Legality and Legitimacy: The Political Philosophy of Popular Sovereignty in the New Latin American Constitutions

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Introduction

The great dynamic of the constitutional movement in Latin America during the last two decades has focus on the recovery of popular sovereignty as the means for re-founding the state and achieving full emancipation. The various centuries of colonialism that came to an end in the early 19th century, the government of economic aristocracies in the form of democratic regimes in the post-independence period, and the oppression of the underprivileged people and ethnic groups by political elites in the last 50 years, has questioned the foundations upon which Latin American states are built upon.

The Latin American neo-constitutionalist movement claims to have recovered popular sovereignty as the main foundation of the state. This dissertation will approach the neo-constitutionalist movement by analyzing the principles underlying the institutional arrangements seeking to preserve popular sovereignty in the Constitutions of Colombia, Venezuela and Bolivia. I will inquire the sovereignty principles underpinning the foundation, structure and functioning of these states in the light of history of legal and political thought. I will focus on the origins of neo constitutionalist in the Colombian constitution, as well as on its further development and radicalization in the constitutions of Venezuela and Bolivia. The latter constitutions are issued from the radical wing of Latin American neo-constitutionalism that aims at re-founding the states through new constitutions1.

I intend to show that, contrarily to what is hoped by the supporters of the new constitutions, and especially by the supporters of the re-foundation, their political project does not provide an alternative to modernity, and even less, a post-modern alternative. I aim at showing that the re-foundation project is essentially a modern enterprise, one rooted in the liberal democratic traditional. The re-foundation project claims to overcome the fallacies of modernity, and essentially, that of the confusion of popular sovereignty and legal sovereignty. Considering on the one hand the paramount importance attributed to popular sovereignty in the re-foundational project, and, on the other hand, the suitability of the concepts of legality and legitimacy for analyzing the nature of power and law in any given institutional setting, I will take these two concepts

1 This project is advanced by the Bolivarian Constitution led by Venezuelan president Hugo Chavez. I will refer to this project as “re-foundational project” or The Project.
as a device to advance my claim. In brief, I will advance my claim by analyzing the concepts of legality and legitimacy underlying the institutions guaranteeing popular legitimacy in the Colombian, Venezuelan and Bolivian constitutions.

To make clear the development of my claim throughout the dissertation I will provide a preliminary definition of the concepts guiding the analysis. There are at least to two different meanings of sovereignty. One refers to the status of a nation-state vis-à-vis other nation-states, indicating that each has autonomous jurisdiction within its own geographical area. The other, which is the one I will retain, considers that within each individual state there is an entity that constitutes the supreme political and legal authority. In Schmittian terms, the sovereign, in the latter sense, would be whoever can decide what constitutes an exception to the application of general rules given some concrete circumstances. Popular sovereignty, or simply “legitimacy”, is then understood as the quality of a government or its norms whose authority is derivative from the natural right of people to liberty. Political power is said to be legitimate, then, if its authority emerges out of people’s consent. In the case we say that the people are the sovereign. Legal sovereignty, or “legality”, would be the quality of a government or its norms whose authority is derivative from the law, and not directly, from the people themselves. Hence, legality implies that the sovereign is the law itself. Since some concepts conveyed in the definitions are to be developed throughout the dissertation, the reader may not find them accurate or unambiguous. Hence, I pray to the reader to keep and open mind and take his objection and doubts with him into the next pages expecting to find in the unfolding of the arguments some ideas that may contribute to his understating.

The supporters of the re-foundational project also claim that the modern fallacy of assimilation of legality and legitimacy is complemented by the assimilation of democracy and representative government. Hence, the new constitutions imply not only the re-foundation of the state on popular basis, but the instauration of democracy.

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2 Cf. Scott Gordon, Controlling the State: Constitutionalism from ancient Athens to today. Harvard University Press. 1999. pp. 18
Although I will not deal directly with this claim, it will show throughout the dissertation, that this goal is not only compatible, but essentially of modern spirit.

The emphasis on a popular re-foundation of the state through new constitutional charters is one of the core ideas of the so called Latin American neo-constitutionalism movement. I take into account two of its core arguments as guiding ideas for my analysis. On the one hand, I take into consideration the importance attributed to the popular foundations of the new constitutions. Indeed, neo-constitutionalists claim that popular sovereignty must to be the footing underpinning the new states. This, they claim, aims at promoting the inclusion of “marginal groups” in the construction of the national project, and moreover, at providing popular legitimacy to the old and new political institutions incorporated in the new constitutions. On the other hand, neo-constitutionalists grant to the protection of constitutional fundamental rights a paramount importance. If it is clear that for the re-foundational project popular sovereignty is the foundational principle of the state, it additionally holds that popular participation must continue to be the guiding principle in the further structure and functioning of the state. Indeed, popular participation is seen as the main instrument for overcoming the ancient rhetoric on the protection of fundamental rights. Neo-constitutionalists highlight how the creation of efficient constitutional actions⁴ for the actualization of fundamental rights is a means for increasing the legitimacy of the political regime. In brief, popular participation becomes the source of legitimacy of the state not only in its foundation but in its structure and functioning.

As mentioned before, I consider appropriate for the defense of my claim to inquire in the history of political and legal thought the relation between political authority and law. This historical background will provide important elements to understand the theoretical implications presupposed in the practical arrangements implemented by the new constitutions. Certainly, the crisis of the model of state that is inspiring these reforms is also a crisis of the political thought underpinning that form of government. Moreover, the crisis of the modern state has been related to a general crisis of modern political thought. Indeed one may argue that modernity has lost faith in itself, and thus, in the feasibility and superiority of its political project: “the construction of a universal

⁴ From the Latin “action”, is a legal institution that entitles a person to bring a claim before a court.
society of free and equal nations of fee and equal men and women enjoying universal
affluence, and therefore universal justice and happiness, through science understood as
the conquest of nature in the service of human power”5.

Considering that the concepts of political authority and law are intimately related, I will
open my first chapter (I) by making a historical introduction on the transition of natural
law to positive law from an epistemological viewpoint (A). This introduction will
provide some elements that will be paramount for understating the transition from
ancient to modern political thought. Indeed, I argue that the decline of the classic
metaphysical and comprehensive worldview -man, political institutions and cosmic
order- in which natural right governed social life, gave way to a new conception of
order in which free and autonomous human beings act and govern the world on the
basis of both pure reason and the rejection of natural right. The profound rupture of
modern conventionally6 oriented political philosophy with a comprehensive
metaphysical worldview constitutes the cornerstone for understanding contemporary
legal and political thought. In a second section (B), I will examine in depth the origins
of political thought in ancient Greece. I will focus on the oeuvre of Plato and Aristotle
to draw the first ideas concerning political power and law. I will show the intimate
relation existing between the conception of government and the metaphysical
worldview held by the Greeks. Moreover, given the importance attributed by the Greeks
to the cosmic order for the organization of social life, I consider convenient to introduce
the relation existing between natural law (right) and the concept of political authority.

In the second chapter (II), I will first (A) introduce the decline of classic natural law and
its consequences over the conception of political authority. Then (B) I will focus on the
first and second scholastic to show the decline of classic natural law and its conception
of government. I will argue that the emergence of nominalism during the second

5 Tarcov N. & Pangle T. Epilogue: Leo Strauss and the History of Political Philosophy, in: History of
1987, pp.908

6 As it will be shown throughout this first chapter, the concept convention (conventionalism) is use in two
different ways. On the one hand, it refers to a particular form of classical philosophy that holds, in both of
its trends -philosophical and vulgar-, that “by nature everyone seeks only his own good or that it is
according to nature that one does not pay any regard to other people’s good or that the regard for others
arises only out of convention” (See Strauss, 1965, p. 115). On the other hand, convention refers to the
modern phenomenon rooted in nominalism, by which, in absence of universals, men are obliged to give
meaning to thing by common agreement.
scholastic became the cradle of modern thought, and thus, the epistemological foundations of modern political thought. Finally (C) I will introduce the emergence of modern natural law through the oeuvre of Hobbes and Locke, and with them, a new conception of political government anchored in the concept of sovereignty.

In the third chapter (III), (A) I introduce the political shifts underpinning modern political arrangements. Then I show, through the oeuvre of (B) Rousseau, (C) Montesquieu and (D) Tocqueville, how the political philosophy underlying modern natural law unfolds into the institutional setting of the modern state. Therein, I will examine the transformation of classic natural law into positive law, the emergence of the division of powers and supremacy of people’s sovereignty, and consequently, the confusion of legality and legitimacy, or, more accurately expressed the subjection of legitimacy to legality. I will finally (E) draw some conclusions on the institutional arrangement and primacy of positive law within modern democracy.

In Chapter four (IV), I will present the tensions between the concepts of legality and legitimacy in contemporary political and legal thought. I will rely on the “dialogue” between (A) Carl Schmmit and (B) Hans Kelsen about the Weimar Republic, to analyze what according to the supporters of the new Latin American project, is a fallacy of modernity, i.e. the replacement of popular sovereignty by legal sovereignty. I will inquiry into the concepts of popular and legal sovereignty as the foundations of the political and legal orders.

I will open the final chapter (V) with a (A) brief introduction on the constituent power of the Colombian (1991), Venezuelan (1999) and Bolivian (2007) Constitutions, as the first step in the recovery of popular sovereignty; sovereignty in the foundation of the state. I will merely focus on these three constitutions because they are the avant-garde of Latin American new Constitutionalism. In the (B) second section I will approach the fourth power established in the Venezuelan constitution as means to endow with popular legitimacy –sovereignty- the structure of the state. The, in the (C) third section I will deal with the Action de Tutela - constitutional review in Colombia, as an institutional mechanism aiming at incorporating a sort of popular legitimacy in the functioning of the state Finally, (E) I will claim that these reforms aiming at institutionalizing popular sovereignty (legitimacy) over legal sovereignty (legality) in
the foundation, structure and functioning of the state, are not in contradiction with the modern project as claimed by the reformers, but contrarily, they are an attempt to develop the modern project by somehow innovative means.

In the last chapter (VI) I will provide some final remarks showing that, when the institutions aiming at endowing with popular sovereignty the Latin American states are study in the light of the history of political and legal thought, they reveal themselves as devices of the modern political project itself. Thus, I claim that their aim is to push further the teachings of modern political and legal thought to recover the faith in the “old modern project”.
Chapter I
The Origins of Political Philosophy: Classic Natural Law and Political Authority

A. Introduction: on the distinction between Natural Law(s) and Positive Law

Probably any contemporary inquiry on the history of political and legal thought is concerned with the natural and positive law distinction. Yet, this is not originally a legal or political distinction but essentially an epistemological one.

The origins of natural law are related to the distinction between what “is” by nature and what “is not”. This distinction considers the possibility of thinking beyond the “ways”7 of things as the given order (law). Prior to the splitting of “the totality of phenomena” into those that are natural and those that are not, the characteristic behavior (“ways”) of all things was taken to be the right order. No difference was made between, for example, the “ways” of plants and the “ways” or “customs” of different communities. In that sense, “ways” concerning human behavior—and thus political institutions—were based on tradition, which, in its turn, was rooted in the superior laws inherited from the ancestors. Therefore as “for authority as the right of human beings to be obeyed is essentially derivative from law, and law is originally nothing other than the way of life of the community”8, legitimacy and legality during the pre-philosophical period, were in practical terms, inseparable, and moreover, indiscernible from the intrinsic value of the community itself. They constituted together an indivisible attribute of authority anchored in the community’s immemorial practice of divine laws.

The flourishing of classic natural law would not have been possible without challenging this conception of authority underlying the “law” –ways. Classic philosophy took the first step by questioning the unity of the diverse elements making the “totality of phenomena”. It pointed out that not all “ways” were natural and that it was possible to make the distinction between natural phenomena and conventional ones. In that sense, philosophy unveiled the twofold content of “ways”: physis and nomos. Hence, classic natural law presupposes both the existence of a comprehensive metaphysical worldview and the epistemological distinction between nature and convention. Rather than a set of

7 For more comprehensive explanation of the “ways” of things as the preceding concept of natural right see Laws. Strauss, Leo. Natural Right and History. Chicago & London. Chicago University Press. 1965. p. 10-34
8 Cf. Strauss, L. 1965 Ibid. p. 84
norms enacted by men\(^9\), classic natural law was defined as the assemblage of just relations among men. This natural law has real existence because it is a constitutive part of the harmonious natural order of the universe. It rules social interaction among men, independently of human will, and aiming at the maintenance of the harmonious order. Hence, it seems senseless to distinguish in this stage of natural law between legality and legitimacy. Authority in classic natural law is not an attribute derivative from man but from the universe.

In contrast with classic natural law, modern natural law abandons the metaphysical and teleological elements central for the classic comprehensive conception of the universal order. Modern natural law\(^10\), strongly influenced by nominalism, focuses on the individual as the only existing reality aiming at drawing subjective natural rights from the examination of his own nature. If this is certainly a modern and rational project, it yet constitutes a variant of natural law, because individuals’ natural rights exist independently of the political power –convention-, this is, by the merely existence of man.

Positivism is also a modern project, but unlike modern natural law, it finds its roots in the emergence of the modern natural sciences. It denies the possibility of granting the status of genuine knowledge to metaphysical or theological assertions, stating therefore, that only knowledge accessible to men by means of a scientific (empirical) method is true knowledge. This epistemological distinction unfolds in at least two different senses in legal thought\(^11\). On the one hand, it is the ground on which legal science, inspired by the methodological parameters of natural sciences, was built upon. The object of study of positivist legal science is law conceived as an external object that has to be described without value judgments. On the other hand, positivism’s denial of metaphysical elements has been translated into the rejection of natural law and morality, not only as valid objects of study, but furthermore, as valid normative orders for the political community. Positivism has thus affirmed that only the law posited by political institutions is true law. Hence, the combination of modern natural law and positive law

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\(^9\) This is indeed what I mean by “conventional”” in the second sense.

\(^10\) Cf. Troper, Michel, La Philosophie du Droit. Paris. PUF (Que sais-Je). 2003, p. 16-17

\(^11\) Following the threefold meanings of Positivism according to Norberto Bobbio (1998), i.e. In Legal Science, in Legal Theory and as an Ideology; I basically limit myself in this stage to introduce Positivism within Legal Science.
implies the rejection of a ruling cosmic order, and with it, the rejection of authority rooted in metaphysical basis. It is thus the transition from modern natural law to positive law that will raise the necessity of legality and legitimacy as desirable attributes of legal and political authority.

The epistemological assumption underlying the distinction between natural and positive right, is obviously, as mentioned before, the distinction between nature and convention. This distinction has marked, in different ways, the understating of law and authority during the different periods of natural law as well as among modern and contemporary positivist thinkers. I argue that this epistemological distinction is methodologically convenient for our analysis because it provides the necessary analytical tools for interpreting the philosophical principles underlying the concept of authority in contemporary politics.

Certainly, as it will be shown throughout the dissertation, contingency is essential to the new conception of political power introduced by modern political philosophy. Contrarily to classic political philosophy, modern political thought will prove to be unable to grasp the trans-historical relation between human beings and their political institutions. Due to the emphasis put by modern philosophy on human consent and positive law as the sources of political justice, their normative proposals regarding the foundational principles of authority and institutional arrangements within the modern state are unable to offer a satisfactory and comprehensive exposition.

In the next section I will introduce the foundational principles of political and legal authority in classic political philosophy in the light of Plato’s and Aristotle’s oeuvres. Firstly I will approach their whole cosmological approach to politics. Then, I will attempt to present their concepts of man’s nature, natural law, political authority and justice. Finally, I will link together these concepts for bringing forth the what could be understood as the underlying concepts of “legality” and “legitimacy” of classic political thought. Nonetheless, as I mentioned before, one must be aware that during classic

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12 I do not take for granted the distinction between legality and legitimacy as a modern one. I propose to go throughout a brief history of political thought and then to conclude the origin and content of those concepts.
political philosophy in which classic natural law prevailed, these two concepts were indeed indistinguishable.

B. The foundational Principles of Political Authority in Classic Natural law

The comprehensive metaphysical view held in the classic period of Greek philosophy implies the necessary tension between the whole and the particular. The study of human “human things”, “divine things” or “natural things” required a comprehensive approach; it required the study “all things”. This conception is shared by both Plato and Aristotle. Nonetheless they do disagree in some more particular points regarding, among others, the concept of law and justice —dikaion. Therefore I will focus on what can be considered to be the core of classic natural law, while I will provide particular remarks only in those issues in which they differ considerably.

Classic natural law is inscribed in a transcendental worldview that places at its center the harmony of the cosmic order. The universe is composed by efficient, material and formal causes, but more essentially, for Aristotle, final causes. The cornerstone of classic natural law, and particularly the Aristotelian view, is the end of things. Hence, to determine what is good for each thing —and thus for man- one must determine what the nature of that thing is, i.e. what man’s natural constitution is. In the case of man, “reason is required for discerning these operations: reason determines what is by nature right with ultimate regard to man’s natural end.” But for so doing, it is also necessary to take into account the teleological order, in which, particular things —with their own ends- are interconnected to make up the harmonic whole —final end of the cosmic order. Therefore one cannot detach what is good for man from what the order of the universe is.

That every man has his own constitution, and hence his own end, must not be taken as a denial of freedom, but the reference according to which freedom has to be interpreted. There is no external force that determines man’s actions. Contrarily, man is, according to his own nature, free to pursue his ends. Certainly we are not talking about the kind of freedom of modern natural law, but a freedom limited to the capabilities and nature of each man. There is a given realm in which man is free to pursue a life of virtue in

13 Strauss, L. 1965. op. cit. 127.
14 Strauss, L. 1965. op. cit. 7
accordance to his nature. One must not confuse the concept of freedom held by classic natural law with the actual concept of freedom practiced during the classic period of Athenian democracy. In the Athenian regime freedom contrasted sharply with slavery. Only those men bear free, with a determined amount of assets and able to contribute the polis’ defense were holders of full freedom, and thus, able to participate in the polis’s government.\textsuperscript{15} In any case it is known that neither Plato nor Aristotle thought of the Athenian constitution\textsuperscript{16} to be the best political regime.

Moreover, for Plato and Aristotle men were not equal. “Since the classics viewed moral and political matters in the light of man’s perfection, they were not egalitarians. Not all men are equally equipped by nature for progress toward perfection, or not all “natures” are “good natures.”\textsuperscript{17} As we mentioned before, the fact that man is somehow pre-set by his natural constitution determines his status in the social order. It is in the light of each man’s end that we have to interpret his particular “equality” status. This teleological view of man’s nature shocks our egalitarian modern spirit, because, unlike premodern political philosophy, modern political thought downplays the teleological realm of man’s nature and revalues the equal dignity of all human beings. As we will see later, this explains to a certain extent the modern appreciation of democratic government. In contrast, the classics regarded the capacity of virtue as the distinctive characteristic of governors. Regardless the potentialities of virtue residing in all men, classics privileged the capacity of effectively practicing it, which among men, vary considerably. Therefore, those men able to practice virtue in a higher degree were entitled to guide the feeblest, or, in other words, the ruling class should be composed by the most virtuous men; by those able to guide the less docile men to virtue. That aristocratic government will enhance the possibilities of all citizens to live in accordance to virtue whereby they will meet their natural end. In that sense political ruling is well practiced if it conduces to men’s achievement of virtue or excellence. The \textit{polis} in which political power is well

\textsuperscript{15} Aristotle, \textit{Politics}. Cambridge (MA), Harvard University Press. 1972. 1317b 40. p. 489
\textsuperscript{16} Cf. Aristotle, Ibid. 1279b 5: 207. Nonetheless Aristotle though that among the many cities’ and state’s constitutions empirically studied by him and his students, the Athenian Constitution could be considered the best, this is, the one that fitted the best to his members.
\textsuperscript{17} Strauss, L. 1965. op. cit. 134
distributed\textsuperscript{18} is that in which the most virtuous men rule, this is the \textit{politeia}. In this perfect regime citizens will be those “who have the capacity and the will to be governed and to govern with a view to the life in accordance with virtue.”\textsuperscript{19} The \textit{politeia} is the most noble and legitimate regime.

Unlike \textit{politeia} virtue oriented government and citizenship, Athenian democracy was characterized by a twofold concept of citizenship: Freedom and equality (justice). Freedom was the elementary condition of equality. Besides accomplishing the requirements of freedom - birth, assets and contribution to self defense- full citizenship required political participation. Only full citizens were equally free because they had equal share on government. Citizens holding power in government were essentially keeping their freedom as far as they were participating in self-government\textsuperscript{20}. Aristotle shows that access to the assembly was limited to citizens and the payment of an ‘entrance’ fee. The resources collected were to be invested in common defence in order to guarantee “full rights of sovereignty and self-government” of the polis\textsuperscript{21}. This is why citizens where not only required to be able to contribute economically to the defence of the \textit{Polis}, but to be actually able to participate in its defence, i.e. to be soldiers.\textsuperscript{22}

Aristotle criticized the interpretation of equality\textsuperscript{23} and liberty\textsuperscript{24} in Athenian democracy. He considered that equality was deprived from its twofold dimension, i.e. numerical equality and equality according to worth. Aristotle meant by the former “that which is the same and equal in number or dimension”, while by the latter “that which is equally by proportion”\textsuperscript{25}. He claimed that in spite that men agree that the absolutely just is what is according to worth, they disagree in that some think that if they are equal in something they are wholly equal, and others think that if they are unequal in something they deserve an unequal share of things\textsuperscript{26}. Thus the democratic misunderstanding of equality and freedom “arose from men’s thinking that if they are equal in any respect

\begin{itemize}
\item \textsuperscript{18} Cf. Strauss, L. 1965. op. cit. p. 136 the distinction of Constitution (\textit{politeia}) for the classics as “the factual distribution of political power” and modern Constitution as the “legal stipulation regarding the distribution of political power”.
\item \textsuperscript{19} Aristotle 1972 op. cit. 1283b 30. p. 241
\item \textsuperscript{20} Aristotle 1972 op. cit. 1317b 40. p. 493
\item \textsuperscript{21} Aristotle 1971. op. cit. XXIX: p. 109
\item \textsuperscript{22} Aristotle 1971. op. cit. XXIX: p. 119
\item \textsuperscript{23} Aristotle 1972. op. cit. 1301a 30. p. 371
\item \textsuperscript{24} Aristotle 1972. op. cit. 1310a 25. p. 437
\item \textsuperscript{25} Aristotle 1972. op. cit. 1301b 25. p. 375
\item \textsuperscript{26} Aristotle 1972. op. cit. 1301b 35. p. 375
\end{itemize}
they are all equal absolutely -for they suppose that because they are all alike free they are equal absolutely.”

Aristotle recomposes the triad citizenship, equality and freedom in classic Athenian democracy by stating what he considered to be the truly principle of democratic justice: “all to have equality according to number… for it is equality for the poor to have no larger share of power than the rich, and not for the poor alone to be supreme but for all to govern equally.” The democratic concept of equality was therefore essentially connected to political justice. Moreover equality in the political realm was taken as participation in government (self-government), which, along with freedom, were the constitutive concepts of democracy: “There are two things that are thought to be defining features of democracy, the sovereignty of the majority and liberty; for justice is suppose to be equality, and equality the sovereignty of whatever may have been decided by the multitude, and liberty doing just what one wants.”

Politically just governments are thus desirable and moreover, as we will see, legitimate. If for classic political philosophy the best regime was only possible (legitimate) under the most favorable conditions, contrarily, the legitimacy of earthly possible regimes had to be judged in accordance to the particular conditions of each society. For the classics “there is only one best regime, but there is a variety of legitimate regimes.” If the best regime is that in which virtue dominates the political domain, legitimate regimes are those in which justice is practiced. The concept of justice differs considerably in Plato and Aristotle and therefore that of legitimate regimes.

Plato understands justice in a comprehensive way in which personal (instincts, heart, reason, etc.) and social domains (polis) are inseparable. For example, Plato thought that in any good constitutional regime man must subdue senses (passions) to courage or reason, because they drive man away from virtue. Because the city is made of people, Justice in the polis is connected with the justice of man. Furthermore, if it is true that it was Plato who originally stated the distributive justice maxima justice is giving each person their due, for understanding the full meaning of justice in Plato we most go

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27 Aristotle 1972. op. cit 1301a 30. p. 371
28 Aristotle 1972. op. cit. 1317b 40. p.493
29 Aristotle 1972. op. cit. 1310a 25. p.437
30 Strauss, Leo. 1965. op. cit. 139-140
31 Plato. La République. Œuvres Complètes, Tome I. Éditions Gallimard. Brussels. 1950(c). IV, 427-428 (pp. 991-992); IV, 433-435 (pp. 999-1003) ; IV, 441 (pp. 1011)
32 Plato. 1950c. op cit. IV, 433-434. pp 1000
beyond that. Certainly, Plato was not thinking in what is due according to law but what is prescribed by nature. What is due to each person according to nature cannot be anything else but that that is good for him. Hence, only those men who can truly know what good is are entitled to govern, because they are the only ones able to render “full” justice. Only philosophers are able to know what is good for man, and thus they are the only ones who can guide the *polis* to virtue. This concept of justice is the underpinning of the *politeia* in which philosophers govern in accordance to nature and citizens obey the law which orders the natural city. The law of the natural city is the same as prudence and is essentially natural law. In this very comprehensive natural law order, in which “law” and “morality” are intertwined, Justice is realizable in the *politeia*, but is unachievable for an earthly regime.

Plato understood the necessity of the imperfect civil society regardless the impossibility of fully materializing natural right (law) for its citizens. The philosopher must know that in attempting to guide a city he must take into account peoples’ will. In Strauss’ words, wisdom has to be mediated by consent for the good of the city. Once again we find the philosopher at the head of the government. As well expressed by Villey\textsuperscript{33}, the political man for Plato (philosopher) has to be able to get through the world of appearances and reach the world of intelligible ideas, where real knowledge of things is\textsuperscript{34}. Unfortunately, in the earthly city only a mixture of natural law discerned by reason –philosopher- and law based on opinion –citizens- seems possible. It is in this imperfect city in which consent emerges as a necessary condition of government. Contrarily to the perfect regime, earthly regimes are legitimate if they are the result of natural justice and consent. Strauss beautifully presents the contrast between the legitimate authority of the perfect and imperfect city, where natural law and diluted natural law rule respectively. Strauss, aiming at making clear the meaning of “full” legitimate political authority, contrasts, on the one hand, the duty of obedience of Socrates to Athenian law described in Plato’s *Crito*, with, on the other hand, the philosopher’s duty of obedience presented in Plato’s *Republic*. In the former, Socrates’ duty of obedience to the imperfect Athenian law is presented on the basis of a tacit agreement –contract- between the *corpus* of the *polis* and him. Socrates broke the law of the city from which he had obtained benefits and before which he has, consequently, acquired the duty of belonging


\textsuperscript{34} Plato. 1950c. op. cit. V, 471-484. pp. 1049-1063.
by obeying its law. Contrarily in the latter, the philosopher’s duty of obedience is not derived from a tacit contract, but from the nature of the regime itself. He obeys the law of the city because the city of the Republic is the best city. It is the city according to nature, where natural law rules. “Only the allegiance of an inferior community can be derivative from contract, for an honest man keeps his promises to everyone regardless of the worth of him to whom he made the promise.”

It seems obvious to conclude that, for Plato, justice -natural right- and thus, legitimacy in its original form, is only achievable in the best regime. Earthly regimes cannot aim beyond a weak type of legitimacy, i.e. a mixture of natural right and consent. In other words, even if for Plato’s “political justice” (in the city) is possible and might justify authority, only a comprehensive realization of justice –political, moral and “cosmic”- fully legitimizes authority. Only authority that combines government on man’s virtue and city’s good is fully legitimate because it makes natural law rule. That highest form of justice and legitimacy is only achievable in the perfect city, in the politeia.

Contrarily, Aristotle provides a more sharp and realistic concept of justice. First, he makes the distinction of what we know today as distributive and commutative justice, in which the former regards the division of public goods according to merits, while the latter concerns the relations among particulars. But what is more interesting for us is his concept of political justice. For Aristotle justice is the achievement of equilibrium of the different interests of citizens, this is what he named dikaion politikon, and constitutes a mixture of nature and law.

This more realistic concept of justice laid down by Aristotle provides more interesting elements for drawing a pragmatic and useful concept of legitimate authority. Since the best regime for Aristotle, even if always desirable, is only possible under very favorable circumstances, man is obliged to strive for the most just regime. An imperfect regime according to Aristotle will not have the attribute of virtue but it can always be just, and consequently legitimate. Therefore men are compelled to seek the best possible regime according to their people’s constitution aiming at providing actual solution to the

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35 Strauss, L. 1965. op. cit. 119
community’s problems. Political power is legitimate when it can put together law and nature in order to satisfy the notion of political justice.

This radical difference between Plato and Aristotle concept of justice can be explained for at least two different reasons:

On the one hand, if it is true that both Plato’s and Aristotle’s theories are contextualized in a harmonious cosmic order, Plato departs from the cosmic order itself to find out what justice is. Contrarily, Aristotle combines his teleological conception of beings with an inductive (empirical) method. Aristotle departed from observation attempting to grasp the nature and ends of things. As for Aristotle things have the essence of the being before actually having its corresponding shape – a seed is a tree before having the tree shape-, he thought to be able to recognize the nature of things by following their natural process. Therefore the concept of political justice for Aristotle cannot be found anywhere else but in the natural social development of man in civil society. In other words, for Aristotle, justice in its narrow sense, cannot be found anywhere else but in social relations, i.e. within the polis. “Because man is by nature social, the perfection of his nature includes the social virtue par excellence, justice; justice and right are natural.”

On the other hand, Plato and Aristotle also disagree in the concept of justice because of their understating of man’s political nature. As we know, for Plato civil society and its laws are necessary but undoubtedly imperfect because they are the mere reflection of natural right, it is nothing else than diluted natural right. Contrarily, for Aristotle civil society is where man, who is by nature a political animal, can develop his potentialities and achieve his end. In that sense, political activity is the means whereby man can fully realized his nature and turn his potentiality in actuality. As far as justice is realizable within the polis, legitimate government is also possible.

Moreover, for Aristotle justice was realizable in the polis through a “nature-society” complementation which does not imply the dilution of natural law neither people’s consent. Contrarily since man is by nature a political animal, justice –in its political sense- is only realizable by the natural development of man within the polis. Therefore, additionally to what has been already said regarding Aristotle’s viewpoint on equality

38 Strauss, L. 1965. op. cit. p. 129
and justice, we must know that Aristotle understood that the essence of justice is the common good. According to him, the common good precedes the notions of communitative and distributive justice. If justice emerges from the interaction between the particular constitution of the city and the cosmos in permanent movement, one must conclude that what is naturally right -just- is essentially changeable. Since Aristotle did not develop further this idea, there have been different interpretations of his assertion. I will stick to the understanding that for Aristotle justice is not an abstract concept built up of principles, but rather, a particular one made up of concrete decisions. If natural right resides in particular decisions and not in general rules, and those decision are to be taken within a particular political community (in which common good is paramount for its survival), then, natural law is essentially changeable.

Once again this great difference with Plato’s teachings seems to have its roots in Aristotle’s empirical method. Among his studies on Greek constitutions he concluded that the Athenian constitution was the best political regime of theépoque. Not because it was democratic –Aristotle was not a democrat- but because it was the best distribution of power according to the city’s nature. Athenian democracy was not the best regime because it was not a government of wise men neither of a mixture of philosophers and enlightened citizens under the rule of law, but it was just, and thus legitimate. Legitimacy of law and the political power for Aristotle lies in the respect to the “naturally just”. That is why the just polis had to be understood as an extension of the natural order in which in which citizens seek to accomplish their natural ends.

Aristotle provides not only a notion of natural right compatible –complementary of- with the notion of positive law and civil society, but moreover with a dynamic conception of natural right as the grounds of both justice and legitimacy of the political authority. The achievement of a just regime for Aristotle implies human effort. There exists the potentiality of justice and human excellence in every political community, but

40 Some have tried to explain the variability in the pragmatic concept of natural right by stating that for the classics “there is a universally valid hierarchy of ends, but there are not universally valid rules of action.” Cf. Strauss, L. 1965. op. cit. 162
41 Cf. Leo Strauss 1965. p. 142. He makes the difference between philosopher and gentlemen. I retake that division but calling the latter enlightened citizens with which I make reference to those citizens that without being philosophers think beyond the darkness of the cavern -doxa.
it only becomes actual through the efforts of man’s action. This permanent interaction between nature and politics is the essence of legitimate authority.

Finally, I think it is worth to put together some teachings from classic political philosophy on the legitimacy of power in classic natural law that will be useful for further analysis.

The most shocking element to our modern eyes might be the classic comprehensive metaphysical understating of life and thus of politics. As we will see later on, contrarily to modern thought that disregards the transcendental dimension of democracy and holds and instrumental viewpoint of government as the appropriate means for guaranteeing order, equality and freedom, the classics understood politics as essentially connected with the natural order and justice. They understood politics in regards to man’s nature and ends, closely tied to an account of human psychology, of man’s desires, interests and powers as well as in the light of the forces of the universe.

This is why for classic political philosophy, and essentially for Aristotle, the city and its inner constitution had to be understood as an extension of the cosmic order, and hence ruled by natural law. Aristotle and Plato differ in the way in which natural law rules politei and the earthly city. As it was said before I will retain Aristotle’s view because it provides, in my concept, the richest and most pragmatic account of classic natural law. In his approach natural law and political justice are not limited to an account of the cosmic equilibrium, but also to man’s ends within a political community. Aristotle put together in an impressive way the exercise of virtue and justice, the cosmic order and political life to provide a comprehensive concept of what legitimacy is. Aristotle method of empirical investigation of the natural order has proved to be of great importance to bring natural law down to earth. He provided a dynamic concept of natural law that became to cornerstone of his pragmatic notions of legitimacy and justice.

Although I hope to have made it clear to the readers’ eyes, it is worth to state that both Plato’s and Aristotle’s political philosophy, and in general all classic natural law, is

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43 Cf. Aristotle 1972. op. cit. 1253
incompatible with any doctrine of social contract or modern voluntarism regarding both the nature of law and legitimacy of authority. If it true that the best regime, as Plato and Aristotle understood it, is beyond any possible actual order, we must also be aware that Plato’s and Aristotle’s teachings can greatly contribute to understand the transcendental dimension of the political order. Aristotle leaves us the teaching of a possible just and legitimate order as the interaction of man, political life and natural right.

In the next chapter I will approach the emergence and foundational principles of modern natural law as well as its teachings on political power. The philosophical shift implied in the understanding of natural law is central to both, a new concept of legitimate political authority, and to the modern political constructivism theory on which contemporary politics and positive law are based upon. In the first section (A) I introduce the last stage of classic natural law during the scholastic school of Thomas Aquinas. Then, in section two (B), I present the emergence of nominalism and the decline of classic natural law and its metaphysical conception of government. In section three (C), I develop, through the oeuvres of Hobbes and Locke, the emergence of modern natural law and its conception on human nature and political authority. Finally, I draw some conclusions regarding the concepts of legitimate and legal authority in modern natural law as well as the shift from natural law to positive law as the source of regulation.
Chapter II
The foundational Principles of Political Authority and Natural law in Modern Political Thought

A. The Decline of Classic Political Philosophy and Classic Natural Law

The decline of classic political philosophy and natural law comes after the great recovery of Aristotle’s legacy by Tomas Aquinas. Aquinas’ version of classic natural law is revitalized by the scholastic tradition which aimed at harmonizing natural law with the catholic teachings. It implied the reconsideration of man’s nature in the light of the divine will-order. Hence, for Aquinas, natural law has to be interpreted under the teachings of the bible, which privileges belief over reason, and thus, redefines both the sources and status of natural law first presented by the classics. His conception of natural law, grounded in belief and divine law, rules out the changeable character of classic natural law, and reveals a divine and natural order to which man’s established order must conform. In that sense, for Aquinas, natural law and theology are intertwined.

Although Aquinas’s version of natural law seems to be grounded in a concept of essence similar to that of Aristotle, the consequences that the former unfolds thereafter are beyond the latter’s metaphysics. He understands human nature as constituted by a determined set of properties that define what “man is”: the essence of man (something) tells us “what is to be a man (that thing)” Therefore, according to Aquinas, natural law is invariable because it derives from the inalterable essence of the godly informed natural order and human nature. Although this characterization represents a radical rupture with Aristotle’s ontological understanding of natural law, both Aquinas and Aristotle do agree that natural law is accessible to men by means of reason. For Aquinas the aim of this inquiry is undoubtedly the establishment of human laws that will lead men to the common good.

The result of Aquinas’s theory, which is framed in the so-called first scholastic, is widely known as the baptizing of Aristotle’s natural law theory. It is precisely to this absorption of natural law by theology that modern political philosophy reacted on nominalistic basis, paradoxically set up, by the so-called second scholastic. For this second wave of scholastic thinking emerged in the Low Middle Ages it was unconceivable a fixed natural world in which god’s omnipotence was neglected. This reaction was leaded by William of Occam, and gave birth to what became the epistemological cradle of modernity, i.e. nominalism.

B. Nominalism and the Epistemology of Modernity

Nominalism, at least in its most original version, argues against the existence of universals. According to nominalists things only exist as particular objects and not as instances of unique and universal essences. This anti-realists insight that opposes Aquinas’ conception of order grounded in essences -e.g. essence of man- is the underpinning of the modern philosophical project, and thus, the ground on which modern natural law and legal positivism have anchored their pillars. Nominalism is incompatible with Aquinas’ claim that man’s nature and the world order are constituted by unchangeable general essences -universals. Nominalists agree that all things have merely particular existence, and therefore, that they have a single identity. Nonetheless they do disagree when explaining the differences among objects apparently sharing an identical nature, i.e. the nature of man. Different attempts have been made for classifying the diverse nominalist’s arguments on the issue, an just as an illustrative example, I highlight the contribution of D.M Armstrong, who has classified the different types of nominalist arguments in five categories –Predicate Nominalism, Concept Nominalism, Class Nominalism, Mereological Nominalism and Resemblance Nominalism- while attempting to show the way in which nominalism can explain what is for a thing to have a property.


The work of William of Occam is widely recognized for having laid down, in a coherent and systematic way, the core ideas of nominalism. I hold\(^{52}\) that Occam’s ideas constitute the grounds on which modern natural law and legal positivism have flourished in opposition to the realist view adopted by the classics. Contrarily to the realist conception of the world, in which particular things share a natural order, relate to each other in terms of that order, and hold common properties that allow the existence of the order itself, nominalism as exposed by Occam, argues against the ontological existence of “the nature of a thing”, and moreover, of common forms or final causes\(^{53}\). Hence, “universals” are merely linguistic signs\(^ {54}\) which are useful for grouping together particular phenomena with apparent similarities. Universals as man, good, etc., are not existing beings in themselves but concepts expressing a relation among particular things, i.e. among particular men or particular good acts, etc. The only true knowledge resides in the particular things\(^ {55}\) themselves and not in the generic terms. Therefore, according to Occam, man’s reason must focus on individual things as they were posited by god in the creation of the world, and not on universals—or relation among things—which do not represent real entities\(^ {56}\). The shift proposed by nominalism from the observation of nature and the whole external order to the constitution of particular things led modern philosophy to place the individual at the center of its reflections\(^ {57}\).

The assimilation of nominalism by Political Philosophy stands clear in the theory of the Social Contract, which in itself is the greatest achievement of modern political and legal thought. It wraps up the whole philosophical tradition developed since the second scholastic in a systematic exposition on the origins of political and legal authority. I will approach the theory of the Social Contract through the influential oeuvre developed by Hobbes and Locke. I will focus on their justification of political and legal authority as well as in their concepts of natural law, justice, legitimacy and legality.

\(^{52}\) The works of Villey, Strauss, Vignaux, De Muralt and Berns that have been widely quoted in this dissertation hold the same view.


\(^{55}\) Vignaux, 1931. op. cit. pp. 752.


\(^{57}\) Cf. Vignaux, 1931. op. cit. pp. 752 ; Villey, M. 2006. op. cit. pp. 228
C. Hobbes and Locke: On the Origins of Modern Political and Legal Authority

The political work of Hobbes might be the best example of the gap opened by nominalism between classic and modern political philosophy, and thus, between the classic and the modern understating of law. On the one hand, and contrarily to the classics, Hobbes takes natural right to be both innate to the subject and source of the sovereign’s authority to enact and enforce the law. On the other hand, he abandons the Aristotelian view that the goal of political power is to promote the accomplishment of man’s end by the establishment of a virtue-oriented order. Instead, he proposes to seek in the original state of nature the foundations of political power. For so doing, Hobbes considers necessary, first, to reformulate the “esoteric” philosophical method of the classics that impeded the production of true and accurate scientific knowledge.  

According to Hobbes, certain knowledge of a thing can only be affirmed if that thing finds its origin in human mind, i.e. whose construction is our own power. Therefore, knowledge of those things which have been originated with the participation of external causes is merely hypothetical. Hobbes evidently rejects the possibility of thinking in terms of universals by stating the impossibility of getting scientific knowledge of the external world. Moreover, he considers that objects existing independently of the human mind are unintelligible. Consequently, Hobbes recognizes the external causation of the universe, and thus, its unintelligibility to human mind. Hobbes regards the impossibly of having certain knowledge about the universe as the footing of man’s absolute sovereignty in the world: “man can be sovereign only because there is no cosmic support of his humanity… because he is absolutely a stranger in the universe…because he is forced to be sovereign”.

Political Science as conceived by Hobbes has the objective to describe the nature of man, his experience in the political and social life. First, and in accordance with his scientific thinking, his aim was to discover the principles governing political life from the study of man’s nature – man’s rights. For so doing, contrarily to the classics, He took into account the way men actually live and not their cosmic ends. He sought to

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59 Strauss, 1965. op. cit. pp. 175
reconstruct man’s present by inquiring into his past, returning to the pre-political stage, to the state of nature.

According to Hobbes it is passions rather than reason which determine man’s behavior in the state of nature. He constructs his theory based on a negative anthropology of human nature in which “man is enemy to every man”\(^\text{61}\). He argues that human beings are naturally a-sociable\(^\text{62}\), competitive and guided by pleasure and desire. Furthermore, the fact that men are naturally granted with relatively similar mental and physical faculties\(^\text{63}\), have made of the state of nature a permanent state of war, in which everyone is in danger of violent death. Hobbes thought that by rooting his natural law in man’s fear of violent death, he was setting solid basis for his theory without betraying his nominalistic assumptions. If man’s most powerful passion is fear of violent death, consequently man’s most powerful desire is that of self-preservation\(^\text{64}\).

If there is any reason for which man ought to abandon the state of nature and unite in a civil society under the power of a centralized authority, it is men’s common desire for self-preservation. But the nature of that commonwealth is conditioned by the previous existence of man’s natural rights. According to Hobbes, the right to self-preservation in the state of nature implies some other natural rights that entitle men to pursue their survival. In other words, Hobbes holds that man has some -immanent- natural subjective rights in the state of nature which, being prior to the political community, are conditions limiting the setting of the commonwealth.

No other right seems more absolute and necessary for self-preservation than liberty\(^\text{65}\). It is effectively the standing point of man’s struggle for survival in the state of nature. Moreover, because in the state of nature liberty is unlimited and the struggle for survival

\(^{61}\) Hobbes. 1998. op. cit. pp. 84

\(^{62}\) Although traditionally it has been argued that Hobbes presents an asocial nature of man in the state of nature, I include this controversial statement following a provocative note made by Rousseau in Discours sur l'origine et les fondements de l'inégalité parmi les hommes. According to Rousseau previous philosophers –mainly referring to Hobbes- have tried to go back to the state of nature but they haven’t been able to do it. They have remained, he argues, in the last stage of it. They have mistakenly transported man to those times as he is present in today’s society, and therefore, have neglected the moment in which men were living like “animals”. Hence, Hobbes contradicts himself in the sense that he aims to present an asocial man in the state of nature but he wrongly endowed him with all the vices of men living in society i.e. competition, diffidence and glory (Hobbes, 1998:83).

\(^{63}\) Hobbes. 1998. op. cit. pp. 82 –Ch. xiii

\(^{64}\) Hobbes. 1998. op. cit. pp. 111, 198

\(^{65}\) Hobbes. 1998. op. cit. pp. 86. Ch. xiv
is unregulated, every man has right to everything. Only two natural laws, which are imposed by the dictate of reason, govern men in the state of nature: 1. “to seek peace and follow it... and... by all means we can, to defend ourselves. 2. That a man be willing, when other are so too, as far-forth, as for peace, and defense of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other man, as he would allow other man against himself.”

Hence, reason imposes to man the necessity of transforming the state of nature, in which perfect natural rights co-exist with imperfect -uncertain- duties, into a system in which a centralized authority guarantees peace by enacting and executing commands. Thus, man as holder of natural rights, is meant to consent on the establishment of that authority which will provide security by establishing a perfect system –positive and coercible- of duties and rights. However, the existence of a sovereign authority implies the abandoning of the absolute character of man’s natural rights. If it is theoretically true that natural rights remain a limitation to the political authority, especially the right to life; in Hobbes, however, the sovereign claims absolute authority within the commonwealth on the basis of the people’s transfer of natural rights -i.e. sovereignty- by institution. In that sense, since the sovereign holds his absolute power –sovereignty- on his own right –derived from nature- the ruler is entitled to govern on the basis of mere authority and not on the basis of truth or reasonableness.

Although Hobbes argues that sovereignty is rooted in the transfer of rights (power) originally belonging to the individuals, he also holds that political authority can emerge on the basis of the acquisition of rights by the sovereign. In case of conquest, if individuals fearing violent death consent in transferring their natural rights to the conqueror in exchange of protection of their life, then, the conqueror is said to have gained sovereignty by acquisition.

68 Hobbes. 1998. op. cit. 138. ch. xxi
For Hobbes, the sovereign in both cases holds full sovereignty. Alike in sovereignty by institution, individuals when consenting in the establishment of sovereignty by acquisition, transfer their natural rights to the governor in exchange of life protection. However, contrarily to the sovereignty by institution in which the contract is inspired in the fear of man to every other man, in the sovereignty by acquisition, the contract is inspired in fear to the conqueror\textsuperscript{70}. The fact that force has mediated this transfer of rights is not relevant, because it was finally fear, as it is in sovereignty by institution, what gives origin to the authority. If fear rendered void the social compact, “no man, in any kind of commonwealth, could be obliged to obedience.”\textsuperscript{71} Nonetheless these two types of establishment of sovereignty are irreducible to one. In the sovereignty by institution the contract is accomplished among men. Each man restrains his rights in as much as the others do. These resign of rights is made among men in benefit of the sovereign, who thereafter, holds absolute power to guarantee the execution of the social contract. In sovereignty by acquisition the contract is not accomplished among men, but between the conqueror and each individual. Each man resigns his rights to and in benefit of the sovereign, who must guarantee the life of each of the contracting persons.

Hence, if it is true that for Hobbes consent is the origin of sovereign authority, what must be regarded to determine the legitimacy of that consent, is not if it was produce by force, but if it was given in exchange of protection of life. The goal of self-preservation is the only valid reason for which man can abandon his natural rights.

It is precisely from the abovementioned argument that Hobbes draws his theory of sovereignty. He rooted the supreme powers of the sovereign not in positive law or general custom, but in natural law. Consequently Hobbes makes of legitimacy the highest attribute of a political order. In words of Leo Strauss, Hobbes lowered the classic goal of politics of the “best regime” to that of a “legitimate government”\textsuperscript{72}. Hobbes succeeded in laying down a theory of a right social order whose actualization is possible in all circumstances. Hobbes disregards the teaching of classic political philosophy that distinguished between good and legitimate regimes on the basis of the different existing circumstances. Contrarily, Hobbes brings forth a scheme under which one may judge the legitimacy of any regime at all times and under any circumstance.

\textsuperscript{70} Hobbes. 1987. op. cit. Ch. V, 12. pp. 90
\textsuperscript{71} Hobbes. 1998. op. cit. 132. ch. xx
\textsuperscript{72} Strauss. 1965. op. cit. 191
Furthermore, the reduction of the “best regime” to “legitimate government” implies the impossibility of distinguishing between good and bad regimes. Man must neglect doctrines advocating for the individual’s autonomy in judging the good and the evil, and must follow the sovereign’s dictates as far as they are not repugnant to the laws of god. Moreover, if for Hobbes justice remained an independent virtue from that of peaceableness, he did provide a new interpretation. He disregarded justice as the establishment of a good political order pursuing the fulfillment of the natural and particular standards governing the cosmic and individuals order respectively. Instead, he looked into human will and identified justice with the accomplishment of the social contract and its unfolding consequences, i.e. the fulfillment of the sovereign’s commands. Hobbes theory combines the possibility of a legitimate government operating in all circumstances with a theory of justice attached to positive rules.

The most remarkable consequence of Hobbes’ theory of sovereignty is the conjunction in one central authority of physical power (*potential*) and legal power (*potestas*). The fact that sovereignty is rooted in the transfer of subjective natural rights from the people to the instituted authority, provide unlimited and legitimate power the ruler. He may thus disregard any law that constrains his own will. In all cases the sovereign is not bounded by legality because civil laws are only his commands and he can release himself from them at his pleasure. As we said before, the sovereign in Hobbes does not rule on the basis of reasonableness but on the basis of authority, in other words, the sovereign is not reason but pure –“inherited”- will. This is the main consequence of absolute sovereignty granted from the people to the sovereign. Men are obliged to follow the commands of the sovereign not because they are reasonable, but because they have the quality of authority. Furthermore obedience appears as imperative because citizens are devoid of moral objection given the fact that law does not establish what is honorable or not, but what is permitted or not. Therefore, in Hobbes, the only reason that justifies civil disobedience is the threat to self-preservation by the sovereign or an alien third.

Although alike Hobbes, Locke sought the underpinnings of sovereignty in the origins of man, and more precisely in his natural rights, he nonetheless differs in the qualities attributed to that state of nature. Even if for both the state of nature is characterized by the aim of self-preservation, Locke does not consider man to be naturally corrupt or bad. Contrarily he argues for a state of nature in which innocence of spirit\textsuperscript{76} dominates the struggle for survival\textsuperscript{77}. Locke follows Hobbes in considering that competition for self-preservation opens the door for conflict and permanent insecurity, but he once again differs from Hobbes, when considering the terms of the conflict itself. He takes distance in regards to Hobbes’ understanding of self-preservation and war. Locke considers that the struggle for self-preservation is not carried out in terms of violent threat to life, but in terms of threat to survival by the appropriation of basic goods required for living – e.g. shelter and food. Thus, for Locke, there is not a truly natural law in the state of nature that imposes universal and unambiguous duties on man’s behavior towards the others or towards god. In Locke, the state of nature is governed by the sole principle of the pursuit of a proper order conducing to happiness, which is neither a law belonging to the external order nor a natural mandate anchored in the subjects, but simply, a dictate of reason\textsuperscript{78}. It thus lacks the attributes of a truly natural law and stands merely as a reasonable mandate that facilitates the pursuit of social happiness.

In spite of the inexistence of a natural law imposing perfect duties in the state of nature man holds innate natural rights governing his fate. Man has been naturally preset with the indelible desire of happiness. The pursuit of this natural desire endows man with additional natural rights, i.e. self-preservation and property, which are prerequisites for the attainment of happiness. Moreover, if happiness is in itself a natural right, life and property according to Locke, prevail in case of conflict. The former is the maximum precondition for happiness, while the latter, understood as the natural right to use natural resources in benefit of man’s own survival, also proves to prevail over the right of happiness.


\textsuperscript{77} I highlight the sharp contrast existing between Locke’s first passages of the Two Treatise in which he presents a peaceful state of nature that respects the natural mandate of preserving mankind (1988, II, § 6-, 8, pp.270-272; II, §19, pp. 280-281), with the passages of later pages in the Treatise in which he affirms that the real state of peace is civil society because the state preceding it is in an ongoing war (1988, II, § 13-21. pp. 275-282). I argue that Locke wanted to present, in opposition to Hobbes, a positive anthropology of man, but making clear that the conditions of the state of nature led men into war.

In absence of a natural law imposing duties among man living in the state of nature, every man has the right to judge the breach to his natural rights of survival, property and happiness\textsuperscript{79}. Men, led to the permanent state of war, are thus obliged to appeal to reason and recognized the equality among them in regards to the basic rights. If they aim to assure the fulfillment of their natural rights, then, a peaceful society must be established. Subsequently, this recognition allows men’s mutual commitment to constitute a political authority that governs society in behalf of each of them as one sole body\textsuperscript{80}.

Locke agrees with Hobbes that civil society is the sole judge of which transgressions are, and which are not, deserving of punishment\textsuperscript{81}. However, Locke’s theory of civil society and political power differs considerably from that of Hobbes. On the one hand, Locke identifies man’s desire of self-preservation with the ownership of the basic goods required for survival and not with the fear of violent death. Hence, the protection of property as means for self-preservation, and not the protection of men from violent death, is at the center of Locke’s social contract. In this way Locke avoids, to a certain extent, the criticism made to Hobbes’ theory of sovereignty\textsuperscript{82}, that it is only operative in extreme cases, i.e. when men fear violent death. On the other hand, Locke argues that the right of self-preservation governing the constitution of the civil society favors a limited type of government. Locke rejects Hobbes appreciation of absolute government as the ideal means for self-preservation within civil society. Contrarily, he considers unlawful any absolute arbitrary power, as well as any government, established without the free consent of the subjects. Therefore, for Locke, the only legitimate government is that which is structurally incapable of oppressing its member once they have resigned their natural rights. This might be the gist of Locke theory of legitimacy and legality. Locke considers that a legitimate government (political power) is that which has been constituted, not only by the free consent of all the subjects, but which is designed in a way that prevents the oppression of its citizens. In spite of the monarchic tendency of

\textsuperscript{79} Locke 1988. op. cit. II. §13, pp. 275-276; II. §87, pp. 323

\textsuperscript{80} Locke 1988. op. cit. II. §89, pp. 325; II. §95-98. pp. 330-332

\textsuperscript{81} Locke 1988. op. cit. II. §88, pp. 324-325

\textsuperscript{82} Strauss 1995. op. cit. 196-197
Hobbes, authors like Leo Strauss argue that all “natural public law doctrines”\textsuperscript{83}, like those of Hobbes and Locke, have the deficiency that in practical terms they imply that the only legitimate government is democracy\textsuperscript{84}. Although one may agree with this affirmation regarding the legitimacy of government, it is important to remark the differences that unfold regarding the operation of government itself. It seems that Strauss rather than making reference to the actual institutional arrangements of a political regime organized in a democratic form, he refers to the constitution of the state on popular basis. Therefore the differences between Locke and Hobbes must be seek not in the concept of legitimacy (origin of government), but in that of legality (operation of government). Contrarily to Hobbes who affirms the absolute power of the sovereign, Locke subjected the supreme power to a system of checks and balances. He considered that the only guarantee of people’s rights was a limited government respectful of the law, i.e. subjected to legality. Moreover, even if Locke did not confer to the people the permanent task of government, he did considered them to be the last control of a tyrannical government.

At this point it is then possible to appreciate clearer the influence of nominalism in Locke’s Political theory. According to Locke, the inexistence of common forms or universal ends impedes individuals to reach the peace that the state of nature was meant to offer. If men are naturally good, sincere and supportive, it is thus the absence of common innate forms that leads them to conflict. Every man judges individually what satisfies his –subjective- natural rights (desires). Those rights are knowable to the individual because they are the consequence of their desire of happiness. Contrarily, natural law, which would impose general duties on man’s behavior, lacks a common form accessible to everyone, and thus, it is in itself unknowable. Hence, the actualization of the law of nature, which will allow the establishment and enforcement of general duties, and in this way the attainment of a peaceful life, is only possible in civil society. Therefore, individuals are appeal to resign their natural rights in benefit of a common authority who will prescribe positive laws for the common goal of happiness.

\textsuperscript{83} Natural public law “is concerned with that right social order whose actualization is possible under all circumstances. It therefore tries to delineate that right order that can claim to be legitimate or just in all cases, regardless of the circumstances” (Strauss 1995. op. cit. pp. 181)

\textsuperscript{84} Strauss 1965. op. cit. 193, also Cf. Berns, L. 1987. p. 411
The fact that both Hobbes and Locke political philosophy have placed man and reason at the center of their analysis shows the great influence of nominalism in the conception that inform our current understanding of law and political power. This conception has privileged man introspection, and thus, provided the grounds for edifying a legal order on the basis of human invention and self-reflection. The centrality of man’s will and reason in the production of law is justified because it is man’s natural rights which are the underpinnings of the instituted political and legal authority. Moreover, the nominalist emphasis on individual sovereignty (freedom-individualism) and laicism (anti-orthodox religious viewpoint) led modern political and legal philosophy to downplay the role of external constraints in the establishment of a positive order. In that sense, modern natural law as the source of political power was deprived of the transcendence recognized by the classics, and subsequently engaged into the individual’s sphere. In sharp contrast with a realist viewpoint, modern natural law emphasized the subjective rights innate in man’s nature, then, it grounded the legitimacy of political and legal power on man’s consent, i.e. in the social contract, and finally, it established a positive system for the production of law. This project advanced by modern political philosophy was reinforced by the general lines of the modern – emancipatory- philosophical project that sought to enhance man’s autonomy by freeing reason from religion.

The epistemological assertion of nominalism that only the study of particular things produce valid scientific knowledge, drove Hobbes and Locke to abandon the contemplation of the cosmic order as a source of law (dikaikon in Greek or Ius in Latin)- and justice. The ambition of scientific knowledge characterizing their theories led them to focus on the individual, the most real and particular subject of study, in order to draw the scientific principles governing the legal and political order. Man’s natural rights were thus established as the core of the philosophical study of political and legal authority. Moreover, the freedom and unlimited power (sovereignty) innate to man became the measure of all. The individual is the source of political power, while his will and reason are the source of law and justice. Man’s will is thus the only legitimate source of authority, and additionally, his consent is the only means by which political legitimacy can be realized.
Lastly I want to make clear that although Hobbes and Locke agree that popular legitimacy –sovereignty- is the foundational principle of political authority, they do disagree in regards to the subjection of the authority to law. For Hobbes the sovereign is not subjected to legality because he embodies the will of the people, and as such, he has absolute legitimacy to disregard the law. The law emerges from the sovereign’s will, which is the people’s will. Therefore the sovereign is not limited by his own law and he does not due respect to it. However, the law is absolute rule for official and citizens. The former are subjected to legality in the accomplishment of their functions. The latter are also subjected to the law, because it is the origins of their rights and duties. Hence the law operates only below the sovereign’s realm - legality does not constrain the sovereign’s political and legal authority because that would be to constrain the people’s will. Contrarily, Locke understood that popular legitimacy as the foundational principle of government was insufficient guarantee of man’s natural rights. He thus subjected the functioning of the political regime to a system of check and balances regulated by the law. He conceived of a system regulated by the law was unable to oppress the citizens. In brief, for Locke, legitimacy as the original foundation of government is distinguishable from legality, as the desirable attribute in the structure and functioning of government. However it must be clear that for Locke, law remains the expression of popular sovereignty.

In the next section, I will briefly introduce the decline of modern natural right in the light of Rousseau’s theory, as well as the institutional settings that these political theories have thereafter inspired. The strong focus that contemporary political arrangement put on popular legitimacy and legality will be at the center of my presentation. Finally I will bring into light the role of positive law in the consolidation of the modern political project.
Chapter III
The Institutional Arrangements of the Modern State in the light of Popular Sovereignty and Positive Law

A. Introduction: The Consolidation of Modern Political Authority under Positive Law

Certainly, Hobbes and Locke set forth the core ideas on which the main political institutions operating in the modern state have been constructed. Yet, at least one more philosophical shift must be mentioned before entering into the institutional arrangements characterizing modern states. The transformation on the understanding of natural right from antiquity to present days has been informed, as we have seen up to now, by the reinterpretation of man’s nature and its relation with the universe and government. The transition from modern natural right to positive right, and thus to the predominance of positive law and legality, is underpinned by a new reinterpretation of human nature and civil government. Firstly, I will focus on Rousseau’s attempt to recover part of the teachings of classic political philosophy, which paradoxically, will led him to set the principles of positive right in his piece “Du Contrat Social”. Then, I will approach the oeuvre of Montesquieu and Tocqueville to show the way in which popular sovereignty has been made into institutional arrangements within modern democratic regimes. Finally, I will point out the unfolding consequences of this institutionalization in the concepts of legitimacy and legality as attributes of governmental authority.

B. Rousseau: on Popular Sovereignty and Positive Law

Since Rousseau agreed that one must inquire into the origins of man for finding the type of civil government that is in accordance with natural right, he wanted first to make clear his divergence with the preceding theories of the state of nature. He accuses previous philosophers to have failed in their attempt to describe the state of nature because, therein, they had conferred to man a nature informed by vices pertaining to men living in civil society. Rousseau agrees with Hobbes and Locke that passions rather than reason governs man in the state of nature, and that self-preservation is the foundational desire of natural law. However, he does not follow Hobbes’ and Locke’s teachings concerning the nature of man and the foundational principles of civil society. Regarding the former, Rousseau thought that man was naturally deprived of reason
because, in the “early” state of nature, man instinctively satisfied his biological needs by making use of the existing natural resources. Since according to Rousseau, man in that pre-rational stage could not know any natural law, there were no moral references for judging man’s nature as good or bad. This re-statement of the state of nature as a moment of full isolation and moral emptiness gave Rousseau the idea that man was a perfectible being. This evolutionary conception was indeed confirmed with the emergence of man’s rationally. He thought that man had acquired reason in a later stage in which he was compelled to think how to face the scarcity of natural means available for satisfying his basic needs. Thus, he concluded, in opposition to Hobbes, that man was to be taken as naturally good given his perfectibility. The “moral emptiness” characterizing man in the state of nature and his capability of perfection was interpreted by Rousseau as the grounding for distinguishing between natural and conventional attributes.

Consequently, Rousseau questioned passions and reason as the foundations of civil society. Since some passions are natural because they belong to man’s constitution, and others are conventional because they come into existence with the development of society, one must be careful not to set the foundations of society in passions that are themselves born at the heart of social life. For him, the foundation of civil society had to be rooted in something preceding any conventional passions, in something which characterized the solitary individual in the state of nature. Rousseau believed that for civil society to last, it needed stronger bonding than mere calculation of interest or the protection of property. Rousseau tried thus to show that the transition from the state of nature to civil society was indeed a natural process. He accepted that only natural passions existed in the “early civil society”, however, he conceived of reason and conventional passions as part of the normal development of events required for the transition from the state of nature to civil society.

Hence, in the “late” stage of the state of nature, in which men find themselves captured by conventional passions, they are driven to a “state of war” that threatens their survival. Men are obliged to appeal to reason and recognize their equal natural rights.

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85 Here we mean those passions that find its origin in society and which will be then consider to be “conventional” in opposition to those that are “natural”.

especially that of survival. This collective recognition of rights is transformed into a rational desire of cooperation inasmuch as it has become a generalized desire. Men agree to pursue a rational, and thus, just society in which freedom is privileged. It goes by itself that for Rousseau freedom rather than self-preservation characterizes the original state of nature. Hence, for Rousseau freedom is the most important value to be kept in the transition to civil society. This means that obedience to law, contrarily to the teachings of Hobbes, provides insufficient guarantee of man’s natural rights unless law itself is the creation of those who due obedience to it. For Rousseau freedom in civil society is obedience to the law that one has given to oneself.

Although one might find some similarities between Rousseau and Locke, the former clearly diverges from the latter regarding the underpinnings of civil society. Even if for both of them men are compelled to use reason for the establishment of civil society, Rousseau digs deeper aiming to anchor the basis of civil society beyond mere calculation. In fact, Rousseau saw civil society as the historical-natural-stage in which man had taken control over destiny by the use of reason, and not merely, as the conventional stage in which will founds a new order that opposes the state of nature.

Rousseau’s idea was to naturalized man’s right to creative action by rooting will in freedom, and making freedom the supreme natural right. Man’s natural freedom is maintain in civil society if he himself is the author of the laws to which he due obedience. Thus, even if Rousseau agrees with Hobbes and Locke that it is the desire for self-preservation what drives man into the social contract, he however, makes a greater emphasis in that the main function of civil society is the re-establishment of the freedom and equality that were disrupted in the late state of nature. Self-legislation becomes the way of assuring self-preservation along with freedom and equality.

In Rousseau, man’s sovereignty i.e. freedom and equality, is fully transferred into the law. Since the law is equalized to citizens’ freedom and equality, the binding force and respect of positive law is of imperative respect to all citizens, and especially, to the government. Rousseau tries to overcome the deficiencies of Hobbes’ absolute sovereign

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89 Rousseau 1976. op. cit. I-6. pp. 89
and Locke’s system of checks and balances in assuring individual rights in civil society. For so doing, he makes citizens sovereigns\(^{90}\). Through the social contract men surrendered all their rights to society, and thus, accepted society to be the only judge of their acts and source of their rights\(^{91}\). Once the majority rule is unanimously accepted, and thus the social compact completed, man is deprived of his natural rights and subjected to the common will. However this complete subjection of man’s rights to society guarantees his freedom insofar as society is ruled by laws of his authorship, i.e. by himself. Thereafter all duties and rights can only emerge from the general will, from civil society.

This emphasis of Rousseau on individuals’ will was the turning point of what Leo Strauss has called the “absorption of natural right by positive law”\(^{92}\). General will took the place of natural right, and thus legality the place of legitimacy. Rousseau introduces legality as the framework of government, which is just and legitimate if it respects the law popularly enacted. In other words, for Rousseau, legitimacy is subjected to legality. Rousseau lays down this reasoning as the basic premise of the Republic. People in a democratic regime are those who define what is to be right, good, just and legitimate because they define what the law is.

By subjecting legitimacy to legality Rousseau subjected politics to law. The government is legitimate not because it draws its authority from the people, but because it conforms to the law:

“J’appelle donc République tout État régi par des loix, sous quelque forme d’administration que ce puisse être... Toute Gouvernement légitime est républicain” \(^{93}\)

Legality becomes the defining attribute of legitimacy from the very moment that law becomes the reflection of man’s freedom in civil society. The general will is not bounded by the compliance to an external order because it expresses the most valuable right of man, i.e. freedom. This boundless authority transferred from man to the law is

\(^{92}\) Strauss. 1965. op. cit. pp. 286  
\(^{93}\) Rousseau 1976. op. cit. II-6. pp. 171
thus the origins of positive right. Justice, right, good, etc. are thereafter conventionally defined because they are to find their source only in positive law i.e. in the general will.

Rousseau’s philosophical picture is yet in need of being stated in terms of institutional arrangements. Although I will not enter into the details of the institutional setting presented in Du Contrat Social94, I highlight two ideas that will be of main importance for the analysis of the Latin American Constitutions. On the one hand, certainly Rousseau did not accept the division or representation of popular sovereignty95. He thought that sovereignty was the expression of popular will, which in some cases, needed of the guide of a legislator96. On the other hand, Rousseau did not appreciate the separation of powers as means for avoiding abuse of authority. Instead, he proposed the implementation of the Tribunat, inspired in the old roman institution of “people’s tribune”97, for securing the law and solving the disputes within the government and between the government and the people. The Tribunat, however was not part of the structure of the state, and thus its function was essentially of opposition rather than of enactment and execution of the law.

I will now turn to Rousseau’s contemporary Montesquieu who provided some of the main features of the institutional setting in modern states. Montesquieu left aside the ambition of direct democracy and proposed a moderate system of elections and separation of powers inspired on the monarchic England of his time, which however, was certainly less democratic than he thought.

C. Montesquieu: Representation, Separation of Powers and Legal Sovereignty

In principle, one may be tempted to point out some similarities between Rousseau’s atypical interpretation of the legislator as the guide of popular will98, and Montesquieu’s concept of the legislator as the organ in charged of preparing the laws to be submitted to people’s approval. However, one must be aware, that on the one hand, Rousseau was dealing with a hypothetical organization of the state, while Montesquieu combined in an ambiguous way, the description of existing regimes with his proposal on the structure of

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95 Rousseau 1976. II-1. pp. 135
97 Rousseau 1976. op. cit. IV-5. pp 394-397
government. On the other hand, Montesquieu abandoned soon the ideal of direct democracy in middle size-states, and with it, he turned to the traditional conception of the legislative power. According to Montesquieu, in a democratic republic the sovereign people must elect common authorities to carry out functions they themselves cannot do. The elected representatives will be in charge, among other things, of preparing the legislation, which however, in small republics, can only be legitimately enacted by the people.

Montesquieu had indeed a great appreciation for republican government because he considered it to be the form of government that best preserves popular sovereignty. In fact, Montesquieu was, alike Rousseau, committed with the preservation of man’s liberty and equality in the institutional setting of government. From the exposition of the different forms of government that Montesquieu presents in *L’Esprit de Lois*, it is precisely the republican form, in opposition to monarchical and despotic government, which is most respectful of man’s freedom. Yet, the republic understood as the form of government subjected to the sovereign’s laws can either be aristocratic or democratic. While neither of them is by nature more respectful of man’s liberty, they do differ in regards to the natural holder of sovereignty. While in the aristocratic republic only a part of the people is sovereign, in the democratic republic it is all people who hold the sovereignty of the republic. Montesquieu aimed at showing in *L’Esprit de Lois* the laws through which each form of government was perfected. Although he shows a special consideration for the aristocratic republic, I will henceforth focus mainly in the democratic republic.

Montesquieu argued that vigorous democratic republics require the sovereign people to feel love for the republic and its laws- that a spirit of patriotism grows in its citizens’ hearts. Indeed, Montesquieu’s demand of moral cohesion within the democratic republic as a requirement for the well functioning of the regime is closely connected to


100 It is important to remark that the word “liberty” is used with a different meaning in Montesquieu’s oeuvre. While for Rousseau liberty refers to the natural right that allows its holders to choose their governors, for Montesquieu, it refers to the safeguard of the people and their goods from the action of government. In Isaiah Berlin’s words, Rousseau refers to positive liberty while Montesquieu refers to negative liberty. However, Montesquieu says regarding positive liberty: “Comme dans un état libre, tout homme qui est censé avoir une âme libre doit être gouverné par lui même, il faudrait que le people en corps eût la puissance législative.” (1969. op. cit. XI-6.pp. 121)

101 Montesquieu 1965. op. cit. XI-4. pp. 117
Rousseau’s concept of “civil religion”\textsuperscript{102}. According to Montesquieu, republican democracy in its perfect expression is only achievable in a small city-state in which public good can prevail over the private interests of citizens\textsuperscript{103}. Therein citizens feel bound by the law which constitutes not only their own will but the spirit of public morality necessary for the achievement of the common good. Therefore he considered that the most legitimate laws for a truly democratic government are those enacted directly by the people.

Montesquieu considered that for giving raise to patriotism in larger republics it was necessary something more than mere popular representation in the enactment of the law\textsuperscript{104}. He considered that if republican government, especially, democratic government, wanted to be fully committed with the liberty of its citizens while strengthening the popular bonding of the nation, it had to meet two more requirements.

On the one hand, he considered essential for the preservation of liberty the separation of the three powers of government, namely the legislative, executive and judicial powers. Montesquieu’s division of powers differs greatly from Locke’s system of check and balances. Since Montesquieu was highly concerned with the security of people among themselves and before the state, he rejects the concentration of power granted in Locke’s theory to the executive branch. Montesquieu questioned the convenience of granting to the executive power the execution of the laws and judgment of its breakers\textsuperscript{105}. Instead, he claims convenient to constitute an independent judicial power for trialing the lawbreakers in accordance to the law enacted by the legislative power. Judges are thus limited to be “la bouche qui prononce les paroles de la loi”\textsuperscript{106}, they must not attempt to moderate the force and harshness of the popular will. The executive power on its turn will be limited to the execution of both the internal law and the external policy\textsuperscript{107}. Regarding the legislative power, Montesquieu considers that ideally it should be the people directly who enact the laws. However he recognized that in big

\textsuperscript{102} Rousseau 1976. op. cit. IV-8. pp.413-430.
\textsuperscript{103} Montesquieu. 1969. op. cit. VIII-16.pp 100
\textsuperscript{104} Montesquieu 1969. op. cit. XI-6. pp. 121-122
\textsuperscript{105} Montesquieu 1969. op. cit. XI-6. pp. 118-119
\textsuperscript{106} Montesquieu 1969. op. cit. XI-6. pp. 127
\textsuperscript{107} I will not go into the details of the executive power in Montesquieu. It is known Montesquieu’s predilection for a monarchic executive power in the detriment of an executive government issue from the parliament (op. cit XI-6. pp. 124).
nations people are meant to participate in legislation through their representatives. The representatives have a greater capacity than the generality of the people to discuss the different issues concerning the republic, and thus they prove to be a better guarantee to the common good. Moreover, Montesquieu proposes a legislative power composed by two chambers for assuring the representation of the nobles and the people. The relation between the executive and legislative power is based on the prerogatives of the former to call the latter to assembly, as well as to extend the latter’s sessions of deliberation.

On the other hand, Montesquieu considered that for guaranteeing political freedom, the republic had to assure the election of its officials by a mixed system of lot and popular vote. Although for Montesquieu all citizens are meant to participate in the popular election of functionaries, the actual access to offices, either by vote or lot, must be limited to certain type of citizens. For example, the election of the senate and lower magistrature that is made by lot, as well as that of the higher magistrature that is to be made by popular vote, must be restricted to haves. However, the have-nots are eligible for the popular courts which are to be chosen by popular vote.

Montesquieu set forth an institutional setting that was well informed by the discussions of his time, especially, that of the social contract. Although Montesquieu has often been included among those refusing the theory of the social contract –mainly that of Hobbes and Locke that were available at his time- I rather agree with those who claim a tacit agreement with it on the basis of his “contractual language.” Hence I argue that Montesquieu provides an important introduction to one of the most classical expositions of institutional arrangements within republican government –aristocratic/democratic- – the one provided by Tocqueville in Democracy in America. Montesquieu approaches the English system for showing the underlying principles that would guide an ideal republic. He makes clear however that there is a gap between the English system rooted in commerce and the desirable republican democratic system rooted in virtue. However, what is to be highlighted from Montesquieu’s institutional arrangement is the emphasis put on massive popular foundations of republican democracy as the best means for

common good. His proposal constitutes one of the first settings in which the law is a dominant feature of politics to the detriment of statesmanship. Although in his institutional arrangements legitimacy has not been completely overtaken by legality because he keeps some restrictions to positive law on the basis of a universal moral law\textsuperscript{111}, one must accept that his language—and why, not his program—is that of a convinced liberal.

Montesquieu exposition provides at least two important elements to be retained for the next sections. He argues that the election of representatives for the legislative chamber is itself an expression of popular sovereignty. If it is true that Montesquieu leans towards the aristocratic republic, he makes clear the importance of maintaining the law as the expression of popular sovereignty. As for Montesquieu a good government is that in which liberty is preserved, one may conclude that political legitimacy is a combination of popular legitimacy and the preservation of liberty. On the other hand, Montesquieu does concede to legality an important role in the functioning of government. His system of checks and balances is based on the sovereignty of the law. It is the law that rules the relation among the powers; it rules the organic functioning of the state.

Although we have concluded that for Montesquieu government is subjected to law in its structural functioning, it will be with Tocqueville with whom we will appreciate the intertwining between legality and legitimacy in the structure and functioning of the state. Moreover, Tocqueville’s \textit{De la Démocratie en Amérique} is a great introduction of representative democracy as the governmental form of the future. In the next section I will present his description of the American democracy in regards to popular participation, legality and political liberty. Finally I will present some conclusion on the institutional setting of the modern state and its consequences over our understating of legality and modernity as an attribute of political and legal authority.

\textsuperscript{111} Montesquieu writes “L’auteur a eu en vue d’attaquer le système de Hobbes, system terrible qui, faisant déprendre toutes les vertus et toutes le vices de l’établissement des lois que les hommes se sont faites …. renverse, comme Spinoza, et toute religion et toute moral.” (Voir Montesquieu. op. cit pp. 30)
D. Tocqueville and the Legal Dogma of the sovereignty of the People

Tocqueville thought that the great political liberty granted by democracy to people was a double-edged sword. Liberty is a necessary condition in the pursuit of happiness, but it is also a powerful threat to democracy when it exacerbates individualism. Indeed, his exposition in the two volumes of *De La Démocratie en Amérique* deals with this dilemma of democratic liberty awaken by the improvement of equality of conditions in the light of the early 19th century American democracy. Moreover, it provides an analysis of how the principle of equality shapes political institutions and peoples’ morality while promoting the conditions of political liberty. Yet, my approach to Tocqueville’s work aims at bringing forth the concepts of legitimacy and legality underlying the political principles governing democratic republics respectful of equality and liberty.

Tocqueville emphasis on equality as the natural force moving history proves that the principle of equality is the cornerstone of his political philosophy. It argues that the passion for equality has for example, inspired men to disobey the mandates of the nobles, whose authority was considered illegitimate because its power had been drawn from usurpation. According to Tocqueville, equality makes men not only independent from each other but awakes in them the desire of following nothing else but their own will. In that sense, for Tocqueville, the desire of equality unfolds into two ideas. On the one hand, equality as the social state associated with the abolishment of social privileges among people. The rights to wealth, education and welfare must be the same for all. Moreover, the state must promote the actualization of those rights. On the other hand, the desire of equality is understood as the underpinning of political liberty. Indeed equality plants the seeds of political freedom by questioning the legitimacy of governors whose authority has not been granted by the people. The rupture of political equality among men, demands the agreement of those who resign part of their “natural right to equality” in benefit of a political authority. Hence, according to Tocqueville, the

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113 However Montesquieu advertises in the introduction of the second volume of *La Démocratie en Amérique* that he does not take equality to be the unique source of the unfolding event of his time- this including the “democratic revolution” (Tocqueville 1981, V. 2. op. cit. Introduction. pp. 5); Also see V. 2 pp. 397
115 Tocqueville does not use this expression. However he takes for granted the modern political teachings of natural law by assuming that man holds by nature the individual rights of equality and freedom. Also cf. Tocqueville. 1981. V.2 op. cit. IV-1. pp. 361
twofold political effects eventually arising from equality and political freedom are either the ambition of obeying only authorities popularly chosen or falling into anarchy. He understands that the triumph of popular government in America is, thus, the triumph of the former over the latter; it is the triumph of democracy.

Indeed, Tocqueville considered America to have the most fertile popular sovereignty in spite of its representative government. His study of the American system provided him the empirical arguments to hold that only a government edified on the grounds of popular sovereignty can be respectful of equality and liberty—individual sovereignty. Therein, the law as the expression of political liberty guarantees the actualization of natural freedom and equality. If Tocqueville agrees that the “dogma of political liberty” has been used at all times to justify all types of government, he nonetheless claims that only in democracy it is a meaningful consequence of the principles of equality and freedom. Thus freedom and equality are both the source and end of political liberty.

The political dogma of popular sovereignty emerges as the consequence of this double nature of freedom and equality. Social power, as rightly conceived by the Americans, can only emanate directly from the people, and once constituted, it does not now any limits. Montesquieu justifies the representative government as the holder of popular sovereignty not only by arguing that when people governs it is in fact the majority that rules, but by showing that the American political system provides in general, the channels for the expression of opinions, passions and interests of the American people.

Moreover, popular sovereignty is instituted as the law of the laws, and with it, equality is set as a foundational principle of political and legal authority. Popular

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118 Tocqueville 1981. V.1 op. cit. I-4. pp. 117
119 Tocqueville 1981. V. 2 op. cit. IV-2.pp. 356. The original text states: “Les Américains croient que, dans chaque État, le pouvoir social doit émaner directement du peuple; mais une fois que ce pouvoir est constitué, ils ne lui imaginent, pour ainsi dire, point de limites; ils reconnaissent volontiers qu’il a le droit a tout faire”
120 Cf. Tocqueville. 1981. V.1 op. cit. II-1. pp. 255
121 Cf. Tocqueville. 1981. V.1 op. cit. I-4. pp. 118. The original text states: « Le dogme de la souveraineté du people sortit de la commune et s’empara du gouvernement ; toutes les classes se compromirent pour sa cause ; on combatit et on triumpha en son nom ; il devint la loi des lois »
authorship of the law\textsuperscript{122} through representation is thus conceived as the natural channel through which the sovereignty of the people is expressed\textsuperscript{123}. However, Tocqueville acknowledges that to claim rigorously that people govern in a certain state one must go beyond the mere popular roots of the law. Indeed, he claims that in America it is the people who govern because it is them who enact the law, execute them, composed the juries and punishes the lawbreakers. Moreover, he shows that not only the political institutions are by principle democratic, but that people choose periodically state officials by popular vote, and by so doing, keep a permanent control over them\textsuperscript{124}.

Beyond all this picture of popular legitimacy brought forth by Tocqueville, one must keep on target the political foundation of this institutional setting. It is indeed the legitimacy of the law that gives legality to power. If it is true that the people govern in America not only through its representation in the enactment of the law, but through the election of officials and direct participation in state institutions –e.g. juries-, I argue that the latter expressions of sovereignty are subjected to the former. It is the laws that set the institutional arrangements through which popular sovereignty continues to be expressed. It is thus popular legitimacy of the law that is at the roots of any further expression of popular sovereignty. Any of the other expressions of popular sovereignty listed by Tocqueville are indirectly subjected to control of legality, and thus cannot be considered a direct expression of the will of the people. Tocqueville seems thus to proclaim the dictatorship of positive law to the detriment of any objective limits to the will of the people in regards to political government. Tocqueville’s oeuvre discarded any possible return to the classic comprehensive view of government. His emphasis on the values of equality and freedom in the construction of political authority, led him, contrarily to his claim\textsuperscript{125}, to lean towards a form of government that relies on positive law as an expression of popular sovereignty, and thus, that privileges legality over legitimacy.

It goes by itself that Tocqueville’s idea of popular sovereignty takes for granted the concept of natural rights anchored in modern political thought. Although Tocqueville

\textsuperscript{122} Tocqueville. 1981. V.1 op. cit. Introduction. pp. 64
\textsuperscript{123} Cf. Tocqueville. 1981. V.1 op. cit. II-1. pp. 255
\textsuperscript{124} Cf. Tocqueville. 1981. V.1 op. cit. II-1. pp. 255
\textsuperscript{125} In the conclusion of \textit{De la Démocratie en Amérique} he claims not to take part in judging the goodness of the emerging modern democracy in regards to previous aristocratic regimes. He claim that only time will show how it unfolds and its convenience over the latter. However one must conclude from his exposition throughout the books that he was indeed certain of the superiority of the former over the later.
claims that man has by nature a restricted freedom, he considers it, to endow man with the power to govern his fate\textsuperscript{126}. Similarly, he considers that peoples are free to govern their fate within its natural limits, and hence, that the fate of a people must respect the freedom of its members. It is by emphasizing popular sovereignty as the condition of a government in accordance to man’s freedom that he retakes the tradition of modern natural law, and with it, the whole philosophical tradition of modernity. Moreover, the timid elaboration of Tocqueville on the nature of the rights of freedom and equality seems to be consequent with his proclamation of the sovereignty of positive law\textsuperscript{127}.

Finally, Tocqueville remains highly concerned with the possibility of despotism within democracy. In fact, he claims that in democratic society a new kind of despotism compatible with popular sovereignty may arise, favored by the growing equality of conditions. Tocqueville argues that the transition from aristocracy to democracy brought the improvement of social conditions of the people. Hence, the more equal the conditions were, the more people were encouraged to turn to themselves and abandon their care to others. Moreover, Tocqueville seems to imply that Rousseau’s civil religion and Montesquieu’s moral cohesion may not guarantee strong bonding in developed democratic societies in which individualism risks to turn into absolute egoism\textsuperscript{128}. Democratic societies assuring equality of conditions risk falling into extreme atomism if citizens are merely concerned by their immediate circle of family and friends. Democratic societies are faced with the challenge of overcoming the inexistence of natural ties among citizens and the lack of concern to one another, in their pursuit for keeping social cohesion and avoiding democratic despotism.

In fact, he claimed that citizens will focus on their own well being and private affairs, while leaving, to the elected authorities, the decisions on public life\textsuperscript{129}. Citizens thus, lose their freedom by limiting their political life to the election of their masters. Due to the lack of natural and artificial bonds in democratic society people become isolated and vulnerable. Individualism divides men into atoms and gives them the feeling that the

\textsuperscript{126} Cf. Tocqueville. 1981. V.1 op. cit. V-8. pp. 402. The original text states: « Providence n’a créé le genre humain ni entièrement indépendant, ni tout à fait esclave. Elle trace, il est vrai, autour de chaque homme, un cercle fatal dont il ne peut sorti ; mais, dans ses vastes limites, l’homme est puissant et libre ; ainsi des peuples »


\textsuperscript{129} Tocqueville 1981. V. 2 op. cit. IV-3.pp. 359
sovereign is the only support of their individual weakness. This new despotism may lead free citizens to become passive servants of the sovereign.

Tocqueville claims that to overcome this apparent threat to democracy nourished by the equality of conditions, one must rely on political liberty. He takes the example of America to show that political liberty carries an emancipatory potential when it is canalized into permanent participation in public life. Participation in public affairs breaks the wall of individualism and puts together individual citizens in a common sphere. Tocqueville thinks that the active participation of citizens in small public affairs is very effective in awakening their interest in the public thing. Finally, some have also seen this permanent participation of citizens in public life as a weakening of legality as the source of legitimacy in modern democracies. Self-government would not be limited to self-legislation and thus legitimacy would imply, contrarily to Rousseau’s view, an active generalized popular participation in public affairs.

E. Concluding Remarks: On the institutional Arrangement of Modern Democracies and the Supremacy of Positive Law

As we have seen in the last section, Rousseau gives wheels to the instauration of positive law in the summit of the political system. Indeed Rousseau goes beyond Hobbes and Locke by strictly subjecting political authority to the law. He transforms modern natural law into positive law by taking the former as the underpinnings of modern political and legal authority, and the latter, as the means for actualizing popular sovereignty within civil society. Moreover the subjection of political government to the law brings legality to the political realm that Hobbes had subjected merely to the sovereign’s will. Thereafter, legality is seen as an important constrain of political authority aiming at protecting individuals positive rights. If legality becomes a desirable and necessary attribute of democratic government it had yet to be complemented by the division of powers and the active participation of the people. Montesquieu aiming at enhancing the security of citizens introduced the division of powers. He thought that a system of checks and balances was an appropriate means for preserving individual positive rights. Moreover, Montesquieu planted the seed of representative democracy that was lately taken by Tocqueville in his panegyric to American democracy.

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130 Tocqueville 1981. V. 2 op. cit. IV-3.pp. 360
131 Tocqueville. 1981. op. cit. II-4-1. pp. 354
Tocqueville shows that legality, as an attribute of political authority, was indeed a guarantee of popular sovereignty. However, he argued that only an extensive popular participation in the running of official affairs guarantees the effective government of the people. Moreover, he thought of popular participation to be the remedy to individualism, which he considered to be the most powerful threat to democracy.

The republican form of government in its original version, this is, the form of government in which political authority is subjected to the law in respect to popular sovereignty, evolved into the constitutional Rechtsstaat. Indeed, the requirement of founding the state on popular basis led to the establishment of constitutions. People’s sovereignty was thus transferred to the constitutional text, which by embodying people’s will became the law of the laws. The political authority instituted through the constitution was thus subjected to it. Although the concept of Rechtstaat is usually attributed to Robert Von Moll in 1832, its constitutional form will reach its apogee in the late 19th and early 20th century. In the next chapter I will approach the shift from republican government to constitutional Rechtstaat in the light our guiding concepts, i.e. legality and legitimacy.

I will rely on the debate between Carl Schmidt and Hans Kelsen during the fall of the Weimar republic to give a final approach to the concepts of legality in legitimacy. I aim at identifying, on the one hand, the arguments presented by both of them to support the primacy of the law and the direct people’s will. On the other hand I present their concern about people’s sovereignty as the foundation of the legal and political system, and their discussion about what would be the best way of protecting peoples liberty i.e. the subjection of government to law or the supremacy of the sovereign over the law if he embodies people’s will.


Chapter IV
The Weimar Republic: A Debate on Legality and Legitimacy in Modern Liberal Democracy

A. Introduction. Legal –rationality and the Legitimacy of Law

It would seem that the instauration of constitutional democracy under the liberal rule of law was the clearest evidence of Max Weber’s claim that legal rationality had become the dominant form of legitimacy. Weber thought that for understanding the reasons for which individuals obey a given authority, it was necessary, first, to understand the process through which power becomes political authority -Herrshaft. Weber provided an interesting answer. He claimed that the generalized belief in the rationality of the law concedes to political authorities, established according to legal procedures, rational-legal legitimacy. Hence, given the modern generalized confidence on reason, citizens rely on the content and application of the law and accept their duty of obedience.

Weber’s claim that legality had become the main source of legitimacy of political authority due to its rational quality is of central importance for understating the forthcoming arguments. His claim is “safely” constructed on the basis of the modern natural law tradition that conceived the social compact and the sovereignty of law as emerged out of man’s rationality, either as an original or acquired attribute. As we have seen throughout this dissertation, the concept of political order built upon man’s liberty and rationality, gave way to an institutional setting, in which people are considered authors of the law through their representatives in the legislative power. Thus, the “novelty” of Weber’s claim that power is also subjected to law due to its rational attributes is not really a new idea. However, Weber does make clear the crisis of popular will as a source of legitimacy. He clearly states the ongoing social process in which people’s will –popular sovereignty- is being replaced by the legislator’s rationality –legal sovereignty. The legislative has become the political institution in charge of channeling man’s desire of power into the rational path of constitutional government by subjecting authority to –constitutional- legality. However, rationality for Weber was not limited to the construction of the law, but also to its application. In brief,
according to Weber, law is obeyed in a proper liberal Rechtsstaat not so much because it expresses popular sovereignty, but essentially, because individuals belief in its rational wrapping.

**B. The Weimar Political Principles and Article 48 of the Constitution**

Although Carl Schmitt retakes part of Weber’s legacy on legitimacy, it was truly a way for developing his criticism against liberal democracy. Schmitt disagrees with Weber in regards to central points. First, Schmitt did not agreed with Weber’s claim that the main source of legitimacy was the belief in the rationality of the norms. Contrarily, he claimed that legitimacy of the norms relies upon people’s rejection or acclamation of it\(^\text{133}\). In that sense he claimed that the general decline on the cultivation of modern rationality had diminished the belief in legal rationality as a valid source of legitimacy. In fact, he attempted to show that the crisis of parliamentary democracy was partly motivated by the overtaking of the belief in will over the belief in reason\(^\text{134}\). Therefore, he concluded that political legitimacy had to be sought beyond the mere authority and rationality of the law.

Additionally, Schmitt diverges from Weber in regards to the role of consent in the construction of legitimacy. For Weber active consent distinguishes legitimate domination from naked domination, while for Schmitt, it is passive consent - i.e. the not activation of the right to resistance- which confers legitimacy to domination. Hence, by fundamentally rejecting the claim of legal-rationality as the source of legitimacy in constitutional democracies under the rule of law, Schmitt opened a polemic debate on the role of legality and legitimacy during the crisis of the Weimar Rechtsstaat.

The Weimar Republic was the political system operating in Germany between 1919 and 1932, before the Nazi’s seizure of power. The weakness of the republic in the early 1930’s obliged the *Reich* government to use regularly the article 48 of the constitution. The application of this article in 1932 led to the famous crisis of the Weimar Republic that became, at the same time, a profitable moment for philosophical and practical

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debates on the concepts of legality and legitimacy\textsuperscript{135}. The article 48 granted to the president the power to compel the Länder to act in accordance to the Reich’s constitution and laws. For so doing, it conferred to the Reich president the faculty of issuing emergency decrees for suspending rights and using armed force in the whole national territory:

“If a state –Land- does not fulfill the obligations laid upon it by the Reich constitution or Reich laws, the Reich President may use armed force to cause it to oblige.

In case public safety is seriously threatened or disturbed, the Reich President may take the measures necessary to reestablish law and order, if necessary using armed force. To this end he may temporarily suspend the civil rights described in articles 114 [personal liberty], 115 [inviolability of the home], 117 [privacy of mail, telegraph and phone], 118 [freedom of opinion and press], 123 [freedom of assembly], 124 [freedom of association] and 153 [inviolability of private property], partially or entirely.

The Reich President must inform the Reichstag immediately about all measures undertaken based on paragraphs 1 and 2 of this article. The measures must be suspended immediately if the Reichstag so demands. If danger is imminent, the provincial government may, for their specific territory, implement steps as described in paragraph 2. These steps may be suspended if so demanded by the Reich President or the Reichstag Further details shall be established by Reich legislation” (my emphasis)

In 1932 the Reich’s President Field Marshal decided to make use of article 48 for restoring “law and order” in the Land of Prussia. President Field issued an emergency decree in which he conferred to the chancellor Franz Von Papen, the powers to take over the government of Prussia, which was at the time, seen as negligent in the control of the political unrest and violence within its territory. The president’s decree was not welcome by the government of Prussia, and especially by the SDP, who perceived it as

\textsuperscript{135} There were many important lawyers and academic participating in the discussion. Among the most important are those of the Frankfurt School as well as Smedn, Radbruch, Schmitt and Heller.
Coup d’État, i.e. an illegal usurpation of power. The SDP was the main socialist party integrating the coalition governing Prussia, which generally, was considered the most important base of institutional resistance against Nazi’s seizure of power. Their commitment to legality led them to challenge the constitutional validity of the decree before the Staatsgerichtshof - the court competent for solving the disputes between the Reich government and the Länder.

Before entering into the decision making process the Staatsgerichtshof affirmed its competence for deciding the claim brought by the Prussian government, which in Schmittian terms, meant that the court claimed for itself the guard of the constitution. In the decision, the court denied the possibility of applying paragraph one of article 48 to the dispute. However, the court upheld the validity of the decree through which the Reich government assumed control of the Prussian political machinery on the basis of paragraph two. The Staatsgerichtshof did not withdraw from the Prussian government the constitutional functions that were not incompatible with the political control of the Reich. Those political functions were basically the participation in the Reichsrat, the handling of relations with other Länder, and the participation in national committees. Finally, the court considered that any conflict originated by the action of the Prussian government and that interferes with the Reich administration of Prussia, would entitle the Reich president to make use of the paragraph one of article 48.

During and after the court case several discussions were opened up among recognized German professors and jurists. Although the court upheld the validity of the decree in a moment in which the SDP was no longer an effective force in Prussia, the academic debate on the legality and legitimacy of the decision continue for some more years. In the next section I will focus on the arguments concerning the convenience of a government grounded in legal-legitimacy or in “will” legitimacy rather than in the proper arguments exposed before the Staatsgerichtshof. Kelsen and Schmitt held respectively the abovementioned positions, which additionally, corresponded respectively to a defense of liberal democracy and an attack to it. I claim that the ideas I

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137 Cf. Dyzenhaus 1999. op. cit.
C. The Crisis of the Rechtsstaat: Schmitt on Popular Legitimacy

The Weimar Republic had a “legislative system of legality” with an institutional arrangement characterized by the predominance of the legislative power – a “legislative state”\(^\text{138}\). Schmitt applies the whole tradition of modern political philosophy to the definition of “legislative state”. He said that it is a political system “that is distinctive in that norms intended to be just are the highest attribute and decisive expression of the community will”\(^\text{139}\). He wanted to point out with this definition the fact that the legislative state attributed popular sovereignty to positive law. So conceived, Schmitt placed the legislative state within the modern liberal tradition. He claims that such regimes aim at defining the substantive values of its political and legal order through a formal legitimating procedure -i.e. the making of the law- which, thus considered, proves to be close to Weber’s claim. Moreover, Schmitt argued that the replacement of statesmanship by the rule of the law in the legislative state implied an institutional setting based on the separation between the function of enacting the law, which is exercised in abstract terms by the legislative power, and the application of the law, which is carry out in particular cases\(^\text{140}\) by the executive power. Schmitt concluded that legislative states imply the institutional division of powers for guaranteeing the rule of law, and thus, since the law itself rules the division of powers, the legislative state is, indeed, a liberal Rechtsstaat.

It goes by itself that Schmitt did not appreciate the concept of legitimacy underpinning liberal democracy under the rule of law. Thus, Schmitt started by questioning the nature of a political regime in which popular will is formally bounded. He asks when does the law can said to be authored or consented by those upon which it is to be applied: When it is elevated to constitutional norm? When it is approved by people’s representatives in the parliament or when it is approved by the majority of the people themselves? Would it have to be absolute or qualified majority?\(^\text{141}\) Schmitt wanted to bring into light the risks innate to liberal democracy under the rule of law in which legitimacy is merely

\(^{139}\) Schmitt C, 2004. op. cit pp. 3
\(^{140}\) Schmitt 2004. op. cit. pp. 4
\(^{141}\) Schmitt 2004. op. cit. 29-30
grounded in formal and procedural standards\textsuperscript{142}. These presumptively rational standards, he argues, do not provide consistent solutions for legal -and value- conflicts emerged at the heart of liberal or even social democratic regimes.

Schmitt dismissed legal rationality as a form of legitimacy because it was inspired in the now tired belief in reason, as it was proved with the crisis of parliamentary democracy. Since legal legitimacy was not only fading out but had proved to be insufficient in solving disputes within democracy, Schmitt proposed to rely on some pre-, constitutional and pre-legal values. He said that once we have acknowledged the existence of those pre-existing values one is compelled to recognize them, and not the law itself, as the liberals hope, to be the source of the regime’s legitimacy\textsuperscript{143}.

In that sense Schmitt evaluated the Weimar constitution as containing a structural and organizational contradiction. He argued that the Weimar constitution mixed a constitution containing organizational procedural regulations and general liberty rights with extensive entrenchments and guarantees in the form of substantial law\textsuperscript{144}. According to Schmitt it was not possible to actualize this constitution, because there cannot be a formal and legal system of legitimacy coexisting with core values that required a protection beyond mere formality. In brief, “no one constitution can guarantee freedom and equality."\textsuperscript{145}

It goes by itself that between these two types of constitution Schmitt lean towards the one containing substantive values. He argues that a constitution –and especially a constitutional reform- must be able to construct the fundamental values that are beyond


\textsuperscript{144} Schmitt 2004. op. cit. pp. 60-61

\textsuperscript{145} McCormick, J. 2004. op. cit Introduction. pp. xxxiv
any partisan interest\textsuperscript{146}. A constitution must reflect the substantive characteristics and capacities of a people to the detriment of mere functionalist value-neutral content\textsuperscript{147}.

\begin{quote}
\textquote{A constitution that would not dare to reach a decision on this question, one that forgoes imposing a substantive order, but chooses instead to give warring factions, intellectual circles, and political programs the illusion of gaining satisfaction legally, of achieving their party goals and eliminating their enemies, both by legal means; such a constitution is no longer even possible today as a dilatory formal compromise; and, as a practical matter, it would end by destroying its own legality and legitimacy. It will necessarily fail at the critical moment when a constitution must proof itself}\textsuperscript{148}
\end{quote}

Although Schmitt provided a set of guidelines for achieving legitimate written constitutions\textsuperscript{149} he was rather in favor of a “non textual” concept of constitution. He argues that statues or written texts may immobilize people’s values\textsuperscript{150} and suppress the right to resistance. Therefore Schmitt found attractive a dynamic concept of constitution\textsuperscript{151} in which its substantive and changing values were assured by a vigorous authority embodying people’s sovereignty. That authority assuring peoples values should be the sovereign, which in the Weimar context, was equivalent to claim that the president should be the guardian of the constitution\textsuperscript{152}. The president must be the sovereign; it must be him who decides when an exception applies to the general rule\textsuperscript{153}. For Schmitt the decree of 1932 against the Prussian government was the perfect opportunity to reaffirm his concept of sovereignty and to show the weakness of a value-neutral democratic system and the virtues of his substantive concept of democracy.

\begin{footnotes}
\item [147] Schmitt 1989. op. cit. pp. 3-11
\item [148] Schmitt 2004. op. cit. pp. 94
\item [149] Schmitt 1989. op. cit. pp. 87-91
\item [150] Schmitt 2004. op. cit. pp. 22-23
\item [151] Schmitt 1989. op. cit. pp. 5
\item [152] Schmitt, C. \textit{Der Hüter Der Verfassung. Berlin} 1985
\end{footnotes}
Schmitt had written before the 1932 court case a text dealing with article 48\textsuperscript{154}. He discussed through rather technical arguments, that to interpret the second sentence of the second paragraph\textsuperscript{155} as a limitation of presidents extraordinary powers contained in the first sentence of the same paragraph\textsuperscript{156}, would not be an interpretation based on “technical” legal reasoning but on pure liberal ideology\textsuperscript{157}. He argued that this limitation was a liberal attempt to maintain a closed legal system in which sovereignty was reduced to legal terms, to the legal hierarchy. Schmitt considered that an interpretation of article 48 in which it was held that the president could take measures to restore public order only to the end of suspending from force the fundamental rights thereafter mentioned, would impose a legal restriction on the president, i.e. a legal limitation to the sovereign. Accordingly the decision made by Staatsgerichtshof was not fully satisfactory for Schmitt. Although in the one hand it upheld the validity of the decree, on the other hand, the validity was upheld on the basis of paragraph two and not of paragraph one. In spite of the fact that the explicit reason lat down by the court was that Prussia had not violated the constitution or laws of the republic, the hidden message was that paragraph two, contrarily to paragraph one, allowed the government to limit the enumerated rights. Therefore, even if the court decided in favor of Schmitt’s general defense, the decision assumed that the guardian of the constitution was the Staatsgerichtshof and that paragraph two does actually impose a legal limitation upon the sovereign.

Schmitt rejected any possibility of reducing sovereignty to law. He argued that sovereignty was a major political quality that was not possible to be left to formal and value-neutral procedures. Hence, he tried to show that the president was the actual sovereign in the Weimar republic because he had both the direct commission of the people\textsuperscript{158} and the authority to take the crucial decision of the republic –the exceptions to the general rule. The idea that the president had the direct commission of the people endows him with legitimacy to decide beyond the law but within the bounds of the collective decisions of the German people themselves. According to this, the president

\begin{itemize}
\item \textsuperscript{155} “To this ends he may temporarily suspend the civil rights described in articles...”
\item \textsuperscript{156} “In case public safety is seriously threatened or disturbed, the Reich President may take the measures necessary to reestablish law and order, if necessary using armed force.”
\item \textsuperscript{157} Schmitt 1924 (1994). op. cit. pp. 216-127
\item \textsuperscript{158} Cf. Schmitt 1985. op. cit. 159.
\end{itemize}
will hold a commissarial power\textsuperscript{159}, alike the one held by the Constitutional Assembly, through which in a moment of “crisis” he would be entitled to decide free from legal constrains. He is the direct and only actual representative of people’s will. Although that decisional-freedom granted by “commissarial sovereignty” is limited in extent, it suffices to entitle the president for appealing to the second paragraph of article 48 in the pursuit of ends others than the suspension from force the fundamental rights.

However, I must make clear that Schmitt expressly denied that the power granted by article 48-2 to the president corresponded to the powers of a “sovereign dictatorship”. Moreover he argued that the type of authority granted by it corresponded to what he called “residual sovereignty from the National Assembly”\textsuperscript{160}. However, I claim that Schmitt’s defense of article 48-2 goes beyond residual sovereignty and falls into commissarial sovereignty (dictatorship). Schmitt claims that under 48-2 the Reich president is entitled to disregard, in emergency circumstances, a norm explicitly contained in the constitution and approved by the Constitutional Assembly. Therefore it seems that president holds an equal “sovereign” authority to that of the Constitutional Assembly, this is, “commissarial sovereignty”. In any case, what comes clear from his discussion of article 48 is that the president is indeed the sovereign within the Weimar Republic.

Schmitt ratifies the sovereignty of the president by declaring him the guardian of the constitution. Indeed, Schmitt regarded the president to be entitled to take the transcendental decisions of the republic, including the decision on the existence of an exception to the general rule. Schmitt argued that any state requires an authority able to deals with critical decisions, with those which are out of the normal functioning of the

\textsuperscript{159} It seems that Schmitt refers here to his concept of “commissarial dictatorship”. Schmitt constructs this concept in opposition to sovereign dictatorship that is who holds an absolute power to establish a constitution. Contrarily, Schmitt develops the concept of commissarial dictatorship from Bodin description of the Roman dictatorships and others who were not wholly sovereign: „Der Diktator hatte nur eine Kommission, wie Krieg zu führen, einen Aufstand zu unterdrücken, den staat zu reformiren oder eine neue Behördenorganisation einzurichten.“ Schmitt 1994. op. cit. pp. 26.

\textsuperscript{160} The original text states: „Die Eigenart der zwischenzeitlich geltenden Befugnis aus Art. 48. Abs. 1 Satz 1 liegt darin, dass einerseits die souveräne Diktatur der Verfassunggebenden Versammlung mit dem Inkrafttreten der verfassung aufhört, andererseits eine der typischen rechtstaatlichen Entwicklung entsprechende Umgrenzung der Kommissarischen Diktatur noch nicht erfolgte, weil man sich, angesuchts der abnormen Lage des Deutschen Reiches, einen weiteren Spielraum sichern wollte... Die Diktatur des Reichspräsidenten ist infolge des blossen Umstandes, dass die Verfassung in Kraft trat, notwendige eine kommissarische. Aber sie ist absichtlich weit gelassen, und in der Sache, niche in eher rechlichen Begründung, wirkt sie wie das Residuum einer souveränen Diktature der Nationalversammlung.“. Schmitt 1924 (1994). op. cit. pp. 238-239
established institutions. Hence, since the president sovereignty comes up only for deciding in emergency cases, Schmitt consider that the sovereign quality of the Weimar president was not in competition with the normal established organs of the state. Although the legitimacy of the decision taken by the president in emergency cases is based on the sovereignty chain coming from the people to the president, it would be only people’s acclamation, or abstention of activating the right to resistance, that would render the president’s decision fully legitimate.

Schmitt’s concept of constitutional democracy rests upon the presupposition that the state is the political unit of the people, and that the people are united by a substantive homogeneity which is expressed in its constitution. If the constitution is at the head of the legal order, one can argue that the basic assumption of Schmitt is that all concepts of law are essentially political. This is actually the gist of Schmitt’s opposition to liberalism. He argues that liberals are mistaken when they attribute sovereignty to the law on the basis of majority decision-making process within a parliamentary democracy, because majority can never be taken to be the expression of general will –of the homogeneity of the people. Moreover, the changing will of the majority, which can be composed by partisan coalitions, requires a neutral state, a state alien to substantive values. This neutrality in the state values and the supremacy of the law guaranteed by the division of powers will allow, argues Schmitt, the seizure of power of a tyrant through legal means. He claims that legal-normativism underpinning liberal democracy by depriving the state of core values and setting a formal system of legitimacy, takes away the power from the people. Liberals place legitimacy in a closed system of norms that provides its own formal conditions of validity.

Finally, Schmitt observed that liberal democracy must powerful threat was its pluralism. Liberal democracy assumes a high risk by implementing a value-neutral state that allows plurality. Liberal democratic states may be unable not only of defending themselves from “legal” tyrants but of defending themselves from the diverse claims from their citizens. Schmitt thought that liberal democracies might hold together as far as they are composed by highly homogenous population, but he claim that a highly diverse society might not be able to overcome its internal fissures. This diverse society represents evidently a direct challenge to Schmitt’s assumption that the state is the
political unit of the people, and that the people are united by a substantive homogeneity
which is expressed in its constitution.

D. Kelsen on Legal Sovereignty and Constitutional Review

If it is true that Kelsen wanted to construct a closed system of norms purged of any
moral, political, sociological and causal elements, one must not lose of sight that he
conceived of law to be men’s product. Kelsen argued that law is an intellectual product
of man that contributes to the establishment of a positive coercive order. Indeed, Kelsen
denied any metaphysical or mystical conception of the law and politics. He conceived
man to be the author of the law, and the law to be the force structuring the political
order, i.e. the state.

“Erblickt man erst in der Bildung solch arbeitsteilung funtionierender Organe
eine „Organisation“ im engeren, technischen Sinne der Wortes, dann hat das
positive Recht wegen seiner Natur als menschlich-will-kürliche Satzung,
deren Normen – mangels Evidenz inhrer Richtigkeit- Zwangsnormen sein
müssen, und der damit verbundenen Notwendigkeit eines den Zwangsakt
realisierenden Organs die immanente Tendenz, aus einer Zwangsordnung zu
einer spezifischen Zwangs – „Organisation“ zu werden. Diese
Zwangsordnung, zumal wenn sie Zwangsorganisation ist, ist der Staat.“

(My emphasis)

Hence, contrarily to Schmitt, Kelsen subjects the political force to law. Law reveals
itself as an autonomous order from politics because the validity of its norms do not rest
upon the authority of the political power that enacts them, but on their production
according to established legal procedures. Norms are valid if they meet the form
requirements of legal production established within a given legal order. Every legal
order is built in the form of a hierarchical structure guaranteeing the validity of all

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pp.1, 57-78; 66.
162 Kelsen 1989. op. cit. 286
163 Kelsen 1989. op. cit. pp. 70, 286-288
164 Kelsen, H. Die Philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus. Pan-
166 “The reason for the validity of a norm can only be the validity of another norm”- Kelsen 1989. op. cit.
pp. 193.
norms in a contradiction-free chain up to the Grundnorm\textsuperscript{167}. The Grundnorm that is placed at the highest level of the hierarchy guarantees the closure of the system. Hence, the legitimacy of the legal order rests on its own parameters, in the autonomy assured by the Grundnorm. Although norms at the interior of the legal order draw their validity from its own forms, Kelsen recognizes that the validity of a legal order as a whole depends on its general effectiveness\textsuperscript{168}.

Consequently, if the validity of a legal order as a whole rests upon a Grundnorm that establishes that “one ought to behave according to the actually established and effective constitution”, and the constitution is the superior norm of the legal hierarchy that regulates the production of law and the structuring of organs dealing with its creation and application\textsuperscript{169}, one must conclude that political power is subjected to law. Now, considering that constitutions are legal norm that structure the heart of the legal order - the production and application of law- by structuring the political order –the state- Kelsen argues that the guardian of the Constitution must be a legal instance who assures the independence of law from politics. Hence, Kelsen did not agree with Schmitt’s claim that the president should be the guardian of the Constitution\textsuperscript{170}. However Kelsen admitted that the president holds a “type” of guardianship of the constitution, but one that is subjected to certain legal limits. In fact, Kelsen held that article 48 of the Weimar Constitution in its first two paragraphs proved respectively both the President’s specific guardianship of the constitution as well as his limitations in the exercise of that function.

It was unconceivable for Kelsen to place the guard of the Constitution in a political authority that was outside of the law. Kelsen took Schmitt’s claim to be an attempt to revive the monarchical ideology in which the guard of the constitution was left precisely to the monarch, who constituted at the same time the greatest threat to the constitution itself\textsuperscript{171}. Kelsen was thus in favor of an independent court for judging the constitutional validity (legality) of the acts of the government, including those of the legislative

\textsuperscript{167} Kelsen 1989. op. cit. pp. 8, 195.
\textsuperscript{168} “… a coercive order, presenting itself as the law, is regarded as valid only if it is by and large effective. That means: the basic norm which is the reason for the validity of a legal order, refers to a constitution which is the basis of an effective coercive order.” Kelsen 1989. op. cit. 46-47
\textsuperscript{169} Kelsen 1989. op. cit. 222-223
\textsuperscript{170} Kelsen, H. Wer Soll der Hüter der Verfassung sein?, Die Justiz, 6. 1930-1931. pp. 576-628
\textsuperscript{171} Kelsen 1930-31. op. cit. pp. 577
power. If the judiciary and the executive branches were subjected to legality by their duty to respect the constitution, the division of powers and the laws enacted by the parliament, the principle of legality also provides the means for constraining the legislature through the constitution, which is itself, the level of legality preceding the legislature. The acts of the legislature are subjected to legality because they have to comply with the highest level of positive law; the constitution. In this sense, for Kelsen “the justiciability of the state was the justiciability of the constitution and as such an appropriate guarantee of the constitution.”

Constitutional review undertaken to safeguard fundamental rights and liberties contained in the constitution is taken by Kelsen as having the only function of controlling the legality of state acts. It aims at avoiding violation of “negative liberty rights” and equality by the enactment or execution of statues. Liberty and equality are the characteristic principles of democracy and thus, according to Kelsen, have to be protected at the constitutional level. Kelsen disregarded the political content of this claim and tried to uphold his theory of formal legality. He argues that if it true that from the very basic assumption that men are equal derives a claim for being free of alien rule, experienced shows that if we wish to remain equal in reality, we must let ourselves be ruled. Thus Kelsen blames political ideology to have linked equality and liberty since Cicero times up to Rousseau, who he called the “most important theorist of democracy”. However, for Kelsen the contrast traditionally established between the citizen’s political self-determination and his participation in forming the governing will of the state, as the classical idea of freedom, with the Germanic idea, which is limited to freedom from rule –in fact, to freedom from the state itself is not a historical, ethnographic difference.

174 Kelsen 1989. op. cit. pp. 224
175 Kelsen says: “This was expressed by a master of political ideology, Cicero in his famous words “Hence liberty has no dwelling-place in any state except that in which the people’s power is the greatest, and surely nothing can be sweeter than liberty, but if it is not the same for all, it does not deserve the name of liberty(De Republica IXXI (47)” Kelsen 2002. op. cit. pp. 86
176 Kelsen 2002. op. cit. pp. 85
For Kelsen “this distinction in the classic articulation of the problem of freedom is only the first step in the inevitable process of change … from its natural condition to a coercive legal order”\textsuperscript{177}. Thus, Kelsen claims that liberal democratic rule demands the autonomy of the legal order in regards to politics, not only because legality makes part of the natural evolution of the idea of freedom and equality but especially because, contrarily to what is claim by political ideology, legality assures a minimum of freedom that mere “political democracy” cannot. Kelsen brings into question Rousseau’s critique of the English representative democracy in which citizens are free only when they chose their representatives. Kelsen argues that in Rousseau’s direct democracy in which governing will of the state arises directly from referendum individuals are free only at one moment, only while voting, and only if he votes with the majority and not with the outvoted minority. Kelsen argues that the principle of legality, especially through constitutional review, provides the means for guaranteeing freedom by keeping individuals free from state rule. Hence, Kelsen defense of constitutional review shows that he conceived of it to be the technically appropriate means for bringing to expression the principle of legality. The principle of legality purged of any political content, as claimed by the legal science\textsuperscript{178}, guarantees an adequate system for ruling society. Constitutional courts are the guardian of legality because there are the guardians of the highest positive law, the constitution.

Finally, Kelsen highlighted the difference between constitutional courts and other courts. He argued that the former were a type of negative legislator because it has the competence to invalidate norms of general application, while the latter only produce norms to a concrete case\textsuperscript{179}. For Kelsen it was not problematic the idea that constitutional courts could actually perform legislative competences. In fact this condescending attitude can be explained on the grounds of Kelsen’s “legal” conception of democracy. Constitutional courts competence to guard the constitution as well as their negative legislative function finds legitimizing grounds in legality as a main feature of democracy. Kelsen Constitutional control system is consistent with his claim that sovereignty resides in the law and not in the popular elected organs of the state.

\textsuperscript{177} Kelsen 2002. op. cit. pp. 85
\textsuperscript{178} Cf. Dyzenhaus 1999. op. cit. pp. 128
\textsuperscript{179} Kelsen 1930-31. op. cit. pp. 589-591
either the parliament as avowed by the modern republican democratic thought, or in the
president as advocated by Schmitt.

E. Schmitt and Kelsen: Two ways of looking at Liberal Modernity

It might be true that Schmitt’s and Kelsen’s theories of political and legal
sovereignty respectively were accomplices of the Nazi’s seizure of power. The former
by placing sovereignty beyond the boundaries of the law and in hands of the president
seemed to have paved the way to the Coup d’état in Prussia and the dictatorship of
National Socialism. The latter set forth a concept of legal sovereignty and legal order
that offered no means for preventing the Nazi’s arrival to power. However, what is to be
remarked in their “dialogue” is the existing conceptual distance in the departing points.
As Dyzenhaus 180 rightly points out, It seems that Kelsen, when arguing about who the
guardian of the constitution should be, and concluded, that is should be the
constitutional court, he was thinking in who would be the best fitted authority according
to the Weimar Constitution, to decide on the legal validity of a norm. However, when
Schmitt argues that the president is the guardian of the constitution his claim is the
result of an inquire regarding who is the legitimate political authority to decide
exceptional cases that are not legally regulated.

Dyzenhaus open a door through which it is possible to approach Schmitt and Kelsen
understating of the role of law and politics in liberal modernity. Schmitt arguments’,
contrarily to his hope, presuppose the modern liberal conception that political power is
underpinned by “natural” human liberty. His claim that political power could not be
limited by the law is thus an expression of the radical liberalism previously defended by
Hobbes. In that way Schmitt placed the sovereign’s power in hands of the president
who, according to him, is the only entity that can embody a homogenous general will.
Legitimacy is thus a political attribute that, residing on the president but being
derivative from people’s original liberty, confers to its holder the power to rule beyond
the law.

Kelsen, on his side, put together Weber’s claim of rational-legality in the construction
of the law and its application in the function of constitutional courts. If Kelsen did not

180 Cf. Dyzenhaus 1999. op. cit. pp. 123
emphasize the rational procedure behind his formal conception of legality, it goes by itself that Kelsen’s system of constitutional control lies in the liberal assumption of the rationality of man in the making of the law and the rational coherence of the legal order. The rechtsstaat in Kelsen although rooted in a closed system of constitutional legality, finds its deepest underpinnings in the belief in free will and rationality. Legality thus understood, is at its most fundamental a principle of constitutionality, a principle of the legality of the acts of the legislator.

In the next chapter I will approach the relation between legality and legitimacy in the new Latin American constitutions. First (A) I will explore the aim of the new constitutions of recovering popular sovereignty, to the detriment of legal sovereignty, by relying on the original constituent power in the making of the constitution. In the second section (B) I will analyze the nature of constitutional review implemented by the Colombian constitution. I will claim that the “popular” constitutional review system established in the “avant-garde” Colombian 1991 constitution is an attempt to establish a mechanism that endows the functioning of state and the law with popular legitimacy. In the third section (C) I will approach the importance granted to popular legitimacy in the making of the constitutions of Bolivia and Venezuela to ground the re-foundational project. I will focus on the study of the establishment of the fourth power, the electoral branch, as means to granting popular legitimacy to the structure of the state. Finally, I will try to show that these measures do not lead necessarily to recover (establish) popular legitimacy over legal legitimacy in the foundation, functioning and structure of the state, but they may provide the sensation of a more open (direct) democracy. Subsequently I will wrap up my main claim that the attempts taken in the Latin American constitutions to recover popular sovereignty in the foundation, functioning and structure of the state do not provide an alternative system to modernity, but contrarily, they try to “radicalize” some of the modern teachings (those of “direct democracy and popular sovereignty) aiming to recover the hope in the modern project.
Chapter V
The Constitutions of Colombia, Venezuela and Bolivia: Popular Legitimacy in the
Foundation, Structure and Functioning of the State

“Las armas nos dieron la independencia,
las leyes nos darán las libertad”181

A. Introduction: The Latin American Neo-Constitutional Movement

The Latin America constitutionalist movement started in the last decade of the twentieth century may be understood as the result of a generalized popular disapproval of the existing political structures. However, it has not been a spontaneous movement but, as it happens in most of the political transformations, it was the result of an imperceptible “enforcement” of a “new” ideology of -political- power and social emancipation. Indeed, the massive popular mobilizations that gave birth to the new Latin American constitutions were inspired in a “project of political emancipation” that aims at overcoming the “fallacies” and structures of liberal modernity, particularly that of the confusion of legality and legitimacy.182

In that sense, although the constitutional re-foundational project183—henceforth The Project—shares central elements with the Latin American neo-constitutionalist movement as well as with the more general theories of European neo-constitutionalism, its underpinnings and agenda go far beyond them. The decline of the European continental constitutional systems inspired in the French constitutions of the late 18th century led to the emergence of the European theories of neo-constitutionalism in the

181 This war cry of Santander, one of the founders of the Colombian Republic, decorates the entrance to the Colombian Supreme and Constitutional Courts
183 Since the re-foundational project in Latin America is a recent phenomenon it is almost unexplored in the academic field. The available bibliography on the topic is almost inexistent, and the little documentation that has been produced is in Spanish. Hence my claims on the “ideological unity of the project” are based on my examination of the constitutional texts of Venezuela, Bolivia and Ecuador; in my participation in the congress “The Forms of Law in Latin America: Democracy, Development and Liberation” in Spain and in which I had the opportunity to assist to different conferences on the issue and shared with some of the persons participating in the abovementioned constitutional process. Finally I rely on some articles written by Albert Noguera, who has participated in the constitutional projects of Bolivia and Ecuador in representation of the academia, and who gently provided me access to his writings prior to their actual publication—currently in process. Although I hope to be loyal to the core arguments of the re-foundation project, I pray the reader to read my affirmations regarding its ideological unity with skeptical eyes.
early and middle 20th century\(^{184}\). Since this transition was undertaken in the post-war period of continental Europe, it had little theoretical impacts on the British and American constitutional systems. The former does not follow the continental constitutionalist tradition, while the latter’s constitution dates from the very beginnings of the American state\(^{185}\).

The Constitutions that were in force in European countries before the two world-wars were certainly the legacy of the political transition from monarchic governments to democratic republics. They sought to anchor their pillars in the social contract theories that privileged the modern conception of natural subjective rights and the absolute believe in human reason. Sièyes, inspired in Rousseau’s direct democratic thought, claimed in his famous project *Reconnaissance et Exposition Raisonnées des Droits de l’Homme et du Citoyen* presented to the National Assembly in 1979 that a constitution presupposes necessarily a constituent power different from the constituted powers\(^{186}\). The original constituent power proposed by Sièyes was thus in accordance with the contractualist tradition. It required a “state of nature” in which people are free and where there are no coercible rules of procedure. In that sense, this ambition could be seen as the political consequence of the concept of natural law prevailing at the époque. However, the idea of an original constituent power, rooted in legitimacy rather than in legality, was faced with a problem of organization. Schmitt unveils the difficulty of allowing the people decide directly on the form and structure of political power, when the *people* as such is unorganized\(^{187}\). In spite of the claims of Sièye, the will of the French *people* was deposited in hands of a representative organ; the National Assembly. The influence of the contractualist theories, and in general of the modern political tradition in the European constitutions, and particularly in French constitutionalism, was also clear in the establishment of a system of checks and balances inspired in the early

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\(^{185}\) The process of the American Constitution antedates the European transition from Constitutionalism to New-Constitutionalism. Moreover the process of establishment of the Federal Constitution that mixes social pacts (e.g. Mayflower) with *Covenants* seems to be too far from the development of European and Latin American Constitutions. However it is important to remark that the American constitutional process has often been regarded as one that coincides with the foundation of the state. This particular idea will be of interest for the analysis of the Latin American re-foundation project, and thus it will be further developed in this section.


\(^{187}\) Schmitt 1989. op. cit. pp. 78-79
ideas of Locke and Montesquieu. They wanted to guarantee subjective natural rights against state abuses through an institutional setting in which state powers were divided among the legislative, executive and judicial branches. Finally, one must say that in spite of the axiological content incorporated in the constitutions it was rather the setting of an institutional arrangement guaranteeing individual rights from state abuses what constituted their intrinsic value.

The emergence of European neo constitutionalism proposes a shift in the intrinsic value of the constitution. Neo-constitutionalists claim that constitutions are not only axiological charters that structure political power, but rather, that their content is essentially normative\(^\text{188}\). Since the constitution is the highest normative text (law) within the state, it must contain, besides the institutional arrangements, a “catalog” of inviolable rights of citizens to which everyone, including the state, owe respect. The (political) constitution becomes a supreme legal text that regulates the enactment, interpretation and application of the once sovereign law. Moreover, if for neo-constitutionalists the control of the state power continues to be an important content of the constitution, they argue that it is overshadow by the importance granted to the protection of fundamental rights\(^\text{189}\). Consequently, constitutions must, on the one hand, provide legal means for the protection of those fundamental rights, and on the other hand, encourage the legislative and judicial powers to perform their function with the end of assuring their supremacy.

Many of the European constitutions currently in force are the result of this legalist approach to the political charter. For example the Italian and Portuguese constitutions dating from 1947 and 1976 respectively meet the abovementioned characteristics. Yet what I want to highlight from them is the fact that they are not focus anymore in the nature of their constituent power but in their content, e.g. a catalog of rights. Indeed the Italian and Portuguese constitutions draw their validity from legality rather than from legitimacy. They are both drafted and approved through legislative procedures in which representation rather than direct popular participation prevails. Despite the popular participation in the election of the Constitutional Assemblies, the Italian and Portuguese constitutions

\(^{188}\) Comanducci 2005. pp. 84-85
\(^{189}\) Comanducci 2005. pp.85
people never approved the final text by referendum. Thus one may say that they are “superior laws” but not, to use Jellinek’s expression, “constitutional constitutions”.

If Latin American neo-constitutionalism retakes great part of the legal legacy of European neo-constitutionalism, especially the 1991 and 1993 Colombian and Peruvian constitutions respectively, the political and social particularities of the continent provided the grounds for the introduction of new “popular” elements. In this chapter I will focus on three characteristics that the Latin American neo-constitutionalist movement shares with the re-foundational project, i.e. (1) the recovery of popular sovereignty by the establishment of original constituent powers, (2) the promotion of active political participation, and the (3) focus on the “actualization” -justiciability- of constitutional rights. I will deal with the first claim in the next section (B), and with the second and third claims in section “C” and “D” respectively.

B. On the Foundation of the State: The Constituent Power in Latin America

Although there was a timid claim advanced by the Latin American neo-constitutionalist movement for recovering popular sovereignty, as it is reflected in the Colombian constitution, it would be only with the constitutions emerged from the re-foundational projects –i.e. Bolivia, Venezuela and soon Ecuador- that this claim will become fully actualized. Indeed, The Project’s aim of overcoming the modern confusion –“fallacy”- between legitimacy and legality led it to state as its main claim the re-foundation of the state on the basis of popular legitimacy.\(^\text{190}\) Considering the long lasting efforts undergone by most Latin American countries in the last two centuries for consolidating liberal democracies in the region this claim has to be taken seriously. At first glance, it seems that the idea of re-founding the states through new constitutions comes from the distinction made by Schmitt between constitutions born within a state and constitution giving birth –Konstituierung- to a state. Schmitt argues that when “a people takes consciousness for the first time of their capacity to act as a nation it is comprehensible that they claim to be in the latter case rather than in the first.”\(^\text{191}\)


If the massive popular mobilizations in some Latin America countries can be taken to be the gain of national consciousness from the part of the peoples, I consider more convenient to approach this phenomena by focusing on the reasons - “ideology”-underlying the massive mobilization in Colombia, Venezuela and Bolivia. In my analysis I replace thus the concept “gain of consciousness” by “development of a new ideology”, and I argue that the latter led to the popular mobilizations that ended up in popular constitutional assemblies. Hence, the first question is what does it mean to establish a state on the basis of popular legitimacy? Are the Colombian constitution and the constitutions of The Project, i.e. Venezuela, Bolivia, Ecuador providing an alternative to modernity?

The Colombian constitution is considered to be the first Latin American Constitution to have rooted its foundations in popular sovereignty. Although it certainly represents a less radical project than the constitutions of The Project it took the first step in the struggle for emancipation by proclaiming the necessity of an original constituent power. During the pre-constitutional arrangements in Colombian, contrarily to Venezuela and Bolivia, there was not a public campaign cheering the slogan of a re-foundation of the state as such. However, the Colombian constitutional movement was itself the result of popular mobilizations claiming for a new constitutional order more respectful of people’s diversity and more coherent with the reality of the nation.

The 1991 Colombian Constitution was more than a necessary project. In spite of the several amendments concerning fundamental rights and extension of citizenship that were incorporated to the 1886 Constitution, it is possible to say that Colombia still had at that moment a quasi-colonial political system. The confluence of an important number of situations, from which I remark, the several ethnic-groups excluded from political participation, guerillas claiming for social justice and political reforms, the incorporation of theories of liberation in farmers movement, the raised of the workers movement and the inefficient and exceptionality in the administration of justice

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Volk als Nation sich seiner Handlungsfähigkeit zum erstnmal bewusst wird, ist eine derartige Verwechslung und Gleichstellung wohl begreiflich.”

ended up in social mobilization that promoted the call to a constitutional assembly. The plural participation and outstanding representation of minorities and historically excluded groups in the Constitutional Assembly was the cornerstone of its popular legitimacy. It was the result of a wide participation of historically excluded groups (e.g. indigenous movement), guerrilla movements that turned to civil life and left-aside the weapons (e.g. M-19) and in general civil society -academic, political parties, NGOs, etc. This popularly elected constitutional assembly was seen as truly issued out of a national consensus. Hence, it claimed for itself the original constituent power and, thus, the legitimate foundational power of the Colombian state. What characterized this constitutional assembly was its legitimacy and not its legality. It was a constituent power and not a constituted power. It is the source of the law because it has popular sovereignty. The Colombian constitution opens the preamble by stating:

“The People of Colombia, in the exercise of their sovereign power, represented by their delegates to the National Constituent Assembly, invoking the protection of God, and in order to strengthen the unity of the nation and ensure its members life, peaceful coexistence, work, justice equality knowledge, freedom, and peace with a legal, democratic, and participatory framework that may guarantee a just political, economic, and social order and committed to promote the integration of the Latin American community decree, sanction and promulgate the following Constitution of Colombia”

Contrarily to the constitutions of The Project that are rooted in an ideological framework that aims at overcoming the deficiencies of the modern liberal project, the Colombian constitution emerged from a relatively spontaneous social mobilization and was not constricted to a defined ideological agenda. The Venezuelan and Bolivian constitutional projects took into account the Colombian experience in recovering popular sovereignty at the core of its political project, and incorporated an ideological framework of resistance to the modern-liberal agenda. The ideology encompassing the constitutions of Venezuela, Bolivia and Ecuador is usually named “Bolivarian Revolution”. This name has been the war cry of Hugo Chavez and he claims to be the
The Project claims that given the evident failure of the modern political project in fulfilling its promises it has unleashed a social and political dynamic of exclusion at national and global levels. Thus, the liberal political project has to be dropped because it has perpetuated oppression by setting a framework that justifies the coercive institutions that sustain and naturalized the hegemony of dominant classes and groups. The Project asserts that the dynamics of exclusion and monopoly of political means by national elites characterize the constitutions and institutional arrangements of the Latin American states built upon the inherited tradition of European modernity.

This oppressive system is run by a legal order deemed to be neutral and autonomous in regards to its validity, but which actually is the modern artifact to perpetuate the power of the haves and the political elites.

Since law had captured the political system and rendered it hardly useful as a counter hegemonic tool, political and economic oppressions have to be fought in different grounds. The bottom-up strategies of social mobilization that were being developed in the region as an alternative to the top-down intervention from the state and international agencies had already prepared the ground for raising a strong ideological claim: to promote a political reform starting from the bottom. The oppression could only be abolished with the abolishment of the ideology underlying the foundations, functioning and structure of the state, i.e. the modern liberal project.

The state has to be re-founded away from the logic of representative democracy and sovereignty of the law. For so doing it was necessary the establishment of a Constitutional Assembly with the original constituent power. The foundations of the

continuation of the incomplete project of Simón Bolivar, the General who gained the independence for the north countries of South America.


Noguera 2008. op. cit pp. 1

Santo’s works have been a great source of inspiration of the The Project. However in this point they seem to defer because while the former considers the possibility of using the law as a counter hegemonic tool for advancing a political agenda, the latter seem to denied the legal and political system of the state as useful tools, and thus propose to re-build the whole legal and political structure.

Albert 2008. op. cit pp. 14
new state had to be taken back to the people, but it could only be done, it seems, by the application of a political project already ideologically biased. The establishment of an original constituent power was the war cry of the political project of Hugo Chavez in Venezuela and Evo Morales in Bolivia –also of Rafael Correa in Ecuador- who saw in popular mobilizations the justification of their political project:

“In Venezuela the 1999 constitutional process is the result of a long process of popular mobilization that starts with the Caracazo in 1999, when thousands of people participated in demonstrations to show their inconformity with the corrupt, elitist and marginalizing system. This process will lead to the election of Hugo Chavez in December 1998. In Bolivia, since April 2000 when the war of water in Cochabamba exploded, the social and indigenous movements started a struggle that led to the resignation of President Gonzalo Sánchez de Lozada and the victory of Evo Morales in the presidential elections of 2005. Evo Morales immediately disposed, as promised in his campaign, the nationalization of the oil and gas foreign companies settled in Bolivia the modification of the law INRA and the establishment of a popularly based constitutional assembly”

Contrarily to the 1991 Colombian constitution, the constitutional processes in Venezuela and Bolivia, as well as the ongoing one in Ecuador, are advanced by a wave of politicians who transformed the ideological framework above-mentioned into political practices.

I argued before that the Colombian constitutional project, compared to that of Venezuela and Bolivia, was a timid attempt to recover national sovereignty. The


The original text states: “En Venezuela, el proceso constituyente de 1999 es fruto de un largo proceso de movilización popular que empieza con el denominado Caracazo en 1989, cuando miles de personas se lanzaron a las calles para expresar su disconformidad con un sistema corrupto, elitista y marginador, hasta la victoria electoral de Hugo Chavéz en diciembre de 1998; En Bolivia ya desde los acontecimientos de la guerra del agua en Cochabamba, en abril del 2000, que suponen el inicio del ciclo de luchas de los movimientos sociales y pueblos indígenas que llevaron a la renuncia del Presidente Gonzalo Sánchez de Lozada y la Victoria electoral de Evo Morales en diciembre del 2005, una de sus principales demandas había sido, juntamente con la nacionalización de los hidrocarburos y la modificación de la ley INRA, la convocatoria de una asamblea constituyente.”
Colombian constitutional assembly was constituted as an original constituent power based on the legitimacy drawn from the popular election of its members and the presence of historically marginalized groups. Although the constitutional assembly was not legally constrained, it did not submit the final text of the constitution to an approbatory referendum.

The Venezuela constitutional project aimed to go beyond the Colombian experience. First, there was a referendum in which the people decided on the establishment or not of a constitutional assembly. Then, the members of the constitutional assembly were elected by popular vote, and similarly to the Colombian assembly, it guaranteed the participation of historically marginalized groups. Finally, although the constitution was drafted by popularly elected members of the constitutional assembly, the original constituent power was truly in hand of the people because the final text was presented to an approbatory referendum. The constitution was finally approved in 1999 with a favorable vote of 71%. If I concluded before that the Colombian constitution was characterized by popular legitimacy, the leaders of *The Project* claim that the Venezuelan constitution was fully legitimate because it was approved by the people. They argued that it was a truly original constituent power that operated in the “legal nothingness” because it was not restricted by the law. It is contrarily the origin of the political and legal order.

Finally, the Bolivian Constitution has undergone a rougher path in its drafting and approval processes. The decision of calling a constitutional assembly was taken by president Evo Morales after his arrival in office. If it is true that its members were popularly elected, the decision of calling a constitutional assembly was not the product of a referendum. Evo Morales assumed that with his electoral victory he was entrusted with the power to call the assembly. The particular ethnic and political composition of the country, in which half of the population claims to be indigenous people oppressed by with minorities, rendered the constitutional assembly a real battlefield. Although the final text of the constitution was finally approved in December 2007, its final approval by referendum has faced enormous difficulties. Probably the most remarkable is the opposition of some of the regions of the country, under the power of the

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²⁰⁰ Cf. Restrepo 2007. op. cit. pp. 82
opposition party, to approve the Constitutions. In fact when the central government was planning to call for the final approbatory referendum, 4 of the 9 regions of the country announced that they had drafted autonomic statues that oppose the content of the constitution and that were going to be submitted to referendum. In the four regions the autonomic statues were approved by more than 80% of the electorate. Thus, the constitutional project in Bolivia faces now a great challenge, and even more, since it is known that another region is preparing a new autonomic referendum. The central government, that has declared illegal the autonomic referendums, called in June 2008 for a recalling plebiscite of the governors of all the Bolivian regions as well as of his office. After his ratification in office as well as of others Bolivian governors opposing the new constitution, the central administration of Evo Morales is attempting to reach a “national political consensus” to finally submit the text of the constitution to the approbatory referendum.

Beyond the difficulties of the political process in Bolivia it seems fair to affirm that the re-foundational project has proved to be more ambitious than Gramsci’s attack to liberalism. It has aimed not only at eroding the modern political liberal ideology but at providing a whole new framework for social life. The settlement of an original constituent power for re-founding the state on the basis of popular sovereignty was the first step in the battle against the modern liberal conception of low-intensity, representative democracy. To use Santos terms, this first step gives way to the emergence of a proposal for “the radicalization of political and economic democracy”201. However the recovery of popular sovereignty in the foundation of the state does not guarantee the defeat of legal sovereignty. The structure and functioning of state must also contain elements that guarantee popular sovereignty.

In the next section, I will present The Project’s claim that popular sovereignty can be guaranteed in the structure of the state by the establishment of the electoral power. For the study of this claim I will mainly focus on the Constitution of Venezuela for two reasons: First, the constitution of Venezuela is the only constitution of The Project that is currently in force, since those of Bolivia and Ecuador still need to go through the approbatory referendum. Second, because the idea of keeping popular sovereignty in the

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201 Santos, Boaventura & Garavito, César. 2005. op. cit. pp. 18
structure of the state through the establishment of the electoral power is an original idea of the Bolivarian Revolution led by the Venezuelan president Hugo Chavez, and whose main purpose if to recover the political project of Simón Bolivar.

C. The Electoral Power in the Bolivarian Revolution

Before entering into the abovementioned analysis I must first recall my surprise when I found that there was almost no bibliography on the issue written in English, and a very poor one in Spanish. Although the Constitution of Venezuela has already been in force for almost 8 years, it seems that the study of the new institutional arrangement of the Venezuelan state, and soon those of Bolivia and Ecuador, has not called the interest of academics. Probably this lack of interest comes from the fact that at first glance, the new powers -i.e. Electoral and Citizen’s power- seem a compilation of existing democratic institutions under the umbrella of a “new” public power of the state. However this superficial approach may underestimate the ideological content of their claim.

The Venezuelan constitution established by the sovereign people -in exercise of their constituent power- set an institutional arrangement of the state that intends to allow permanent popular participation. Indeed, the project giving birth to the new state202 conveyed the permanent expression of people’s sovereignty, and thus, it was against a traditional institutional arrangement in which political power was taken away from people. The opposition to the system of checks and balances as the means for controlling states abuses was transformed into the creation of the citizen’s and electoral power. The main goal of these new powers was to assure citizen’s control of state intuitions, including the control of the three traditional powers. I will focus on the electoral power because it contains more meaningful elements for our analysis.

The article 5 of the Venezuelan constitution establishes that:

“Sovereignty resides untransferable in the people, who exercise it directly in the manner provided for in this Constitution and in the law, and indirectly, by

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202 This new state included a new name. The Republic of Venezuela became with the 1999 Constitution the Bolivarian Republic of Venezuela.
Now, the means to assure the effective exercise of people’s sovereignty was the establishment of an independent electoral power. The Bolivarian Constitution of Venezuela wanted to restore the original roman ideas of popular participation, which had been part of Bolivar’s political project. The advocates of The Project claim that the electoral power tries to restore, contrarily to representative democracy, the roman system of the mandate in which magistrates popularly elected decide on issues on which people directly have not decided. However, the decisions taken by the roman magistrates were under the supervision of the Tribunat, who as explained before, had the power of veto.

This Roman institution was latterly retaken by Rousseau for developing his institutional setting in Du Contrat Social, and was finally implemented by Simón Bolivar in the Bolivian Constitution of 1826. Bolivar who had great admiration for the Roman institutions, and especially for the Roman constitution, incorporated the roman model by the establishment of a fourth power, i.e. the electoral power. The article 8 of the 1826 Bolivian constitution states:

“The supreme power is divided for its exercise in four sections: Electoral, legislative, executive and judicial”

The electoral power was established in article 19, reading as follows:

“The electoral power is exercised directly by active citizens. There will be one person elected for every one hundred voters”

Finally article 26 established:

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204 I will include the original texts of the quoted articles because they are not of easy translation. In this way I try to be loyal to the reader and to the original ideas. The original text states Art 8. “El Poder Supremo se divide para su ejercicio en cuatro secciones: Electoral, Legislativa, Ejecutiva y Judicial”

205 Original text art. 19. “El Poder Electoral lo ejercen inmediatamente los ciudadanos en ejercicio, nombrando por casa ciento un elector.”
“The Legislative power emanates directly from the electoral powers chosen by the people; its exercise is divided in three chambers: Tribune, senators, censurers.”

The political structure was meant to bring the new Republic of Bolivia an appropriate institutional setting for achieving full independence from European power. Although political independence was formally achieved in the early 19th century, the presence of European descendents, criollos and the pressure coming from the Spanish Crown was threatening the stability of the emerging state. Thus, the institutional setting of Bolivia aimed at empowering the locals and limiting the power of those with European background; the “Bolivians” were thus the plebeians, while the “Europeans” were the patricians.

The Bolivarian Republic of Venezuela wanted to recover Bolivar’s legacy by the establishment of the Electoral power as an independent branch of National Public Power. The article 136 establishes:

“Public Power is distributed among Municipal Power, that of the States Power and National Power. National Public Power is divided into Legislative, Executive, Judicial, Citizen and Electoral”

The electoral power aims at guaranteeing popular participation at every moment and independently from the other public powers, especially, from those popularly elected. Considering the great variety of popular participatory means contained in the constitution it was necessary that its direction, organization and control were separated from the other branches of power. The electoral power will thus guarantee the expression of people’s sovereignty through vote, referendum, consultation of public opinion, mandate revocation, legislative, constitutional and constituent initiative, open forums and meetings of citizens whose decisions are binding, etc. However, besides these participatory means established in article 70, the Electoral power can also direct, control and organize other participatory initiatives coming from civil society itself.

206 Original text art 26. “El Poder Legislativo emana directamente de los cuerpos electorales nombrados por el pueblo; su ejercicio reside en tres cámaras: Tribunos, Senadores y Censores”
Indeed the Venezuelan Constitution emphasizes the importance of permanent interaction between members of civil society, and thus the electoral power can provide the means for assuring that successful interaction, e.g. by organizing elections for labor unions (art. 293, N. 6)

The independence of the fourth power is thus structurally guaranteed by two important means, i.e. financial and organic independence. Regarding the former, the Electoral Power participates directly in the national budget. It is not subordinated to another branch of public power, but it is in equality of conditions with them. Regarding the latter, The Electoral Power is an autonomous branch of the state whose functions are exercised by the National Electoral Council as governing body, which in itself, is constituted by different subordinated organs. The National Electoral Council is composed by five members “having no ties to organization for political purposes; three of these shall be nominated by civil society, one by the schools of law and political science of the national universities, and one by the Citizen Power.”

The independence of the Electoral power has already been tested. In a 2004 popular initiative, supported by the government’s opposition, succeeded in collecting the amount of required signatures for running a recall referendum against Hugo Chavez. The National Electoral Council certified the validity of the signatures and run the referendum elections in August with the question: *Do you agree to revoke, for the current term, the popular mandate as President of the Bolivarian Republic of Venezuela conferred on citizen Hugo Rafael Chávez Frías through democratic and legitimate elections? NO or YES?* The final result was favorable to the permanence in office of Chavez. Another important event happened in 2007 when the president of Venezuela handed in the initiative to modify more than 60 articles of the 1999 Constitution aiming at fully establishing his “socialist project”. The Electoral power called for a plebiscite the 2nd December in which it asked the original constituent power, i.e. the people, the approval or refusal the proposed reform. The people making use of their sovereignty refused the reform and it was like that certified by the Electoral power.

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207 Cf. article 294 of the Bolivarian Constitution of Venezuela
208 Cf. article 296 of the Bolivarian Constitution of Venezuela
Finally, the Electoral Power, as I said before can provide direct assistance to the functioning of civil society organizations. Indeed the Bolivarian project aims at strengthening grassroots movements and bottom-up participative democracy. It is based in a strong ideological framework characterized by a direct challenge to neo-liberalism and north-hegemony. The aim of establishing social networks of cooperation and an economic system based on associative work requires the strengthening of civil society. In that sense the Electoral Power wants to establish, without the necessary intermediation of political parties, a direct link among citizens, and between citizens and the state. The Bolivarian Revolution justifies its institutional arrangements in that it promotes and allows the expression of citizens sovereignty at all times and through institutional means.

It is undeniable the independence granted by the Bolivarian Constitution to the Electoral Power. Moreover it may be true that it assures popular participation in the everyday democratic life of Venezuela. However does it really make popular sovereignty prevailed over legal sovereignty, furthermore, does it really overcome or provide an alternative to the political thought underpinning modern institutional arrangements?

The Electoral power aims at establishing the supremacy of popular sovereignty over legal sovereignty in the structure of the state. Yet the independence granted to the Electoral Power within the state structure is meant to guarantee the expression of people’s will in regards to every necessary matter in the country’s life. However, are decisions taken through participatory means in Venezuela not subjected to the control of the law? Indeed the expression of people’s will through referendum or plebiscite may not be bounded by the legal system except in their procedural requirements. However this two participatory means are of extended use in other countries in South America and Europe in which the electoral authorities do not constitute an autonomous public power. Now, regarding the other participatory means I argue that they are not only completely bounded by the law but that they are not channels for the expression of people’s will. The participation of people in the everyday social and political life of the country- through social organizations, participatory budget discussion, participatory developments plans, etc- does not necessarily mean that decision taken in those participative instances are issued directly from people’s will. Decisions taken therein are not always the result of vote, but they are often taken on the basis of negotiations among
actors or based on technical arguments, etc. Thus people’s participation in decision-making process does not necessarily imply popular legitimacy and supremacy of people’s sovereignty —will—, since it could also mean “deliberative” legitimacy or “rational” legitimacy. Those instances are thus not only subjected to the law in their procedure, but in their content. Finally I just recall the argument of Kelsen against Rousseau’s direct democracy in which, according to the former, individuals are only free at one moment, only while voting the referendum, and only if he votes with the majority and not with the outvoted minority.

Now, precisely regarding the political philosophy underlying the Electoral Power, I argue that popular participation has always occupied an important place in the underlying theory of modern democracy, although it certainly varies according to place and time. I just recall our study of Tocqueville, for whom the supporters of the Bolivarian Project show great aversion, regarding the means employed in America for avoiding extreme individuality. Tocqueville concluded that there was an active participation of citizens in all realms of public life. He thought that people were governing in America not only because they were electing people for filling the official offices, but because they had participation in small, medium, and large decision through their engagement in social life. In this sense one may argue that the autonomy granted by the Bolivarian Constitution to the Electoral power may indeed assured independence of the electoral authorities and strengthen grassroots movement in society. However this form of direct participation is not beyond or against the political conception of modernity. Contrarily modern political philosophy emphasize that individuals are the original holders of sovereignty because there are by nature free. Thus any political organization ought not to be run without his consent. This modern premise can however be translated in different institutional arrangements, either in those characterized by representative institutions or in those in which people have a more direct participation. I do not discuss here the virtues of one or the other system; I just remark the fact that they are different actualizations of the same core idea.

In the next section I will show how neo-constitutionalism claims to have anchored the functioning of the state in popular sovereignty. My choice for analyzing the practical relation between legality and legitimacy in the light of constitutional review is based in the elucidative potential residing in the connection between power and justice. Indeed
the central position occupied by the concern for justice within political societies makes the judicial [judging] function a privileged source for revealing the transformation [and nature] of power. As it has been rightly point out, the history of justice is the political history of that society itself or, moreover, that the different models of justice are intimately related to different models of political order.

D. Popular Sovereignty and Constitutional Review: The Tutela Action in Colombia

The preamble of the Colombian constitution sets a list of substantive values, e.g. liberty, equality, justice, etc. that are to be achieved within a “legal, democratic and participatory framework…” Certainly, modern democracies attribute an important value to participation in a country’s political life. Although participation is frequently limited to popular elections, the abovementioned references to both, Rousseau’s criticism of the English representative system and Tocqueville’s claim of popular participation as means for avoiding extreme individualism, must remember us that a fit democracy has to promote citizen’s participation beyond officials and parliamentarians election.

The Colombian constitutional assembly was aware of this late liberal democratic claim and thus established a wide participatory framework. I highlight article 103 of the constitution that states in its first paragraph:

“The following are the people’s means for participating in the exercise of their sovereignty: the vote, plebiscite, referendum, popular consultation, open town council meeting, legislative initiative, and recall of officials.” (my emphasis)

It is difficult to deny the importance that these participatory means have had in the political life of Colombia in the last two decades. However, I claim that the most interesting device of popular participation lies in the structure of constitutional review.


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The constitutional actions are not considered by the constitution as participatory means in the democratic life of the country; however, their simplicity in procedural terms has rendered them a natural channel of participation. I claim that the original aim of constitutional review in Colombia was to provide an overall popular legitimacy the state and its law.

By “constitutional review” I mean not merely the competence of the constitutional court to declare void laws or administrative decrees when they breach the constitutional charter, but the general system of “constitutional judicial review”\textsuperscript{212} established in Colombia for the protection of constitutional rights. Colombia has a semi-diffused system of constitutional control. i.e. only the constitutional court can declare a law or decree unconstitutional, but all judges of the republic are competent to drop the application of a law or decree they consider against the constitution. This type of decentralized constitutional control, that makes every judge of the republic guard of the constitution, aims at assuring, at all times, the foundational values of the state over mere functional legality.

However, what is not seizable by the concept “semi-diffused constitutional control”, but that I include in the concept “constitutional review”, are the constitutional actions established for the protection of individuals’ and groups’ fundamental rights. As I mentioned before, neo-constitutionalists advocate for the inclusion of a “catalog” of fundamental rights in the constitution. Latin American neo-constitutionalism in particular has claimed for the establishment of judicial channels for actualizing, rather than merely protecting, those constitutional rights. It seems that the inclusion of a long catalog of social rights in the constitution was a strategy for gaining popular legitimacy. Indeed, the economic gap between haves and no-haves had bipolarized Colombian society. The former, who constitute a minority, were enjoying full citizenship, while the latter, composed of the greatest part of the people, were living under precarious conditions. The justiciability of constitutional fundamental rights, and particularly of

\textsuperscript{212} I will not discuss here if constitutional review, and more particularly constitutionals courts’ review, make part of the functions of the judicial system, i.e. if it belongs to the judicial branch or not. However, for Colombia, the fact that constitutional norms regulating the functioning of constitutional “justice” are under Title VIII concerning the “Judicial Branch” drive me to affirm that for Colombia it is organically part of the judicial power of the state.
social rights, was thus included in the constitution as means for assuring popular legitimacy in the functioning of the state.

In Chapter 4 of Title II “Concerning the Protection and Application of Rights” (my emphasis) the constitution established four different types of constitutional actions\(^{213}\) for the protection of fundamental rights. I will give a general overview of the fulfillment (art. 87) popular and group (art. 88) actions, while making an in-depth analysis of the Tutela action (art. 86). The fulfillment action entitles any person to appear before legal authorities to demand the application of a law or the fulfillment of an administrative act. The popular action, entitles a group of citizens to claim before a judge the protection of the collective rights incorporated in the constitution. Among others, this action makes justiciable the rights to homeland, public space, public safety and health, administrative morality, free economic competition, clean environment, etc. The group action, which is also indented to protect constitutional collective rights, differs from the popular action, in that the former contrarily to the latter entitles the plaintiff to claim for indemnity.

The Tutela action\(^{214}\) completes the constitutional protection of fundamental rights. It is to be remarked that constitutional actions are meant to make justiciable all fundamental rights and not only those known as “negative liberties”. The Tutela Action is established in article 86 of the constitution and its text states:

“Every person has the right to file a writ of protection before a judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whomever acts in his/her name for the immediate protection of his/her fundamental constitutional rights when that person fears the latter may be violated by the action or omission of any public authority.

The protection will consist of all order issued by a judge enjoining others to act or refrain from acting. The order, which must be complied with immediately, may be

\(^{213}\) As mentioned in the introduction, I use Action as derivative from the Latin “action”. Is a legal institution that entitles a person to bring a claim before a court. The spanish name of the actions are: Tutela, cumplimiento, popular y de grupo.

challenged before a superior court judge, and in any case the latter may send it to the Constitutional Court for possible revision.

This action will be available only when the affected party does not dispose of another means of judicial defense, except when it is used as a temporary device to avoid irreversible harm. In no case can more than 10 days elapse between filing the writ of protection and its resolution.

The law will establish the cases in which the writ of protection may be filed against private individuals entrusted with providing a public service or whose conduct may affect seriously and directly the collective interest or in respect of whom the applicant may find himself/herself in a state of subordination or vulnerability.”

The Tutela action has some similarities with the Recurso de Amparo\textsuperscript{215} of the Spanish and other Latin American and European constitutions. Although it does belong to the family of Recursos de Amparo, the Tutela action has some very specific particularities. As it can be read from article 86, the claim can be filed before any judge of the republic for the protection of the constitutional rights. Indeed any citizen through a very expedient procedure has access to the protection of his constitutional rights. The personerias, which are public institutions belonging the executive power and providing “judicial assistance” for the protection of rights, have tutelas samples and standard formats that can be filled by the plaintiffs with the assistance of public officials. Although the Tutela action itself does not have any procedural formality –it can be done orally for example–, the assistance provided by the personerias allows a clearer identification of the fundamental right breached or needing protection, as well as the clear description of the facts\textsuperscript{216}.

Although originally the Tutela action was established for the protection of fundamental rights making part of the so called first-generation human rights, the constitutional court has set a reiterative precedent that made justiciable social rights through the Tutela

\textsuperscript{215} There is not an equivalent action in English or American Law. However the type of actions belonging to Recurso de Amparo can be defined as actions for the infringement of fundamental rights and freedoms.

\textsuperscript{216} For other types of legal assistance used prior to the filed of the Tutela action, cf. García, Villegas, M & Rodríguez, C. 2001. op. cit. pp. 437
A study released in 2001 revealed that most of the plaintiffs used the *Tutela Action* for claiming protection to rights of petition (23.93%), work (16.32%), due process (12.84%), education (7.92%), social security (7.29%), property (5.86%) and health (4.12%)\textsuperscript{218}.

The time-frame in which decisions have to be hand down by judges is also a great strength of the *Tutela action*. Once the claim has been filed, judges must decide within the next 10 days. This decision time-frame has encouraged citizens to appeal to the *Tutela action* for the protection of their rights. However one must be aware that the *Tutela action* has a narrower scope than regular action because it is restricted to cases in which the affected party “does not dispose of another means of judicial defense” or when it is used as “a temporary device to avoid irreversible harm”. The decisions arisen by *Tutela action* are fully coercible by police and administrative means, and consequently its contempt, constitutes a criminal offense.

The *Tutela action* has given the constitutional court and the whole judiciary in general an important and increasing role in the country’s political life. However some polemics surround nowadays the *Tutela* decisions. On of the most controversial discussions concerns the consequences of *Tutela* decisions on the national budget. Judges deciding *Tutela actions* are not bound by the budgetary planning of the national or regional government/institutions. For example, judges can order to public hospitals to undertake medical procedures or provide medicines that are not included in the social security system if those procedures/medicines are necessary to protect the right to life-health of the plaintiff. The obligation of hospitals to comply with the decision has led many of them to financial difficulties and administrative inefficiency. Another debate that has been overshadow by the previous one, concerns the possibility granted by the *Tutela action* to low-hierarchy judges to overrule higher judges decisions, including those of the Supreme Court\textsuperscript{219}. This phenomenon known as *Tutela contra Sentencia* –*Tutela against judicial decisions*– occurs when a claim filed through a *Tutela action* attacks decisions taken by judicial authorities in violation of the fundamental right to due process. Since the *Tutela* can be file before any judge of the republic it may happen that

\textsuperscript{217} García, Villegas, M & Rodríguez, C. 2001. op. cit. pp. 423
\textsuperscript{218} García, Villegas, M & Rodríguez, C. 2001. op. cit. pp. 426-427
\textsuperscript{219} This phenomenon in Colombia has been called “tutela contra sentencia”.
a low hierarchy judge, who in that is the guard of the constitution, overrule the decision of a higher judge. Finally, I will focus in the function of the constitutional court in regards to the *tutela action*. Then I will draw some concluding remarks on the role/position played/occupied by constitutional review within the framework of popular legitimacy lay down by the 1991 Colombian Constitution.

The article 241 of the constitution states that the Constitutional Court safeguards the integrity and supremacy of the constitution. For so doing the same article enumerates 10 different functions, from which I will just focus in number 9, i.e. “Revise, in the form determined by the law, the judicial decisions connected with the protection of constitutional rights”. The court acts then as a “third court of appeal” in regards to the *Tutela* decisions previously taken by lower judges. The court has developed this function in two forms.

On the one hand, the procedure of *Revision* aims at unifying the decision-making criteria employed for the protection of fundamental rights in cases in which lower judges hold extreme divergent positions. This function is known in constitutional doctrine as *Unificación de Jurisprudencia* –Unification of precedent-. The Constitutional Court’s interpretations contained in decisions handed down by this procedure are not compelling for lower judges when deciding new *tutela actions*. However, they are widely incorporated by the whole judiciary taken into account the interpretative authority of the constitutional court in regards to the protection of constitutional rights.

On the other hand, the procedure of *Revision* also aims to revise particular decision as such. The constitutional court selects “cases in which lower judges may not able to see a violation of *fundamental rights*”\(^\text{220}\). Then, the Constitutional Court hands down a decision valid only for the particular case. However, the Constitutional Court is legally competent to advance “collective” revisions of *Tutela actions* -i.e. to aggregate individual claims for the protection of similar fundamental rights- in order to hand down decisions with general effects, i.e. ergo omens decision. Some have seen in this procedure the origin of constitutional activism and production of judicial public policy.

\(^{220}\) García, Villegas, M & Rodríguez, C. 2001. op. cit. pp. 434
Contrarily to Kelsen’s conception of Constitutional Courts as negative legislators and holding essentially a judicial function, the Colombian Constitutional Court is an active actor in the legal and political life of the country. The terms “judicialization” or “judicialization of politics”\(^{221}\) have been coined to express the combination of these two realms in the judicial function. The concept “judicialization” implies two different but complementary situations. On the one hand, there is the fact that justice-rendering authorities –especially judges and courts- are more frequently appeal concerning rights’ claims and conflicts in both public and private spheres\(^{222}\). On the other hand, judicialization also refers to the fact that the activity of decision making instances is intimately related with politics and policy-making\(^{223}\), moreover, that politics is being channeled through justice authorities.

The Colombian Constitutional Court can thus be included in this “judicialization” phenomenon. It has used judicial review as means not only to decide particular cases, but to advance the “social agenda of the constitution” and promote structural changes that eliminate permanent threats to fundamental rights. Examples of the latter are the decision of the Constitutional Court ordering a jail reform\(^{224}\), as well as the decision establishing a public policy for the attention of the forced displaced population. By focusing on the latter decision I will make some final remarks.

The displacement phenomenon in Colombia is one of the most dramatic humanitarian crises of the world today. The displaced population counts more than three million people and their poor living conditions in the big urban centers has been frequently neglected by the Colombian government. This situation started to change when more than 1150 displaced “family nucleus”, by making use of the *Tutela action*, claimed

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\(^{222}\) Hirschl, R. 2004. op. cit. pp. 100-125

\(^{223}\) Hirschl 2004. op .cit pp. 169-210

\(^{224}\) In the decision T-153/1998 the Constitutional Court intervene the jail situation in the country by establishing some parameters under which the government had to act in a specific time period to solve the imprisoned overpopulation. There are some similarities between the Colombian Constitutional Court decision on this issue with the judgment hand down by the American Supreme Court. Cf. Perry M, *The Constitution, The Courts and Human Rights. An Inquiry into Legitimacy of Policy Making by the Judiciary*. Yale University Press. Westford. 1982. pp.148
before different judges and jurisdictions all throughout the country the state violation of their fundamental rights constitutionally protected. Giving the raising number of claims, the inefficacy of lower-judges’ decisions and the contradictory solutions proposed by most of them, the Constitutional Court through the procedure of Revision took over the claims. Aiming at making a comprehensive and systematic analysis of state public policies, laws and social conditions of the displaced population in the country, the Court handed down decision T-025/2004 with *erga omens* effects.

The Constitutional decision did not merely disapprove the policy previously designed by the state as appropriate means for the protection of the displaced population fundamental rights, but it also created a frame for renewing governmental intervention. This decision also became guidance for lower courts and state agencies when interpreting the Constitutional fundamental rights of the displaced population.

The constitutional court after studying the cases, and in particular the situation of the displaced population, declared the *Estado de Cosas Inconstitucionales* -unconstitutional state of things-. This declaration means that some generalized and permanent social facts do not meet the minimum standards for the fulfillment –actualization- of peoples’ fundamental rights. Consequently, the Court, as the highest guardian of the constitution, is entitled to set some orders/guidelines, of compulsory implementation for all state organisms, in order to enhance the protection of fundamental rights. In brief this judicial institution, developed by the court itself, legitimizes its political intervention in public policy. An example of this intervention can be seen in the decision T-025/2004:

“In the present case, the Third Section of Revision of the Constitutional Court will give two types of orders. Orders of complex execution related to the unconstitutional state of things and directed to guarantee the rights of all the displaced population, even of those that haven’t filed a complaint. Such orders have as purpose that the organizations in charge of taking care of the displaced population establish, in a prudential term and inside of their orbit of competence the corrections that are necessary to overcome the problems of scarcity of resources and the inefficiency of state agencies to implement the state policy of attention to the displaced population.” (Judgments T-025/2004). On the other hand the Court also gave orders of
simple character “directed to respond concrete requests made by the plaintiffs.” (T – 025/04).

Certainly this decision falls under phenomena of judicialization widely documented by authors like Hirschl and Sweet who have shown that “the power of Constitutional-based judicial review has come to replace basic policy choices of the elected representatives of the people.”225 Thus, one may ask what makes special the constitutional review phenomenon Colombia.

I do argue that constitutional review in Colombia goes beyond the two main meanings of judicialization of politics. What I highlight to be of main importance in the Colombian system of constitutional review, and that contributes to advance my main claim regarding the recovery of popular sovereignty in Latin American neo constitutionalism, is not so much that judges are political actors, which indeed they are, or that there is a more frequent appeal to courts for the defense of constitutional rights, which is also true, but that it is intended to be an artifact that maintains popular sovereignty in the functioning of the state. Thus, I argue that direct and easy participation of people in constitutional review provides the illusion of direct democracy and thus of popular sovereignty over legal sovereignty.

In this way I also turn to my concluding remarks by contrasting the Colombian constitutional review with Kelsen’s claims on the nature and function of the constitutional courts. The distinction draw by Kelsen between constitutional courts and other courts emphasizes that the former were a type of negative legislator because they are entitled to invalidate norms of general application, while the latter only produce norms to concrete case226. This distinction does not seem to be valid for the Colombian constitutional review system. If it is true that only the constitutional court can invalidate norms of general application, any judge of the republic is entitled to drop the application of a law considered against the constitution. Moreover, any judge has the active guard of the constitution due to the general competence granted by the Tutela action. Finally

226 Kelsen 1930-31. op. cit. pp. 589-591
the Colombian Constitutional Court does not only invalidate norms of general application, but it does enact them.

Kelsen also remarked that the main function of constitutional courts is to guard “constitutional” legality within a legal system. However, I claim that the function of the constitutional review in Colombia is intended to go further than that. With the introduction of the constitutional actions for the actualization of fundamental rights, constitutional review becomes more than an instrument of legality; it becomes a means for achieving popular legitimacy of the state. The direct access of any citizen to constitutional actions, and in particular to the *Tutela action*, endows the institution of the judicial system with the apparent function of promoting direct democracy. The fact that the “constitutional judges” protect not only “negative liberty rights” but also positive rights -housing, work, social security, etc- increases the legitimizing potential of constitutional review. In spite of the fact that the Colombian system of constitutional review may unveil the incompetence or incapacities of the executive and legislative branch in fulfilling citizen’s rights, which in a presidential democracy can be of considerable importance, it gives the overall image that the state legal and political system as a whole provides the means for the attainment of the common well being. In this way, Constitutional review surpasses its mere function of guardian of legality and becomes a legitimizing institution grounded in popular participation.

The outstanding role of constitutional judges in the Colombian legal system can lead, as I showed before, to the claim that constitutional review has the unstated role of endowing the functioning of the state with popular legitimacy. However, one must distinguish between the sociological and philosophical dimensions of that claim. I do agree that constitutional review may increase the positive popular perception of the legal and political systems through what I have called “the illusion” of direct democracy. This sociological fact however does not necessarily coincide with the claim that the functioning of the state itself is grounded in popular sovereignty.

The judiciary has held a political role along history that varies in strength according to particular circumstances of time and place. Nonetheless, the active protection of fundamental rights by constitutional judges cannot be taken to be the necessary consequence of political systems rooted in popular sovereignty. For example, in the
America of Tocqueville, which some supporters of The Project see as the origin and accomplishment of the confusion between legality and legitimacy as well as of democracy and representative government\(^{227}\), the judiciary had a remarkable political intervention. However, Tocqueville showed that the great political power of the American judiciary was rooted in the constitution predominance within the legal system\(^{228}\). He argued that, although judges in America met the main characteristics of general judicial power -i.e. referee in conflict resolution, decide particular and not general cases, and to act upon demand\(^{229}\)- they were also granted with political power by their position within a system in which the constitution rules all the actors in society, including the three state powers\(^{230}\). Yet, the defenders of popular sovereignty may argued that in political and legal systems in which the constitution is instituted by the original constituent power, the political intervention of constitutional judges is justified because they guarantee the primacy of people’s original will- the constitution. In that sense constitutional review is not a control of legality but of popular sovereignty.

I approach this objection by one sociological and two philosophical –or rather political- arguments. First, one must be careful to attribute an absolute progressive role to courts regarding rights protection of underprivileged or marginalized populations. Hirschl\(^{231}\) rightly remarks that the judicial function can also serve as an instrument of economic and political elites to reinforce their domination. Second, constitutional court’s popular legitimacy to interpret the original will of the constituent in the light of the ever changing circumstances may be questionable if we take into account that its members are not popularly elected. Thus one may ask, as Schmitt did, if the president, or I say, other popularly elected institutions, would not be more legitimate guardians of the constitution\(^{232}\). Finally, I argue that the main function of this type of constitutional review is not to overcome the accused modern supremacy of legal sovereignty, but essentially, to try to recover the hope in the modern project regardless the type of legitimacy it may convey.

\(^{227}\) Noguera 2008. op. cit. pp. 8-9  
\(^{228}\) Tocqueville, 1981. op. cit. I-1-6  
\(^{229}\) Tocqueville 1981. op.cit. I-1- 4  
\(^{230}\) Tocqueville 1981. op. cit. pp. I-1-4  
\(^{231}\) Hirschl 2004. op. cit. pp. 38-64  
\(^{232}\) This idea can also be expressed in terms of the tension between electoral democracy and judicial law-making that has been discussed for long time in United States.
E. Concluding Remarks on Popular Legitimacy and Modernity

Since I have provided already some conclusion at the end of each section I will just make some concrete final remarks.

Latin American Neo-constitutionalism advocates for constitutions build upon original constituent powers, i.e. the people. The Colombian 1991 constitution took the first step by establishing a National Assembly with wide representation of society and whose members were popularly elected. However, the re-foundational project wanted to go beyond. They wanted to re-found the state through new constitutions as means for achieving popular sovereignty over legal sovereignty. This claim is based on a technical argument that downplays the substantive qualities of a constitutional foundation of the state. The project claim that it is possible to re-found the state on popular basis if it is done through a real original constituent power, in opposition to a derivate power. They claim that only an original constituent power makes a real constitution. Consequently they argue that a constitutional text issued from a derivative power has the same nature that the law, because they are both subjected to legality rather than to popular sovereignty.

This claim however downplays the more general difference pointed out by Bolingbroke, between government by constitution and government by will. The former, characteristic of the Rechtsstaat, is that in which a “constitution” originated in general will, contains a system of rules that is always and at all times valid. The latter is a system of actuality, it rules what occurs at a given time, and thus, is essentially changeable. Certainly The Project aimed at establishing a long lasting constitution that rules long in time. The fact that the people through referendum approves the constitutional text drafted by a popularly elected assembly, does certainly guarantee a more inclusive state than the post-colonial states. However, the goal remains the same. The establishment of a constitutional text -this time approved by the people- that subjects political authority to legality, to the respect of the constitution superiority within the legal order. Moreover, the claim that constitutions contain people’s will becomes problematic when it has to be interpreted and applied. Then, the guardian of the constitution, the Constitutional Court actualizes people’s will, contained in the constitution, in the light of the new social circumstances. Here, as it was mentioned before, we raised the question if the president or other popularly elected institutions would not be more legitimate guardians of the
constitution. I do not pretend to revive Schmitt’s radicalism, but if The Project aims at
establishing the absolute sovereignty of people’s will—in opposition to the law- and an
alternative to liberal modernity it seems more coherent to assume Schmitt’s proposal
and to return to a government of will in which the president incarnates people
homogenous spirit. However, that will not be a government by constitution but a
government by will.

Although as I will develop in my final remarks in the next section, Schmitt’s proposal
also falls short in overcoming “modernity”, he has some interesting point that may show
the inconsistency of the re-foundational project. Schmitt diagnoses a sort of liberal false
consciousness whereby statues guarantee justice and freedom, while what they actually
do is to cast off the right to resistance: “only through the acceptance of these pairings
[law and statue, justice and legality, substance and process] was it possible to
subordinate oneself to the rule of law precisely in the name of freedom, remove the right
to resistance from the catalogue of liberty rights, and grant to the statue the previously
noted unconditional priority.”

Even if constitutions are the result of people’s will, their application becomes part of the legal system, and thus, a “statue”. It becomes a
statue as far as it rules the system from above and claims to contain the essential norms
of that society. It claims to be source of justice when the institutional arrangements and
principles it has established are generally respected, i.e. when the legal order as a whole
is effective.

Finally, the supporters of The Project also argued against the traditional separation of
powers. They claim that the division of powers in the modern state is an inside system
of checks and balances among the three branches but detached from the people. They
see this phenomenon not only as part of the confusion of legality and legitimacy, but of
democracy and representative government. Consequently, they argue that the system of
checks and balances takes the sovereignty away from citizens –legitimacy- by
subjecting institutional disputes to the sovereignty of the law -legality. Thus they claim
that the establishment of the Electoral Power, inspired in the institution of the Bolivar
Electoral Power, and this in the Roman Tribunat retaken by Rousseau, would bring

233 Schmitt 2004. op. cit. pp. 22
234 In this sense and regardless Kelsen’s calim of formal validity of norms, I do agree with him when he
claims that the validity of the legal system as a whole lies in its general effectively.
political control back to people. However, the supporters of the re-foundational project seem to neglect that Rousseau’s entrusted to the law, as the expression of common will, the regulation of the Tribunat. Similarly, the Electoral Power in Venezuela is subjected to legality because it must comply with the laws enacted by the parliament, the decision hand down by the courts, the decrees issue by the executive, etc. It makes part of the political system under the rule of law, and thus has to comply with the system of legality laid down by the Constitution. Moreover, the Electoral Power itself, contrarily to the 1826 Bolivian constitution, is a representative organ with very low representative coefficient, because the Consejo Nacional Electoral is composed only by 5 elected members. Hence, the Electoral Power proposal does not constitute a real objection to the subjection of legitimacy to legality or to the confusion of democracy with representative government. Contrarily it is rooted in the same logic. On the one hand, Rousseau himself says that the tribunat is the guardian of the law and the legislative power, while on the other hand, its competences and periods of session are to be defined strictly by the law.

I will approach in the next section the final remarks of the dissertation in which basically I will hold that the political philosophy underlying the ideology of popular participation in the new Latin American constitutions is that of modernity. I will show that what characterizes modern political thought is not popular or legal sovereignty, but the radical break with a comprehensive metaphysical conception of political power. What comes to be dominant after this break is the rejection of natural right and the belief in a posited concept of justice, common good, etc. Strauss remembers us that the reject to natural right “is tantamount to saying that all right is positive right, and this means that what is right is determined exclusively by the legislators and the courts of the various countries.” I will complement his general idea by adding, by the people’s will.

235 Cf. Bolivar, S. Mensaje al Congreso, quoted in: Catalano. P. Conceptos y principios del Derecho Público Romano, de Rousseau a Bolívar, In: Constitucionalismo Latino I, Istituto Universitario di Studi Europei, Torino, 1991, pp. 35-59. Bolivar wanted to go beyond the 100-1 proportion proposed by the Bolivian Constitution, he wanted the electoral power to have 1 person very 10 electors.
236 Rousseau 1976. op. cit. IV-5. pp. 394
237 Rousseau 1976. op. cit. IV-5. pp. 397
238 Strauss 1965. op .cit. pp. 2
**Final Remarks. Reviving the Faith in the Modern Project**

The epistemological underpinning of the methodological approach proposed by this dissertation, a combination between theory (history of political and legal thought) and practice (Latin American Neo-Constitutionalism), is the claim that the crisis of the modern state is a crisis of its underlying political and legal philosophy. Indeed, I have presented the transition from ancient to modern political and the legal thought by making a great emphasis on the break of modern philosophy with the classic tradition of natural law and the metaphysical conception of political power. Then, I have dug deep into modern political and legal thought to understand the “alternative” proposed by the Latin American neo-constitutionalist movement, and especially the re-foundational ambition of the *Bolivarian Revolution*. They claim to propose an alternative to modern liberal democracy that throughout my analysis I could not find. However, I did found the ideological claim through which, I argue, they pretend to revive the faith in the ideas of modern political and legal thought. They aim at overcoming the crisis of the modern state by denigrating on the modern ideas that have allegedly driven the state to crisis, while highlighting the modern ideas that promised to lead to emancipation.

After the presentation of the concepts of legality and legitimacy throughout the dissertation it goes by itself the absurdity of the arguments hold by the supporters of the re-foundation project. They claim to provide an alternative to modernity by recovering popular sovereignty and democracy to the detriment of legal sovereignty and representative government. However, we have seen that the concepts of popular sovereignty (legitimacy) and legal sovereignty (legality) become only distinguishable with the emergence of modernity. It is the emergence of modern political thought that by cutting the classic link between metaphysics and politics, and thus, between classic natural law and social order, compels modern philosophy to search new foundations for political and legal authority. It is only from then that the concept of legitimacy, as the desirable attribute of government, and legality as the desirable attribute of the legal system ruling the social order, come into existence and can be confused.

Hence, the supporters of the re-foundation project disregard that the modern political emancipatory project is precisely directed towards the consolidation of democracy and positive law as sources of political and legal authority respectively. This is faithfully
proved by the modern tasks of abolishing religion as the source of legal authority, and consequently, aristocracy or monarchy as the form of government.

Regarding the three realms -i.e. foundation, structure and functioning- of the Latin American States studied in the light of the history of political and legal thought I conclude the following:

The foundation of the state in popular sovereignty is a generalized and accepted idea among modern liberal theorists. All contractualist authors who share the same assumption of man’s natural freedom agree that the origin of political power is only legitimate if it is made upon men’s consent. Thus the claim of the supporters of the re-foundation project to anchor the pillars of the state in popular legitimacy is in accordance with the modern liberal tradition. It has the assumption that equality and freedom most underpin the construction of the political structure that will govern men in social life.

Regarding the structure and functioning of the state I must concede that modern political philosophy provides different institutional settings in which popular sovereignty is more or less dominant over legal sovereignty. However, I want to remark that the supporters of the re-foundation project show appreciation for Rousseau, but not for Locke, because they consider the latter to have taken sovereignty away from the people and deposited into the law. Once again they are mistaken. Rousseau claimed that popular sovereignty invested in the law should run the political. He is a theoretician of the confusion between legality and legitimacy, because he subjects political power to law, when the latter is the direct expression of people’s will. Hence I argue that both Rousseau and Locke are theorists of the Rechtsstaat. The former sets the popular groundings for the supremacy of the law. The latter, establishes the division of powers as means for guaranteeing respect to the mandates of the law. Although in different ways, both Rousseau and Locke subject political power to the law, i.e. in both of them sovereignty is a legal concept. Moreover, in the Rechtsstaat the political authority is subjected to the “presumption of the rationality” of the legislator, and thus it seems that it is people’s reason rather than to people’s will that govern. In contrast, Hobbes and Schmitt hold a political concept of sovereignty. They do not conceive of the political
authority to be subjected to law. The sovereign is outside the legal system because he embodies peoples’ will, and thus it is him who transfers legitimacy to law.

Hence, I argue that as a consequence of the transition from the metaphysical conception of government to the mere earthly political conception of government, the concept of sovereignty has acquired two different underpinnings. On the one hand, and following the tradition of the theorist of the Rechtsstaat, sovereignty is a legal concept that transmits legitimacy from law to the political power. On the other hand, inspired mainly in Hobbes, sovereignty is a political concept that transmits legitimacy from the political authority to the law. If the political project aims at placing the sovereign outside the law, they should opt for following Hobbes or Schmitt rather than Rousseau.

However, following Schmitt would neither guarantee to the defenders of the re-foundation project to be able to provide an alternative to modern political ideas. Although certainly Schmitt argued against some of the very core ideas of liberalism, Strauss has remarkably noticed the limitation of Schmitt’s criticism to liberal modernity because, precisely, he seems to have followed some of Hobbes teachings. He shows that Schmitt political theology goes back to the very core and origin of modern liberalism, i.e. to Hobbes’ concept of the state of nature. According to him, Schmitt undertakes the attack of liberalism from inside, because he takes for granted the origins of man in civil society, when he reproduces the state of nature in his description of contemporary politics. When Hobbes describes the status naturalis as merely the status belli, Strauss²³⁹ argue that, this in Schmitt’s ideas, means that the status naturalis is the genuine political status. Hence while for Hobbes the nature of war consists not in actual conflict but in the “knowing disposition thereto”, so for Schmitt the political lies not in fighting itself but by a behavior that is determined by this possibility.

Finally, the state’s modern institutional arrangements whether inspired in the Rechstaat model or not, is characterized by the supremacy of positive right. Indeed we have pointed out that in the modern setting of the state, the sovereign, either inside or outside the legal system, has the authority to posit the law, and thus, to define what is right, just,

equal, etc. This feature of modernity is undoubtedly inherited from nominalism. It was
the grounds on which the modern emancipatory project rejected the classic
metaphysically order governed by natural ends. Consequently, modern philosophy
claimed to man the center of action. Once again we see the limitation of the *re-
foundation project* in providing an alternative to political modernity. It goes by itself
that the idea of recovering to man the center of power (popular sovereignty) so he can
define his organization and future, is the most deep claim of the modern ideal of
emancipation.

Finally, I agree with Villey\(^240\) when he criticizes our modern spirit because we have
dwelt in this modern conception of law and politics in spite of having strongly contested
the philosophical enterprises underpinning their most central concepts. Although we
think of Hobbes, Locke, Rousseau, etc. as philosopher with great historical value but
insufficient width for a comprehensive explanation of today social life, we continue to
reproduce in the legal and political fields concepts deeply anchored in modern
philosophy. Our theories of law and the state have poorly questioned the centrality
occupied by the concepts of absolute sovereignty, absolute property, subjective rights,
assimilation of *loi* and *droit*, etc.

Thus, it seems that the claim of re-founding the state beyond modernity has fallen short.
They have misjudge political modernity and have failed to notice that what
characterizes modernity is the break with the classic tradition of natural right and the
metaphysical conception of politics, rather than the confusion of popular sovereignty
with legal sovereignty. I do not argue against liberal democracy, which has been greatly
renewed by authors like Rawls, but against the misunderstandings of the modern-liberal
tradition.

Hence, I do not think the re-foundational project is directed against modernity but it is
essentially a way of recovering the faith in the modern ideals. Its claims attempt to blur
our political and legal notions to make undistinguishable what we approve and
disapprove of liberal modernity. Its attacks to modern liberal ideals have to be
interpreted as an ideological artifact that seeks the disapproval of our tired imaginary

\(^{240}\) Villey, M. 2006. op. cit. pp. 182
idea of modernity in order trust in the “new ones”. In that way it actually attempts to recover our faith in the overall modern project. The re-foundation project is thus not a renewal of the political and legal though underlying the modern state, but a new ideological artifact of modern thought aiming to recover the faith in itself.
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