or Derrida essays on those subjects or with hasty conclusions. Regarding that, such studies may somehow be the object of study in law school and foremost philosophers.

The example brought up many times in this work, "The Margin of Appreciation," the European Court of Human Rights resorted to hiding behind its doctrine a deeper Western debate than its elementary development suggests. We could situate a critique on one side of this concept due to its unbearable lack of connection with a positive idea of law, or the

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<sup>613</sup> Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards, (1999), *International Law and Politics* Vol. 31, p. 844.

<sup>614</sup> Friedrich Müller; Ralph Christensen, *Juristische Methodik Band II - Europarecht* (Berlin: Duncker & Humblot, 2003), p.48-61.

analyzation could be toward the goal of the doctrine. In a nutshell, we could frame in each case what could be a reason to leave, for each to resolve its own issues, or, in order words, the Court should decide in each case that they may not interfere in order to respect the national court's decisions. The last was the main objective of this work.

Such naïve assumption from the ECHR hazards that it is a project of a community. Additionally, it turns the Court into a political instance, whereas its decisions have no aim to assume a political status. It is not a sheer responsibility of the Court. Human rights doctrine and practice have caused more dizziness than clarity. Due to its later development, after World War II, on which sharp debates on the nature and methodologies of law began to appear, a generation of passionate jurists was eager on the subject of human rights. Although the doctrine has pointed to an essential end, its flaw and superficial debate have compromised its legitimacy. If we take the example of the *Abwägung*, which may regard the principal methodology used to decide an issue, any further research on this matter should be shocked mass media and whoever shares some exciting on the decisions from ECHR. The overwhelming number of critical works on the *Abwägung* should at least put in question and suspension its use. On the other hand, *Abwägung* and "balance" are regarded by many courts around the world as something brilliant and unquestionable.

#### **V4.2 - beyond the vain philosophy**

Since Husserl admitted the crises of rationality in Europe, the next generation of philosophers was keen to debate of the ghost of reason in the new era. The philosophical advice was not enough for the new generation of post-war jurists. Taking into consideration the large degree that Hegel, Kant, or Bentham had influenced the jurists from the 19th and 20th century, we may wind up that our juridical epoch has much less to do with philosophy and history, and they are more engaged with political and mass media speech.

Although a philosophical vocabulary aimed to universalism is often employed by the ECHR, such a bold attitude comes with a price. As we have seen during this work, incongruence and unconcealment are set off in the jurisprudence of the ECHR since its very beginning. We could take Heidegger<sup>615</sup> as an example in his polemical but instigating text *Letter on Humanism*, in which he pointed out the sharp difference between action and

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<sup>615</sup> Martin Heidegger, "Letter on Humanism", in. *Global Religion Vision* Vol. 1/I, July 2000, p. 83-109.

thinking and moreover, how a puzzle is to mark out what humanism could mean. On this assumption, Heidegger teaches that humanism is "grounded in a metaphysic or is itself made to be the ground of one"<sup>616</sup>. Following this consideration that I came up, as Derrida, which the essence of his work poses the question of metaphysical knowledge in Western Society, as well how Paul de Man, Blanchot or Kafka understood the way of the West.

Whether or not those thinkers have raised some suspicions on metaphysical thinking, jurists should hear their analysis and begin to question their own doubts in some convictions. As has already been stated, those convictions were elaborated and driven by a metaphysical perspective. For example, how to manage neutrality and the Other if Western culture is inclined to judge the Other as being the same as any Being? In a manner of speaking, the initial conception of fundamental rights - which would later be used as the starting-point for human rights - were not developed to investigate the differences between beings but only the differences that might supposedly be verified between any beings. If we follow this kind of thinking, many cultural features that make the Other my neighbor must be ignored, and any issues must be decided by categories that were elaborated and framed based within a metaphysical framework.

We obviously experience utter turmoil in the field of jurisprudence. This is thanks to an inability to think beyond the mere vocabulary of the juridical lexicon. The term "margin of appreciation" has been employed without wise and critical thinking; it has been the law's methodology for more than three decades. If we take a look at the 19th century through until the 1960s, the number of jurisprudence schools in German and Anglo-Saxon countries was an indication of a different sort of thinking. Nowadays, we could perhaps affirm that *Rechtsbegriff* and jurisprudence have been characterized by being a pastiche form of thinking, with chunks that cannot form the same picture. Moreover, as I have insisted over this word, a rhetoric of political naïvety has taken over law's thinking.

In the past, the school was struggling against each other to prove, in a nutshell, who had the most coherent systematical thinking, or which one could tie up law and politics, as Schmitt strove to make it. Without question, new demands form other thoughts for the law, for instance, the problem or concern with a neighbor (*Nebensmenschen*). Legal science and legal philosophy were used to introduce or to appropriate forms of thinking from philosophy

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<sup>616</sup> Ibidem, p.87. "Metaphysics does indeed represent beings in their Being, and so it thinks the Being of beings. But it does not think the difference of both".

or other human science. Yet, for many decades those appropriations have been reproduced with substantial flaws and incoherence, not only terms, as "margin of appreciation," but argumentation concerning fundamental and human rights.

### V.4.3 - From Politics of Friendship

Community and neighbors have always been a concern for Western-Jewish society, or at least since the acceptance of the Torah<sup>617</sup>. It is quite puzzling to pinpoint when the community was reduced to the private sphere. Further, explaining why right cannot be addressed to strengthen communitarian thinking is a Gordian knot, especially because it is a question related to political theology, and it is also the point of issue that modern secularism should offer at least a reflection.

Only a few current jurists have further developed this problem, among them Thomas Vesting and Ino Augsberg<sup>618</sup>. Whoever is engaged in this project somehow has an idea that goes beyond the unity of the law to a unity of life. It would be a sort of formation that should reconcile traditional thinking with our political "phantasies"<sup>619</sup>.

In a brilliant, but an incomplete article, Thomas Vesting has grasped the urgency of thinking about laws and rights in a communitarian way. As Vesting points out, rights set up neighbors in a horizontal perspective to make rights stable, and because it is supposedly 'vermuten' to be the essence of the rights. Vesting pivoted his article on the development of asymmetry between subjectivity during the 20th century and a sort of stagnation of law's thinking, still performing calculations based on 19th centuries models<sup>620</sup>.

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<sup>617</sup> Emmanuel Levinas, *Totality and Infinity - An Essay on Exteriority* (Pittsburg: Duquesne, 1991), p. 33-52.

<sup>618</sup> Ino Augsberg, *Kassiber* (Munich: Mohr Siebeck, 2016), p.17-31.

<sup>619</sup> Eric L. Santner, *On the Psychotheology of Everyday Life. Reflections on Freud and Rosenzweig* (Chicago/London: Chicago University Press, 2011), p.24. Santner introduces the project from Rosenzweig, which in perspective could extend to thinking the problem between law and neighbor. "The discussion as a whole between different levels and aspects of phantasy and defense: the formation that Rosenzweig dubbed the 'old thinking' and that we can understand more generally as metaphysical thinking, in which the thinker is placed outside of life, at the 'end of world'; the fantasies that underlie our political and ideological captivation, that sustain our psychic entanglement with regimes of power and authority, our psychic attachment to existing social reality; and finally, the fantasies that were of primary interest to Freud in his work with individual patients, that is the fantasies that testify to the impasses of desire as they emerge the context of an individual's fateful passage through the straits of oedipal normativity. Though there are important differences between this kinds and levels of fantasy, there is, I think, far more to be gained by exploiting what they share than is treating them in isolation. For what is at stake in all of this are the various ways in which human beings, in their everyday life, turn away from the challenges and claims of what is in their very midst".

<sup>620</sup> Thomas Vesting, "Nachbarschaft. Grundrechte und Grundrechtstheorie ind Kultur der Netzwerke", in: Thomas Vesting, Stefan Koriath, Ino Augsberg (org.), *Grundrechte als Phänomene Kollektiver Ordnung* (Tübingen: Mohr Siebeck, 2014), p. 57-86.

#### **V.4.3.1 - the asymmetry of rights and life**

I have entered upon in this discussion because whereby Vesting's paper brings back the philosophical-political debate over theology in everyday life. The neutralization institutionalized by text burdens the law by demanding that the official interpreter makes a choice that must be vested as rational. Further, every decision must transmit the message that other side, the defeated, has a guarantee that his issues have the potential chance to prosper when, some day, he turns to be the other part of the issue. Still and all, this is not what we have seen in many cases from ECHR over this work.

The essence of rights does not score with everyday life. In my interpretation, it is not possible to simply cut off the essence of political theology from the "social systems." As Kafka had pictured in his works, or even Benjamin and Levinas, it opens up a consequence to society in which the individual has the legitimacy to exclusivity, and society comes to be a permanent struggle of hierarchy, even talking in horizontal relationships.

#### **V.4.3.2 - the mechanical production of decisions**

To sum up, we have an experience whereby the ECHR decides a kind of radical singularity, in which is demanded a recognition of universality. The exigence of a repetition of reasons based on past events is not saved from modalities of cognition based on a mechanical function of decision and interpretation. For jurists, knowledge should be determined by calculations and work as a trivial machine. However, if we only slightly touch on Paul de Man's works, we would have the impression that everything that has been decided until now is wrong. Paul de Man, roughly speaking, advocates that knowledge is impossible by investigating it through a sort of grammatical flaw that is inherent to the grammar itself. Moreover, every writing is contaminated by a performative act of speech.

So to speak, in this perspective, discrepancies are an outcome of modernity due to the technology of the text. We could extend it or even wind up where that gap is present in law, rights, and decisions. The issue gets deeper when recalling Derrida's and Levinas's assumption on justice. The only feasible perspective that we might have should be that any model of law or interpretation that comes up will reproduce the recent knowledge.

## CONCLUSION

We have seen that any particular method, institution, argument, or even interpretation can be contaminated by the concealment and the inception of our language. Speaking about language, it has been losing its political relevance to a scientific narrative. Gaston Bachelard<sup>621</sup> was already concerned how the essence of scientific language could go far beyond its range, and it could be able to modify not only science, but how society thinks. Samuel Weber has based his main studies on this matter. His task has been to point out how the scientific knowledge and its association with the truth has also been incorporated by critical literary<sup>622</sup>.

I attempted to put forward in this work how some law's institutions and methodologies were influenced and have been acting toward the premisses of science. All divisions (*Fachbereiche*) need more classifications, and furthermore "methodologies" and interpretation's techniques. All the same, critics against the methods are always being raised, eventually, such critics are also relying on the same issue of the methods.

I was surprisedly overwhelming first time I read about the "doctrine of the margin of appreciation". It just was introduced "ex nihilo", and right after that scholar began to describe it, striving to draw it with a juridical language. During the work I was never keen to spell it out or to bound the "margin". I firmly think that would be a waste of time since many scholars are doing it; moreover, political and philosophical investigation has lost prestige among jurists. Thus, a philosophical definition of the "margin" would raise no interest in the community. I would add, that the only theoretical description that lately has been accepted in Public Law, is the one inaugurated a quarter of century ago, by Robert Alexy. This tradition has been introduced the worst in terms of dogmatism and moralism. The most of the papers which have been written about the "margin," were pivoted in the discussion on "balance" and the bounds between law and moral.

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<sup>621</sup> Gaston Bachelard, *The New Scientific Spirit*,

<sup>622</sup> Samuel Weber, *Institution and Interpretation* (Stanford: Stanford University Press, 2001), p. ix-xix. "What is at stake in the struggle between traditional model of thoughts, whether in the experimental sciences or elsewhere, and the increasing number of intellectual practice that can no longer easily be assimilated to that tradition or comprehend by it, is nothing less than the 'idea' and 'ideal' of 'knowledge' based on a notion of truth presupposes both the 'separation' of thought from its object and the 'priority' of the latter over the former, it is the distinction itself that the operations of the 'new scientific spirit' have rendered increasingly problematic."

I managed to follow Geoffrey Bennington<sup>623</sup> concerning the philosophical-political investigation. Needless to say, that we both share a kind of devotion to Derrida's oeuvre. By increasing disciplines and subjects, proportionality, Legal School has been losing the skill of getting at the bottom of the issues. An optimistic view over human rights, humanism, and constitutional's principle would drive graduates, scholars, and practitioners into a dogmatism and moralism, on which it would expose their inability to grasp the political and theological to the *Zeitgeist*. Being of the opinion that principles and humanistic values would soften the unyielding relation between rules and facts. It wound up into producing idioms and assurances that "law is political" or "the goal of the law is to rule the society"<sup>624</sup>.

"Margin of appreciation" is an instructive example of how an idea, which is more a conjecture, can be freely employed due our condition of being under the amalgam of the truth. In other words, the Way of the West is to first accept it, because we assume that we are being under truth. Further rejection, critics, and argumentations come not to unconceal or to explore the violence of the origins.

In a nutshell, our identity, deeds, thoughts is shaped under the condition or context of being in the West. It means that, although we seek for conditions to build peace and harmony, we have been overlooking the possibility of frustration or that the universe is constituted by good and evil. As it was that we were capable of correcting the chaos through the creation of abstract tools, instead of acting. Although, the "margin" at the first sight, apparently, seems to be a powerless tool or method to set things that are out of the order, the intention of spawning a doctrine that can adjudicate if a supranational order can meddle in a country due to certain conditions, chiefly if a country has been not following the formal and material procedures of the rule of law; what can be drawn of this lesson is that through the will of knowledge also lays an authority.

Usually, we have been seeking only through subjects as freedom, equality, human dignity, so on, the linchpin of worldly and transcendental conundrums. However, there are a plenty of "methodologies" derived from those subjects. It would their aim to safeguard the transcendency of freedom, equality, democracy, whatsoever. "Balance", "margin of appreciation", "reverse solange" are, I am going to insist, samples to attempt to keep us away from a likely frustration. Since humanism and constitutional values together with the

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<sup>623</sup> Geoffrey Bennington, *Scatter I - The Politics of Politics in Foucault, Heidegger, and Derrida* (New York: Fordham University Press, 2016), p.1-9.

<sup>624</sup> *Ibidem*, p.3.

logic have returned to the West, there is an endeavor to make the rule of law and democracy to come off.

Heraclitus was anxiety about the conception and formulation of the meanings. His lessons last until nowadays, as trace. His remarkable quote about the river is not as simple as normally people are used to believe. Through that kind of writing, almost poetic, Heraclitus's aim was to teach us about the space created among words (especially nouns) and meanings. Blanchot has perfectly grasped Heraclitus's intentions:

"Almost every one of these formulations is thus written in proximity to neighbor things, coming to terms with them by a movement that goes from thing to words, then from words to things, according to a new relation of contrariety we are powerless master once and for all, but that makes us hear in concrete fashion the mysterious relation existing between witting and the logos, then between logos and men; a relation according to the double direction of 'coming together-going apart': when they are apart they move away from one another."

By accepting the writing as the form to delivery any message or truth (let's not forget that Socrates was a teacher or the teacher because we never wrote anything) the Western decided to bring the implications of writing together. Writing has never been able to elaborate a reality. It cannot construct one. Moreover, as I have been attempting to show, the factual reality has much more elements than the act of writing can absorb. In other words, writing is always incomplete and at the same time it is exposed to infinite forms of informations and reasons.

The law of the men has struggled to isolated the juridical information from the infinite space. This is totally in vain. Even scientific knowledge has failed to provide a language that can isolate what should be law. Perhaps, Kafka was the few one who grasped that reality is not able to be controlled by language, methods or expressions. He understood that reality and dreams have much more similarity than we may think about them. Like dreams, a man cannot control the triggering of the decisions. We avoid to accept it. Because the fact we are endowed with authority and language, we refuse to accept the fact decisions are not under our wishes and desires, and this differentiates us from the gods.

Last but not least, the research of the present work is to confront many truths that were settled in law's realm since de 19th century. The literary and theological dimensions are employed to demonstrate that argumentations or rhetorics can be also elaborated in this way, and not just through a fragile scientific argumentation that has been ruled the law's system.

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