

The Immanent Frame and the Temptations of Transcendence: The Problem of Legitimacy in Late Modern Political Thought (1905-1933)

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1. Introduction

From the end of World War II to the present, the study of politics in the liberal West, both from an empirical and from a normative perspective, has focused predominantly on the issue of the (re)distribution of socially relevant goods and resources. As a North American political scientist famously put it, in the title of an important work, politics was essentially about *who gets what, when and how*.¹ In normative political theory, (re)distributive justice quickly emerged as the hottest topic of research, as thinkers sought to determine how goods and resources should be distributed in a just society. John Rawls' *A Theory of Justice* appeared in this context arguably as the single most important work of Western political philosophy in the second half of the twentieth century.

The reasons for the predominance of the (re)distributive question in post-1945 Western political thought are not particularly hard to fathom. On the one hand, the West's antagonist in the Cold War espoused a political ideology which called for radical redistribution – and to which Western intellectuals naturally felt obliged to reply. On the other hand, several states in the West initiated redistributive reforms after the Second World War, in the process of erecting a new model of welfare state.

The (re)distributive question, of course, remains relevant today – even if the welfare state is generally thought to be in decline –, and plenty of brilliant minds are drawn to its challenges. In the present essay, however, I wish to explore a different view of politics; one which sees the fundamental problem of politics as that of order – as opposed to war or chaos – and its ultimate, legitimate grounds. Such is, indeed, a logically prior conception of the political problem, even if it has been overshadowed for decades by (re)distributive concerns. (Re)distribution can only appear as the central political issue as long as the basic tenets of order are not considered to be at stake. Today, the rise of religious extremism, mass-scale terrorist violence and the predicaments of so-called *failed states* in the economic peripheries – states which fail to secure the basic degree of internal peace needed before other tasks, including (re)distributive ones, can be addressed – seem to indicate that political order cannot simply be taken for granted the way it used to be by mainstream Western intellectuals in the second half of the twentieth century.

In what follows I will consider the political thought of three authors – Max Weber, Hans Kelsen and Carl Schmitt – who were fundamentally concerned with the issue of legitimacy, that is, with the problem of «the ultimate grounds of the validity of a domination»². Such concern must be understood in its multiple contexts. In a more immediate sense, it is a product of the historical circumstances of war, defeat, revolution and permanent political crisis that characterized German-speaking Central Europe

¹ Harold D. Lasswell, *Politics: Who Gets What, When, How*, New York, Whittlesey House, 1936.

² Max Weber, *Economy and Society*, Berkeley, Los Angeles and London, University of California Press, 1978, p. 953 (emphasis elided).

throughout the first half of the twentieth century. On the other hand, in a broader perspective, contention around the «ultimate grounds» of political authority appears as a clear symptom of late modern intellectual impasses that extend far beyond any specific national context; impasses marked both by the modern dissolution of traditional, religiously-inspired markers of certainty and by the collapse of the modern rationalist illusion which, for a while, upheld the ambition of furnishing an equally stable and lasting alternative. Even if a retrospective glance from the standpoint of a consolidated Western liberal democracy in the late twentieth (or early twenty-first) century might treat the separation of religion and politics as a *fait accompli*, in the late modern reflections of Weber, Kelsen and Schmitt the matter was far from settled. If, for centuries, the inscription of the political order in a grander, divinely established order which transcended the empirical finiteness of all that is human had supplied political authority with a substrate of meaning – and a promise of duration beyond the biological lives of rulers and ruled – that was crucial to its legitimacy, secularization posed a very clear and serious challenge to the foundations of political order. Political legitimacy was, indeed, torn between the immanent movement which sought to ground the political order in its own – purely human and rational – terms, on the one hand, and multiple promises of transcendence, on the other.

2. Weber: charisma against the full closure of modernity's «iron cage»

As every reader of *The Protestant Ethic* surely knows, Max Weber was particularly sensitive to the unintended consequences of ideas. Certainly, no Protestant doctrinaire intended to provide the spiritual conditions for the emergence of modern capitalism. Notwithstanding, the commitment of Protestant asceticism «to remodel the world and to work out its ideals in the world»³ ended up infusing «the struggle to rationalize the world»⁴ which characterizes both modern capitalism and modern science. These new forces of rational modernity, in turn, quickly emancipated themselves from their religious sources and took a life and logic of their own, as they increasingly succeeded in emptying social relations from the sacred meanings that used to be attached to them. Such evaporation of meaning, as Weber suggests in the breathtaking *crescendo* that concludes *The Protestant Ethic*, also hits the political philosophy of the Enlightenment and its theories of human rights, which he interpreted as the secularization of religious natural right doctrines.⁵ The golden age of the Rights of Man, according to Weber, extended from the second half of the eighteenth to the early nineteenth century, as they inspired political revolutions in North America and across Europe. However, the substantial axiological appeal of the discourse of human rights increasingly wore off, in the process of being rationalized into mere legal positivism. The forces of modernity – rationalization, bureaucratization, specialization, and secularization – contributed to the erosion of the ultimate meaning of all human actions and, thus, also to a deep crisis of political

³ Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, London and New York, Routledge, 1992, p. 124.

⁴ Weber, *The Protestant Ethic*, p. 64, n. 30 (on p. 181).

⁵ See *ibid.*, p. 124: «The rosy blush of its laughing heir, the Enlightenment, seems also to be irretrievably fading...»

legitimacy. To be sure, such «disenchantment of the world»⁶ might be interpreted as a longed-for liberation from old theological cosmologies, but to Weber it also signaled the loss of a significant source of meaning to human life in all its spheres. The prospect of the rise of an «iron cage»⁷ that would incarcerate mankind in a world of routine, function and utility, deprived of an ultimate purpose, was amongst Max Weber's deep-seated fears.

Still, he was not the type of thinker prone to nurture false hopes or groundless illusions. To Weber, a disillusioned realist if there ever was one, the return to an idealized past free from the strictures of state bureaucracy and the capitalist economy was nothing but a romantic cradlesong that every serious observer had the duty to discard, if only for the very simple reason that pre-modern societies had actually all been filled with plenty of harsh strictures of their own. Several, if not most, of the elements that combined to form the frightening panorama of the «iron cage» of modern life had to be acknowledged. Yet, there still appeared to be some room left for the – however transient – eruption of sources of meaning capable of preventing the full closure of modernity's cage. Indeed, the arena of politics offered, in Weber' view, some of such precious promises. For sure, modern politics was decisively marked by the unstoppable growth of bureaucratic apparatuses both within the state and within the political parties. However, their primacy could still be defied by charismatic leaders whose personal qualities allowed them to rise above, and command, both the spiritually proletarianized party staffs and, eventually, the whole machinery of public administration.⁸

The concept of charisma, borrowed from Protestant theology, is Max Weber's key for the possibility of an extraordinary rupture with the continuity of modern legal-rational, bureaucratic rule. According to Weber's sociology of domination, charisma is one of the three pure types of legitimate rule, along with tradition and rational legality. As social scientific ideal-types, of course, they are trans-historical categories which can have explanatory clout in various social, cultural and temporal contexts. Nonetheless, in broad world historical terms, there is an implicit linearity to their succession. To sum it up rather crudely: it all starts with charisma, force of habit and precedent make tradition out of it, which in turn is rationalized, giving rise to modern legality. Charisma is, thus, the original focal point of legitimate domination, since it intervenes directly in the realm of symbols, representations, values and beliefs within which domination is exercised and with reference to which it must be justified. As the author puts it, «charisma, in its most potent forms, disrupts rational rule as well as tradition altogether» and «is indeed the specifically creative revolutionary force of history»⁹. In contrast, tradition and legality are but the routinization of charisma, providing the system of rule with an essentially derivative form of legitimacy.¹⁰

⁶ Max Weber, «The Social Psychology of the World Religions», in H. H. Gerth and C. Wright Mills (Eds.), *From Max Weber: Essays in Sociology*, New York, Oxford University Press, 1947, p. 290.

⁷ Weber, *The Protestant Ethic*, p. 123.

⁸ See Max Weber, «The Profession and Vocation of Politics» (as known as «Politics as a Vocation»), in Max Weber, *Political Writings*, Cambridge, Cambridge University Press, 1994, p. 351: «[T]he only choice lies between a leadership democracy with a 'machine' and democracy without a leader, which means rule by the 'professional politician' who has no vocation, the type of man who lacks precisely those inner, charismatic qualities which make a leader.»

⁹ Weber, *Economy and Society*, p. 1117.

¹⁰ See *ibid.*, p. 252: «Charisma is a phenomenon typical of prophetic movements or of expansive political movements in their early stages. But as soon as domination is well established, and above all as soon as control over large masses of people exists, it gives way to the forces of everyday routine.»

Weber's transfer of charisma from the paradigmatic instances in the world of ancient monotheistic religion to modern politics is, however, filled with thorny implications. To begin with, for sure, charisma is largely de-theologized in the process. The modern charismatic leader is not a prophet committed to spread the word of the one and only God, and thereby to transform the whole set of values and symbolic references of a given community. Much more modestly, he appears as a man seeking to further a particular cause amongst diverse, either competing or non-mutually exclusive, alternatives, taking part in the insolubly pluralistic struggle of religious and secular gods that is so brilliantly outlined in «Science as a Vocation»¹¹ as the trademark of the modern fragmented world. On the other hand, the modern incarnation of charisma, if it can't translate into a full-fledged, successful revolutionary movement¹², necessarily entails a compromise with the rationalized and bureaucratized institutions of mass democracy. Indeed, in a posthumously published essay on the three pure types of legitimate rule, Weber explicitly conceives modern democracy as an anti-authoritarian reinterpretation of charisma which involves, in essence, a reversion of the original causal nexus.¹³ The power of the modern charismatic leader stems not anymore primarily from intrinsic exceptional qualities, which *per se* command the devotion of the followers – in the pure form of charismatic authority, obedience is an obligation, not a choice –, but instead on the formal, *i. e.* electoral recognition of the former by the latter. What used to be the effect of the charismatic appeal – popular recognition – now became the primary cause, the fundamental basis of legitimate democratic rule. Charismatic politics was thus embedded in the formal procedures of modern democracy.

Max Weber's modern charismatic leader appears, hence, as a creature divided between the conflicting demands of transcendence and immanence, between the uncompromising commitment to whichever grand causes might bestow upon the political order the ultimate meaning it so urgently craves for and the necessary reliance on the electorally constructed will of the people, which, in the last resort, might deny a leader his charismatic status. The ambivalence of Weber's modern charismatic politics is a major symptom of the erosion of standard liberal narratives of political legitimacy in the late modern era.

3. Kelsen: towards an immanent theory of democratic legitimacy

To the ultimately unsolvable dilemma of Max Weber's modern reenactment of charismatic politics one can contrast Hans Kelsen's effort to affirm democracy from a strictly immanent perspective. Perhaps no other thinker was so strongly committed to interpreting legitimacy as formal democratic legality and to freeing the theories of law and the state from all theological remnants.

The problem of political legitimacy is, in the Austrian scholar's eyes, that of the construction of the people as the immanent source of legitimate authority and the collective subject of rule. Kelsen's quest for the *demos* claims to be heavily inspired by

¹¹ Max Weber, «Science as a Vocation», in Gerth and Wright Mills (Eds.), *From Max Weber*, pp. 129-156.

¹² See Weber, *Economy and Society*, p. 989: «Such an apparatus [bureaucracy] makes “revolution,” in the sense of the forceful creation of entirely new formations of authority, more and more impossible (...). The place of “revolutions” is under this process taken by *coups d'état* (...).»

¹³ See Max Weber, «Die drei reinen Typen der legitimen Herrschaft», in Max Weber, *Gesammelte Aufsätze zur Wissenschaftslehre*, Seventh Edition, Tübingen, Mohr Siebeck, 1973, p. 487.

Rousseau in its reading of the ideas of freedom and equality.¹⁴ However, the Rousseauian connection soon begins to fade away, as Kelsen's deepest epistemological concerns move to the fore. The point is not only that the author rejects the utopian prospects of an actual elimination of the rule of man over man. Much like Weber, Kelsen, too, considers democracy a form of domination (*Herrschaft*). But more significantly perhaps, in stark contrast to the Rousseauian tradition¹⁵, the author refuses to conceive the people in substantive terms as an empirically existing entity. In his view, the people is and remains an abstract, normative construct, which can only fictitiously be personified.

Yet, the Kelsenian break with a substantivistic – in the author's terminology: hypostatized – approach to the concept of the people does not merely indicate a move away from the footsteps of Rousseau. Much more importantly, it marks the author's attempt to liberate the theories of law and the state from the intellectual horizon of theology, so as to make them attain the level of a truly modern science.

In 1922/23, Kelsen published an important, though often overlooked, article called «God and the State»¹⁶, which sets out to investigate the analogies both between the two concepts and between the disciplines – theology and law – which study them. In the first part of the essay, drawing on Feuerbach, Durkheim and Freud, Kelsen explores the parallels between the social and the religious problems. According to him, the unconditional subjection to a higher authority which characterizes the religious experience is quite identical to the subordination to the imperative injunctions of state and society. The second part of the text, in turn, presents a more ambitious argument. Suggesting that the theory of the state exhibits striking similarities with theology, Kelsen argues that such nexus must be broken, if a pure science of law and the state should emerge. In the author's view, the problem with the concepts of God and the state, as they are commonly understood by the disciplines of theology and law, is that they are personifications unduly turned into reifications (or hypostatizations) of abstract notions of overarching unity:

«If the person called “the state”, created by juristic knowledge to illustrate the unity of the legal system, is hypostatized in the usual manner and contrasted to the law – whose unity such personification of the state merely expresses – as a distinct being, one faces quite the same problem or pseudo-problem as in theology. The latter can only persist as a discipline which differs from moral or natural science insofar as one holds to the transcendence of God over the world – this fundamental dogma of all theology –, to the existence of a supernatural, extra-earthly God. Similarly, indeed, a doctrine of the state which differs from the theory of law is only possible as long as one believes in the transcendence of the state over the law, in the existence or rather in the sham existence of a meta-legal, extra-legal state.»¹⁷

¹⁴ See Hans Kelsen, *Vom Wesen und Wert der Demokratie*, First Edition, Tübingen, Mohr Siebeck, 1920, pp. 3-12.

¹⁵ More precisely, to Georg Jellinek, one of the leading jurists of the traditional Imperial *Rechtslehre*.

¹⁶ Hans Kelsen, «Gott und Staat», in Hans Klecatsky, René Marcic, Herbert Schambeck (Eds.), *Die Wiener rechtstheoretische Schule: Schriften von Hans Kelsen, Adolf Merkel, Alfred Verdross*, Vol. 1, Vienna, Europa Verlag, 1968, pp. 171-193.

¹⁷ Kelsen, «Gott und Staat», p. 181 (translation mine).

The analogies between both reifications – of God and the state – are numerous, but they can all be brought back to the duplication of the object of knowledge which, according to Kelsen, is the product of every hypostatization. Indeed, theology and law seek to square a circle with formally equivalent theories, composed of two distinct instances. Firstly, there is voluntary submission to the created order. In theology, this happens when God takes human shape, with the scission between God, the almighty father, and his human son, who is bound to the laws of nature. Legal theory, for its part, postulates the principle of the voluntary commitment of the state to the legal order it has established, so as to explain the mysterious «metamorphosis of the state *qua* power into the state *qua* law»¹⁸. Secondly, there is exceptional transgression of the created order. The concept of miracle, which designates a momentary, divinely imposed suspension of the laws of nature, allows theology to reaffirm God's omnipotence and transcendence. Likewise – and Carl Schmitt's *Political Theology*, as one will see below, is the most explicit expression of this –, legal theory reasserts the sovereignty of the state by allowing it, in the presence of extraordinary circumstances, to step beyond – partially or totally annulling – the existing legal order. Rejecting these analogies, Kelsen appears overtly as an epistemological atheist who wishes to expunge the knowledge of law and the state from theological (pseudo-)dilemmas and their (pseudo-)solutions.¹⁹ A man of modern science, he discards both the notion of the natural miracle, as a momentary suspension of the causal laws of nature imposed by the omnipotent God, and the idea of a «legal miracle»²⁰ (*Rechtswunder*), which pretends to affirm the sovereignty of the state by making it transcend, in exceptional conditions, the legal order it created in the first place.

The triumph of form and function over substance in Kelsen's pure theory of law and the state has significant implications for his understanding of democracy. Since democracy designates a specific form of state, it necessarily shares the latter's general formal features. Thus, a democratic state, too, is reduced to the democratic legal order, to the expression of its systematic unity, to an abstract «point of imputation»²¹ (*Beziehungspunkt*) to which the actions of its agents or organs are attributed. Ultimately, however, this formal understanding of the state as a complex compound of abstract normative relations, hierarchically organized as a system of delegation and representation, can only do little to affirm democracy from the point of view of the ideas of freedom, equality and popular rule. In fact, rather more modestly, in the mid-1920s Kelsen ends up defending parliamentary democracy essentially as the achievable compromise between some degree of popular participation in the creation of the legal order and the inescapable requirements of the social division of labor, which he views as a necessary condition for progress.²² Yet, an additional argument, which not only draws democracy closer to the orbit of Kelsen's secularist and scientific *Weltanschauung*, but also narrows the gap between democracy's ideology of freedom and equality and its institutional realities, is supplied to such a frail case for the democratic state: the idea of democracy as the fundamental political expression of a relativistic understanding of truth and knowledge.

¹⁸ *Ibid.*, p. 185 (translation mine).

¹⁹ See *ibid.*, pp. 191-192.

²⁰ *Ibid.*, p. 189.

²¹ *Ibid.*, p. 187.

²² See, above all, Hans Kelsen, «Das Problem des Parlamentarismus», in Klecatsky, Marcic, Schambeck (Eds.), *Die Wiener rechtstheoretische Schule*, pp. 1661-1687.

The idea of relativism, on the one hand, helps Kelsen conceive the people, as it really exists, in pluralistic terms. The political parties emerge thus as the irreplaceable instruments of modern democracy, and the attainment of a consensual, supra-partisan general will – a part of the nineteenth-century parliamentary ideal – is discarded as a sheer meta-political illusion. On the other hand, and above all, relativism reconnects Kelsen's democratic theory with his epistemology. Indeed, just as there is no absolute truth which transcends the limits of human cognition, there can also be no absolute value from which social and political authority might be unconditionally derived, irrespective of the conflicting wills of the actual members of the political community:

«Because democracy weighs everyone's political will equally, it must also respect each political belief and opinion (...) in equal measure. If one renounces to the knowledge of an absolute value, the opposite opinion must also be deemed possible. Relativism is therefore the conception of the world presupposed by the democratic idea.»²³

However, the lack of a substantive axiological foundation to democracy involves specific risks, which the triumph of form and method over substance in the modern theory of knowledge was actually spared from. To be sure, modern science was always subject to being challenged by rival or alternative sources of meaning, truth and knowledge, even if its social prestige seemed to increase with every technological advance or cultural achievement it contributed to. Yet, boundaries were clearly marked: religious adversaries of science generally refused to enter the latter's realm, just as much as the apologists of scientific modernity declined to play the game of religious transcendence. The case is utterly different with the radical pluralism of relativistic democracy, which, as Kelsen acknowledges, so as not to become entangled in a «fateful contradiction»²⁴, must not deny its most ruthless absolutist enemies access to its own instruments, *i. e.*, the change to freely participate in the definition of the legal/political order – hence leaving the door open to the abolition of democracy through democratic means. The «fatherless society»²⁵ of democracy, the fraternal order of immanent freedom, equality and pluralism, cannot prevent the menace of a *revenge of the father*²⁶.

4. Schmitt: a politico-theological challenge to modern politics

Carl Schmitt's critique of liberal democracy and secular modernity appears as one of the most radical attempts to reaffirm the idea of transcendent political authority in the late modern era. Schmitt's rejection of the capitalist economy and its liberal political order has distinct layers, which extend from an early literary-aesthetic condemnation of modern civilization to the astute exposure of the contradictions of the parliamentary state. Yet, the core of Schmitt's critique is located in his *Political Theology*, with its peremptory assertion – *contra* Kelsen – that the problem of the foundations of the political order must not leave the orbit of metaphysical-theological reasoning.

²³ Kelsen, *Vom Wesen und Wert der Demokratie*, p. 36 (translation mine).

²⁴ Hans Kelsen, «Verteidigung der Demokratie», *Blätter der Staatspartei*, 2. Jahrgang, p. 98 (translation mine).

²⁵ Hans Kelsen, «Foundations of Democracy», *Ethics*, 66 (1), 1955, p. 31.

²⁶ I borrow the expression from Peter Gay's *Weimar Culture: The Outsider as Insider*, New York and London, W. W. Norton, 2001, p. 102.

Schmitt's concept of sovereignty is marked by the primacy of the exception over the norm. According to the well-known inaugural sentence of *Political Theology*, «[s]overeign is he who decides on the state of exception»²⁷. This means that only under extraordinary circumstances, in the context of a real emergency, can light be shed upon the true subject of sovereignty, who is thus irreducible to a system of abstract legality. Still, what does this concept of sovereignty as decision on the exception have to do with a theological understanding of the problem of political legitimacy? Well, in another decisive passage of the same work, the author posits that «[a]ll significant concepts of the modern theory of the state are secularized theological concepts»²⁸.

Indeed, the legal and political idea of decision on the exception as the revelation of the true sovereign is, in Schmitt's view, nothing but the secularization of the theological concept of miracle; the former plays in the theory of the state the exact same role as the latter in theology. Whilst, as we saw above, Kelsen sought to discard the notion of the «legal miracle», which constituted an obvious obstacle to the rise of a science of law and the state free from theological contamination, Schmitt speaks simultaneously against the modern repression of state sovereignty as decision on the exception – in favor of the primacy of the abstract norm – and against the retreat of an actively intervening God from the world:

«For the idea of the modern constitutional state triumphs together with deism, a theology and a metaphysics that banishes the miracle from the world. This theology and metaphysics rejects both the direct divine intervention through an exceptional transgression of the laws of nature which is conveyed by the idea of the miracle and the direct intervention of the sovereign in a valid legal order. The rationalism of the Enlightenment dismissed the exception in every form.»²⁹

Given the inextricable link he posits between political thought and theology, Schmitt is inevitably drawn to the conclusion that modern secularization constitutes not only a general turn away from religion, but also the eclipse of political ideas. Indeed, Schmitt interprets modern secular civilization as a grand «struggle against the political»³⁰. This modern retreat of religious *and* political ideas leaves the author at pains to translate his thought into a clearly delineated alternative to liberalism. The panorama must have been quite frightening in his eyes: Protestant sects, as Weber had shown, were the spiritual sources of capitalism and liberalism; Lutheran deference to authority crumbled, if not earlier, with the fall of the Wilhelmine Empire after World War One; and political Catholicism (in whose circles Schmitt first became politically active) seemed to be increasingly compromising, in Germany and elsewhere, with the secular forces of parliamentarism and democracy. Of course, visions of a robust authoritarianism aiming

²⁷ Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, Ninth Edition, Berlin, Duncker & Humblot, 2009, p. 13 (translation mine).

²⁸ Schmitt, *Politische Theologie*, p. 43 (translation mine).

²⁹ *Ibid.* (translation mine).

³⁰ *Ibid.*, pp. 68-68 (translation mine): «Today nothing is more modern than the struggle against the political. American financiers, industrial technicians, Marxist socialists, and anarcho-syndicalist revolutionaries unite around the demand that the unobjective rule of politics over the objectivity of economic life be eliminated. There should only be organizational-technical and economic-sociological tasks, but no more political problems. The prevailing type of thinking is no longer capable of perceiving a political idea. The modern state seems to have indeed become what Max Weber sees in it: a huge apparatus.»

to overcome the crisis of the liberal state, even if of mainly secular inspiration, flourished in the early twentieth century. And, to be sure, Schmitt endorsed their ideas and adopted their languages in several instances. Still, he was never, in essence, a radical nationalist, in spite of the circumstantial attraction to the political mythology of fascism.³¹ Nor was he a conservative thinker strictly in search of a political stability which pluralistic democracy appeared unable to secure, even if a cursory reading of his exploitation of the plebiscitary tendencies of the Weimar Constitution might suggest that.³² Schmitt's praise of fascism has less to do with any genuine nationalist enthusiasm – for him, in the last analysis, a mere derivative of pagan, polytheistic idolatry³³ – than with the longed-for restoration of the supreme authority of the state³⁴. And his notion of plebiscitary leadership does not really testify to a concern with political stability in a strict sense, but rather to a deep hunger for unchallengeable order – a hunger stemming from profound religious sources.

Of course, the fact that the state, as the modern embodiment of political order, has an undeniable transcendent deficit and emerges, in itself, as a product of secularization, is something Schmitt knew all along.³⁵ But such fragment of achievable order was still worth fighting for, still worth vindicating against both the deceitful universalist promises and the actual pluralist degeneration of secular liberalism.³⁶ To the cause of statist authoritarianism Schmitt could find plenty of associates, but none actually shared his deepest theological concerns. The collaboration with the racist ideology of the Nazis expresses perhaps the ultimately unavoidable tragedy of this last great counterrevolutionary thinker.

5. Conclusion

This late modern dispute on political legitimacy and its «ultimate grounds» provides no fully satisfying answers to the issues and dilemmas it raises. Nor could it, to be fair. The rise of modernity's immanent frame constituted, and still constitutes, a challenge to political thought in general, and to the problem of legitimate order in particular. Max Weber was one of the first thinkers to face it, in an attempt to reconcile divergent claims. On the one hand, the acknowledgement of the necessities immanent to modernity, of the processes, instruments and institutions which set its general tone. On the other, the persisting reliance on charisma, on the personal charismatic devotion to grand causes, whose transformative potential, even if short of the «prophetic *pneuma*, which in former

³¹ For the author's *flirtation* with Italian fascism, see Carl Schmitt, «Die politische Theorie des Mythos», in Carl Schmitt, *Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1923-1939*, Third Edition, Berlin, Duncker & Humblot, 1994, pp. 11-21; Carl Schmitt, «Wesen und Werden des faschistischen Staates», in Schmitt, *Positionen und Begriffe*, pp. 124-130.

³² See Carl Schmitt, *Der Hüter der Verfassung*, Tübingen, Mohr Siebeck, 1931; Carl Schmitt, *Legalität und Legitimität*, Munich and Leipzig, Duncker & Humblot, 1932.

³³ See Schmitt, «Die politische Theorie des Mythos», p. 20 (translation mine): «For political theology, this [the political mythologies of nationalism and fascism] is polytheism, just as every myth is polytheistic.»

³⁴ Schmitt, «Wesen und Werden des faschistischen Staates», p. 128 (translation mine): «The fascist state decides not as a neutral, but as a higher third party. That constitutes its supremacy.»

³⁵ See, above all, Schmitt's book on Hobbes, written shortly after the author had fallen from grace with the Nazis: Carl Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes. Sinn und Fehlschlag eines politischen Symbols*, Second Edition (Günther Maschke), Cologne, Hohenheim, 1982.

³⁶ See Carl Schmitt, «Staatsethik und pluralistischer Staat», in Schmitt, *Positionen und Begriffe*, p. 162: «(...) a piece of concrete order is more valuable than the empty generalities of a false totality.»

times swept through the great communities like a firebrand, welding them together»³⁷, might still help prevent the full closure of the modern «iron cage» and the ensuing enslavement of mankind by the forces of rationalism and materialism.

Hans Kelsen, for his part, rules out the need for any break whatsoever with modernity's immanent forces. According to him, the legal/political order must be justified in its own rational terms, without recourse to the sophisms of theology. Kelsen ends up finding a sort of anti-foundational foundation to modern democracy in the worldview of relativism, characterized by a *scientific* equidistance from all the passions, interests, values, beliefs and opinions at stake in the democratic competition for political power. But the democratic relativist would soon have to recognize the flimsiness of such base, and how it could not possibly prevent the self-destruction of democracy, its appropriation by the advocates of autocracy and political absolutism.

Carl Schmitt exploited the paradoxes and fragilities of pluralist/liberal democracy with unmatched sharpness. However, his grander ambition was that of an uncompromising, theologically-inspired rupture with modern secular politics, or, to be more precise, with the modern evaporation of «the political». There was more than a hint of anachronism in such a venture. Indeed, if monotheistic Christian faith had been its original source of inspiration, it ended up joining the swarming secular political mythologies that promised to transcend the crumbling liberal-capitalist order in the first decades of the past century.

Historically, of course, Max Weber's, Hans Kelsen's and Carl Schmitt's reflections on the foundations of political order are set in the prelude to perhaps the greatest catastrophe of European civilization: the Third Reich. And they have all suffered, rightly or wrongly, from being read in such a retrospective light. Post-1945 political thought in the West was marked by the renaissance of natural right theory, both as a reaction to the horrors of the recent past and as an alternative to the materialist doctrines glorified in the Soviet East. As late-modern thinkers, Weber, Kelsen and Schmitt, in spite of everything that sets them apart, shared a deep dissatisfaction with the basic premises of natural law. The postwar marginalization of their political ideas, or their turning into a favorite object of critique by some of the promoters of the resurgence of natural law, was surely not unexpected. This predominance of natural right theory has caused a reorientation of political thought to the domains of ethics and morality, which has brought about the primacy of issues of distributive justice. Still, the questions raised by the late modern German contentions on the problem of political legitimacy reverberate today, even if they tend to remain hidden beneath a more or less reassuring veil. As Kelsen said, those concerned with finding out what lies beyond positive law, and serves as its foundation, will encounter «neither the absolute truth of metaphysics nor the absolute justice of natural right. Whoever lifts the veil and does not close his eyes, will see the hideous Gorgon face of Power staring back at him.»³⁸

It takes courage to look power in the eye, and the terrain is as difficult now as it was a century ago. Remaining within the immanent frame of modern politics provides only short, unsatisfying answers; embracing temptations of transcendence might, in turn, prove

³⁷ Weber, «Science as a Vocation», p. 155.

³⁸ Hans Kelsen, «Diskussionsrede zu den Berichten „Die Gleichheit vor dem Gesetz im Sinne des art. 109 der Reichsverfassung“», *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 3, 1927, p. 55 (translation mine).

to be fatally dangerous. To question the «ultimate grounds» of political order and authority is a risky business.

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