THE LEGITIMACY OF THE ORDER. THE PARADOXES OF THE POLITICAL THEORY IN THE MODERNITY

A LEGITIMIDAÇÃO DA ORDEM. OS PARADOXOS DA TEORIA POLÍTICA NA MODERNIDADE

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ABSTRACT: In this article I aim to describe some paradoxes concerning the need to seek a foundation of political and legal order. In particular, I try to analyze, from a historical and conceptual point of view, the role of the pre-political State in the Hobbes's philosophy; the abstractness of the idea of sovereignty as sum of individual wills and as source of norm; the distinction between violence and force, legal and illegal, etc. I explain that some items, conceptions and "key words" (semantic) of political philosophy in modern era are linked to a particular social structure based on a secularization of pre-modern ideas and systems thanks to whom the social order could be represented.

KEY-WORDS: Sovereignty; Common good; Representation; State.

RESUMO: Neste artigo pretendo descrever alguns paradoxos que dizem respeito à necessidade de buscar um fundamento da ordem política e jurídica. Em particular, busco analisar, a partir de um ponto de vista histórico e conceitual, o papel do pré-político do Estado na filosofia de Hobbes; a abstração da ideia de soberania como soma de vontades individuais e como fonte de norma; a distinção entre violência e força, legal e ilegal, etc. Eu explico que alguns itens, concepções e "palavras-chave" (semântica) de filosofia política na era moderna estão ligados a uma estrutura social particular com base em uma secularização de ideias pré-modernas e sistemas, graças a quem a ordem social poderia ser representada.

PALAVRAS-CHAVE: Soberania; Bem comum; Representação; Estado.

1 LEGAL AND ILLEGAL. THE FORM OF LAW IN THE MODERNITY.

For the natural law tradition the positive norms, which represent the result of a political decision, contribute to create a just society if they correspond to the "pre-state" and "pre-political" norms. In this sense, according to the tradition of natural law, we may define the existence of two types of law[2], natural law and positive law. In some philosophical conceptions these two types of law correspond to the two phases of human history: the state of nature and the civil society or State. Although there are two types of law, it is clear that any law, even the pre-state and

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[2] A. Cavanna, Storia del diritto moderno in **Europa, Le fonti del pensiero giuridico**, vol. 1, Milano, 1982, p.49.

pre-political law which characterized the hypothetical human condition before the entry of man in society, may be invoked only through a power able to promulgate binding rules for all members of a social order. Without a power of this kind, the laws of nature would remain outside the legal order as moral principles of a given society. This power corresponds to the State that did not exist in pre-modern society.

The semantics of the political concepts of the early modern period mainly concerns the relationship between the natural law and the positive law, the latter posed by the institution, the State, whose fundamental function is to promulgate collectively binding rules. The State, as a decision-maker about the rules applicable in its territory, is sovereign. According to the tradition of natural law, the rules established by the sovereign must be inspired by the natural law. In this sense, the natural law represents a limitation of the power of sovereign or, in a broad sense, of sovereignty. The limit of sovereignty derives from the fact that “the exegete” of the relationship between the two types of law (natural law and positive law) is not the same ruler. The question, in short, consist in determining who has the right to establish relations between the “two laws”. In other words, who has the power to define a positive law as valid and as corresponding to the natural law. The tenured of this right may therefore establish limits on the sovereign or, in other words, being himself the ruler who determines which laws are valid. The fundamental duty of the sovereign is to establish the difference between law and “not law”. The rule is valid when it is established by the sovereign. Otherwise it has no value, it is "not law". If anyone has the right to say that the rule willed by the sovereign is “not valid” because it is contrary to natural law, means that the will of the sovereign, his power to will the law, is limited. The person or institution that describes "what is right" exerts a clearly superior power to sovereignty itself, or it represents the real sovereign, because in the final analysis, it has the task of distinguishing law from not law.

With respect to the relationship between the natural law and the positive norms, the difference between the legal and political semantics in the pre-modern era and the modern era would be, from this point of view, quite formal. In the Middle

Ages has been held the battle for supreme *potestas*[3] between the papacy and the empire: the struggle between the King and the Pope was concerned, first and foremost, those who had the power to establish the law for each other or, in other words, those who should submit himself to the rules decided by his rival. The issue regarding who should "observe" the difference between law and not law within a context, which could be called *Res publica christiana*[4]. The pre-modern semantic not distinguish between morality, religion, and law. The rules established within a given territory or for certain groups of people should be considered ethical and corresponding to God's will. It can be argued that the foundation of the law and, in general the norms of social order, was religious. The law, to be valid, must not conflict with the natural law and the dictates of the Christian religion. The difference between moral and immoral, right and contrary to right (law/not law) was referring to an order willed by God[5]. It was evident that the observer of the difference between moral and immoral, natural law and its negation, was the person or persons who, in a given context, appeared to be as legitimate interpreters of God's will.

The modernity based on the differentiation of the code law / not law from the ethical-religious conceptions arises thanks to some institutions, among which the most important is the sovereignty. Sovereignty in fact allows the distinction of the code of law from other codes that is moral/immoral, sin/grace, natural/ unnatural, etc. The sovereign may decide in an absolute way (*ab-solutus*)[6] that is unbind from the moral, ethical or religious criteria. The act of the sovereign is not unethical but simply the law do not draw its validity from morality, religion and law of nature. It depends on the will of the sovereign. The procedures of law and politics become progressively autonomy from the ethical-theological interpretations and statements. While at the basis of ethical or religious representations, there is a code that can be represented by the formula moral / immoral and contrary / obedient to the will of God, the code of the policy and the law do not relate to morality or religion, but represent the basis for

[3] G.Vallone, **Ustrój średniowieczny**: od Schmitta do Brunnera, Antynomie polityki, in: D.Stasi e M.Bosak, (red.), Rzeszów 2010, p.77.
[4] P.Grossi, **Auctoritas universale e pluralità di "potestates**" nel mondo medievale, in Mediterraneo, Mezzogiorno, Europa, in: Studi in onore di Cosimo Damiano Fonseca, G. Andenna e H. Houben (red.) Bari 2004, p.16.
[5] J.Finnis, **Prawo naturalne i uprawnienia naturalne**, trans. K.Lossman, Warszawa 2001, p.450.
[6] M.Villey, **La formazione del pensiero giuridico moderno,** Milano 1986, p.570.

a social communication in which the theological reference, no longer occupies, as in the pre-modernity, the main place. According to Luhmann[7], social systems differentiate themselves from a stratified social order by building their autonomy, i.e. by referring to the rules which they themselves determine. The system of law and policy that differentiates themselves from the rest of society, and above all from the communications relating to morality and religion, create for themselves the ability to perform functions that other systems do not perform.

2 THE PARADOXES LINKED TO THE SOVEREIGNTY

The issue of sovereignty and the matter of the self-foundation of the policy constitute two of the themes of Thomas Hobbes's philosophy. The self-foundation, or simply the self-organization of political communication through a semantic emancipated from religious reference is evident in his political philosophy[8]. In the Hobbes's political thought only the sovereign has right to observe what is legal and what is against legality by basing its observation only on itself. He is *legibus solutus* also from the point of view of collectively binding decisions[9]. He bases own ability and willingness to decide exclusively on himself or, in other words, only on his sovereignty and he do not take account of its own earlier decisions. The paradox is that he has right to be sovereign only on the basis only to his will.

The question could be formulated in relation to the concept of sovereignty is: on what the sovereignty bases its supremacy? How can we distinguish between who has the right to be sovereign and who has not? The solution elaborated by Hobbes in his political works to solve those questions does not remove the paradox of self-reference of the idea of sovereignty, but rather adds another that might hide

[7] N.Luhmann, **Ausdifferenzierung des Rechts**. Beiträge zur Rechtssoziologie und Rechtstheorie, Frankfurt a.M. 1999, p.97.

[8] "Hobbes per primo dunque formula il concetto di personalità dello Stato, inteso come persona civitatis. (…) Il paragone che Hobbes istituisce tra sovranità e anima mette in risalto il suo rifiuto di una visione intellettualistica della legge, e la sua adesione, quindi, a quella concezione volontaristica, che ancora una volta sottolinea l'artificialità della creatura Stato: come l'uomo può volere e non volere, attraverso l'anima, così lo Stato può volere e non volere attraverso il sovrano.La sovranità intesa allora come potere illimitato attribuito al sovrano implica anche l'assoluto arbitrio di chiunque individuo o assemblea ne sia titolare." G.P.Calabrò, **Diritto alla sicurezza e crisi dello Stato costituzionale**, Torino, 2003, pp.42-43.

[9] G.Tarello, **Storia della cultura giuridica moderna**, cit., p.60.

the first. The sovereign, for Hobbes, bases his right to be sovereign on the pact between the individuals founding the civil society, the body politic and the social order[10]. It is clear that it is a useful fiction (not the only one present in the old and new contractual doctrines) that does not solve the problem of the legitimacy of the sovereign power[11].

The distinction “modernity / pre-modernity” does not indicate fully a break between two periods or between two social orders but, at least from a political point of view, a continuity. The role of the sovereign *super legem* in Hobbes's political philosophy is similar to the role of God in the pre-modern representation of the order[12]. Like God, the ruler indicates the difference between order and order, he is the sole interpreter of the content of the laws of nature and he is not subjected to any power. For the author of *Leviathan*, the multitude of men in the state of nature becomes a single person in civil society, the plurality of voices and interests of the situation of natural disorder, characterized by *Bellum omnium contra omnes*, it becomes a single will which determines the order in the civil society. The civil society is characterized by the suppression of the individual use of force. The sovereign’s power derives from the pact among men. The covenant then turns them into practice in delegation or representation.

By representation, the ruler becomes the expression of the all individual wills, although his will cannot be identified with the sum of them. The representation is reduced to the founding act of sovereignty, after which the sovereign is *ab-solutus*, free to represent the civil society only according to its will.

The forces of the multitude[13] are housed in a single *summa legibusque solutas potestas*, a power not tempered by the natural laws established by the supreme authority of God and even from other fundamental law such as a constitution. The sovereign has a faculty that does not belong to any subject in the pre-modern world: making decisions for everyone according only to its will. The paradox of sovereignty is that the representation of all wills essentially correspond

[10] T.Hobbes, **The Elements of Natural Law and Politics**, Whitefish 2004, p.46.
[11] N.Bobbio, **Thomas Hobbes**, Torino 2004, p.67.
[12] G.Marramao, **Dopo il Leviatano**, Torino, 1995, p.307.
[13] On the concept of multitude see the work of Hardt and Negri. M. Hardt, A.Negri, **Moltitudine**, Milano 2004.

only to his own. The opinions of individuals cannot constrain the sovereign, but especially in the State in which the supreme power is acting to ensure peace and order, must match those of the sovereign, whether prince or assembly. The image of the Leviathan, the biblical monster with the face of Cromwell, with the crosier in one hand and a sword in the other, represents the overcoming of the two "grand institutions" of the Middle Ages: the papacy and empire. Religion is no longer the guarantee of peace, but the exact opposite[14]. The sovereign power holds in its bosom all the powers that too religious. Every nation is a church, the kingdom of God is the civil realm. In this way, no other authority can claim the right to be rival of sovereign power. Individuals may have different interpretations of God but these remain outside the political pact. Every liberal interpretation in fact lead to conflict and the state of war.

Hobbes thus dividing the public sphere from the private sphere. The sovereign power is not characterized by a “higher purpose”, it legitimates himself by the mere fact of having the strength and the power to make decisions collectively binding. The sovereign power is the maximum force in a certain group or territory, for maximum strength is defined as a force superior to that individual. With Hobbes the theoretical paradigm of sovereignty, which had roots in the medieval representation of the fullness of power, is carried to its logical extreme. The order does not coincide with the plane of providence but with the use of force. We can differentiate a legitimate force by a force illegitimate or violence. But it could also argue that we can distinguish one illegitimate violence from a legitimate violence: force. The force (or the power) of the sovereign cannot be identified with violence thanks a paradox: it is the sovereign who establishes the difference between legitimate force and violence. He observes the difference between legal and illegal[15].

[14] G.Fassò,**Storia della filosofia del diritto**, Bologna 1968 vol.II, pp.109-115.

[15] “Von Willkür spricht man deshalb, weil der Katalog der Kriterien politischen Entscheidens allein auf der Basis von Ethik und Recht nicht geschlossen werden kann (...) Die Abschlussformel Willkür erspart der Ethik und dem Recht, die Abweichung von sich selbst zu legitimieren (...) Moment unvermeidliche Willkür an der Spitze der Hierarchie begleitet den neue Souveränitätsbegriff von Anfang an(. Diese ebenso künstliche wie unabdingbare Begrenzung notwendiger Willkür ist das Grundproblem der gerade erfundenen säkularen Politik, ein Problem, das in Kontinentaleuropa den Staat als Lösung generiert.” H.Willke, **Ironie des Staates.** Grundlinien einer Staatstheorie polyzentrischer Gesellschaft, Frankfurt 1992, p.27.

In the civil society described by Hobbes, between the sovereign and the citizen there are no other sources of law or intermediate powers. Legitimate is the power that is based on the right to power, namely only the sovereign. The problem of political and legal philosophy of the modern age is how to limit this power and legitimacy through representation[16].

We can then formulate the first, partial conclusions with respect to the issue we are dealing with. Hobbes laid the foundations of legal positivism and the State as holder of the monopoly of force. The theoretical model of the organization of the law in Hobbes is one of the modern cultural premises of the absolute State. The thought of the author of *Leviathan*, from this point of view, opens a new science, which places at its center the description of a policy that ensures the peace and order of social life: this is the season of the modern natural law theory, beginning in the mid-seventeenth century and reaches up to the French Revolution[17]. The fundamental and specific aspect of the modern natural law theory is the subjectivism, as opposed to the objectivism in the ancient and medieval times. "What unites the writers of natural law is precisely the method: it is without doubt the naturalistic. This character of the natural law of the '600 approaching the ideal of the legal doctrine of the time to that of natural science, that precisely in that century was growing."[18]

It can be argued, to conclude on this point, that the season of natural law has "dowry" to the history of political and legal concepts three paradoxes related to the concept of sovereignty. These three paradoxes concerning respectively the need to seek a *foundation of political and legal order* into a covenant or existence of a primitive and pre-political state; the necessity of *the will of the sovereign-representative* as a synthesis, impossible to realized, of the wills of the individuals; *the distinction between force and violence*, and thus between lawful and unlawful, through an institution, the sovereign power, which inevitably ends in order which is self-referential one.

[16] D.Stasi, **Thomas Hobbes**. Modernità e teoria politica., Torino 2007, p.35.
[17] N.Bobbio, **Stato, governo, società**. Frammenti di un dizionario politico. Torino1995, p.69.
[18] G.Fassò, **Storia della filosofia del diritto,** cit., p.199. If Hobbes belongs to the current Positivist or a natural law that constitutes the object of the search for Norberto Bobbio. N.Bobbio, **Thomas Hobbes**, Torino 2004.

3 THE COMMON GOOD AND THE "POLICE STATE"

Around the sixteenth and seventeenth centuries the domain of a given area of some organized groups, the formation of government extended over the whole kingdom, the formation of armies, introduce some innovations in European political institutions. The State has the power to put the law and his relationships with other entities external to its territory, such as other States. One of the tasks of the modern State is to protect the property rights of every individual. The individual becomes a subject of rights and it has the power of claims against the political power. Before the Renaissance, as Burckhardt says: "The man had no value except as a member of a family, a people, a party, a corporation, a race or any other community."[19]

While in the pre-modern society the rights of each individual are derived from its position in social stratification, in the modern society the individual rights refer only to the subject regardless of its belonging to a clan or a social group[20]. Not all individuals, however, can define their rights. Only the sovereign defines the rights of individuals. The issue of what rights and what decisions the sovereign realizes represents the subject of discussion around the State, forms of government and subsequently, the separation of powers. Prior to the appearance and the current use of the term "State" the problem of the distinction between political order and the State does not even arise[21]. From *Politica methodice digesta* of Johannes Althusius (1603) to the *Politica* Heinrich von Treitschke (1874-1878) until *La Politica in nuce* of Benedetto Croce (1925), the treatment of the themes of the State continues to appear under the name of "politics." The term "State" in the sense of regime or "body politic of a nation", dates back to before 1500, when it appeared to the men of the sixteenth century that a new political form needed to be equipped with a name[22].

[19] J.Burckhardt, **La civiltà del rinascimento in Italia**, Roma 1994. The functional differentiation generates changes in the representation of the individual compared to the old order even in the most popular literary figures of the period taken into account. Faust (1587), Don Quixote (1605), Don Juan (1620 ca.), Robinson Crusoe (1719) are "myths" of literature of all time, but have their genesis in the modern context.
[20] N.Luhmann, **Individuum, Individualität, Individualismus**, (w:) Gesellschaftsstruktur und Semantik, Frankfurt am Main 1989, pp.175-176.
[21] N.Bobbio, **Stato, governo, società**. Frammenti di un dizionario politico. Torino1995, p.66.
[22] F. Bonini, **Lezioni di storia delle isttuzioni politiche**, Torino, 2002, p.6.

The State is a concept not easily describable. It can be argued that even if we limit the scope of the search to a period of about a thousand years of European history, no one gets a clear concept of the State[23]. Among the types of State that arise in the modern era it is possible to describe a type of State that can be called "police State"[24] that is characterized by having as a stated aim of the pursuit of the "common good." The police State is not legitimate according to traditional morality, but by the differentiation between society and the State, between the private interests and the general interest whose the unit of difference is the idea of the common good. The common good, and the interests that were pursued by the State, do not coincide with the ethical and religious conceptions, to which the political order recognizes the right to exist in the “internal forum” but not to be an source of law alternative towards the State[25]. On the basis of the idea of the “common good” State both builds its own morality, which coincides with its laws and decrees, and marks its difference from the other political institutions. The common good however coincides in the final analysis with the protection of private property. This is not to argue that the police State coincides exactly with the status of the owners or class. The common good concerns, ultimately, the protection of an order based on distinction between wealthy and poor, you might say, between included and excluded in the order of the police State. The State that has the duty to promote and defend the common good is not directly interested in the affairs of private individuals, but mainly in the protection, in general, of private property. It is sovereign, but, unlike the model of absolute State, it provides for the defending more than planning the entire social order. This type of State, distinguishes, in any case, the private interest from the general public[26].

[23] „Selbst wenn man das sucht Feld auf eine etwa tausendejährige europäische Geschichte einschränkt, führt das noch nicht zu einem klaren Staatsbegriff.” N.Luhmann, **Die Politik der Gesellschaft**, Frankfurt 2000, p.189.

[24] C.Mortati, **Le forme di governo**, Padova, 1973, p.28.

[25] „Die Unterscheidung von Staat und Gesellschaft macht sich unabhängig von Annähmen über einen Bauplan der Schöpfung, über ein Wesen des Menschen oder über einen Anfang bzw. ein Ende der Geschichte“ N.Luhmann, **Soziologische Aufklärung. Beiträge zur funktionalen Differenzierung der Gesellschaft**, Opladen 1987, vol.4, p.67.

[26] „Die Gemeinwohlformel braucht einen Gegenbegriff, braucht eine “andere Seite”, die sie nicht zu bedenken und zu betreuen hat. Sie lebt seit dem auslaufende 18.jahrhundert vom Gegenbegriff des Privatinteresses (...). Für die Selbstfestlegung des Systems auf Gemeinwohl sind in jedem Fall politische(politisch zu verantwortende) Entscheidungen notwendig. Aber diese Entscheidungen bewegen sich im Sinnhorizont der Form „Gemeinwohl“, das heißt: der Unterscheidung von

In the police State the working classes are in a position purely passive, with no real rights and without the possibility of political participation. The farmers are still tied to the land structure of medieval origin and continue to form the so-called "serfdom", whose members cannot claim rights except to a minimum of sustenance."[27] The common good was not so “common”. The proof lies in the fact that every act of government, by its nature, does not help at all ever: if it should be to someone, hurt someone else. The "common good", from the logical point of view does not exist. The common interest is not (historically) more than the particular interest of a fraction which is able to convince the rest of society that his is the interest of all[28]. Individuals may have claims against the State which, in any case, has the task to decide, to protect the common good[29] and defend the order[30].

With the rise of the police State we are witnessing the end of the civil wars of religion and the transformation of war in the war Between the States. In the political semantics, which accompanies these transformations the political sphere frees itself from any appeal to a transcendent or immanent reality of the nature of things[31]. The formula of religious peace of the Edict of Nantes (1598) highlights a historical trend toward the dissolution of the medieval social order and to the

öffentlichen und privaten Interessen“. N.Luhmann, **Die Politik der Gesellschaft**, Frankfurt 2000, p.121.

[27] C.Mortati, **Le forme di governo**, cit., p.30.

[28] “Fra il Sette e l’Oottocento si sono attestati tre miti di matrice borghese: collegati cioè all’illusione di risolvere l’obbligazione politica in un contratto-scambio. La prima utopia è che nel parlamento si possano conciliare (mediare) gli interessi divergenti: così come nel contratto scambio, si smussano le pretese rispettive fino a renderle tra loro compatibili.Questa illusione è alla base della dottrina parlamentare kelseniana (…) dal punto di vista della logica giuridica un compromesso non può diventare una decisione o addirittura una norma.(…)”. G.Miglio, Le trasformazioni del concetto di rappresentanza, in: Le regolarità della politica, op.cit., p.990.

[29] „Der Staat hat jetzt das zu erhalten und zu fördern, was er selbst unterminiert. Die Leitformel heißt jetzt „Glück“ im Sinne von „Eudamonia“, von weltlichem Wohlergehen unter Einrechnung von Moral und von Aussichten auf religiöses Heil.(...)Der Staat hat die Aufgabe, die Glückseligkeit aller zu fördern unter der Voraussetzung, dass sie nicht mehr anstreben, als ihnen zukommt..(...) der Staat ist in dieser Hinsicht(nicht natürlich in seinen Mitteln und selbstverständlich auch nicht in seiner Macht) absolut, weil sich für die Glücksmehrung keine sinnvollen grenzen angeben lassen“.(...)“Der Staatbegriff dient als Abschirmbegriff für zahlreiche Innovationen mit der Tendenz der Ausdifferenzierung eines spezifisch-politischen System (...) Der Staat hat es mit Stoerungabwehr, mit Ruhe und Ordnung zu tun. Und dies angesichts einer unruhigen Welt als eine beständige Aufgabe, die einen dafür geeigneten Apparat erforderlich macht und rechtfertigt“ N.Luhmann, **Die Politik der Gesellschaft**, Frankfurt 2000.

[30] R. Koselleck, **Critica illuministica e crisi della società borghese**, Bologna 1984, p.19.

[31] N.Luhmann, **Soziologische Aufklärung**. Beiträge zur funktionalen Differenzierung der Gesellschaft, p.73.

transition to a secular foundation of the order. The order, "which can no longer coincide with the traditional morality of the Church, comes from the State downgraded from the center of orientation of the whole life of humanity to a European private matter, a set of subjective beliefs that can no longer directly produce positive norms."[32] To summarize as described until now we can say that: the order in pre-modernity was represented as *universitas rerum, congregatio corporum*, order of things which differed from the chaos, disorder. The modern era produces a *Übergang* from a social differentiation based upon a hierarchical order to a functional type of social differentiation. The conceptions of modern politics have their own originality not in the identification of ethical judgment and policy, but just in the separation of ethics and politics. The functional differentiation marks the end of the primacy of the moral and creates the secularization[33]. Religion or morality become more and more a private matter. The power is centralized in the State Police and gradually becomes independent from the influence of the Church and the privileges that the old types of State guaranteed.

4 THE LEGITIMACY OF THE POWER

The will of the State manifests itself through the elimination of all intermediary bodies between the State and the citizens that somehow can limit the power of the first. The State lacks validity rules that emanate from these intermediary institutions, giving legal obligation only to the norms that is to control placed by the State. Outside of the positive law no longer recognizes any valid legal principle[34]. The privileges of the feudal society had now become nothing more than tools of individual advantage and factors of uncertainty and confusion in the legal regulation of social life[35]. In fact, these privileges represent a network so extensive, which produced

[32] G.Miglio, Oltre Schmitt, in AA.VV. **La politica oltre lo Stato**: Carl Schmitt, Venezia, 1981, p.38.
[33] L.Shiner, The Meaning of Secularization, in "**International Yearbook for the Sociology of Religion**", III (1967), pp.51-62.
[34] G.Fassò, **Storia della filosofia del diritto**, op.cit.vol. III, pp.13-25.
[35] '' Europe was composed of an array of political types. In addition to Empire, there were kingdoms, principalities, free cities that had their own laws, currency, and political structures, church territories, memorial baronies, and leagues of cities. This heterogeneous collection of political organizations, whit only weak conceptions of territoriality, and no concept or sovereignty or exclusive legal jurisdiction, was nevertheless unified loosely under the cosmology of a God-directed hierarchy, suffused with a

intricate exceptions to the general rules compromising seriously what is the typical function of law, namely the guarantee of certainty and stability of relations[36]. The rise of a new social subject, the bourgeoisie, requires a new law that would make “inviolable” the individual freedom and autonomy, freeing the individual from those feudal ties that was still tied, and protecting the free disposal of the property and private economic initiative[37]. It can be argued, therefore, that "there is no modern society without private property."[38]

The asymmetry between the top layer and bottom layer that had characterized the pre-modern society does not disappear in modern times, but it was transforming itself. The asymmetry in modern society regards political communication, namely the distinction between decision-makers and interested in the decision, representatives and represented. The political modernity consists in the fact that the differentiation between included and excluded from the political and legal representation is not considered "natural", but “functional”: it is the result of the will and decision of men. In this phase of modernity the asymmetry in the representation of the order is still linked to an ethical principle: the common good that is what a social group decides is the common good for all. The political order is based on a division between the owners and the people who lack the ownership, which the idea of common good helps to hide. The history of the modern State is the story of the gradual "privatization" of all "internal" conflicts and of the systematic imposition of the obligation for the citizens to recourse to the courts of the State for the resolution of any dispute. This the story of a long struggle to get what Weber calls the "monopoly of legitimate force," whose highest prerogative is the right and duty to ascertain who the enemies are: those against whom there will be only legitimate war[39]. The “other”, everything that does not fit in the order may be considered an enemy, this means

common Christian religion (respublica Christiana)”. K.J.Holsti, **From States systems to a society of states**: the evolution of international relations, “International relations”, vol.I., p.4.

[36] D.Stasi, **Filozofia porządku prawo-politycznego w nowożytności**, Rzeszów 2009, p.33.

[37] P.Becchi, **Giuristi e principi, Elementi di una storia della cultura giuridica europea**, Genova, 2000, p.18.

[38] “Al tempo stesso però la proprietà privata è costituita come proprietà individuale libera, legittimata in base al libero scambio e svincolata dalla posizione e dalle caratteristiche sociali e personali del proprietario”. P.Barcellona, **Formazione e sviluppo del diritto privato moderno**, Napoli 1993, pp.141-142.

[39] G.Miglio, Guerra, pace, diritto, in **Le regolarità della politica**, op.cit. p.766.

"exclusion and ethical and legal condemnation of private war and civil war, which are considered by definition, illegal wars and unacceptable"[40] The paradoxes of representation of the strength and the foundation of sovereignty (the basis for the foundation of the sovereign will) hide the asymmetry that exists between the holders of the decision and of the public force in a given territory and those who are subject to such decisions. Without the paradox of representation of the strength and foundation of power would not be possible to represent the order of society. The social order, in other words, is based on a principle, sovereignty, and an idea of the common good functional to the centralization of power and the monopoly of the use of force on the part of a social group in respect of the "other".

The political theory of modernity is an attempt to dispel the paradox of unity of the difference between subject and "decision-makers of the order" that the power of modern necessarily produces[41]. As we have seen the State asserts as the holder of the monopoly of the legitimate use of force[42]. The problem of legitimacy is ultimately that of force. The theory of the State is in this sense a theory of force. The monopoly of power, which is the legitimate monopoly of political performance in a given territory, differs from the illegitimate power, one that can undermine the legitimate power. Power, in this sense, is the power of the State from which distinguishes the illegitimate power: that power which for lack of strength cannot accomplish the task of establishing the law, in other words a power that has no power.

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[40] Ibidem, p.767.
[41] N. Bobbio, **Stato, governo, società**. Frammenti di un dizionario politico, Torino 1995, p.70-71.
[42] "Er führt (in heutiger Terminologie) zu der Unterscheidung von legitimer und nicht legitimer Gewalt und postuliert für Staatgewalt Legitimität (...)Wir sehen in Anschluss an die Staatlehrender Tradition, den Schlüssel für ein Verständnis des Staatsbegriffs, im Begriff der Staatgewalt, oder allgemeiner: in einer Theorie der Gewalt" N.Luhmann, **Die Politik der Gesellschaft**, Frankfurt 2000, p.192.

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