

# THE STATE, THE TERRITORY, THE COLONIZED

## O ESTADO, O TERRITÓRIO, O COLONIZADO

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**Abstract:** The territory is the place of a political category of sovereignty, the definition of a specific and cultural legitimacy that can become a memory of history itself. It is a representation that disappears with man himself or with the very men who had maintained it, but which – and this is precisely where that specific force of change lies – lives again as a necessity of law and politics, which have their roots in the possibility of representing themselves as sovereigns. The risk of a return of imperialism in different forms, such as those of the great international organizations, remains ever closer.

**Keywords:** Sovereignty. Territory. Territorial. Imperialism. Colonized. Kafka. Freedom. Security. State. King's two bodies. Constitution. Law.

**Resumo:** O território é o lugar de uma categoria política de soberania, a definição de uma legitimidade específica e cultural que pode se tornar uma memória da própria história. É uma representação que desaparece com o próprio homem ou com os próprios homens que a mantiveram, mas que - e é exatamente aí que reside essa força específica de mudança - revive como uma necessidade do direito e da política, que têm suas raízes na possibilidade de se representarem como soberanos. O risco de um retorno do imperialismo em diferentes formas, como as das grandes organizações internacionais, permanece cada vez mais próximo.

**Palavras-chave:** Soberania. Território. Territorial. Imperialismo. Colonizado. Kafka. Liberdade. Segurança. Estado. Os dois corpos do rei. Constituição. Lei.

1. *The core of classical legal and political doctrine on the State*

1.a. The evolution of political and legal thought founding the state as a concept and as the most proper and direct emanation of a constitution, a constitution understood as the founding element of the state itself and the legal foundation of the division of powers, was already formed in Jean Bodin who, curiously enough, expressed himself in this way with regard to a legitimate monarchy "J'ay mis en nostre definition, que les subjects soyent obeissans au Monarque Royal, pour monstrer qu'en luy seul gist la maiesté souveraine: et que le Roy doit obeir aux loix de nature, c'est à dire gouverner ses subjects et giuder ses actions par la justice naturelle (...). Si donc les subjects obeissent aux loix du Roy et le Roy aux loix de nature, la loy d'une parte et d'autre sera maistresse (...): c'est pourquoy ceste Monarchie se doit appeller royale e légitime" .<sup>1</sup>

It is already immediately possible to detect, , how in Bodin's thought we rediscover the traces of a legitimate monarchy by virtue of the fact that the laws of nature were to be obeyed by the king, and the king, precisely through those laws, which he himself had to obey, obtained the possibility of creating the necessary laws to which the people, in turn, gave obedience. The idea legitimacy embodied in Bodin's pages reflects the destiny of a sovereignty in which the king himself, who assumed it, was subject to a natural justice to which he had to refer in order to be able to create the laws necessary for the life of the state itself: on the other hand, d'Holbach himself reiterated how the general interest of society was to secure for the greatest number of citizens the advantages for which they have associated themselves: these advantages are liberty, property and security? .<sup>2</sup>

One can realise from these last words how strong the lesson of John Locke himself was at that time.

1.b. Bodin, moreover, fully described the traces of a philosophy of history that expressed, but could still express, the circular vision of an epoch and the transmission of political power. The latter would only belong to a narrow group of people who would manage it by controlling social change: the struggle would, inevitably, become radicalised between these groups, as a function that sets in place the permanence of these groups. Whatever the

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<sup>1</sup> J. BODIN, *Les six livres de la République*, Du Puys, Paris 1576 (Utet, Torino 1965), p. 273.

<sup>2</sup> Thus P.-H. THYRI d'HOLBACH, *Système de la nature, ou des lois du Monde Physique et du Monde Moral*, London 1770 (transl. it. Utet, Turin 1978), I, p. 9.

form of government, the power of majorities becomes the fruit of a naive idea that is never realised in its actual premises, every form of government is described solely in a power of the minority and in a control of the popular minorities, no other type of sovereignty could realistically be imagined: sovereignty becomes merely the self-reproduction of the power of an individual over his fellow men; it is the capacity for domination that subjugates the forces of the multitude to the authority of this individual; it is the universal and particular recognition of the right of the victor. The Constitution which arises from the hope of a society shattered by civil war, is reversed in the description, which is obtained in that text, of the pacification of individual forces opposing, which had found in the struggle their moment of confrontation and affirmation. The winning political force drafts the constitutional text with the aim of realising the singularity and universality of the real power relations, essentially describing the possibility of a sovereignty that, whatever the form of government, becomes totalitarian by belonging to the one who has managed to decide on the state of exception. The motor of history, therefore, discovers the roots of its desires in the description of inequalities and the continuous re-proposition of individual or oligarchic sovereignty. The bloody impression of a beheading unrealistically represents the possibility of a rebellion that only lasts the moment of that cut. Soon after, a new sovereignty is embodied in the pages of a constitutional text that declaims democratic principles, that offers the division of powers, that leaves open the possibility of popular debate: democracy turns out to be a deception that concrete political sovereignty exercises, an immutable political lie.<sup>3</sup>

1.c. Thus, a sort of closed circuit was Bodin formed in , in which his subjects would accept those laws as the best possible: legitimacy, even from that moment on, becomes a criterion of legal obedience, and sovereignty takes on the characteristic of deciding through the certainty of a legal system, precisely by rendering legitimate its own decision that is embodied in the drafting of a constitutional charter .<sup>4</sup>

Bodin's attempt, after all, was that of a reconciliation between freedom and authority, linking elements that, on the one hand, cut across any possible whim of the king by subordinating him to the laws of nature, or - one could even say - subordinating him to his own sovereignty; and on the other hand, allowing him to create those necessary laws through

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<sup>3</sup> On these considerations see the overall theses of N. BOBBIO, *La teoria delle forme del governo nella storia del pensiero politico*, Giappichelli, Turin 1976 and E. RIPEPE, *Le origini della teoria della classe politica*, Giuffrè, Milan 1971.

<sup>4</sup> This is the view of J. CHANTEUR, *L'idée de légitimité*, in 'Annales de philosophie politique', 7, (1967), p. 148.

which to rule, which then resulted in obedience by the people and thus in a recognition, not only of the king's sovereignty, but also of his legitimacy. Later, during the 17th century, Le Bret, the councillor of state, saw in sovereignty the power of an individual will to assert itself and limit itself autonomously: legitimacy arose from a recognition of the strength of the sovereign; in the relationship that was created between the people and the king, two things had to be clearly distinguished for *royauté légitime*: sovereign authority on the one hand and the pursuit of the well-being of the subjects on the other.<sup>5</sup>

1.d. Therefore, the only 'juridical' aspect in Bodin's theory, i.e. donating laws to the people, was actually reflected in the conception of a political a-priori posed by sovereignty, which was defined by Bodin precisely as a 'power to donate laws to all in general and to each in particular'. It is precisely from that conception - which is considered erroneous here for the reason that an effective exercise of the 'political' requires legal control of those acts, issued by the *politician*, by an body *ad hoc*, an acquisition that only came about in the 20th century thanks to the elaboration of the system of constitutional justice - the Hobbesian, Hegelian and later theses would develop Schmittian, according to which sovereignty would be radicalised around a body-of-the-King that would 'transmigrate', after the French revolution of 1789, into the foundation of a positive constitutional document capable of reinstating the King's lost sovereignty. In essence, the Constitution was immediately considered, but above all hypostatized and idealized utopically, as an instrument of pacification of the political forces opposed to each other, so that the 'sovereign' would maintain precisely the legitimacy for 'a conscious establishment of the order of the collectivity', Thus, in reality, the Constitution loses its essence and profile as a fundamental legal document, which is such precisely because it is capable of protecting and guaranteeing the exercise of fundamental rights and freedoms of the individual, an exercise that it is up to the<sup>7</sup> only then to realise in a coherent and effective legislative work. In this regard, Georg Jellinek argued *politician*<sup>8</sup> that the being of the State can therefore only rest on its own will (*das Staatswillen*): which is why the Constitution is a sovereign decision, only insofar as it is *legal*, only then to arise and pass as a fact of political power, in a situation in which, however, the social order itself will become possible,

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<sup>5</sup> J. PICOT, *Cardin Le Bret et la doctrine de la souveraineté*, Recueil Sirey, Paris 1962, p. 183.

<sup>6</sup> See J. BODIN, *op. cit.*, p. 142.

<sup>7</sup> This is how D. KLIPPEL, *Staat und Souveränität*, in O. BRUNNER, W. CONZE, R. KOSELLECK (eds.), *Geschichtliche Grundbegriffe*, Bd. VI, Klett-Cotta, Stuttgart 1972-1992, p. 109.

<sup>8</sup> G. JELLINEK, *Allgemeine Staatslehre*, Häring, Berlin 1900, p. 274.

in the implementation of those individual rights and the guarantee of fundamental freedoms, which can be implemented and realised by virtue of a legal control of the *politician*.

1.e. It can be seen from this how the semantic destiny of the concept of the state has, in the course of its evolution, the need for a gone through *kata-strophè* in which the struggle for law, as an essential moment, could seek a resolution in the relations between opposing political forces. In this way that the concept of the constitution described, therefore, in its genesis, this phase, highlighting it as a necessary premise of its semantics; in this sphere, the constitution determined, in effect, a sublimation of political violence from the moment it rationalised the relations of power between political forces through the command of law is understood.

The historical and semantic passage that is derived is relevant: until the American and French Revolutions, the political referent was embodied in the body of the King as the expression of the universal principle of sovereignty, i.e. until the fall of the King, one had to 'reign'; after this reign, the possibility of was released *government*: the Constitution was enacted in order to organise the government of the state and society. But it was not possible to get rid at a stroke of the violence generated by confrontation and conflict; rather, it remained chained to the codification of a constitutional text and controlled by legal command, although it was precisely the latter that allowed the recognition of the effectiveness of subjective rights and inalienable freedoms of the individual.

From these theses and what has been considered, it is possible to arrive at the following synthetic legal-epistemological foundation: *the a-priori legal principle of the state is translated into the rationalisation of the sovereignty of the political*.

2. *The concept of the constitution looms in a synchronic dimension for the understanding of its a-priori legal foundation.*

2.a. Deepening this introductory analysis of constitutional change, understood precisely as a problematic assumption hinging on the diachrony between the reign of the political and the safeguarding of the legal order of the state, we wish to indicate, then, in the struggle for law the moment of a birth for the affirmation of constitutional guarantees.

The morphology of the concept of the struggle for law marks in its beginnings the development of what could be characterised here as *constitutional morphogenesis*, i.e. the determination of specific legal forms that the very evolution and development of constitutional

transformations has since concretely shown and highlighted<sup>9</sup>: it would appear relevant to observe and delineate how the struggle is constituted in a particular legal form; in this way the very concept of harmony becomes a mechanism of social security: the harmony of law, that which rests in the codes, is the condition of necessity not only of social survival, but also of the containment of its conflicts: in this regard, it emerges how the legal-constitutional text has profiled, and currently still continues to profile, the propagation of a neutralised antagonistic will, describing the escape from the *danger of* a Hobbesian war of all against all through the *security* of the legal order; this text pacifies the energies that assert themselves from the effort of survival and channels them by rationalising them into the legal and political mechanisms, precisely those mechanisms because of which the conflict itself had been produced. Thus the Constitution realises, in the very self-legitimation of fundamental principles, the legality of its emergence and affirmation; it establishes and consolidates the monopoly of an unconditional necessity that presupposes the classical opposition of rulers/governed, but resolves it in the assimilation of three main relations:

- i. in the relationship between a **command** and the consequent production of **obedience**;
- ii. in the relationship between **sovereign force** and **sedated rebellion**;
- iii. in the relationship between **political control** and the **production of legal coercion**.

2.b. In relation **a)** one will notice a property *resolving*: the command posits obedience as a consequence; one can be certain of obedience having previously ruled over the conflict having emerged victorious. One cannot in this case fear as a response to the command a rebellion, one tends to assimilate: one obtains obedience to the command also because the previously manifested conflict has been resolved with the affirmation of a single sovereign legal will.

Relation **(b)** posits an property *unravelling*: the strength of sovereignty manifests its morphology in the reduction of the rebellion, in which case one tends towards an affirmation:

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<sup>9</sup> On the search for specific legal forms that are relevant for consequent political phenomenologies and transformations of the concept of the state itself, we turn to the research conducted by Dieter Grimm in *idem*, *Der Wandel der Staatsaufgaben und die Krise des Rechtsstaats*, in D. GRIMM (ed.), *Wachsende Staatsaufgaben - sinkende Steuerungsfähigkeit des Rechts*, Nomos, Baden-Baden 1990, pp. 291-306; however, reference was also made to the earlier and fundamental study by Dieter Grimm entitled *Verfassungsfunktion und Grundgesetzreform*, in 'Archiv des öffentlichen Rechts', 97, (1972), pp. 489-508; on the same problem also W. KRAWIETZ, *Recht als Regelsystem*, Steiner, Wiesbaden 1984.

one re-knows sovereignty and respects its strength in the encounter/clash between the rebellion and the resolution therein.

Relation **(c)**, on the other hand, indicates a property *balancing*: forces have been returned to the situation of political control that acts and imposes itself on possible antagonists through the coercion exercised by law. The Constitution as well as the totality of codes themselves, becomes the ideal and essential instrument of the dynamics of political control: the conflict posits the discrepancy between an old order and a new one, disallowing the law to reassert itself as the discipline of the legality of control. By destroying law, conflict re-establishes it in a new recodification; it enforces the broken conventions and reconstitutes them as new rules by inserting itself within a political system, so that law itself can then find the re-establishment of its own previously violated procedures and its legitimacy.<sup>10</sup>

2.c. Therefore, according to a heuristic interpretation of the evolution of the concept of the constitution, in which interpretation methodological evaluations intersect for a reflection that is a description and observation of how constitutional change establishes the passage of consequent forms of state and transformations of the politician in his work of implementing constitutional objectives through the activity of regulation, the law itself, as it arises and is enucleated between the concepts of *Verfassungswandlung* and *Verfassungsänderung*, outlined by German legal-constitutionalist science, acts in the effectiveness of the resolution and rationalisation of the political conflict, often preceding the establishment of the constituent power: the constitution, therefore, subsequently, as the custody and legal formalisation of fundamental principles, encloses and reinforces the security of the state, effecting and bringing to fruition the legal control of the *political*.

2.d. In this regard, one could point out how the very problem of constitutional change takes shape precisely in the field of the political legitimisation of a new event, which would not, however, have any *raison d'être* if it were not rooted in abstract legal formalisation, but were instead tied purely to the reason of state for the protection of economic centres that escape state sovereignty, a phenomenon, for example, of prevailing success and outcome

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<sup>10</sup> Michel Foucault says: 'It is under pressure from the royal power, for its profit and to serve it as an instrument of justification that the legal edifice in our societies has been elaborated. Law in the West is a law commissioned by the king', thus M. FOUCAULT, *Defending Society*, Ponte alle Grazie, Florence 1990, p. 31.

in globalisation<sup>11</sup>. In this perspective, reference can be made to Simmel's assertion<sup>12</sup>, who held that life is pre-announced in the content of the struggle, it becomes a phenomenon of the struggle and the form of it, the absolute sense of the manifestation of what permeates law and society: the very becoming of law and the evolution of society have no other foundation than that of the struggle. A struggle - as Simmel says - in the absolute sense, which contains within itself the unresolved contrast of 'opposites' (war and peace, love and hate, construction and destruction) and which cannot be resolved within a total acquisition of peace.

In Simmel, the origin of the struggle is based on an opposition of principles<sup>13</sup>: hatred and envy, necessity and need, become for Simmel the unity of the juridical-political path of the struggle: in it lies the unleashing of tension, the expression of a magma, between opposing principles that interpenetrate in harmonic and disharmonic, synchronic and diachronic forms. Often the contrast that the struggle for law brings into being shows a confused and inextricable set of causes, whereby reasons of a political or juridical or social order are then determined by factors of a moral, psychological, ethnic, etc. order. The law thus resorts to the Weberian internalisation and rationally monopolised management of violence, with the aim of consolidating a government of command action that should be able to reduce the resistance of the possible vanishing points of social and civil conflicts, reducing or breaking the mechanism that determines them.

2.e. One cannot, therefore, disregard the observation that legal change on the one hand, and political necessity on the other, must find a common ground for resolving the state/society dichotomy, precisely in the objective of finding a Heraclitean that envelops the very evolution of the contemporary state in an economic, legal and political synchrony. Indeed, a Hegelian-style 'overcoming' of the rationality/reality dichotomy is urgently needed: the *logos* Heraclitean explains the conflict, but *logos does not* claim to resolve it. One recognises, on the contrary, *mutatis mutandis*, in the very same concept of *Verfassungswandlung* the development realised for a kind of *Befreiung* from the irreducible pluralism of antinomic historical and political dimensions, such as rulers/governed, state/society, economy/politics, etc. According to such a perspective, it can be seen that the same classical theory of the division of

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<sup>11</sup> On this, is very insightful from a perspective the study by O. HÖFFE, *Demokratie im Zeitalter der Globalisierung*, Beck, Munich 1999, *political ethics*

<sup>12</sup> On this we refer to G. SIMMEL, *Soziologie. Untersuchungen über die Formen der Vergesellschaftung*, Duncker und Humblot, Leipzig 1908, p. 248 ff.

<sup>13</sup> *Ibid*, p. 247.

powers, the fundamental principle on which democratic constitutions are based, on the one hand sovereignty by decentralising it for its coordination and balancing; on the other hand, however, it only apparently *disarmonises reharmonises* it in the constitution, which, when and if it is amended, would once again place the function of sovereignty at the centre of the attention of the law in constitutional the face of the often presumed needs and urgencies for renewal posed by the *political*.

3. *What are the traces of constitutional change in state theory?*

3.a. If one therefore considers the constitution, strictly and peculiarly, as the result of a legal rather than political evolution<sup>14</sup>, constitutional change itself finds its legitimacy solely in the assumption of the legal foundation preceding every political decision.

It is no coincidence that Rudolf von Jhering argued that the goal of law was peace; the means to constitute this goal was that struggle towards the certainty of a fulfilment of the rights and freedoms safeguarded and protected precisely by the Constitution<sup>15</sup>: an infringed command, therefore, becomes unresolved obedience that law has the task of peacefully restoring. The emergence of any constitution demonstrates precisely the illegality and corporeality of violence: this would represent the glimpse of a historical memory that rests in the new foundation of a constitutional right, a peace that the Constitution arises only after having been ineluctably preceded by struggle.

The new posing of a constitution is thus an attempt at a new sovereignty that has as its end the re-establishment of order: the sovereign could obtain order for his kingdom through brute and blind force; the constitution, on the contrary, rises to legal and political culture, recovering order not in the cyclical nature of death, a task of the sovereign, but in political direction. In this regard, goes on to say Jhering that the struggle, which law demands (*erfordert*) in order to come into being, would not be a curse at all, but rather a blessing<sup>16</sup>; the struggle would rather be inserted within society as an instant of pure realisation of the effectiveness of law: the latter is then affirmed in the struggle and in the 'blessing' of an effectiveness of jurisdictional guarantees. There is, therefore, a basic equilibrium in which the Constitution affirms itself by performing a function of transition from the old to the new: the codes do not merely recount the human experience of the struggle, but realise a taxonomic

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<sup>14</sup> Cf. N. LUHMANN, *La differenziazione del diritto*, il Mulino, Bologna 1990, pp. 35-60.

<sup>15</sup> Thus R. von JHERING, *Der Kampf ums Recht (Abschiedsvorlesung of 1872)*, Klostermann, Frankfurt 1943, p. 3.

<sup>16</sup> *Ibid*, p. 11.

scheme where by the Constitution reveals and highlights in its substantiality the event of an inevitable and inescapable juridical process, through which the struggle, which brings it into being, offers a valid system for interpreting all possible combinations of alliances between opposing political forces.

3.b. It will be these alliances, as produced by a process of a legal nature that invests them with ownership and authority, that will decide and govern over the state of exception, to express through the constitution and its possible changes the realisation of a new and necessary sovereignty. In fact, within the very economic variables that can affect changes in government and transformations of political directions, it is worth emphasising that any change can ultimately be dictated by a differentiation of expectations regarding the behaviour defined as 'usual' of political parties: a voter, indeed, 'in order to evaluate government action, then compares the behaviour of the governing party with its behaviour *usual*. If economic conditions have deteriorated compared to expectations, he will vote against the ruling party and vice versa" ; however, two years later than 's research<sup>17</sup>Nordhaus, it came to light that even economic policy could affect the objectives of constitutional implementation and the variables of possible material changes to the constitution itself, to such an extent that "from the beginning to the end of the period between two elections, the time horizon of the ruling party is only the next election. Economic policy is therefore solely directed at minimising the loss of votes in that election. After the latter, however, the horizon shifts to the next election. Then the party in power, whichever party it is, determines unemployment, and thus inflation, during the following period, so as to minimise the loss of votes at the next election' .<sup>18</sup>

3.c. In this way, one can reflect on the fact that the attempt to reformulate a normative-constitutional statement must then necessarily find its premises in the guarantee of the inviolability of the legal system in which the legitimisation of the actually flows *politician* , which otherwise would not find any premise based on popular sovereignty, on the principle of equality and on the reservation of the law as bulwarks of the democratic state, but on the contrary would resolve itself in being an expression of the centralisation of powers to reduce itself to a symbol and form of totalitarianism. One cannot overlook the fact that this

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<sup>17</sup> Thus the analysis careful advocated by W. D. NORDHAUS, *The Political Business Cycle*, in *The Review of Economic Studies*, XLII, (1975), p. 172.

<sup>18</sup> Thus D. C. MacRAE, *A Political Model of the Business Cycle*, in *The Journal of Political Economy*, LXXXV, (1977), p. 252.

legitimation of political power expresses recognition in the sense of *Anerkennung*, i.e. ‘approval’, and therefore consent by those who materially exercise sovereignty: the people.

3.d. Thus the substantive aspect that can be deduced from ‘s assertion Jhering is *hypothetised* in that inwardness of law that on the one hand ensures and protects the feeling of a developed, cohesive and extended order in its social function, but on the other hand cannot be determined through a struggle for law, a struggle understood precisely as the pursuit and maintenance of constitutional guarantees for the affirmation of normative implementations aimed at positively realising those rights, those freedoms and in general those principles enshrined in the Constitution. Law, in short, is not naked thought, but living force<sup>19</sup>: the sword without the scales is mere violence; the scales without the sword highlight the impotence of law. Law, nonetheless, does not express itself as the natural experience of violence, but discipline so that the social order is preserved united: stability, however, of the legal order does not necessarily coincide with the defence of constant values within the system, as much as one might define as *constitutional homeostasis*; Rather, the stability of the legal system - it is discernible - is addressed to the intrinsic possibility of its modification over time, which is made explicit, precisely, in that constitutional change that defines both the inevitable transformation of the relations between powers for their ever more defined coordination and mutual control, and, consequently, makes new and more democratic forms of legitimation of the *political* in pursuit of the objective of implementing, in a peculiar manner, the guarantee and safeguarding of rights and freedoms: this process, which takes the form of a possibility of change in the democratic legal order, a successive and progressive change indicating the invariable and unalterable balance over time of the legal-political order and state sovereignty, is clarified, differently, precisely in the concept of *constitutional homeoresis*: in such a process of constitutional change, then, what is meant here to be defined as the *legal cre-odo* (from the Greek ‘obligatory path’) of changes that conform within a constant and stable recognition of

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<sup>19</sup> Thus R. von JHERING, *Der Kampf ums Recht*, cit., 10-21. The struggle, however, is not interpreted by Jhering as merely an exception, a temporary restriction of the will of life, which in Nietzsche’s words becomes ‘the great and small struggle is everywhere about predominance, about growth and propagation, about power, in accordance with the will to power, which is precisely the will of life’ (thus F. NIETZSCHE, *Die fröhliche Wissenschaft*, Hanser, München/Wien 1977, p. 215), a problem of the latter that lets us see society as a place of Hobbesian clash, the site of Schmittian conflict from which the will to power is reaffirmed; rather, for Jhering, the struggle is an ethical-legal yearning, which resolves itself into a warning about the *political*. In general, the assessments and analyses of Rudolf von ‘s work Jhering by T. GROMITSARIS, *Theorie der Rechtsnormen bei Rudolph von Jhering. Eine Untersuchung der Grundlagen des deutschen Rechts-realismus*, Duncker & Humblot, Berlin 1989.

the legal-constitutional order, since such change follows constitutionally guaranteed and pre-supposed procedures and rules.

3.e. Of such a legal-positive, but also ideal and semantic-historical development, which has run through German constitutionalist doctrine during the last century, both the methodology and the aims will be explored in the following pages, with the aim of highlighting a heuristic hermeneutics of constitutional change.

On the basis of what has been argued in the preceding pages, one can then acquire the following synthetic legal-epistemological foundation: *the legal-constitutional command brings into being a control of the political between constitutional change and the recognition of the protection of a sovereignly legitimate state order.*

#### 4. *Territory and land: their colonisation*

4.a. The state, with respect to the previous paragraph, is constituted on a territory that is already indivisible, connects and joins individuals. *Territory is a concept over which to exercise possession, ultimately a category of legal-political discourse*, however, is never infinite, nor is it geographically: .

In this vision, the tolerance expressed by the sovereign exerts a politico-geographical significance because it controls the swathes of territory: there is no population, but territory; it is the extreme limit that must be controlled because this limit looms as the margin of a difference, a difference within which to exercise possession of sovereignty. Territorial tolerance is the direct exercise of the sovereign outpost, it is culture that controls nature, power that observes memory. Nature thus remained compressed in definitions and concepts, a metamorphosis of myth and the ritualisation of a legal constitution; culture was thus able to effectively rise to the description of an ethnocentrism that revealed, and still continues to reveal, the defined and immutable presence of the conquered and despoiled territory.

4.b. The *land* came to be and to constitute itself as the only extreme margin of the emotional imagination of one's memory, the sip of a culture that shipwrecks in thought and does not actually occupy space. Territory is the site of a political category of sovereignty, the definition of a specific and cultural legitimacy that can become the memory of history itself. Here again, history is an instrument of legitimisation of sovereignty. The land that becomes a concept, i.e. territory, follows the identical destiny of an instrumental tolerance, no longer

utopian or nationalistic, but simply political: the tolerance thus described, that is tolerance that makes use of its sovereign territory, is already in itself a direct exercise of intolerance.

Thus it is precisely in the tribalisation of conflict that the law expresses its strength and power. The colonized territory is condemned as a body that suffers the word and conforms to an obligation of salvation. The transgression of the one who appears pervaded by the time of redemption is tolerated. Perhaps sublimated. That transgression is no longer an act; it is rather the offence for the law that analyses it: the word persecutes but is also persecuted. It suffers its penalty.

But who instituted the punishment?

4.c. During confession, the victim-colonized told the perpetrator-coloniser about the guilt; the patient perpetrator noted down every word of the victim. The desire for redemption was formed in him. But the truth expressed actually reveals a formal content: the executioner-coloniser desires the most opportune truth, the one that can legitimise him in inflicting exemplary punishment, since his underlying desire, the *libido legis*, is the representation, in the sense of *Darstellung*, of condemnation. The tolerance of truth depends on the executioner's ability to reveal his sentence: the truth that emerges through the sentence is a process of sublimation of the violence of power. In fact, political power does not act directly, rather it seeks the creation of consent: if political power exerted its force directly it would cause an intolerant connection. Thus it adapts law to its needs for democratic domination through the demagogic ritual of words, images, representations: tolerance in this way becomes secularised, and does so, in a final stage, in the economic exercise of power that succeeds in enslaving and uniting servant and lord.

The word pandered to by the image thus becomes a linguistic act of command that seeks the political exauthorisation of democracy. Already the Enlightenment, after all, had expressed the geometric reason for order, but also rendered truth as a game of mediations and relations above which the control of the state would then rule mightily: justice is dispersed in law itself, its instrument will be equality through which it will become possible to regulate punishment and merit: precisely in order to fulfil this mission, the Enlightenment has re-proposed the ineluctability of domination<sup>20</sup>. What is reinforced is only the dominion of the Enlightenment: the *libido dominandi* is the new arrangement of the sovereign, no longer *ars*, nor play of forms, but only desire 'hidden in the folds of discourse'. The discourse thus

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<sup>20</sup> M. HORCKHEIMER and T. W. ADORNO, *Dialectics of the Enlightenment*, Einaudi, Turin 1980, p. 24, 39.

accomplished renders the consistency of a tolerance towards power<sup>21</sup>, but recovers it by dressing it in a new guise: this tolerance makes innocent the moment of the *eidetic politician's* power. There will be those who possess it economically and wield it industrially; and there will be those who will always have to struggle to acquire it. And it is not certain that they will achieve it. Today's ruler is an unscrupulous party democracy of profits. What, indeed, succeeds in capitalising interests, it serves.

The rest is subservient.

4.d. The word finally expresses, thus institutionalised, power, and performs it in political, juridical, civil. The exauthorisation of power, possible Enlightenment intolerance towards the king's body, would be structured as intolerance towards the legal and political text. Today's regular social order, of modern and western democracies, is intolerant precisely towards the constitutions that promulgate and found it, but pervaded by a murky and sordid tolerance towards economic powers. The code thus represents the collection of that truth revealed by the law, the power of the sovereign asserts itself as a guide, becoming a link from the sense of innate human derealisation to the sense of innocent tolerance, that which provides for the law and codifies it. In this, increasingly political tolerance and legal sovereignty appear linked, in a reciprocal exchange that makes chance a historical necessity, and even a dimension of political opportunity. Precisely according to Roland Barthes, language is translated and resolved into a kind of legislation of which language is the code. It is difficult to see in language a revelation of power because we forget that it is a classification and as a classification it becomes repressive<sup>22</sup>. In the constitutionalising text, the power of the *political*, the reality principle, has undone *the logos* and constituted a new juridical-political order: the individual has been repressed. The revealed truth of the victim-colonized to the executioner-coloniser expressed the sense of a universal chastisement, the idea of a concrete and invisible domination that takes root in the moments of everyday life: the civilisation of the nascent nation, strong in its civilisation, constitutes the medium of repression and restores domination. The individual, the subject of rights, takes on the sign value of language, i.e. of the code, when he-who-leads by pronouncing his discourse brings opposites together in order to annul them. The one-who-leads does not content himself with repeating what has already been

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<sup>21</sup> Thus R. BARTHES, *Lecture*, Einaudi, Turin 1981, p. 5.

<sup>22</sup> *Ibid*, p. 7.

said, he does not settle into the ‘slavery of signs’, rather - Roland Barthes says again - he affirms, he says, he ‘repeats what he repeats’.<sup>23</sup>

4.e. The Enlightenment has thus arrived at *ratio ordo*, classification, division, and finally the sanction that law ensures if violated. And so through law the state strengthens the margins of its security, but also necessarily appropriates law: constitutional law; the sovereign’s right is now the right of the constitution.

Everyone’s? Who is *everyone*?

Tolerance has indeed broken the veil of a utopian feeling of the word, it has upset the *mimesis*, concentrating its energy in the legal text, revised and modified according to an order *propter Stati rationes positum*. In this, the sense of the ‘s discourse *politician* offers repetitions that do not mark any reaction or progress, but only stabilise the model of power. Within the discourse, no stable utopian margin is to be found; the Enlightenment has in fact deprived utopia of its power. Tolerance has thus extended the scope of its boundaries, encompassing subjective law: the Enlightenment is the Euclidean command in the reduction of civil society to subjugated knowledge. It is precisely political tolerance that surreptitiously legitimises conflict within society; this conflict introduced by political tolerance is codified, in the sense that it has made a semantic shift: it is a legal conflict that resolves *politically* a difference.

From what has been pointed out and analysed can , the therefore be enucleated following synthetic juridical-epistemological foundation : *political tolerance produces the pursuit of ethnocentric and imperialistic goals insofar as éthnos characterises the achievement of conflict on the basis of an ethicality of the political element.*

## 5. *The colonized*

5.a. It is thus thanks to this so manifest and evident terror, long internalised, that sovereignty has had and would still have the possibility of asserting itself and making the history of a political body as a symbol of an inescapable necessity, without of which the balance of power relations that the constitutional text achieves would immediately come into play.

The centralisation of sovereignty is initially stabilised in the metaphor of a body that takes upon itself the historical fate of man’s struggle against his fellow man, a struggle caused

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<sup>23</sup> *Ibid*, pp. 9-10.

by the maintenance of the balance of power. The integrity of the physical body does not describe the real play of forces beyond that physical body, but merely realises a representation of it that marks the course of history, that renders an image in which society can glimpse itself. Indeed, it is still a moment in which society legalises the functionality of power relations, making them stable and recognising them as superordinate to itself. In this delegation that maintains and reinforces a peace, which is in reality only a long armistice, are revealed, but the traces of that recognition without which sovereignty itself would have no *raison d'être* also : the passage between one kingdom and another, between a dictatorship and a democracy, is a passage in which the morphological decline of sovereignty is manifested. It is a re-veiled representation that disappears with man himself or with the very men who had maintained it, but which - and herein lies that specific force of change - revives again as a necessity of law and politics, which are rooted in the possibility of self-representation as sovereign.

The requirement of absoluteness does not, therefore, become an effective model that marked the 17th century, but it is precisely in absoluteness that the real boundaries of this concept are described, which must answer to nothing but itself: it is in fact as an expression of self-referentiality that law decides, decides on itself, on its procedures, even to the proceduralising of the same. Sovereignty has violently affected history, becoming the origin of a permanent and collective conflict in which its tautological and at the same time paradoxical expression is rediscovered: it affirms itself through conflict, a conflict that actually generates it, but then becomes the only possible choice to which one can defer so that the conflict itself can come to an end.

In this, sovereignty has that particular characteristic, which places it before the fundamental category of legal-political discourse, beyond which there is the silence of uncertainties and before which there is nothing but the moment of collective violence, which poses the decline of hopes. As it will be possible to point out, what will emerge epistemologically relevant will be the further semantic references that the analysis of the concept of sovereignty will inevitably determine in a fundamental characterisation of its myth: a myth that revolves around itself appearing, precisely in this rotating, *logos*; but also *topos* of decision: rationalisation of conflict; re-establishment of law.

5.b. Tolerance that has become a political concept has lost all hope that had made it a margin of salvation and a way out of a conflict that was at first religious, but then increasingly civilised and political. The dream thus shattered of imperialism, that of having thought

of replacing the perfect combination of nature/culture of other civilisations with the sole culture of its own civilisation, manifests itself in the anonymous body of the condemned and in a machine, that of positive law, which recites its force in an artificial manner and around whose force the life of the entire colony imagined by Franz Kafka comes to unfold and exhaust, almost surrealistically,<sup>24</sup>. But the instrument, the machine that engraves the violated norm on the offender's body with the help of a harrow, now appears as an effigy of a glorious and ancient past: a device that reappears, almost as if in a museum, in the explorer's visit to the mysterious colony. The officer who welcomes the explorer meticulously describes the entire regulatory apparatus, celebrating its splendour and the time that was. In fact, after the death of the old commander, who seems to have always been within the colony as a sort of founding principle and universal archetype, the custom of the device and its very importance fell into general disregard. The officer is the only one who opposes the new custom as the lone perpetrator of every event in the colony: in this way, the dead commander can find in the officer the hope of violence.

5.c. The toughest issue for the officer, however, is precisely the fact that no one fears the machine that writes the violated rule on the offender's body any more: the infernal device is rusty, trudging along structurally<sup>25</sup>. In his emphasis, the officer confuses the scout and makes him his comrade-in-arms. And this is the typical imperialist and military discourse, that of remembering, that of observing the memory that the present has for the sole purpose of controlling it. But above all, the political-military discourse is based on nostalgia for an order that never corresponds to real desire, it is always something lost, hidden, now unobtainable. This sort of interrupted coitus vents all its bitterness in an extreme defence: impotence generates sadism, the raising of one's own torment is produced by the unleashing of violence on the body of others, thus by the manifested and represented suffering of the other: culture without nature makes a massacre of those who still possess the nature/culture binomial unaltered: the European has savagely destroyed and imperialised precisely because he is aware of a lack: that of barbaric and primitive nature. His process of civilisation then

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<sup>24</sup> Reference is made to the short story by the Prague writer *In the Penal Colony*, which is extraordinarily effective from a metaphorical point of view for understanding the very becoming of positive law.

<sup>25</sup> In a sudden burst of nostalgia for an old order that had simply been supplanted by chaos, the officer lets loose: 'It was impossible to fulfil all the prayers to be able to look closely. The commander wisely stipulated that one must above all think of the children; (...) I often crouched here, two children on the right and two on the left in my arms. How we all took from the face of the martyred one the expression of transfiguration, how we stretched our cheeks towards the splendour of this justice finally achieved and already passing! What a time, comrade!', thus F. KAFKA, *Nella colonia penale*, in *idem, Racconti*, Edipem, Novara 1982, p. 190.

ended up making him truly 'barbaric': since he could no longer be described in the history of mankind, the European had to destroy the history of civilisations and replace that history with his own: the history of civilisation.

5.d. In this sphere, the differentiated structure of the general desire for nature, and thus the particular structure of founding it on culture, belongs to the domain of an absolute contingency<sup>26</sup>, in which the dilation between civilisation and civilisation is felt. Imperialism, like the poor official in Kafka's tale, is sadistic because it is powerless, and it is powerless because it entrusts a fetish (the law machine) with the function of a social order. Into this artificially maintained social order, he inserts the beloved object and hated: the body (i.e. nature). The body of the offender is also the body of the victim: but the offender is above all the one who has failed to attain the dignity of rank (of master), the one who has consciously rebelled against the constituted and represented social order; he is the object of pleasure that one wishes one could love only to reduce to one's will.

5.e. The monstrosity of such an attempt, which violates nature and instinct, founds a transcendental analytic whose aim is precisely that of making the particular universal, so that the former is its foundation: one destroys in order to regain what has been destroyed. In this, sadism is consummated, which becomes the fruit of the desperation provoked by expectation: the broken limit can no longer be reconstituted. Imperialism itself admits that the other is the Sartrean *pure contingency of presence*, i.e. nature and culture that complement each other, that disappear because they are bound and absolute. The sadistic desire of imperialism is precisely to strip primitive culture and the other of all its nature: the suffering produced will, however, only marginally reduce the despair of the European who should be able to repress and destroy everything in order to then feel the shame of his civilisation resolved and exhausted within himself. But the European knows and recognises that civilisation, in all its forms, nevertheless reappears from memory and from the ashes, and that there is never sovereignty that can suppress it completely. On this subject, Sartre says: "That is why the sadist will want manifest proof of the subjugation to the flesh of the other's freedom: he will tend to make the other ask for forgiveness, he will force him by torture and threats to humiliate himself, to deny what he holds most dear. It is said that this happens for the sake of

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<sup>26</sup> J.-P. SARTRE, *L'essere e il nulla*, Il Saggiatore, Milan 1984, p. 468.

domination, for the sake of power. But this explanation is vague and absurd. It is the taste for domination, which should be explained first’ .<sup>27</sup>

5.f. Hence the taste for domination disconcerts civilisation, while on the contrary it persuades the conscience of civilisation. After all, civilisation follows the path of a relationship of understanding and maintaining the nature/culture pair; civilisation, on the other hand, breaks all ties, drinks up the gush of life that the spoils and plunder of human history render it. The machine of Kafka’s tale, the one that writes the violated norm in full on the skin of the offender, explores individual consciences, essentially posits a ritual that it renews every day: the attempt is actually to render mythical the return to order as the only shore of salvation. The discourse of power, as usual, thus tends to reassure through blackmail. But the politico-legal structure does not differ much since, by shifting the discourse to a higher level, that of sovereignty and the regulation of the relationship of forces between a political centre and an economic and social periphery, it must equally legitimise the conscience of sovereignty itself, ultimately making obedience effective and repressing any possible attempt at rebellion.

5.g. Thus the machine, the device that executes the Law, comes to be constructed in a complex manner so that its operation is equally incomprehensible and/or reserved: esoteric. For if the machine, the Law, were *esoteric*, it would alter any balance of power and force: the symbol can only be absolute and powerful if the sign that founds it remains unrevealable. And Kafka specifies through the words of the officer that the condemned man then does not know which norm he has violated, he will learn to recognise it on his own body<sup>28</sup> . By martyring the body, the erotic ritual, which had preceded the actual exposure of the condemnation, regains its lost space in the sadistic consciousness of the officer. In this case, unforeseen events cannot be tolerated, the machine cannot jam: the observation, the gaze, the admiration do not tolerate interruptions, one savours the other’s defeat. However, at the highest moment of approaching desire, the machine self-destructs. Attempts to explain to the explorer the workings and necessity of the machine largely fail and are completely sterile and incomprehensible. The desperate officer prefers to self-punish himself by dying in the destruction of the device, now his privileged object of pleasure. His conscience finds an effective opening to his being: torn and killed by what is dearest to him in the world, the officer

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<sup>27</sup> *Ibid*, p. 491.

<sup>28</sup> F. KAFKA, *op. cit.*, p. 180.

does not know how to defend himself from what he loves and gives himself fully to it. Sadism overturns his relationship, he has only and always loved the other without being able to be loved in turn: if one cannot defend oneself against what one loves, the lover (the offender) destroys the beloved (the Law removed), while also causing him to be destroyed. What actually generated the conquest of culture stripped of flesh, devoid of nature, was a generalised envy that finds its reason for being in self-destruction. The lover will never be *loved*; he knows this and recognises it, which is why he finds a solution to the conflict by destroying himself.

Civilisation becomes an erotic dismantling of civilisation: lover who can no longer be loved.

5.h. On the other hand, the ritualisation of the legally and politically circumscribed and described territory, without a historical and natural basis, creates imperialist cultural dependence: territorialism develops as an intolerance linked to one's own space<sup>29</sup>, so that once the territory has been ceded and decolonized, the most immediate consequence is the emergence of what is evidenced as 'internal conflict', and territorialism is just that: an internal and post-colonial conflict.<sup>30</sup> It would deserve certainly consideration to reflect on the fact that imperialism does not recognise any civilisation outside its own: but a civilisation that incorporates another is a political act that responds to the concept of civilisation: to civilise means precisely to humanise-to-self, to make the *other-that-is-other*, part of me. Moreover, at the origin of the problem of the existence of others, a fundamental question arises: the other - says J.-P. Sartre<sup>31</sup> - is precisely the I-that-is-other, part of *me*. Only through a negation is it possible to bring into evidence what is other; to affirm the other, imperialism must deny it, otherwise it would be denying itself. And the negation can only be that which opposes the servant to the lord: that is, death. This is why imperialism, as is currently the case with globalisation as the transformation and 'modernisation' of imperialism itself, is an evident and civilised social cannibalism, which renounces everything that comes to it from outside, in order to determine the certainty of itself.

We are, therefore, a long way from utopia, from reason and probably also from the instrument: the territory described, in fact, is a concept over which to exercise possession

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<sup>29</sup> Thus I. EIBL-EIBESFELDT, *Ethology of War*, Boringhieri, Turin 1983 and 1990, pp. 49-50.

<sup>30</sup> On this concept see the still very interesting analyses by Julien Freund, such as *idem*, *L'essence de la politique*, Sirey, Paris 1965; *idem*, *La notion de politique. Théorie du partisan*, Seuil, Paris 1972; *idem*, *Topique de la polemologie*, in "Res publica", XIX, 1, (1974); but also one cannot overlook reference to J.-P. FAYE, *Théorie du récit. Introduction aux "Langages totalitaires"*, Hermann, Paris 1972.

<sup>31</sup> See *idem*, *L'essere e il nulla*, il Saggiatore, Milan 1984, p. 296.

with the direct consequence, noted above, of finally acquiring the dignity of a category of juridical-political discourse. In this vision, the tolerance expressed by the sovereign exerts a political-geographical significance since it controls the swathes of territory: there is no population, *only* territory.

In reality, the political exercise of tolerance has produced the fractioning of conflicts and a sort of aspiration to the rank of legitimacy on the part of the decolonized states: it is precisely the western legal models, borrowed and reproduced, that serve to reflect on that ancient Hegelian dialectic between *Herrschaft* and *Knechtschaft*, a dialectic that is affirmed thanks to what we have here defined and analysed as a *Hobbesian gnoseological-political oxymoron*: it is necessary, therefore, to prove how the servant is now able to be master in his place and of his decolonized place that has been granted to him, to become and evolve to the rank of master; the servant, in turn, will believe in imperialism as an opportune machine for the consolidation of his territory: the process of *mimesis* follows in parallel with the political ritualisation of tolerance, between the political-legal symbolism and the Renaissance imagery.

That is why, it seems worthy of attention, the formation of sovereignty traces a productive scheme between utility and interest, but in order to pursue this project it must necessarily be based on the *colonized*, the political signifier of what has become *territorial*, because if it were not so, there would not be that emotional drive towards domination, there would therefore be no "production of the unconscious". In the end, the colonial system, the enterprise, is but part of the structure, that of territorial and natural-cultural centralisation: imperialism is politically constituted by productions that strain difference. In this case, the colonial system unilaterally claims that history exists, historicises<sup>32</sup> itself and places itself at the centre of observation. This is why Thomas Hobbes' is translated into the structure of the *Leviathan libido statuendi*, to become political psychology: the *servant* has repressed the image of his locus of action (nature) and removed his freedom (culture): thus alone has he acquired, by eroticizing as Lacan thought, the rank of *master*.

From this one can, in fact, sadly understand Friedrich Engels' assertion that, of Hegel, and, one adds here, also of Hobbes as well as Schmitt, one had to preserve the method while avoiding the system<sup>33</sup>. Indeed, on the basis of these assessments, one can deduce the

<sup>32</sup> G. DELEUZE and F. GUATTARI, *L'anti-Edipo*, Einaudi, Turin, 1975, p. 201.

<sup>33</sup> Friedrich Engels did not fail to stigmatise that process of political-constitutional transformation that should have led to the exit from the Hobbesian state of nature by means of an increase in product without capitalist slavery: by eliminating the market, the same historical process of constituent evolution would have passed "aus dem Reiche der Notwendigkeit in das Reiche der Freiheit" (thus F. ENGELS, *Herrn Eug. Dühring's Ummwälzung*

following and conclusive: legal-epistemological synthetic foundation *necessitas politica non habet legem, sed politici rationem ius constituit*.

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