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**A THEORY OF POLITICAL POWER AND RIGHTS:  
A SECRET EXCHANGE FOR LEGITIMACY**

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*To my Parents, Mahboob and Mohsen*

## **Preface**

Perhaps the sentiments contained in the following pages are already fashionable in our time, but it is the arguments within that seek to procure the more general favor. The habit of not thinking a thing is wrong, may give it the superficial appearance of being right. What will be criticized in the following pages has been defended by some, but tumult cannot last forever; against it stands time along with reason; conversion is the inevitable character of time.

As violent abuse of power generally results in calling the right to power into question, and as the authoritarian and totalitarian (antidemocrat)- rulers and regimes have undertaken in their own rights, to support their own authorities, parliaments or Majleses, legal apparatuses, and their own concept of laws, and as the good people of this world are grievously oppressed by the combination of these, the people have an undoubted right to inquire into the pretensions of all part of these regimes, and equally to reject the usurpations of them and their offices.

In the following pages, I tediously avoided distractions to the aim of examining the matter of - normative - legitimacy of power and the instruments of power. The work is strongly committed to the importance of finding a successful way to distinguish the characteristics of the political. Compliments as well as censure, and any prejudice to any part of the process in which power is born, thrives, and dies, makes no part thereof. The purpose is to see a linear political-historical path where – theoretically - power is redefined and reborn and where – pragmatically - power uses different instruments to justify and legitimize itself in different social-political grounds, e.g. in the ancient Athenian city-state, in the medieval Islamic age, and in the modern constitutional democracy i.e. republic. Hence, the present work inaugurates a research program in which I exemplified and investigated the transformation of power that has taken centuries and is still evolving.

The genesis of this work is indebted to the idea of a better life with better politics, and it is bestowed on humanity, not by abolishing cushion, but by encouraging motility. This work is mothered by pedagogical necessity and it emphasizes the study of power and rights. The wise and the worthy need not the triumph of this work; and those whose sentiments are injudicious or unfriendly. The limitations are unlimitedly various. Some readers may detect differences in the pace and tonicity of the exposition, but I gladly share my enthusiasm with others. Some may find the following sheets betray a plodding, unaccented quality that loses both the intonation of author's personality and the inner tensions appropriate to the magnitude and dignity of the undertaking. The work, in fact, aims not to sound pedestrian, but to share the aura of the man, of the author. Thus, I beg for a favor of the reader not to abound the entire work by the early judgment based on a few particular phrases, for understanding the design of the work cannot be done completely except by going through the whole of it. Here, the truth will not appear until we have seen the chain that connects the parts. Moreover, the diverse terminology that I used conceals no fundamental difference of approach; the persuasion of values for granted left the details for future discussion.

The origin of this work is raised by too much pains on mankind which have been rained upon them (and in matters too which might never have been thought of, had not the sufferers been aggravated into the inquiry,) by the only and simple but important factor of social-political life:

power.

The cause of legitimate power is, in great measure, the cause of all people's life as political beings. The more we dive into each part of this work, the more we see the certainty of the principles on which this work is founded. Many circumstances vital to the argument are neither local nor historical, but are, in fact, universal, and through which the principles of all lovers of humankind are affected, and in the event of which, not only their affections but also their reason are interested. The laying of a regime that desolates with fire and sword, with the oppressive divine laws, and with the a brutal and despotic concept of legality, is at war with the natural rights of humankind. As long as usurpation of power and ignorance of the people's right are the case, and extirpating the defenders of rights from the face of the earth is the concern of every person to whom nature has given power, the present study is not a choice but a duty.

The AUTHOR. - Berlin, March 27, 2016.

## **Acknowledgment**

To carry out such a duty, I am confined with the small world of words but sincerely want to express enormous gratitude to the mother and supervisor of this work- *Doktormutter*- Prof. Dr. Anne Eusterschulte. She helped me through every step along this way. She offered countless suggestions and comments and helped me improve the final product, and steadied my personal equilibrium. Her support and tact made the impossible the possible. I also thank Dr. Günter Frank who helped me patiently in the early incarnation of this work and Prof. Dr. Henning Hahn who is the second advisor of this work. His friendly and helpful manner always helped me to overcome the challenges. In the last phases of my Ph.D. candidateship, he was like a guardian Angel. I thank the members of colloquium of philosophy department and Otto-Suhr-institute at the Free University of Berlin; Dahlem Research School; the working groups at Konrad-Adenauer-Foundation; and the participants in the many conference panels at which I presented my work. I also appreciate the hospitality of Postgraduate Center of University of Vienna during my two-semester-stay in Vienna. Moreover; I am indebted to Prof. Dr. Mark Haugaard. I have benefited greatly from his comment on the parts of chapter one of this work. I was also fortunate to receive helpful comments on the chapter two of this work from Prof. Dr. h.c. Christian Joerges.

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Ultimately, my greatest debt is to my family and friends who supplied unflagging confidence. I wouldn't be anywhere without my parents, Mohsen and Mahboob. I am grateful and humbled when I think about all that I owe them and so appreciative of their love and support. I also thank my little sister, Mina Shokri. They bestowed me their love unconditionally. I received important moral and academic support from my close friend while writing this book, Nathan Delaney. I thank him sincerely. I also thank my friends, Kate Dearden, Angelica Taylor, and Kibbs Felicitas. They were important to my ability to complete the final revision of the work. Finally, I thank my partner, Yana. M. Handzhieva, who supplied bottomless reservoirs of good humor and love. She made many accommodations, large and small, so that I could get my work done. For this, she has my profound gratitude.

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## Introduction

Political power – *Macht* <sup>1</sup> is so absorbed in our lives that we may think little or nothing at all about it; nevertheless, it is the most important element in our society, of our intellectual inquiry and to this work. So what do we know about political power? Political power has gone through a long historical and informative process. Sometimes it has appeared as charismatic figures and virtuous men, and other times it is in the hands of a united community. While sometimes it is deified and worshiped, other times it is defied and torn from any attention. It is presented in different forms, in a web of intricate ethical, historical, and juristic interpretations, in scholastic apologies, in political and psychological explanations, and in the scientific and legal justifications. Sometimes political power is bound to shrewd principles and a logical spirit, respecting love and life, and other times it is attached to the great Leviathan, cunningly upholding the arrogance of authority. Indeed, political power is Janus-Faced.

The amount of books and masses of answers, as well as the transformations in the concept of power, seem infinite. I write now in the same city that the wall of power broke down into pieces several times, the city in which Hitler and Churchill marched; the city once had the army, and once the army had the city; the capital city of the fight between the West and the East, between democrats and anti-democrats: Berlin. Though, I have been thinking about the ideas in this work at least since I was an undergraduate student and I have been long fascinated by the politics, power, and rights. I started working on these ideas eight years after the initial thoughts. In Berlin I began this work on the theory of power and its legitimacy; I feel that we are in the middle of a new furious struggle for the possession of not only power and symbols, like in the old times, but for its justification and legitimacy - justification and legitimacy still constitute its two central political issues. Standing in such a critical time and among the works which have tackled these central issues, it is not my aim to admirably repeat or to stubbornly refute any of these prior conclusions of the masters of political dialectics. Having acquainted myself with different worlds and ideologies of power, and acknowledging with respect such thinkers, I aim to set forth in the following pages what I have found about political power during my years of reading, observation and experience. I do this with the acknowledgement that no one can be wholly impartial and detached from unlimited elements in time and place. The hope, however, is that the following pages will be relatively objective for a democratic and legitimate environment of the twenty-first century in the Western world, as well as a provocative idea for others.

I shall not be concerned with the question of whether power, as Plato and Aristotle elaborated, is the pure, natural knowledge of the few “blue-bloods”, or it is, as Farabi implied, a divine secret knowledge of prophet and priests; nor shall I address whether power, as some have inferred from Machiavelli, is essentially immoral, or if it must have a pure moral basis, as declared by Rousseau, or whether power is the irresistible and al-mighty Leviathan, as

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<sup>1</sup> The German equivalent for power.

Thomas Hobbes, John Austin and Carl Schmitt constructed or finally, whether the state should do much, very little, or nothing at all.

My purpose is to elaborate a theory of political power and right to set forth what elements and instruments political power has which make it justified or legitimate. To do so, it is necessary to appeal to certain standards of justification that transcend from a social situated form of empowerment and narrative. The discussion will include perhaps more realism than is usual than with those who relentlessly but shallowly seek to attack or defend some form or phase of a specific government, political action, or decision. I shall try to show how power was regarded historically and how it has been born again and again - the morbidity and mortality of it, as well as the plurality of competing royalties, the credenda, the miranda and the agenda of authority. I will also look at some of the instruments that help power survive, and some other instruments that can cause it crippling afflictions. I shall show why power cannot obtain immunity, how it declines and overthrows authority - the emerging trend of power in our time.

Given the enormous volumes that have been written on the nature of political power, one may well ask, "what is left unsaid?" The answer is the time in accordance with the nature of state; that the nature of power must be reconsidered from time to time in light of trends in social organization and how the human intellect relates to it. The great masses of new material produced in the fields of Economics, Anthropology, History, Politics, Jurisprudence and Sociology, written in the recent years, demonstrates not only the quantity but also the quality by which those who are concerned with political authority have been challenged. Furthermore, institutional and social changes of great meaning are also occurring under the influence of a long list of trends. The family, religion, school, Economics, and Psychology are undergoing profound modification, and are thus affecting the basis of political power. The manifestation of the will of society, in a collective sense, is what compels reconsideration of earlier conclusions reached in light of less adequate data on the role and nature of power.

Here, it may be asked, "what is 'political power', or more accurately, what is 'legitimate political power'?" From the outset, is the concept so broad and vague that there is no definite observation or conclusion that emerges from the most urgent, persistence and acute inquiry?<sup>2</sup>

Where a general definition of political power would be profitable for its role in the established state, the instruments of political power in the domain of social relations, as well as the potentiality of its manipulation can also be questioned.

Indeed, political power is Janus-Faced. Political power is both magnetic and repercussive, restrictive and liberating. The fortune or misery of power is in organized command and control. We may not be able to fully define or escape this power, and the common sense manifestation of it is on every hand. Political Power does not lie in guns, ships, stone walls and nuclear bombs. In fact, political power lies in the definite common patter of impulse and logics. Political power is both dominating and empowering capacity which implies its own critique. If soldiers choose not to fight or the people connive at the disobedience of laws, or if those in office make outlaw laws even a virtue, then the authority is impotent and doomed to vanish. Power is a complex social pattern, lurking somewhere behind its material defences, both in habit and consciousness, woven deeply in the nature and lives of men. To rationalize this

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<sup>2</sup> Merriam, *History of the Theory of Sovereignty since Rousseau*, (New York: Columbia University Press, 1900).

mystery of command, corporation, coordination and legality, many of the world's sharpest minds have devoted their intelligence.

How often have the noises and screeches over the definition of power caused us to forget the essence of authority in the battle for its competing justification and its welcoming manifestation of legitimacy? How and which Justification and legitimacy of political power are closely affiliated to the social interests, historical evolutions, and rational evaluations? How often do we think about distinguishing political power from the concepts of justification and its instruments in social situations? How often do we think about the instruments used by the authority exercised by the kings, the churches, the chambers of commerce and, the unions? What is the difference between the ecclesiastical justification of power and political justifications of power?

The truth is that, although this confusion challenges us, it also helps us to create a sharp and clean definition of power, an assessment of the instruments of power that would overcome the shade-overs, and it helps us to better understand the justification and legitimacy of different forms of authorities. Divine law, natural law, governmental principles, the miranda and credenda of power, and legal principles, all have their unique characteristic which forms different instruments of power. Yet, a clearer definition would only highlight the similarity and differences between them. Their parallelism and the interchangeability of their functions will show us how power transforms in itself, and how it thrives for justification. Indeed, if this were not so, the world would be far simpler, yet more difficult to govern.

To carry out the duty that I named and to know how are we to distinguish between normatively benign or beneficial and normatively problematic and objectionable relations of the concepts of power, whether they are relations of power-over, power-to, or power-with; we have to investigate on the legitimate political power. So the structure of the work comes as follow. The part one of chapter one of the present work introduces the core theories which will be assessed through the work. Hence, the distinguishing piece of this inquiry is chapter three. In chapters one and three, I investigate on the concept of right and the concept of power, as the two interrelated elements to form different levels of justification and legitimacy and, more importantly, as the indicator of political obligations. For, an authority that declines to respect the right of people has a deficit of "sovereignty". But this does not mean that there do not exist marks of distinction between the political power and political rights. In fact, if it were not so, the inquiry into justification and legitimacy of power would be far more difficult or even impossible. The two integrated concepts of political power, power and rights, are usually observable in the nature of regimes, in the practice of power, and in the consciousness of the common will, as it is cumulatively effective as a characteristic of power marks. For, a legitimate sovereign that respects the rights of people, obligates people to obey the law. These two concepts of power and rights are more readily interchangeable than is often assumed.

In chapter one and three, I will argue that the justification and legitimacy of political power also have a generality of purpose which is the sovereignty. A sovereign state that forms a defense against internal and external forces may not fall to any other. States use political agencies to do this job, along with the preservation of some form of external order and practical justice by which the general notion of "state and society" is set. This general framework may vary from one society to another, from one justified power to another, but the special significance of sovereignty, as the closest element to political power is less subject to change.

Whether the origin of power is confounded with power or not, is the question at the core of this inquiry – this is the question of the relationship between political power and political rights. The critique of the work is clear: what are the elements that reveal the concepts of power: power as a practice of domination and as a practice of emancipation. Generally, state and society are both the same and are not the same. They are the same in terms of the legitimate power structure, since power resides in the political rights of the people and since the concept of order, justice, leadership, responsibility, trusteeship, cooperation, coordination, and of legality are rooted deeply in the inner lives of individuals and associations of individuals, in the society which thrives only with its political consciousness. Yet, state and society are not the same since society is produced by our wants, and state by our wickedness; the former promotes our happiness positively by uniting our affections, and the latter does so negatively, by restraining our vices. The one encourages discourse, and the other creates distinctions. While the first is a libertarian patron, the last an authority and a punisher. However, as I argued the instrument of power in chapter two, the fact that true legitimate political power resides in both society and the elected government is a blessing, and is essential to the fullest and richest development of the individual life and the inquiry of the modern political soul. Whether it is the competing interests of individuals in the society or competing elements between different social forms and institutions, the significance of a central integrating concepts of power and rights become more apparent. The possibilities of a regulator between good or evil, of justified or unjustified, and of legitimate or illegitimate also take on a deeper meaning.

Thus, political power differs not only based on the general terms of its justification and legitimacy, but also by its regulation of conducts, and by the instruments of power which all of them together comprise a polygon of political power.

### **The structure of this work**

This work, as a general study on the legitimacy of power, in general, is divided to three chapter and chronological number of parts. The division of chapters indicates the main or general idea in each chapter. Chapter one is about power, chapter two is about instruments of power, and chapter three is final remarks, which serves as a chapter to present and address some critiques. Chapter three also is the conclusion of this work on the concepts of power and rights.

To give more details and to point out some hall marks of each chapter: in the chapter one of this work, I investigate on the concepts of power and rights. I move on to indicate the general characteristic of authoritarian and totalitarian regimes, both in the ancient classic material and in the modern political arena. This chapter is dedicated to the study of dictatorship and the concept of monopoly of force. In chapter two, where I study the instrument of power, I focus on admiration, belief and legality. Indeed, authorities utilize many instruments, but the present studies are restricted to investigate the instruments which are related to the concept of justification and legitimacy. Thus, in chapter two, two important instruments of power, admiration and belief, or the miranda and credenda of power are assessed. The other important instrument of power, i.e. the prevailing instrument of modern powers, is the concept of legality. So I investigate to find the legitimacy of legal systems.

It is a modern competing element of justification of political powers by which one survives while the other one dies. There is in “legality” a symbolic value and norm of high importance which can help the justification of an authority or destroy the notion of social relations. Today,

it is assumed that to be legal for a state's power is to bear a proud banner that rallies to its support in a great number of almost all modern communities. On the contrary, to be "illegal" for a state's power is to deter any kind of support. This is why powers assume that legality is always merged with the crown of victory. To be more specific on the relation between the legality and justification/legitimacy, the legal system of the Weimar Republic of Germany, and the debates between the legal theorists of this period of time, are taken as an example.

It is in chapter three that I conclude the discussion of power, rights, and legality. It is a brief conclusion that summarizes the arguments, critique and findings of the previous chapters and addresses whether the presence of the concept of power in a political system renders these regimes "more legitimate."

### **Some words with the readers of this work**

Although growing at a fast pace, contemporary scholarship on power has so far generated only a fragmented understanding of authoritarian/totalitarian, or in contrary, legitimate regimes. In most cases, as it is common in political science, the power of regimes is examined individually, in isolation. In turn, we lack a unified theoretical framework that would help us to identify key elements in legitimacy of power. This work attempts to fill that void.

The aim of this work is to contribute to the modern political theory, to evaluate the legitimacy of a regime and its instruments of power according to the theory of the 'integrated concept of power and rights' and 'political consciousness' and to see how power is legitimized or has deficit legitimacy. In brief, the central claim of this book is this: key features of the legitimacy of a regime – including its appearance, its institutions, its policies, and its legal system - as well as the survival of leaders and regimes – are shaped by the balance of the twin concepts of power and rights in a political spectrum. In the chapters that follow, I develop theoretical arguments that elaborate on and qualify this claim, and I present empirical examples that supports it.

Moreover, the argument in these pages does not profess a brand new synthesis of power woven from the standard facts and reflections of our time. Such a task may be reserved for another occasion. Here, I wish to touch on the neglected characteristics and concepts of political power that clearly emerge in the evaluation process of its instruments and their effects. I also do not intend to alter existing terms or to add glittering vocabulary. I trust that none of the followers of the heavenly-sent figures, Plato, Aristotle, Farabi, Rawls, Machiavelli, Locke, Bodin, Hobbes, Merriam, and Steinberger, who may cast their eyes upon the following lines will consider the use of my own poor patois as evidence of intentional disrespect or of stubborn ignorance to any other student of power, government or society. The critiques which are presented are not the fundamental heresy of traditional interpretations, but add new emphasis on a age-old problem in politics.

To those who merely care about finalities, the following lines and the work in general, will be nothing but loose and momentary. But to those who deal with stability along with the revolution of knowledge, to those who are generally looking for the increment of truth along with facts and experience, this work may have value as a hypothesis if not as a conclusion.

In any case, it is evident that in the new world towards which we are madly rushing, nothing is more important to our social and political lives than understanding political power, its

instruments, and its nature. Furthermore, no task is more urgent than the mastery of concepts that bring light or darkness, heaven or hell, to individuals, civilization and to all of us.

## **Chapter One: Dissolution of Power and Rights: Authoritarian and Totalitarian Regimes**

**Part One: Legitimate Political Power**  
**Essentially Integrated Concept and Theory of Political Consciousness**

## OF THE TERRIBLE DOUBT OF APPEARANCES

Of the terrible doubt of appearances,  
Of the uncertainty after all, that we may be deluded,  
That may-be reliance and hope are but speculations after all,  
That may-be identity beyond the grave is a beautiful fable only,  
May-be the things I perceive, the animals, plants, men, hills, shining  
and flowing waters,  
The skies of day and night, colors, densities, forms, may-be these are (as  
doubtless they are) only apparitions, and the real something has yet  
to be known,  
(How often they dart out of themselves as if to confound me and mock me!  
How often I think neither I know, nor any man knows, aught of them,)  
May-be seeming to me what they are (as doubtless they indeed but  
seem) as from my present point of view, and might prove (as of  
course they would) nought of what they appear, or nought anyhow,  
from entirely changed points of view;  
To me these and the like of these are curiously answer'd by my lovers,  
my dear friends,  
When he whom I love travels with me or sits a long while holding me  
by the hand,  
When the subtle air, the impalpable, the sense that words and reason  
hold not, surround us and pervade us,  
Then I am charged with untold and untellable wisdom, I am silent, I  
require nothing further,  
I cannot answer the question of appearances or that of identity beyond  
the grave,  
But I walk or sit indifferent, I am satisfied,  
He ahold of my hand has completely satisfied me.

- Walt Whitman, *Leaves of Grass*, 1860.

## 1. Conceptualization: Essentially Integrated vs. Essentially Contested Concepts

Political power is all around us, visible and invisible. It is manifested in the everyday social relations, in peoples' ideologies and their actions.<sup>3</sup> When a man seeks power, power effects the process; but when a man wields power, power is the man. Based on its ubiquitous presence, it is assumed that it fits in the category of the taken-for-granted-things. Yet, to comprehend the concept of political power, one may step beyond the taken-for-granted-things and look into the process that power constantly evolves.

Of course, the concept of power includes the bias. However, to those scholars who are familiar with this concept, the source of power, the necessity of its existence, and the power relations do not intrinsically lay in the category of the taken-for-granted-things. This is an initial challenge which I present under the title of 'the essentially contested/integrated concepts of power'. Hence, we address this challenge and then move on to simplify and explain the constituent concepts of power.<sup>4</sup> Here, we have to ask: "what is the first step to understand the nature of political power?"

In 'On the Social Evolution of Power To/Over', Jonathan Hearn begins his article by saying that "we are much more comfortable critiquing power than we are matter-of-factly describing it".<sup>5</sup> This is true to some extent. However, recently, scholarly disciplines such as Sociology, Psychology, Philosophy, Economics, and Political Science, in one way or another try to define power. Both, the critique of Hearn and the endeavor of classic and modern scholars to define political power are due to the complexity of it. In fact, political power is not only a complex concept but also it is the core essence of a society. When power evolves, it affects the core essence of a society.<sup>6</sup>

So, after addressing the initial challenge, we try here to fully realize this concept by analyzing it and its instruments and by addressing the social evolution that affected by it.

### 1.1. Essentially Contested Concepts of 'power'

If we look back at the works written on the concept of power, we realize that some scholars identified power as a single concept. Following such method, they have presented political

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<sup>3</sup> Mills, *The Sociological Imagination*, (New York: Oxford University Press, 1959).

<sup>4</sup> It may appear that the theory of power and right is not a novel approach. In this work, yet, it is a fundamental element of argument which needs to be defined. It also can appear that the concept of power and right miss different aspects of analysis and are mentioned as equating concepts. This simply not true, as the aim of the work is to conceptualize a very basis of the concept of political power not a system of thought. Thus, such conceptualization does not say that others are right or wrong but it is a conceptual tool to make a sense of an important aspect of social-political life.

<sup>5</sup> Hearn, On the social evolution of power to/over, *Journal of Political Power*, 7:2, 175-191, (2014), p.176.

<sup>6</sup> See Hearn, On the social evolution of power to/over, *Journal of Political Power*, 7:2, 175-191, (2014), p.176.

power as identified with its exercise,<sup>7</sup> domination,<sup>8</sup> subject dispositions,<sup>9</sup> freedom<sup>10</sup> or empowerment.<sup>11</sup> Among these concepts, the most primitive yet prevailing concept of power is the preserve of the powerful by ‘domination’ or ‘power over’ those with less power or the powerless.

Despite a long history of discussions, arguments, wars and compromises on the different notions of political power, theoretically and pragmatically, never these challenges cause a shift from the single concept of power to the mixed or integrated concepts that can provide us a sufficient and comprehensive definition of – modern - power and legitimacy. The literature is replete with the examples of the theories of the single concepts of power that are applied contradictorily.<sup>12</sup> Emphasis on the single concept of political power led to the lack of unanimity in saying that which definition is adequate, and which of them implies the justification and legitimacy of power. Based on such differentiated approaches, it has been believed that ‘power’, as the Scottish social theorist Walter Gallie first proposed in 1956, is an “essentially contested” concept.<sup>13</sup>

The theories of the ‘singular concept of power’ are the foundation of an initial assessment of the concepts of power.<sup>14</sup> In this sense, they are no less important than the more complex ones. Yet, such a theory focuses on the theorists rather than the concepts, suggesting that ‘essentially contested concepts’ are carrying the intention of the scholars, not that they in themselves are essentially definable. They can be defined as the user of the concepts wishes. For example, when a theologian uses the concept of power, its legitimacy or the concept of political rights, their view of such concepts entails a clear religious definition of a power structure. A socialist has a different view of power which emphasizes every aspect of social life, while a liberal’s definition of power is circumscribed in a scope which emphasizes a strict distinction of the public and the private sphere.<sup>15</sup> While a theologian may ignore the social variables, a socialist may ignore the effects of religion in the formation or transition of power. Such relativity between a theorist and the concepts is actually the consequence of a tension between the normative evaluation of the concepts and empirical evaluation of the concepts. This form of conflict causes scholars to imply that there could be no agreement on a singular concept that can define political power; hence they agree to not agree.<sup>16</sup>

Here, the question follows with a very important consequence: ‘does the concept of political power, just like ‘democracy’ and ‘legitimacy’, carry the evaluative referent or

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<sup>7</sup> Dahl, ‘The Concept of Power,’ *Behavioral Science*, 2, (1957): 201–215.

<sup>8</sup> Lukes, *Power: A Radical View*, (Basingstoke: Palgrave Macmillan, 2005).

<sup>9</sup> Foucault, “The Subject and Power.” *Critical Inquiry*, (1982): 8 (4), 777-795; Dean, *Governmentality: power and rule in modern society*, (London: Sage, 2010)

<sup>10</sup> Morriss, ‘Power and Liberalism,’ in Clegg and Haugaard, *The Sage Handbook of Power*, (London: Sage, 2009).

<sup>11</sup> Arendt, *On Violence*, [London: Penguin, 1970].

<sup>12</sup> Collier, Hidalgo, and Maciuceanu. "Essentially Contested Concepts: Debates and Applications." *Journal of Political Ideologies* 11.3 (2006): 211-46, p.211.

<sup>13</sup> Gallie, “Essentially Contested Concepts.” *Proceeding of the Aristotelian Society*, 13 (4), (1956), 167-198.

<sup>14</sup> Lukes, *Power: A Radical View*, (London: Macmillan, 1974); Connolly, *The Terms of Political Discourse*. (NJ: Princeton University Press, 1983).

<sup>15</sup> Haugaard and Ryan, (ed.) *Political Power: The Development of The Field*, (Opladen: Barbara Budrich Publishers, 2012), p.10.

<sup>16</sup> Haugaard and Ryan, (ed.) *Political Power: The Development of The Field*, (Opladen: Barbara Budrich Publishers, 2012), p.9.

calculative referent?' Perhaps such a question leads us to analyze in a single scale scientific approach, or perhaps scholars belonging to each side of academic disciplines, namely Sociology, Philosophy, or Political science, would declare that a concept of political power falls squarely within their field. This claim simply debatable.

If political power, as well as democracy, human rights, and legitimacy are merely evaluative concepts and only fall into the normative evaluation of political sphere, or, if these concepts are merely calculative and fall into the empirical calculation of political sphere, how do we practice critique if there is no connection?

Thus, following the evolutionary process of historical consciousness,<sup>17</sup> there must be an incentive to welcome the interrelationship between the intensive and extensive, and particular and universal factors to analyze different concepts of political power, as well as legitimacy, democracy, etc. In this sense, both normative and empirical evaluations are needed for the assessment of the concept of power.

## **1.2. Essentially Integrated Concepts of 'power' and 'rights'**

In the pragmatic sphere, the concept of political power is a bit clearer, yet we should be careful to hold it far from the taken-for-granted-things. Different societies have experienced different forms of political power as authorities and sovereigns have formed different power structures. Nevertheless, different concepts of political power are the products of the capacity of the people in each region and their own unique experience in life through a long historical-political process.<sup>18</sup> Here, an important point to note and central argument of this work is to show that the main reason for existence of different forms of political power and different power relations is the interdependency of the concepts of political 'power' and political 'rights': hence the 'essentially integrated concepts' of power and rights. While the essentially integrated concepts of power and rights emphasizes all concepts of power, the exercise of power and formation of state is more understandable.

Thus, political power is an integrated concept: it comprises the concept of political 'power' - power over - and political 'rights'.<sup>19</sup> Only with this approach, we can transcend the notion of power and have the better understanding of politics, political lives, organizations and political phenomena.<sup>20</sup>

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<sup>17</sup> See also speech in the City Hall of Reims on 30 March 1960 in *Neuen Zürcher Zeitung*, 31 March 1960, Nr.90, p.2. <http://www.zeitungsarchiv.nzz.ch> [accessed 07 Aug. 2014]; Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.163.

<sup>18</sup> Huntington, *The Clash of Civilizations and the Remaking of World Order*. (New York: Simon & Schuster, 1996), p.41.

<sup>19</sup> We will get back on both concepts later. See also Conte and Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee*. (Farnham: Ashgate, 2009).; Kelsen, *Pure Theory of Law*, (Berkeley, University of California Press, 1967).

<sup>20</sup> See also 'Why Power is the Central Concept of the Social Science'. In *The SAGE Handbook of Power*, Introd. and ed. Stewart R Clegg, Mark Haugaard, (California: SAGE Publication Ltd., 2009) p.1

Given our attention to the concept of civil and political rights, we can refer to the different concept of political power, namely ‘power over’ as domination, ‘power to’ as rights,<sup>21</sup> and ‘power of’ as the moral significance to those rights. The complexity or complicity of power and critique is for domination; the freedom and capability of action of the free or resisting subject/citizens must be understood as power. If it is to become intelligible how the resisting subject/citizens has the capacity, or the power, to oppose power as domination, then the critique of domination or ‘power over’ becomes the both descriptive and normative critique to achieve the specific effects of power.

Surely, possession of rights, the concept of ‘power to’, makes claiming rights possible, yet the “moral significance” of rights depend on the possibility of claiming them.<sup>22</sup> This is a new concept presented in this work which it is called the concept of ‘power of’. It implies the will and the intuition - of a person or political organization - to act autonomously to claim the rights, and also being aware of or being conscious of the two other concepts of power: the concept of ‘power over’ and ‘power to’. In other words, to have a valid claim on others for possession of the political right to power.<sup>23</sup> These concepts of power are the crucial and determining factors for each political order, since they place an agenda through which power is formed and exercised.

Even if a theorist is particularly interested in the concept of ‘power over’ or domination, they have to admit that this implicitly involves some sort of the concept of political rights which can be held as an essential factor to understand this concept of power. As authority is always embodied in the voice of God, or the worldly leaders and personalities, the concept of power has always implied the claimant to it. This approach can explain, from both the normative and empirical evaluations, why different forms of power relations can carry different definitions of what is assumed as ‘essentially contested concepts’.

In other words, political power is not comprised of the ‘essentially contested concept.’ It is comprised of “the integrated concepts” of power - over - and - political - rights. From now on, the concept of power is characterized by a systematic recognition and observance of rights, namely the ‘right to cede the right’ and the ‘right to rule’.

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<sup>21</sup> Wesley Newcomb Hohfeld presents the distinguished concepts of rights. His analysis rests upon two fundamental theses: first, a right is a three-term relation involving an individual who is the right-holder, a specific type of action, and one or more other individuals against whom the right is asserted. Second, although ‘right’ as it is used in the law is not a univocal term (no single definition can capture its diverse uses), most assertions of rights can be analysed into, or reduced to, conjunctions of four distinct types of assertions: claim rights (rights *stricto sensu*), privileges (or liberties), powers, and immunities. Thus, there are distinguishable uses of ‘rights’ corresponding to Hohfeld’s four categories—claims, liberties, powers, immunities. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, (New Haven: Yale University Press).; Martin and Nickel, ‘Recent Work on the Concept of Rights’, *American Philosophical Quarterly*, 17 (1980): 165–80.

<sup>22</sup> Feinburg, “The Nature and Value of Rights”, *Rights, Justice, and the Bounds of Liberty*, (Princeton: Princeton University Press, 1980): 159-184, p. 151.; See also Darwall, Stephen L. *Morality, Authority, and Law: Essays in Second-Personal Ethics*, (Oxford: Oxford University Press, 2013), p.114.

<sup>23</sup> See also Mill, *Collected Work of John Stuart Mill*, (Toronto: University of Toronto Press, 1969), p.250.

## 2. The Theory of Political Consciousness and Legitimacy of Power

### 2.1. The Essentially Integrated Concepts, the Political Consciousness and Legitimacy

A community without power is chaos. Chaos is not merely the absence of power but the absence of political power and political rights, which is merely the absence of order. Mostly, chaotic situations lead to the emergence of dictators and tyrants.<sup>24</sup> In his precise investigation on the authoritarian/totalitarian regimes, Milan Svoblik elaborates on this point:<sup>25</sup> Most uninterrupted or long-term periods of authoritarian/totalitarian ruling regimes originate in newly independent states (i.e., thirty-six percent of all authoritarian/totalitarian regimes after 1946) and after democratic breakdowns (i.e., twenty-nine percent); this was the case of Cambodia in 1953 and Chile in 1973, respectively. The remaining thirty-three percent of authoritarian spells either began prior to 1946 (e.g., the Soviet Union) or emerged after a period of foreign occupation, collapse of state authority, or civil war (e.g., Mao's China in 1949).<sup>26</sup>

Thus, lacking power is chaos, but power can be the cause of the subordinate experience, humiliation, and threat. On the one hand, power identifies a group of people as one entity, e.g. nation, society, political community and a state, under its umbrella, on the other hand, it can threaten the identity of some groups. It gives security to the political community or an institution to thrive and develop, and yet those who hold power, or seek to do so, can be at odds with one another or the people whom they govern, and thus, pose a threat to their own existence and to others. In this sense, political power is among the most important issues, as it is the most problematic one since balance is so difficult to achieve. So what are the consequences of such an inevitable and critical aspect of social-political life?

In general, different interpretations in these factors, domination, exercise of power, and political rights determine whether one person or group can exercise political power over others. Political power, by which the different forms of power relations appear, is the basic and crucial part of political order. Furthermore, political power is the primary factor for the establishment, identification, survival, and development of a state (*Staat*)<sup>27</sup> or a political institution. We can see how the debates on the appropriate power relation<sup>28</sup> have been a contentious issue in the history of civilization. From the social engineering perspective, political power is the

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<sup>24</sup> "Leaders may come to power by a coup d'état, a palace putsch, or a revolution." Gandhi, *Political Institutions under Dictatorship*, (New York: Cambridge University Press, 2008), p.7. Regarding the terminology, there is one important point that should be said: It would be the most controversial thing to define a wide range of political concepts by a single word, when it offers on the whole many prudent and sensible observations – and in particular by a word like dictatorship, to which ordinary etymology gives unlimited stretch, because anyone who 'dictates' can be called a dictator. However, the terms that are used in this work rely on the modern concepts. So, the terms such as dictators, despotic rulers and authoritarian/totalitarian regimes all exercise power only with power over and monopoly of instruments of power, i.e. propaganda, media, education, religion, and legal system, in different measures.

<sup>25</sup> Svoblik, *The Politics of Authoritarian Rule*. (Cambridge: Cambridge University Press, 2012).

<sup>26</sup> Svoblik, *The Politics of Authoritarian Rule*. (Cambridge: Cambridge University Press, 2012), p.26.

<sup>27</sup> 'Staat' is a German word equivalent to the English word, 'state.'

<sup>28</sup> An appropriate power relation, here, interpreted as the one that on the one hand attributed to history and a country, and on the other hand, attributed to the rational-normative principles and the theory of political consciousness.

cornerstone of harmony and homogeneity in political community by which “the generality of a system of values in a community [are] allotting recognition”, not only to individuals and groups, but also to the different approach of such classification under a regularized system.<sup>29</sup>

Alas! the unfortunate effects of the separation of the concepts of ‘power’ and ‘rights’ are the political disasters throughout the times when a quasi *Rechtsstaat* (constitutional or legal state) based on the “rule of law” or legal order, or in contrast, a *Machtstaat* (dictatorship or tyranny)<sup>30</sup> based on the ‘admiration’ and ‘belief’, produces a concept of authoritarianism/totalitarianism.<sup>31</sup> The separation of ‘power’ and ‘right’ is a reason for asymmetric power relations in which the concept of ‘power over’ or domination subjugates the other concept of power.<sup>32</sup>

On the contrary, the only remedy for such asymmetric power relations is the presence of the reciprocal, constitutive, and integrated concepts of power and rights. In other words, the appreciation of power as the ‘essentially integrated concepts’ of political ‘power’ and political ‘rights’, which produces a symmetric relation between the concepts of power. The balance between the ‘power’ and ‘right’ is a major ground for a cognitive, pragmatic, and progressive legitimate power.<sup>33</sup> The essentially integrated concepts of power – *viz.* the integrated concepts of ‘power’ and ‘rights’ - are not only based on the historical claim of legitimate power that may be restricted to specific social and historical variable and to certain people, but also contain a comprehensible concept of universality.<sup>34</sup> It emphasizes the whole definition of power, and all of the comprising elements of it. Thus, our definition of legitimate power is to show that it is a universally mechanism that brings obligation to act in a contain political framework. This normative approach should be practical in a way that we could be able to set it as an evaluative element to assess other definitions of power and its implementation.

Given the three main concepts of power, namely the concepts of ‘power over’, ‘power to’, and ‘power of’, and our theory of ‘the essentially integrated concepts’ of power, our definition of power should be the definition of legitimate power which can be applied universally. This idea is elaborated by a prominent German philosopher and political theorist, Dolf Sternberger: “Legitimacy is the foundation of such governmental power”, Sternberger wrote, “as is

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<sup>29</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p.244.

<sup>30</sup> Dictatorships lack an independent authority that would enforce mutual agreements – including the rules according to which formal institutions are supposed to operate whereas despotic authority corporates with legal system. I use the terms dictatorship and authoritarian/totalitarian regime interchangeably and refer to the heads of these regimes’ governments as simply dictators or authoritarian leaders or despotic rulers, regardless of their formal title. The main idea is referring to the system of oppression that are based on the separation of ‘power’ and ‘right’. See Bobbio, *Democracy and Dictatorship*, (Minneapolis: University of Minnesota Press, 1989) and Svobik, *The Politics of Authoritarian Rule*. (Cambridge: Cambridge University Press, 2012), p39.

<sup>31</sup> See also Merriam, *Political Power*, (New York: Collier Books, 1934), p.158.; see below part three: “Polygon of Political Power: Legality”.; See also Baer: „*Der Bürger*”im *Verwaltungsrecht. Subjektkonstruktion durch Leitbilder vom Staat*. (Tübingen: Mohr-Siebeck, 2006), p. 95. Both *Rechtsstaat* and *Machtstaat* translated by author.

<sup>32</sup> Shokri, "Legitimacy and Theory of Political Consciousness." *Journal of Political Sciences & Public Affairs*, 04 (01) (2016), p.3.

<sup>33</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.117.

<sup>34</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.20.

exercised both with a consciousness on the government's part that it has a right to govern and with some recognition of that right by the governed.”<sup>35</sup>

This combination embraces all concepts of political power in a form of essentially *not* contested concepts – but, on the contrary, the essentially integrated concepts – , which are a reciprocal constitutive part of political power. In other words, the legitimacy of political power is the effect of a developing capacity or ability in a power relation which is based on the rational and historically intended wills. Such phenomenon can be referred to as the ‘consciousness of rights’ or ‘political consciousness’, which engages with both sides of the government and the governed.<sup>36</sup> It ensures that each side of this political spectrum can recognize both their rights and the rights of other side, and produces confidence.<sup>37</sup> It also shapes the concept of power as the essentially integrated concept of ‘power’ and ‘rights’.

In this work, I will use the ‘consciousness of rights’ or ‘political consciousness’ as a mutual recognition, observation, justification, and appreciation of rights that belong to the nature of legitimate – and most of the times democratic – powers. Accordingly, the concept of mutual knowledge that supports a healthy, confident, and reciprocal constitutive character of political power and political rights, the political consciousness, builds the concept of ‘state’ as a unified identity of leaders and followers.<sup>38</sup> Moreover, the political rights, as we correctly understand, are not only the capacity and rights of the citizens for taking part in the government – and of being immune to their life and liberty against violation by the state power –, but also take the formation of the ‘will’ of the state, of the right to govern.<sup>39</sup>

We can use the credit of what Dahl argued in his book, *On Democracy*, for our argument: “If and when many citizens fail to understand that democracy requires certain fundamental rights, or fail to support the political, administrative, and judicial institutions that protect those rights, then their democracy is in danger.”<sup>40</sup>

The concept of the usurpation of power stands contrary to the concept of legitimacy. This is seen in Sternberger's argument regarding the legitimacy and its opposite, the usurpation of

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<sup>35</sup> Sternberger, ‘Legitimacy’ in *International Encyclopedia of the Social Sciences* (ed. D.L. Sills) Vol. 9 (New York: Macmillan, 1968), p.244.

<sup>36</sup> I should clarify immediately here that ‘political consciousness’ in this work is not the same as ‘political awareness’ or ‘social consciousness’ in Karl Marx’s thoughts. Unlike Marx who uses this term as a sort of ideological form among his idea of the bourgeoisie and the proletariat, ‘the political consciousness’ is not only an actual awareness of rights and power on both sides of state and society – governors and governed – but is the inevitable element in the ‘actual power relation’ to that end. So, this term in this work is completely diverged from what Marx had in mind for his economically-based power relation. See also, Marx, *A Contribution to the Critique of Political Economy*, (Chicago: International Library Publishing Co.1904, first pub.1859).

<sup>37</sup> See Sternberger, ‘Legitimacy’ in *International Encyclopedia of the Social Sciences* (ed. D.L. Sills) Vol. 9 (New York: Macmillan, 1968), p.244.

<sup>38</sup> The theory of political consciousness explains the capacity of legitimation of a power structure based on the rational normative principle. In this sense, Berger and Lockmann argue that “Legitimation ‘explains’ the institutional order by ascribing cognitive validity to its objectivated meaning.” and “Knowledge proceeds values in the legitimation of institutions.” See Berger and Luckmann, *The Social Construction of Reality; a Treatise in the Sociology of Knowledge*. (England: Penguin Group, 1966), p.111.; Kelsen, *Vom Wesen und Werten der Demokratie* [The Nature and Value of Democracy], (Aalen: Scientia Verlag, 1928), pp.8-9.

<sup>39</sup> Kelsen, *General Theory of Law and State*, (Cambridge: Harvard University Press, 1949), p.87.

<sup>40</sup> Dahl, *On Democracy*, (New Haven: Yale University Press, 1998), 50.

power, distinguished by the nature of political consciousness, the state's criteria, and the evaluation of instruments of power.

“Usurpers, after seizing power, have often tried to strengthen their positions by giving their governments a legitimate form, and these attempts to clothe a usurping power with legitimacy, whether successful or not, have often revealed what the standards of legitimacy are for a given society or civilization.”<sup>41</sup>

Yet, the mere notion of legitimacy is endangered by the “plurality of its patterns and its sources” in different forms of regimes which aim “to enjoy widespread authentic recognition of its existence or try to win such recognition.”<sup>42</sup>

Indeed, the desire for legitimacy is rooted in all power structures. In general, if we refer to the definition of legitimacy presented in this part, then the definition of the usurpation of power can comparatively be recognizable. The usurpation of power, thus, is basically the violation of the principles of the political consciousness.

## 2.2. Sovereignty and The Political Consciousness

Different premises and ideologies on political power, endeavor to reach power, and their efforts to develop a high level of authority in a power relation have caused the general historical-political experience of a unique message: all individuals, groups, societies and institutions seek to establish an effective political order. The aim of a political order, good or bad, legitimate or illegitimate, is to centralize a constituent political power and develop a systematic power relation. The aim, at its best, is to build sovereignty – sovereign authority or *Herrschaft* and to induce loyalty, obedience, and order. Thus, we should ask, what is sovereignty?

If we generally can divide the notion of sovereignty, we can refer to classical and to the modern concepts of sovereignty. Jean Bodin, a French jurist and political theorist of the sixteenth century, is the pioneer in the theory of the modern concept of sovereignty. In *On Sovereignty*, Bodin, who followed Aristotle and Niccolò Machiavelli, theorized the concept of sovereignty for the Anglo-Saxon kings.<sup>43</sup> He complains of the politics of his time and the hopeless diversity of views among those who have written on politics, and concludes that it is

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<sup>41</sup> Sternberger, ‘Legitimacy’ in *International Encyclopedia of the Social Sciences* (ed. D.L. Sills) Vol. 9 (New York: Macmillan, 1968), p.244.

<sup>42</sup> Sternberger, ‘Legitimacy’ in *International Encyclopedia of the Social Sciences* (ed. D.L. Sills) Vol. 9 (New York: Macmillan, 1968), p.244.

<sup>43</sup> See Bodin, *On Sovereignty*, trans. Julian Franklin (Cambridge: Cambridge University Press, 1992), p.1; Franklin, *Jean Bodin and the Rise of Absolutist Theory* (Cambridge: Cambridge University Press, 1973), and pp.54-68; Lukes, *Power: A Radical View*, (Basingstoke: Palgrave Macmillan, 2005).; see also Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Gloucester: Peter Smith, 1989), p.204; Hans Kelsen, *General Theory of Norms*, trans. Michael Hartney (Oxford: Oxford University Press, 1991), p.256; Jacques Derrida, “Force of Law: ‘The Mystical Foundation of Authority,’” in *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell (New York: Routledge, 1992), pp.3-67; Claude Klein, *Théorie et pratique de pouvoir constituant* (Paris: PUF, 1996), pp.194-99

not worthwhile to waste time in weighing authorities.<sup>44</sup> At some point, Bodin follows closely the lines of Aristotle's *Politics* on power to lay the foundations for his discussion of sovereignty as the ultimate nature of political and legal authority.

The simplest approach to Bodin's argument is that his argument on the social basis and philosophical end of the state - the teleological approach - , the analysis of the family and the distinction between family and state, the characteristics of paternal authority and the institution of slavery, are all treated in a manner that strongly suggests the Greek precursor.<sup>45</sup> However, the difference between Aristotle and Bodin's thought was caused by time; Bodin has the historical knowledge of the Roman Empire and European history. The prevailing concept of contract in Roman Law has a strong effect in Bodin's theory of state. In the time that Bodin formulated his theory of state and sovereignty, the contract idea was the weapon almost exclusively of the factions whom he was opposing. In the sixth chapter of the first book of *Les Six Livres de la Republique (In The Six Books of the Commonwealth)*, which consists of *On Sovereignty*, where Bodin considered the relation between the concepts of state and citizens and between the concepts of state and the commonwealth – *respublica* -, he makes a bold distinction between power as a sovereign and rights:

“When the head of the family leaves the household over which he presides and joins with other heads of families in order to treat of those things which are of common interest, he ceases to be a lord and master, and becomes an equal and associate with the rest. He sets aside his private concerns to attend to public affairs.”<sup>46</sup>

Such distinction between the conception of power and right is regarded as the essential distinction by Bodin, which provided the ground for his theory of sovereignty.

In the eighth chapter of the first book of *Les Six Livres de la Republique*, Bodin takes up the formal discussion of sovereignty, committed to the concentration of power in the monarchy, and therefore laid the foundations of sovereign absolutism.<sup>47</sup> The idea is embodied, as we have already seen, in his definition of state. He argues that:

“Sovereignty is supreme power over citizens and subjects, unrestrained by the laws.”<sup>48</sup>

Along with this argument, he formulated the concept of sovereignty which became quickly popular: “sovereignty is the absolute and permanent kind of power of a republic that the Latins called majesty.”<sup>49</sup>

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<sup>44</sup> Bodin, *The Six Books of Commonwealth*, (Cambridge, MA: Harvard University Press, 1962), preface. See also see Dunning, “Jean Bodin on Sovereignty.” *Political Science Quarterly*, vol. 11, no. 1, 1896, pp. 82–104. p.88.

<sup>45</sup> Dunning, “Jean Bodin on Sovereignty.” *Political Science Quarterly*, vol. 11, no. 1, 1896, pp. 82–104. p.89.

<sup>46</sup> Bodin, *The Six Books of Commonwealth*, (Cambridge, MA: Harvard University Press, 1962), p.18.

<sup>47</sup> King, *The Ideology of Order: A Comparative Analysis of Jean Bodin and Thomas Hobbes* (London: Psychology Press, 1999).

<sup>48</sup> *Majestas est summa in cives ac subditos legibusque soluta potestas.*

<sup>49</sup> ‘la souveraineté est la puissance absolue et perpétuelle d’une République que les latins appellant maiestatem’ Bodin, *The Six Books of Commonwealth*, (Cambridge, MA: Harvard University Press, 1962), p.25.

In this sense, the Bodin's theory of sovereignty does not match squarely the concept of absolutism. He stands between the absolutism of technicity and the monarchical republic, something close to the Roman Empire. His problem was to formulate the concept of sovereignty, given the supreme right and supreme power. Consequently, he defined sovereignty as “the highest power of command”<sup>50</sup> in the hands of the state, which “has its origin in a deliberate act of volition on the part of a number of individuals.”<sup>51</sup> It is advisable to consider the concept of the ‘deliberate act of volition’ in relation to the Roman background of the term *potestas*. The common concept of power of that time is related to *lex regia*, in which the Roman jurist transferred to the ruler – or emperor - the absolute power – or imperium – to rule. The concept of the *lex regia* as the voluntary act of the people for the purpose of conferring power is rooted in the political rights of the people to do so. This concept of state gives the republican institution which employed the Bodin’s theory the same significance as that employed by the Romans over a thousand years before.<sup>52</sup>

In this sense, in the sixth chapter of the first book of the *Commonwealth*, Bodin distinguished himself from Aristotle’s theory of state and followed Machiavelli’s path.<sup>53</sup> He rejected the confused and contradictory criteria of citizenship in Aristotle's *Politics*, especially the assertion that participation in some political rights is a characteristic of the citizen. A citizen, says Bodin, is "a free man who is subject to the sovereign power of another"<sup>54</sup> which is above of the institution regulation, temporal offices and positive law. For Bodin, “[t]he true sovereign remains always seized of his power”<sup>55</sup> by any means and method.

Indeed, Bodin’s theory of sovereignty responded to a number of pressing problems of his time and place beside “the moderation of religious conflict between the Huguenots and the Catholic League.”<sup>56</sup> His theory of sovereign and state was an outgrowth of the revival of law in the Roman empire and in Europe, and was basically adopted by the other theorists, namely by Thomas Hobbes, Samuel Pufendorf, and later by Jeremy Bentham, John Austin, Max Weber, and recently by Steven Lukes.

However, sovereignty is something beyond a mere force and its instruments. There is something that gives this force a sense of justification. In this process, contrary to the tradition of Bodin and Hobbes, Montesquieu stands against Bodin and Rousseau stands against Hobbes. Yet, Montesquieu used the same method of Bodin, and Rousseau used the method of Hobbes. Montesquieu's work emphasizes those elements in social and political life which are most independent of human volition, and hence minimize the significance, if not to exclude the conception, of absolute sovereignty. Rousseau, on the contrary, intensified the absoluteness of the sovereign human will as conceived by Hobbes, and made it the sole basis of his theory of democracy.<sup>57</sup>

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<sup>50</sup> Bodin, *On Sovereignty*, trans. Julian Franklin (Cambridge: Cambridge University Press, 1992), p.1; Franklin, *Jean Bodin and the Rise of Absolutist Theory* (Cambridge: Cambridge University Press, 1973), p. p.23.

<sup>51</sup> Dunning. “Jean Bodin on Sovereignty.” *Political Science Quarterly*, vol. 11, no. 1, 1896, pp. 82–104. p.90.

<sup>52</sup> Scott, *Law, the State, and the International Community*. (Columbia University Press: New York, 1939), p.332.

<sup>53</sup> Bodin, *The Six Books of Commonwealth*, (Cambridge, MA: Harvard University Press, 1962).

<sup>54</sup> Bodin, *The Six Books of Commonwealth*, (Cambridge, MA: Harvard University Press, 1962).

<sup>55</sup> Bodin, *The Six Books of Commonwealth*, (Cambridge, MA: Harvard University Press, 1962), p.25.

<sup>56</sup> Andrew, “Jean Bodin on Sovereignty”, *Republics of Letters: A Journal for the Study of Knowledge, Politics, and the Arts*, 2, 2011, 75–84. p.78.

<sup>57</sup> Dunning. “Jean Bodin on Sovereignty.” *Political Science Quarterly*, vol. 11, no. 1, 1896, pp. 82–104. p.104.

However, sovereignty is something beyond a denial of human volition or an absoluteness of sovereign people's will. There is something that gives this force a sense of authority. One of the core thesis of this work is to consider both sides of political spectrum, which are the right of the government and the rights of governed, in any analysis that it sets forth. Given this framework, the definition of sovereignty, along with political power, is a product of mutual political relation in the political spectrum. Thus, one finds the definition of sovereignty here far from the power of state over people *qua* 'state sovereignty', and close to the definition of 'popular sovereignty' – which we call democracy and is closest to the definition of a constitutional democratic republic – which we call a republic. Yet, the definition of sovereignty which will be presented does not exactly have the same definition of the popular sovereignty – or democracy.<sup>58</sup>

Our definition of sovereignty is comprised of two parts which come as follow: (i) 'Sovereignty' is a justified intended force which is implemented by the legal order, (ii) Sovereignty is the intended collective will in a possible authority which is in conformity either to moral values, or political consciousness, or both.

The definition of sovereignty, here, presents a balance between the 'absolute state's sovereignty' and the mere 'people's sovereignty', between the independent from of any human volition and the absoluteness of the sovereign human will. In this sense, sovereignty is not equivalent, nor can it be merely reduced to "the highest power of command" and it is beyond the concept of mere force. It is related to the concepts of legitimacy and legality in the theory of power.<sup>59</sup> Moreover, sovereignty is not equivalent to the property of the legal order. A true sovereignty can only be understood by the essential integrated concepts of power and rights. It is a middle ground, which to some extent has value in itself, and to some extent is the subset of the state and the people. In this sense, the concepts of sovereignty and justified political power are close to each other. However, the concepts of sovereignty and legitimate political power can either be close to or opposite from each other. The difference between them is related to the elements of legitimacy. Where an approach to the concept of political power emphasizes the concept of 'right', an approach to the concept of sovereignty emphasizes the justified intended force accompanied by the legal system.<sup>60</sup> Yet, the legitimacy of a claim to right by which a political order utilizes the instruments of power is not merely based on the concept of empowerment. It is also related to other elements which legitimacy is comprised of.<sup>61</sup>

The question of sovereignty has seldom been fixed. As a rule, competing interpretations have striven for primacy. The great debates about the power, sovereignty, and their legitimacy are reflected in the both normative and analytical competition. The question of sovereignty is "what is sovereignty?" Asking this question about 'sovereignty' does not mean limiting oneself to describing its effects, but relating those effects either to a cause or to a basic nature. Yet, the

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<sup>58</sup> Aristotle, *Pol.*1273<sup>b</sup>.; See also Ostwald, *From Popular Sovereignty to the Sovereignty of Law: Law, Society, and Politics in Fifth-century Athens*. (Berkeley: University of California, 1986.)

<sup>59</sup> The critiques regarding the concept of sovereignty will be addressed when we are discussing the legitimacy of legality.

<sup>60</sup> Gandhi and Przeworski, "Authoritarian Institutions and the Survival of Autocrats". *Comparative Political Studies* 40, (2007): pp.1279-1301.

<sup>61</sup> Given our core theory of the political consciousness. See this work, p.7-8. See also Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.20.

question of “who holds sovereignty” is not accurate.<sup>62</sup> The question of who holds it asks in particular the subsidiary question of whether it belongs to an individual or a collective, hence making the concept of ‘sovereignty’ either mysterious or relative. In fact, the question of ‘who’ should be designed for ‘power’ not sovereignty. The question of sovereignty is not whether it belongs to individuals or a collective since it is a qualitative character of a political actor whether it is individual or a collective.

Furthermore, the historical-political process in which an observation to reach a form of sovereignty occurs can be called ‘the rivalry of political power’. The main aim in the rivalries of political power is to establish a power structure that is controlled by a sovereign political actor, and that is based on some ideology and norms.<sup>63</sup> The main problem is to solve the problem of justification and legitimacy and to reach some level of these to thrive.<sup>64</sup> This does not mean, as C. Wright Mills implied, that “the ultimate kind of power is violence”,<sup>65</sup> or as Max Weber elaborated, that power is “rule of man over man,” which is allegedly legitimate violence.<sup>66</sup>

On the contrary, in *On Power*, Bertrand de Jouvenel admitted that if we take a close look at history, it shows us that it is the register of political rivalries.<sup>67</sup> Every sort of rivalry between political powers or organized political units would utterly end in one form of sovereign order, since norms and ideology cannot be applied in chaos or maintained in demoralized nothingness.<sup>68</sup>

In fact, the rivalry of political power is something beyond violence and war; it is the formation of sovereignty, which is a result of a continuing integration process.<sup>69</sup> Furthermore, politics is a realm in which the rivalries between political powers can be resolved by victory and can be defeated by a conciliation which is a compromise<sup>70</sup>. In the realm of politics, the clash of decisions or result of their interactions is ended by the concept of a sovereign who consists of both a legal force of a hegemonic political unit and political consciousness. It is in the harmony between the state’s authority and the political consciousness of a society that the collective “will”<sup>71</sup> of the political unit – as it is comprised by both the government and the

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<sup>62</sup> Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept*, (New York: Columbia University Press, 2015), p.4.

<sup>63</sup> See also Shokri, "Islam and Politics: The Case of the Islamic State." *Studia Humana* 5.2 (2016), p.3.

<sup>64</sup> Linz, “An Authoritarian Regime: Spain.” In Erik Allardt and Stein Rokkan (eds.), *Mass Politics*, (New York: The Free Press, 1970), p.254. Gandhi, *Political Institutions under Dictatorship*, (New York: Cambridge University Press, 2008). *Comparative Political Studies* 40, (2007): pp.1279-1301, p.xix.

<sup>65</sup> Mills, *The Power Elite*, (New York: Oxford University Press, 1956), p.171.

<sup>66</sup> Weber, *Politik als Beruf*, (München, 1921).

<sup>67</sup> Jouvenel, *On Power, Its Nature and the History of Its Growth*, (New York : Viking, 1948), p.135.

<sup>68</sup> See also Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, (Cambridge, MA: MIT, 1985), p.22.

<sup>69</sup> See also Smend, *Staatsrechtliche Abhandlungen: und andere Aufsätze* (Berlin, Duncker & Humblot, 1994).

<sup>70</sup> See also Haugaard and Ryan, (ed.) *Political Power: The Development of The Field*, (Opladen: Barbara Budrich Publishers, 2012), p.41.

<sup>71</sup> See Kelsen, *General Theory of Law and State*, (Cambridge, Massachusetts: Harvard University Press, 1949).

governed - is manifested, which is the guarantor of order within the boundaries of constituent power.<sup>72</sup>

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<sup>72</sup> Ernst-Wolfgang Böckenforde, “Die Verfassungsgebende Gewalt des Volkes-Ein Grenzbeff des Verfassungsrechts,” *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht* (Frankfurt-am-Main: Suhrkamp, 1991), 11-12; Andrew Arato, “Forms of Constitution Making and Theories of Democracy,” *Cardozo Law Review* 17 (1995): 202–54; Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (Minneapolis: University of Minnesota Press, 1999), 1; Martin Loughlin, “Constituent Power,” in *The Idea of Public Law* (Oxford University Press, 2004), 100; Martin Loughlin and Neil Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007), 6.

### 3. Concept and definition of Political Power

#### 3.1. The Single-dimension Concept of 'Power Over'

Power is a problematic concept according to its variation or, at least, the interpretation of it. Based on the ruthless pragmatism and the order of nature, one may believe that the concept of power is taken-for-granted, which, self-evidently obtains immunity for the powerful. This is possible only if power sustains an intense and sometimes brutal love of self that is fully expressed by 'domination' or the concept of 'power over'.<sup>73</sup>

In the context of the more theoretical-political tradition, the critique of power will always ultimately constitute a critique of domination, albeit in a broad sense of this term, for if the understanding of power is focused paradigmatically on the case of the 'will and political rights', or the external determination of the performance of an action in accordance to right/authority, then the fundamental problem with power necessarily leads back to precisely this moment of heteronomy or external influence, the problem of 'power over'. Based on these fundamental premises, let us see how power evolves.

A detailed investigation of the antique and classical literature of power suggests the existence of a single, unified concept of power, i.e. domination, centered on the ability-based definition of the concept. In Plato's *Republic*, power is virtue in the hand of a few for the sake of the interests of all. This power is the guarantor for the virtuous and ideal society and works under the hierarchical and dominative power relation. For a long time after Aristotle, power remained what it was for Aristotle: a movement of power within a system for the survival of the domination of the state. In Machiavelli's *The Prince*, power is presented as a coercive and military *imperium* which uses the most out of the movement of power for domination and control.<sup>74</sup> In Hobbes, although the movement of power and restrains to the states' power from individual is considerable, the ultimate backing for power is coercion and violence. He assumed that such a concept of domination is the only remedy to overcome the political problems, and that it is a presupposition for the commonwealth. In Nietzsche, power is the reality and the definition of human fate. His theory of denunciation of cultural and moral values was a critique of social totalities. His project of a theory of the 'will(s) to power' promotes the idea that power is an ontological principle; power has the life of its own that may be suitable for the description not only of a specific type of intersubjective process, but also of all expressions of life.<sup>75</sup> Hence, to complete the philosophical tradition started from Aristotle which implies that power has to define the real and moral to create the condition of legitimacy.<sup>76</sup>

The definition of power which was prevailing in the era previous to the two World Wars is primitive, tautological, and traditional, therefore it would satisfy neither the modern

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<sup>73</sup> Jouvenel, *On Power, Its Nature and the History of Its Growth*, (New York : Viking, 1948), p. 120.

<sup>74</sup> Machiavelli, *The Prince*, (Oxford: Oxford University Publication, 2005 [1513]). For more discussion on the problem of this approach to power that produces 'the problem of authoritarian control', see this chapter 1.3.1.

<sup>75</sup> Nietzsche, *The Will to Power*, (London: Weidenfeld & Nicolson, 1968), p.51.

<sup>76</sup> Nietzsche, *The Will to Power*, (London: Weidenfeld & Nicolson, 1968). Clegg and Haugaard, *The Sage Handbook of Power*, (London: Sage, 2009), p.2.

philosophers, nor the political scientists or sociologists.<sup>77</sup> The need of the post-war period was to systematically reformulate a number of social-political elements to fit the new emerging concept of modern power. Despite this dissatisfaction, need, and the historical experience of the two World Wars, this theoretical trend of power as domination still continued in the post war period; some of the classic and modern renowned political and social theorists, namely Max Weber,<sup>78</sup> formulated a definition of power similar to the primitive and biased one:

“Power is the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which that probability rests.”<sup>79</sup>

In Weber, the definition of ‘power’ covers both the German *Herrschaft* as authority, and *Macht* as coercive or military domination.<sup>80</sup> Since the early years of the twentieth century, this definition re-emphasized the traditional and prevailing single concept of power – power over - which was repeated and refined by other theorists many times.

Surprisingly, even Robert Dahl, a prominent American theorist of democracy, writing in ‘the Concept of Power’, formulated this single and primitive concept of power as the alphabetical ‘zero-sum’ one and presented it as if it is the ‘bedrock idea of power’: “A has power over B to the extent that he can get B to do something B would not otherwise do.”<sup>81</sup>

To put aside a long list of different analyses and interpretations of this theory, especially this sentence that shortly became famous, a point is obvious enough that we can mention it. Dahl believes that A, based on the ability, resource and actual domination, can exercise control over B. This also means that the theory of power by Dahl suggests that: if B wants to do x, A either wants B to do x or does not. If A wants that, then there is congenial or controlled exercise of power.<sup>82</sup> If A does not want B to do x, then A exercises its control to the extent that B does not do x; then there is uncongenial or uncontrolled exercise of power. Either ways, A can exercise its control over B directly by force and coercion, or indirectly by manipulation.

Although the conflict of interests is obvious in Dahls theory of power, his definition left no room for the possibility of the general concept of constituent power. Moreover, the word “otherwise” in Dahl’s famous quoted-sentence stands against everything that the legitimate power stands for. It also implicitly denies any notion of democratic government where power is defined as the collective will of people.

In this tradition, Steven Lukes introduced the ‘three dimensions of power’. His attempt was responding to the ‘pluralist’ and ‘behaviourist’ approaches to the study of power emanating

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<sup>77</sup> Clegg and Haugaard, *The Sage Handbook of Power*, (London: Sage, 2009), p.2.

<sup>78</sup> 21 April 1864 – 14 June 1920

<sup>79</sup> Weber, *Economy and Society: an outline of Interpretive Sociology*. (California: University of California Press, 1978), p.53.

<sup>80</sup> Weber, *Economy and Society: an outline of Interpretive Sociology*. (California: University of California Press, 1978).

<sup>81</sup> Dahl, “The Concept of Power.” *Behavioral Science*, 2, (1957): 201–215, p.202-3.

<sup>82</sup> For the congenial and uncongenial aspect of power, see Pettit, ‘Dahl’s power and republican freedom’, *Journal of Power*, Vol. 1 (1), (2008), pp.71-73.

from Yale University, and articulated by Robert Dahl<sup>83</sup> and Nelson Polsby.<sup>84</sup> In the first edition of his *Power: A radical view*, he followed the question of power in general. So his view, more or less, concentrated on the concept of power over:

“Is not the supreme and most insidious example of power to prevent people, to whatever degree, from having grievance by shaping their perception, cognitions and preferences in such a way that they accept their role in the existing order of things either because they can see or imagine no alternative to it, or because they see it as natural and unchangeable, or because they see it as divinely ordained and beneficial?”<sup>85</sup>

In the second edition of *Power: A radical view*, there is a shift in Lukes' argument. This time, his real concern is not with power itself, but with the question: how do the powerful secure the compliance of those they dominate?<sup>86</sup> He argued against Dahl who refers only to the exercise of power. Lukes differentiated between “potential and actual power, between its possession and its exercise.”<sup>87</sup> Thus, although in essence he presented the same prevailing definition of domination in his theory of power, he admitted that power is a capacity that may never be, and may never need to be, exercised; yet you can be powerful by satisfying and advancing others' interests.<sup>88</sup> Given the ‘three dimensions of power’, Lukes admitted the existence of the perception and the consciousness of people on the debates on power. However, Lukes' ‘three dimensions of power’ does not rest upon the clear idea of power as right, since he considered rights as the negative and subsidiary of the concept of ‘power over’ or ‘domination’.<sup>89</sup> However, he regard domination or the concept of ‘power over’ as a tool that impedes the subject's ability “to use reason correctly.”<sup>90</sup> In general, Lukes' concept of domination and ‘power over’ define the power relation to the extent that related to the ‘relation’ in the theory of domination. His argument sharpens the ill effect of domination and the concept of ‘power over’ in conflict with the outgrowth of the consciousness of the ‘subjects’ of power.

This belief and the instinct of domination promoted by Lukes reminds us of the concepts of power and autonomous will which Jouvenel argued in his work, *On Power*:

“In every condition of life and social position a man feels himself more of a man when he is imposing himself and making others the instruments of his will, the means to the great ends of which he has an intoxicating vision. To rule a people, what an extension of the ego is there!”<sup>91</sup>

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<sup>83</sup> Dahl, *Who Governs? Democracy and power in an American city*, (New Haven CT: Yale University Press, 1961).

<sup>84</sup> Polsby, *Community power and political theory*, (New Haven CT: Yale University Press, 1963).

<sup>85</sup> Lukes, *Power: A Radical View*, (Basingstoke: Palgrave Macmillan, 2005), p.24.

<sup>86</sup> Lukes, *Power: A Radical View*, (Basingstoke: Palgrave Macmillan, 2005), p.110.

<sup>87</sup> Lukes, *Power: A Radical View*, (Basingstoke: Palgrave Macmillan, 2005), p.12.

<sup>88</sup> Hearn, What's wrong with domination?, *Journal of Political Power*, Vol. 1 (1), (2008), p.38

<sup>89</sup> Hayward & Lukes, Nobody to shoot? Power, structure, and agency: A dialogue, *Journal of Power*, 1:1, (2008): 5-20.

<sup>90</sup> Lukes, *Power: A Radical View*, (Basingstoke: Palgrave Macmillan, 2005), p.115.

<sup>91</sup> Jouvenel, *On Power, Its Nature and the History of Its Growth*, (New York : Viking, 1948), p.121.

Thus, power for Jouvenel, it turns out, is an instrument of domination. This is one step further for reformulating and redefining the Hobbes' single concept of power as 'domination'. Jouvenel defines power as 'power over' but beyond the confines of its primitive and biased concept. He refers to power as the right to use means and instruments. As an English state-theorist in the seventeenth century, his definition of power encompasses a wider aspect of the concept of 'power over' than of those Weber in the twentieth century:

"The Power of a Man is his present means to obtain some future apparent Good."<sup>92</sup>

A better definition of the single concept of power is highlighted by Barry Hindness. In *Discourse of Power*, he refers to the other concept of power, namely the concept of 'power to'. However, he regards the concept of 'power over' and the concept of 'power to' as variants of a notion of power, regarding them as the quantitative capacity to realize an actor's will. Although this conception mostly encompasses the concept of 'power over', it appears in relation to the concept of sovereign power, "the power that is thought to be exercised by the rule of the state or by its - central - government."<sup>93</sup> Thus, his approach was a starting point to consider power as some form of 'right'.

### 3.2. Beyond the Single-dimension Concept of 'Power Over'; Understanding The Concepts of 'power to/of' and Legitimacy

In contrast to Hobbes and Lukes, Hannah Arendt's positive concept of power refutes the violence. Following the work of Alexander Passerin d'Entreves, *The Notion of the State*,<sup>94</sup> Arendt formulated the concept of power distinguished from force or mere domination. "Power", for her, "is always, as we would say, a power potential and not an unchangeable, measurable and reliable entity like force or strength."<sup>95</sup> Arendt places emphasis on the concepts of empowerment, rights, and 'power to'.<sup>96</sup> In short, she concentrated her critiques of power on the concept of power *qua* rights:

"When we say of somebody that he is 'in power' we actually refer to his being empowered by a certain number of people to act in their name."<sup>97</sup>

However, Arendt does not only emphasize the concept of 'power to', but also formulates the concept of power as the collective will, and as a function of human relations:

<sup>92</sup> Hobbes, *Leviathan*, (Cambridge: Cambridge University Press, 1996), p.62.

<sup>93</sup> Hindness, *discourse of power: From Hobbes to Foucault*. (Oxford: Blackwell, 1996).

<sup>94</sup> D'Entrèves, *The Notion of the State: An Introduction to Political Theory*, (London: Oxford University Press, 1967).

<sup>95</sup> Arendt, *The Human Condition*, (Chicago, IL: University of Chicago Press, 1998), p200.

<sup>96</sup> Arendt, *On Violence*, [London: Penguin, 1970].

<sup>97</sup> Arendt, "Communicative Power." in *Power*, edited by Steven Lukes, (New York: New York University Press, 1986), p.63.

“While Strength is the natural quality of an individual seen in isolation, power springs up between men when they act together and vanishes the moment they disperse.”<sup>98</sup>

The relation between the concept of ‘power to’ as a right and collective will introduces a new concept of power which might be called ‘power with’. In fact, the concept of ‘power with’ is “a kind of collective version of ‘power to’ proposed by Arendt.”<sup>99</sup>

Jürgen Habermas is among the other modern thinkers of the post war who helped the development of the concept of ‘power to’ as the classical critique of domination. In his work, *The Theory of Communicative Action*, he reformulated the classical critiques of ideology, which was inherit in the Frankfurt School from Marxist, to overcome the vague and inadequate conception of social domination that it formerly promoted.<sup>100</sup> He used this critique by developing a conception of rationality to investigate the ‘condition of systematically disordered communication.’<sup>101</sup> In two of his prominent works, with the titles of *Hannah Arendt’s Communicative Concept of Power*<sup>102</sup> and *Between Facts and Norms*,<sup>103</sup> he took over the idea of Arendt’s communicative power to show that legitimate power is not restricted to the narrow and prevailing traditional concept of domination, but it is empowered by the political and civil rights in the realm of public discourse.

Habermas’ complimentary theory of Arendt’s presents a complex theory of power within the paradigm of domination, which was not possible to overcome with the concept of ideology (and the Marxist concept of class domination). His theory of communicative power is affected by strategic interactions, and represents an understanding-oriented form of communication that reshapes an idea of power.<sup>104</sup> Such an idea of power encompasses the political and civil rights of citizens. It overcome the pure idea of domination as the zero-sum concept which emphasizes having power at the expense of others. This opened an important window to the discussion of power: communicative power is the expression of citizen’s political autonomy. As a result, power appears as a reciprocal relation between domination and rights which forms a legitimate institutional power.

According to the normative view of power, it is clear that no power is exclusively based on the single concept of ‘power over’. Furthermore, according to the pragmatic exercise of power, no regime can exclusively be based on the means of violence, since violence and the integrated concepts of power can be juxtaposed, but they are antithetical. Even the theorists of the concept of ‘power over’ which is traditionally regarded as the single and the only concept of power,

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<sup>98</sup> Arendt, *The Human Condition*, (Chicago, IL: University of Chicago Press, 1998), p200.

<sup>99</sup> Dean, *The Signature of Power: Sovereignty, Governmentality and Biopolitics*, (Los Angeles: SAGE, 2013), p.8.

<sup>100</sup> Allen, Recognizing domination: recognition and power in Honneth’s critical theory, *Journal of Power*, 3:1 (2010), p.21.

<sup>101</sup> Habermas, *The theory of communicative action*, Vol. 2. (Boston: Beacon Press, 1984). See also Habermas, The hermeneutic claim to universality. In: G.L. Ormiston and A.D. Schrift, eds. *The hermeneutic tradition*. (Albany, NY: State University of New York Press, 1990), 245–272.

<sup>102</sup> Habermas, ‘Hannah Arendt’s communicative concept of power’. In: Steven Lukes, ed. *Power*. (London: Blackwell 1986), 75–93.

<sup>103</sup> Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (Cambridge: Polity Press, 1996).

<sup>104</sup> See Saar, Power and critique, *Journal of Power*, 3:1, (2010), p.14

indirectly, refer to the other aspects of power in their arguments. In fact, no theorist of power can escape from a determinate but historically coined interdisciplinary field of interpretive and pragmatic social relations.

The single concept of power is also logically impossible where the concept of power always needs a claimant to power, whether such a claimant is an individual, or a group, or a society. To understand that, we need to recognize how power emerges, operates and thrives.

### 3.3. The signature of power

Indeed, history shows that the rivalry of political power is inevitable. The location of man to the office and his possession have always been deployed for his will and design to possess power. However, I mentioned that the definition of the rivalry of political power is something beyond violence and war, and I must now qualify this statement. First, political rivalries are the product of differences between theories and ideologies that show the concept of power on which a regime should rely.<sup>105</sup> So the rivalry of political power is between the authorities which are different in kind. Second, various forms of political powers may be threatening each other. This is due to their different nature of authorities which is based on the different combination of the concepts of political power, i.e. ‘power over’, ‘power to’, and ‘power of’.<sup>106</sup> So we should ask, what is the combination of the concepts of power?

For a long time authorities have used the concepts of power as if they are antinomies and binary oppositions: ‘power to’/ ‘power over’, power as right/ as authority. Even when instances of power as right reveal both concepts of ‘power over’ and ‘power to’, this may be held in opposition to ‘power of’ *qua* capacity. This helps us to consider power not as a competing concept, but as a comprehensive phenomenon of social commodity. Thomas Wartenberg, a critic of ‘power over’ as a single concept of power, argued that most of the confusion in the literature about power has been created by an ignorance of its ‘fundamental duality’ of ‘power over’ and ‘power to.’<sup>107</sup>

Relating this empirically founded theory to the normative criteria, power can be seen as a ‘dynamic element of social interaction.’ In *The Signature of Power*, Mitchell Dean argues that “what is distinctive about the concept of power is the way the notion refers us to a set of oppositions that in turn can become unities in relation to other oppositions”.<sup>108</sup> He called this movement, which is the “unity and renewed opposition” of the concepts of power, the ‘signature of the concepts of power’.<sup>109</sup>

It is helpful to add this definition to a number of known categories of regimes. Where a monarchy, autocracy, or a military regime would merely rely on the concept of ‘power over’,

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<sup>105</sup> Shokri, "Islam and Politics: The Case of the Islamic State." *Studia Humana* 5.2 (2016), p.3.

<sup>106</sup> See also Dean, *The Signature of Power: Sovereignty, Governmentality and Biopolitics*, (Los Angeles: SAGE, 2013),

<sup>107</sup> Wartenberg, *The forms of power: from domination to transformation*, (Philadelphia, PA: Temple University Press, 1990).

<sup>108</sup> Dean, *The Signature of Power: Sovereignty, Governmentality and Biopolitics*, (Los Angeles: SAGE, 2013), p.12.

<sup>109</sup> Dean, M., 2012. The signature of power. *Journal of Political Power*, 5 (1), 101–117, p.101.

a constitutional monarchy or parliamentary regime would rely on both concepts of ‘power over’ and ‘power to’. Yet, with the emergence of the concept of ‘power of’ in a hierarchical power relation, begins the process of politicization which is the major cause for reforms in power structures or system change. It is the process of politicization that turns an autocracy into a monarchy or a constitutional democracy, i.e. republic.<sup>110</sup> This principle can be obviously seen in a long list of today’s prominent and Western powers such as Canada, England, Sweden, and Norway, which have been transforming for centuries toward being more democratic by trying to make a balance - a concept of checks and balances - between the concept of monarchical ‘power over’ and the concepts of ‘power to’ and ‘power of’.

Along with Dean’s argument on the signature of power, we can argue that to detect the nature of a political regime is to view the ways in which the concepts of power is dynamically generated and constructed. If they are generated and constructed as dispersed sets of apparent oppositions, the regime is to some extent despotic, or it lacks the concept of sovereignty. If they are generated and constructed as integrated concepts, the regime is sufficient and legitimate. This transformation is the signature of power which dynamically moves from the concept of ‘power over’, that is regarded of as necessarily conflictual and is mostly used as a synonym for domination, to ‘power to’, that is regarded as a consensual and intrinsically legitimate instance of power.

### **3.4. What is Political Power?**

Here, we may ask: what is ‘political power’? Based on its social aspect, can we define power in a way that it can comprise all the aspects of dynamic social elements on which the different power structures rely?

As political power is crucial and the rivalry of political powers is inevitable, there have been discussions between political philosophers, sociologists, political anthropologies and political scientists on the different definitions of political power and the different ways in which political power can be justified. Obviously, political power is not a mere force, violence, or a mere authority.<sup>111</sup>

The most appropriate way of understanding ‘power’ from a social sciences standpoint is to consider it as an intrinsically relational concept, as a substantive element more than a conceptual one.<sup>112</sup> The understanding of this should be quite limited to how power functions in real life. The substantive understanding of the concepts of power should be heartily welcome to admit that: power necessarily involves some relationship with other people,<sup>113</sup> i.e. co-foundation of ‘power over’ and ‘power to’, and also power is involved with one’s self, i.e. co-foundation of ‘power to’ and ‘power of’.

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<sup>110</sup> An autocrat is a single ruler who rules despotically and without any coalition.

<sup>111</sup> Fukuyama, *The End of History and the Last Man*, (Toronto: Macmillan, 1992), p.15.

<sup>112</sup> For the difference between the substantive and conceptual approach to understand the concepts of power see Morriss, A response to Pamela Pansardi, *Journal of Political Power*, 5:1(2012), 91-99

<sup>113</sup> Pansardi, Power to and power over: two distinct concepts of power?, *Journal of Political Power*, 5:1, (2012), p.84

Moreover, if we refer to the three concepts of power, i.e. power over, power to, and power of, we can also refer to the normative-logic priority between them. Priority is for the concept of ‘power to’, as the political and civil right, to have the power and authority. For instance, Dowding and Morriss are among the prominent scholars who advocate such priority, emphasizing that any instance of ‘power over’ necessarily includes an instance of ‘power to.’<sup>114</sup> However, a normative priority of ‘power to’ over ‘power over’, based on the essentially integrated concepts turns out to be similarly ill-founded. This is because facts about ‘power to’ are necessarily also facts about ‘power over’. This means the priority of either of the two concepts cannot be made without the basis of a moral evaluation. This moral evaluation is ‘power of’: the intrinsic normative value of right in itself which obligates the right to claim the civil and political rights. Thus, if ‘power over’, ‘power to’, and ‘power of’ are the different aspects of a dynamic element of social interaction which from time to time form a signature of power, can we then have a comprehensive understanding of power?

From what we have gone through, and based on the historical and political consciousness, political power can be defined as a collective will<sup>115</sup> (direct democracy, republic), or representative of a collective will<sup>116</sup> (representative regimes, republic, aristocracy, monarchy), or a quasi collective will (dictatorships, oligarchy, autocracy, etc.), to produce effects,<sup>117</sup> soft and hard,<sup>118</sup> within the territory<sup>119</sup> of its reproduction of justification of its authority,<sup>120</sup> which claims moral, rational,<sup>121</sup> and historical responsibilities. The fatherhood of power is not only “found in violation, in the raw will to domination, in some divine sanction which makes of power a second religion; in some moment of contract between members of incipient political society,”<sup>122</sup> and not only in decisions or policy “involving severe sanction (deprivation)”<sup>123</sup> or coercion,<sup>124</sup> but also in constant involvement of equilibrium,<sup>125</sup> in an intuition of others and their rights.<sup>126</sup> This makes power a crucial element of respect, in the recognition of benefit, capability, and resource, in a ‘processual relation’,<sup>127</sup> in the autonomous will to influence asymmetrically. Moreover, political power is a resource which can never be a mere projection

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<sup>114</sup> Dowding, *Power*, (Buckingham: Open University Press, 1996), p.4 and Morriss, ‘Power and liberalism,’ in Clegg and Haugaard, *Handbook of power*, (London: Sage, 2009) p.55.

<sup>115</sup> Arendt, *The Origins of Totalitarianism*, (New York: Schocken Books, 1948).; Arendt, “Communicative Power.” in *Power*, edited by Steven Lukes, (New York: New York University Press, 1986).

<sup>116</sup> Smith, *The Theory of Moral Sentiments*, (Amherst, NY: Prometheus Books. 2000, first published in 1759).

<sup>117</sup> Parsons, ‘On the Concept of Political Power’, *Proceedings of the American Philosophical Society*, 107 (3) (1963): pp. 232-262.; Dahl, “The Concept of Power.” *Behavioral Science*, 2, (1957): 201–215.

<sup>118</sup> Nye, *Soft Power: The Means To Success In World Politics*, (New York: Publication Affair, 2004).; Mann, *The Sources of Social Power I* (Cambridge: Cambridge University Press, 1986).; See also Nordlinger, *Soldiers in Politics: Military Coups and Governments*. (Englewood Cliffs, NJ: Prentice-Hall, 1977).; Perlmutter, *Military and Politics in Modern Times: Professionals, Praetorians and Revolutionary Soldiers*, (New Haven, CT: Yale University Press, 1977)., Dahl, “The Concept of Power.” *Behavioral Science*, 2, (1957): 201–215, p.202-3.

<sup>119</sup> Treitschke, *Politics*, (New York: The MacMillan Company, 1916).

<sup>120</sup> Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986).

<sup>121</sup> Tilly, *Trust and Rule*, (Cambridge: Cambridge University Press, 2005).

<sup>122</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p.31.

<sup>123</sup> Lasswell and Kaplan, *Power And Society; a Framework for Political Inquiry*, (New Haven: Yale University, 1950), p.74.

<sup>124</sup> Russell, *Power: A New Social Analysis*, (New York: Routledge, 1938).

<sup>125</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p.32.

<sup>126</sup> See Lasswell, *Power and personality*, (New York: Norton, 1948), p.10.

<sup>127</sup> Schermerhorn, *Society And Power*, (New York: Random House, 1961).

of will from the powerful to those subject to them, from ruler to ruled, and which cannot be monopolized by any one group.<sup>128</sup>

Moreover, power is comprised of something attributed to objects, personalities, and institutions. Power is more than ‘a thing’, i.e. the power of a person or institution; it is a combination of availability of means of violence, or control of others and needed resources - *puissance* - with the empowerment element in the dynamic social interaction - *pouvoir*.<sup>129</sup> Thus, power is the cornerstone of both the conceptual/normative and the causal/substantive realms.

Without the recognition of the concepts of power, namely ‘power over’ as authority, ‘power to’ as right, and ‘power of’ as capacity, it is hard to criticize the concept of power and to understand its rich – modern - and complex definition. For instance, Michel Foucault, albeit defining power as ‘force relation’, fails to see the combination of the conceptual/normative and the causal/substantive realms. In his book, *The Will to Knowledge*, he defines power as the following:

“...power must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization; as the process which, through ceaseless struggles and confrontations, transforms, strengthens, or reverses them, as the support which these force relations find in one another, thus forming a chain or system, or on the contrary, the disjunctions and contradictions which isolate them from one another...”<sup>130</sup>

Thus, Foucault tried to separate the ‘how’ and the ‘why’ of power, which is incoherent. In other words, he tries to avoid attributing any points of origin of power to anything; rather there are just ongoing ubiquitous force relations, flowing through everything.

Learning from this failure, we adhere to the idea that political power covers various reciprocal concepts which cannot be limited merely to one of its concepts. Hence, power is something beyond a mere force and a mere authority. It is difficult to even consider the concept of ‘power over’ as the only concept of power, since the structure in which power should be exercised always consists of relations between the different groups whose activities constitute it.

In fact, the integrated concept of power and right and the concept of political consciousness make the maintenance and effectiveness of power possible. Furthermore, we can merge these three concepts of power (‘power of’, ‘power over’, and ‘power to’) to show the historical-political process, in which the normative and empirical perspectives are inseparably laying on the reciprocal or integrated concept of power and rights, and pave the road for its justification and legitimacy. In other words, for being legitimate, the power of a regime should be comprised of the three concepts of power.

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<sup>128</sup> Heller, *Staatslehre* [Theory of the State], (Leiden: Sijthoff, 1934).

<sup>129</sup> See Sayer, Power, causality and normativity: a critical realist critique of Foucault, *Journal of Political Power*, 5:2, (2012), p.180-181.

<sup>130</sup> Foucault, *The Will to Knowledge, History of Sexuality*, (London: Penguin, 1998), p.92.

The justification of political power is an assessment to the effectiveness of power as well as its legitimacy. Individuals, societies, and institutions seek to justify their political power since it is one main angle of preservation - obtaining immunity - and effective rule.<sup>131</sup> The history of blood shows that despotic authorities from time to time use the different instruments of political power - or the polygon of political power - in order to obtain their immunity, hence, to prove that their concept of 'power over' implies a certain shape and method of justification. Explicitly and implicitly, they try to redirect the historical-social process of politicization in order to produce and exercise sovereignty and legality. In this sense, the 'essentially contested concepts', do help to implicitly recognize the semi-concepts, but they do not help to recognize the essentially integrated concepts of power and rights and the polygon of political power (its instruments), nor the 'signature of the concept of power' through the history of a society. In contrast, arguing for 'no essence of power'<sup>132</sup> also divorces completely the normative evaluation from the historical consciousness.

The theory of 'the essentially integrated concepts of power and rights' as well as 'the signature of the concepts of power' are in conformity to explain how power is born, how power can be defined, exercised, transferred, or refuted.

In *Political Power*, a prominent work in political theory, Charles E. Merriam presents the context of political power as mobilization of the need for "organized political action."<sup>133</sup> This mobilization requires "the personality types to be adjusted and adopted in social living."<sup>134</sup> He emphasizes that "power is first of all a phenomenon of a group cohesion and aggregation, a child of group necessity or utility, a function of the social relation of men."<sup>135</sup> In this sense, political power can similarly be seen as an inseparable recurrent character of a political community or a political institute, and function in order to satisfy its "need", or to its "advantage."<sup>136</sup>

When we rightly evaluate any concept of power, any notion of state or any power structure and power relation, then it can be observed that we, as the legitimate child of our own history, are representing and carrying the souls of historical sequence with a certain definition of power and right in our mind.<sup>137</sup> Power and rights do not corrupt nor are they corruptions, they reveal both the nature of state and the nature of the people.<sup>138</sup>

Taking this argument to the next step, it is the recognition of 'need' or 'advantage' of power, which are rooted the historical consciousness. If such recognition is shaped by the political consciousness of a society, it creates the un-contested reciprocal constitutive concepts of political power, which includes the concepts of 'power over', 'power to', and 'power of'. Here, we are beginning to get a sense where the - justification and - legitimacy of power might lie.

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<sup>131</sup> Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.20.

<sup>132</sup> Haugaard and Ryan, (ed.) *Political Power: The Development of The Field*, (Opladen: Barbara Budrich Publishers, 2012), p12.

<sup>133</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p.31.

<sup>134</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p.31.

<sup>135</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p.31.

<sup>136</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p.34.

<sup>137</sup> Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p163.

<sup>138</sup> See also Caro, *The Years of Lyndon Johnson: The Passage of Power*. (New York: Alfred A. Knopf, 2012), p.26.

Thus, when we do talk about the legitimate authority and sovereignty, we are not merely emphasizing the empirical form of a systematic power relation, i.e. ‘power over’, we are implicitly referring to the origin of the ‘constituent power’,<sup>139</sup> the right to claim such power, and the concept of empowerment, i.e. ‘power to’, which is normatively reprehensible, and, we are referring to the autonomous act and the scope of power, i.e. ‘power of’.

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<sup>139</sup> Kalyvas, “Constituent Power”, *Political Concepts: A Critical Lexicon*, Vol 1 (3.4) (New York, 2015) <http://www.politicalconcepts.org/constituentpower> [retrieved on 06 Dec. 2015].

#### 4. The Justification and Legitimacy of Political Power

“Politics is our destiny,”<sup>140</sup> as are power and authority; that is what we know. But do we know what ‘the characteristics of such authority’ are? Today, there are various discussions on authority and political power. Yet, how often do we think about the state, collective organizations, unity, and the element of war and peace in relation to such an entity? How often do we think about the public binding to the authority and benevolent political integrations? If we know one thing about power and its relationship with the modern nation-states, it is that power is like the old stone building that stands for centuries, yet justification and legitimacy are not the painting on the building, which is applied after the building is completed, and leaves the building essentially unchanged. They are more like the cement that permeates the concrete and makes the building what it is. In other words, justification and legitimacy are part of the foundation of political power.

Legitimacy and justification are among the main factors that contribute to discussions of political power and the state, and how could it be otherwise?<sup>141</sup> Thus, whenever we hold our breath and try to make a good argument on the concepts of political power, in the very silent moments of thinking, we do realize that we cannot ignore discussions on their justification and legitimacy. Our awareness is heightened by revealing that power, state and government are reflecting our own nature; we furnish the means by which we suffer or we enjoy.

The elements of justification are various. Justification and legitimacy may refer to a strategy, a policy, an arrangement or an institution. They also may refer to a power structure and a power relation.<sup>142</sup> All of these aspects are the workings of power in four dimensions of politics, economics, ideology,<sup>143</sup> and military.<sup>144</sup> Moreover, all of these aspects may be justified or legitimized, but power, as it is manifested in constant organic action, is hard to fully predict and evaluate, it is difficult to reduce it “ultimately in the last instance.”<sup>145</sup> However, the events and incidents of politics are moving towards a better understanding of its rules and its relations.

One of the elements which provide us with a specific form of justification is the rational-normative principles.<sup>146</sup> By ‘rational’ or ‘rationality’ we mean the habit of acting by reason: “a

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<sup>140</sup> Sternberger, *Drei Wurzeln der Politik*, Schriften II,1. (Frankfurt am Main: Insel Verlag, 1978), p.19.

<sup>141</sup> See also Plato, *Republic*; Aristotle, *Politics*; Farabi, *The Virtues State*. (1962); Locke, *Two Treatises of Government*, (Cambridge: Cambridge University Press, 1988); Weber, *Economy and Society: an outline of Interpretive Sociology*. (California: University of California Press, 1978); Beetham, *The Legitimation of Power*, (Palgrave Macmillan, 1991); Merriam, *Political Power*, (New York: Collier Books, 1934); Strauss, *Natural Rights and History*, (Chicago: The University of Chicago Press, 1953). Sharp, *From Dictatorship to Democracy*, (Boston: The Albert Einstein Institution, 2010).

<sup>142</sup> Simmons, *Justification and Legitimacy*, (Cambridge: Cambridge University Press, 2001), p.123.

<sup>143</sup> Hall and Malesevic, “The Political Sociology of Power.” Haugaard and Ryan, (ed.) *Political Power: The Development of The Field*, (Opladen: Barbara Budrich Publishers, 2012), p.161-184.

<sup>144</sup> Mann, *The Sources of Social Power I* (Cambridge: Cambridge University Press, 1986); Mann, *The Sources of Social Power II*, (Cambridge: Cambridge University Press, 1993).

<sup>145</sup> Mann, *The Sources of Social Power I* (Cambridge: Cambridge University Press, 1986), p.1.

<sup>146</sup> See also United Nation, Human Rights, Office of the High Commissioner for Human Rights, *Universal Declaration of Human Rights*, <http://www.ohchr.org/EN/UDHR/Documents/60UDHR/bookleten.pdf>

commitment to the principle that all of one's convictions, values, goals, desires and actions must be based on, derived from, chosen and validated by a process of thought.”<sup>147</sup> Nevertheless, ‘normative’ principle means the desirable, rational and analytical ‘righteous’ norms set forth by logic which obligate an autonomous political actor – whether a person or an organization – in their act or will.

The rational-normative-principles is in fact can be based for a ‘legitimate justification’. Here, as it is alleged in this work, a form of justification which is based on the rational-normative- principles plays a crucial role for the legitimacy of political power. In this sense, such principles connect the notions of rightfulness to norms, which are related to the appreciation of civil and political rights of people. Here, if rational principles are right, principles of reasoning that are based on such principles are normative principles of reasoning, “namely they are the principles we ought to reason in accordance with.”<sup>148</sup> This approach is important in order to gain a clear perspective and understanding of the legitimacy of power.

In other words, the account of justification and legitimacy in this work is to mix a properly definition of them – based on the normative-philosophical project, - with the social-scientific judgment about legitimacy-in-context and power behavior. It is an assessment of the underlying structure and logic of legitimation in general as well as the developmental sequence of historical forms of legitimation after the pattern of cognitive developmental psychology. Thus Jürgen Habermas critique, namely legitimacy is “abstracts from the systematic weight of grounds for validity” or “untenable because of the metaphysical context in which it is embedded”<sup>149</sup> are not accountable here.

#### 4.1 Sources

As history shows, authorities have acquired and exercised political power according to three sources: the traditional Natural Law or divine law, inheritance tradition, and rational-normative principles. Each of them can be divided in various forms. Political power that is based on justified natural or divine law can result in two forms of political orders: monarchy or autocracy. Political power which is based on justified inheritance tradition can be divided to three forms of political orders: monarchy, oligarchy or aristocracy.

Political power which is based on justified rational-normative principle can be various forms of political order or regimes such as monarchy, aristocracy, republic, and democracy. In this sense, if we say that a regime – no matter in which form – is ‘based on justified rational-normative principles’. The principles which help all concepts of power to thrive and then it encompasses a critical characteristic for its justification or its legitimacy.<sup>150</sup> Nevertheless, if the rational-normative-principle accompanied with the political consciousness in a power spectrum – viz. this means that both the governors and governed be aware of their political rights and appreciate the rights of the other side - it makes the legitimate political order. It is

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<sup>147</sup> Rand, *The Ayn Rand Lexicon: Objectivism from A to Z*, (New York, NY: Meridian Book, 1986), p26.

<sup>148</sup> Mele and Rawling. *The Oxford Handbook of Rationality*, (Oxford: Oxford University Press, 2004), p.285.

<sup>149</sup> Habermas, 'Legitimationsprobleme im modernen Staat', 332, pp.37-56 (revised English version in Habermas, 1979) p.204.

<sup>150</sup> See also Barnard, *Democratic Legitimacy: Plural Values and Political Power*, (Montreal: McGill-Queen's University Press, 2001), p.26.

assumed that the ultimate balance between the authority and political consciousness is manifested in the democratic power structure in which power is equilibrium.

However, each of the forms of political orders can diverge from one another by considering different elements. Some of the vital elements are: who can claim power and who can claim to political rights. Moreover, it is important to investigate why they can claim power and rights. While the latter is the question of legitimacy, the first and second are the questions of justification.

So, what is this enigmatic concept of justification, and what is its connection to a power relation and social order? There is vast skepticism about the concepts of justification. This may partly be because the contemporary works have a lack of clarity and understanding of the concept of justification and its associated concepts, namely the concept of legitimacy. In other words, we must assess the concept of justification with her cousin, the concept of legitimacy.<sup>151</sup> Some others exclude them from discussions, arguing that they are purely evaluative yet unstable. They believe that justification and legitimacy are changing from one society to another.

Regarding the theological origin of the definition of justification, to justify is to declare righteous, to make one right with God. Justification is God's declaring those who receive Christ to be righteous, based on Christ's righteousness being imputed to the accounts of those who receive Christ (2 Corinthians 5:21).<sup>152</sup> Though justification as a principle is found initially throughout the scripture, the main passage describing justification in relation to believers is Romans 3:21-26:

“But now a righteousness from God, apart from law, has been made known, to which the Law and the prophets testify. This righteousness from God comes through faith...”

It seems that the concept of ‘faith’ and ‘belief’ are the constitutive elements of ‘justification’ of an authority.<sup>153</sup> So we should ask how this concept of justification after two millenniums evolved and how its use shifted from theology and entered the realm of politics?

The main core of Western modern politics is secularization. This is not the refutation of the religion, as it is an important cultural-historical element and one aspect of individual life, but of the decisive role of religion in politics.<sup>154</sup> Secularization means that the principles which are applied in the modern nation-state are working through a rationalized and institutionalized power relation, affecting the instruments of power and forming a politicized ideology and a

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<sup>151</sup> Simmons, *Justification and Legitimacy*, (Cambridge: Cambridge University Press, 2001); Morris, “State Legitimacy and Social Order.” Kühnelt (ed.), *Political Legitimization without Morality?*, (Springer Science+Business Media B.V. 2008).

<sup>152</sup> See also Wright, *Justification: God's Plan & Paul's Vision*, (Downers Grove, IL: IVP Academic, 2009).

<sup>153</sup> See Beetham, *The Legitimation of Power*, (Palgrave Macmillan, 1991), p.15.; According to cultural theories, societies hold beliefs that shape collective action and government. Some societies are so intolerant or distrustful that their governments simply cannot function effectively. See also Banfield, *The Moral Basis of a Backward Society*, (New York: Free Press, 1958), Weber, *The Protestant Ethic and the Spirit of Capitalism*, (New York: Charles Scribner's Sons, 1958).; Putnam, *Making Democracy Work: Civic Traditions in Modern Italy*, (Princeton: Princeton University Press, 1993), and Landes, *The Wealth and Poverty of Nations*, (New York: W. W. Norton, 1998).

<sup>154</sup> Referring to religion in this work is not an attempt to criticize any specific form of it or try to understand which religion conveys what messages. The approach of this work is in the realm of political theory, not theology. Throughout this work religion respected as an instrument of power and is assessed in this sense.

legal order. Thus, we shall ask: do the justification of state and justification of political power hinge upon the – religious - values? Moreover, by answering this question we have to ask whether values justify ‘religious belief’, or is it the other way around? Here, the comprehension of such a concept gets a bit harder.

The traditional concept of justification is often relying on righteousness as a concept which is originated in tradition, culture, religion, and other value-origin premises. On the one hand, righteousness, which causes immunity to ‘the non-comparative moral objections’, is the cornerstone of the concept of justification.<sup>155</sup> Rule of law, on the other hand, is one of the indicators for the justification of a state or political power. Yet, justification – as well as legitimacy - is nullified in the absence of the concept of political rights.

Even Achilles was only strong as his heel: the values which are merely based on the religiously anointed belief are not rationally accountable. They are relevant to the historical and cultural contexts; rooted more in belief of people than anything else. Moreover, they miss the logical component of the evaluation.

However, we can argue that the modern concept of justification, while still relying on righteousness, presents righteousness as it is originated in the logical and rational premises. This is where the major challenge appears: we argue that both modern definitions of justification and legitimacy are originated in the logical and rational premises but this causes an unwanted confusion. To address this confusion, we should distinguish between the source and content of justification which - albeit not perfectly - conforms to the distinction between the concepts of legitimacy.<sup>156</sup> So what is justification and what is legitimacy?

#### **4.2 The Concepts of Justification and Legitimacy of Power**

Justification work through the concepts of political power: exercise of power, domination, subject dispositions, freedom or empowerment. All of these can be assessed by three concept of justification: input as source, output as performance and result, and throughput as exercise.<sup>157</sup> If a political power, power relation or power structure can be justifiable, it is not only due to the existence of an authority but also due to the utilization of the instruments of political powers - the polygon of political power – in the boundaries of their exercise of power and their effects.<sup>158</sup> Such analysis can be done in the three interrelated approaches of input, output, and throughput justification.

When John Locke argued for a sort of state or government, or an authority to be justified, he took for granted that such political power has the output justification, that it is an

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<sup>155</sup> See also Simmons, *Justification and Legitimacy*, (Cambridge: Cambridge University Press, 2001), p.203.

<sup>156</sup> Barnard, *Democratic Legitimacy: Plural Values and Political Power*, (Montreal: McGill-Queen's University Press, 2001), p.27.

<sup>157</sup> The concept of input, output, which was introduced by Scharpf, and throughput, which was introduced by Schmidt, have been used for legitimacy. Here I borrow these three approach for the concept of justification. See Scharpf, *Governing in Europe: Effective and democratic?*. (New York: Oxford University Press, 1999).; Bäckstrand, Multi-Stakeholder Partnerships for Sustainable Development: Rethinking Legitimacy, Accountability and Effectiveness. *European Environment*, 16, (2006): 290-306.; Pierre and Peters, *Governance, politics and the state*. (Houndmills, Basingstoke: Macmillan, 2000).

<sup>158</sup> See also Dahl, A Democratic Dilemma: System Effectiveness versus Citizen Participation. *Political Science Quarterly*, 109(1), (1994): 23-34.

unobjectionable and preferable status to the “state of nature”, as its outcome is morally permissible. When Nozick encountered the anarchist fundamental question: “whether there should be any state at all. Why not have anarchy?”<sup>159</sup> He argued to show that the state is justified, even in its minimal form. The state is preferable than the “most favored situation of anarchy”<sup>160</sup> in a morally permissible form since as nothing but heaven is impregnable to vice. But his approach was not enough for the modern discussion on justification.

In line with the arguments of James Madison on the separation or division of powers in the state, the justification of state in its reasonable form takes its premises from the practical philosophy, as he argues:

“The interest of the man, must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary.”<sup>161</sup>

Individuals at some point will begin to relax in their duty and attachment to each other and this remissness will point out the necessity of justifying some form of government and state to supply the defect of moral virtue.<sup>162</sup> From these three different modules, one thing is crystal clear about the main concept of justification: justification appears to be a defensive approach to block the alternatives which are based on the moral and normative evaluation, and it will be raised to bind people together to a ‘common cause’.<sup>163</sup>

#### **4.2.1 Ability to Consent and Capacity of Mutual Respect**

However, the unwanted confusion that we just mention still exist. So, we should ask: if the moral and normative evaluation can be found in the concept of justification, how are the differences between justification and legitimacy comprehensible? To answer this question, let us briefly summarize what we have proposed: Legitimacy ‘is multi-dimensional in character.’<sup>164</sup> The concept of legitimacy considering the present categorizations, namely input, output, and throughput.

In the *Two Treatises of Government*, a renowned work of Locke, one of the concepts which makes a balance between the definitions of justification and legitimacy is presented. This is because of Locke’s emphasis on, what he called, the “consent.”<sup>165</sup> For Locke, it is not enough that political power is merely justified, it must carry a form of legitimacy. This laid the foundation of the theory of consent in which the political rights naturally belong to the people.

(i) The legitimacy of a state – to some extent - relies on a transition of power from the subjects to an institutionalized authority known as the state. This can only happen when the

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<sup>159</sup> Nozick, *Anarchy, State, and Utopia*, (NY: Basic Books, 1974), p.4-5.

<sup>160</sup> Nozick, *Anarchy, State, and Utopia*, (NY: Basic Books, 1974), p.4-5.

<sup>161</sup> Madison, et al., *The Federalist*, (Indianapolis : Liberty Fund, 2001, first pub.1788), Nr.51, pp. 268-169.

<sup>162</sup> Paine, *Common sense*, (Philadelphia : printed. And sold by W. and T. Bradford, 1776).

<sup>163</sup> Bevir, Democratic Governance: Systems and Radical Perspectives. *Public Administration Review*, 66(3), (2006): 426-436.; See also Osborne and Gaebler, *Reinventing government: How the entrepreneurial spirit is transforming the public sector*. (Reading, MA: Addison-Wesley Publishing, 1992).

<sup>164</sup> Beetham, *The Legitimation of Power*, (Palgrave Macmillan, 1991), p.15.

<sup>165</sup> Locke, Sec.95.

concept of ‘power over’, can be separated from the concept of ‘power to’. In this sense, then through a deliberative recognition of rights, the concept of ‘power to’, has the ability to transition itself based on autonomous will. This ‘capacity’ as the concept of ‘power of’ is to transition political rights for forming a legitimate power structure. Moreover, the process in which this deliberative transition of right takes place can be referred to as the process of politicization.

Yet, the critiques on the absolute theory of consent are numerous, and Locke should have known the impossibility of unanimous consent, or the consent to cede the inalienable rights, and the fine line of the separation between consent and the concept of legitimacy (we get back to this point in part four of this work).<sup>166</sup>

Sternberger took a further step for assessing the concept of legitimacy. He introduces the justification of the state based on its reciprocal existence which recognizes the consent of the subject. This, of course, occurs not in the sphere of legitimacy, but in the initial forms of justification. Sternberger claimed that:

“When our concept of state comes from *Polis* or [this concept] encompasses the idea of a contact, a *compact*, a *contrat*, an agreement in itself, - it is not only important to see that a state is not made by such agreement, but to see that agreement, contract, or compatibility of the unity of the opposites which is continually made through time, are important for the existence of the state - then, in fact, we should hesitate to confer the name of a state to a totalitarian system. Where there is no subject, there can be no agreement. Where there is no agreement, the interior peace is just an appearance which is partly consisted of violent repression and partly consisted of directed civil wars.<sup>167</sup>

(ii) So, the legitimacy of state partly consisted of the rational-normative-principles, which are the cornerstone of the exercise of power and its effectiveness, and partly consisted of the political consciousness of people. This level of legitimacy can be reached when the state and people – the governors and the governed – constantly recognize and appreciate their own political rights and the other side. This ‘ability’ as the combination of the concepts of power forms a legitimate power structure.

In short, justification of a state or a regime does refer to the alternatives and possibilities of moving from one to another form of state, government, or power, and can be used as a

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<sup>166</sup> An elaborated collection of critiques is presented in: Barnett, ‘Constitutional Legitimacy’, *Columbia Law Review*, (2003), 103 (111), pp.111-148.; See also part four of this work: “Justification and Legitimacy: Legality and Political Power”.

<sup>167</sup> The author’s translation from the German text: “Insofern unser Begriff des Staates sich von der Polis herschreibt oder die Idee eines Vertrages, eines compact, eines contrat, eine Vereinbarung in sich trägt – nicht daß er aus solcher Vereinbarung hervorgegangen sei, ist wichtig einzusehen, sondern daß Vereinbarung, Vertrag und Verträglichkeit, Einigung der Gegensätze in der Zeit immerfort hergestellt werde, ist notwendig, damit der Staat lebe -, insofern müssen wir sogar zögern, dem totalitären System den Namen des Staates zuzuerkennen. Wo keine Subjekte sind, kann auch keine Vereinbarung stattfinden oder hergestellt werden. Und wo keine Vereinbarung stattfindet, ist der innere Frieden nur ein Anschein, der auf dem teils gewaltsam unterdrückten, teils gewaltsam gelenkten Bürgerkriege beruht.” Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.117. On the definition of Polis and citizenship see Miller, *Nature, Justice, and Rights*. (Oxford: Clarendon Press, 1995), p.3.

defensive moral, legal, or political instrument. The legitimacy of the state refers to two important points: power as authority and right as empowerment.

- First, it refers to the historically-rooted mutual relationship between power and its subjects by which it shapes historical consciousness. Moreover, it refers to the political consciousness which directly affects the power relation. In this sense, the concept of consent conveys an important aspect of legitimacy: mutual determination and appreciation of political rights by the governors and the governed and the knowledge of the capacity cede the rights by the people comprises an important part of the notion of legitimacy.<sup>168</sup> Furthermore, the existence of the state and its authority, as Sternberger argues, face a dramatic challenge when they lose the consent and trust of their subject.
- Second, the legitimacy of the state, a regime, or a political organization, refers to its origin: The legitimacy of state is the product of the essentially integrated concepts – of power and rights - and the equilibrium between the concepts of power.

Here, we have to ask whether the concept of justification, which is the matter of the possibility of alternatives, is far from the concept of legitimacy? While Justification refers to a minimal concept of power, due to the lack of or blocked alternatives, and due to the moral preference, legitimacy refers to the concept of rational, moral, and institutional interactions between an authority and its subject. To take a look at the essentially integrated concepts of power, we can say that unlike justification, “legitimacy is the reservoir of loyalty on which leaders can draw.”<sup>169</sup> In many cases, the concepts of consent and trust parallel the process of legitimacy.

#### **4.2.2 Weberian Herrschaft**

The interaction between the concepts of consent and trust is critically based on the moral and rational premises. This means that power that is not legitimate “offends our moral sense; in an underlying logic common to moral argument everywhere” and “in the needs that are shared by all societies.”<sup>170</sup> The point mentioned here and the integrated concepts of power and right provide a social scientist or political theorist with the framework to undertake three different tasks in studying legitimacy. The first is the definition of legitimacy appropriate to different historical types of social and political system. The assumption made here is that this definition should be confirmed with the essentially integrated concepts of power and rights and the theory of political consciousness. The second task for a theorist in studying legitimacy is assessing the degree of it in the context of a specific power relation, “as a necessary element in explaining the behavior of those involved in it.”<sup>171</sup> The third task is a systematic comparison between different forms of legitimacy in different regimes.

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<sup>168</sup> Simmons, *On the Edge of Anarchy*, (Princeton: Princeton University Press, 1995).

<sup>169</sup> Tyler, *Why People Obey the Law*, (New Haven: Yale University Press, 1990), p.26.

<sup>170</sup> Beetham, *The Legitimation of Power*, (Palgrave Macmillan, 1991), p.22.

<sup>171</sup> Beetham, *The Legitimation of Power*, (Palgrave Macmillan, 1991), p.23.

Thus, Weber and his proponent confirm one dimension of justification and they have related it to the legitimacy. Following Weberian view, in “Alternative Future”, Charles Taylor argues that:

“Legitimacy is meant to designate the beliefs and attitudes that members have toward society they make up.”<sup>172</sup>

However, Weber’s typology of legitimate domination does not contribute to the substantive characterization of legitimate power. This is because, for Weber, legitimacy is an intrinsic element to domination yet an additional element for the concept of power. While he reduces his definition of power to domination as the ‘probability that certain specific commands (or all commands) will be obeyed by a given group of persons’, he immediately adds that the every such system of domination ‘attempts to establish and to cultivate the belief in its legitimacy.’<sup>173</sup>

Following the Weberian tradition to identify legitimacy through belief of people, Seymour M. Lipset, a contemporary American political sociologist, argues in “Social Conflict, Legitimacy, and Democracy” that:

“the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society.”<sup>174</sup>

Based on this tradition to define legitimacy, it is hard to move from the absoluteness of this concept of legitimacy – as Weberian view implies - towards higher and different forms of legitimacy. Though these statements –, and in general, the Weberian view, - on the capacity or actual belief of people in a state’s power explain the instrument of power - belief - which authorities use for their justification and legitimacy, they cannot sufficiently explain legitimate power.<sup>175</sup> In fact, the Weberian attempt which aimed to define the concept of legitimate power once and for all is only an introduction to a dimension of justification by using one of the instruments of power, namely the admiration and belief in power (or the *miranda* and *credenda* of power), which without a doubt produces compliance and support based on ‘inducement and attraction’.<sup>176</sup> Hence, this approach is more related to the concept of sovereignty - or *Herrschaft*

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<sup>172</sup> Taylor, “Alternative Future: Legitimacy, Identity, and Alienation in Late Twentieth Century Canada.” in *Communitarianism: A New Public Ethic*, ed. M. Day, (Belmont: Wadsworth, 1994), p.54.; Taylor, “Alternative Future: Legitimacy, Identity, and Alienation in Late Twentieth Century Canada.” In *Constitutionalism, Citizenship and Society in Canada*, edited by A. Cairns and C. Williams (Toronto: University of Toronto Press, 1985): 183-229 (reprinted in C. Taylor, "Alternative Future." In *Reconciling the Solitudes*, edited by G. Laforest (Montreal: McGill, Queen's University Press, 1993): 50-120.

<sup>173</sup> Weber, *Economy and Society: an outline of Interpretive Sociology*. (California: University of California Press, 1978), pp.212-13.

<sup>174</sup> Lipset, “Social Conflict, Legitimacy, and Democracy.” in *Legitimacy and the State*, ed.W. Connolly, (New York: New York University Press, 1984), p.88.

<sup>175</sup> See the full discussion in part two of this work. See Banfield, *The Moral Basis of a Backward Society*, (New York: Free Press, 1958), Weber, *The Protestant Ethic and the Spirit of Capitalism*, (New York: Charles Scribner’s Sons, 1958).; Putnam, *Making Democracy Work: Civic Traditions in Modern Italy*, (Princeton: Princeton University Press, 1993), and Landes, *The Wealth and Poverty of Nations*, (New York: W. W. Norton, 1998).

<sup>176</sup> Simmons, *Justification and Legitimacy*, (Cambridge: Cambridge University Press, 2001), p.133.; Nye, *Soft Power: The Means To Success In World Politics*, (New York: Publication Affair, 2004).

- than legitimate power. Moreover, Weberian view has based its justification on its own terms, not on the non-comparative rational and moral objections.

### 4.2.3 The Concepts of Power and Legitimacy/Justification as Political Rights and Duties

On the contrary to the Weberian view, not admiration nor belief is a determining factor for the legitimacy of an authority, it is more related to the justification of it, yet its deficiency also challenges both the concept of justification and legitimacy with the same pragmatic consequence: the weakness of power.

Christopher Morris recognized this challenge and distinguished the belief as the source of legitimacy and the belief in legitimacy. In “State Legitimacy and Social Order” he argues that “the belief in a state’s legitimacy is crucial – a state that was legitimate but not believed to be so would be no more effective than an illegitimate one thought to be legitimate (it might even be less effective).”<sup>177</sup> Given the concepts of ‘power over’ and ‘power to’, which emerged under the concepts of political ‘rights’, the concept of legitimacy cannot be an absolute definition nor one-dimensional. So we shall ask what can we offer more than this one-dimensional approach?

The concept of legitimacy can be divided into three dimensions or forms of, input, output, and throughput:

- Input legitimacy may explain the questions of: 'What is legitimacy?', 'Based on its origin, is it good or bad?', etc. To answer this question, we have to rely on the rational-based argument and the normative analysis, in which the nature of ‘power’ and the subject are identical. Hence, empowerment and the concept of ‘power to’ is in the center of discussion. This is, in other words, referring to the questions regarding the sources: ‘Who makes the claim to legitimacy?’, ‘What are the sources of legitimacy?’ (these questions will be answered in the present Part of the work).
- The output legitimacy is referring to the outcome of power relation, the outcome of the concepts of ‘power’ and ‘rights’.
- Furthermore, throughput legitimacy is referring to the question regarding the implementation, the question of power relation, and the question of the instruments of power (these questions will be answered in chapter two).

We redefined and distinguished the concepts of justification and legitimacy from their traditional definitions. Here, we can say that:

First, justification is about alternatives of power and beliefs of the subject. It is not the existence of an authority but also is “a particular level of development of an organization necessary to secure the law.”<sup>178</sup> It is the utilization of the instruments of political powers- or the polygon of political power.

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<sup>177</sup> Morris, “State Legitimacy and Social Order.” Kühnelt (ed.), *Political Legitimization without Morality?*, (Springer Science+Business Media B.V. 2008), p.17. See also Mack Smith, *Modern Italy: a Political History*, (Ann Arbor: University of Michigan Press, 1997).

<sup>178</sup> Heller, *Staatslehre* [The Theory of the State], (Tübingen: Mohr Siebeck; Auflage: 6,1983, first pub. 1934), p. 332.

Second, Legitimacy, as it is implied hereafter in this work, is the complex moral and rational rights, a combination of ‘power to’, ‘power over’, and ‘power of’; it is a vital apparatus of essentially integrated concepts, which is manifested in the three grounds of input, output, and throughput; it is the observation of interactions based on a high regarded ‘political consciousness’. Legitimacy allows the authority the ‘right’ “to be the exclusive imposer of binding duties,”<sup>179</sup> and rights, to be the exclusive imposer of coercion, e.g. sanction and punishment, to observe the duties and to recognize and safeguard the rights of its subjects, and to constantly maintain its justification through which the authority and subject would comply through their duties, recognize the rational and mutually constitutive concept of power, and to maintain the political stabilities.

Third, legitimacy, although it composes all concepts of justification, it is about civil and political ‘rights’,<sup>180</sup> mutual recognition and observation of it, and the scope of its entitlement and empowerment.<sup>181</sup> In this sense, in a legitimate regime, the concept of legitimacy of state’s power and its justification is almost in coexistence. As both legitimacy and justification are divided to three dimensions of ‘input’, ‘throughput’, and ‘output’; the throughput dimension, where the exercise of power is manifested in the different form of legality and coercion, is the highest point where the justification and legitimacy work together. In input dimension, the moral and rational political rights,<sup>182</sup> and in output dimension the social function and civic cohesion are the highest points where the justification and legitimacy work together.

To move on to the next part, I have to say that the discussions on the justification of political power, legitimacy of political power and political systems are as old as the discussions on the social order, and the justification of social orders and power relations. In *The Legitimation of Power*, in which David Beetham combined the insights of social science and political philosophy to show that:

“An understanding of legitimacy helps explain, for example, why people have the expectations they do about a power relationship, why institutions of power differ systematically from one type of society to another, why power is exercised more coercively in some contexts than others. Above all, it helps to explain the erosion of power relations, and those dramatic breaches of social and political order that occur as riots, revolts and revolutions. It is not just because these events are particularly dramatic and fateful that they interest the social scientist. As with so much else about society, it is only when legitimacy is absent that we can fully appreciate its significance where it is present, and where it is so often taken for granted.”<sup>183</sup>

According to the structure of this work and the proposed questions, in the forthcoming pages, we concentrate on the traditional form of justification of hierarchical power relation, which is originating in natural/divine law. The aim of the following part of work is not to argue

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<sup>179</sup> Simmons, *Justification and Legitimacy*, (Cambridge: Cambridge University Press, 2001), p. 130.

<sup>180</sup> Simmons, *Justification and Legitimacy*, (Cambridge: Cambridge University Press, 2001); p.133.

<sup>181</sup> Beetham, *The legitimation of power*, (London: Macmillan, 1991); Coicaud and Curtis, *Legitimacy and politics*, (Cambridge: Cambridge University Press, 2002); see also Tankebe, *Policing and Legitimacy in a Post-Colonial Democracy: A Theoretical and Empirical Study of Ghana. Ph.D. Thesis* (Unpublished), University of Cambridge.

<sup>182</sup> An in-depth analysis of this concept of legitimacy will be presented in part three of this work, see ‘Article 48 and the Theory of Political Consciousness’.

<sup>183</sup> Beetham, *The Legitimation of Power*, (Palgrave Macmillan, 1991), p. 6.

the applicability of the ancient political thoughts to our own.<sup>184</sup> It is not to underestimate ancient Greek tradition of thought in its consistency; while this tradition is richer than conceded to a narrow aspect of analysis. Similarly, is not to argue about the essence of Natural Law or Divine Law. There is an enormous amount of pure philosophical works from both medieval and modern scholars and theorists on these topics. Given to our theory of power and political consciousness, the aim of this part is a new interdisciplinary approach to a mutual criticism to argue how the hierarchical power relation, which emerged from such laws, is not justifiable, legitimate and accountable.

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<sup>184</sup> With this assumption, some scholars such Field, tried to verdict that others such Popper, Russel and Crossman misunderstood Plato's political thoughts in historical context. See G. C. Field, "On Misunderstanding Plato". *Plato, Popper And Politics: Some Contributions to a Modern Controversy*, Bambrough, (ed.), (Cambridge: Heffer, 1967), p.71.;Bambrough presents a moderate criticism of this point in "Plato's Modern Friends and Enemies". Bambrough, *Plato, Popper and Politics: Some Contributions to a Modern Controversy*, (Cambridge: Heffer, 1967), p.6.

## **Part Two: Authoritarian and Totalitarian Regimes in Ancient and Modern Politics**

## 1. A Short background of the Justification of Political Power: The Birth and the Death of Power

The justification of political power is not only one of the key concepts in the Western tradition of thoughts, but also a vital concept for any functional or effective power.<sup>185</sup> The justification reflects the characteristic of political power - and *vice versa* -, its face, its shape, its movement, and its involvement. Yet, the justification assesses the rightfulness and also the legitimacy of political power. This concept has changed from time to time in societies. The changes in the concept of justification present themselves as serious challenges for authorities. Such challenges mostly leads to the transformation of power, the death of on authority (*Herrschaft*), and the birth of another. The challenges are not the causes but the symptoms. Yet, we may ask what are the causes and situations under which political power can be trapped in its own “morbidity and mortality”?<sup>186</sup> Is it the ideology in a power structure which it holds dear, is it the practice of power in a great variety of tension situations, or, is it the people's disaffection and the power - hungry office holders?

It is easy to argue that there is an implicit relationship between the justification of power, as the righteousness of an authority to other alternatives, and the recognition of the rights. Moreover, it is easy to say that the legitimacy of an authority perpetually closes the doors of morbidity and mortality to power. But is it not correct, if we base our idea on the theory of absolutism? Hence, we may not only investigate how powers, especially authoritarian and hybrid powers, collapse but also question the variety of ways in which they operate.

From the historical point of view, the endeavors of authorities have been not only to justify political power but also to find the best form of power structure which would be infallible, healthy, and secure. This intellectual path goes back to ancient Greek political thought. Plato and Aristotle are the most notable and accountable theorists in this tradition.<sup>187</sup> Although their accounts of state and power is completely different to what we have in our time, their contribution to the concept of justification of power is recognizable. They encountered the question of the justification of power, and questioned the structure on which power relies. This question has remained as one of the fundamental problems of politics, inciting us to assess further questions, such as, ‘which form of government is good and which one is necessary?’ or ‘what kind of power structure should be ultimate?’. This was the starting point to the long – lasting problem in the history of political theory.<sup>188</sup>

The endlessness of the problem of justification of political power is rooted in a very simple rule: the carefully designed and detailingly devised power structures and political systems are theoretically elaborated, so it has been assumed that such perfect systems can be perpetual in reality, but history itself has generally abandoned them. The theories of states and political

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<sup>185</sup> La Porta, et al., “The Quality of Government.” *Journal of Law, Economics and Organization* 15(1999): 222–79.

<sup>186</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p. 237.

<sup>187</sup> My method to assess Plato and Aristotle would not lay down their differences. At least, I am sure that there are enormous accountable and insightful works in this perspective. What I have done is to single out some common points to assess the justification that they based their power structure theories on. Grote emphasized that, “The scheme of government [political structure] proposed by Aristotle, in the two last book of his *Politics*, as representing his own ideas of something like perfection, is evidently founded upon the *Republic* of Plato: from whom he differs in the important circumstance of not admitting either community of property or community of wives and children.” See Grote, *Aristotle*. (New York: Arno Press, 1973), p.539.

<sup>188</sup> See also Popper, *The Open Society and Its Enemies: The Spell of Plato*. (London: Routledge, 1947), p.106.

regimes can be not detached from their people, their situations, and their transformations. Hence, no matter good or bad, legitimate or illegitimate, strong or weak, popular or infamous, all are doomed, some day, to the hex of morbidity and mortality. At least, this is the most obvious lesson that we can learn from history. Moreover, we can see that history repeats itself. Yet, we have to ask, what can be left for the concept of stability of a regime?

### **1.1. Ancient Athenian City Politics and the Stability of Authority: The question of Justification of Power**

The importance of a specific approach to justify a social order in a political community, arguably, is comprehensible since it almost provides a sufficient way to illustrate how political power can be exercised, how the power relation can be structured, and in which way can it be legitimate. In the pragmatic realm, we can observe that any authority needs to justify its power. In his prominent book, *Grund und Abgrund der Macht*, Sternberger vividly explain the importance of justification for an authority where he said:

“any state that wants to wield authority<sup>189</sup> tries to convince its subjects or its rivals that its rule is justified. An authority without the justified concept of its power will die.”<sup>190</sup>

There are some rules and elements of justification that help regimes to stabilize social order and safeguard authority regardless of what that social order is. James Madison, one of the founding fathers of the United States, stressed that one of the reason for stability of a regime is residing on the ‘origin’ of the decision of people. In one of letters to his jurist friends, William T. Barry, he wrote:

"A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”<sup>191</sup>

This concept is similar to the theory of knowledge and power which addressed long time ago by ancient Greek political philosophers, namely Plato and Aristotle. Here, a question may appear: I there any connection between the present study and the political work of Plato and Aristotle?

Given the central theory of this work, i.e. theory of political consciousness, the concept of knowledge<sup>192</sup> among people is important for justified power. So, the argument here refers to the basics of this idea and get all the way back to what, which at least, is part of our heritage in political theory: political thoughts of Plato and Aristotle regarding the justification of power. However, modern theorists and scholars see the political theories of ancient Greece very

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<sup>189</sup> *Gewalt*

<sup>190</sup> Translated by author: „Jedwede Regierung woher auch immer ihre Gewalt rühren mag, führt eine Überzeugung ihrer Rechtmäßigkeit mit sich oder stirb doch danach, sich zu rechtfertigen.“ Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.20.

<sup>191</sup> Letter from James Madison to W.T. Barry (August 4, 1822), in *The Founders' Constitution*, Volume 1, Chapter 18, Document 35, (Chicago: Chicago University Press, 1987/2000).

<sup>192</sup> By knowledge, I mean the awareness or conscious of possessing civil and political rights.

differently. Different modern interpretations cause confusion and one may soon become very uncertain as to the intended meaning of Plato and Aristotle regarding some of the important points in the *Republic* and *Politics*. The comprehensive focus of this part of the work is to give a critical sketch of the general and fundamental ancient and modern theories of the justification of power which serve the purpose of ‘historical background’ of the concept of justification of political power.

At the very starting point to understand the research question in Plato and Aristotle’s political works, we can detect a problem. It seems that when the ancient Greek political philosophers summed up their ideas of cosmology, society, and Natural Law in their political theories, they started assessing the normative principles to determine which form of society was best. However, they misread the concept of power as they tried to form a political system which fit their own scale of Athenian traditional values. In fact, the question of ‘what is the best?’ was the question of ‘what is the fittest?’<sup>193</sup> In any case, it is clear that their question in their political works was considering the justification of political power.

In this sense, this part of the work takes a further step and ask: to what extent would the tenacious issues of modern politics, such as justification of a state or regime have affected by their works? So, we must assess whether there is a noticeable gap between the ancient Greek theorists and modern theorists in recognizing the concept of civil and political right of people.

To answer this question, there are two general approaches. Few have argued that in ancient Greek political thought “the State exists in order to serve the wants of men.”<sup>194</sup> This is simply false because of the nature of hierarchical power relation in Athenian Ideal city-state. Others have argued that there was no concept of ‘civil and political rights of people’ in ancient Greek political theories.<sup>195</sup>

R. G. Mulgan argues that the notion of individual rights is scarcely, if at all, present in Aristotle:

“Like all ancient Greeks, [Aristotle] has little conception of individual or human rights, of obligations which are due to individuals because they are individual human beings [. . .] Because the individuals had no inherent rights, there was less sense of conflict between

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<sup>193</sup> See also Merriam, *Political Power*, (New York: Collier Books, 1934).

<sup>194</sup> Copleston, *A History of Philosophy: Greece and Rome*, (London: Burns, Oates & Washbourne, 1966), p.225-232 Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.235. See Aristotle, *Politics* II 1261<sup>a</sup>.; Miller, *Nature, Justice, and Rights*. (Oxford: Clarendon Press, 1995), pp. 87-88.

<sup>195</sup> Rahe, *Republics Ancient & Modern: The Ancient Régime in Classical Greece*, (The University of North Carolina Press, 1994), p.19, 31; Ostwald, ‘Shares and Rights: "Citizenship" Greek Style and American Style’, in J. Ober and C. Hedrick (eds.), *Démokratia: A Conversation on Democracies, Ancient and Modern*, (Princeton: Princeton University Press, 1996), pp. 49-61.; Burckhardt, *Griechische Kulturgeschichte*, (Berlin & W. Spemann, 1898), p.29. For counter argument see Wallace, ‘Law, Freedom, and the Concept of Citizens' Rights in Democratic Athens’ in J. Ober and C. Hedrick (eds.), *Démokratia: A Conversation on Democracies, Ancient and Modern*, (Princeton: Princeton University Press, 1996), pp. 105-19. P. Cartledge and M. Edge, ‘“Rights,” Individuals, and Communities in Ancient Greece.’ in R. Balot, *A companion to Roman and Greek Political Thought* (UK: Wiley-Blackwell, 2009), pp.149-63. Strauss argues that “that man cannot reach the perfection of his nature except in and through civil society and, therefore, that civil society is prior to the individual. It was this assumption which led to the view that the primary moral fact is duty and not rights.” Strauss, *Natural Right and History*, (Chicago: University of Chicago Press), p. 183.

competing claims of individual and state and therefore less sense of sacrifice in depriving individuals of their property or liberties.”<sup>196</sup>

More strongly, G. H. Sabine also denies that the Greeks had any conception of rights:

“The modern notion of a citizen as a man to whom certain rights are legally guaranteed would have been better understood by the Roman than by the Greek, for the Latin *ius* does partly imply this possession of private right. The Greek, however, thought of his citizenship not as a possession but as something shared, much like membership in a family. This fact had a profound influence upon Greek political philosophy. It meant that the problem as they conceived it was not to gain a man his rights but to ensure him the place to which he was entitled.”<sup>197</sup>

Following Sabine, Alasdair MacIntyre promote the idea that it is anachronistic to impute any concept of rights to Aristotle or indeed to any ancient thinker. MacIntyre assumed that:

“there is no expression in any ancient or medieval language correctly translated by our expression ‘a right’ until near the close of the Middle Ages: the concept lacks any means of expression in Hebrew, Greek, Latin or Arabic, classical or medieval, before about 1400, let alone in Old English, or in Japanese even as late as the mid-nineteenth century.”<sup>198</sup>

This claim may be partly considerable to the extent that among more recent political theorists it has become almost an accepted assumption that there is no trace of rights (natural or otherwise) in Aristotle or other Greek or Roman political philosophers. This dictum is often coupled with the claim that the very notion of ‘a right’ is so alien to the ancients that any interpretation of Aristotle, which imputes rights to him must be guilty of anachronism.<sup>199</sup>

In *Fundamental Legal Conceptions*, Wesley Newcomb Hohfeld, a prominent American jurist, asks what would constitute such rights claims. Although his argument is in the realm of legal rights, his account strongly related to the realm of jurisprudence and moral rights.<sup>200</sup> One of the concept of right presented by Hohfeld is to ‘claimed right.’<sup>201</sup> Indeed, the core essence of right is to claim it: the moral significance to right. Claim to right is also a ‘side constraint’ upon the actions of others. With this approach we can investigate in the Plato’s and Aristotle’s works.

(i) Consider these two following texts:

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<sup>196</sup> Mulgan, R. G. *Aristotle's Political Theory: an introduction for students of political theory*, (Oxford: Clarendon Press, 1977), p. 33.

<sup>197</sup> Sabine, *A History of Political Theory*. (Illinois: Dryden Press, 1973), p.5.

<sup>198</sup> MacIntyre, *After Virtue: A Study in Moral Theory*, (London: Duckworth, 1985), p.67.

<sup>199</sup> Green, *Lectures on the Principles of Political Obligation*, (London: Longmans, Green, and CO.), sect. 39. Mulgan, R. G. *Aristotle's Political Theory: an introduction for students of political theory*, (Oxford: Clarendon Press, 1977), p. 33.

<sup>200</sup> Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, (New Haven: Yale University Press).; Martin and Nickel, ‘Recent Work on the Concept of Rights’, *American Philosophical Quarterly*, 17 (1980): 165–80.

<sup>201</sup> See this work, page 16, foot note 19.

“... having and doing of one’s own and what belongs to oneself would admittedly be justice.”<sup>202</sup>

“... when people dispute, they have recourse to a judge; for the judge is meant to be a sort of ensouled justice. And they seek the judge as an intermediary, and in some places they call judges mediators, assuming that if they get an intermediate amount, they will get justice. The just is therefore in some way intermediate, if the judge is also.”<sup>203</sup>

The line of argument implies that resolving dispute is getting justice. The process comprises the level that the disputants “say that they have their own.”<sup>204</sup> In this context, the definition of one receives in a just settlement of a dispute is to get that which is ‘one’s own.’<sup>205</sup>

- (ii) Freedom was an important concept in Greek tradition and in Greek politics. This can be seen in the comparison of Greeks and Barbarians, Men and Women and in the concept of household. The concept of “free” in contrast to slave also implies the right to be free. “To the ancient Greek a free man or free woman was fundamentally contrasted with a slave who belongs wholly to another person.”<sup>206</sup>
- (iii) The concept of authority also implies the concept of right. By exercising authority, one or an organization can create specific rights, duty, and obligation. Having authority also implies that one or an organization can execute law or a person.<sup>207</sup>

Aristotle states that :

“Solon seems at any rate to grant the most necessary power to the people, namely to elect and audit the offices, for if they did not have the authority over this, the people would be a slave and an enemy to the government.”<sup>208</sup>

Thus, it is clearly another tradition of thought against Mulgan, Subin and MacIntyre which shows that the concepts of power and right are inseparable. According to these foundation, Ernest Barker offered that:

“Plato thinks of the individual as bound to do the ‘duty’ to which he is called as an organ of the State: Aristotle thinks of the individual as deserving the right which he ‘ought’ to enjoy in a society based on (proportionate) equality.”<sup>209</sup>

“The life-breath of the State [. . .] is a justice which assures to each his rights, enforces on all their duties, and so gives to each and all their own.”

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<sup>202</sup> Plato, *Republic* IV 433<sup>c</sup> 6-434<sup>a</sup> 1

<sup>203</sup> Aristotle, *Nicomachean Ethics* V 4, 1132<sup>a</sup> 19–24.

<sup>204</sup> Aristotle, 1132<sup>a</sup> 27–9.; See also Plato, *Republic* IV 433<sup>c</sup> 6-434<sup>a</sup>.

<sup>205</sup> “justice is the virtue through which individuals have their own things.” Aristotle, *Rhetoric* 9, 1366<sup>b</sup> 9–10. See also Aristotle, *Politics* 1280<sup>b</sup>11

<sup>206</sup> Miller, *Nature, Justice, and Rights*, (Oxford: Clarendon Press, 1995), p.102. See Aristotle, *Politics* 1254a10; 6 1255b11.; Plato, *Republic* II 359c7).

<sup>207</sup> Aristotle, *Politics* III 14 1285a

<sup>208</sup> Aristotle, *Politics* III 1274<sup>a</sup>15–18. See also Aristotle, *Politics* III 1272<sup>a</sup> 5.

<sup>209</sup> Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.235.

More interestingly, Andrew C. Bradley called attention to the parallel between the debate over suffrage in nineteenth-century England and the discussion of constitutional justice in Aristotle's *Politics*. Like Aristotle, the English used the word 'right', as well as 'justice', in a double sense. Bradley distinguished these senses as follows:

“When we say that a man has a right to the franchise, what do we mean? We may mean that according to the constitution, the English political *dikaion*, he can claim it, because he satisfies the conditions laid down by the law as necessary to the possession of it. But when the franchise is claimed as a right by those who do not satisfy these conditions, this cannot be the meaning. They really affirm that the actual law, the English *dikaion*, is not properly or absolutely just and does not express 'natural right', that, according to real justice, they ought to have the suffrage, and that, if they had it, the state would be less of a *parekbasis* [deviation] and nearer to the ideal.”<sup>210</sup>

In this sense, the concept of claim to right, right to liberty, and right of authority *qua* domination primitively is expressed in Plato's *Republic* and Aristotle's *Politics*. However, it is clear that the concept of 'right' of individuals who possessed a set of 'inalienable' rights in the sense advanced, for example, in the American Declaration of Independence. In this sense, Newman argued that:

“The State does not come into being, in Aristotle's view, in derogation from, or limitation of, man's natural rights: on the contrary, it calls them into existence. It enunciates what is just (1253a37): it is in the State, and with reference to its end, that men's rights are to be determined (1282b14).”<sup>211</sup>

Beside the discussion of justice, and more importantly, Plato in *Republic* and Aristotle in *Politics* argue for the justification of a hierarchical state. An attempt to justify a power structure or a regime leads to another issue: the possession of political power, hence the question of 'who is entitled to such power' or question of 'right to power'. Here, we can see that the possession of political power is related to the alternatives which is obviously the question of the justification of power, and on the other hand, it is related to the origins of power and the concept of rights, its effectiveness, and its compliance which is the question of legitimacy.<sup>212</sup>

We already argued that at least each political regime, more or less, needs to be justified, so it needs the concept of rights in both sides of the power spectrum, that is the governors and those who are governed. Without such concepts, historically and pragmatically speaking, there would be no political power, nor would any power relation hardly be stable. In this sense, the concept of civil and political rights of people in ancient Greek political thought is somehow covered, and coexists with other discussions. Although there is no direct discussion in ancient Greek political works on rights and political power, and its legitimacy, almost all were

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<sup>210</sup> Bradley, 'Aristotle's Conception of the State', in E. Abbott (ed.), *Hellenica*, (London, (1991 first pub. 1880), 181–243. pp. 49–50.

<sup>211</sup> Newman, *The Politics of Aristotle*, (Oxford: Clarendon Press, 1886), p.32.

<sup>212</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.119.

implicitly concerned with these questions. Furthermore, without the concept of civil and political rights, there would be no process of civilization or politicization.

Thus, the critique utterly ignores the concept of political power which is not changeable in any time. This critique also ignores the theory of political consciousness: the idea that legitimate political power is the mutual recognition of right in the relation of an authority and its subject, and the idea that political power is the essentially integrated concepts of ‘power’ - *qua* power over - and ‘right’ - *qua* power to/of.

For example, the main issue of Plato’s *Law and Republic* and Aristotle’s *Politics* is distribution of political power. The Aristotelian concept of justice is nothing more than a philosophical discussion about inequality between equals, or his theory of the states is about the justification of specific form of distribution of power. What Aristotle believed, first, was the idea of elementary differences between Greeks and Barbarians, by which he meant any non-Greeks, and, second, the theory of master and slave and his controversial theory of ‘slaves based on their nature’, and third, the theory of the relation between husband and wife in a household which refers to the natural inequality in which he believed. In contrast, we see that he believed, as he argued in his famous theory of the state, the statesmen (*politikos*) established the state and the concept of share power. Even though Aristotle's approach to the civil and political rights and power is hard to be comprehended in the modern, western political world. Given his theory of the distribution of power, the concept of ‘right to power’ is one of the cornerstone of his political thought.

The answer presented here to the question ‘whether the discussion about the civil and political rights is comprehensible in the ancient Greek political thought?’ should not be compared to the modern criterion for the civil and political rights of people, especially the one which is introduced as the official concerns in the United States and in France.<sup>213</sup> In fact, it was around three centuries ago that we were officially vaccinated with the modern concepts of human rights and political rights. Today, one may ask, ‘why should we even make an effort to understand the antique passages in which the idea of political power and rights may esoterically be mentioned, especially after all the changes in the Western history?’

It is important to know that the concepts of rights and power, implicitly, were among a long list of concepts which are addressed by Plato and Aristotle. Yet, I may warn that for the modern thinkers, the ancient theory of state may appear as a paradox but it should not let us ignore that the ancient innovation in justification of power aimed at the stability of Athenian city-state, even though is the primitive form, are vying our attention. Plato and Aristotle approach to justified power is one of the roots that help us to better understand one form of the modern concept of justification.<sup>214</sup>

## **1.2. To Harness power**

In the last decades, the increase of the scholarship on the concept of power and criticizing the authoritarian/totalitarian and semi-democratic – hybrid - regimes has so far generated only a fragmented understanding of despotic forms of politics. It also became an increasingly common trend to do studies on the authoritarian parties, legislatures, bureaucracies, and

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<sup>213</sup> Sternberger, *Drei Wurzeln der Politik*, Schriften II,1. (Frankfurt am Main: Insel Verlag, 1978), p.87.

<sup>214</sup> See Sternberger, *Drei Wurzeln der Politik*, Schriften II,1. (Frankfurt am Main: Insel Verlag, 1978), p.88.

elections,<sup>215</sup> as well as repression, leadership change, and regime stability across dictatorships.<sup>216</sup> Yet in most cases, these facets of despotic powers and dictatorships are examined individually and in isolation.<sup>217</sup>

In contrast to this modern trend, the consideration of this part is to investigate for a unified theoretical framework that would help us to identify the different concepts of authoritarian/totalitarian regimes, their sources of justification, their key instruments, and to identify their enormous variations.

To do so, comprehensible aspects of the concept of justification are necessary, which can be traditionally found in Plato's *Republic* and Aristotle's *Politics*. Yet, we have to consider the chronological and thematic understanding of Plato and Aristotle's works. As Plato and Aristotle wrote their works in Arts, Philosophy, and Politics, any given concept is treated slightly different throughout their works when it is related to a specific theme. It is for this reason that firstly, we only consider Plato's *Republic* and Aristotle's *Politics* that are related to our discussion, and secondly, these works are selected because they are still the foundation of Medieval and modern theories of the hierarchical and mostly despotic power structures. In classical period between seventeenth and twentieth centuries, those who argued for European monarchies such as Robert Filmer and his followers, for European aristocracies such as Hobbes, Schmitt, and Strauss, and in the twenty-first centuries, those who are arguing for the Middle-Eastern monarchies and theocracies furiously use these ancient works as their main resources. Finally, we only address the context of these selected works restricted to answer our question of justification in a 'historical consent. This concentration helps us to prevent from wandering or getting lost in numerous works of Plato and Aristotle and to make sure that our argument follows a linear path.

Plato, as a pioneer in theorizing a systematic power relation, tried to justify a certain power structure, where he discusses the Philosopher-King, whom he assumed has the natural right to rule. Plato was concerned about the hierarchical power structure so much that he extended the theory of power of his Philosopher-King excessively over all levels of private and social spaces. One reason to abandon the search for Plato's perfect and unchangeable form of state, would be the power that the ruler holds. When we look deeper, we can realize that along with the 'perfect state', Plato had cared much about stability and harmonization of the state. Although, the idea of the perfect state fits the most to the idea of healthy and stable authority, but reaching the latter has been not always addressed the "perpetuation of ideal condition."<sup>218</sup> Both unattainable ideology and manipulative securitizing the authority is not as the same as possession of political power. Hence, they threaten and sometime beaten authority in its own game. Yet, the bold changes for such aims bring morbidity and mortality to power.

Aristotle, as Newman mentioned, "with some variations, followed in Plato's footsteps."<sup>219</sup> His idea about an ideal power structure in *Politics* was more democratic compared to Plato's *Republic*. Yet, at the very core of Aristotle's idea is the question of the due and justice in the

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<sup>215</sup> Gandhi and Przeworski, "Authoritarian Institutions and the Survival of Autocrats". *Comparative Political Studies* 40, (2007): pp.1279-1301, p.1283.

<sup>216</sup> See Green and Gerber, *Get Out the Vote! How to Increase Voter Turnout*, (Washington D.C.: Brookings Institution Press, March 24, 2004).; Cox, *Making votes count*. (Cambridge: Cambridge University Press, 1997).

<sup>217</sup> Svobik, *The Politics of Authoritarian Rule*. (Cambridge: Cambridge University Press, 2012), p.2.

<sup>218</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p.237.

<sup>219</sup> Newman, *The Politics of Aristotle*, (Oxford, 1886), vol.1, p.82

distribution of power. Following Plato, Book I to III and Book V of Aristotle's *Politics* represented the same theory of justification of power of hierarchical power structure in which power satisfies the interests of the few at the expense of others or the majority. He believed that in order to theorize the most stable political order he needed to justify the hierarchical power structure, and as one of the traditional thinkers, who held the metaphysical approach so dear, he based his political theory on the theory of naturalness or naturalism.

In *Nature, Justice, and Rights*, Miller argues that:

“Aristotle's politics may be characterized as ‘naturalistic’, in the sense that it assigns a fundamental role to the concept of nature (*phusis*) in the explanation and evaluation of its subject-matter. Indeed, naturalism, in this sense, is a dominant theme throughout his philosophy.”<sup>220</sup>

However, his intention was clear. Aristotle knew that the stench of injustice affects the health of the political community and its power relation. Injustice, whether between individuals, between social groups, or in a general concept of distribution of power or function of law, produces a fever of disaffection, anger, and rebellion which can be a dangerous foe against an authority.<sup>221</sup>

In modern times, the defender of the same naturalness and natural rights of hierarchical power, such as Filmer, Hobbes, Carl Schmitt, and Leo Strauss, emphasize on the same line of reasoning to justify the hierarchical and authoritarian/totalitarian power, as they found the concept of traditional natural right to be a truism.<sup>222</sup> This common point between the traditional and the modern advocates of hierarchical power structure and theory of naturalness can be vividly seen in Strauss' argument where he admittedly expressed: “since men are then unequal in regard to human perfection, i.e. in the decisive respect, equal rights for all appears to the classics as most unjust.”<sup>223</sup> Thus, he concluded that “the best regime is that in which the best men habitually rule, or aristocracy.”<sup>224</sup> Yet, these modern theorists did not seek for the ideal justice anymore, since they realized that ‘justice’ is an irrational ideal without the concept of legality. They may believe that the ideal justice is not the subject to cognition. Furthermore, it has been assumed that in modern-day politics, at least after the age of Enlightenment, the concept of common interests which has strongly emerged from rational cognition would be more comprehensible than the ideal justice. We can see that the endeavors of both ancient and modern political theorists are aimed to introduce an order that satisfies one or some interests at the expense of others.<sup>225</sup>

Here, it must be stated that neither the hierarchical power relation nor the inequality between individuals are what Western political values and our normative theory of power rely on. The pioneers of modern Western politics in the classic era such as Locke, Charles

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<sup>220</sup> Miller, *Nature, Justice, and Rights*, (Oxford: Clarendon Press, 1995), p.28.

<sup>221</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p.243.

<sup>222</sup> See also Shapiro, *Legality*, (Cambridge: Harvard University Press, 2011), p.15. Shokri, "Strauss's Farabi." *Studia Humana* 2:2 (2013).

<sup>223</sup> Strauss, *Natural Rights and History*, (Chicago: The University of Chicago Press, 1953) p.135, see Birgit Haas (ed.), *Macht: Performativität, Performanz und Polittheater Seit 1990*, (Würzburg: Königshausen & Neumann GmbH, 2005), p.82-84. See also Shokri, "Strauss's Farabi." *Studia Humana* 2:2 (2013).

<sup>224</sup> Strauss, *Natural Rights and History*, (Chicago: The University of Chicago Press, 1953) p.140

<sup>225</sup> Kelsen, *General Theory of Law and State*, (Cambridge: Harvard University Press, 1949), p.13. The concept of legality and legitimacy will be addressed in part three.

Montesquieu, Rousseau and a long list of other thinkers (from the seventeenth century through the twentieth century) have had significant different views from ancient political thought and their modern strings. The most important difference that diverged the modern politics from the traditional one is that the nature and the content of the traditional divine law are not accountable anymore to call the inequality between men as a natural fact, and hence to give a privilege to the so-called naturally selected individuals, the philosopher-kings, and the blue-bloods.<sup>226</sup> In fact, neither the stability nor the security of power holders cannot justify such means.

On the contrary to this critique, the founding fathers of modern politics, such as Locke, refer to the political and civil rights such as liberty, life, and property. These rights became the principal of the modern theory of natural rights.<sup>227</sup>

To argue that there is the natural right or divine right of the people is just as hard as to argue that there is the divine right of kings. Yet, looking from the political angle, the nature of men as political beings is comprised of interdisciplinary concepts of individual *qua* parts of a power structure which entitles them to claim certain rights. The concept of rights which are based on the normative, rational, legal foundations concerning one's own behavior, somebody else's behavior- *jus in personam*-, and certain things- *jus in rem*.<sup>228</sup> These rights cannot be ignored when we are concerning the concepts of power. A normative, rational, and legal right presupposes a normative, rational, and legal duty. It also presupposes a spectrum to exercise the claim to the right. As an individual *qua* part of a power structure, I have had a right to my life, my liberty, and my property always, and based on this awareness or consciousness, I consciously bound myself to an authority and a certain legal order in which both the authority and I are morally, rationally and legally obligated to recognize our rights and the boundaries of our powers as well as the others. Here, we can see that political power is not only comprised of (i) the concept of 'power over', or domination, but also it is comprised of (ii) the concept of 'power to' which implies the rights that the members of each side of political spectrum<sup>229</sup> are entitled to, and of (iii) the concept of 'power of' which implies the right to claim the rights- the moral significance of rights.<sup>230</sup>

Yet, get back to the basics, political power is inevitably transformed in each society. This is the starting point for the traditional-political thoughts. The morbidity and mortality of power are based on vast organic elements and situations. An authority can do its best to protect itself from the political fluctuations by adopting an appropriate justification and legitimacy in different spheres and dimensions. Yet, there are the other factors that should be addressed,

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<sup>226</sup> However, for Plato "individuals are incapable of apprehending the truth". See Rice, *A Guide to Plato's Republic*, (Oxford: Oxford University Press, 1998), p.53. Farabi, Medieval Islamic political theorist followed the footsteps of Plato for saying that others imitate selected or privilege individuals "because neither nature nor habit has provided their mind with the gift to understand them as they are". Farabi, *On the Perfect State (abādi' arā' Ahl Al-madīna Al-fāḍila)*, a Revised Text with Introduction, Translation, and Commentary Richard Walzer, (Oxford: Clarendon Press, 1985), p.279.

<sup>227</sup> Locke, *Two Treatises of Government*, (Cambridge: Cambridge University Press, 1988) s.6, p.270-271, See Wolff, *An Introduction to Political Philosophy*, (Oxford: Oxford University Press, 1996) p.20

<sup>228</sup> Kelsen, *General Theory of Law and State*, (Cambridge: Harvard University Press, 1949), p.75.

<sup>229</sup> The governors and those who are governed.

<sup>230</sup> Feinburg, "The Nature and Value of Rights" in J. Feinburg, *Rights, Justice, and the Bounds of Liberty*, (Princeton: Princeton University Press, 1980): pp.143-159, p. 151.; See also Darwall, Stephen L. *Morality, Authority, and Law: Essays in Second-Personal Ethics*, (Oxford: Oxford University Press, 2013), p.114.

which are that each regime tries to address and fortifies the justification and legitimacy of its own. These two elements certainly are an advantage for an authority. Hence, if a regime fails to do so, the questioning about these concepts is fatal.<sup>231</sup> To address the challenge of justification, authorities have to tackle a long list of predicaments which can take place in each following realm:

1. Ideology (input justification)
2. Social functioning (throughput justification- output justification)
3. Diversity in race, religion, and gender (throughput justification)
4. Civic cohesion (output justification)
5. Personnel and officials (throughput justification)
6. Techniques of organization and actions (throughput justification)
7. Law (input justification- throughput justification)
8. Moral (input justification)
9. Symbolism (input justification- output justification)
10. International relations (output justification)

Here, we have to ask, ‘how is an authority to harness power without falling prey to a charge of lost of justification and legitimacy?’, ‘Can a regime that upholds the flag of authority be considered as a justified and legitimate one?’

From the assessment of the ancient Greek political theories, indeed, we learn that the justification of power is vital for a regime. However, their theories of the justification of hierarchical power relation are not accountable today, since they were strictly related to the political problem of their time.<sup>232</sup> The idea of Ideal-state, after all, turned out to be that it was not universally ideal. Moreover, we can dismiss much of their political thoughts, especially Plato’s, since their theory lacks the lens through which one can see the reality. Of course, any modern theory of political power and its justification is not merely centered around the output approach, namely the Ideal State, but also it covers more concepts of power, and in a way that it is more related to the reality.

Moreover, we learn from the political theories of Plato and Aristotle that wisdom and knowledge can weaken the shock of political change and can explain the morbidity and mortality of power.<sup>233</sup> From their negative emphasize we learn positively that the justification of power is not only about the common good and the perfect state- which related to the output justification- but also is about the political rights and the moral significance of rights. It is only in this way that an authority can address the dissatisfaction and ineffectiveness which threaten its existence.<sup>234</sup> A shift in Aristotle’s political thoughts from Plato’s indicates that to some extent such knowledge is tied to the historical and political consciousness. These two elements

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<sup>231</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p.253-254.

<sup>232</sup> Jacoby, *Picture Imperfect: Utopian Thought for an Anti-Utopian Age*. (New York: Columbia University Press, 2005), p.167.

<sup>233</sup> See also Merriam, *Political Power*, (New York: Collier Books, 1934), p. 237.

<sup>234</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), 263.; see Letter from James Madison to W.T. Barry (August 4, 1822), in *The Founders' Constitution*, Volume 1, Chapter 18, Document 35, (Chicago: Chicago University Press, 1987/2000).

<http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html>

are directly linked to the evaluation of the patterns of 'political equilibrium', which puts a vast amount of time in the actual process of personalities and situation by which the processes of justification and legitimacy are being shaped. We can learn from the patterns of 'political equilibrium', that is the recognition of the rights on both sides of the political spectrum, to avoid people lost their civil and political rights, their dignity, and their property.<sup>235</sup>

Yet, the question remains regarding how the authoritarian/totalitarian state could be justified. How can authoritarian/totalitarian states thrive in the rivalries of political power? And how can they wield their power, even for a while?

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<sup>235</sup> See also Merriam, *Political Power*, (New York: Collier Books, 1934), p.263.

## 2. The Justification of Authoritarian/Totalitarian States

Is power involuntary bad, voracious, and brutal? This question is important, yet difficult to be answered. It is important since it affects almost every other aspect of politics. It is hard to be answered since we pose this question only when there is a political predicament. Today, what we consider as political power after both world wars, has at some points diverged from the medieval and ancient concept of authority, and at other points less so.

The common point between the modern and ancient political theories is the concept of ‘power over’ or domination. The questions such as ‘what is an authority and its origin?’, and ‘what is political power?’ cheerfully lead us to the old-fashion stories and histories of people in hierarchical power relations. These traditional theories still are held dear by some modern scholars who try to use the ancient Greek theories to answer today’s questions. Indeed, the ancient political thoughts glitz as one of the unbelievably clever, interdisciplinary, and original approaches to the concept of justification of political power.

The notion and the concept of political power in ancient Greek political thought, especially in Plato and Aristotle, is, however, an elusive concept. If we want to take each of the arguments on power and authority which are presented in the *Republic* and *Politics* and compare them with other arguments in other works of their authors, we could easily get lost in the details and loose track of the general direction of these works.<sup>236</sup> So to understand the approach of Plato and Aristotle to these concepts, we must bear two points in mind. First, the core essence of *Republic* and *Politics* define the justification of power as identical with the definition of the concept of ‘controlling’, ‘domination’, or ‘power over’. Second, both the *Republic* and *Politics* imply that the initial concern that leads to the formation of an authority is the preservation of life,<sup>237</sup> yet the initial concern that leads to establish a political order is the natural excellence in practical and calculative wisdom: virtue.<sup>238</sup> Both elements are the inevitable premises for the teleological politics in which there is an ‘Ideal city.’ For Plato and Aristotle, this hypothetical city is located “back from the sea so that distributing contacts with sailors or other strangers might not operate to upset the equilibrium of the community”,<sup>239</sup> and so that the stability of authority unquestionably remains. The preservation as an initial concern to justify an authority implies that the concept of ‘power over’ is a natural concept.<sup>240</sup> Considering virtue as an inseparable part of the concept of power implies that the concept of ‘power over’ as the only concept of power, in identity and existence, is a good thing. Thus, the power of preservation not only as a necessity but also assumed to be a virtue. This approach to the concept of power means that the hierarchical principles in a power relation are the only possible and natural ones, since the preservation was the main ground to serve a bigger entity- i.e. community, which emerges out of the man’s experience of life. It also entails that the so-called natural concept of ‘domination’ is the good one.

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<sup>236</sup> Rice, *A Guide to Plato's Republic*, (Oxford: Oxford University Press, 1998), p.40.

<sup>237</sup> Aristotle, *Pol.* 1252<sup>b</sup>-1253<sup>a</sup>; See also Newman, *The Politics of Aristotle*, (Oxford, 1886), vol.1, p.80.

<sup>238</sup> On Aristotelian virtue see Miller, *Nature, Justice, and Rights*, (Oxford: Clarendon Press, 1995), p.11.

<sup>239</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p.237.

<sup>240</sup> Montesquieu, *The spirit of laws*, trans. by Thomas Nugent, (Kitchener: Batoche Books, 2001, first pub. 1748), p.172.

The combination of the concepts of naturalness and virtue to define the concept of power shaped a systematic teleological politics in which the arguments for the justification of power provide a concept of unequal and unchecked notions of domination for an authority.<sup>241</sup> However, the problem of the concept of political power is not only related to the exercise of power. In fact, the question is wrongly proposed, as the ancient Greek political theorists wanted to comprehend: what are the highly regarded aims of the power? what about the aim of ‘ideology’? which outcome relates the ideology to the exercise of power? and how an ideology can be laid down for such power structure?<sup>242</sup>

The theory of teleological-political concept of power implies the necessity of preservation for justification of power. For Plato and Aristotle, this concept can be broken down into two general notions of power relation: (1) the control of men over the external factors and (2) the control of some men over others.

Let us elaborate on the first notion of power relation. For the ancient Greeks, the control of men over the external factors is only possible with the knowledge of the cosmos.<sup>243</sup> This element can be vividly seen in Plato’s politics.<sup>244</sup> In this sense, the ancient philosophers (Plato and Aristotle) have seen that nature is a hierarchical order, and they assumed that this hierarchical order would be an *ideal* model to imitate to build a perfect human society.<sup>245</sup> Any fluctuation was a movement to change toward corruption since it was understood as being against the stable *Ideals*. This sense of controlling over the external factors was a movement against the accepted theory of “everything is in Flux” proposed by Heraclitus<sup>246</sup>, one of a prominent philosophers of ancient Greece. This theory is one of the sources of modern relativism.

We have to ask how the concept of ‘control of man over the external factors’ is related to the concept of ‘control of some men over others’? To answer this question, we need to understand the relationship between the doctrine of Flux and the justification of power. According to the ancient Greek theorists, these concepts are linked based on two assumptions. On the one hand, society as a natural being and as a part of cosmos has a decaying trend, so every law of the universe is true for human community. In this sense, the theory of flux was not only concentrating on the nature as material but also on the human society.<sup>247</sup> On the other hand,

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<sup>241</sup> Wolff, *An Introduction to Political Philosophy*, (Oxford: Oxford University Press, 1996) p.75.

<sup>242</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.118.

<sup>243</sup> Universe. See Susemihl and Hicks. *The Politics of Aristotle*, (London: Macmillan, 1894), p.48.; See also Vogt, *Law, Reason, and the Cosmic City: Political Philosophy in the Early Stoa*, (New York: Oxford University Press, 2008), p.97-98.

<sup>244</sup> Popper, *The Open Society and Its Enemies: The Spell of Plato*. (London: Routledge, 1947), p.17, 40-44; Wolff, *An Introduction to Political Philosophy*, (Oxford: Oxford University Press, 1996), p.73-74

<sup>245</sup> This idea emerged from a school which some scholars called “Natural Philosophy”. See also I. H. Gran, *Philosophies of Nature After Schelling*, (London and New York: Bloomsbury Academic, 2008), p.35-6. Paul Avis Argues that this Idea could be deduce syllogistically. Cf. Paul Avis, *God and the Creative Imagination*, (New York: Routledge, 1999) p.40-41. See also Susemihl and Hicks. *The Politics of Aristotle*, (London: Macmillan, 1894), p.48.

<sup>246</sup> Cratylus 402a = DK22A6; (D. 61, M. 35) Hippolytus, *Refutatio* IX.10.5.; Charles Kahn, *The Art and Thought of Heraclitus*, (Cambridge: Cambridge University Press. 1979). Heraclitus of Ephesus. c. 535 – c. 475 BC. was a pre-Socratic Greek philosopher, and a native of the city of Ephesus, a part of the Persian Empire.

<sup>247</sup> Popper, *The Open Society and Its Enemies: The Spell of Plato*. (London: Routledge, 1947), p.11-12.

the interdisciplinary aspect of the ‘study of nature’, and ‘philosophy’ dictated that there is a direct connection between the natural law of the universe and the natural law of the state. The theory of Flux, which was at first a study on the nature as whole,<sup>248</sup> was a way of addressing the political problem of the time which was the ways of democratization and the rebel of people against power holders,<sup>249</sup> Here, we can see the emergence of the second notion of the so-called natural power relation which is ‘the control of some men over others’. ‘Others’ became the foundation of the concept of power relation and formed a primitive concept of political spectrum.

The ancient Greek political theorists could not ignore the role of people, at least in a sense that the idea of their ideal ruler in their theory of hierarchical power relation is manifested in the personalities who were the few white, free, Greek landlord males. In this sense, we can argue that based on the presumption that the concepts of ‘power of’- or the moral significance of rights- was not utterly obscure for the ancient Greek philosophers, and their endeavors for the justification of political power were not for the specific individuals, but for the ruling class. The notion of ‘control of some men over others’ does not imply any democratic elements, but only is an assessment to the theory of Ideals and an answer to the problem of Flux.

For ancient Greek philosophers, this rivalry was a vital part of a hierarchical power structure. Heraclitus tried to find a solution for his doctrine of Flux and tried to demonstrate a stable ground beyond the world of flux. Plato followed along this line of thought by trying to assess this question of justification of power of ruling class, and to find a way out of the problem of instability, i.e. Flux, which was a destructive wave against the Athenian ruling class, a class that Plato saw himself as belonging to.<sup>250</sup> In other words, beyond the philosophical point, there was a personal motive for Plato since he considered himself to be of royal blood.<sup>251</sup> This fluctuation in Athenian society was a high price for Plato who lost Socrates and his family members in the process of democratization.<sup>252</sup> Thus, based on both his ‘philosophy of Nature’ and his ideology, Plato, took for granted that fluctuation is degeneration. Similarly, this assumption was also the concern of his descendants. In particular, one can see that the degenerating fluctuation is one of the fundamental presumptions in Aristotle’s *Politics*. The

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<sup>248</sup> Armstrong, (ed.) *The Cambridge History of Later Greek and Early Medieval Philosophy*. (London: Cambridge University Press., 1967) p.24.

<sup>249</sup> See also Crossman, *Plato To-day*, (London and New York: Oxford University Press, Routledge, 1937, 2013), p.16.

<sup>250</sup> See Perry, *Western Civilization: Ideas, Politics, and Society*, (Boston: Wadsworth, 2013) p.82.; Barker interpreted the transformation of Greek political structure as the chaotic situation. Barker, *Greek Political Theory: Plato and His Predecessors* (London: Methuen, 1960), p.48.

<sup>251</sup> His father’s family traced back to the last tribal king of Attica, and his mother’s family to the Solon. For his family tree see B. Witte, *Die Wissenschaft vom Guten und Bösen* (Berlin: Waker de Gruyter & Co., 1970), p.53.; see also J. Kirchner, *prosopographia Attica*, N.11855, (Berlin: 1903). See also Waterfield, *Why Socrates Died: Dispelling the Myths*, (London: Faber and Faber, 2009), p.14.

<sup>252</sup> Bambrough, (ed.), *Plato, Popper And Politics: Some Contributions to a Modern Controversy*, (Cambridge: Heffer, 1967), p.8.; See also Waterfield, *Why Socrates Died: Dispelling the Myths*, (London: Faber and Faber, 2009). See also Saxonhouse, *Free Speech and Democracy in Ancient Athens*, (Cambridge: Cambridge University Press, 2006).

‘control of some men over others’ is the core essence of *Politics* for the justification of political power *qua* domination on a stable grounds of a harmonized state.<sup>253</sup>

## 2.1. Knowledge and Hierarchical Power Relation

Though the ancient Greek political theorists were the pioneers in the theory of state, finding a stable ground that they could ultimately refer to was harder for them than the modern and western political theorists.<sup>254</sup> The theory of ideal city or ideal state was not easy to elaborate in the time of the prevailing concept of relativism. History of political thought was at its early stage and the ancient Greek political theorists have had no sample and very little political experience. In this sense, Plato, following Heraclitus, made an attempt to use the theory of *Logos* to build his own critical theory of state and power.<sup>255</sup> As nature was one of the strong representatives of power and a great concern for philosophers, his political theory was excessively centered around the theory of nature and the natural law.<sup>256</sup> Plato maneuvered his way toward the theory of hierarchical natural structures, which implies a divine ideal of being on the top of his pyramidal theory.<sup>257</sup>

For Plato, the stability of the ‘ideals’ implies an order, which can be known and used as the sample to control the men. Plato stressed this point in his ontology which is a top-down approach to demonstrate that this hierarchical structure should be used for engineering the human society to avoid the fluctuation. Hence, he assumed that the ontological view of the ‘reality’ requires a hierarchical order for controlling the society to gain the stability in the state. The stability and controlling seem to be parallel elements and a stable ruling class is assumed to be a vital part of such community. Furthermore, both for Plato and Aristotle, to know this structure is to possess wisdom, and to control the community according to this wisdom is to naturally possess the excellence.<sup>258</sup>

To elaborate on this point is to know how it helps to understand the hierarchical political order that it implies. As Aristotle and Plato believed, the first step is ‘to understand’ such structure. This step combined two fine lines.

(i) The first fine line in Plato and Aristotle political thought is a fundamental difference between the truth and opinion. In Book Six of *Republic*, Plato stated:

“Let us agree that their<sup>259</sup> desire is for the whole [truth, knowledge] of it; there is no part whether greater or less, or more or less honorable, which they are willing to renounce.”<sup>260</sup>

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<sup>253</sup> See also Grote, *Aristotle*. (New York: Arno Press, 1973), p.7-8.; Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.232.; Merriam, *Political Power*, (New York: Collier Books, 1934), p. 186.

<sup>254</sup> Shokri, "Rhetoric Tradition and Democracy: Isocrates' Role in Ancient Greek Political Idea. Start Point of Western Political Philosophy." *Studia Humana* 4.3 (2015).

<sup>255</sup> Shokri, "Rhetoric Tradition and Democracy: Isocrates' Role in Ancient Greek Political Idea. Start Point of Western Political Philosophy." *Studia Humana* 4.3 (2015), pp16-17.

<sup>256</sup> Heraclitus, I (D.1,M.1) Sextus Empiricus, *Adversus Mathematicos* VII. 132

<sup>257</sup> Grene, *A Portrait of Aristotle*, (London:Faber, 1963), p.47.

<sup>258</sup> Plato, *Republic*, 508<sup>e</sup>-509<sup>b</sup>.; See also Sayers, *Plato's Republic: An Introduction*, (Edinburgh: Edinburgh University Press, 1999), p.123.

<sup>259</sup> philosophical minds

<sup>260</sup> Plato, *Republic*, 485<sup>b</sup>

We can continue to agree that knowledge proceeds values in the justification and legitimation of power structure. However, we cannot agree that such values cannot be the assessable ones.<sup>261</sup> For Plato, to know the order of being is to know the truth.<sup>262</sup> This specific and holistic approach to a knowledge of a subject not only demonstrates that there is a presumed difference between the truth and opinion but also such difference is generalized to give an absolute view to the concept of knowledge of universe.<sup>263</sup>

(ii) The second fine line in Plato and Aristotle political thought is ‘knowledge’. It is the core essence of the redefined concept of virtue. They assumed that who possesses this virtue also possesses political power over others. They believed that to understand the ‘structure’ – of this universe - is to reach a certain wisdom. In Plato’s theory of wisdom, this point is elaborated in the famous allegory of the cave. He regarded the people trapped in the cave and have no knowledge of the outside world. He, especially, downgraded the place of cave in the hierarchical universe.<sup>264</sup> He believed that this comprehension, namely to recognize the role and place of state, was knowledge rather than a belief and those who have this privilege are directly connected to the stable world of ideals. Moreover, he believed that the knowledge of the whole hegemonic body of the universe,<sup>265</sup> i.e. the order of being- *ordo essendi*-,<sup>266</sup> shows a path in which the cosmos as the highest rank reveals the truth about the order of the lower rank: the state.<sup>267</sup> Thus, ‘knowledge’ *qua* virtue. Both Plato and Aristotle believed in knowledge *qua* virtue since as the ideal state is ‘the product of mind’<sup>268</sup> it is assumed that it has accompanied by a mere teleological priority. Thus, who has virtue also has power.

In Plato’s and Aristotle’s political thoughts, what makes this sort of knowledge as a virtue and as instrument for emphasize on the concept of ‘power over’ or domination is the assumption that the state is part of the nature and it must follow its natural hierarchical structure. This sort of knowledge considers the people, the individuals, merely as parts of the state and their function merely aim to benefit the state.<sup>269</sup> They excessively believed that state

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<sup>261</sup> See above p.3.; Berger and Luckmann, *The Social Construction of Reality; a Treatise in the Sociology of Knowledge*. (England: Penguin Group, 1966), p.111.

<sup>262</sup> Plato, *Republic V*, 475<sup>e</sup>

<sup>263</sup> Plato, *Rep.* 509<sup>b</sup>

<sup>264</sup> Plato, *Republic VII*; see also Plato’s analogy of Sun *Rep.* 516. For further reading about the theory of the Ideal state and its relation to the Heraclitus theory of flux see Popper, *The Open Society and Its Enemies: The Spell of Plato*. (London: Routledge, 1947) p.16-17

<sup>265</sup> David Macauley, *Elemental Philosophy: Earth, Air, Fire, and Water as Environmental Ideas*, (New York, State University New York Press, 2010) P.144-45

<sup>266</sup> See Ernest Keen, *Chemicals for the Mind: Psychopharmacology and Human Consciousness*, (USA: Praeger, 2000), p.4.; For the platitudinal notion of universe see Richard Rorty, ‘The World Well Lost’, in Robert B. Talisse, Scott F. Aikin, (ed.) *The Pragmatism Reader: From Peirce through the Present*, (Princeton: Princeton University Press, 2011), p. 356-7.; To see how ‘the order of being’ shaped in theological aspect see Aidan Nichols, *Shape of Catholic Theology* (USA: The Liturgical Press, 1991), p.266.

<sup>267</sup> Sometimes Plato changes his words from “universe and “whole” to the “gods”. “That most excellent life offered to humankind by the gods, both now and forever.” (Plato, *Timaeus*, 90<sup>d</sup> 4-6). See also Armstrong, (ed.) *The Cambridge History of Later Greek and Early Medieval Philosophy*. (London: Cambridge University Press., 1967) p.24.

<sup>268</sup> Barker, *Greek Political Theory: Plato and His Predecessors* (London: Methuen, 1960), p.281.; Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.112.

<sup>269</sup> Samaras, *Plato On Democracy*, (New York: P. Lang, 2002), p.25.; See also Plato *Rep.* 428<sup>e</sup>-429<sup>a</sup>.

is prior to the individuals as a whole and its hierarchical structure is natural.<sup>270</sup> Hitherto, we have to admit that the ancient concept of state elaborates an excessive existence of hierarchical character of power,<sup>271</sup> and that is what we are mainly concerned with here.

The theory of state, for Plato and Aristotle, was the first and the last thing. In *The Open Society and its Enemies*, Karl Popper, a prominent contemporary Austrian philosopher, argues that to justify state as a hierarchical structure, the initial question was 'who should rule'? and that introduced a major problem in moral philosophy to the world of politics:

"It is my conviction that by expressing the problem of politics in the form 'Who should rule?' or 'Whose will should be supreme?', etc., Plato created a lasting confusion in political philosophy. It is indeed analogous to the confusion he created in the field of moral philosophy by his identification, discussed in the last chapter, of collectivism and altruism. It is clear that once the question 'Who should rule?' is asked, it is hard to avoid some such reply as 'the best' or 'the wisest' or 'the born rulers' (or, perhaps, 'The People' or 'The General Will' or 'The Master Race' or 'The Industrial Workers'). But such a reply, convincing as it may sound for who would advocate the rule of 'the worst' or 'the stupid' or 'the born slave'? is, as I shall try to show, quite useless."<sup>272</sup>

In fact, Plato and Aristotle did not emphasize on the rule of privileged individuals unless it was in the line of their primary aim. The primary aim of Plato and Aristotle was to justify the hierarchical power structure and its aim. The obfuscated concept of power relation in Plato and Aristotle's political thought is on the contrary to the pragmatic process toward equilibrium. Consequently, the equality of all men, which is one of the values of the democratic power relation, is sacrificed based on the assumption that the aim of society can be reached only as a stable hierarchical system.<sup>273</sup>

The teleological and natural political ancient political theories convey that all men are not naturally equal.<sup>274</sup> Plato condemned democracy as he argued that democracy as an aberration is a constitution that 'treat[s] all men as equals, whether they are equal or not'.<sup>275</sup> In book six of Republic, Plato strongly argued against democracy where he uses ship analogy:

"Imagine then a ship or a fleet in which there is a captain who is taller and stronger than any of the crew, but who is a little deaf and has a similar infirmity in sight, and whose knowledge of navigation is not much better. The sailors are quarreling with one another about

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<sup>270</sup> Armstrong, (ed.) *The Cambridge History of Later Greek and Early Medieval Philosophy*. (London: Cambridge University Press., 1967) p.25.; Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.278.; Treitschke, *Politics*, (New York: The MacMillan Company, 1916), p.4. Miller, *Nature, Justice, and Rights*. (Oxford: Clarendon Press, 1995), p.45.

<sup>271</sup> Plato, on the idea of the good, tried to "create an orderly world, he looks at an Ideal modern." Armstrong, (ed.) *The Cambridge History of Later Greek and Early Medieval Philosophy*. (London: Cambridge University Press., 1967) p.23.

<sup>272</sup> Popper, *The Open Society and Its Enemies: The Spell of Plato*. (London: Routledge, 1947) p.106

<sup>273</sup> Nettleship, *Lectures On the Republic of Plato*. (London and New York: Macmillan; St. Martin's P, 1958.), p.90; Sayers argues that "The inequalitarianism of Plato's social philosophy is undoubted", See Sayers, *Plato's Republic: An Introduction*, (Edinburgh: Edinburgh University Press, 1999), p.62

<sup>274</sup> Samaras, *Plato On Democracy*, (New York: P. Lang, 2002), p.25; See also Düring, *Aristoteles*, (Heidelberg: Carl Winter Universitätsverlag, 1966), p.503-504.

<sup>275</sup> Plato, *Republic 558<sup>c</sup>*

the steering—everyone is of the opinion that he has a right to steer, though he has never learned the art of navigation...<sup>276</sup>

Plato condemned democracy not because of its potential danger of the ‘mob rule,’ but because of his preference to the authoritarian/totalitarian form of power. For him, a certain class or certain individuals are necessary for the aim of the state, so as their power. This would be a class that can control the rest of the population with a minimum risk of *decay* for the state; a class that has knowledge of the stable world of ideal. In this way, the virtuous-teleological politics rule out tons of individuals to find ‘the wisest’ men or ‘the born rulers’; hence tagged everyone else as ‘mob’, the ‘stupid’ or the ‘slaves’.<sup>277</sup> This way of justification of power structure has dictated that the most members of a state have neither the knowledge nor the right to power. We can realize that the reason for this problem is that the definition of the power is reduced to merely the concept of ‘power over’ or ‘domination’. The ancient political theorists argued that only those who have the knowledge are entitled to claim the right to rule over people’s life and liberty.

This knowledge and these virtues, in Plato’s political thought, can be found only in philosophers.<sup>278</sup> In book six of Republic, Plato explicitly chose his ruling class, used their knowledge as an mere instrument for teleological politics:

“It is necessary to understand the nature of philosophers first, for I think that, if we can reach adequate agreement about that, we will also agree that the same people can have both qualities and that no one but they should be a leader in cities.”<sup>279</sup>

Hence, according to him, only the philosophers have an opportunity to be the ruling class.<sup>280</sup> In other words, Plato makes a king out of philosopher. That is how the concept of ‘to have knowledge’ is the same as the virtue ‘to control’ of others *qua* domination.<sup>281</sup>

The distinction between a philosopher and the rest, here, is a certain virtue which Plato and Aristotle interpreted it as the wisdom.<sup>282</sup> In particular, this distinction is the bedrock of Plato’s political thought, which aims for flourishing a class of rulers with the certain privilege to control others.<sup>283</sup> Hence, the concept of political power and its justification in the power relation in the ancient Greek political philosophy, especially for Plato, was merely reduced to

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<sup>276</sup> Plato, *Republic* 488<sup>c</sup>–489<sup>d</sup>

<sup>277</sup> Nettleship argues that Plato “thinks of the soul as being either proportionate or disproportionate so as to be well or ill adapted to take hold of truth, just as a hand maybe well or ill adapted for taking hold of things”. See Nettleship, *Lectures On the Republic of Plato*. (London and New York: Macmillan; St. Martin's P, 1958.), p.90

<sup>278</sup> Rice, *A Guide to Plato's Republic*, (Oxford: Oxford University Press, 1998), p.42. See also Nettleship, "The Good as The Supreme Object of Knowledge" in L. Charmwood (ed.) *Lectures On the Republic of Plato* (London and New York: Macmillan; St. Martin's P, 1958.), p.212-237.

<sup>279</sup> Plato, *Republic* VI, 485<sup>a</sup>

<sup>280</sup> Plato, *Republic* II, 369<sup>a</sup>; Samaras argues that “this type of freedom can only be achieved by those who conceive and comprehend reason, the philosopher-ruler.” See T. Samaras, *Plato On Democracy* (New York: P. Lang, 2002), p.30.

<sup>281</sup> Plato, *Rep.* 508<sup>c</sup>, See Wolff, *An Introduction to Political Philosophy*, (Oxford: Oxford University Press, 1996) p.73-74

<sup>282</sup> Plato, *Republic* IV, 428a-c

<sup>283</sup> See Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.112.

the concept of ‘power over’ or domination.<sup>284</sup> Moreover, if the character of the ruler class at different moments in the *Republic* and *Politics* can be justified with the theory of knowledge, teleological-political philosophy might be the most flexible and telling of all concepts in their political works. Their theory of justification of hierarchical power appears to be a persuasive philosophical argument, rather than a thought-provocative and political one, however, it was likely acceptable among all philosophers.

Overall, Plato and Aristotle's theory has only enough of a share in truth to narrowly dodge a charge of despotism, hypocrisy, and disaffection. If we want to ignore the philosophical arguments and see the political aspect of their arguments, their theory of justification of power based on the teleological premises and naturalness trappings (or cosmological politics) of the sort of authority, only inspires devotion in those who are not entirely lovers of wisdom but only the lovers of power *qua* domination over others. After all, the reinvented concept of justification of hierarchical power is faintly familiar with the modern concepts of ‘power over’ but symbolic and suggestive of the deepest truths of philosophical reason. Yet, it fails to emerge in the pragmatic instances. The novel power of the ruling class in the theory of justification of hierarchical power, which is based on the theory of teleological politics and theory of naturalness, assumed to be stabilizing the Athenian city state. However, this theory threatens the state and its unity.

## **2.2. Reluctance to Control or to Knowledge: The Problem of Education in Philosopher-King’s Autocratic Role.**

The knowledge *qua* virtue, as a qualitative aspect, gives the ruler a general mean to claim power. The general concept of virtue is a pure qualitative concept in Plato’s political thought on which he theorized the character of the ruling class. Yet, we can further see that the general concept of virtue, including both the knowledge and the way to apply it, are the theoretical and practical aspects of the same qualitative concept.<sup>285</sup> For Plato, the qualitative aspect was the only important cornerstone of having political privileges. Thus, for him, the virtue of wisdom is what makes the ruler a leader *per se*.<sup>286</sup> Plato’s ruler is adorned with the concept of virtue with which a philosopher can be transcend to the world of ideal. Indeed, as long as the qualitative aspect could have been the only aspect of qualification, such theory of transcendence would have been flawless.

However, both the concepts of knowledge and virtue, which Plato presented in his political theory, are in fact indifferent to what the community could have consisted of or what historical process it has been gone through. This could be one of the major fault lines in Plato’s thought.

On the contrary to Plato’s theory of virtue and power, the function of ‘the claim to power’, which in fact is the right of every human being, and the function of ‘philosophy’, which in fact is an acquisitive quality, belong to the different worlds. This was a problematic point that put an acquisition on the philosopher for the grievance in power and makes Plato’s theory with an injustice. It seems Plato was aware of in *Republic*. We might believe in this allegation due to the metaphor of the cave. So, he continued to justify the domination of philosopher over people.

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<sup>284</sup> See also Lukes, *Power: A Radical View*, (Basingstoke: Palgrave Macmillan, 2005).; Haugaard and Ryan, (ed.) *Political Power: The Development of The Field*, (Opladen: Barbara Budrich Publishers, 2012).

<sup>285</sup> Plato, *Republic IV*, 428-429

<sup>286</sup> See also *Selected Aphorisms*, 2001, Aphorism 4: 25, p.13

Plato used the metaphor of the cave to argue that for the philosophers this world is like a cave. In book seven of *Republic*, when we read through the Plato's argument that philosophers are the ones who can complete their journey outside of the cave with the mean of philosophy, it is not surprising for us if we continue reading that they might be "unwilling to occupy themselves with human affairs,"<sup>287</sup> thus there is no motivation for them to come back. But Plato believed that philosophers are the real – political - rulers. So, he must address some paradoxical points here: first, why a 'freed' philosopher must return to the cave after such exodus? And second, why a philosopher should claim to power after his return?

At the beginning of the discussion Plato mention that:

"It won't be surprising, if those who get so far are unwilling to involve themselves in human affairs, and if their minds long to remain in the realm above."<sup>288</sup>

As it has been mentioned, the unwillingness of philosophers seems to mean that they are reluctant to claim power. At least, this would be the logical conclusion. In contrast, from a deeper analysis of Plato's *Republic* we can understand that Plato used this point to advance his argument on the concept of justice. In other words, it seems that Plato somehow used this concept of unwillingness merely to argue that this would be the character of a just ruler. For readers of Plato remains either a confusion or an active imagination. Either way, today we face the numerous interpretations and critiques of Plato's work. For the same reason, we will abdicate any duty to interpret this theory and restrict ourselves to discussing two main arguments regarding this issue:

1. Plato argued that merely those who have experienced a just way of life are preferable to govern the state. Yet, the 'just way of life' for him was the life which is built by the philosophical education and is full of deliberation.<sup>289</sup> He believed that given the philosopher's experience in the philosophical life, they would not seek "self-satisfaction"<sup>290</sup> with, or abuse power. The contradiction between the theory of the philosopher-king and the reluctance of philosophers to rule is obvious. In this sense, we can see that Plato mostly argued that the reluctancy of philosophers to rule is necessary, but we also see that such necessity is ignorable in Plato's theory of philosopher-king.<sup>291</sup>

2. We have mentioned that Plato has set himself an immense task. His intention was to theorize a system of political thought in which he elaborates upon a new concept of justice and a new definition of just state. Plato's ideal which he assumed as the just one. As he argued, the ideal state, imitating the imaginary world of ideals, is constructed on the social definition of justice, which is defined by the 'Principle of Specialization'.<sup>292</sup>

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<sup>287</sup> Plato, *Republic VII* 517<sup>c</sup>

<sup>288</sup> Plato, *Republic* 517c-d

<sup>289</sup> Bambrough, (ed.) *Plato, Popper and Politics: Some Contributions to a Modern Controversy*, (Cambridge: Heffer, 1967), p.82.

<sup>290</sup> Sheppard, *Why the Philosopher Returns to the Cave?*, *Richmond Journal of Philosophy* 6 (Spring 2004), p.1.

<sup>291</sup> White, *A Companion to Plato's Republic* (Oxford: Basil Blackwell, 1979), p.190.

<sup>292</sup> See Barker, *Greek Political Theory: Plato and His Predecessors* (London: Methuen, 1960), p.195.

### 2.2.1. Principle of Specialization

To assess these issues and the related theories thereof requires that we supply a sufficient amount of time, so here, these issues will be assessed as long as they are related to the theme of the present work. We will start with the latter issue and then will move on to the first one.

The Principle of Specialization is related to the distribution of power based on the Natural Division of Labor.<sup>293</sup> So to understand, Plato has had set the idea that each person fits into a specific position and fulfills a certain task in a society. Yet these tasks are arbitrary since, as he assumed, they are set by nature.<sup>294</sup> The specific concept of this premises is to identify a form of “justice with the principle of class rule and the class privilege” so that no class can interfere into the business of other class.<sup>295</sup>

“The interference with one another’s business, then, of three existent classes, and the substitution of one for the other, is the greatest injury to a state.”<sup>296</sup>

For the principle that every class should attend to its own business means, briefly and bluntly, that the state is just if the ruler rules, if the workers work and if the slave slaves.<sup>297</sup> However, Plato move further to show his theory of justice and justification of power of philosopher as a king follow by force. So, he continued to insist that ‘the interference with one another’s business’ “would most rightly be designated as the thing which chiefly works it harm.”<sup>298</sup>

The nature of power *qua* domination proves that the key role played by the credibility of the people’s threat – the emergence of democracy in their time - to replace a ruler also accounts for why Plato’s theory of political authority formally vested in authoritarian/totalitarian leadership posts can only rarely be separated from the person holding the post or from the personalities.<sup>299</sup>

Despite this general rule, Plato argues strongly in the favor of the philosopher’s claim to power. However, based on ‘one man, one role’, the role of a philosopher and role of a king seem to be two roles, as a philosopher and as a king, and the theory of reluctant philosopher-king seems to be paradoxical.<sup>300</sup> It is in this sense that Plato violated his own rules of ‘one person, one role’.

### 2.2.1. Give with One Hand and Take Back with the Other: Philosopher or King?

Plato assumed that philosopher returns to the cave – or to this political world - based on the presumption of the nature of justice. Julia Annas wrote in her introduction to the *Republic*:

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<sup>293</sup> See also Samaras, *Plato On Democracy*, (New York: P. Lang, 2002), p.55.

<sup>294</sup> Plato, *Republic VII* 434<sup>c</sup>

<sup>295</sup> Samaras, *Plato On Democracy*, (New York: P. Lang, 2002), p.50.

<sup>296</sup> Plato, *Republic* 343<sup>c</sup>.

<sup>297</sup> Popper, *The Open Society and Its Enemies: The Spell of Plato*. (London: Routledge, 1947), p.90

<sup>298</sup> Plato, *Republic* 343<sup>c</sup>.

<sup>299</sup> On despotic power and personalities see Myerson, “Justice, Institutions, and Multiple Equilibria.” *Chicago Journal of International Law* 5(1) (2004): 91–107.

<sup>300</sup> Sheppard, *Why the Philosopher Returns to the Cave?*, *Richmond Journal of Philosophy* 6 (Spring 2004), p.3.

“the philosopher-kings know what is just because they have the knowledge that is based on the form of the good. Their return is demanded by the justice that prescribes disinterestedly what is best for all.”<sup>301</sup>

Even if it is ideally true, it seems that the paradoxical claim of Plato - that philosopher is reluctant to power but he claims power and wants to be a king - shows that his philosopher is eternally trapped between two worlds: the world of contemplation and the world of action. Yet, in Plato’s political thought the connection between the two world made when he argued that philosopher should return because it is the only way to be just. Here we can see how Plato assumed that the notion of just and the claim to power is identical.

If we follow Plato’s argument on the definition of justice, we realize that what Plato presented as the account of justice is in fact based on his theory of the Principle of Specialization and his presumption of the distribution of power. He centered his theory and the presumption around the idea that the state has priority. Due to the prevailing concept of Nature in Plato’s ‘just state’, people as individuals must play their role which is imposed by nature.<sup>302</sup> Thus, though individuals are differentiated by their arbitrary characters, namely some are assumed to be servant and some others peasant, they all have a common prior aim: The aim of people – or the parts - is to serve the state.

Furthermore, to justify his theory of hierarchical state, Plato also argued the theory of arbitrary character of individuals. He started from the metaphysical arguments. So, he argued that the human soul consists of three parts: the rational part, the spirited part, and the appetitive part. For Plato, those men in whose souls the appetitive part is dominant belong to the class of ‘artisans and businessmen’,<sup>303</sup> for those whose souls are dominated by the spirited part belong to the military class; and for those whose souls are dominated by the rational part belong to the ruling class (the class later named the philosopher-kings). Yet, his excessive anti-democratic position made him believe that the majority of the people are those who have souls in which the appetitive part dominates the others, and in contrast, there are very few people in whose soul the rational part dominates the others: the philosophers.

### 2.2.2.1 Justice for a Part or Justice for a Whole!

Strictly speaking, Plato tried to labor ‘what just is?’. In Book four of *Republic*, the concept of individual and their function is comprehensible merely as a part of the concept of state. Based on Plato’s argument on the comparison between the parts and the whole, we can see that an individual is an ‘unjust’ entity since as an individual they lacks the harmony that can only be found in the state.<sup>304</sup> Moreover, the philosophers as the ruling class are powerful since they recognize and safeguard this harmony which is imposed by the state.

It is necessary to examine the motive of Plato’s philosopher; not only in relation to the theory of ideals but also to his crowing vision of the good *qua* virtue.<sup>305</sup> In other words, we have to

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<sup>301</sup> Annas, *An Introduction to Plato’s Republic* (Oxford: Clarendon Press, 1981), 266.

<sup>302</sup> Miller, *Nature, Justice, and Rights*. (Oxford: Clarendon Press, 1995), p38.

<sup>303</sup> Plato, *Republic* 434<sup>b</sup>

<sup>304</sup> See also Sayers, *Plato's Republic: An Introduction*, (Edinburgh: Edinburgh University Press, 1999), p.63

<sup>305</sup> Bambrough, (ed.) *Plato, Popper and Politics: Some Contributions to a Modern Controversy*, (Cambridge: Heffer, 1967), p.82.

examine his motives not only in the realm of the cosmological concept of naturalness but also the teleological aspect of virtue politics.

Plato should have shown that how philosopher's claim to rule could be justified. However, he chose a hard way. He excessively relied on the theory of naturalness, the ground on which he argued that recognizing philosophers as the ruling class is a must.

We see the arguments of Plato on the concept of justice which may trick us into assuming that such arguments present the concrete ground for justification of philosopher's power. Indeed, Plato was concerned about the concept of justice which was the prevailing subject of discussions, yet he was also concerned about a way that he could elaborate on the theory of justice which could match the rest of his political thought. He argued that the only way that the distribution of power would be 'just' is when the philosophers possess the political power. Thus, to match the concept of naturalness, justice, and holism, he tried to marry philosophy to metaphysics, teleology, and politics, as if they are the same things.<sup>306</sup> According to Plato, given the strong connection between philosophy, politics, and nature, each man is a small part of a system which is linked to another and such connection builds the unity of the whole, the political community.

But we cannot stop there. To understand Plato, we have to take one more step back again and see the argument from a wider point of view which refers to the first aforementioned issue. Plato regarded the political community as an inseparable component of nature and the cosmos. In this way, Plato could have argued that as long as the political community would be the component of nature, and politics would be the only instrument to regulate and control this community, the philosophy could have been regarded as a major instrument to know the ideal state and to recognize justice. However, he merely argued for the teleological aspect and stability of his hierarchical regime:

“The object of our legislation [...] is not the special welfare of any particular class in our society, but of the society as a whole; and it uses persuasion or compulsion to unite all citizens and make them share together the benefits which each individually can confer upon the community; and its purpose in fostering this attitude is not to leave everyone to please himself, but to make each man a link in the unity of the whole.” [Plato, *Rep.* 519e-520a]

He argued for the teleological aspect and stability of his hierarchical regime since he wanted to overcome the paradoxical roles of philosopher and king. So, he merged the idea of usefulness and value.<sup>307</sup> This lead Plato to assume that philosophy and politics are the same, just as a philosopher and a king. The claim to establish the just state, for Plato, seems possible only if the philosophers would have became the rulers and the rulers would have became the philosophers, and “political power and philosophy thus come into the same hands.”<sup>308</sup>

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<sup>306</sup> See also Sayers, *Plato's Republic: An Introduction*, (Edinburgh: Edinburgh University Press, 1999), p.63.; See Plato, *Republic* 396<sup>b</sup>; Rice, *A Guide to Plato's Republic*, (Oxford: Oxford University Press, 1998), p.40.

<sup>307</sup> Plato, *Republic* 505<sup>a</sup>

<sup>308</sup> Plato, *Republic* 473<sup>d</sup> Bambrough, (ed.) *Plato, Popper and Politics: Some Contributions to a Modern Controversy*, (Cambridge: Heffer, 1967), p.9.

However, the theory of philosopher-king harms the teleological politics of state. To overcome this critique, Plato refers to the functions which imposed by nature. For Plato, the claim that the philosopher should be the king is not the matter of intention and the individual goals, but he argued that it is an inescapable task for the philosopher which is set forth by nature. This claim demands a strict identification of the philosophical and political concepts: the philosopher-king is required to rule and their ruling is assumed to be in the nature of the ruler, yet the philosopher-king must acquire a specific wisdom and that contains the education of the forms or the ideals.<sup>309</sup>

Plato argued more specifically that one of the tasks of the philosopher-king is to unify and harmonize the community with the cosmos.<sup>310</sup> Interestingly, Plato excessively relied on the arbitrary characters of human soul and assumed that it must agree with nature. He used this premise to argue that the philosophers must rule in order to fulfill their function or their tasks which are in fact fitted by nature. Plato argued that to properly understand the philosopher's ascent out of the cave and know the real world is in itself to understand the duty to return and duty to force the inhabitant of the cave to obey the divine laws, the natural rules and the hierarchical structure. Having said that, it is the strict and interwoven identity of philosophy, metaphysics, and politics that is manifested into the half-arbitrary and half-acquisitive Principle of Specialization.<sup>311</sup>

However, Plato's theory of philosopher-king detach morality from philosophy and politics. The philosopher-king's claim to power is devoid of any moral significance of right. For Plato claim to rule is just a duty set by nature.

### **2.2.3. Different View: Justification by redefining Justice in Authoritarian and Totalitarian Power**

Although Plato tried to argue that the philosophers must complete their final task by being the kings, his main challenge was the justification of such office. He has done to succeed in this mission, however, his theory of teleological politics, principle of specialization, and justice are full of paradoxes, as they are in contradictions with each other.

### **2.2.3 Different View: A Lesson from History**

As it has been argued, Plato assumed that the political duty of philosophers is to go back to the cave – or this political world - and rule people, as Plato called them the mob. Given the social and political changes of the time and the emergence of direct democracy in Athenian city-state,<sup>312</sup> the political intention of Plato was to give the concept of despotic hierarchical regime a new sense of justification. Consequently, he wanted to convey his readers that only the

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<sup>309</sup> See also Barker, *Greek Political Theory: Plato and His Predecessors* (London: Methuen, 1960), p.236.

<sup>310</sup> Sayers, *Plato's Republic: An Introduction*, (Edinburgh: Edinburgh University Press, 1999), p.63.; See also Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.161.; Barker, *The Political Thought of Plato and Aristotle*, (New York: Dover Publications, 1959), p.277.

<sup>311</sup> Sheppard, *Why the Philosopher Returns to the Cave?*, *Richmond Journal of Philosophy* 6 (Spring 2004), p.3

<sup>312</sup> Of course, the direct democracy, here, is in the sense of the ancient Athenian political discourse, not the modern one such as the case of Switzerland.

philosophers just like him are entitled to be the ruling class. To secure such concept both for the sake of the ideal hierarchical state and for his followers, he gave the concept of heredity to his theory of justice and principle of specialization. Plato wanted to make sure that such high political positions would be guaranteed to all of his fellow philosophers and all of his descendant, similar to a hereditary kingdom where a king think about his descendant.

Today, when we think about the real motives, we realize that it seems unrealistic, even for Plato himself, to rely merely on the idea of the 'duty' or the obligation of 'fulfilling function'. The real motive of hierarchical and despotic rulers is not to fulfill their duty. Moreover, the teleological reasoning, such as 'fulfilling the natural duty' cannot justify the claim of the philosopher-kings to power. Since there are other power relations that can reach the aim of the idea city without imitating the hierarchical and despotic power relation of it.

However, today, it has been seen through the history that the rulers of the authoritarian/totalitarian regimes try to present their motives as nationalistic, ideological, or religious as possible.<sup>313</sup> So, we might try again to answer the question which address the motives of the long list of rulers, the philosopher-kings, the autocrats, the dictators, the *Caliphs* and the *Mollas*: on what ground and for which motives would the 'reluctant' philosophers or any other personalities, if such reluctance is plausible at all, agree to rule? Well the answer is simple: may the philosophers agree not to rule for wealth, power, and honor, which have been always the strong motives for every man, they would find themselves to be ruled by others, especially by the sophists who were their opponents, which would endanger their philosophical life and their existence in the first place. This was the lesson that Plato learned the hard way in his early age when he lost his family members and his teacher, Socrates.

Furthermore, the ruling of others over the philosophers does not match Plato's political thoughts whose core essence is in fact to believe in the arbitrary or natural function for every man and believe in the teleological aspect of life.<sup>314</sup> Thus, Plato could not possibly divest such an important privilege, namely having an authority to rule over others, from his philosophers and give it to the other claimants of power. In this way, for Plato, not only 'philosophizing' and 'ruling' are one and the same position, but also their shared task is to regulate community under a hierarchical principle of nature, the principles by which he assumed that the philosopher-kings are only able to grasp, comprehend, and interpret the rules of nature for the state.

We can conclude and expand this theory: when a class or a group or an individual be reluctant to rule, they find themselves to be ruled by others and do what others demand. From the political behaviourism point of view, this founding can be seen in any hierarchical and despotic power relation. The motives of a despotic ruler or, more practical in these days, the real motives of a collective, will of entity who presents itself in some form of political organization or political party, are to win the freedom and power over others to have the most political effectiveness, ranging from their will to their action.

As the right to rule is the concept of 'power over' and the only dimension of authority for an absolute hierarchical power, weather for the ancient or modern regimes, it is assumed that

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<sup>313</sup> See Shokri, "Islam and Politics: The Case of the Islamic State." *Studia Humana* 5.2 (2016).; Shokri. A New Perspective in the Middle East, *Glocalism* 2 (2016), p.17.

<sup>314</sup> Wolff, *An Introduction to Political Philosophy*, (Oxford: Oxford University Press, 1996) p.76

such a right to dominate others is among the-taken-for-granted-things. This is one of the fallacies of Either/Or by which politics is assumed to be reduced to a set of rules, that is restricted to a one concept of power: ‘power over’. One side rule over others and the other side ruled by others.

Following Plato, most of the modern authoritarian/totalitarian regimes rely on the same teleological arguments. Authoritarian and totalitarian regimes, on the rights and left, using the corrupted concept of justice and duty to fight and justify their concept of ‘power over’. They use these concepts to encroach on the people’s life and to ‘control’ them for reaching their own aim. They interpret their aims through their theory of justice and duty, following Plato, the aim of the state and for its good. For Instance, Saudi Arabia, Sudan, and Yemen presents different forms of Islamic theocracies which are concerned with the aims of the state based on the religion.<sup>315</sup> Moreover, Syria, Libya, Pakistan, Afghanistan, Egypt, Jordan, Kuwait, Iraq, United Arab Emirate, Oman, Qatar, Russia, China and Yemen are among a long list of states which present some form of autocracies concerned with the aims of the state based on some form of nationalism in which they promote an egalitarian social order parallel to the rapid economic growth.<sup>316</sup>

However, the authoritarian/totalitarian and hybrid regimes challenged by their own weakness. The question of justification and legitimacy. In this sense, any despotic personalities attempt to justify their authorities by dictating and forming the consciousness of people.<sup>317</sup> Following Plato, they try to convey people that they are rulers by nature and their natural duty is to serve as rulers which is set by God. They often utilize a sort of education which suppresses the political consciousness, and consequently the political and civil rights of people, for the sake of the ideal city.<sup>318</sup> The concept of justice, which they sell in their educational system, is the paradox that exists in the nature of the authoritarian/totalitarian power relation. This paradox can never be solved.<sup>319</sup>

### **2.3. Despotic Authority and the Expenses of Self-Justification; Virtue vs. Justice**

If we look at the structure of reasoning that Plato provided in *Republic* and his argument about the connection between reason and authority, we can realize that his approach to the concept of power does not differ from what he perceived as the norm of the Athenian society. He tried to defend the same traditional form of Greek ruler but in the guise of philosophers. This can be a sign to argue that the type, or characteristic of a ruler is linked to the history of the society or states in which they could emerge and rule.<sup>320</sup> The ruler and the ruling class cannot be

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<sup>315</sup> Shokri, "Islam and Politics: The Case of the Islamic State." *Studia Humana* 5.2 (2016).

<sup>316</sup> See Shokri. A New Perspective in the Middle East, *Glocalism* 2 (2016), p.2. Svolik, *The Politics of Authoritarian Rule*, (Cambridge: Cambridge University Press, 2012). See also Eichengreen, and David, "Democracy and Globalization." *Economics and Politics* 20(3) (2008): pp. 289–334. Haber, Maurer, and Razo, *The Politics of Property Rights: Political Instability, Credible Commitments, and Economic Growth in Mexico, 1876–1929*. (New York: Cambridge University Press, 2003).

<sup>317</sup> Shokri, "Rhetoric Tradition and Democracy: Isocrates’ Role in Ancient Greek Political Idea. Start Point of Western Political Philosophy." *Studia Humana* 4.3 (2015), p.23.

<sup>318</sup> See Rice, *A Guide to Plato's Republic*, (Oxford: Oxford University Press, 1998), p.61.

<sup>319</sup> www.worldbank.org, The World Bank -. "Data." *EdStats: Education Statistics*. Web. 16 Oct. 2016.

<sup>320</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p. 47.

understood apart from their state, their community, and their power structure in which they emerged and they thrive. Here, let us elaborate on what we claimed to see how this ends in the expense of the concept of justice and justification of power.

Though Plato could not escape from his attachment to the Athenian tradition, he tried to deal with it in a different and unprecedented way, he tried to deal with it normatively. To establish his political thought and to elaborate on a new character of the ruler, Plato worked on the concept of virtue. Yet, his innovation was not the concept of virtue, which was already the prevailing concept of his time, but it was to make a shift in the 'definition of virtue'. The new concept of virtue that he proposed in his works seems to be based on the didactic and normative principles.<sup>321</sup> However, this new concept is something between a quality that can be achieved and a quality that, as he believed, is set by nature. That said, the concept of virtue that Plato proposed is also accompanied by an arbitrary character of a soul, for which he tried to provide a justification of right and privilege for the few, for his philosophers.

One of the important problems of Plato's political thought is the assumption that only the philosophers, which are by nature philosophers, possess these virtues and hence, only they are entitled to the right of authority. The nature of such hierarchical power is asymmetric which implies a form of despotic power "with reference to the special class recognized as citizens."<sup>322</sup> For Plato, the control of man over himself was the product of the theoretical knowledge about universe,<sup>323</sup> and the control of man over the external factors would not occur without the control of men over themselves, since "man and city are alike."<sup>324</sup> Plato's presumptions lead us to two points. First, Plato believed that merely philosophers can recognize the cosmological-hierarchical order, thus they can claim to possess an intrinsic and natural virtue. Second, based on such recognition, he believed that the philosophers are the right leaders whose force over people to imitate the cosmological-hierarchical order is justifiable. Here, Plato found his way to a new approach based on the natural and virtue politics to theorize a stable ruling structure in which 'the natural knowledge plus virtue equal authority' are the foundation. The questions are, how this method of justification would assess or reject the *legitimacy* of such political power, and whether the ancient Greek method of justification results in an absolute and despotic power.

Plato's politics appear to be destructive in practice. As Ellen Wood, one of the contemporary commentators on Plato's work, stressed on, "power over men", which is the power to command the service of dependent laborers who are obliged to serve by virtue of their juridical or political status, was typically the most highly prized possession of the property for the ruling classes in the pre-capitalist societies'.<sup>325</sup> Hence, Plato's philosopher-king is the one who would "think about what is the best only for what is under its control."<sup>326</sup> Yet, what Plato

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<sup>321</sup> Grote. *Aristotle*. (New York: Arno Press, 1973), p.540. They connect the virtue to the happiness. It is "The active exertion and perfected habit of virtue" which basically no one could reach such quality except the few. Aristotle, *Ethics*, vi. 9. 3.

<sup>322</sup> Grote. *Aristotle*. (New York: Arno Press, 1973), p.541

<sup>323</sup> Plato, *Timaeus*, 89d 4

<sup>324</sup> Plato, *Republic IX*, 577d

<sup>325</sup> Wood, *Peasant-Citizen and Slave: the Foundations of Athenian Democracy*, (London: Verso, 1988), p.114

<sup>326</sup> Plato. *Republic I*, 345<sup>e</sup>.; See also Wolff, *An Introduction to Political Philosophy*, (Oxford: Oxford University Press, 1996) p.75

could not address in this normative approach is the basic civil and political rights of people. He, consequently, sacrificed the normative principles for the sake of the teleological concept of state. The philosopher-king despotically possess power while trying to justify his power based on possession of the virtue. Given such practice, it is clear that:

(i) Plato's philosophical knowledge, which assumed to be power, was in reality a powerless accessory. (ii) What Plato introduced as the concept of virtue in fact is not the concept of virtue at all in our modern philosophical arguments.<sup>327</sup> Plato's idea of hierarchical order demands primarily that the natural rulers rule and natural slaves be the slaves. He could not detach his thought from his Athenian society and what he argued is rooted in the traditional Athenian race-thinking. This theory of virtue politics and the way to claim power is the dismissal of the concept of 'power to', and hence it is proved unfit to be the framework for further development in politics.

In the ancient Greek political theory, the concept of political power is emerged from the concept of state, by the concept of state, and for the concept of state. Yet, the notion of people, whether as a collective or as the individuals, is intentionally obfuscated. It is not very clear that whether political power, in the ancient Greek political thoughts, is entitled to some chosen individuals or the state's power is bestowed upon some individuals. Obviously, for Plato and Aristotle, power should be merely exercised by the philosopher-kings and the virtuous men respectively.

Once the theory of nature of justice and teleological politics were used exclusively by claimant of 'power over, philosophers, and aristocrats, and had spoken the proud language of conquest, however, it in our modern time is translated into the rather bitter language of people and the nations who have had the struggle for their political progress, for their politicization and who have fought their way to build legitimate power relation. It is now clear to say that when only one person or some people are naturally entitled to particular rights, is simultaneously to deny the same rights for others, and hence ignore the other important component of the state.

Based on the traditional prejudice of inequality, which can be found both in ancient and modern states, it is only the self-justified approach that can explain some men are the rational beings and some are not, some men are free while some others are enslaved, and some men are citizens while others have no social status, as some have political power over others while others are being denied of that right.<sup>328</sup> This is one of the reasons why the ancient philosophers could afford to develop the idea of virtues politics along natural and hierarchical concepts of power and the ancient Athenian city-state traditions. Furthermore, one also can easily theorize the notion of a despotic power and a hierarchical state based on such prejudice. The philosopher-kings of Plato, virtuous men of Aristotle, and religious rulers of modern Middle Eastern regimes are among a long list of despotic rulers who commonly justify their own power. They dictate their own definition of virtue to make up a ruling class who control much

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<sup>327</sup> See also Sprague, *Plato's Philosopher-King: A Study of the Theoretical Background*, (Columbia: University of South Carolina Press, 1976), p.76.; Merriam, *Political Power*, (New York: Collier Books, 1934), p. 184-185.

<sup>328</sup> Plato, *Rep. VI*, 485<sup>a</sup> and Aristotle, *Pol.* 1255<sup>b</sup> - 1278<sup>b</sup>

of the life, labor, and liberty of others.<sup>329</sup> This form of despotic power is justified by the knowledge that appears to be a virtue, yet, especially for Plato, it is not the virtue of free deliberative action in the political realm; it is in fact the knowledge to follow whatever natural law or the words of God imply and that is assumed to be a mere emulation of nature as an ideal structure for the state.<sup>330</sup> In other words, political power is another form of half-arbitrary and half-acquisitive virtue in a hierarchical power-oriented system. As we can see, Plato's argument on the office of power-holders in the community sounds like a concept which assumed to be among the taken-for-granted things since he thought that the imitation from the hierarchical order of nature is justifiable.

One may ask, however, 'do the holders of political power or the rulers at least present a sort of concept of civil and political rights of people?' This can be a difficult question to answer. However, we try to address it by making bridge between the concept of virtue and function – or teleological politics.

Though the concept of despotic power cannot be presented without the idea of some individuals and personalities grabbing the authority and though it is combined with some functional personalities, philosopher-kings, virtuous men, *Führer*, and *Caliphs* are merely playing a symbolic role to shape a hierarchical concept of political order and the state. In ancient Greek virtues politics and, subsequently, for the traditional theory of the just state, the personalities are the necessary 'means' for the state<sup>331</sup> since the virtues cannot be fulfilled without the concept of these individuals.<sup>332</sup> This is true when we assess the same principles under the teleological-political aspect. In this way, individuals are assumed to be like the raw soil, ready to be cultivated for the blossom of the state's order. According to ancient Greek political thoughts, although individuals do not have the political rights, some of them do have tasks. Those who are chosen due to the arbitrary character of their souls are required to reach and fulfill two tasks: to acquire knowledge and to be virtuous. These two tasks are vital, since both are the principles to obtain immunity in the traditional concept of power. The aim of such power is that such that one or some men have control over others. Here, political power in a hierarchical power structure puts a measurable despotic force not only on the individuals, but also on the power structure itself, on the legislative, administrative and judicial branches, (if it appears that there is such division at all). Despotic rulers make sure that the dictated definition of *halcyon*, (a concept power that merely contains the concept of 'power over', mostly rooted in tradition, in the idea of patriarchy, or in the concept of belief), would be respected by everyone and by every sub-organization.

We can see that the hierarchical theory of the state that Plato and, to some extent, Aristotle presented, as the interpretation of the cosmos, provides a ground upon which to justify such an unchecked force on the people as the just power relation.

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<sup>329</sup> See Samaras, *Plato On Democracy*, (New York: P. Lang, 2002), p.53.; Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.112.

<sup>330</sup> Rice, *A Guide to Plato's Republic*, (Oxford: Oxford University Press, 1998), p.48.

<sup>331</sup> Düring, *Aristoteles*, (Heidelberg: Carl Winter Universitätsverlag, 1966), p.490.

<sup>332</sup> See also Annas, Julia. "Aristotle on Human Nature and Political Virtue." *The Review of Metaphysics* 49 (1996), 731–754, p.736.

Plato gives the absolute right of political power, e.g. right to rule over all or ‘power over’, to his philosopher-king<sup>333</sup> since he assumed that the philosopher-king is the only person who can use the knowledge of the hierarchical order of the cosmos and the source of knowledge of such structure for the state. He emphasized that; “[u]ntil philosophers rule as kings or those who are now called kings philosophized...cities will have no rest from evils, nor I think will the human race.”<sup>334</sup>

It is important to investigate whether Plato argued the origin of such entitlement beyond what he proposed as the concept of justice and teleological politics. In fact he did not address this question directly. Plato’s philosopher-king is entitled to his own observation of the concept of ‘power to’ to conclude his own concept of ‘power over’. Yet, self-entitlement -or self-justification- was not the innovation of Plato in the discussion of justification of power. At least, we know that self-justification of power is the common standpoint of almost every authoritarian/totalitarian power throughout history. Furthermore, those who establish such hierarchical power structures were not philosophers at all.

In sum, we have to echo one point that was mentioned 2.1. of this part. In Plato’s politics, the ruling class is assumed to have a natural privilege which is used as the reason to argue ‘why the position of philosopher-kings should be preserved’ and ‘why they should be at the top of the state’s hierarchy’.<sup>335</sup> For Plato, to entitle one person as a ruler is simultaneously to claim his right to power over others since he is assumed to be the only one who possesses the wisdom of governance. As minimum recognition as it is, Plato implicitly recognized the concept of ‘power to’ of a philosopher as a ruler, yet he deceptively transformed it to the concept of ‘power over’. Equally, we can see in Aristotle’s *Politics* that the virtuous men are endowed with political power by the same deceptive transformation method.

Even if the concept of ‘power to’ can be implicitly comprehended from the role of personalities, it is malevolently presented in a way that not only would not restrain the concept of authority, i.e. ‘power over’, but also fortifies it. Knowledge and virtue of faceless rulers as the philosopher-kings, virtuous men, and religious ruler, who are faceless for the sake of the state’s aim,<sup>336</sup> are the main instrument to claim the absolute ruler’s privilege over others. However, we can see a contradiction. In fact, political knowledge is not important for despotic rulers as well as the theorist of despotic power.<sup>337</sup> The concept of knowledge as a foundation of justice and despotic power relation is paradoxical when taking into account that forming a hierarchical power has already been done by rulers who were not philosophers and virtuous men at all. Thus, acquiring the knowledge of philosophy, in a sense that the ancient Greeks understood it, is in question in the first place, if we can be skeptical to the natural hierarchy as the just structure.

Here, we realize that the self-justified political power is one of the rock-solid presumptions that Plato and Aristotle as well as any sort of despotic power took for granted. However, the

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<sup>333</sup> Plato, *Rep.* 473<sup>d</sup>- 431<sup>c</sup>, *Apologia* 21<sup>c</sup>

<sup>334</sup> Plato, *Rep.* V, 473<sup>c-e</sup>

<sup>335</sup> See also Samaras, *Plato On Democracy*, (New York: P. Lang, 2002), p.28-29

<sup>336</sup> See also Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.233. See also Svobik, *The Politics of Authoritarian Rule*, (Cambridge: Cambridge University Press, 2012), p.80.

<sup>337</sup> See also Farabi, *Selected Aphorisms*, 2001, Aphorism 4: 25, p.13.

self-justified despotic political power denies the right to freedom of other men in the political community.<sup>338</sup> The monopoly in possession of political power is merely a combination of the teleological and the theological theories of the universe. In this sense, the absolute rule of the philosopher-king or the possession of power by the virtuous men are merely despotic and a form of tyranny.

This is not only true for the ancient hierarchical power structures but also for any hierarchical regime that tries to justify its despotic authority. The enormous gap between the legitimate states and the rest, not only and not primarily in authority, but in political consciousness, technical knowledge, and general competence, has plagued the concept of power ever since the beginnings of genuine world politics.

### **3. A missing Piece of Puzzle: Self-destruction of Despotic Power Structures**

Hitherto, the origin and ancient theories of justification is criticized. Here, we continue this critique with a missing piece of puzzle in the theory of justification: the self-destruction of the self-justified despotic power. So, let us take a different approach in our critique.

It seems impossible to convey the idea of those who are advocating the absolute and hierarchical political powers and power structures, respectively, just by saying that they should recognize the right of individuals and the necessity of the political consciousness. The simple but important reason is because no absolute political power attempts to restrain or limit its authority.

While we have based our own values, i.e. Western democratic values, of human rights and the justification of power structure on the solid foundations of mutual recognition of rights and the rule of just laws; we must bear in mind that others may have a different approach to the concept of justification which may not be based on the moral values nor on the mutual recognition of rights. So, although it is hard, we must put ourselves in the different possible positions and see how we can address absolute political power from a different approach.

Here, I would echo the idea that was brought up before, in section 2. Of this part. Specifically, I will argue against the absolute political power and indicate its presumed ‘myth of the flawlessness’. This myth is excessively believed by those who possess the authoritarian/totalitarian power or those who gain profit from such systems. To do so, I will simply consider the other side of political spectrum rather than power holders, namely ‘people’ for whom an absolute power governs.<sup>339</sup>

So, let us begin with an assessment of the assumption that absolute political power is ‘absolute’. This assumption implies that absolute political power does not need any justification of authority in a way that this justification depends on those whom it governs. For

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<sup>338</sup> Ophir, *Plato's Invisible Cities: Discourse and Power in the Republic*, (London: Routledge, 1991), p.86.

<sup>339</sup> See this work above, chapter one, part one

example, the philosopher-king of Plato or the modern autocracies are assumed to be absolute powers who are the rulers “whether ... he finds a group who accept him or not, is obeyed or not.”<sup>340</sup>

Absolute power is in fact the one-dimensional form concept of power *qua* domination which is adorned with an unchecked and unlimited form of authority, and it is supported merely by the concept of self-justification, regardless of other possible bases on which this power rests.<sup>341</sup> So, an absolute concept of power, if it is possible at all, encompasses two other sub-concepts: (i) the one-dimension of authority, i.e. ‘power over’, and (ii) the theory of self-justification of power.

However, given our theory of power and as it has been seen in history of power, an absolute power cannot be absolute. Because any form of power at least need a minimum level of political consciousness, no matter negative or positive, to exist and thrive. The political consciousness is assessable when we consider the origin of power and the justification of power. In other words, whether or not an authority can admit it, it inevitably needs the concept of political consciousness to wield power.

### 3.1. Self-Justification and Political Consciousness

Here, there might be an objection. As the political consciousness is the foundation of legitimate power in which the mutual recognition of rights in both sides of political spectrum is recognizable, how come the authoritarian/totalitarian and hybrid regimes abuse it? and what is negative political consciousness?

Despotic authorities use a trick to gain immunity from such trade. The institutionalized absolute dominant authorities use the disinclined common-sense of their population, they shape the negative political consciousness: they partly recognize people as their subject and form a system of education that decisively convince people that the power of power holders are justified.<sup>342</sup> These authorities strive to organize “the infinite plurality and differentiation of human beings as if all of humanity were just one individual.”<sup>343</sup> Their total domination is to interpret these plurality and the will of people to the concept of singularity and a single will of the state. Today, the clear examples of such a regime is the North Korean monarchy. Though the form of the regime exhibits a totalitarian dictatorship, the notion of party politics plays a strong role. The Workers' Party of Korea (WPK), the Korean People's Army, and the government have come to acquire respectively different and considerably strengthened roles to deceitfully provide a foundation for the justification of regime for their people.<sup>344</sup>

Thus, we can find the concepts of the ‘justification of power’ and the ‘absolute power’ in an ironical antagonism. There is no justification of absolute power that can qualify by specific attributes, but in such concept is merely the concept of ‘domination’ of an authority. Thus, despotic hierarchical authority would be an absolute one-dimensional concept of ‘power over’

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<sup>340</sup> Farabi, Selected Aphorisms 32, in *The Political Writings*, Transl. by Charles Butterworth, (Ithaca: Cornell University Press), p, 28.

<sup>341</sup> See this work, chapter two, the concept of the ‘Political’

<sup>342</sup> See 3.3. This work

<sup>343</sup> Arendt, *The Origins of Totalitarianism*, (New York: Schocken Books, 1948), p.438.

<sup>344</sup> Kim, Kap-sik. "SURYONG'S DIRECT RULE AND THE POLITICAL REGIME IN NORTH KOREA UNDER KIM JONG IL." *Asian Perspective* 32.3 (2008): 87-109. Web.

with a deceitful ‘appearance’ rather than a legitimate political power. In fact, such an absolute authority cannot wield power without some form of justification.

Here, we should pause and think: what is really impetuous and implicit in the theory of ‘absolute power’ that seems unemployable both theoretically and pragmatically? What is ignored in this idea which is otherwise observed many times in pragmatic politics?

What has been observed is that: at least each political system, more or less, needs the concept of rights on both sides of the governors and those who are governed.<sup>345</sup> This concept of political consciousness has been indirectly admitted by all form of regimes, even by the totalitarian, authoritarian and hierarchical regimes.<sup>346</sup> The reason is that , despotic authorities know that the dissatisfaction of the people not only dismisses their effectiveness and their policy influence in a long-term despotism, but also gradually degrades the authority or even challenges the domestic stability and even the existence of the state.<sup>347</sup>

In *The Dictator's Army*, Caitlin Talmadge presents a compelling new argument to help us understand why authoritarian and totalitarian regimes,<sup>348</sup> with their military apparatus, win the domination for a short time, especially at wars, but they eventually fail.<sup>349</sup> Talmadge's framework for understanding effectiveness focuses on four key sets of organizational practices for domination:<sup>350</sup> promotion patterns, training regimens, command arrangements, and information management. Different regimes face different domestic and international threat environments, leading their power organization, including their militaries, to adopt different policies in these key areas of organizational behavior.<sup>351</sup>

Based on both the Talmadge's argument and the political consciousness, authoritarian and totalitarian regimes facing significant threats from regimes insider and from people. Thus they are likely to adopt practices that consequently squander the state's power, while regimes lacking such threats and possessing progressive goals are likely to adopt the effective practices often associated with democracies. Talmadge shows the importance of threat conditions and organizational practices for domination, namely by military, in two paired comparisons of

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<sup>345</sup> see above p.9.; Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.20.

<sup>346</sup> The existence of ‘Assembly’ that has a decorative role in Plato's *Law* is already a concession to the theory of ‘political consciousness’ for admitting that even Plato as the theorist of hierarchical power structure could not fully ignore the concept of rights. See also Samaras, *Plato On Democracy*, (New York: P. Lang, 2002), p.236.

<sup>347</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.117.

<sup>348</sup> Indeed, we have to distinguish between authoritarian/totalitarian regimes and teleological regimes. But we also have to distinguish between the authoritarian regimes and the totalitarian regimes. From the first glance, we can argue that their difference is not fundamental but existential and instrumental. The totalitarian system, particularly, is consisted of the link between the ideology and structural violence in every possible form, while the merely authoritarian regime is targeting the main thing, and usually on the concentration of authority.<sup>348</sup> In their existence, they all are the extreme form of utilized power. The concept of political rights is diminished in both forms of regimes.

<sup>349</sup> Talmadge, *The Dictator's Army Battlefield Effectiveness in Authoritarian Regimes*, (Ithaca: Cornell University Press, 2015).

<sup>350</sup> Talmadge, *The Dictator's Army Battlefield Effectiveness in Authoritarian Regimes*, (Ithaca: Cornell University Press, 2015), Ch.1.

<sup>351</sup> Talmadge, *The Dictator's Army Battlefield Effectiveness in Authoritarian Regimes*, (Ithaca: Cornell University Press, 2015).

states at war: North and South Vietnam (1963–1975) and Iran and Iraq (1980–1988).<sup>352</sup> Drawing on extensive documentary sources, her analysis demonstrates that threats and practices can vary not only between authoritarian/totalitarian regimes but also within them, either over time or across different political units. The result is a persuasive explanation of otherwise puzzling behavior by authoritarian/totalitarian regimes.

Theoretical assessment of the vital practical instruments, likely course, costs, and outcomes of conflicts involving adversaries or coalition partners of authoritarian/totalitarian regimes shows us an important lesson: No sovereignty can be established in a community unless it is followed and backed up by explicit or implicit admiration – which produce inducement and attraction - or belief of people in a power structure and their position in this system,<sup>353</sup> and hence, direct or indirect, consent of the people to the authority of political power. Simply we can see such a form of justification, especially in hybrid regimes, in different forms of participation of people, namely in some kind of bureaucracy or elections.

Getting back to the ancient Greek philosophers as an example, we can see that this concept of justification, namely recognition of people as one part of political spectrum, was not admitted. At least this is true for Plato. This is why that Plato tried to justify the power of the philosopher-king by providing what seemed to be the rational-teleological perspectives. This is the same reason why Aristotle tried to justify the power structure in which the ruling class is the only class that has the due to the political authority, and for the same reasons, for the justification of despotic power.<sup>354</sup> They did not justify the authority with authority flawlessly. Indeed power can never be a personal instrument. Plato and Aristotle covered the concept of the authoritativeness of the state by emphasizing the teleological aspect of a state. Both Plato and Aristotle, in this sense, tried to highlight the ideal aim presumed for the state which was, at it best, a utilitarian presumption that requires dictatorship: that ‘everyone’ would be better off at the end.<sup>355</sup>

To back up our agreement that an absolute political power is not absolute and any form of regime needs some form of justification, we refer to Sternberger’s argument. In *Grund und Abgrund der Macht*, he argued that:

“What we call ‘politics’, obviously, is not a single manner.”<sup>356</sup>

Otherwise how the ‘states’ (*Staaten*), ‘alliance of states’ (*Staatenbündnisse*), war and peace, and a long list of other elements can be described.

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<sup>352</sup> Talmadge, *The Dictator's Army Battlefield Effectiveness in Authoritarian Regimes*, (Ithaca: Cornell University Press, 2015), Ch.4.

<sup>353</sup> see also Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.109-135.; Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.21.

<sup>354</sup> See also Bakshi, *Politics and Prejudice: Note on Aristotle Political Theory*, (Delhi: University of Delhi, 1975), p.134-135

<sup>355</sup> As Barker call it idiocracy, he argues that it urge “the despotism of the Idea”. Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.164.

<sup>356</sup> Translated from German by author. Was wir >politisch< nennen, ist offenbar nicht von einerlei Art.” Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.19.

“therefore the state, up to this [modern] age, is held true as the political entity, since it ensures the peace or promises such insurance through the acknowledgment of the consent of its citizens and acknowledgment of the instruments of power.”<sup>357</sup>

Sternberger continues to argue that the rivalries between the different groups such as state and its citizens - the government and the governed - emerged due to the different interests. I would add one more important group too: the regime insiders. We immediately realize that if there is no acknowledgment of the right of the people by the authority and claim to right and power by each group, then there would be no conflict of interests. It is in this sense, that the state makes difference between its friends and enemies and treat the people despotically as if its power does not partly rely on the acknowledgment of the people.<sup>358</sup>

### 3.2. Deceitfulness

The deceitful form of self-justification and the weakness of the idea of absolute power can be better observed when we carefully recognize the behavior of the modern authoritarian/totalitarian regimes and semi-democratic regimes. These regimes are trying to cover their authoritativeness with unrealistic elections, propaganda and minimum participation of the people in administrative positions.<sup>359</sup> This is because even power that is “incarnated in a specific person, [...] must be generalized as authority.”<sup>360</sup> This cannot happen unless and authority rely on admiration, belief, and trust.

How did Mussolini by signing Lateran Treaty, Hitler by running in elections, or Stalin by showing loyalty to the Bolshevik party, slaughtered peoples, brought famine, and took away millions of lives? How did Vladimir Putin in Russia and Kim Jong-un in North Korea present themselves as the representative of their people while slaughtering their own citizens and threatening the lives of others? Is it a political system, social structure, or the power hunger of these power holders that help them to stabilize their position? In the past decade, how did Hugo Chavez in Venezuela (1999), Jean-Marie Le Pen in France (2002), Evo Morales in Bolivia (2006), Viktor Orbán (2002 and 2010) in Hungary, and Donald Trump in the United State (2016) gain the highest ‘popularity’ among the people of their countries?

There is no such thing that power is a mere force or domination.<sup>361</sup> These rulers and a long list of other figures from the old and new time have merged their authoritative forces with propaganda, designed elections, and the face of their legal systems or political institutions,<sup>362</sup> to control the ‘consciousness’ of people. “*Ich bin der erste Diener meines Staates*”<sup>363</sup> ( I am

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<sup>357</sup> Translated by author. „Der Staat gilt seit alters für das exemplarische >politische< Gebilde deswegen, weil er dank der Zustimmung seiner Bürger und dank seinen Machtmitteln einen Bezirk des Friedens gewährleistet oder zu gewährleisten verspricht.” Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.20.

<sup>358</sup> Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.20.

<sup>359</sup> Mühlbacher, *Democratisation and Power-Sharing in Stormy Weather: The Case of Lebanon*, (Weisbaden: VS Verlag, 2009), p.195.

<sup>360</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p. 204.

<sup>361</sup> Fukuyama, *The End of History and the Last Man*, (Toronto: Macmillan, 1992), p.15.

<sup>362</sup> Gandhi and Przeworski, "Authoritarian Institutions and the Survival of Autocrats". *Comparative Political Studies* 40, (2007): pp.1279-1301.

<sup>363</sup> *Mémoires pour servir à l'histoire de la maison de Brandebourg*. In: Friedrich II, *Œuvres de Frédéric le Grand*, Bd. 1, Tome I.(Berlin: Imprimerie Royale), S. 123

the first servant of my state)<sup>364</sup> is the utterance of any authority who knows how a functional authority works. It is in this sense, that the propagated ‘trusteeship’<sup>365</sup> helps the skilled ruler “to emphasize and reiterated their deep sense of responsibility for the general welfare of people he serves.”<sup>366</sup>

Today, we can also see that how different forms of endeavors, including the elections with their special ceremonies, which were organized by the authoritarian/totalitarian regimes have served as an avenue to recover the concept of justification and legitimacy for their power. Several Middle Eastern, African and Asian states held national polls and ceremonial elections during the last decades that merely “served as exhibitions of the unfettered power of longtime incumbents.”<sup>367</sup>

The table below provides a result of a statistical study which backs our argument. It indicates that how the concept of civil and political rights is declined in the semi-democratic regimes in the Middle East.

Survey Edition	Free		Partly Free		Not Free	
	Number of Countries	Percentage	Number of Countries	Percentage	Number of Countries	Percentage
2016	2	11	3	17	13	72
2015	2	11	3	17	13	72
2014	1	6	5	28	12	66
2013	1	6	6	33	11	61
2012	1	6	4	22	13	72
2011	1	6	3	17	14	78
2010	1	6	3	17	14	78
2009	1	6	6	33	11	61
2008	1	6	6	33	11	61
2007	1	6	6	33	11	61
2006	1	6	6	33	11	61
2005	1	5	5	28	12	67
2004	1	5	5	28	12	67
2003	1	6	4	22	13	72

Table 1. The number of the free, partly free and not free states in the Middle East from 2003 to 2016.

Source: Freedom House, "Freedom in the World: 2016", [www.freedomhouse.org](http://www.freedomhouse.org).

<sup>364</sup> Translated by author.

<sup>365</sup> See also Gandhi, *Trusteeship*, (Ahmedabad : Jitendra T. Desai, 1960).

<sup>366</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p. 204.

<sup>367</sup> Freedom House, "Freedom in the World: 2016", [www.freedomhouse.org](http://www.freedomhouse.org), p.17.

To have a quick general picture of what has been argued, the following statistic designated by Free House, scales every state from one to seven- one being free states in which people can enjoy the civil and political rights, and seven being non-free states.

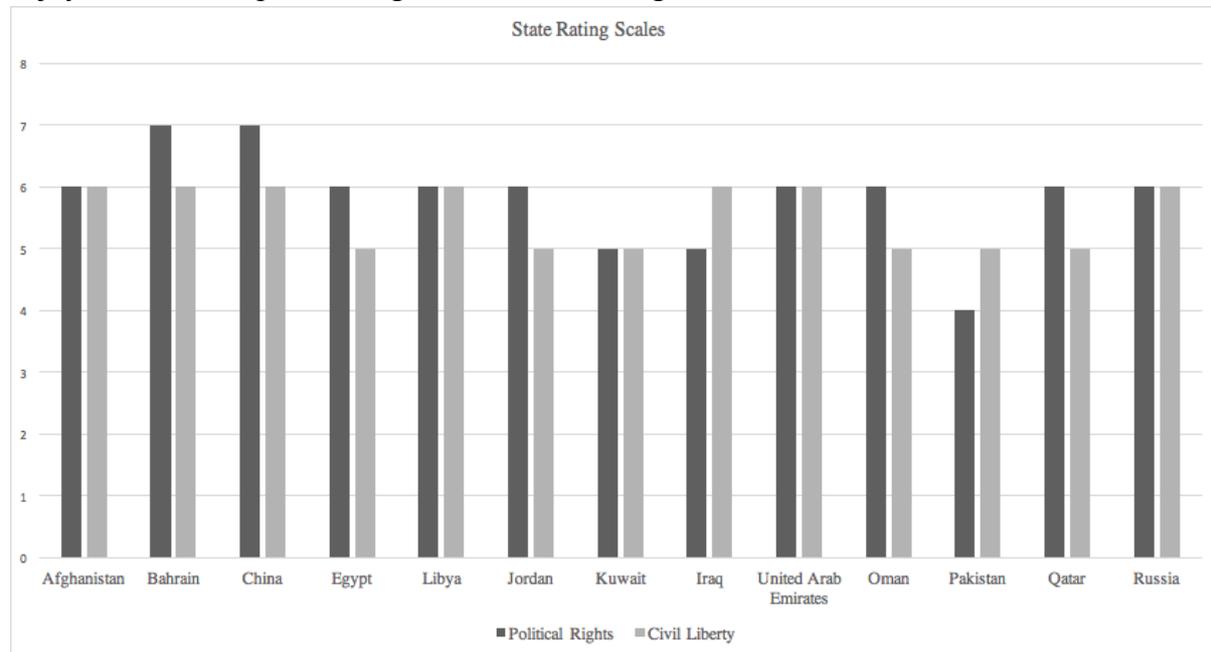


Figure 1. The scale of freedom in the civil and political rights.

Source: Freedom House, "Freedom in the World: 2016", [www.freedomhouse.org](http://www.freedomhouse.org).

We can see that a long list of hybrid regimes including Libya, Pakistan, Afghanistan, Egypt, Jordan, Kuwait, Iraq, United Arab Emirate, Oman, Qatar, Russia, and Yemen have seemingly relied on some sort of justification, ranging from the concept of election, political party, or parliaments, to the concept of legality. However, the political rights and civil liberty of people in these states are excessively suppressed by the regimes. Hence, although these regimes are trying to utilize some form of justification, they in fact impose their authority despotically. In such regimes, the concept of 'power to' and 'power of' are ignored. The result shows that while despotic regimes are partly relying on the concept of justification approved by or originated in the people, they try to ignore it. This means that the people either empower such rulers or disapprove them. Such empowerment or disapproval is relying on the form and nature of the 'political consciousness'.

Another reason that approves this result is the concept of responsibility. We can see that the concept of responsibility and trust are abused in the authoritarian/totalitarian regimes, and especially in semi-democratic regime, since the concept of responsibility is institutionalized and also possessed only by power holders. This is why the authoritarian/totalitarian regimes do not select anybody from the - common - people to work for them, but only those who obey unquestionably and who believe unconditionally. In other words, they merely choose from their own team. This is because these regimes partially depend on the justification that emerged from the minimum or even negative political consciousness of the citizens. For such a government, as in industry, it is important not only to have production but also salesmanship which present a face of a community to whom the responsibility and authority of government

are imposed. For the good are useless unless to be known, or to be believed to be good, and there is an effective demand for them.<sup>368</sup> In this sense, we can realize how closely the justification of power works along the concept of ‘appearance’ in politics.

Plato was right when he said at the end of the ninth book of the *Republic*: ‘The [ideal] city is founded in words; for on earth I imagine it nowhere exists.’<sup>369</sup> In addition, we can also argue that the completely opposite idea of the ‘ideal state’ is also founded in words, for in the real world its existence is impossible, in fact existence of any absolute form of a state or any absolute form of power is impossible.<sup>370</sup> The theory of political consciousness coupled with these pragmatic instances show us that absolute, unchecked, and unrestrained political power has not and cannot exist, as long as humans remain human. Since the existence of the city states to our modern national states, there has always been a minimum or even negative political consciousness within every power relation at any level, including family, community, state, and international relations. This means that even the most despotic powers cannot completely ignore the concept of justification of their authority, and they continuously try to obtain their immunity by producing the negative political consciousness, to gain some sort of justification.

### 3.3 Negative Political Consciousness

Here we address the final form of despotic power and elaborate on what I claim before on the concept of ‘negative political consciousness’. Besides the theory of political power, we can observe from time to time that some power structures are *quasi* despotic. As an example, we can mention the power structure of Saudi Arabia and North Korea.

The absoluteness of their power is not only a result of the despotic power structures that they built, but also a result of the way that they justified their power. Looking back at the history of civilization, we can see that most of so-called slaves and serfs did not rebel, and this situation remained as so for a long time from one place to another, so they gave their indirect consents to their own justification of slavery. This is the same case when we consider the modern definition of slavery where the hierarchical powers not only try to occupy the labor of people, but also dismiss or take control of freedom in a despotic manner. Admitting to such power is also admitting to the concept of right-less-ness<sup>371</sup> of self or denying your own civil and political rights.

This form of justification of despotic power is partly owed to those whose governance fortifies the despotic concept of power. The deficit form of power, false knowledge, and iniquitous belief produce the negative political consciousness, in which people are not aware of their own political rights. The negative political consciousness can work all the way up to

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<sup>368</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.204.

<sup>369</sup> Plato, *Republic* 592<sup>a</sup>; See also Barker, *Greek Political Theory: Plato and His Predecessors* (London: Methuen, 1960), p.287, 279.

<sup>370</sup> Farabi categorized states in 6 groups. Following Plato, he assumed that on the one side stands an Ideal State. But he took one further step and he theorized the “Necessary City” on the other side, an absolute idea of state against ‘ideal state’. See Farabi, *Selected Aphorisms* 28, p.25., This attempt is also can be seen in the recent works of political scientist. As an example of such approach see Alvarez, Cheibub, Limongi, and Przeworski, "Classifying Political Regimes." *Studies In Comparative International Development* 31.2 (1996): pp. 3-36.

<sup>371</sup> not having rights

form the concept of power and sovereignty. Such deficit backs up the corrupted version of the concept of power and helps the despotic power to thrive.

The negative political consciousness also results in those who possess power believing that they are naturally superior, or knowing that they got this power merely based on the peoples' unquestionable admiration or belief. Thus, the negative political consciousness, as I would like to call, is a 'one-dimension' justification of power. It is similar to the political consciousness. However, the negative political consciousness is the corrupted concept of the right to rule of governors, and the concept of right-less-ness of those who are governed.

What differentiates the negative political consciousness from the political consciousness is the certain form of admiration or belief.<sup>372</sup> The beliefs of the slave in their slavery, the beliefs of women in their lower position compared with men,<sup>373</sup> the beliefs of poor people in their degraded position (compared with the rich people), etc. So, here we should ask about the factors that help such negative political consciousness grow.

The position of people in a community, their dominated concept of classes and workers, lack of opportunity in any sense, and specific low-quality education, are among a long list of factors that shape their beliefs that somehow they have less political rights than others. However, when we think about the relation between these factors and social variables, we realize that it is not only these factors but also the whole power structure which is an effective cause to produce these factors. Those who are born and live in an epoch of hierarchical authoritarian/totalitarian regimes and royal families are taught and educated by such regimes.<sup>374</sup> They are taught to believe in the control of one man over the rest, or to believe in the control of one class over other classes. This means that they are taught that not to think about the civil and political rights of others as if they do not exist or if they exist, they should be in accordance with the regime's aim and structure. Those who unquestionably regard themselves as the servant of a person, a community a person, a race or a religious cult, are those who admittedly deny their own political rights.

### **3.3.1. Populisms and the Negative Political Consciousness**

The lords, monarchs, or the philosopher-kings are members of the ruling class. If we could talk to them and question their power, they would argue based on edict, how 'great their power' is and how it is 'the divine will of God', or 'divine will of Nature', and probably 'the best way to live'. They would passionately tell us how teleological dominance is justified, and that secures their authority. They would do so to appear as the justified and legitimate powers. This introduces us to the relation between the collective consciousness of people to create an epoch that the ruling class appear to be popular among majority: the concept of populism.

Certainly, there is no big difference between the number of beliefs and admirations today compared to the Medieval time or ancient era. Throughout the recorded history, despotic

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<sup>372</sup> See this work, chapter two: "Polygon of Political Power, Beauty and Force".

<sup>373</sup> See also Sayers, *Plato's Republic: An Introduction*, (Edinburgh: Edinburgh University Press, 1999), p.84

<sup>374</sup> Barker argues that "the state is itself an educational system." Barker, *Greek Political Theory: Plato and His Predecessors* (London: Methuen, 1960), p.236.

powers rely on the fear which is spread among their people or the admiration and belief of their people which they gained it with seduction and superstition. Today, we may ask whether there is a freedom of social mobility,<sup>375</sup> but this question should not distract us from the question as to whether the justification of an authoritarian/totalitarian power is possible at all.

Any illegitimate or despotic power voraciously ensures that the people believe in the power of the power holders, thus ensuring that they believe in the despotically controlled state. The illegitimate and despotic powers indeed do use the concept of justification, however, the justification that they use is based not on moral righteousness or rational-normative principles, but on blocking alternative and the negative political consciousness. As harsh, unequal and miserable as the life of slaves and serfs might be, they probably swallow most of the ruling class' dictates. Furthermore, as harsh and miserable the life of the people under the despotic power might be, they assumed that such power is the appropriate one. Such assumption rotted in the elaborately built 'propaganda' and specific forms of 'education'.<sup>376</sup> Thus, the negative political consciousness centers around the world of 'appearance' and populism but does not match the world of reality and awareness of political rights.

### 3.3.2. Ideology, belief, and the Negative Political Consciousness

"Ideology", Corbett argues, is that "any intellectual structure consisting of a set of beliefs [and I would also add admirations] about man's nature and the world in which he lives."<sup>377</sup> We cannot, so as Plato and Aristotle could not, imagine our world without political structures and power relations so as we cannot imagine them without ideologies.

Corbett continue, "it will escape none but the simplest devotee that ideologies serves the interests of certain institutions, and therefore of those who hold office in those institutions [...] the social function of ideologies [beliefs and admirations] is to condition man intellectually to obedience."<sup>378</sup>

This concept is close to one of the Weberian approaches to the concept of belief. Weber tries to explain the place of belief in the state's attempt to justify its authority, yet he extend the concept as an "attempts to establish and cultivate the belief in its legitimacy."<sup>379</sup> That is how the negative political consciousness can be shaped. Based on the negative political

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<sup>375</sup> Some of the Plato's advocates tried to undermine Plato's emphasis on inequality and the natural privilege of the highest class. some were in a favour whereof we might call 'social mobility'. See Taylor, *Plato: The Man and His Work*. (London: Methuen, 1960), p.275; Sabine, *A History of Political Theory*. (Illinois: Dryden Press, 1973), p.63.; Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.421.

<sup>376</sup> See Grote, *Aristotle*, (New York: Arno Press, 1973), p.540: On the systematic education system that Plato and Aristotle presented, Grote argues that "Men so educated, according to these philosophers, will behave as perfectly in the relation of superior to inferior." [Grote, 1973, 540]. See also Shokri, "Rhetoric Tradition and Democracy: Isocrates' Role in Ancient Greek Political Idea. Start Point of Western Political Philosophy." *Studia Humana* 4.3 (2015).

<sup>377</sup> Corbett, *Ideologies*, (London: Hutchinson, 1965), p.12.; See also Bell, *The End of Ideology; on the Exhaustion of Political Ideas in the Fifties*. (Cambridge, Harvard University Press, New York: Free Press, 1965, 1962), p.435

<sup>378</sup> Corbett, *Ideologies*, (London: Hutchinson, 1965), p.57; See also Adams, Ian. *The Logic of Political Belief: a Philosophical Analysis of Ideology*. (Savage, MD: Barnes & Noble Books, 1989), p.17.

<sup>379</sup> Weber, *Economy and Society: an outline of Interpretive Sociology*. (California: University of California Press, 1978). p.213.

consciousness, folks assumed that they must consent to the power structure in which they must give up their 'equal civil and political rights'<sup>380</sup> to the things that are not natural at all but 'appear' to be so: to the hand-made Gods and leviathans. This is crucial to understand the relationship between the justification of political power and authority where *pouvoir* constituent forms different structures that can then be used against the constituents themselves.

There is a fine difference between political power, its justification and its legitimacy. Justification helps a power structure to be established. Without it, there would be no 'political' authority. This is why even the absolute hierarchical powers try to justify their power. To do so they indirectly shape the beliefs of people. Even the absolute power ranging from the kings and philosopher-kings in monarchies, to Hitler and Mussolini in semi-democratic systems, cannot claim privilege in political rights and accumulate authority unless a 'minimum negative political consciousness' of those whom they governed is presented in their power structures. This is true not only for those just named but also for any asymmetric power relation that implies a despotic form of regime such as autocracies, theocracies, and semi-democracies.

Given the concept of power, we can also argue that an absolute concept of 'power over' is absurd without the minimum concept of 'power to'. If the establishment of a power structure needs a minimum political consciousness, then it is highly plausible that the absolute and unrestrained authorities drastically 'need' the negative political consciousness.

While the Italian tyrannies of the renaissance era and the aristocracies of France were aware of the civic spirit in their states, while the National Socialist Party of Germany (Nazi) was aware of the power of "das deutsche Volk", and while the theocrats in the Middle East are aware of their 'pious follower', they have emerged through all sorts of claims to rights and titles, and at the same time they became emancipated from all restraints of power. Such parties sell a figure along with the awe of their crown, customs and laws.<sup>381</sup> The reign of Napoleon was characterized with the series of effort for justification and even legitimacy of his authority. These endeavors are not restricted to Napoleon, but are valid for every form of authority and regime. That is certainly clear.

### **3.3.3. A Lesson from the Attempts to Justify Power**

What is laid down beneath these historical-political phenomena are the endeavors of power holders for reaching a certain level of justification and legitimacy. These endeavors reveal a very simple but very important fact which we have argued: these endeavors, just like what we have seen in the ancient Greek authoritative power structure theories, reveal that any absolute and despotic hierarchical authority cannot be absolute power. This means that they also connote stop the process of politicization among their people: through the time, people more and more realize their civil and political rights and help the process of power equilibrium in a power structure. This process of politicization continues constantly in an authoritarian/totalitarian regime to the point that it turns it into a semi-democratic or democratic regime. In these cases, it works in a way that the interests of the state and interests of the individuals reach equilibrium.

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<sup>380</sup> The modern notions of natural rights of individuals such as right to life, liberty, property and dignity.

<sup>381</sup> Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.20.

This inevitable ‘process of politicization’ is driven by the ratio between two sides of political consciousness, which cause closeness between the mutual recognition of rights.

At its best form, ‘process of politicization’ in a despotic regime possibly removes all the *quasi* justification and legitimacy elements, and reveals if the naked authority is in fact a ‘usurpation’.<sup>382</sup> So, the authoritarian/totalitarian and despotic states have been always encountering the problem of the process of decay in their authorities, since the control of self and control of men is contradictory under the inevitable process of politicization, and effectively the political consciousness. In this sense, the control of a man over others is neither absolute, nor rational, nor natural.

The authority of any monarch, autocrat, or dictator cannot do any favor to ‘prevent the change’ and to secure the position of ruling class. However, relying on force is exactly the fault point that the despotic powers have been relying on, which is the absolutism of the unchanged concept of ‘power over’. Yet, it is clear that these authoritarian/totalitarian or despotic power structures will never reach a further goal other than moiling for their own preservation. This brings to light a further contradiction that is laid behind Plato’s political thoughts and some similar theories of authoritative/totalitarian power relations, and that is: authoritarian/totalitarian regimes or any other justified authority that is based on ‘negative political consciousness’, can, by no means, satisfy the demands of teleological politics.<sup>383</sup>

### **3.3.4. Circle: The Negative Political Consciousness and Populism**

It is easy to assume that the end of the process of politicization is when the perfect level of political consciousness in a democracy is reached and the established power is legitimate. But neither the appearance nor the nature of power has any formative effect on the process of politicization. The process would not stop for the sake of any form of power or the political consciousness; its continuity is infinite. The process of politicization helps to produce and also to destroy the political consciousness and any form of regime at the same time. This can be caused, for instance, in a democracy by the excessive emphasis on the liberal or utilitarian principles or on some form of conservative leadership. It also can be caused by the principle of appearance and populism in the politics which rooted in the emergence of negative political consciousness to overrule the political consciousness.<sup>384</sup> That is why we see from time to time that different forms of dictatorship or authoritative rulers emerged from the democratic regimes.

However, because historical-political judgement is always dependent on the experience of its contemporary context, the process of politicization will be reserved and ignored. For example, it is ignore to consider the Ancient Greece for the rise of Peisistratos and the Ancient Roman Republic for the rise of Caesar. In the sixteenth and seventeenth centuries there was a

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<sup>382</sup> Sternberger use the term ‘usurpation’ as opposite of legitimacy. Sternberger, *Grund und Abgrund der Macht, Schriften VII*, (Frankfurt am Main: Insel Verlag, 1986), p.21.

<sup>383</sup> This was the major problem for Aristotle, to find a ‘mean’ way for establishing a hierarchical power structure without jeopardizing the authority of the ruling class, and the mixed government was a reasonable choice. See Winkler, *Geschichte des Westens: Von den Anfängen in der Antike bis zum 20. Jahrhundert*, (München: Beck, 2012), p.179.; Blythe, *Ideal Government and the Mixed Constitution in the Middle Ages*, (Princeton, NJ: Princeton University Press, 1992), p.21.

<sup>384</sup> To pursue the problem more deeply, see Fishkin, *Tyranny and Legitimacy: A Critique of Political Theories*, (Baltimore: Johns Hopkins University Press, 1979).

social development that led from democracy to Caesarism.<sup>385</sup> Moreover, in the modern Era, some democratically of the twentieth-centuries, particularly in Weimar Republic, that led from the democracy to the dictatorship of the Third Reich is less addressed.

If the popular sovereignty would be our objective, then the contemplation into the dangerous vice of it is inevitable. Karl Löwith was the first thinker who defined the fundamental character of totalitarian states as a "politicization of life" and, at the same time, noted the curious contiguity between democracy and totalitarianism:

“Since the emancipation of the Third estate, the formation of bourgeois democracy and its transformation in to mass industrial democracy, the neutralization of politically relevant differences and postponement of a decision about them has developed to the point of turning into its opposite: a total politicization [*total Politisierung*] of everything, even of seemingly neutral domains of life. Thus in Marxist Russia there emerged a worker-state that was "more intensively scare-oriented than any absolute monarchy"; in fascist Italy, a corporate state normatively regulating not only national work, but also "after-work" [*Dopolavoro*] and all spiritual life; and, in National Socialist Germany, a wholly integrated state, which, by means of racial laws and so forth, politicizes even the life that had until then been private.”<sup>386</sup>

The instability, injustice and unbalance concepts of power which from time to time form a totalitarian/authoritarian regime i.e. dictatorships, communists, socialist, fascists, etc., been the mortal diseases under the popular government in forms of democracy. Then we have to ask what is the proper cure for it?

There are two instant ideas: Addressing the problem by removing the causes; or addressing the problem by controlling its effects. Addressing the problem by removing the causes is by destroying the liberty which is essential to its existence like the cases in dictatorships. Addressing the problem by controlling its effects is by giving to every citizen the same opinions, the same passions, and the same interests like the cases in communism and fascism. However, these two methods are – if not worst – similar to the problem that we just mentioned. The first method is not practical because liberty is essential for the concept of power, political consciousness, and political life. Moreover, the second method is not realistic because liberty causes that different opinions will be formed.

In *Federalist*, James Madison, wrote about the direct democracies – or as he called it “pure democracy” - with the prevailing slogan of ‘majority rule’:

“democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have, in general, been as short in their lives, as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed, that, by reducing mankind

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<sup>385</sup> The absolute monarchy that emerged at that time did not find its legitimation in any consensus of the people; it saw itself as legitimized through God’s grace (*Gottesgnadentum*), and it placed itself against the estates – which means, in this context, against the people. Lehmann, *Das Zeitalter des Absolutismus: Gottesgnadentum und Kriegsnot*, (Stuttgart: W. Kohlhammer, 1980).

<sup>386</sup> Löwith, 'Der Okkasionelle Dezisionismus von Carl Schmit', in *Heidegger: Denker in Dürftiger Zeit. Zur Stellung der Philosophie im 20. Jahrhundert*, (Göttingen: Vandenhoeck & Ruprecht, 1960), pp.32-71.

to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.”<sup>387</sup>

However, to show the fine line between democracy and republic, Madison emphasize on the governmental process-oriented quality, namely the quality of decision making in total or partial inclusion of citizens in decision:

“The two great points of difference, between a democracy and a republic, are, first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.”<sup>388</sup>

Consider a step beyond the single model of regime to address the problem of despotism and negative political consciousness is the combination of all concepts of power which can be found in a constitutional democratic republic. This kind of system emphasize on double-sided: the liberties and the civil and political rights of the individuals in their conflicts with authority and rights of the central power of the state simultaneously prepares a tacit but increasing inscription of individuals' lives within the state order or decrease it to the disaffection; thus offering a new and more dreadful foundation for the very sovereign power or to threaten it. In other words, an important and distinguishing character in a power relation is the combination of the concepts of power and compatibility between them; that is the importance of the signature of power. Only the constitutional democratic republic can be the most resistance to these political turbulences which can be caused either by the dictatorships or by the excessive negative political consciousness.

By this, I mean that republic refers to the mechanism of governmental power and democracy refers to the appointment, process and quality of government. Where democracy (*Dēmokratia*) alone is not a virtue in itself and is literally translated to ‘people rule’ or ‘majority rule’ a republic (*res publica*) is legitimate alone and is literally translated to ‘public affair’ or ‘public assembly’. Democracy is important for the liberty of individual and exercise of such liberty. Republic is important to uphold the legitimate legal order and to secure the rule of legitimate law. The combination of both is the balance in power and resistance to both elective despotism and non-elected dictatorship which is most likely to provide a healthy political consciousness. In such system which healthy political consciousness causes the legitimate signature of power, the following outcomes and opportunities are provided:

1. The system that provides the opportunity for an effective participation causes that the essential civil and political rights be respected.
2. The system that provides the opportunity for equality in voting prevent the signature of power in favor of tyranny.
3. The system that provides the opportunity for alternative form of information causes the gaining enlightened understanding and enhances the political consciousness, self-determination and moral autonomy.

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<sup>387</sup> Madison, et al., *The Federalist*, (Indianapolis: Liberty Fund, 2001, first pub.1788), p.46.

<sup>388</sup> Madison, et al., *The Federalist*, (Indianapolis: Liberty Fund, 2001, first pub.1788), p.46.

4. The system that provides the opportunity for exercising final control over the agenda protect the essential personal interest and common wealth.

5. The system that provides the opportunity for inclusion of all adults helps general freedom, prosperity and political equality in civil and political rights.<sup>389</sup>

#### **3.3.4.1 The Case of Germany: Populism and AFD**

Germany is one of the strong legitimate democracy<sup>390</sup> across the world. However, as a young democratic nation after the World War II, it experienced the first paradox between political consciousness and negative political consciousness in its democracy. In 1964, The National Democratic Party of Germany (NPD) as a radical right party gained almost five percent of votes of the German population and continue to exist in *Reichstag* (German Parliament). The similar paradox in Germany occurred in the very recent years. The Alternative for Germany (AFD), another radical right-wing party reaches five percent in 2013 and gain a seat in German Parliament.<sup>391</sup>

This trend, however, can be seen from time to time in different countries. In the recent decades, we witness that there has been people who vote for such radical parties. Both in 1993 and 1997, more than sixteen percent of population in Hamburg and in 1991 ten percent of population in Bremen vote for these radical parties.

such paradox is also observable from the federal and state perspective. In Berlin, in 1989, the Republican Party or *Die Republikaner Berlin* gained 7,5 percent which secured its place in the Abgeordnetenhaus von Berlin. Since this time, those small and federal parties managed to be close to *Die Republikaner Berlin* - such as der Statt Partei, der Schill Partei, der Deutschen Volksunion (DVU), Partie Arbeit für Bremen und Bremerhaven, der Bürgern in Wut, Freie Wähler, and Piratenpartei, - and gained some success in the democratic elections. Some of the 'ideologies' of these parties can gain the title of 'populism' and some other 'extremism'. The success of these small and most of the time radical parties to exist in Germany, similar to other democratic regimes, is due to the modification of their approach, ideologies and behavior to mobilize the mass.<sup>392</sup>

However, all of these parties, form of ideologies and justification of their claim have shown that they cannot stabilize their parties and hold power for a long time. This is obvious when the popular ideology reveals its extreme or radical roots. Before any election, these parties and, similarly, any popular ideology or leader try to win new voter, but after victory against their opponent, they are doomed to use force against those who vote for them. They may be good at mobilizing the mass, especially in polarized society, but they are surely bad at governing the mass.

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<sup>389</sup> For more discussion on the mentioned point see Dahl, *On Democracy*, (New Haven: Yale University Press, 1998), pp.37-61.

<sup>390</sup> Democracy not in a broad a vague sense, but the one which is defined in this work.

<sup>391</sup> Infratest dimap, Bundestagswahl: Eine Analyse der Wahl vom 22. September 2013, WahlREPORT, Berlin 2013

<sup>392</sup> Infratest dimap, Abgeordnetenhauswahl Eine Analyse der Wahl vom 18. September 2011, WahlREPORT, Berlin 2011

In polarized and seemingly polarized societies, the people who are not satisfied with some policies and also critical of the government choose to vote for 'alternative' trending ideology. For example, In Germany, after the crisis of refugees in 2015, the voters who choose the radical parties such as AfD and NPD increased.<sup>393</sup> What is important for our argument, here, is not whether a dissatisfaction is correct or not, but that the radical ideologies gain popularity through such process and with this mean, the radical parties – such as AfD – are able to mobilize people.

Populism of the radicals in a democracy is occurred when the answer to the certain problems assumed to be fitted to the proposal of the extreme political left or right. It is also occurred simply because the theoretical framework informing the most democratic political thoughts as a virtue in itself preclude grasping the roots of populist politics as an unwanted child of democracy.<sup>394</sup> Through such populism, the emergence of authoritarian/totalitarian personalities is inevitable. This is the argument that shows how the process of politicization can override the democracy when it over-value and utilize one of the most important element of justification: the people.

Here, we might have diverged from the main point of this part which is addressing the justification of power in authoritarian and totalitarian regimes. So after pointing out the common element between the populism of political right and justification of power in authoritarian/totalitarian regimes, we shall get back to the main track and leave this discussion on 'the justification of power in democracies' to another work. The important point is that: indeed, the populist parties and personalities of political right most of the time attempt to mobilize people through passions – fear and admiration – and belief of people.<sup>395</sup> They produce a strong an aggressive concept of 'us' against 'them' or 'friends' against 'enemies' to create a collective form of identification by which it appeals their discourse and supports the justification of their power 'over' with a deceitful emphasize on the concept of 'the people'.<sup>396</sup>

### 3.4. Power Holders

The concept of power holders and personalities is problematic. Especially, for the theorists of the despotic powers who try to justify the concept of 'power over' as it is the prevailing concept- if not the only one- of their doctrine. This problem can be traced in Plato's arguments presented in the theory of philosopher-king. A bit further, we can see the same problem for Farabi, who adopted the ancient Greek political thoughts to solve the prevailing problem of power in his time. Today, this problem still persists in both the political theories and in the practice of power. The modern despotic regimes not only try to adopt the semi-democratic principles, but also present their leaders as the charismatic and benevolent leaders to their people. To this extent, we see that even when we are considering the justification and legitimate

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<sup>393</sup> Infratest dimap, Bundestagswahl Eine Analyse der Wahl vom 22. September 2013, WahlREPORT, Berlin 2013.

<sup>394</sup> Panizza, *Populism and the Mirror of Democracy*, (New York and London: Verso, 2005), p.51.

<sup>395</sup> Banfield, *The Moral Basis of a Backward Society*, (New York: Free Press, 1958), Weber, *The Protestant Ethic and the Spirit of Capitalism*, (New York: Charles Scribner's Sons, 1958).; Putnam, *Making Democracy Work: Civic Traditions in Modern Italy*, (Princeton: Princeton University Press, 1993), and Landes, *The Wealth and Poverty of Nations*, (New York: W. W. Norton, 1998).

<sup>396</sup> Panizza, *Populism and the Mirror of Democracy*, (New York and London: Verso, 2005), p.55.

power in democracies, the problem of ‘charismatic leaders’ and popular personalities appears to be problematic. So, we have to ask: is it true that the question about the ruling class has always been the question about the ruler(s)?

Though problematic for justification of power, we can clearly see that ‘the concept of personnel’ is inevitable for any despotic power structure. One of the reasons for that is due to the concept of admiration. Admiration as an important instrument of despotic powers is in fact related to ‘the world of appearance’ which cannot be depersonalized. If the people would admire a despotic kind of regime, they could not possibly do that without admiring the leader of the regime. They would be distracted from their suffering, while admiring the leader in power, which in most cases was assumed to be holy. Pharaoh, kings of Egypt (1200 BCE), Constantine the Great (272-337), Cadwalla, king of the West Saxon (685-88), Sebbi, king of the East Saxon, Friedrich III. (1424-93) are among a long list of rulers who were able to wield power, since they were admired and assumed to be holy for their people. Thus, what is the problem for a despotic power?

A despotic power with an assumingly justified power faces two problems. One is justifying a superior place in a community and calling it the office. The other one is justifying the power of selected leaders whose power has been assumed to be natural, yet their privilege is based on the political system rather than their position. These problems are contradictory in their nature, thus even the theorists of despotic power who tried to solve one of them, could not do it without becoming caught in a circular argument or ignore the other. Furthermore, even if a theorist tries to address one of these problems, they should ignore the essence of political power – which we have addressed in part one of this work.

For example, the philosopher king of Plato, as one of the ideal rulers of a hierarchical power, is the first victims of the theory of justice and the theory of teleological politics. In fact, Plato could not address the concepts of ‘power to’ and ‘power of’ in his theory of justice, as he could not escape from personalizing his philosopher-king in his theory of ideal state. Nevertheless, Plato could not manage the paradox he faced between the possession of power and the theory of political right where his philosopher-king is doomed to lose his rights to his own will in order to have authority over other people. The idea of the servant of the state is presumed in propaganda of personalities and leaders of the hierarchical power structures.<sup>397</sup> Today, we see all sorts of leaders who rule despotically but represent themselves as personalized and identified individuals, as the servants of the state they serve. We will argue this point in part five of chapter two.

What we have argued addresses the common points which can be found in the ancient Greek political thoughts (focusing on Plato and Aristotle), and the modern concept of despotic power in authoritarian/totalitarian regimes. However, there are some glints from Aristotle’s thought that help us more to assess the concept of justification of political power. In the following pages of this part, especially in part three of this part, it will be shown that how his specific approach is related to the modern political justification of power, especially the one in the semi-democratic regimes.

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<sup>397</sup> For the concept of losing the right to property for ruling class see Grote. *Aristotle*. (New York: Arno Press, 1973), p.542

## 4. Aristotle's *Politics*: A Step Toward the Justification of Democratic Power or Authoritarian/Totalitarian Power?

### 4.1. Aristotle's Virtue Politics

Aristotle wrote *Politics* to address the wave of democracy which the ancient Athenian city-state faced. Following Plato, he tried to address this problem by assessing the concept of justification of authority. He witnessed that Plato's theory of justification is somehow bold and above of all, is far from the ongoing pragmatic stream of his time. So he tried to find a theory which can provide a balance between what is going on and what should be going on in the ancient Athenian society.<sup>398</sup> To this extent, his approach is normative. The aims of Aristotle was to include the concept of virtue as a good political instrument under the given circumstances.<sup>399</sup> Aristotle, just like Plato, believed that the traditional ruling class has the privilege in rights to have the authority and control over others, but the problem he faced was more about the justification of power.

In this sense, we should ask whether Aristotle insisted on the concept of 'power over' and regarded it as the one dimensional concept of power. This question is as important as it is difficult. It is important since it helps us to understand the cornerstone of Aristotle's political thought, yet it is difficult since we need to distinguish between Aristotle's critiques on different regimes. This task is not an easy one when we realize that Aristotle's political thought is interwoven to his philosophical thought.

To justify the concepts of power and state, Aristotle began to illustrate the empirical power relation of such an idea at the beginning of his *Politics*. He took two points for granted. One is that the state is "the highest of all" that should be served;<sup>400</sup> second, that the concept of state naturally comprises the concept of hierarchical power relation. While the first one is rooted in teleological reasoning, the latter is rooted in functional reasoning. His starting points were based on the concepts of 'preservation' and 'sufficiency'. The place of the state, compared to the household, family, and individuals are appreciated as the whole compared to its parts.<sup>401</sup> The primary aim of both household and the state is to obtain immunity and sufficiency for their existence. Hence, although the function of the parts is necessary for the aim of the state, the aim of the state is superior to the aim of the individuals as its parts.<sup>402</sup> Those who serve this aim have more *shares* in political power, in the authority over others.

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<sup>398</sup> Aristotle, *Politics* 1253<sup>a</sup> 9.

<sup>399</sup> Susemihl and Hicks. *The Politics of Aristotle*, (London: Macmillan, 1894), p.57.

<sup>400</sup> Aristotle, *Pol.* 1252<sup>a</sup>

<sup>401</sup> Salkeve (ed.), *The Cambridge Companion to Ancient Greek Political Thought*, (Cambridge University Press, 2009) p.314.; See Newman, *The Politics of Aristotle*, (Oxford, 1886), vol.1, pp.28-29.

<sup>402</sup> Newman, *The Politics of Aristotle*, (Oxford, 1886), vol.1, p.31.

It is likely that the idea of ‘shared political power’ was an innovation that diverged the politics of Aristotle from Plato’s.<sup>403</sup> However, Aristotle did not turn his back completely to the traditional justification of power. For him, the hierarchical order of state is not only based on the idea that the state is natural but also more importantly on the ideas that the state in its existence and in its order is naturally so.<sup>404</sup> In other words, the state is not just naturally emerged in its origin but also naturally functions, and its aims are naturally and arbitrarily oriented. This is the point that connects the ‘study of nature’ and philosophy in the political thoughts of Plato and Aristotle. This strong connection implies that nature illustrates an ideal hierarchical order so the state should be like the nature since it is part of it.

In this sense, we see that both Plato and Aristotle argued that the state should be hierarchical. Yet, the fluctuation in the nature, as they tried to see it, follows some specific rules. Based on the tendency of these Greek philosophers to emphasize on both the tradition and the logical argument of justice, we can argue that the concept of virtue was the only choice for them. In fact, the mixture of the argument on the natural political rights and the rational principles of justice results in a strong account of the ‘virtue’.<sup>405</sup>

They believed that being virtuous would “provoke little envy or jealousy, among men of the ordinary stamp.”<sup>406</sup> Aristotle’s theory of political virtue is a hard work which appeared as a repulsive theory rather than inviting one in favor of the ruling class, and the virtue appears to be an instrument by which the ruling class can justify, hence stabilize their power.

#### **4.2. Aristotle’s Approach for Justification of Power**

We can see in Aristotle’s thought that while virtuous men can serve the aim of the state, they also safely share the most in political power,<sup>407</sup> have the right to rule over others, and thus they are on the top of the pyramid of the power structure.<sup>408</sup> For Aristotle, since the hierarchical power relation justifies absolute rights of virtuous men over others, their virtues were regarded more as a shield for the justification of power and the rulers. In fact, Aristotle believed that virtue gives the rulers political rights as if they are naturally justified to control other people and to induce people to follow them. This could happen explicitly and implicitly. The theory of virtue is the basis of justification which related either to the teleological view or the hierarchical view of the state by Aristotle in *Politics*.

Above all, what is important is that Aristotle’s teleological view put the state before people, and his hierarchical view put some individuals before others. While the latter shows that Aristotle admitted some form of ‘power to’ and the concept of civil and political rights, at least

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<sup>403</sup> Evans, argues too, that “the basis of Aristotle’s criticism of Plato’s Ideal state is his recognition of the difference between the state and other grouping.” Evans, *Aristotle*, (Brighton, Sussex: Harvester Press, 1987), p.159. At this point, we can argue that the distribution of political power, mostly, depends on the social class and grouping in power structure.

<sup>404</sup> See Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.270.

<sup>405</sup> Simpson, *A Philosophical Commentary on the Politics of Aristotle*, (Chapel Hill: University of North Carolina Press, 1998), p.203

<sup>406</sup> Grote. *Aristotle*. (New York: Arno Press, 1973), p.542

<sup>407</sup> Salkeve (ed.), *The Cambridge Companion to Ancient Greek Political Thought*, (Cambridge University Press, 2009) p.311-315

<sup>408</sup> Aristotle, *Pol.* 1281<sup>a</sup> 5-8

for the Athenian white landlords, the first one ruled them out for the sake of a despotic concept of 'just' domination. Such an approach causes ignorance regarding the equal civil and political rights among people. In this sense, the rights of the people would be doomed to fade in the *naturalness* theory of the state.<sup>409</sup> Moreover, the Aristotle theory of state is also incomplete due to the ignorance of the concept of power because the state and power are parallel concepts.

As it is expected, the only important argument for Aristotle was not the civil and political rights of people but the rights of power holders. To argue in favor of the doctrine of the state's order as the natural order and to justify the hierarchical form of power structure, Aristotle took two approaches in *Politics*.

1) The first one is the top-down approach. This approach is an assessment to demonstrate the best form of the state which was evaluated according to the theory of naturalness. According to such an approach, the perfect state, as a whole for itself, is a part of the cosmos. Thus, as a whole, it has an ultimate aim,<sup>410</sup> and as a part of cosmos, it should be structured in a form that matches the natural form of the cosmos, i.e. the hierarchical form.

2) The second one is the bottom-up approach in which the concentration is on the parts of the state and individuals. It assesses the status of individuals according to their functions, virtues, and their aims.<sup>411</sup> This approach is important since it gives a clear perspective on the comprising parts of the power structures which Aristotle proposed in *Politics*. At the same time, the assessment of this approach helps us to understand the forms of justification of micro-authorities due to their function and shares.

#### 4.1 The Bottom-Up Approach

Aristotle's bottom-up approach emphasizes the structural foundation of power relation. What starts to be questioned is whether the understanding of the bottom-up approach in which the individuals or people as 'comprising parts' that intended to have 'functions' simply degraded to the concept of individuals or people as mere instruments or means.

It is important to note that Aristotle used the bottom-up approach to justify hierarchical power structure, which is obviously accompanied by certain Greek/Hellenistic cultural values.<sup>412</sup> He knew that the hierarchical power structure represented by the power holders in some form of an organization, such as state, has sat at the table of power for centuries. A similar form of such structure is the traditional concept of household. *Politics* starts from the traditional concept household, which has been assumed to be "a major part or material share of the functions, often performed by a government, [...]"<sup>413</sup> The structure of the traditional concept of household is excessively and closely interwoven with the structure of state, and it is

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<sup>409</sup> See Newman, *The Politics of Aristotle*, (Oxford, 1886), vol.1, p.3.; Düring, *Aristoteles*, (Heidelberg: Carl Winter Universitätsverlag, 1966), p.478

<sup>410</sup> Evans, *Aristotle*, (Brighton, Sussex: Harvester Press, 1987), p.161; Aristotle, *Pol.* 1279<sup>a</sup>

<sup>411</sup> See also Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.278.

<sup>412</sup> See also Grote. *Aristotle*. (New York: Arno Press, 1973), preface.; Susemihl and Hicks. *The Politics of Aristotle*, (London: Macmillan, 1894), p.47.; According to Crossman, the social transition of ancient greek society from hierarchy to democracy "has brought with it a wave of pan-hellenistic feeling". See Crossman, *Plato To-day*, (London and New York: Oxford University Press, Routledge, 1937, 2013), p.27

<sup>413</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p. 67

represented as a basic and simple model. In Book I of *Politics*, Aristotle start arguing about the state with the following lines:

“He who thus considers things in their first growth and origin, whether a state or anything else, will obtain the clearest view of them. In the first place there must be union of those who cannot exist without each other; namely, of male and female, that the race may continue.”<sup>414</sup>

Thus, Aristotle “fabricates something that does not exist, namely, a kind of human species resembling other animal species whose only “freedom” would consist in “preserving the species.”<sup>415</sup>

He affected by the Greek/Hellenistic cultural values and assumed that members of a household naturally are unequal individuals. In this sense, he also assumed that a group of households forms a city or a state, hence the state is comprised of unequals, namely the “natural ruler and subject.”<sup>416</sup> In other words, his logic is based on a simple syllogist deduction that individuals are unequals, “namely male and female”(IaQ)<sup>417</sup>, unequal Individuals comprise family, household and state (IaS)<sup>418</sup>, so a state is comprised of unequal (QaS) and naturally is hierarchical.<sup>419</sup> Based on this logic, he tried to elaborate a solid ground for unequal positions in a community to demonstrate that a hierarchical political order is natural, and the concept of power which can be found in all levels of social spatial is the ‘just’ and ‘justified’ concept of ‘power over’.<sup>420</sup>

This elaboration could have fulfilled only if the concept of household was the most important component of the circle of social relation and power.<sup>421</sup> He directly refer to this point in Book I of *Politics*:

“The state is made up of households, before speaking of the state we must speak of the management of the household.”<sup>422</sup>

We see that how Aristotle refer to the concept of ‘power relation’ between the parts of the household while he uses the word ‘management’. He continued:

“the first and the fewest part of a family is master and slave, husband and wife, father and children.”<sup>423</sup>

However, we can argue that based on the ingenuity of the argument on the traditional concept of household, its structure, and lack of the rational-normative principles, Aristotle’s bottom-up approach became diminishing to the strength of hierarchical power structure.<sup>424</sup> The reason for this is the unavoidable resistance of the concept of civil and political rights of the

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<sup>414</sup> Aristotle, *Politics* 1252<sup>a</sup> 25-29.

<sup>415</sup> Arendt, *The Origins of Totalitarianism*, (New York: Schocken Books, 1948), p.438

<sup>416</sup> See also Düring, *Aristoteles*, (Heidelberg: Carl Winter Universitätsverlag, 1966), p.489.

<sup>417</sup> Aristotle, *Pol.* 1252<sup>a</sup> 26-27

<sup>418</sup> “Family are master and slave, husband and wife, father and children” Aristotle, *Pol.* 1253<sup>b</sup> 7-8. “Village appears to be that of a colony from the family.” Aristotle, *Pol.* 1252<sup>b</sup> 18-19. “The state is made up of household.” Aristotle, *Pol.* 1253<sup>b</sup> 1. “Household consist of slave and freeman” Aristotle, *Pol.* 1253<sup>b</sup> 4

<sup>419</sup> Aristotle, *Pol.* 1252<sup>b</sup> 30

<sup>420</sup> Aristotle, *Pol.* 1253<sup>b</sup>, Strauss argues that elimination of traditional sex roles is unnatural and impossible. See Strauss, *City and Man*, (Chicago: University of Chicago Press, 1978), p.116-117. Shokri, "Strauss's Farabi." *Studia Humana* 2:2 (2013).

<sup>421</sup> Mackoen, *Introduction to Aristotle*, (Chicago: University of Chicago Press, 1947), p.584

<sup>422</sup> Aristotle, *Politics* 1253<sup>a</sup> 1-3.

<sup>423</sup> Aristotle, *Politics* 1253<sup>a</sup> 3-4.

<sup>424</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p. 67

people or the concept of ‘power to’. We can see that Aristotle had hard times to address such critique in books 3, 4 and 5 in *Politics*. Hitherto, we may ask how Aristotle tried to ignore such concept of rights in the first three books of *Politics* and how he tried to propose the theory of natural inequality between men, which opposes the link between the legitimacy of power and the rights of people.

Indeed, not only Aristotle knows about the ‘convention theory’,<sup>425</sup> but his democratic opponent argued strongly against the theory of slavery in his time. However, he began to argue his bottom-up theory in a power relation by addressing this point. In book I of *Politics*, he said:

“Others affirm that the rule of a master over slave is contrary to nature, and that the distinction between slave and freeman exist by convention only, and not by nature, and being an interference with nature is therefore unjust.”<sup>426</sup>

Unexpectedly, instead of addressing the critique after mentioning it, he starts a new discussion of ‘personal property’. First, the discussion of ‘personal property’ is another reason to argue that the concept of right of ‘some people’ were admitted in *Politics*. Yet, Aristotle hoped that through this discussion he addresses the critique he left before: the conventional theory of master and slave. He argued:

“Instruments are of various sort; some are living, others lifeless; in the rudder, the pilot of a ship has a lifeless, in the look-out man, a living instrument; for in the arts the servant is a kind of instrument. [...] Again, a possession is spoken of as a part is spoken of; for the part is not only the part of something else, but wholly belongs to it; and this is also true for a possession. The master is only the master of the slave; he does not belong to him, whereas the slave is not only the slave of his master, but wholly belongs to him.”<sup>427</sup>

Aristotle could not possibly admit that the household and family are made from equals for two reasons. First, because household is placed at the bottom of this hierarchical system, a system that uses this socio-spatial to today,<sup>428</sup> having unequal individuals in the household was taken for granted by Aristotle and his . Second, because of his personal position, which is backed up on the one hand by the feeling that he had had a duty to defend elite, philosophers and ruling class against others, and on the other hand, by his loyalty to the stable Greek/Hellenistic tradition of life.<sup>429</sup> Thus, in *Politics*, slavery is an embraced assumption in the household, and therefore, in the community.<sup>430</sup>

To generalize, the bottom-up approach shows us that the ancient hierarchical power structure theory is based on the assumption of the natural inequality of men. This false

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<sup>425</sup> See Also Ambler, “Aristotle's Understanding of the Naturalness of the City.” *Review of Politics* 47 (1985), 163–85, p.163

<sup>426</sup> Aristotle, *Politics* 1253<sup>b</sup> 20-23

<sup>427</sup> Aristotle, *Politics* 1253<sup>b</sup> - 1254<sup>a</sup>

<sup>428</sup> Flashar, *Aristoteles: Lehrer Des Abendlandes*, (München: Beck, 2013), p.108-109.

<sup>429</sup> See William Bier, *Privacy, a Vanishing Value?*, (Fordham University Press, 1980) p.23

<sup>430</sup> See also Chaurasia, *History of Western Political Thought*, (New Delhi: Talantic Publishers, 2001)p.99-100; Evans, *Aristotle*, (Brighton, Sussex: Harvester Press, 1987), p.158.; Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.231.

presumption helps Aristotle to use it to address the problem of the justification of the authority of the ruling class.

Alfred Taylor, a British idealist philosopher, argued that slavery in *Politics* is something similar to the concept of labor in our modern world.<sup>431</sup> Moreover, Malcolm Heath, a professor of Greek literature, also says that ‘natural slaves’ are the result of a “lack of autonomous practical rationality.”<sup>432</sup> These claims imply that Aristotle’s theory of inequality was a ruthless pragmatic solution to justify slavery.<sup>433</sup> Be that as it may, this pragmatism may provide Aristotle with a practical principle to be used by naturalness theory. To say that slaves are likely corrupted by nature and that they are capable of being ‘controlled’ to do the ‘useful’ things,<sup>434</sup> provides immunity for the authoritarian/totalitarian theories.<sup>435</sup>

This does not, however, provide a sufficient ground to justify the authority of the few or the ruling class from the teleological point of view. This insufficiency is more visible when Aristotle encountered the growing concept of political consciousness in his society. To the contrary, in *Politics*, the comparison between the relationship of husband/wife and master/slave were considered as a part of the larger problem of the shaping and exercise of natural authority, which was an attempt to address the justification of power and the concept of political consciousness.

#### **4.1.1 The Naturalness of the Authoritarian/Totalitarian VS. The Political Consciousness**

Aristotle utilized philosophy against its own critical and provocative nature. Aristotle’s approach is based on the natural inequality, which is the bedrock or the starting point for the theory of naturalness in more primitive surroundings.<sup>436</sup> Slavery, according to Aristotle’s theory of justice, is assumed as the function of biology. The theory of naturalness in hierarchical power structure is the concrete prologue to the idea that the monopoly of power should be enjoyed by one gender, a certain race, or a particular occupation. The cost thereof, is the exclusion of the vast majority from their civil rights,<sup>437</sup> and consequently exclusion of them in the power structure, while the few, or the ruling class, enjoy excessive power over them.

Moreover, the theory of naturalness of the concept of hierarchical state which Aristotle proposed in *Politics* is accompanied by a reductionism perspective, where Aristotle argues that

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<sup>431</sup> A. E. Taylor, *Aristotle*, (London and Edinburgh: Nelson and Sons, LTD., 1919) p.113-15

<sup>432</sup> Heath, “Aristotle on natural slavery”, *Phronesis: A Journal for Ancient Philosophy*, Volume 53 (3), 243-270.; Fortenbaugh, *Aristotle’s Practical Side: on His Psychology, Ethics, Politics and Rhetoric*, (Leiden: Brill, 2006), p.242.; See Aristotle, *Pol.* 1260<sup>a</sup> 12

<sup>433</sup> See also Mackoen, *Introduction to Aristotle*, (Chicago: University of Chicago Press, 1947), p.584-585. See also Düring, *Aristoteles*, (Heidelberg: Carl Winter Universitätsverlag, 1966), p.491.

<sup>434</sup> *Ibid*, p.114

<sup>435</sup> See also Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.228.

<sup>436</sup> Alexander Grant Collins, *Ancient Classic for English Readers: Aristotle*, ed. W.Lucas, (Edinburgh and London: William Blackwood and Sons, 1898), p.120-22. Taylor interprets slavery as ‘household servant’, and to moderate it, he continues to call it “assistance in small businesses”. Yet, this word-game does not compensate the very rights of these people who were repudiated and excluded from fundamental rights. See A. E. Taylor, *Aristotle*, (London and Edinburgh: Nelson and Sons, LTD., 1919) p.114.; Merriam, *Political Power*, (New York: Collier Books, 1934), p. 67.

<sup>437</sup> Grote. *Aristotle*. (New York: Arno Press, 1973), p.541.

the reason that justifies the method a state uses to obtain its immunity is ‘just’ because, as he believed, “political community, which is the highest of all, and which embraces all the rest, aim at good in a greater degree than any other, and at the highest good.”<sup>438</sup> But this approach does not support, in any sense, the teleological-political doctrine of virtuous politics. Since ‘virtue’ was not the only determining factor of entitlement to political power. Thus, this approach was also a mis-appreciation of virtues as individual excellences.

Despite these problems, the theory of naturalness of the concept of hierarchical state granted that the ancient hierarchical domestic power relations, e.g. the household, the family, etc., not only were assumed to be natural (not conventional), but also were used as a strong reason for elaborating the conservative and traditional theory of hierarchical community. However, the conservative theories of Aristotle challenged by the new democratic theories not that popular at that time. In point of fact, vast power has been wielded by the advocates of the democracy in Greece, and even by non-traditional forms of leaders, such as women, outside of Greece. We can arguably highlight Artemisia who was the Queen of Sheba, and Helen of Troy.<sup>439</sup>

In any way, Aristotle could not escape from the new problems that he encountered in his bottom-up approach: the idea of family and its members, the problem of justification of political power, and the problem of virtues politics in a hierarchical power relation. Above of all, the problem of the merging political consciousness. These partial considerations on the concepts of people and state can be seen as a step toward democracy, since the concept of individuals, power and justice attracted some attentions toward the concept of rights and ‘power to’.

Nevertheless, the study of patterns of authority will become a much larger problem. It shows that the discrimination against social classes, races, and gender, which Aristotle assumed that is based on the naturalness theory of authoritarian/totalitarian of state, is in fact not the function of biology at all. This form of discrimination is but the function of oppression and it leads to the formation of authoritarian/totalitarian political power.<sup>440</sup> It was on the assumption of the naturalness theory of authoritarian/totalitarian of state that Aristotle tried to argue that some individuals are naturally subordinates and slaves. He despised democracy for the same reason that today is regarded as the unobjectionable one: the civil and political rights of people. The argument on the naturalness of the authoritarian/totalitarian of state was not for the sake of truth or justice. It was for the sake of the ruling class. Aristotle wanted to justify the privilege in the rights of the few- the ruling class- not only by dismissing the rights of others but also by saying that it is natural. Subsequently, the distribution of political power, based on the assumption of the naturalness theory of authoritarian/totalitarian of state, is dedicated to those who have the chance in birth, social structure, gender, and their families. Thus, we even see a considerable contradiction between Aristotle’s theory of power and his teleological or value-based approach.<sup>441</sup> Furthermore, Aristotle’s argument of natural inequality turns out to be a

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<sup>438</sup> Aristotle, *Politics*. 1252<sup>a</sup> 5-6

<sup>439</sup> Encyclopaedia Britannica, Artemisia I. Polyaeus: Statagems- Book 8, 53.5

<sup>440</sup> Similarly, Roderick Long has done a comprehensive comparison between liberal and communitarian principle of Aristotle thought. See Long, “Aristotle’s Conception of Freedom”, *The Review of Metaphysics* 49 (June 1996): 775-802.

<sup>441</sup> See also Rice, *A Guide to Plato's Republic*, (Oxford: Oxford University Press, 1998), p.53.

strong counterpart of the rational-normative principles, by which it ignores the law of nature itself and the democratic values.

Hence, if we consider Aristotle's virtuous politics, the political privilege automatically falls short in its own values under the authoritarian/totalitarian regimes. First, privilege means to meet the condition that a person naturally is entitled to gain virtue. Then, as the second step, the natural freeman who possesses the virtue- which differs from time to time and from one society to another- may be entitled to the highest position in the hierarchical political community. Yet, for the same reason of naturalness, coupled with the reductionism perspective- that a community or organization or a state is superior to the individuals- the rights of the office holders fade away by the prevailing concept of the natural right of the state.<sup>442</sup> This point can be similarly argued for the top-down approach.<sup>443</sup>

## 4.2 The Top-Down Approach

It has been said that Aristotle made a comparison between the State as a whole and the people as its part.<sup>444</sup> Now we should qualify this claim regarding the concept of justification of power. Aristotle's top-down approach starts from the concept of reductionism of universe, in which the place of state in comparison to the individuals is the same as the place of intellect in the cosmos in comparison to the state.<sup>445</sup> This is why the bottom-up approach and the top-down approach are the complementary for an understanding of the justification of power in the authoritarian/totalitarian and the semi-democratic regimes.

Aristotle believe that the state can have properties, or at least the right and capacity to gain them over the individuals, as a whole that are not extricable from the sum of their parts.<sup>446</sup> Aristotle made a strong comparison between a part and the whole- or the individual and the state- where he argues that "the state is also prior in nature to the household and to each of us individually, since a whole is necessarily prior to its part."<sup>447</sup> So we may ask why such priority is important for Aristotle?

The thesis that the state – *Polis* - is prior by nature to the individual has been called 'undoubtedly the most provocative assertion in the *Politics*.'<sup>448</sup> Some scholars, such as Miller, tried to argue that the theory of 'priority' in *Politics* is in fact the theory of 'completeness.' "it represents a complete and self-sufficient whole, whereas individuals taken by themselves and

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<sup>442</sup> Ophir also argues that "Socrates presents the idea of the philosopher-king as a means for the realization of the ideal city". See Ophir, *Plato's Invisible Cities: Discourse and Power in the Republic*, (London: Routledge, 1991), p.101.

<sup>443</sup> See Newman, *The Politics of Aristotle*, (Oxford, 1886), vol.1, p.31.

<sup>444</sup> See also Miller, *Nature, Justice, and Rights*. (Oxford: Clarendon Press, 1995), p.39.

<sup>445</sup> for the concept of reductionism see Richard H. Jones, *Reductionism: Analysis and the Fullness of Reality*, (Cranburg: Bucknell University Press, 2000) p. 19

<sup>446</sup> It is hard to say that Aristotle share the Plato's communism idea of state's share property. See Mayhew, Robert. "Aristotle on Property." *The Review of Metaphysics* 46 (1993), 802–831.; See also Bambrough, (ed.) *Plato, Popper and Politics: Some Contributions to a Modern Controversy*, (Cambridge: Heffer, 1967), p.83.

<sup>447</sup> Aristotle, *Pol.* 1253<sup>a</sup> 20-24. Miller, *Nature, Justice, and Rights*. (Oxford: Clarendon Press, 1995), p.45.

<sup>448</sup> Keyt, 'Three Basic Theorems in Aristotle's Politics', in Keyt and Miller Keyt, *A Companion to Aristotle's "Politics."*, (Oxford: Basil Blackwell, 1991), pp. xiv + 407.

apart from the polis are not complete and self-sufficient.”<sup>449</sup> For Aristotle, to argue that the part is naturally subordinate to the whole and whole’s aim, which he regarded as the ultimate aim, is at the same time to argue that the possession of some rights by which it is applicable for the state, naturally are not applicable for possession by its parts. Here, we begin to understand that why, as Arendt argued, political freedom reduces in "preserving the species."<sup>450</sup>

Aristotle’s theory, partially, is the theory of ‘holism’ which some modern psychologist advocated.<sup>451</sup> What emerged from the argument in which the concept of holism is the favorable concept is nothing more than a sense of inferiority. If we could translate the aim of the concept of holism into the simple words, it would be ‘the self-denial of rights’.<sup>452</sup> Indeed, the priority was the question of the power of the state, or better say, justification of the concept of ‘power over’ as the only concept of power. Aristotle proposed this theory where he treated the concept of state, power, and the ruling class indifferently.

We have argued that the self-denial of rights is the ultimate effect of the ‘negative political consciousness’, but it cannot leave the concept of justice unchangeable. The authenticity of the ancient and modern concept of holism is questionable in politics as it is based on the negative political consciousness. At least, this is highly notable when we are discussing the rights of individuals<sup>453</sup> which can be referred to the concept of justice, and the virtue politics which can be referred to the concept of power. However, to complete his argument on ‘holism’, which provides a ground for the justification of the natural and hierarchical structure between the state and individuals, Aristotle could only rely on the allegory between body and its part. He says: “If the whole body has perished<sup>454</sup> there is no longer be a foot or a hand, except homonymously.”<sup>455</sup>

It can be seen that the Aristotle compare the state with the body and the people with the parts of the body to show that without the state, the existence of the parts are meaningless.

Thus, we might ask what is the justification of state. Obviously, Aristotle cannot recognize the primary role that state plays in securing the rights of people<sup>456</sup> and he tried to elaborate a theory against the ‘political consciousness’. What is notable in Aristotle’s thought is the excessive reliance on the ‘Either/Or’ arguments. Aristotle insisted on the idea of ‘state or nothing’, which emerged from the belief in the deceptive assumption of the theory holism.

Given Aristotle’s theory of holism, in which the hierarchical order seems to be secured, Aristotle implicitly turned his back to the theory of ‘mean’ between two extremes which he professed in *Nicomachean Ethics*.<sup>457</sup> In *Politics*, the way of reasoning does not only imply a

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<sup>449</sup> Miller, *Nature, Justice, and Rights*. (Oxford: Clarendon Press, 1995), p.50.

<sup>450</sup> Arendt, *The Origins of Totalitarianism*, (New York: Schocken Books, 1948), p.438.

<sup>451</sup> Adler, *Understanding Human Nature*, (Oxford: Oneworld Publication, 1992).

<sup>452</sup> See also Adler, *Understanding Human Nature*, (Oxford: Oneworld Publication, 1992), Chapter 6.

<sup>453</sup> See Oshry, *Seeing Systems: Unlocking the Mysteries of Organizational Life*, (Berrett-Koehler, 2008), Auyang, Sunny Y, *Foundations of Complex-system Theories: in Economics, Evolutionary Biology, and Statistical Physics*, (Cambridge: Cambridge University Press, 1999).

<sup>454</sup> Which he meant ‘the state’

<sup>455</sup> Aristotle, *Politics* 1253<sup>a</sup> 24-26.

<sup>456</sup> Evans, *Aristotle*, (Brighton, Sussex: Harvester Press, 1987), p.157.

<sup>457</sup> Aristotle, *Nicomachean Ethics* 1103

hierarchical relation between the parts of the community, but is also stressed on the concept of facelessness of the individuals.<sup>458</sup>

Moreover, In *Politics*, the priority and naturalness are the imperative characters of the state. In other words, the priority of the state is absolute and its absoluteness is natural. The fact that Aristotle defended this thesis, following Popper's argument, we can argue that Aristotle is, with Plato, a precursor of modern totalitarianism.<sup>459</sup> This natural priority, which was the bedrock of *Politics*, is one of the main tenacious issues for the justification of political power of authoritarian/totalitarian regimes. So, the concept of faceless individuals or people, which covered by the concept of the wholeness and priority of the state, is still alive in the authoritarian/totalitarian regimes by selling their self-justification of the concept of 'power over'. Whereas an established authoritarian/totalitarian regime boasts of supernatural powers, everyone else fades into anonymity.<sup>460</sup> In modern regime, Aristotle's theory of state can be found in different forms.

Today, we can clearly see that this massive conception of the state as a whole, and its citizens as its parts, can of course form no standard for modern western political theory; in which an individual belongs not only to this one community but rather they are essentially capable of forming a part of many, without identifying their whole personality with any one thereof.<sup>461</sup>

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<sup>458</sup> Svolik, *The Politics of Authoritarian Rule*, (Cambridge: Cambridge University Press, 2012), p.80.

<sup>459</sup> Popper, *The Open Society and Its Enemies: The Spell of Plato*. (London: Routledge, 1947), ch.11. See also Barnes, 'Aristotle and Political Liberty', in Patzig (1990), 249–63. and Holmes, 'Aristippus in and out of Athens', *American Political Science Review*, 73 (1979): pp. 113–28.

<sup>460</sup> Svolik, *The Politics of Authoritarian Rule*, (Cambridge: Cambridge University Press, 2012), p.80.

<sup>461</sup> Treitschke, *Politics*, (New York: The MacMillan Company, 1916), p.4.

## 5. Deficiency

Every researcher in political theory has an attitude toward political power. This attitude determines a very nexus between the theory of rights and power which is an approach to all problems of political theory and pragmatic politics. The ancient Greek philosophers, in this way, have had a unique approach to political power and power relation within the concept of state.

For Plato and Aristotle, based on what they claimed based on the concept of virtue, political power is knowledge. Though for Plato this knowledge is almost divine, for Aristotle this concept of knowledge is degraded to its worldly concept and hence more pragmatically a political concept. Nevertheless, for both philosophers, this knowledge is a virtue.

However, this knowledge is also related to the ancient cosmological point of view which has a dark side. The dark side of such knowledge is simply the political regime it suggests. In such regime, two concepts are comprehensible. First is the concept of hierarchy and second is the concept of imitation. Both of these concepts are excessively diverted from the politics and philosophy.

(i) In the realm of politics, the concept of the despotic hierarchical regime, whether as the product of the divine knowledge or the religious law, lacks the recognition of civil and political rights of people and the possibility of making decision, e.g. human rights, including freedom, equality, property, etc. which are all included in the concept of 'power to'. Although there was an emergence of democracy in ancient Greece, and although Plato and Aristotle were aware of the emergence of the political consciousness among the people,<sup>462</sup> the deficiency in recognition of a wide range of individual rights can be seen in their works. (ii) In the realms of philosophy, the concept of imitation of the state from the universe lacks the essence of critical thinking and the virtue of free will. In fact, the critical thinking and free will are comprising the concept of cognition. Imitation appears to be the opposite form of philosophy, as it is highly, or sometimes only is influenced by the mixture of the worlds of appearance and superstitions.

Here, the question is about qualitative analysis of justification and legitimacy of power. We can ask, 'what are the minimum characters of political consciousness that are ignored by despotic hierarchical regimes with regard to the question of political power and its way of justification, and why?' Generally speaking, this deficiency in despotic hierarchical regimes is the product of 'the signature of power': a relationship between the concept of rights and the concept of power. The deficiency of the concept of 'power to' can arise from the lack of normative legitimacy of political power and lack of the political consciousness.

For example, Plato and Aristotle, tried to address the lack of normative legitimacy along with the emerging concept of popular government – power in the hands of more than one person - in their time. They knew no other support than the concept of virtue.<sup>463</sup> Yet, the same knowledge which was regarded as the virtue and provided the justification to have the most

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<sup>462</sup> Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell); Miller, *Nature, Justice, and Rights*. (Oxford: Clarendon Press, 1995), p.88.

<sup>463</sup> Montesquieu, *The spirit of laws*, (Kitchener: Batoche Books, 2001, first pub. 1748), p.38.

‘share’ in political power was in fact used for the denial of the rights of – the most of - people and even the ruler for the sake of state.

In another words, in ancient Greek theories of power and rights, political power is neither self-consciousness of rights, nor the consciousness of others’ rights in which power can normatively fit the legitimate power relation. Consequently, political power was an approach to a deficit virtue. In these theories, the faceless rights of the individuals gave their place to the despotic power of community. Yet, this power is monopolized and *quasi* represented by one or some people, - namely by philosopher-king or virtuous men - not the community itself. Having that said, at the same time, the ancient concept of political power is neither the rights of these privileged individuals nor the separated function of their community. This is the contradiction that has been ever since manifested in the link between the authoritarian/totalitarian power and the theory of natural holism. When the ‘idea’ of virtue is banished, ambition invades the minds of those who are disposed to receive it, and avarice possesses the whole community.

In this sense, political power as despotic as it can be presented as the ‘just’ and ‘natural’ set by either nature or God, the power of state. So we have to ask: what about the concept of virtue? For ancient Greek philosophers, the only reason through which the power relation is justified is the natural-teleological view of the state and the state’s *aim*.<sup>464</sup> For them each citizen is like a slave who has run away from his master, that which was “a maxim of equity he calls rigour; that which was a rule of action he styles constraint; and to precaution he gives the name of fear.”<sup>465</sup> In such an approach to the state and power, the individuals are faceless, as are the different parts of the state. Moreover, there would be no distinction between ethics and politics, religion and politics, economics and politics, or culture and politics. All moral, economic, and theological problems are assumed to be the teleological-political problems. Politics seems to be a monopoly of the state in which it is justified through its virtuous definition of political power in the patrimony of private persons.<sup>466</sup> This justification is manifested the most in Aristotle’s approach to the state’s justification of power, in the faceless virtuous men. A man is a citizen and a citizen is a man. Only through the political action and fulfillment of his function, i.e. he becomes a virtuous man for the sake of the state, an individual becomes a man and a man becomes an individual. The right of the citizen, an individual or a man is the right to fulfill its function.<sup>467</sup> His right is to be powerless by the monopoly of political power of the community. Simultaneously, the members of the commonwealth riot on the public spoils, and its strength is only the power of a few, and the license of many.

Yet, in this hierarchical and absolute power structure, the relationship between the citizens and rulers, or between the subjects and rulers are incommensurable. This last-long deficiency of justification is based on a deficiency in the link between the theory of ‘political consciousness’ and the justification of power structure under authoritarian/totalitarian regimes.

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<sup>464</sup> See Bakshi, *Politics and Prejudice: Note on Aristotle's Political Theory*, (Delhi: University of Delhi, 1975) p.137

<sup>465</sup> Montesquieu, *The spirit of laws*, trans. by Thomas Nugent, (Kitchener: Batoche Books, 2001, first pub. 1748), p.39.

<sup>466</sup> Aristotle, *Pol.* 1276<sup>b</sup>22–24

<sup>467</sup> See also Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.278.; Aristotle *Pol.* 1253<sup>a</sup>

This is true also in the Aristotelian justification method. To address this fundamental problem, Aristotle returns to justify a partial equality among those who are equal. The presumed equality was not the natural right of people but was for a few individual virtuous men. The equality, in fact, was rooted firstly in the arbitrary character of chance such as birth and family, and secondly on the deficient virtue.

However, partly admitting to equality among freemen – the male Greek land lords - was a positive step that Aristotle took.<sup>468</sup> Compare to Plato, he assumed that the political right belongs to some people and not only the philosopher-king. However, we recognize a paradox in his theory. He used this approach to argue that the citizens should function in their political roles, who are deliberately participating in the politics of the state.<sup>469</sup> They, thus, should have a share in political power. Conversely, he argued that only virtuous men share in power, not the citizens.<sup>470</sup> This entails a hierarchical relationship between citizens of the state and ruler(s) in an indefinite way *viz.* the citizens and the ruler share in the same privilege of rights, namely freedom, or virtue, but it seems that the ruler more accurately fulfills its function according to the virtue than citizens do.<sup>471</sup> The problem is the quantitative analysis of justification and legitimacy of power. We can ask, ‘which determining factor can be justified in measuring this accuracy for distribution of political power?’

In Aristotle’s *Politics*, the uncertainty in answering this question shows the deficient justification of political power in the ancient politics. Given the share political power in Aristotle’s thought, both citizens and rulers had an equal right, hence an equal possibility share in political power; yet, rulers are naturally entitled to the right of absolute political power, i.e. to have a say over the rights of the citizens and occupy the office, because they possess the ability to completely exercise their virtue.

However, the virtue politics does not justify the hierarchical power relation. In other words, the theory of virtuous man without the theory of naturalness would be the same reason to prove that the hierarchical political system is unlikely since indefinite virtuous men are equal individuals, and they could claim for sharing in political power and in office. It seems that the radical idea of the rights of the rulers, i.e. virtuous man over those who are equal with and over others, appeared odd to Aristotle. Thus, in the book VII of *Politics*, there is no discussion on the kingship as a justified power relation.

In sum, the hierarchical power structure is not only based on the deficiency in the appreciation and observation of human rights, but also on the very core essence of the virtuous and teleological politics. These are the deficiency in the appreciation of different concepts of power. Hence, emphasis on the one-dimensional power while trying to ignore the other dimensions produces a strong sense of insecurity and distrust in a society.<sup>472</sup> The mutual

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<sup>468</sup> Aristotle, *Nicomachean Ethics*, V.3. 1131<sup>a</sup> 10-<sup>b</sup> 15; *Politics*, III. 1280<sup>a</sup> 8-15, III. 1282<sup>b</sup>18-23. See also Hatzistavrou, 'Faction' in *The Cambridge Companion to Aristotle's Politics*, (Cambridge: Cambridge University Press, 2013) p.292.

<sup>469</sup> Aristotle, *Politics* book III. See Kraut, *Aristotle: Political Philosophy*, (Oxford: Oxford University Press, 2002), p. 112). See Waldron, “The Wisdom of the Multitude: Some Reflections on Book 3, Chapter 11 of Aristotle’s *Politics*.” *Political Theory* 23 (1995): pp. 563–84.

<sup>470</sup> Aristotle, *Pol.* 1277<sup>a</sup>14–16.

<sup>471</sup> Miller, *Nature, Justice, and Rights*. (Oxford: Clarendon Press, 1995), ch.4. See also Brown, 'Rights' in *Aristotle's Politics and Nicomachean Ethics? Review of Metaphysics*, 55(2) (2001), pp. 269–295.

<sup>472</sup> Popper, *The Open Society and Its Enemies: The Spell of Plato*. (London: Routledge, 1947), p.15.

insecurity and distrust among the subordinated people and rulers make political power an unaccountable, untrustworthy and deficient power. This deficiency to justify the power, and the effects thereof, which are the lack of accountability, trustworthiness, effectiveness, are the basic traits for the insufficiency of authoritarian/totalitarian regimes to obtain their immunity and stability. It is a lesson that should be learned, that the authoritarian/totalitarian powers have an ironical fear from their own authority which produces insecurity, just as the bleeding heart that has an ironical fear from its own blood.

In authoritarian/totalitarian regimes, political power is the monopoly of the state, yet this produces a backlash. As it can be seen throughout history, these approaches inevitably caused a hedged constraint by the faceless people, i.e. those without rights and identity and are outside of power. This constraint, arguably, is a progressive movement of a society in politicization, the process of politicization. Hitherto, it can be seen that justification of hierarchical power structured regimes, whether they belong to the ancient era or the modern one, face serious questions regarding their power and their domains of authority due to this constraint.

### **5.1. Insecurity and Emergence of Liberalism**

From the psychological point of view, there is always a high or low sense of insecurity and fear in people. Whether little or much, whether in a democratic regime or in a dictatorship, fear and insecurity exist since state and government is not completely identical with society. Thomas Paine<sup>473</sup> opens his influential book, *Common Sense* with the following words:

“Society is produced by our wants, and government by our wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices.”<sup>474</sup>

Under the rule of a dictator, the level of insecurity or fear is high for those who are governed because their life, liberty, and their property are not in their own hands.<sup>475</sup> This acrid sense of insecurity is not only comprehensible from the theoretical analysis, which can be implied under the assessment of specific power structure, but is also comprehensible based on the undeniable political trend in every alteration which can emerge in any power structure.<sup>476</sup> Hereof, it is also a politico-historical fact.

When we consider the main argument of the present work, we realize that the sense of insecurity is in fact unavoidable for every authoritarian/totalitarian regime due to the inevitable emergence of the political consciousness, and the process of politicization of individuals in a

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<sup>473</sup> Thomas Paine (1737-1809) - An Englishman who came to America in 1774, he was a political philosopher who promoted change through revolution rather than reform. Paine is most renowned for his activities advocating democracy. *Common Sense* (1776) - This widely-read pamphlet argued for America's immediate separation from England. It is considered by many to be the catalyst that roused public feeling and was most influential in the creation of the Declaration of Independence.

<sup>474</sup> Paine, *Common sense*, (Philadelphia : printed. And sold by W. and T. Bradford, 1776), Ch.1.

<sup>475</sup> TenHouten, Social dominance hierarchy and the pride–shame system, *Journal of Political Power*, 10:1, (2017), 94-114.

<sup>476</sup> See Bramstedt, *Dictatorship and Political Police: The Technique of Control by Fear*, (London: Routledge, 1945).

society. The reason that people distrust their regime is based on their cognition and their experiences which compose their political consciousness. In the very basic model of power relation in any authoritarian/totalitarian regime, we can clearly allege to the idea that the lack of security among the people can emerge due to their concern with their rights and their property, and more importantly, their lives. In contrast, the reason that power holders distance themselves from the democratic element is due to their distrust in the votes of their people. They try to obtain immunity for their power by ignorance and violence. These two elements are like a plague for the tree of power.

In the ancient Greek era, the sense of insecurity among the ruling class and elites caused both the power holders and the philosophers to try to sophisticatedly argue for a new form of hierarchical power structure against the wave of democratization caused by the primitive political consciousness. However, the ancient Greek philosophers miscarried the essence of political consciousness.

Today, we can see that the lack of institutional security is, as always, based on ignorance and causes violence. These elements cause the instability and unaccountability throughout the whole power spectrum. The distrust and insecurity in top-down and bottom-up approaches, i.e. among people and within the institutions, raises various ominous fates to the justification of authoritarian/totalitarian power structures and to the existence of despotic political power. Among the positive consequences is the demand of people for a better political order. Successful result of this demand is a regime that implies a form of power shaped by the political consciousness in which the mutual rights of the citizens and governors are completely respected. Moreover, such a regime is comprised of the logical form of legality. (We will get back to this point in the chapter two of this work.) It also relies on the rational-normative principles by which is emphasize on the desirable form of equality, rights, and liberty. Justice is the basis of the political consciousness and one of the grounds for the normative legitimacy of a political order and its main trait. The rational-normative principles also emphasize the notions of collectivity, sovereignty, and republic. Lacking in these elements is somehow powerlessness in a political spectrum.

(i) Powerlessness for people means being subjected to the usurpation of power by others, to live completely according to the dictates of another's judgment and nature. So, when we consider the despotic hierarchical political regimes e.g. autocracies, communism, and theocracies, in which the individuals are assumed to be right-less and powerless,<sup>477</sup> and the concept of political consciousness is rejected, or when we consider the semi-democratic regimes in which the deceitful concept of political rights and right-less-ness produce the negative political consciousness, we can see that the concept authority in these regimes lack the rational-normative principles. (ii) By ignoring these principle, the states or regimes lack the concrete grounds for the legitimacy of their authority.<sup>478</sup> Consequently, a high sense of insecurity along with other negative feelings such fatalism, pessimism, resignation, anxiety, submissiveness, and shame, in the authoritarian/totalitarian regimes, endeavors to win the justification of their power, their unaccountability and instability, and their illegitimate form

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<sup>477</sup> Lukes, *Power: A Radical View*, (Basingstoke: Palgrave Macmillan, 2005).

<sup>478</sup> See also Serena Parekh, *Hannah Arendt and the Challenge of Modernity: A Phenomenology of Human Rights* (New York: Routledge, 2008) p.29

of legality- as we will see in the third part of this work- cause them to be doomed to be powerless regimes too. So powerlessness for an authority is the lack of comprehensive concept of political power. So, here we have referred to two levels of powerlessness: one is at the level of individuals, which refers to the concept of power, and the other one is at the level of regimes which refers to the concept of rights.

The concept of powerlessness does not mean that an authoritarian/totalitarian regime cannot exercise their force upon the people or form an institutional authority, but it means that the regime is not entitled to any right of sovereignty over people in a way that it stifles the principle of liberty, as it emphasizes only the political autonomy, whereby the people cannot deliberately constitute the whole political spectrum nor can share in political power. Although the powerless regimes pragmatically can be the authority – which able to utilize a legal system and force such as military and police - over the people, as they more or less are able to justify some forms of theological or legal order and authoritatively exercise their power, their authority is not accompanied by the consent of the people and the rational-normative principles. Hence, such power is not shaped or based on the political consciousness. What we see in Libya, Tunisia, and Saudi Arabia or even in China in one way or another is simple fact that they are the different forms of semi-democracies, autocracies and communist regimes. So, these ghastly and fallible authorities, which possess no concept of sovereignty or legitimacy, are in fact the powerless regimes; they possess the concept of authority but they lack in the concept of legitimacy and sovereignty.<sup>479</sup>

The authority of the regimes which cannot be matched with the rational-normative principles, and reject the concept of political consciousness, can in fact be known as usurpers of power.<sup>480</sup> As we argued in part 2.1., the concept of illegitimate political power, and the structure in which they are exercising as the illegitimate power structure, are identical to the concept of usurpation of power.

The question is now: ‘what are the effects of inevitable political consciousness on the different regimes, especially on the hierarchical authoritarian/totalitarian power structures?’ To answer, we start with the process of politicization as the procedural effect of the emergence of the political consciousness.

### **5.1.1. The Process of Politicization, Insecurity, and Search for Political Rights**

The political consciousness, as we argued, is the mutual awareness of rights and power by the both sides in a political spectrum: governors and those who are governed. Furthermore, it functions against the usurpation of power. It causes a trend which we have called the ‘process of politicization’. This positive trend mutually benefits the political consciousness, especially when we consider the bottom-up approach to the concept of power. In the process of politicization, the recognition of the ‘rational-normative principles’ assess the concept of justification’ in a way that it provides the initial steps for the appreciation of a legitimate power. Such recognition provides the alternative theories by which the despotic or authoritarian/totalitarian regimes can be reformed or substituted.

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<sup>479</sup> Freedom House, "Freedom in the World: 2016", [www.freedomhouse.org](http://www.freedomhouse.org), pp. 3-5.

<sup>480</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.21.

Moreover, the rational-normative principles demand the rational legal order in which the values it provides can be also defended. It can also evaluate the legal order. In a legal order which is positively evaluated, all relationships become predictable and calculable. In this sense, there would arguably be more security and less distrust.

When the trend of politicization works all the way throughout a regime, the concept of ‘power over’ cannot be represented as the only concept of power. In the process of politicization of people, the concepts of ‘power to’ and ‘power of’ will be revealed and recognized. In such a process, the primary change - in an institutional sense - is the social order and concept of law. But law, just like economics or politics, is purely instrumental.<sup>481</sup> The legal order of a regime provides a new form of justification for an emerging power relation. In this power relation, which is based on the rational and legal principles, the level of insecurity among the citizens is minimal. This is backed up by two elements. One is the calculability emerged from the legitimate legislative power, and the second is the normative legitimacy of law.

Here, the importance of the rational-normative principles is clear due to the demanded form of power. According to the concept of power formed by the political consciousness, the share of state in authority, which is the concept of ‘power over’, cannot be merely justified by the authority itself. Alas! this is rejected in the authoritarian/totalitarian regimes in which everybody should follow the definition of power and the kind of interpretations of the laws which the state dictates.<sup>482</sup> Legal order in the authoritarian/totalitarian regimes is an instrument in the mere hands of power holders, the state, or the authority. In this situation, to respect the legal order as the mere justification of a political power would be seriously doubted. Moreover, never can the concept of power over be enough to guarantee the rights of individuals e.g. life, liberty, equality, security of person, dignity, and property,<sup>483</sup> nor their preservation. The simple reason for that is because there is no authority that voluntarily restricts its own domination.

## 5.2. The deficiency in Justification and the Critique

The deficiency of justification of authority, for most of the part, depends on the deficiency in the implementation of the rational-normative principles. The role of the legal order in an authoritarian/totalitarian regime, or even in the semi-democratic one, is highly irrelevant when the authority poses a threat to its people and their rights. Modern regimes are fully aware of the role of law for both their justification and for their exercise of power. That is the reason that we can see a high sense of insecurity among the citizens of the authoritarian/totalitarian regimes while the regimes are strictly relying on the concept of legally justified power relation.

In *Considérations sur la France*, Joseph de Maistre, a conservative French politician, stressed the link between political power and the law in favor of monarchy. He argued that ‘political power cannot be dissolved in law’.<sup>484</sup> When we consider his argument in our discussion, here, we can use the same reason for the presence of a high level of insecurity under

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<sup>481</sup> Dyzenhaus, *Legality and Legitimacy*, (Oxford & New York: Oxford University Press, 1997), p.11.

<sup>482</sup> Merriam, *Political Power*, (New York: Collier Books, 1934), p. 74

<sup>483</sup> Universal Declaration of Human Rights, Article 2.  
<http://www.ohchr.org/EN/UDHR/Documents/60UDHR/bookleten.pdf>

<sup>484</sup> Joseph de Maistre, *Considérations sur la France*, trans. R. Librun (London: McGill-Queen’s University Press, 1979) Ch. VI. 8-9

a self-legalized despotic political power; whether this self-legalized power is the oligarchic and aristocratic regimes in Aristotle's *Politics* or the military-based regimes in south-America and Middle East, or in religious-based and patriarchal-based regimes in the Middle-East.

The sense of insecurity is somehow a psychological motive for the emergence of the critiques against the authoritarian/totalitarian political power. Such critique may be found at most in the enlightenment period where the rational-normative principles find their way into the concept of modern natural law. What the theorists like John Locke have presented as the considerations for the individual rights such as liberty, equality, security of person, dignity, and property are not far away from what we argue as the cause of the emergence of political consciousness.

In this sense, the first right would be the preservation of life. The concept of this right is rooted in the principle of liberty, which causes a modern political fraction of liberalism. The next step in the search for the locus of the rights of liberty, i.e. freedom, put considerable questions on the justification of hierarchical political power, in which the rulers have the right over the life of subordinates. The question of political power, and those who are assumedly entitled to it, is the question of the capability and rationality of recognition of human rights.

The emergence of liberal ideas in the enlightenment period was due to the distribution of political power and the way it was justified. The principle of liberalism, in contrast to the Platonic-Aristotelian absolute concept of the state power, insists on the idea that political power is not naturally justified for a state, nor the business of one or some rulers, i.e. the few.<sup>485</sup> Consequently, a high level of distrustfulness toward political power and the state emerge from the concept of liberalism. This distrustfulness and insecurity would emphasize 'the preservation of the people lives' rather than 'the state preservation', and 'the society goals' rather than the 'state's goals'. What is critical about the concept of liberalism is its fallibility to any sense of extremism. In the best case, liberalism in a republic produces the concept of utilitarianism. In the worst case, liberalism can, arguably, end in the idea of anti-political power or anti-state.

I should dismiss these extreme ideas. The extreme liberal form of social contract in which it suggests that we all are 'living together without any commitment and expectation', or that we need just 'mutual aid',<sup>486</sup> rather than living in the political community- which can be a contrasting view of the totalitarian state- is nothing more than the concept of anarchism.<sup>487</sup> Moreover, the idea of the preservation of life in the extreme concept of liberalism overrides any idea of mutual right, yet the same concept cannot provide any sufficient reason to ratify the right behind it without mutual recognition. In this sense, this extreme approach to the concept of liberalism, which escapes from any commitment to any power structure, is a denial of political consciousness.

In contrast to the extreme concept of liberalism, the Platonic-Aristotelian teleological-political conception of the state's political power embraces all activities of the people. It fully

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<sup>485</sup> Rawls, *Political Liberalism*, (New York: Columbia University Press, 2005).; Larmore, *The Autonomy of Morality*, (New York: Cambridge University Press, 2008).

<sup>486</sup> Kropotkin, *Mutual aid*, ed. Paul Avrich (London: Allen Lane, 1975)

<sup>487</sup> Godwin, William, (1976) *Enquiry Concerning Political Justice*, ed. Isaac Kramnick, Harmondsworth: Penguin.

controls education, economics, religion<sup>488</sup> and culture. Moreover, the only focus of the Platonic-Aristotelian conception of the state's political power is the teleological expectations. This means that their approach puts the state and its aims prior to the concept of individuals' rights and their lives. We also dismiss this concept of power which emphasizes merely on the authority *qua* 'power over', which falsely rejects the concept of political consciousness, and hence ignores the concept of 'right'. Such ignorance of right is equal to the ignorance of the concept of power which produces the illegitimacy of power. What we see in the authoritarian/totalitarian and semi-democratic regimes is the illegitimate form of power, which is identical to some forms of usurpation of power. The usurpation of power causes that these regimes be insufficient and incapable of their own preservation.<sup>489</sup>

Ordered liberty/ordered liberalism, as a mean between extreme liberalism and authoritarianism, supports the mutual appreciation of rights. By ordered liberty, we may consider the concept of power along with the value position. This means the emergence of other competing factors, such as wealth and knowledge for power.

In any way, from the top-down approach, the appreciation of human rights is the grounds for the accountability and trustworthiness of political power, which are essential to the establishment a rational and legitimate political order. From the bottom-up approach, the appreciation of right of government by individuals not only is the recognition of authority but also a formative element for the sovereignty of a regime. Furthermore, it helps the stability of a regime, which assesses the concept of legitimacy.

Hitherto, it can be seen that the excessive reliance on the principle of liberalism - extreme liberalism - and absolute or despotic hierarchical regimes are contrary to each other, yet they share the same deficiency. They fail to appreciate the reciprocal constitutive link between the concept of man and the concept of citizenship, and between the concept of power and the concept of right.<sup>490</sup> Furthermore, they fail in recognition of the process of politicization of a community and in supporting a living political consciousness. If a political system excludes some from participating in politics while it gives privilege and fundamental rights to others, it cannot guarantee the inviolability of a long list of vital political and social rights such as freedom, rights, and private property from the government intrusion, violation, and occupation. Yet, it is true in a system based on the extreme concept of liberalism in which there would be no mutual recognition of power, and especially no recognition of the concept of sovereignty and law.

Among all forms of regimes, it seems that a reliable - defensible and constitutional-regime, whether it is a democracy or a monarchy, recognizes the right of individuals, and as a consequence comprises the elements of a legitimate power structure. Such a regime respects the concept of republic in the definition of sovereignty, and can effectively imply a systematic power relation which is based on the rational-normative principles. The potentiality of rational and normative use of political power, in both the legislative and executive concept of power,

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<sup>488</sup> See Farabi, *The Aphorisms of the Statesman (Fusul al-Madani)*, (Cambridge: Cambridge University Press, 1961).

<sup>489</sup> Sharp, *From dictatorship to democracy: a conceptual framework for liberation*, (Boston: The Albert Einstein Institution, 2010), p.15

<sup>490</sup> Starr, *Freedom's Power: The True Force of Liberalism* (Basic Books, April 2007). p. 18, 35.

can balance between the preservation of right and the effectiveness of the law. In this sense, the accountability and the legitimacy of political power can be arguably guaranteed.

## 5.2. Aristotle and Multitudes' Tyrannical Political power

For Aristotle, the different forms of authority do not excessively differ in their concepts of justification. This can be visualized in a triangle on which each side presents a concept of Aristotelian discussion for power. On one side is the concept of the state, on the second side, is the concept of justification of power relation, and on the third side is the concept of political power. These three concepts are *in* the triangle as the community, not outside, which make them inseparable aspects as they are mixed up under the notion of political power in Aristotle's *Politics*.<sup>491</sup>

However, each of them results in the deficiency of legitimacy of political power. We have gone through such deficiency which is exercised by the authoritarian/totalitarian power structure. We also discuss the incompatibility of such power with the virtues politics. Hence, here we just mention some further points.

What we mean by the deficiency of legitimacy is partly based on the lack of rational-normative principles in what Aristotle presented as the virtuous politics. In his theory of state, Aristotle ignores the equality of the people in basic political rights, hence he ignores the equal rights of individuals in political shares such as power. Although Aristotle wished to protect the power from the so-called mob, he could not ignore the process of politicization in the Athenian society. He admitted to the claim of the multitude to rule and that was the turning point in the political thoughts and ancient Greek philosophers. It seems that the idea of the multitude to rule is also the most democratic-based argument in *Politics*. In his theory, Aristotle talk about the 'share political power'. In fact, his theory of 'shared political power' was a participating deliberation by the specific individuals.<sup>492</sup> Although such an approach is adorned with the democratic values, Aristotle did not treat everybody in a society as equals. We can see that Aristotle still argued for the natural rights of a ruler over citizens and natural rights of citizens over the peasants, women, and so-called slaves. He was basically relying on the concept of the 'political application' of the important advancement for hierarchical power relations.<sup>493</sup>

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<sup>491</sup> Fontana argues that Aristotle proposed two approach to the authority of state. One is despotic and the other one is political (or constitutional). Cf. Benedeto Fantana, 'State and Society: The concept of Hegemony in Gramsci, in *Hegemony and Power: Consensus and Coercion in Contemporary Politics*, Ed. Mark Haugaard, Howard H. Lentner, (Oxford: Lexington Books, 2006) p.25.

<sup>492</sup> Ober (2008) does not put stress on deliberation. His idea was the recognition of one another's diverse forms of expertise: "What is needed is a body of decision makers capable of recognizing (through social knowledge) who really is expert, and capable of deciding (by voting) how much weight to give various domains of expertise in 'all things considered' judgments. His interpretation is more close to the hierarchical Aristocracy of book III. Richard Kraut refers to the value of discussion to explain the merits of decision by certain multitudes." (Kraut, *Aristotle: Political Philosophy*, (Oxford: Oxford University Press, 2002), pp. 112-15. In this way, he stressed on the teleological view of Aristotle's politics in deliberative participation. Jeremy Waldron argues that Aristotle is invoking the dialectical fruits of "deliberation" rather than the mere summation of diverse views. Here, the implementation of the power relation is still hierarchical. Waldron, "The Wisdom of the Multitude: Some Reflections on Book 3, Chapter 11 of Aristotle's Politics." *Political Theory* 23 (1995): pp. 563– 84.

<sup>493</sup> Fortenbaugh, *Aristotle's Practical Side: on His Psychology, Ethics, Politics and Rhetoric*, (Leiden: Brill, 2006), p.241.

The concept of political power does not comprise the rights of individuals because, as Aristotle believed, the state's power merely relies on the concept of traditional natural rights. If the civil rights of individuals become one of the important concepts of power, a state cannot be sufficiently respected by the traditional concept of natural rights and hence wield political power.<sup>494</sup> The shared political power stilled is the authority of the few, the ruling class, without any further consideration of the concept of equality. Based on this deficiency, the democratic elements of shared political power, blurred in the theory of teleological concept of power, dictates the authority in the form of aristocracy.

In *Politics*, Aristotle assumed that the authority of the self-justified regimes is secured by the virtuous principles. However, the appreciation of such power cannot be gained by the people where the concept of justification is monopolized by the authority, hence there is no safe haven for the self-justified regimes pragmatically. In fact, none of the forms of power relations are secured since power is flowing, but the self-justified powers are the most vulnerable to the inevitable political changes.<sup>495</sup>

*Politics* was a sophisticated work for its time, but it is still primitive when we consider the different approaches to the concept of power. One can see throughout *Politics* that one of the strong arguments is when it admits the different power relations in different regimes. This fact incites various potential claimants to the authority. Yet, Aristotle fails to show that each established political order has its specific method of justification outside the closed-circle of natural law or arbitrary elements. For instance, where in the ancient democracy, the majority justified their political power based on their quantity, in the monarchy, oligarchy, or aristocracy, the minority justified their political power based on their qualities such as blood, wealth, or an arbitrary concept of virtue.<sup>496</sup> In *Politics*, Aristotle was excessively concerned with the prevailing concept of natural right to the extent that he failed to admit such or any claim to power is neither virtuous nor arbitrary.

Yet, one may say that we cannot ignore the other side of Aristotle's argument on the 'virtue politics'. Based on this claim, the virtues politics seem to be a qualitative concept of authority, because it emphasizes virtue as the main factor. This qualitative aspect may also be assumed as being one of the reasons that the virtues politics includes more people in the realm of politics than the traditional concept of power in his time, hence virtues politics was assumed to be a more democratic theory. This argument may be true to some extent. However, the qualitative aspect of virtue politics still has the quantitative measurements. We should not forget that the theory of virtue politics is the principal of Aristotle's *Politics* in which he merely presents a self-justified hierarchical power structure. This self-justification is an emphasis on regimes' power as a virtuous one, not power of individuals. Aristotle wanted to build an argument on the virtuous aspect of regime's power, not only by showing the differentiated claims on political power, but also by a comparative approach.<sup>497</sup> Thus, he unintentionally had to show

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<sup>494</sup> Newman, *The Politics of Aristotle*, (Oxford, 1886), vol.1, p.312.

<sup>495</sup> Svobik, *The Politics of Authoritarian Rule*, (Cambridge: Cambridge University Press, 2012), p.44.

<sup>496</sup> Aristotle, *Pol.* 1282<sup>a</sup> 39-41; see also Mackoen, *Introduction to Aristotle*, (Chicago: University of Chicago Press, 1947), p.589. See also Shokri, "Islam and Politics: The Case of the Islamic State." *Studia Humana* 5.2 (2016), p.5.

<sup>497</sup> See also Fortenbaugh, *Aristotle's Practical Side: on His Psychology, Ethics, Politics and Rhetoric*, (Leiden: Brill, 2006), p.275.

that no mere claim is necessarily secures the justified power relation, because any such claims can be revert or fulfilled by another group instead.

“All this seems to make it evident, then, that none of the definitions on the basis of which people claim that they themselves deserve to rule, whereas everyone else deserves to be ruled by them, is correct. For the multitude would have an argument of some justice against those who claim that they deserve to have authority over the governing class because of their virtue, and similarly against those who base their claim on wealth. For nothing prevents the multitude from being sometimes better and richer than the few, not as individuals but collectively.”<sup>498</sup>

In fact, Aristotle's aim was not to highlight the quality of equal claims to power, but to emphasize the merit of the state's power compared to the individual's or a group of individuals'.

However, contrary to Aristotle's expectations the power of collective individuals lost its claim compared to the state's authority as a whole. However, the concept of ruler and personalities is inevitable in a theory of hierarchical power relation. Thus, in Aristotle *Politics* the multitude share state's power by sharing offices compared to the collective notion of people as a society. Yet, this argument shows Aristotle's pragmatic approach to the relationship between the concept of authority and the concept of political power, in which there are limitations and contradictions for the multitude's claim of power. In the concept of authority, the limitations for the multitude's claims of power are according to the mere concept of the claims which are besieged by their opponent groups. We may claim that, the limitation of the multitudes' claim to power is the same as the limitation for the few to claim to power.

### 5.2.1 Virtue Politics

However, the terminology of 'the claim to power' has a broad criterion. In book III of *Politics*, Aristotle realized this weakness and tried to categorize the most important criteria that 'the claims to power' are based on. Among these criteria were wealth, equality, divine order of the king, physical virtue, such as power for fighting (Sparta), and finally the political-ethical virtues. It seems that except the concept of ethical-political virtue, the rest of the criteria 'to claim to power' were somehow rooted in the traditional concept of Athenian authority. The ethical-political virtue-based claim to power was an innovation of the ancient Greek philosophers, which were systematically presented by Plato and shaped to their practical basis in Aristotle's *Politics*. For Aristotle, two strong and pragmatic grounds of claims to power were wealth and virtue.<sup>499</sup> We can clearly see that both of these criteria have a strong quantitative character.

Let us get back to the limitations for the multitude to claim power in *Politics*. These limitations, along with the considerations of opponents or other groups of multitude, are also due to their relativism in both the 'functioning' and 'task fulfillment' of a virtue. Virtue, according to Aristotle, is defined by the philosophers. Accordingly, any claimant to political power surely assumed that he or she possess the virtue. In this sense, those who claim power

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<sup>498</sup> Aristotle, *Politics* book III 13, 1283b 27–35.

<sup>499</sup> Aristotle, *Pol.* 1283<sup>b</sup> 17–18; See Blythe, *Ideal Government and the Mixed Constitution in the Middle Ages*, (Princeton, NJ: Princeton University Press, 1992), p.20.

define it and, consequently, fit it to their own elements of justification since they have their own approach to fulfill a specific task. Hence, any claimant to political power has its own tasks to fulfill which might be irrelevant to the other groups or persons who claim to the same authority. However, it is plausible that the power holders continuously inherit the authority since the only power who set the criterion in a hierarchical regime is the authority itself. Not surprisingly, the virtue politics is nothing more than a mutual link between the claim to rule and the virtue which is the 'essence' that is merely defined by the authority.<sup>500</sup> In this sense, there would be not the criteria but a criterion which is defined by the authority that wield power and whatever it is, it would be the virtue.

However, the claim to rule based on *specific* state's criterion can be always advanced by the state. Here, we see that for the multitude's claims to rule, there is a contradiction between shared politics and a specific criterion. For the multitude to claim to power, there should be no authority at all. This is the main cause that the claim for the justification of power based on state criterion, at the same time, is the claim to the self-justification of an authority to stabilize their power against any change. Consequently, an absolute priority for Aristotelian power holders is to make the state an absolute hierarchical authority, no matter how many power holders they are.

Aristotle also tried to restrict the concept of authority regarding the concept of virtue as a criterion for which the state should stand, i.e. aims of the state. However, the deficient legitimacy emerges from the link between the concept of virtue as the only criterion and the nature of the state's priority. In this sense, the criterion- or the criteria- is not only emerged from authority and justified as the right of authority, but it has its exclusive characteristic. It gives the right to power, i.e. the qualitative right to rule over others, to the few as there are the quantitatively distributed offices. The offices are the place in which to carry out the state's aim in the best form and those who sit in the office hold the real power. This is the same characteristic we observe in today's semi-democratic regimes.

Moreover, in Aristotelian virtue politics, the state aims are based on the virtue and are merely for the sake of the state. Yet, the collective aims are obscured and sometime nonsense when we try to detach them from the concept of state. This causes the teleological aspect of the virtue politics to also gain its meaning only if we admit the priority of state authority.

When the criteria such as wealth and virtue would be the means to satisfy the aim of the state as the only and ultimate end, whomever has them is assumed to have the natural privilege of authority over others.<sup>501</sup> This means that if a criterion does not fit in the state's aim agenda, it is the meaningless and unaccountable one, since it is already excluded by the authority and its shared but monopolized political power. This method, in fact, is not only a qualitative way to exclude people from the office and secure the hierarchical power structure but also exclude any potentiality for change that may threaten the state's high office. This change is highly

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<sup>500</sup> "Isn't a tyrannical man like a city ruled by a tyrant, a democratic man like a city ruled by a democracy, and similarly with others? And won't the relation between the cities with respect to virtue and happiness be the same as those between the man?" Plato, *Rep.* 576<sup>c</sup>

<sup>501</sup> See also Newman, *The Politics of Aristotle*, (Oxford, 1886), vol.1, p.81 : Aristotle "was misled, partly by the general sentiment of his race and age, which exaggerated the contrast of vocations, partly by his own teleology, always too ready to classify things as means and ends".

regarded as the change toward democracy and redistribution of political power, rights, and freedom.

In *Politics*, the very nature of *shared* political power in the hierarchical power structure is questionable. And it means that, critically, there is no shared political power at all. Political power nurtures the criterion that fulfill the state's aim and the criterion feed the self-justified authority. In this sense, in *Politics*, the structure of the arguments are based on the justification of authority and stability of office in hierarchical power relation rather than the legitimacy thereof.<sup>502</sup>

We can expand the concept of this argument to assess the general terms and condition for the different forms of regimes. We can allege to the idea that without the rational-normative principles for the authority to stand on, the authenticities of different criteria can be challenged in different states.

### 5.2.2 Collective Multitude and Deliberative Democracy

In Aristotle's politics, wisdom and virtue are among the most favorable criteria of the state. The process of arguments through books III and VI of *Politics* are laid out in a way which shows that the fulfillment of these criteria is more likely in the three forms of political orders: monarchy, aristocracy, and constitutional government.<sup>503</sup> He assumed that if a system is among one of these, then it is likely that the common character of its ruling class would be the wisdom and virtue. In contrast, he could not ignore the political changes of his time.<sup>504</sup> In book 5 of *Politics*, he mentioned that:

“Still democracy appears to be safer and less liable to revolution than oligarchy. For in oligarchies there is the double danger of the oligarchs falling out among themselves and also with the people...”<sup>505</sup>

In this way, he admitted that the collective multitude<sup>506</sup> causes a possible emerging power relation, which is still not the best one. The possibility of it is driven by two reasons: on the one hand, the accountability of multitude shows that they can fulfill the state's aim,<sup>507</sup> and on the other hand, the multitude- of people- might trump the few on the basis of *quantity* so that it ensures the fulfillment of the criteria which is set forth by the state. In theological politics, the fulfillment of the state's aim is the claim to rule in which the multitude's political power is to be both allocated and limited. Hitherto, the collective multitude is adorned with the characteristic of participation.<sup>508</sup> At the first glance, the form of distribution of power in which

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<sup>502</sup> See also Antony Hatzistavrou, 'Aristotle on The Political Life', in *Routledge Companion to Ancient Philosophy*, ed. Frisbee Sheffield, James Warren, (NY: Routledge, 2014). Subrata Mukherjee and Sushila Ramaswamy, *A History of Political Thought: Plato to Marx*, (New Delhi: PHI Private Limited, 2011) p.102.; Blythe, *Ideal Government and the Mixed Constitution in the Middle Ages*, (Princeton: Princeton University Press, 1992.), p.20. Grote argues that the education of such power structure provides a agenda for the citizens to respect and follow their superior. Grote, *Aristotle*, (New York: Arno Press, 1973), p.540.

<sup>503</sup> Aristotle, *Pol.* 1289<sup>a</sup> 31-32

<sup>504</sup> Aristotle, *Pol.* 1286<sup>b</sup> -1288b

<sup>505</sup> Aristotle, *Politics* book V, 1302<sup>a</sup>

<sup>506</sup> Alexander Grant Collins, *Ancient Classic for English Readers: Aristotle*, ed. W. Lucas, (Edinburgh and London: William Blackwood and Sons, 1898), p.119

<sup>507</sup> Aristotle, *Pol.* 1281<sup>a</sup> 40-45,

<sup>508</sup> See also Barker, *The Political Thought of Plato and Aristotle*, (New York: Russell & Russell, 1959), p.418.

the authority is in the hand of the multitude, makes Aristotle's view slightly close to what we have in the representative democratic regimes.<sup>509</sup> Yet, it is diverged from the modern democratic regimes because of a lack of other rational-normative principles such as equality and freedom. In this sense, in Aristotelian theory of 'share power' or political participation, there is no concept of the mutual recognition of rights by both sides of the governors and the governed, but it is only the recognition of the right of the few who represent themselves as the free multitude Greek males.

In fact, the teleological view of the state and the concept of the claim to power present a concept of self-justification. Such an approach cannot provide the concept of legitimacy which is based on the political consciousness.

It is true that the authority *qua* 'power over' was the only character of political power, no matter if it is in the hand of one, the few, or the multitude. So far, we may notice that the concept of legitimacy never became a case in the ancient Greek political discourses. In this sense, the differences between the notion of democracy and tyrannical rule of the multitude were ignored, and the focus was only on the authority of the state. The questions were not focused on 'what is authority?' Authority *qua* 'power over' were taken for granted. The real question for the ancient Greek philosophers was whether the authority belongs to one person or to some people. Hence, the deficiency of legitimacy in 'the multitude rule' makes it more a tyranny than any other form of regime.

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<sup>509</sup> Aristotle, *Pol.* 1317<sup>a</sup> 39-45- 1317<sup>b</sup> 1-3

## **6. A Lesson from the Ancient Political Thought: The Ratio of Authority and Deliberative Participation; An Institutional Framework**

To start this part, once again we must consider the question on the notion of authority. What was ‘authority’ in the ancient politics? In a very simple form, the traditional notion of authority dictates the mere concept of ‘power over’. As we argued, in defining power and authority, the ancient Greek philosophers ignored the concept of legitimacy, therefore, we cannot find either the rational-normative justification nor the stable intention for the claim to rule over others with the exception of ‘holding office’. In the ancient Greek politics, at least for Plato and Aristotle, to have authority is exegetically to imply to hold office. That would bring the honor, satisfaction,<sup>510</sup> and at the same time, the privilege in right to rule over others.

The previous assessment on the lack of legitimacy of the claims to rule can help us to find and to evaluate the empirical aspect of authority rather than the normative one. Though the holding office was the authority and the state itself, the regime needed some stability, since through violence the state’s effectiveness is challenged. This is provided by the concept of teleology and ethics in the ancient political thoughts. Specifically, the teleological politics implies that the authority naturally belongs to the state, and the claim to hold office is limited to a part of a community who are respected as representative of ‘the state’s aims’. For ancient Greek political theorists, this point is important since the ‘state’s aim’ is not the ‘people’s aim’- who were mostly regarded as the mob- , hence ‘the state’s rule’ is not ‘the people’s rule’. Yet, the state, office, and the authority were the same and those who held offices were assumed to have a certain natural ability or virtue that gave them the right to exercise power. Furthermore, this is because of the assumption that the origin of authority is merely the state, not the individuals, or people in the collective sense.<sup>511</sup>

To elaborate on this point, we must do a comparison analysis between the teleological view of the state and the hierarchical power relation. Since, on the one hand, the authority and the state are assumed to be the same perception, and on the other hand, they are assumed to be prior and separated from the people; this builds a hierarchical power relation between those who have the right to hold office and those who have not. Aristotle, arguably, maneuvered from one form of hierarchical power structure to another form, only to the extent that he changed the numbers of offices and office holders.<sup>512</sup> This, critically, indicates the rivalry over the right to hold office, i.e. the right of authority over others.<sup>513</sup> Yet, the very essence of rivalry reveals the contradiction between the specific criterion and the right to authority.

The ethical or virtue politics also implies that the authority naturally belongs to the state and the claim to hold office is limited to a part of a community who are respected as representative of ‘the state’s norms’. But we do not, as the convention dictates, focus on the norms. We turn our focus on the bigger picture, on the rivalry itself. In this sense, we see that it is in fact the office that entitles someone to the right to rule, not the merit nor the wealth,

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<sup>510</sup> Susemihl and Hicks. *The Politics of Aristotle*, (London: Macmillan, 1894), p.51.

<sup>511</sup> Aristotle, *Pol.* 1282<sup>b</sup> 1-8

<sup>512</sup> Susemihl and Hicks. *The Politics of Aristotle*, (London: Macmillan, 1894), p.61.

<sup>513</sup> Aristotle, *Pol.* 1281<sup>a</sup> 10-15

which traditionally took over by the rule of heritage. This form of hierarchical power structure causes the virtues politics to collapse on its own roots since the Aristotelian virtues politics does not recognize equality. Hence, the concept of virtue became an instrument for power which places emphasis on the ‘position’, on the ‘office’, and on the concept of heredity.

In ancient Greek politics, we cannot find any satisfactory answer to the question of: ‘Who should be the rulers?’. Aristotle could never answer this question without considering the Athenian city-state, since if he would have done that, then the whole notion of authority would have changed. Hence, for Aristotle- and Plato- the teleological politics is nothing more than the state’s aims which vary from one regime to another, but does not in any sense refer to the will of people. Moreover, we can see that the right to hold office, i.e. authority, is recognized by the criteria which are previously set forth by the state. For instance, whether the rich should hold the office, or the poor, or the wisest man, or whether each of these groups are the multitude or the few, can be defined under the state’s teleological-natural approach *viz.* the same teleological-natural approach that implies a hierarchical power relation by the state and for the state.<sup>514</sup> If the wealth fulfills the teleological aim of the state, so the state, the power holders, and a long list of those whose power relies on the immunity and imperium of the concept of ‘power over’, it dictates that the richest should have the right to rule and share the most in political power. In contrast, if the virtue fulfills the teleological aim, the virtuous man shares the most in political power.

In *Politics*, book V, Aristotle presumed that the best forms of regimes are monarchy and then aristocracy. These forms of regimes can fit the most criteria that is required to fulfill the state’s aims under the hierarchical power relation. What Aristotle mistook in his entire political works was taking for granted that the power relation should be strictly hierarchical.

However, the relationship between the multitude and the office was the main problem of *Politics*, while assuming that the only power relation is a hierarchical one. As he argued that:

“For a state in which a large number of people are excluded from office and are poor must of necessity be full of enemies.”<sup>515</sup>

In the hierarchical regime, the expression of “excluded from office” is probably closer to the nothingness, the zero. To be excluded from office is to be excluded from all or most important parts of the social and civil rights.<sup>516</sup>

According to the political consciousness, this exclusion at some point causes the frustration which is against the kings, the elites, and the office holders. This is the rivalry which takes place between the people and those who are holding the office, and forms the ‘the problem of authoritarian control’. Should this democratic constraint be based on the rational-normative-principles, then it is the process of politicization in a society.

However, Aristotle represented all the theories that might be contrary to his theory of hierarchical regimes as a vague chaotic movement. Even for him, we can allege to the idea that the process of politicization would be a movement anti the state’s authority. His understanding

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<sup>514</sup> For the discussion of function and state see Salkeve (ed.), *The Cambridge Companion to Ancient Greek Political Thought*, (Cambridge: Cambridge University Press, 2009), p.311-315.

<sup>515</sup> Aristotle, *Politics* book III, 1281<sup>b</sup> 25–30.

<sup>516</sup> Grote, *Aristotle*, (New York: Arno Press, 1973), p.541

of the democracy is quite far from the essence and the function of the modern concept of democracy. In Aristotle's thoughts, democracy cannot comprise a legitimate form of power. He assumed that the people or multitude is the community of freemen but with no merit;<sup>517</sup> they do not have the human dignity and equality in rights. In this sense, it is assumed that multitude misuses political power.<sup>518</sup>

However, the concept of multitude is not dispensable. Even if we look at the authoritarian perspective, we cannot completely ignore people simply since the ignorance of their resistance is not expedient when we consider the effectiveness of political power. To secure the most important offices from the so-called mob was the aim of the ancient philosophers. Yet, Aristotle realized that the absolute exclusion of the multitude does not secure the teleological political power. So, he investigated for a mean way.

Aristotle proposed the theory of 'the mixed regime' in which some parts of society has to some extent a political function. In the mixed regime, some few people - - Greek, male, rich, landlords - have a specific right to share in politics, yet they neither share in the office nor in authority. Indeed, Aristotle was the first theorist of the hybrid regime.

Aristotle used the theory of 'the mixed regime' in order to solve the problem that considers the immunity, stability, and accountability of the hierarchical state.<sup>519</sup> This problem was simply 'the problem of authoritarian control': the contradiction between hierarchical political power which was not distributable among freemen, and the capability of the multitude to rule or to be an enemy. He called his proposal an "escape"<sup>520</sup> from the problem. Even if the mixed regime was a step toward a democratic state, the emphasis of hierarchical power relation that, backed up with Natural Law, secures the concept of despotic power relation and non-distributable political power. Furthermore, it halts the normative justification of such authority.

In Aristotelian politics, the mixed regime is assumed to be an attempt to justify the hierarchical power relations, which at the top was the office; since it gives partial rights to people. Here, the mixed regime is the concept of the hierarchical state with its contradictions. Aristotle, in the theory of mixed regime, tried to share some power with some people in order to continuously obtain immunity for the hierarchical form of state. Yet, the Aristotelian 'right to share in politics' confronts a fundamental critic since the authority of the mixed regime mostly relies on the concept of self-justification.

However, we cannot ignore the positive part of the theory of the mixed regime. To tackle the most problematic issue for the effectiveness and security of the state's political power and its power relationship, Aristotle proposed that the multitude should take a part in politics. Here, we can see that the deliberative and judicial functions are the shares of the multitude in politics.<sup>521</sup> Aristotle made this unprecedented move in the book III part two, when he discusses

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<sup>517</sup> Susemihl and Hicks, *The Politics of Aristotle*, (London: Macmillan, 1894), p.46.

<sup>518</sup> Aristotle, *Pol.* 1281<sup>b</sup> 25-30. For misuse the concept of power and authority by multitude see Arblaster, "Democracy", *Concepts in social thought*. (USA: University of Minnesota Press, 1994.) p.48. On the contrary, for the concept of 'polyarchy' and one form of democracy, see Dahl, *A Preface to Democratic Theory*, (Chicago: The University of Chicago Press, 2006), preface.

<sup>519</sup> W. L. Newman declare that 'We notice that Aristotle does not rest the claim of mix government on the ground that a system of 'check and balance' is necessary.'" See Newman, *The Politics of Aristotle*, (Oxford, 1886), vol.1, p.265

<sup>520</sup> Aristotle, *Pol.* 1281<sup>b</sup> 30

<sup>521</sup> Aristotle, *Pol.* 1281<sup>b</sup> 30-31, 34-35

the potential competence of the multitude for the state's aim and their potential contestation for the authority.

In this phase, the question for Aristotle is a question between a good choice and a right choice. First, Aristotle was aware of the ability of multitude for producing the effective results in political participation. This forced Aristotelian teleological politics to come near to democratic values. He then argued that people - or the freemen - should participate in the "deliberation and judgment." His argument is based on two reasons. First, According to the concept of collectively, people can attribute more than one man to the state's aim.<sup>522</sup> Second, Aristotle was aware of the potential emergence of the political consciousness.

In *Politics*, it seems that the participation and distribution of power are not exactly equal. Moreover, the relationship between deliberative participation and holding office must be assessed more closely to see that, critically, deliberative participation and distribution of power do not share the same ratio of political power. For Aristotle, the distinction between the claim of the few to rule and the claim of multitude to rule was an exoteric dispute over 'the political rights', but at the same time, was an open dispute over 'the teleological concept of state's authority'.<sup>523</sup>

The issue about the multitude to rule is framed with overarching Natural Law, which in the end emphasizes the hierarchical power relation. The participations of people in Aristotelian political thought should not be defined as people entitled to authority *qua* office, but as something related to the social participation. The presented concepts of 'deliberation' and 'judgment' are more similar to participating in a city-council and interconnected to the ancient Athenian government. However, the two conditions in which the multitude should take part-deliberative participation and judgment-, in ancient Greek, would be better understood by reading the extended text.

"There is still a danger in allowing them to share the great offices of state, for their folly will lead them into error, and their dishonesty into crime, but there is a danger also in not letting them share, for a state in which many poor men are excluded from office will necessarily be full of enemy. The only way to escape is to assign to them some deliberative and judicial functions. For this reason, Solon and certain other legislatures give them the power of electing to offices, and of calling the magistrate to account, but they do not allow them to hold office singly." (III, 1281b 25-35)

In this way, 'deliberation and judgment' is considered only in case of Solon.<sup>524</sup> Based on this case, Aristotle tried to show that the deliberative and judicial functions are only related to

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<sup>522</sup> Aristotle, *Pol.* 1281<sup>a</sup> 42–1281<sup>b</sup> 3, 1286<sup>a</sup> 26–30

<sup>523</sup> Mansfield argues that Aristotle and Tocqueville's distinction between the few and many is different. Where the Aristotle's distinction is based on dispute and a choice, Tocqueville's distinction is based on the historical succession. Harvey C. Mansfield, 'Majority Tyranny in Aristotle and Tocqueville'. In *Friends and Citizens*, Ed. Bathory, Schwartz (Maryland: Rowman & Littlefield Publishers, Inc., 2000). P.289.

<sup>524</sup> see also Bakshi, *Politics and Prejudice: Note on Aristotle Political Theory*, (Delhi: University of Delhi, 1975) p.127

the participation in courts and selecting agents to take care of domestic policies.<sup>525</sup> In the council “deliberation” refers to the means by which officials were elected and scrutinized in advance of taking office, and “deliberation judgment” in the courts refers to the means by which their performance was inspected and held accountable.<sup>526</sup>

It is interesting, though, that neither of the deliberative and judicial functions is regarded as the participation in office, i.e. the authority to rule. The difference between holding an office, which is basically ‘the authority and power over others’, and to have relation to the office, which is basically ‘the participation in the politics’ are regarded as two forms of power relations in completely different spheres. In fact, for Aristotle, there is one form of authority to rule that took for granted and that is the hierarchical authority.<sup>527</sup> Here, authority- as manifest as office- hierarchically stands above all classes in a community of equals, and the only connection of office and other parts is the unilateral canal of politics. Thus, the ratio between the claim of multitude to rule and authority is repugnant, whereas, the ratio between the authority and office is equal.

### **6.1 The Problem in the theory of the Multitude’s Claim to Power**

By giving the multitude a right in deliberation and judgment, Aristotle met the problem halfway. What Aristotle proposed might be assumed as a step toward democracy by some neo-Aristotelian today like Michael Sandel who emphasizes “the moral fabric” of the community.<sup>528</sup> Such an approach in fact failed to see the ancient Greek politics beyond the sparkling concept of ethics and justice. But at the same time, Aristotle’s political theory is also recognized as an attempt to justify an authoritarian/totalitarian power structure by some critical thinkers like Karl Popper. The latter approach is the pure analytical method which reveals the betrayal of those who come after Socrates, namely the authoritarian/totalitarian ideology in the ancient and modern political thoughts, in Plato’s works and those who followed him, namely Karl Marx and Friedrich Engels.<sup>529</sup>

The core point of the traditional form of justification as a heritage left by the ancient Greek philosophers is not whether the question of justification adds more to the abundance of those who have authority, but it is whether it gives enough for those who have nothing to support the authority. The Aristotelian ‘escape’ is not a solution at all. In fact, there is no justification for denial of human rights and rejection of the political consciousness. In this way, if Aristotle’s “escape” was a move that has been made toward democracy, it could not provide a sufficient nor a concrete answer to the question of political rights. And if it was a move toward securing

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<sup>525</sup> Such as counting taxes, etc., Cf. Richard Kraut, *Aristotle: Political Philosophy*, (Oxford: Oxford University Press, 2002), p.405

<sup>526</sup> Hansen, *The Athenian Democracy in the Age of Demosthenes: Structure, Principles, and Ideology*, trans. J. A. Crook. Norman, (Oklahoma: University of Oklahoma Press, 1999), pp.159-218.

<sup>527</sup> See also Schumpeter, J. A., *Capitalism, Socialism and Democracy*, (London: George Allen and Unwin, 1996[1943]) p.247

<sup>528</sup> Sandel, *The Case against Perfection: Ethics in the Age of Genetic Engineering*, Cambridge: Harvard University Press, 2007

<sup>529</sup> See Popper, *The Open Society and Its Enemies: The Spell of Plato*. (London: Routledge, 1947).

the authority of state, it could not even provide a theory by which one can obtain immunity for united<sup>530</sup> ideal-hierarchical political power.

Given the failure of Aristotle, we may ask: 'By what means, then, do ongoing power structures themselves influence their own authority and level of effectiveness?'. This question indicates conditions by which hierarchical regimes practice their authorities.<sup>531</sup> Any form of participation of people in politics is a kind of justification for the authority of hierarchical regimes. This is true in the modern hierarchical power structures in which people take part in the social procedures through some form of bureaucracy, in which the definition of freedom is reduced to following what is already dictated by the power holders. In this way, people may enjoy exercising their minimum level of rights in a way that they come to believe that even such rights could not be recognized without this power structure.

People, or the multitude, "indirectly express their" consent by participating in politics.<sup>532</sup> What is really happening, however, is that power always produces the causes that help to justify its authority. To reach the peak in the process of self-justification and a high level of effectiveness thereof, it is required to use the 'deceptive' or 'negative' political-consciousness, which is essentially established on false belief rather than knowledge. In contrary to the political-consciousness, one form of the negative political consciousness is when people believe that they are without rights.<sup>533</sup> We may not forget that one of the important means or instruments for the hierarchical power structures is to influence the beliefs of people, and among the most important of such beliefs are those related to the justification of their own despotic power.<sup>534</sup> In this sense, the negative political consciousness would be one of the most important means for the traditional and modern hierarchical power structures which would pave the road for the authority to practice its hierarchical power relation more effectively and securely, since people or the multitude in the tyrannical regimes assume that the authority naturally belongs to the state.<sup>535</sup>

It is interesting to question whether there is any comprehensive difference between the ancient form of despotic power and the modern one. Indeed, they are not very different in their essences. The reason for this answer is clear when we refer to the theory of political consciousness. Legitimacy relies on the mutual recognition of rights and political power in a regime, whereas illegitimacy, which is the common point of all despotic regimes, lacks in this character.

This is the reason that we can see that the shared political power in any authoritarian/totalitarian regime is undermined and the concept of the political rights of people is something far from reality.

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<sup>530</sup> Aristotle, *Pol.* 1281<sup>b</sup> 10–15

<sup>531</sup> See Beetham, *The Legitimation of Power*, (Palgrave Macmillan, 1991) p.104

<sup>532</sup> See also Coicaud and Curtis. *Legitimacy And Politics: a Contribution to the Study of Political Right and Political Responsibility*. (Cambridge: Cambridge University Press, 2002), p.23.

<sup>533</sup> See above p.13

<sup>534</sup> See also Beetham, *The Legitimation of Power*, (Palgrave Macmillan, 1991) p.104

<sup>535</sup> see p. 17

### **Part Three: Modern Authoritarian and Totalitarian Regime**

## 1. Authoritarian/Totalitarian and Semi Democratic Regime

### 1.1. contemporary authoritarian/totalitarian and semi-democratic regimes: Deficiency of Political Power and Emergence of Political Problems

Leo Tolstoy, one of the great writers, vividly wrote in his Novel, *Anna Karenina*, “Happy families are all alike; each unhappy family is unhappy in its own way.”<sup>536</sup> We can say the same for the authoritarian/totalitarian and semi-democratic – hybrid - regimes. These regimes come in different forms. We can see this point if we only refer to some of them: For seventy years, Mexican leaders came from only one party, the Institutional Revolutionary Party (PRI). Meanwhile, in Argentina, a junta of generals designed elaborate rules about how to share power, only to abandon them after they took office in 1976, governing for the next seven years in quick succession and by crude domination and repression. In North Korea and Saudi Arabia, a patriarchal dynasty has ruled for decades, each dying on the throne after maintaining a personality cult reminiscent of premodern despotism.<sup>537</sup> In short, authoritarian/totalitarian and semi-democratic regimes rely on variety of institutions and personalities, and outcomes: They may have legislatures, parties, and even elections; they exist in some of the poorest but also some of the wealthiest countries around the world; and their leaders and personalities may wear a crown or a military uniform and stay in office for days or decades.

Although far from extinct, authoritarian/totalitarian regimes have been declining both in number and as a proportion of all regimes since the early 1970s.<sup>538</sup>

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<sup>536</sup> Tolstoy, *Anna Karenina*, (New York: New American Library, 1976).

<sup>537</sup> On Mexico, see Krauze, *Biography of Power: A History of Modern Mexico, 1810–1996*, (New York: Harper Collins, 1997). And Magaloni, *Voting for Autocracy: Hegemonic Party Survival and Its Demise in Mexico*, (New York: Cambridge University Press, 2006).; on Argentina, see Rock, *Argentina, 1516–1987: From Spanish Colonization to Alfonsín*. (Berkeley, CA: University of California Press, 1987). And Remmer, *Military Rule in Latin America*, (Boston: Unwin Hyman, 1989); and on North Korea, see Demick, *Nothing to Envy: Ordinary Lives in North Korea*, (New York: Spiegel & Grau, 2009). and Oh and Hassig, *North Korea through the Looking Glass*, (Washington, DC: The Brookings Institution Press, 2000).

<sup>538</sup> Svobik, *The Politics of Authoritarian Rule*, (Cambridge: Cambridge University Press, 2012), p.25.

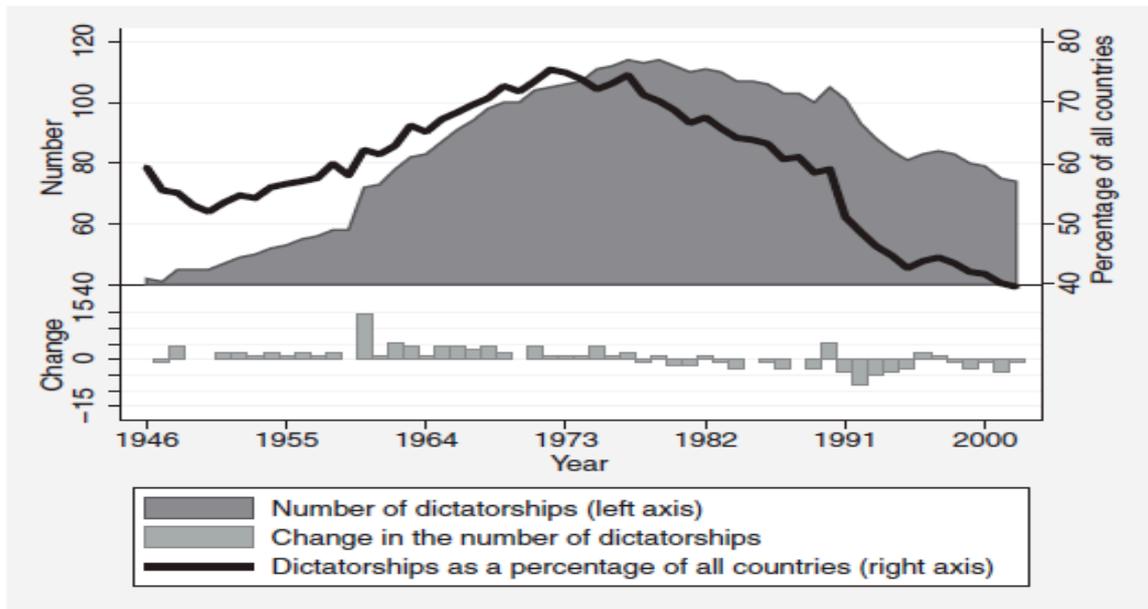


Figure 2. The number and change in the number of dictatorships, 1946–2008.

Transitions to semi- democracy and democracy through the process of politicization have democratic breakdowns during the last three decades.<sup>539</sup> Especially since the end of the Cold War, surviving authoritarian/totalitarian regimes have at least nominally come to resemble a form of democratic criteria in terms of their formal institutions.<sup>540</sup> So, this is the main difference between authoritarian/totalitarian regimes and semi-democratic regimes. The few that defy the trend of politicization and democratization, especially those likes North Korea or Saudi Arabia, appear to be stuck in an atavistic state, anachronistic and at odds with the rest of the world.

Looking at them more closely, we realize that some contemporary authoritarian/totalitarian and semi-democratic regimes claim that they are more democratic as they really are. If we were to trust the declarations of these regimes about their authorities, most of them would be like democracies. More often, contemporary authoritarian/totalitarian and semi-democratic regimes would be an improvement on democracy: - according to their claims - Muammar Qaddafi’s Libyan Jamahiriya was a committee-governed as a “direct democracy,” solving the contradictions inherent in capitalism and communism,<sup>541</sup> Vladimir Putin’s Russia is assumed to be a “sovereign democracy,” ensuring that the country is governed not by Western meddlers but rather by the Russian nation; and even China professes to be “the people’s democratic

<sup>539</sup> See also Merkel, Wolfgang. 2010. “Are Dictatorships Returning? Revisiting the ‘Democratic Rollback’ Hypothesis.” *Contemporary Politics* 16(1): 17–31.; Diamond, “The Democratic Rollback: The Resurgence of the Predatory State.” *Foreign Affairs* 87(2) (2008): 36–48, and Puddington, “Freedom in Retreat: Is the Tide Turning? Findings of Freedom in the World 2008.” (Freedom House Report, 2008) have a more pessimistic view about the future of democracy.

<sup>540</sup> Diamond, “Thinking about Hybrid Regimes.” *Journal of Democracy* 13(2) (2002): 21–35.; Levitsky and Lucan “The Rise of Competitive Authoritarianism.” *Journal of Democracy* 13(2) (2002): 51–65.; Schedler, *Electoral Authoritarianism: The Dynamics of Unfree Competition*. (Boulder, CO: Lynne Rienner Publishers, 2006).

<sup>541</sup> Mattes, “Formal and Informal Authority in Libya since 1969.” In Dirk J. Vandewalle (Ed.), *Libya since 1969: Qadhafi’s Revolution Revisited*, (New York: Palgrave Macmillan, 2008), p.59.

dictatorship.”<sup>542</sup>

It is therefore essential to explicitly state how we recognize an authoritarian/totalitarian regime or semi-democratic regime. In defining these regimes as an independent country, we should recognize their failure in three approaches:

- First, an authoritarian/totalitarian and semi-democratic regime fails to possess all of the concepts of power,<sup>543</sup> hence lack the concept of legitimacy. It exercises power mostly based on the concept of usurpation of power and without regular alteration in power.
- Second, a regime that fails to implement the principle of political consciousness; it fail to satisfy the following four criteria for democracy: on the one hand, it fails to form (i) free and competitive legislative elections and (ii) an executive that is elected either directly in free and competitive (presidential) elections or indirectly by a legislature in parliamentary systems.<sup>544</sup> On the other hand, it fails to have (iii) an alternative form of information and (iv) freedom of expression.<sup>545</sup>
- Third, a regime that fails to be recognized by people as a sovereignty power mostly due to the diminution of its role and its oppressiveness, it fails to form an associational autonomy .<sup>546</sup>

## 1.2. Institutional Heterogeneity

As is apparent in Figure 2, the explanation of authoritarian/totalitarian politics encounters extraordinary scope and diversity. A major source of this diversity is that dictatorship is a residual or negative category defined in the first place by what democracy is not. Defining dictatorship should be simple: “it is obviously the opposite of democracy.”<sup>547</sup> The titles such as *The Social Origins of Dictatorship and Democracy*<sup>548</sup> and *The Economic Origins of Dictatorship and Democracy*<sup>549</sup> would have us conveyed. However, defining dictatorship, e.g. authoritarianism/totalitarianism, as well as democracy is not simple in our modern political world. In fact, authoritarian/totalitarian regimes – as well as democratic regimes - vary widely in their institutional arrangements. In her paper, ‘What Do We Know about Democratization after Twenty Years?’, Barbara Geddes concluded, “different kinds of authoritarianism differ

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<sup>542</sup> On “sovereign democracy,” see Masha Lipman, “Putin’s ‘Sovereign Democracy,’” *The Washington Post*, 15 July 2006.

<sup>543</sup> See part one chapter 1.

<sup>544</sup> Przeworski et al. *Democracy and Development: Political Institutions and Well-Being in the World, 1950–1990*, (New York: Cambridge University Press, 2000), Boix, *Democracy and Redistribution*, (Cambridge: Cambridge University Press, 2003). and Cheibub et al. *Presidentialism, Parliamentarism, and Democracy*, (New York: Cambridge University Press, 2010). On the legislative and executive in authoritarian/totalitarian regimes see Svobik, *The Politics of Authoritarian Rule*, (Cambridge: Cambridge University Press, 2012), Ch.2.

<sup>545</sup> For the process-oriented approach to qualify a regime as democratic see Dahl, *On Democracy*, (New Haven: Yale University Press, 1998), p.85; Dahl, "What Political Institutions Does Large-Scale Democracy Require?" *Political Science Quarterly* 120.2 (2005): 187-97, p.188-89.

<sup>546</sup> Gandhi, *Political Institutions under Dictatorship*, (New York: Cambridge University Press, 2008), p. 7.

<sup>547</sup> Gandhi, *Political Institutions under Dictatorship*, (New York: Cambridge University Press, 2008), p.3.

<sup>548</sup> Moore, *Social Origins of Dictatorship and Democracy*, (Boston, MA: Beacon Press, 1966).

<sup>549</sup> Acemoglu and Robinson, *Economic Origins of Dictatorship and Democracy*, (New York: Cambridge University Press, 2006).

from each other as much as they differ from democracy.”<sup>550</sup>

This investigation, as well as virtually all others on power, first establishes a set of criteria that defines what a democracy is and what authoritarian/totalitarian politics is. The presented criteria in this work is important to understand legitimate power and to consider any regime that fails to satisfy those criteria – regardless of its label and institutional form - to be a despotic power which forms a dictatorship or authoritarian/totalitarian regime.

This practice places essentially no limit on the institutional heterogeneity among authoritarian/totalitarian regimes. Thus, these regimes are in countries whose institutions at least nominally mirror standard democratic institutions – and, as we see in history, some dictatorships in fact do emerge after democratic breakdowns – as well as in countries with a highly idiosyncratic or traditional institutional makeup. Stalin in Russia, Hitler in Germany and Castro in Cuba are the examples of the former; Saudi Arabia, with its *quasi* feudal system of overlapping dynastic and religious authorities, is an example of the latter.<sup>551</sup>

Typologies that attempt to impose order on this heterogeneity have a long pedigree in political science. When restricted to dictatorships, Aristotle distinguished between the government of one and a few, Montesquieu between despotic and monarchical regimes, and Machiavelli between absolute and limited princes – all of which actually parallel the power-sharing equilibria of established and contested autocracy that I develop when I discuss the problem of power-sharing.

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<sup>550</sup> Geddes, “What Do We Know about Democratization after Twenty Years?” *Annual Review of Political Science* 2 (1999): 115–44, p.121.

<sup>551</sup> See P’erez, *Army Politics in Cuba, 1898–1958*, (Pittsburgh, PA: University of Pittsburg Press, 1976) and P’erez, *Cuba: Between Reform and Revolution*. (New York: Oxford University Press, 1995) on Cuba; See Herb, *All in the Family*, (Albany, NY: State University of New York Press, 1999) on Saudi Arabia.

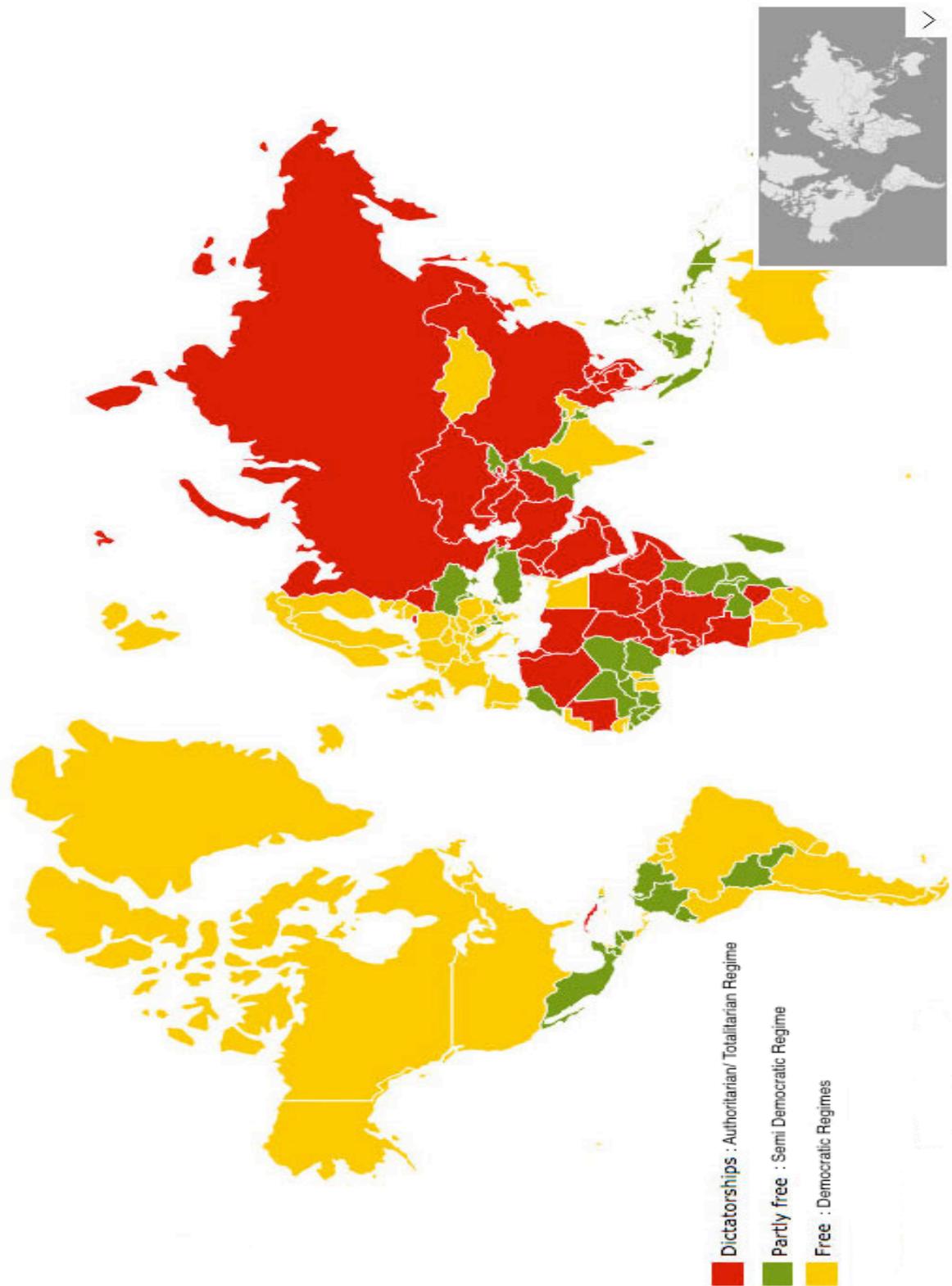


Figure 3. Dictatorship around the world, 2016.

Note: World geography as of 2016; not displaying countries that ceased to exist prior to 2016; countries that were part of another dictatorship prior to 2016 do not inherit that dictatorship's year count. The study presented by Freedom House. Source: <https://planetrulers.com/current-dictators/>.

In contemporary political science, the heterogeneity of authoritarian politics – as well as prevailing global trends – have been matched by a correspondingly diverse and evolving set of typologies. Dictatorships used to be totalitarian,<sup>552</sup> authoritarian,<sup>553</sup> and bureaucratic authoritarian;<sup>554</sup> one-party<sup>555</sup> and military;<sup>556</sup> as well as *sultanistic*,<sup>557</sup> patrimonial,<sup>558</sup> and neopatrimonial<sup>559</sup> - all with further variations and subcategories.<sup>560</sup> The proliferation of elections after the end of the Cold War has since shifted the discipline's attention to competitive,<sup>561</sup> electoral<sup>562</sup> and semi-democratic regimes.<sup>563</sup> Most recently and comprehensively, Geddes distinguishes among personalist, military, and single-party dictatorships;<sup>564</sup> Gandhi among civilian, military, and monarchical dictatorships;<sup>565</sup> and Beatriz Magaloni and Ruth Kricheli among military, monarchic, single-party, and dominant-party authoritarian regimes.<sup>566</sup>

Building on these scholarship, the nature of political organization of dictatorships or the authoritarian/totalitarian regimes can be identifying in different states and in a state with different forms. Considering Syria as an example between 1970 and 2000. It was a military, single-party, it was directly ruled by the military, maintained a single ruling party, had a legislature that was elected within a single party, and had an executive that was elected in single-candidate elections.<sup>567</sup> These aspects of Syrian politics reflect distinct conceptual

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<sup>552</sup> Arendt, *The Origins of Totalitarianism*, (New York: Schocken Books, 1948).; Friedrich and Brzezinski, *Totalitarian Dictatorship and Autocracy*, (Cambridge, MA: Harvard University Press, 1965).

<sup>553</sup> Linz, "Totalitarian and Authoritarian Regimes." In Fred Greenstein and Nelson Polsby (Eds.), *Handbook of Political Science*, Vol. 3. (Reading, MA: Addison Wesley Publishing Company, 1975), pp. 191–357.

<sup>554</sup> O'Donnell, *Modernization and Bureaucratic-Authoritarianism*, (Berkeley: Institute of International Studies, University of California, 1973).

<sup>555</sup> Huntington, "Social and Institutional Dynamics of One-Party Systems." In Samuel P. Huntington and Clement H. Moore (Eds.), *Authoritarian Politics in Modern Society: The Dynamics of Established One-Party Systems*, (New York: Basic Books, 1970), pp. 3–45.

<sup>556</sup> Nordlinger, *Soldiers in Politics: Military Coups and Governments*. (Englewood Cliffs, NJ: Prentice-Hall, 1977).; Perlmutter, *Military and Politics in Modern Times: Professionals, Praetorians and Revolutionary Soldiers*, (New Haven, CT: Yale University Press, 1977).

<sup>557</sup> Linz, and. Chehabi. *Sultanistic Regimes*, (Baltimore, MD: Johns Hopkins University Press, 1998).

<sup>558</sup> Weber, *The Theory of Social and Economic Organization*, (New York: The Free Press, 1964).

<sup>559</sup> Jackson and Rosberg, *Personal Rule in Black Africa: Prince, Autocrat, Prophet, Tyrant*, (Berkeley, CA: University of California Press, 1982).; Snyder, "Explaining Transitions from Neopatrimonial Dictatorships." *Comparative Politics* 24(October, 1992): 379–99.; Bratton and Van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*, (New York: Cambridge University Press, 1997).

<sup>560</sup> See Brooker, *Non-Democratic Regimes: Theory, Government, and Politics*, (New York: St. Martin's Press, 2000), Ch.1 and 2.

<sup>561</sup> Levitsky and Way, "The Rise of Competitive Authoritarianism." *Journal of Democracy* 13(2) (2002): 51–65.; Levitsky and Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War*, (New York: Cambridge University Press, 2010).

<sup>562</sup> Diamond, "Thinking about Hybrid Regimes." *Journal of Democracy* 13(2) (2002): 21–35.; Schedler, *Electoral Authoritarianism: The Dynamics of Unfree Competition*, (Boulder, CO: Lynne Rienner Publishers, 2006).

<sup>563</sup> Ottaway, *Democracy Challenged: The Rise of Semi-Authoritarianism*, (Washington, DC: Carnegie Endowment for International Peace, 2003).

<sup>564</sup> Geddes, "What Do We Know about Democratization after Twenty Years?" *Annual Review of Political Science* 2 (1999): 115–44.

<sup>565</sup> Gandhi, *Political Institutions under Dictatorship*, (New York: Cambridge University Press, 2008).

<sup>566</sup> Magaloni and Kricheli, "Political Order and One-Party Rule." *Annual Review of Political Science* 13 (2010): 123–43.

<sup>567</sup> See Seale, *Asad: The Struggle for the Middle East*, (Berkeley: University of California Press, 1990), p.173.; George, *Syria: Neither Bread nor Freedom*, (New York: Zed Books, 2003), pp.82-99.

dimensions that are not mutually exclusive. Given these typologies we realize that there are some important limitations. A major flaw of most existing typologies is the practice of classifying dictatorships into ideal types or according to several prominent, descriptive features. The wrong approach typically collapses multiple, conceptually distinct dimensions of authoritarian politics onto a single typology. The single typology is the common mistake that we argued in Part one on the concepts of power. The “types” of authoritarian/totalitarian regimes that emerge, in turn, (i) are neither mutually exclusive nor collectively exhaustive and (ii) require difficult classification judgments that weigh incommensurable aspects of authoritarian/totalitarian politics. These consequences compromise the validity and reliability of these typologies, limiting their appropriateness as general purpose typologies of regimes.

### **1.3. The Problem of Authoritarianism/Totalitarianism: Violence and Political Rights**

As we argued, there is always a kind of endeavor which has been done by the state, by power holders, or by the regime, to justify its authority and its sovereignty. In Authoritarian/totalitarian regime and semi-democratic regimes these endeavors are unique and vital. They are unique due to the nature of these regimes and they are vital for them due to challenges they face.

A typical journalistic account of authoritarian/totalitarian politics invokes the image of a spontaneously assembled tanks and soldiers lined up in the central square of a country’s capital; countering the insurgency, as the power holders engages in a desperate attempt to appease or disperse the assembled masses. This image leads us to a question: How do authoritarian governments try to prevent regime instability?

Though this question is at the center of the study of authoritarianism and democratization, our understanding of how regimes solve the problem is not only incomplete but also dramatically change after each political phenomenon took place in the recent years.

In *The Politics of Authoritarian Rule*,<sup>568</sup> Milan W. Svoblik, a contemporary professor at Yale university, address two question:

1. What drives politics in dictatorships?
2. What are the fundamental conflicts in authoritarian/totalitarian regimes and how they resolve these conflicts?

Based on Svoblik’s argument, authoritarian politics takes place in the shadow of the threat of violence, and “dictatorships inherently lack an independent authority that would enforce compliance with institutional procedures for resolving political conflicts.”<sup>569</sup> the authoritarian/totalitarian regimes face two fundamental problems. First, the threats from the masses over which they rule: the problem of authoritarian control. Second, the threat from the elites with whom dictators rule: the problem of authoritarian power-sharing. These two problem are “the problem of authoritarian control.”<sup>570</sup> The first threat is ‘the problem of authoritarian control’, by which they are threatened by the people. These regimes try to control

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<sup>568</sup> Svoblik, *The Politics of Authoritarian Rule*, (Cambridge: Cambridge University Press, 2012).

<sup>569</sup> Svoblik, *The Politics of Authoritarian Rule*, (Cambridge: Cambridge University Press, 2012), p.44.

<sup>570</sup> Svoblik, *The Politics of Authoritarian Rule*, (Cambridge: Cambridge University Press, 2012), p.3.

their share of power against the people. The latter threat is ‘the problem of authoritarian power-sharing’, by which they are threatened by those with whom they share power.<sup>571</sup>

In this sense, from the psychological point of view, there is always a high sense of insecurity throughout the hierarchical power structure rooted in the problem of authoritarian control/power-sharing. This sense of insecurity is the most for the authoritarian power holders when their usurpation against people or their unequal share of power against one another in favor of themselves be challenged. So, how an authoritarian/ totalitarian regimes thrive and partly possess authority?

Unlikely to succeed, theorizing the problem in an ad-hoc manner suggests that they use violence as the most arbiter of conflicts for authoritarian/totalitarian regimes. However, sooner or later, despotic authorities realize that they need stability, some form of sovereignty and political power. On the contrary to the ad-hoc manner of theorizing the problem of power, authoritarian/totalitarian regimes have to give up their principle of violence and force to gain some form of justification in exchange. To address ‘the problem of authoritarian control/power-sharing’, the contemporary and classic literature on totalitarianism - namely Arendt, Karl Friedrich and Zbigniew Brzezinski -<sup>572</sup> examined the instruments with which authoritarian/totalitarian elites dominate the masses, namely manipulation by ideology and secret police. Recently, this investigation is reflected in the works of Jennifer Gandhi<sup>573</sup> and Adam Przeworski<sup>574</sup> in which they argued that the threat of popular opposition compels dictators to share rents and establish certain political institutions (e.g. legislatures) that lend. Moreover, the work of Henry Thomson examines the way that the policy formulation and implementation as well as the nature of the interaction of power holder in a dictatorship “impede mass mobilization and mitigate economic grievances to prevent regime instability.”<sup>575</sup>

With these approaches we can understand why some dictators, like Saddam Hussein in Iraq, Kim Jong-un in North Korea, or the kings of Saudi Arabia, establish personal monarchies and autocracies from scratch and stay in power for decades; why the matter of power elsewhere is reduced to the mostly institutionalized concept, in contemporary China, North Korea, and the United Arab Emirates; or to the military concept, as Uganda was under Idi Amin, and as Egypt was under Mubarak.

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<sup>571</sup> See Aristotle, *Politics*, Book IV; Svobik, *The Politics of Authoritarian Rule*. (Cambridge: Cambridge University Press, 2012), p.2.

<sup>572</sup> Arendt, *The Origins of Totalitarianism*, (New York: Schocken Books, 1948).; Friedrich and Brzezinski, *Totalitarian Dictatorship and Autocracy*, (Cambridge, MA: Harvard University Press, 1965).

<sup>573</sup> Gandhi, *Political Institutions under Dictatorship*, (New York: Cambridge University Press, 2008).

<sup>574</sup> Gandhi and Przeworski, “Cooperation, Cooptation, and Rebellion Under Dictatorships.” *Economics & Politics* 18(1) (2006): pp. 1–26. Gandhi and Przeworski, "Authoritarian Institutions and the Survival of Autocrats". *Comparative Political Studies* 40, (2007): pp.1279-1301.

<sup>575</sup> Thomson, H. "Repression, Redistribution and the Problem of Authoritarian Control: Responses to the 17 June Uprising in Socialist East Germany." *East European Politics & Societies* (2016), p.1.

### 1.3.1. The Problem of Authoritarian Control

It was Machiavelli who offered an elaborated picture that how an authority can rely on the concept of ‘power over.’ Since then, political thinkers have offered varied theories about whether it is better to be loved than feared. Machiavelli favored the latter, namely fear and control over the people, because “a wise prince should establish himself on that which is in his own control and not in that of others.”<sup>576</sup>

In fact, Machiavelli present the problem in the simplest way. Many authoritarian/totalitarian regimes do not have much freedom when deciding how much to rely on the concept of ‘power over’ or on the military to rule over people. Their nature of authority causes that they inevitably face challenges. In regimes that face mass, organized, and potentially violent opposition, the legal apparatus and military are the instruments capable of defeating such threats. When the authority of authoritarian/totalitarian regimes is in jeopardy, political dependence on non-democratic instruments, such as governmental organizations and military may be insurmountable.

For example, in March 2011, the Arab Spring<sup>577</sup> came to Syria. Protests against Bashar al-Asad’s regime broke out in the southern city of Dera’a on March 18 and, by the end of the month, mass protests erupted across the entire country. This is when Bashar al-Asad found himself facing the one of the two fundamental problems of authoritarian rule: the problem of authoritarian control. By late April of 2011, the government was stepping up arrests, imprisoning activists, and firing live rounds on demonstrators across the country and increase utilizing this instruments ever since.<sup>578</sup> In the last days of 2016, the Syrian Army – with the help of Russian Air Craft – ruined the city of Aleppo and most parts of the country. Consciously, in the first days of 2018 Assads’ army used the chemical weapon against his own country men and women. These are the example of the excessive reliance of the regimes on the concept of ‘power over’ *qua* domination in different forms.

Furthermore, some authoritarian/totalitarian regimes - and their personalities and rulers - simply inherit the politically entrenched and oppressive economics and militaries when they come to power. These regimes, in turn, must concede to the rich or to the army greater resources, institutional autonomy, and influence over policy. The personalities become who have the most influence. For Example, this is why the Egyptian military presides over a complex of commercial enterprises,<sup>579</sup> why the Honduran military won complete autonomy over its budget and leadership positions after it brought President Ram’ on Villeda Morales to power in 1954,<sup>580</sup> and why, in 1973, the Uruguayan military had its political influence institutionalized in a National Security Council that assisted several docile presidents in “carrying out national objectives.”<sup>581</sup>

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<sup>576</sup> Chap. XVII, “Concerning Cruelty And Clemency, And Whether It Is Better To Be Loved Than Feared” in Machiavelli, *The Prince*, (Oxford: Oxford University Publication, 2005 [1513]).

<sup>577</sup> The series of protests and demonstrations across the Middle East and North Africa that commenced in 2010.

<sup>578</sup> See “Hard Choices for the Government,” *The Economist*, 22 January 2011; “E.U. Bans Syrian Oil as Protests Continue,” *The New York Times*, 3 September 2011; “A Cycle of Violence May Take Hold,” *The Economist*, 9 April 2011; and “More Stick Than Carrot,” *The Economist*, 12 May 2011.

<sup>579</sup> Cook, *Ruling but Not Governing*, (Baltimore, MD: Johns Hopkins University Press, 2007), p.19.

<sup>580</sup> Bowman, *Militarization, Democracy, and Development: The Perils of Praetorianism in Latin America*, (University Park: Pennsylvania State University Press, 2002), Ch.5.

<sup>581</sup> Rouqui’e, *The Military and the State in Latin America*, (Berkeley: University of California Press, 1987), p.251.

Investigating on such path, more recently, in *The Political Economy of Dictatorship*,<sup>582</sup> Ronald Wintrobe explicitly contrasted domination *qua* repression and power-sharing *qua* co-optation.<sup>583</sup> He treated these two as substitutes. Furthermore, he attributed the variation in their use across authoritarian/totalitarian regimes to the preferences of individual personalities: dictators. Others have addressed repression and cooptation in isolation. The classic literature on - bureaucratic - authoritarianism/totalitarianism in Latin America focuses primarily on repression, as does more recent research.<sup>584</sup> Meanwhile, in the literature on elections, legislatures, and parties in authoritarian/totalitarian and semi-democratic regimes, the key mechanism is almost exclusively co-optation.<sup>585</sup>

At first glance, repression, ‘power over’ and domination is the prevailing concept in authoritarian/totalitarian regimes. However, authoritarianism/totalitarianism is various. This introduces a new perspective to study power in these regimes: the difference between domination and co-optation. This difference may seem to be one between negative and positive incentives for compliance with the regime’s inducement or threat – or “sticks and carrots”<sup>586</sup> in popular parlance. However, when we examine the two in isolation or treat them as substitutes, we may overlook that differences in their use have far-reaching consequences for the political organization and vulnerabilities of these regimes. Here, the importance of the theory of political consciousness is clear.

Heavy reliance on repression, force, or ‘domination’ - namely by the military, police, or law - is a double-edged sword. It entails two fundamental moral hazard: (i) the cruel and brutality of personalities to use force and to abuse their domination voids any moral significance to ‘right’ to power, namely power over other people. Moreover, it contradicts to any notion of political power;<sup>587</sup> (ii) the very resources that enable a regime’s repressive agents to suppress its opposition also empower it to act against the regime itself. Hence an authority

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<sup>582</sup> Wintrobe, *The Political Economy of Dictatorship*, (Cambridge: Cambridge University Press, 1998).

<sup>583</sup> See Nye, *Soft Power: The Means To Success In World Politics*, (New York: Publication Affair, 2004), pp.7-8.

<sup>584</sup> On totalitarianism, see Friedrich and Brzezinski, *Totalitarian Dictatorship and Autocracy*, (Cambridge, MA: Harvard University Press, 1965) and Arendt, *The Origins of Totalitarianism*, (New York: Schocken Books, 1948); on bureaucratic authoritarianism, see O’Donnell, *Modernization and Bureaucratic-Authoritarianism*, (Berkeley: Institute of International Studies, University of California, 1973) and Stepan, *The Military in Politics: Changing Patterns in Brazil*. (Princeton, NJ: Princeton University Press, 1974). Stepan, *Rethinking Military Politics: Brazil and the Southern Cone*, (Princeton, NJ: Princeton University Press, 1988); for more recent research on repression, see Davenport, “State Repression and the Tyrannical Peace.” *Journal of Peace Research* 44(4) (2007): 485–504., Gregory, *Terror by Quota: State Security from Lenin to Stalin*, (New Haven, CT: Yale University Press, 2009), Lorentzen, “Regularizing Rioting: Permitting Public Protest in an Authoritarian Regime.” (Working Paper, 2009). and Robertson, *The Politics of Protest in Hybrid Regimes: Managing Dissent in Post-communist Russia*, (New York: Cambridge University Press, 2011).

<sup>585</sup> On elections, see Lust-Okar and Amaney “Rulers and Rules: Reassessing the Influence of Regime Type on Electoral Law Formation.” *Comparative Political Studies* 35(3) (2002): 337–67. On legislatures, see Gandhi and Przeworski, “Cooperation, Cooptation, and Rebellion Under Dictatorships.” *Economics & Politics* 18(1) (2006): 1–26., Gandhi, *Political Institutions under Dictatorship*, (New York: Cambridge University Press, 2008) and Malesky, “Gerrymandering Vietnam Style: Escaping the Partial Reform Equilibrium in a Non-Democratic Regime.” *Journal of Politics* 71(1) (2009): 132– 59.; on parties, see Magaloni, *Voting for Autocracy: Hegemonic Party Survival and Its Demise in Mexico*. (New York: Cambridge University Press, 2006) and Magaloni, “Credible Power-Sharing and the Longevity of Authoritarian Rule.” *Comparative Political Studies* 41(4/5) (2008): 715–41.

<sup>586</sup> Nye, *Soft Power: The Means To Success In World Politics*, (New York: Publication Affair, 2004), p.5.

<sup>587</sup> For the notion of political power See this work in 3.4.

remains powerless, although it utilizes force and repression. Furthermore, once the separate personalities from a regime who identifying a group or a party, namely the religious leaders or military generals or financial investors, become indispensable for a regime's survival, they acquire political leverage that they can exploit. Religious leaders frequently done so in the Medieval Age when popes and Caliphs claimed to power. Most of the times, those kings who crowned by popes and Caliphs overthrew by their institutionalized church and mosque later. The popes and Caliphs were assumed indispensable, they used this political leverage and most of the time overthrew the regimes and stablished their own theocracies. Even in modern Middle Eastern politics, from time to time, we are experiencing an uprising a religious ruler or a religious group in political arena. Moreover, military generals also frequently do so by demanding privileges, perks, and policy concessions that go beyond what is necessary for suppressing the regime's opposition – they claim a seat at the table when the spoils of their complicity are divided. As Machiavelli warns in *The Prince*, those emperors who come to power by “corrupting the soldiers” become hostages of “him who granted them the state.”<sup>588</sup> This is why the former Tunisian President Zine El Abidine Ben Ali kept his military small and underequipped; why the Iraqi Baath regime disposed of its uniformed accomplices immediately after it came to power in 1968; and why Mao Zedong insisted that the Party must always command the gun.

On the contrary to Machiavelli's thought, in fact, no dictatorship can do away with mere domination. The lack of political consciousness – inherent in any political regime where a few despotically govern over the many – is the ground for their loos of authority and lost it to other claimants of power. These claimants were not only the people outside of the regime but also the other elites and personalities who claim to more power than they actually exercised: by “regime insiders”.<sup>589</sup>

### 1.3.2. The Problem of Authoritarian Power-Sharing

The view of authoritarian/totalitarian politics as primarily one of a struggle between the elites in power and the masses excluded from power is severely incomplete. If ‘the problem of authoritarian control’ were indeed the paramount political conflict in authoritarian/totalitarian regimes, then we would expect dictators to fall after a defeat in a confrontation with the people –the masses -, as Ceausescu did in 1989, or we would expect that any popular uprising ended in a democracy, as German Revolution of 1918–19. Simply stated, conventional wisdom dictates that ‘successful’ popular uprising is the only reason when things go wrong for authoritarian/totalitarian regimes and their personalities and rulers.

Comprehensive data and the recent studies<sup>590</sup> on authoritarian/totalitarian regimes and on

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<sup>588</sup> Chap. VII, “Concerning New Principalities Which Are Acquired Either by the Arms of Others or by Good Fortune,” in Machiavelli, *The Prince*, (Oxford: Oxford University Publication, 2005 [1513]).

<sup>589</sup> Svulik, *The Politics of Authoritarian Rule*. (Cambridge: Cambridge University Press, 2012), p.4.

<sup>590</sup> Svulik, *The Politics of Authoritarian Rule*. (Cambridge: Cambridge University Press, 2012)., Ramseyer and Rosenbluth, *The Politics of Oligarchy: Institutional Choice in Imperial Japan*, (New York: Cambridge University Press, 1995)., Geddes, “What Do We Know about Democratization after Twenty Years?” *Annual Review of Political Science* 2 (1999): 115–44.; Magaloni, “Credible Power-Sharing and the Longevity of Authoritarian Rule.” *Comparative Political Studies* 41(4/5) (2008): 715–41. Myerson, “The Autocrat's Credibility Problem and Foundations of the Constitutional State.” *American Political Science Review* 102(1) (2008): 125–39.

leadership changes in these regime contradict this conventional understanding. For example, Svobik presents an investigation on these regimes includes all 316 authoritarian/totalitarian personalities and leaders – dictators - who held office for at least one day between 1946 and 2008 and lost power by nonconstitutional means. Figure 4 summarizes this various nonconstitutional ways by which these despotic rulers or dictators lose office.<sup>591</sup> Among the 303 leaders for whom the manner by which they lost power could be ascertained unambiguously, only thirty-two were removed by a popular uprising and another thirty stepped down under public pressure to democratize – this accounts for only about one-fifth of nonconstitutional exits from office. Twenty more leaders were assassinated and sixteen were removed by foreign intervention.

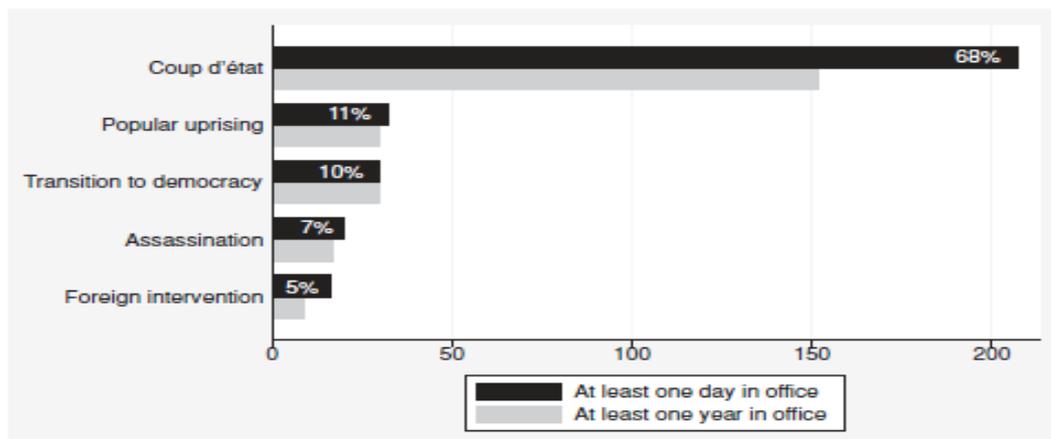


Figure 4. Nonconstitutional exits from office of authoritarian leaders, 1946–2008.

Note: Percentages refers to a category’s share of all nonconstitutional exits. Exits of interim leaders are not included. Unambiguous determination of exit was not possible for thirteen leaders. Source: Svobik, *The Politics of Authoritarian Rule*. (Cambridge: Cambridge University Press, 2012), p.5.

Yet as Figure 4 indicates, the remaining 205 dictators – more than a half – were removed by regime insiders: individuals from the dictator’s inner circle, the government, or the repressive apparatus. Given the data provided by Svobik,<sup>592</sup> this type of leader exit from office named as *coup d’etat*.<sup>593</sup> This is how Leonid Brezhnev replaced Nikita Khrushchev in 1964, how a group of military officers ousted the Ghanaian President Kwame Nkrumah in 1966, and how the deposed Tunisian President Zine El Abidine Ben Ali got rid of his predecessor in 1987. Moreover, whether in the line of democratization or not, coup and reform alongside of revolution have been significant phenomena in the history of the Middle East since the beginning of the nineteenth century. Especially in the non-Arab countries with a long history of statehood, e.g. Iran and Turkey. “Coups have been carried out by peaceful as well as violent

<sup>591</sup>In this study, he included any type of exit from office that did not follow a natural death or a constitutionally mandated process, such as an election, a vote by a ruling body, or a hereditary succession.

<sup>592</sup> Svobik, *The Politics of Authoritarian Rule*. (Cambridge: Cambridge University Press, 2012), Ch.3.

<sup>593</sup> Here, the term *coup d’etat* refers to a forced removal of an authoritarian leader by any regime insider, not necessarily the military. (The latter is often implied in popular usage of the term.) For a discussion of the various terms associated with a coup like removal of governments, see Luttwak, *Coup D’etat: A Practical Handbook*. (New York: Knopf, 1968).

means, and by civilian as well as military elements”<sup>594</sup> for a number of causes and under various conditions and regimes of rule which it would be useful to analyze and compare. This element is interesting for power transition. This is the case of *coup d'etat* of May, 1960 against Menderes regimes in Turkey and *coup d'etat* of 1921 in Iran.<sup>595</sup> Indeed, there are short-lived authoritarian/totalitarian regimes which may have been vulnerable because of their inexperience in office or a weaker hold on power or lack of admiration and belief of the people. Thus as far as authoritarian leadership dynamics are concerned, a majority of personalities and rulers of authoritarian/totalitarian regimes lose power to those inside the gates of the palace rather than to the masses outside. The predominant political conflict in dictatorships appears to be not between the ruling elite and the masses but rather one among regime insiders. This is the second of the two problems of authoritarian rule that I identify: the problem of authoritarian power-sharing.

As far as this problem is concern, we might ask whether we can apply our theory of political consciousness – or at least a sense of it – in this form of transition of power which caused by the problem of authoritarian power-sharing.

### **1.3.3. The Problem of Authoritarian/Totalitarian Regime and the Theory of Political Consciousness**

The evidence I just reviewed suggests that to understand the politics of authoritarian/totalitarian regimes, we must examine why and how the problem of authoritarian/totalitarian regimes undermines their ability to govern and thrive. Possession of political power is the greatest concern of any regime. In the regimes that such power assumed to be in the hands of one man or one party, not only the concern to ‘acquire’ such power escalates but also this acquirement is the threat to the justification of power because those who do not possess such power want to gain it. The source of this rivalry for power can be either people or regime insiders. In fact, even Machiavelli admitted to the rivalries of power within a system and tried to show a solution. In *Prince*, he wrote that All principalities are governed in two different ways. The first are governed “by a prince with all others as his servants” who merely assist him in governing and, if they are obeyed, it is “because they are his ministers and officials”; the second are governed “by a prince and by barons” who have their “own dominions” and “are recognized by their subjects.” In the Kingdom of the Turk, which is an example of the former according to Machiavelli, all ministers are “his slaves and bound to him.” However, the King of France, who is an example of the latter, cannot take away the privileges of the barons “without endangering himself.”<sup>596</sup>

This rivalry shows us two important points. (i) The tension in a political spectrum in an authoritarian/totalitarian regime, whether it is between the despotic ruler and the regime insiders or between the state and the people, is an evidence of the claimants to civil and political

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<sup>594</sup> George, "Revolutions and Coups d'Etat in the Middle East: A Comparative Study", *Die Welt des Islams*, 10 (1/2) (1965): pp. 17-32, p.17.

<sup>595</sup> George, "Revolutions and Coups d'Etat in the Middle East: A Comparative Study", *Die Welt des Islams*, 10 (1/2) (1965): pp. 17-32, p.20.

<sup>596</sup> Machiavelli, *The Prince*, (Oxford: Oxford University Publication, 2005 [1513]), pp.16-17.

rights. (ii) The authoritarian/totalitarian regimes try to show that they are democratic or they try to make coalition.

To these ends, the awareness of people about their civil and political rights or the claim of the regime insider for more power are the evidence of politicization in a power spectrum. While the former pose a 'credible' threat to the authoritarian/totalitarian regime: the problem of authoritarian power-control, the latter pose a 'credible' threat to the despotic ruler or a dictator: the problem of authoritarian/totalitarian power-sharing.

(i) To counter the problem of authoritarian/totalitarian power-sharing, authoritarian/totalitarian regimes and despotic rulers try to share some power with the regime insiders. This form a 'ruling coalition': It is a set of individuals who support a dictator – a despotic ruler - and, jointly with him, hold enough power to guarantee a regime's survival. This terminology is inspired by its semantic counterpart in Soviet politics: Stalin's inner circle came to be known as the "select group," the "close circle," or – most commonly – the "ruling group."<sup>597</sup> Hafez al-Asad assembled a coalition of old comrades-in-arms, business elites, and Baath Party officials<sup>598</sup> So we might ask where this balance of claimant to power occurs?

One of the key obstacle to successful power-sharing is any dictator's desire and opportunity to acquire more power at the expense of his allies. However, as allies for a despotic ruler means an institution of collective leadership and instrument of his personal rule, for allies or regime insiders sharing duties is sharing power.

(ii) To counter the problem of authoritarian/totalitarian power-control, these regimes and despotic rulers try to justify their power. This form a 'justification' method: it is a set of instrument that through admiration, belief and legal system guarantee a regime's survival. As we argue in 3.1., the justification method often produces a negative political consciousness.

The process of politicization among people and regime insiders balanced by the dictator's attempt to accumulate power at the expenses of repression on both people and regime insiders. For instance, Joseph Stalin reached to the pinnacle of Soviet authority.<sup>599</sup> His authority grimly perished many lives in the government-directed terror, punitive famines, and deportations during Stalin's rule.<sup>600</sup> By the end of the 1920s, Stalin had eliminated rival factions; by the end of the 1930s, the Great Purges decimated any independent, collective power of the Communist Party, the Red Army, and Soviet officialdom.<sup>601</sup>

We see that how the rivalries of power work and how the balance between 'power' and 'right' might result in the equilibrium of power a political disaster is the asymmetric relation between them. Either the people or the ruling coalition of the regimes insider, who are the claimant of power, threaten the dictators and authoritarian/totalitarian rulers. The commonwealth and common interest of people conflict with the nature and aim of the authoritarian/totalitarian

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<sup>597</sup> Gorlizki and Khlevniuk, *Cold Peace: Stalin and the Soviet Ruling Circle, 1945–1953*, (Oxford: Oxford University Press, 2004), p.47.

<sup>598</sup> Perthes, *Syria under Bashar al-Asad: Modernisation and the Limits of Change*, (London: Routledge, 2006).

<sup>599</sup> Suny, *The Soviet Experiment: Russia, the USSR, and the Successor States*, (New York: Oxford University Press, 1998), p.167.

<sup>600</sup> Snyder, *Bloodlands: Europe between Hitler and Stalin*, (New York: Basic Books, 2010).

<sup>601</sup> Suny, *The Soviet Experiment: Russia, the USSR, and the Successor States*, (New York: Oxford University Press, 1998), Ch.11.; See also Svobik, *The Politics of Authoritarian Rule*. (Cambridge: Cambridge University Press, 2012).

regimes. More importantly, even the joint desire of the dictator and the ruling coalition to share power is complicated by a fundamental conflict of interest between them: Members of the ruling coalition worry that the dictator could use his position at the helm of the regime to acquire more power and later eliminate them from the ruling coalition.<sup>602</sup> Consider, as an further instance, the fate of Abdel al-Hakim Amir, who was a key member of the Free Officers Movement that brought Gamal Abdel Nasser to power in Egypt in 1952. Amir held key political posts in the Egyptian government, including the Supreme Control Committee that oversaw the Egyptian public sector and the Committee to Liquidate Feudalism that presided over agrarian reforms, culminating in his appointment as head of the Egyptian military. Nasser used Egypt's defeat in the Six-Day War of 1967 as a pretext for removing Amir from office and arrested Amir shortly thereafter for allegedly plotting to overthrow him. Amir eventually committed suicide under unclear circumstances.<sup>603</sup>

Under dictatorship, the effective deterrent against the opportunism of the rulers of the authoritarian/totalitarian regime is either the ruling coalition's threat to replace the dictator or the people to change the regime: the problem of authoritarian totalitarian power control/sharing. The key point that members of the ruling coalition inside a regime or people is to discourage the dictator from usurping power is to establish the credibility of that threat which emerged with the process of politicization.

This logic implies that the interaction between a dictator and regime insiders and the interaction between regime and people generally takes only two politically distinct forms. Under the first, which I call 'contested power-sharing', the process of politicization causes a balance between power of a dictator and the allies – the allies are capable of using the threat of a coup to check the dictator's opportunism, albeit imperfectly. Furthermore, under the second, which I call 'contested power-control', though the established authoritarian/totalitarian regimes have acquired so much power by any mean and alliance, the threat of the process of politicization causes that they try anything – e.g. education, propaganda, legal system, and policies, to present themselves as justified – and some time as democratic – as possible that they can reduce the threat by people.<sup>604</sup> The people are capable of using the threat of a rebellion to check the dictator's and the regime's opportunism. The process of politicization in the authoritarian/totalitarian regime caused the 'contested power control/sharing' helps the regime and society move toward the equilibrium of power in the power spectrum. If this process not interrupted by emergence of another authoritarian/totalitarian regime or ruler, it can someday reach the political consciousness.

Here, we ask whether there is any absolute formula for the justification of authoritarian/totalitarian regimes? In fact, there is not. Many established dictators, autocrats and despotic rulers have acquired so much power that they assumed that they can no longer be credibly threatened by their allies or by threat – they assumed that they have effectively monopolized power. In fact, many accounts by classical philosophers and historians identify

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<sup>602</sup> The dictator's potential opportunism is the central obstacle to successful authoritarian power-sharing. See Svobik, *The Politics of Authoritarian Rule*. (Cambridge: Cambridge University Press, 2012).

<sup>603</sup> Waterbury, *The Egypt of Nasser and Sadat: The Political Economy of Two Regimes*, (Princeton, NJ: Princeton University Press, 1983), pp. 98, 279, 336–8.

<sup>604</sup> Shokri, "Rhetoric Tradition and Democracy: Isocrates' Role in Ancient Greek Political Idea. Start Point of Western Political Philosophy." *Studia Humana* 4.3 (2015).

precisely this analytical distinction: as we argued, Machiavelli distinguishes between the King of France, who cannot take away the privileges of his barons “without endangering himself,” and the Turk, whose ministers are his “slaves.”

Meanwhile, historians of the Soviet Union distinguish between the pre-Purges and the post-Purges Stalin that achieved “limitless power over the fate of every Soviet official”; and historians of China distinguish between the pre-1958 Mao, who “listened to interests within the system,” and the “later Mao,” who simply overrode them.<sup>605</sup> Hence the backward process from ‘contested power control/sharing’ to established autocracy represents the degeneration of authoritarian/totalitarian power-control/sharing into personal autocracy.

However, the assumption of established autocrats, despotic ruler and dictators does not help them to stay in office for a long time. “The comprehensive data on authoritarian leadership transitions reveal that a typical dictator does not stay in office for much longer than an American president.”<sup>606</sup> In sum, this is a fact that dictators and autocrats lose power in a confrontation either with regime insiders or the people, who excluded from power. The origin of this conflict is the formation of an authority in which there is not an equilibrium between the concept of power and the concept of right.<sup>607</sup>

### **Concluding Remarks for this chapter**

Let me draw this stage of the inquiry into conclusion and pose a final question to be answered. We argued that the process of politicization - the process of being aware of the rights in both side of power spectrum which end in political consciousness - is more fundamental than the mere fact of authority, that is, of rule over people. This process can lead us to the concept of political consciousness. Thus, above all is the concept of political consciousness, which elaborates clearly the concepts of legitimacy and justification of an authority. The political consciousness works against the concept of usurpation or any other concept that offers a seductive persuasion of justification. Since the political consciousness is the mutual recognition of right by those who govern and those are governed in a society, it promotes an equilibrium level of ‘power’ and ‘right’ between the three dimensions or the concepts of power: the concept of ‘power over’ (domination), the concept of ‘power to’ (political rights), and the concept of ‘power of’ (empowerment). According to such equilibrium, the moral significance of rights can be manifested by the concept of ‘power of’. The political consciousness is vital to form a definition of legitimate political power. It is in this sense that we can argue that the legitimacy of political power can never be gained by relying on a mere concept of power ‘over’- of a person, a state, or an organization-, as it is assumed to be, and consequently, there is no possibility for it to obtain its immunity in reality.

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<sup>605</sup> Machiavelli, *The Prince*, (Oxford: Oxford University Publication, 2005 [1513]). Khlevniuk, *Master of the House: Stalin and His Inner Circle*. (New Haven, CT: Yale University Press), p.247. Teiwes, “Normal Politics with Chinese Characteristics.” *The China Journal* 45(2001): pp.69–82.

<sup>606</sup> Svobik, *The Politics of Authoritarian Rule*. (Cambridge: Cambridge University Press, 2012), p.44.

<sup>607</sup> Svobik, *The Politics of Authoritarian Rule*. (Cambridge: Cambridge University Press, 2012).

If power is the old stone building that stands for centuries, justification and legitimacy are not the painting on the building, which is applied after the building is completed, and leaves the building essentially unchanged. They are more like the cement that permeates the concrete and makes the building what it is. Legitimate political power is a core element necessary for a power structure or a power relation to not only thrive in long-run but also to be effective. Such power structure/relation consists of the oath of allegiance to these three concepts of power, and is the one in which the essentially integrated concepts of power is appreciated.

Here, we may ask: 'How does reading the theories of political power, especially the concept of political power and political rights, improve our understanding of the modern regimes and modern democracies?'

Most importantly, it has been shown that political consciousness is an inevitable characteristic of any progressive regimes. This progress politicizes people, shapes power relations, and characterizes political power in a way that the concepts of power throughout the political spectrum is equal. In this sense, I have argued that not only the genesis but also human social evolution has involved a dialectical increase in our powers 'to' and 'over'. Though power emerged from the one-dimensional concept of domination, namely 'power over', it is combined with other concepts, namely the concept of 'power to' and 'power of'. This combination is a particularly successful 'strategy' for maximizing this dialectic form a legitimate power relation, which is influenced by the positive political consciousness.

We are observing that the same progress is true in International Relations (IR). It is the same process of politicization that develops the capacity of the state to reach a harmonized political consciousness in which the interactions between the international organizations result in a higher level of democratic and hegemonic consensus, the strengthened in the rule of law, and the appreciation of universal values. Moreover, in both domestic and international relations, political consciousness is a proactive element, which is backed up with the rational-normative principles and the moral significance of rights. In other words, it shapes the identity of political power as well as assessing its justification and its legitimacy.

Even the early architectures of political theories have esoterically addressed this issue. Though the identity of power cannot be detached from the historical process in which the interaction of state and its subjects took place,<sup>608</sup> and, which has since the Enlightenment era dominated the modern political discourse, we will argue that power evolved in a more pragmatic attitude in modern days. This brings us to the following point.

Less than one decade ago, democracy became a favorite alter for everyone. But we have to know that beyond the exclusive categorization in political science, democracy is one of the characters of a political system where as a political system is a combination of different forms and different quantitative or qualitative characters. We need to know that the possibility of mixed elements in modern regimes is more plausible rather than any traditional or one-dimensional regimes with a single concept of power. For it is naïve to believe that the process of politicization completely cease to work in an authoritarian/totalitarian regime.<sup>609</sup> This leads us to find a foundation to grow the democratic values within the system of hierarchical power

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<sup>608</sup> see Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.163.

<sup>609</sup> Sternberger, *Grund und Abgrund der Macht: Über Legitimität von Regierungen*, (Frankfurt am Main: Insel Verlag, 1986), p.28.

relations. Any authoritarian/totalitarian rulers need to utilize some instrument of power to justify its power through solicit the cooperation of outsiders or deter the threat of people.

Furthermore, whatever the power structure of a despotic authority dictates, we may conclude that similar action would have been taken also if the political structure had been democratic. What hierarchical and patriarchal political systems have in common with democracy is that they all, to some extent, are based upon justified political power. This justification arises from the underlying values of these regimes which must have some resonance in the state and society in question in order to remain politically stable. In our modern day, we see that nondemocratic rulers govern with democratic institutions, such as legislatures and political parties. In this sense, the democratic guise of political institutions in authoritarian/totalitarian regime promote the authoritarian norms. This point can be seen in almost every Middle Eastern and African regime. The mere concept of democracy is in fact diverged from the legitimate concept of a regime. Whereas the latter is the inevitable integrated concept of the political power, the first, on its own, is just a structure or a way of practicing such power. In this sense, the concepts of democracy and the legal order are not inherently included in the concept of legitimacy.

In contrast, this means that it would also be naïve to believe that the hierarchical power relations should or would completely cease to work in presumably democratic power structures. Although we cheerfully hold our position with Arendt that once said: “*Power* corresponds to the human ability not just to act but to act in concrete,”<sup>610</sup> we notice that the concept of democratic regime and the concept of collectivity of power became more exigent over the course of political rights. In fact, Arendt did not offer further analysis to show what the legitimacy is. So, we have asked: ‘what determines such act in the hand of an authority?’. This may further be related to the following questions: how do the democratic criteria outweigh others? and what makes a democratic state a legitimate democratic state? These questions led us to see how the democratic values, along with the rational-normative principles increasingly cause the power relations and power structures to act rationally and morally. In other words, the form of system and the ‘group’, as well as the form through which a power structure can be changed, is only partially relevant to its procedures and its outcome. The whole argument of such can be addressed with the assessment of the concept of ‘political consciousness’. Its existence implies that all concepts of power are working dialectically together to shape a hegemonic, rational political power. On the contrary, lack of political consciousness causes various forms of usurpation of power, as well as illegitimate power relations. This leads us to the next point, which is a real price of this discussion.

What is more important is that the justification and legitimacy of power are the normative characters upon which every system hinges its immunity, authority, and effectiveness. What I called legitimacy, (in part 1 of this work), is based on the rational-normative justification of political power and the appreciation of the moral significance of rights in the process of politicization which form the political consciousness in a power relation. Moreover, what I have called legitimate democracy is meant to be the abolition of all forms of political absolutism and all form of political privilege which can lead to despotic authority, dictatorship

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<sup>610</sup> Arendt, “Communicative Power.” in *Power*, edited by Steven Lukes, (New York: New York University Press, 1986), p.64.

and despotism; it is the equilibrium of the concepts of power. It is also a setup for some sort of government that can merge the notion of political duty and political right and can raise the possibility to indicate a 'state' as a unified identity of leaders and followers, thus, should be adorned with the process of politicization, as democracy is the 'mean' *per se*. In practice, we see that in (i) a free and competitive legislative elections and (ii) an executive that is elected either directly in free and competitive (presidential) elections or indirectly by a legislature in parliamentary systems.<sup>611</sup> Hence, we should not forget that our habits, which is too naturalized for us to fully perceive, keeps us in our places.<sup>612</sup>

It is true that the rational-normative principles and the moral significance of rights, and as the consequence, political consciousness is necessary and inevitable for the legitimacy of political power. In other words, while power is the inseparable feature of institutionalized intended wills, its approach is related to the subject positions.<sup>613</sup> Seeing the power as an essentially integrated concepts means that the three concepts of power- 'power over', 'power to' and 'power of'-, are inseparable. However, the authoritarian and totalitarian power holders are entirely rejecting these formulations.

Building upon the idea that the essentially integrated concepts of power form a legitimate constitutive power, we may say that the legitimate democracy appears to be an accountable, trustworthy, and effective power structure in which all concepts of power equally appear in every aspect of social interaction and practice. Thus, echoing this structure of power, as we talk about legitimate democratic power relation, we are implicitly referring to three inevitable elements. The first one is the rational-normative principles to define what legitimacy is, the second, the political consciousness of the governed and the governors to act what is implied by rational-normative principles, and the third, the moral significances of rights within the concept of empowerment to establish a legitimate democratic exercise of power.

However, we may not forget to reinforce an attitude of suspicion towards power that we are most comfortable with. Therefore, as we have argued, it is likely that an authoritarian/totalitarian regime might wish to act according to the will of people, at least, appear to do so, and partially recognize the democratic values, since in this way the regime gains some sort of justification. In most of them, we see some sort of political institutions that try to reach this aim. These political institutions are the product of strategic behavior on the part of political actors.<sup>614</sup> The justification of the regime somewhat helps for obtaining immunity for its authority and neutralizing any threats to their rule. Furthermore, it must solicit the cooperation of regime insiders and the people to insure that individuals do not have incentives to damage the authority.<sup>615</sup>

As David Hume observed, "all absolute governments must very much depend on the

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<sup>611</sup> Przeworski et al. *Democracy and Development: Political Institutions and Well-Being in the World, 1950–1990*, (New York: Cambridge University Press, 2000), Boix, *Democracy and Redistribution*, (Cambridge: Cambridge University Press, 2003). and Cheibub et al. *Presidentialism, Parliamentarism, and Democracy*, (New York: Cambridge University Press, 2010). On the legislative and executive in authoritarian/totalitarian regimes see Svobik, *The Politics of Authoritarian Rule*, (Cambridge: Cambridge University Press, 2012), Ch.2.

<sup>612</sup> Bourdieu, *The logic of practice*, (Cambridge: Polity Press, 1990)

<sup>613</sup> Haugaard and Ryan, (ed.) *Political Power: The Development of The Field*, (Opladen: Barbara Budrich Publishers, 2012), p.49.

<sup>614</sup> Gandhi, *Political Institutions under Dictatorship*, (New York: Cambridge University Press, 2008), p.180.

<sup>615</sup> Gandhi, *Political Institutions under Dictatorship*, (New York: Cambridge University Press, 2008), p.181.

administration, and this is one of the great inconveniences of that form of government.”<sup>616</sup> However, the justification through the political institution cannot be enough for the regime effectiveness. The authoritarian/totalitarian rulers who relied on their political institutions have always failed. For instance, Joseph Stalin’s strategic blunders during World War II, especially his obdurate refusal to believe that the Soviet Union had been attacked by Germany in the summer of 1941;<sup>617</sup> Saddam Hussein’s successive rejections of diplomatic attempts to resolve the crisis preceding the Gulf War of 1990–1991;<sup>618</sup> and Mao’s attempt to lift rural China out of backwardness by shifting from agriculture to backyard iron foundries during the Great Leap Forward.<sup>619</sup> Under established autocracy, no one dares to point out that the emperor has no clothes. In this sense, to the extent that authoritarian/totalitarian political institutions help incumbents address problems of governance, they would appear to make democratic transitions even less likely.

In fact, the mere justification is proved not enough to reach the aims of justification (immunity and corporation) in a long-run. Even established autocrats, authoritarian/totalitarian regimes are not entirely free of constraints on their authority. The authoritarian/totalitarian rulers are challenged with opposition and the lack of cooperation: the problem of authoritarian/totalitarian power-control/sharing. Consequently, we can see the process of transition of power. Regimes turned from absolute monarchies to constitutional monarchies (such as England), or lost their powers to another form of power structure (such as the Iran monarchy before 1979 which turned to theocracy). However, above all, there is one point that applies to all hierarchical power relations: what is unavoidable for the authoritarian/totalitarian and semi-democratic regimes is the constant erosion of their authority in the process of politicization and the emergence of the political consciousness.

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<sup>616</sup> Hume, “Of the First Principles of Government.” In *Essays, Moral and Political*, (London: Cadell, 1748).

<sup>617</sup> Bialer, (Ed.), *Stalin and His Generals: Soviet Military Memoirs of World War II*, (New York: Pegasus, 1969).

<sup>618</sup> Atkinson, *Crusade: The Untold Story of the Persian Gulf War*, (Boston, MA: Houghton Mifflin, 1993).

<sup>619</sup> Dikötter, *Mao’s Great Famine: The History of China’s Most Devastating Catastrophe, 1958–1962*, (New York: Walker & Co., 2010).

## **Chapter Two: Instruments of Power**

## **Part Four: Polygon of Political Power: Beauty and Force**

“I believe in the flesh and the appetites,  
Seeing, hearing, feeling, are miracles, and each part and tag of me is a  
miracle.  
Divine am I inside and out, and I make holy whatever I touch or am  
touch’d from,  
The scent of these arm-pits aroma finer than prayer,  
This head more than churches, bibles, and all the creeds.  
If I worship one thing more than another it shall be the spread of my  
own body, or any part of it,  
Translucent mould of me it shall be you!  
Shaded ledges and rests it shall be you!  
Firm masculine colter it shall be you!  
Whatever goes to the tilth of me it shall be you!  
You my rich blood! your milky stream pale strippings of my life!”  
- Walt Whitman, *Leaves of Grass*, 1860.

## 1. Introduction to the Concepts of Miranda and Credential of Political Power

It might be surprising to learn that the Medieval Muslim political theorists based their schools of thought on those of the ancient Greek philosophers. After all, there have been fundamental differences in the historical development of these two civilizations, in their political experience, in their cultures, beliefs, and in their educations. Among, a reason for such divergence between them can be attributed to their resources. However, similarities also grew, beginning in the era called “the translation movement”, when the West and East became acquainted with each other’s academic, philosophical works. In the medieval period, around the middle of seventh century, some of the ancient Greek works were first translated into Arabic and introduced to the Medieval Middle Eastern world.<sup>620</sup> So, a short assessment of the historical development of this relationship will help better understand the transitions in the concepts of political power and right and its instruments. It will also help better understand the concept of states, government, and the political discourses in the Middle Eastern regimes today.

### 1.1. Historical Background: The Rebirth of the Concept of Political Power and the Greek Legacy

The academic relationship between the East and the West started in the ancient world.<sup>621</sup> The contact between the historian and physicians, and philosophers in the ancient Greek city-states and the Persian empires can be traced back to the early years of the *Akhaemenid* (or *Achaemenid*) Empire.<sup>622</sup> Ctesias (ca. 415-398 B.C.), for instance, was a famous Greek physician and historian who worked for the royal family of the *Akhaemenid Empire*.<sup>623</sup> Such an academic exchanges in both works and scholars were the practice of those old days.

However, such a relationship has not been salvaged through a history overloaded with the wars and conflicts. The successful invasion of the Persian Empire by Alexander III (356-323 B.C.) of Macedon, around 331 B.C., allowed Greeks to travel to the East securely, but not the other way around. The aim of Alexander was not to assert positive influence on the culture or education of the lands occupied by him. In fact, although he was acquainted with Aristotle, he was not interested in the philosophical dialectic as Aristotle did to introduce the ancient Greek culture and philosophy to the Persians. His knowledge of politics and philosophy did not have significant consequence on his private life. William Tarn, a renowned English philosopher and historian, wrote that “the primary reason why Alexander invaded Persia was, no doubt, that he never thought of not doing it; it was his inheritance from Philip II of Macedon, the father of Alexander.”<sup>624</sup> Nonetheless, his worldly greed may be the other reason for his invasion. He did not free Greek cities from the control of Satraps for the sake of the human rights and dignity,

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<sup>620</sup> Kenny, *A New History of Western Philosophy, Medieval Philosophy*, vol.II, (Oxford, Oxford University Press, 2005),p.33-34

<sup>621</sup> Montgomery and Kumar, *A History of Science in World Cultures: Voices of Knowledge*, (New York: Routledge, 2016), p.122.

<sup>622</sup> Montgomery and Kumar, *A History of Science in World Cultures: Voices of Knowledge*, (New York: Routledge, 2016), p.122. Farabi, *Aphorisms of the Statesman(Fusul al-Madani)*, Trans. and Introd. by D.M. Dunlop, (Cambridge: Cambridge University Press, 1961), p.2.

<sup>623</sup> Burn, *Persia and the Greeks*. Duckworth. London. 1984.

<sup>624</sup> Brunt, *The Aims of Alexander, Greece & Rome*, Vol. 12, No. 2, (Oct., 1965):205-215, p.205.

as the Persians emperors already respected the rights and dignity of individuals with their good and just governance over their lands. The first “bill of rights” in the history of civilization was, in fact, introduced in Persia, *viz.* This bill was the decrees Cyrus made, known as the Cyrus Cylinder, in the city of Babylon in 538 B.C.<sup>625</sup> In fact, Alexander “freed” Greek cities from the control of Satraps so that they wouldn’t pay taxes to the Persian Empire but to him. He, however, did not stop at that point. This greed pushed him to try to occupy as much land as possible so that he could collect more taxes. Just like some states in our time, for Alexander, the trade of blood and war was a lucrative business.

In the eyes of non-Greeks/Macedonians, he was a foe. As a foe, he was Alexander “the Not so Great” who brought nothing but nationalistic and fascistic pride merely in the expenses of nonsense brutal military massacres. In this sense, much was done for “political independence and unity” throughout the Persian Empire in the hope that they could return to the *status quo*.<sup>626</sup> Besides that, the reason for resistance of Persians against the Greeks was their strong religious belief to Zoroaster and their admiration for the place and dedication to the rule of the Persian Kings, who they believed was bestowed by God. These two reasons did not leave a room for Persians to adopt foreigners’ –Greeks- way of thinking, as they appeared to be their foes. Thus, ancient Persians had no inclination to abandon their own principles of thought for that of the Greeks. Moreover, the invaders shared nothing with the inhabitants of the Persian Empire; the Greek culture, history, religion, language, and even their food were different from the Persians. Thus, we must ask, what was the political consequence of such a clash of civilization for the justification of power?

In those days, the concept of justified power was based on the admiration of people for the role of the king, and the belief that he would preserve their nation’s security, interests and identity based on the tradition and religion. Nevertheless, the concept of statehood was renowned in the political discourse of Persian Empire whereas to the Greeks only the concept of city-state was comprehensible. So, though the nature of the ancient Greek political thoughts were philosophical, or better to say, metaphysical. These thoughts had not enough practical substance for expansion in the days of admiration of power. Ancient Greek traditional thought and way of life was full of patriotism and nationalism, but with tribal, racial and religious ideologies which let no space for outside influence.

Persia’s second invasion by the Muslims changed their situation once again. The transition to different concepts of power occurred again as a consequence of the long war, and with the constant and destructive invasion of Arab culture into Persia through a long course of time.<sup>627</sup> With the growth of this new notion of power, under the apparatus of leviathanic divine law, Persian’s perspectives on personal life, social life, their relationships to each other, the notion of war and peace, and the notions of friend and enemy became vague. Confusion over the

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<sup>625</sup> The Cyrus Cylinder (in Persian: استوانه کوروش) or Cyrus Charter is an ancient clay cylinder, now broken several fragments, on which is written a declaration in Akkadian cuneiform script in the name of Persia's Achaemenid king Cyrus the Great. See also Finkel, *The Cyrus Cylinder: The King of Persia's Proclamation from Ancient Babylon*, (London: I. B. Taurus, 2013).

<sup>626</sup> Gat and Yakobson, *Nations: The Long History and Deep Roots of Political Ethnicity and Nationalism*, (Cambridge: Cambridge University Press, 2013), pp.115-116.

<sup>627</sup> See Hawting, *Muslims, Mongols, and Crusaders*. (London: Routledge, 2004).

definition of these concepts remained from the dark ages ever since. Medieval Persians encountered different and mostly contradiction debates from Greeks philosophers and Muslims. Over this period, there was a transition of focus from phrontistery of Alexandria to the phrontistery of Antioch and then to Baghdad.<sup>628</sup>

Particularly since the seventh-century, in the new *Caliphs* era, contentions between social groups, classes, races and ideologies of the West, Persians and Arabs turned into a wide range of beliefs. Scholars, philosophers, and political theorists paid attention to the various social-political discussions and their relationship to religion, philosophy, and politics. This process was the formation of new form of power *qua* power over.

Farabi, one of the most important Persian medieval political theorists, saw the challenges of such a situation.<sup>629</sup> He, as well as other theorists of his time, studied the mainstream ancient Greek works of Plato and Aristotle. He was concerned with how to implement what he had learned in philosophy to answer the socio-political problems of his time. One of the necessities for anybody who was familiar with the magic of ancient Greek ethical-political inquiry in Farabi's time, was to propose a solution or justification for the prevailing concept of Islamic power structure.<sup>630</sup>

Farabi, as a political philosopher, saw an obligation to take part in the fight between the prevailing ideologies of his time, which was started between Manichaeism.<sup>631</sup> His theory had similar or common points with the theories of pre-Socratic philosophers as well as Islamic groups such as *Mu'tazilah*.<sup>632</sup> This rivalry between religion, based on devotion and imitation, and philosophy, based on the critical thinking, continued long after the era of "the translation movement".

Though translated works introduced the impressive and provocative ancient Greek philosophers' thoughts- especially of Plato and Aristotles'- to the Islamic world,<sup>633</sup> it also added more problems to the convoluted situation. For instance, Islamic scholars interpreted Plato's works and added Islamic essence to it.<sup>634</sup> But why did they focus on Plato, in particular? Were the commentaries on Plato's *Republic* delivered sporadically?<sup>635</sup> Was Plato collectively selected by Islamic scholars from the Greek works?

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<sup>628</sup> See also Copleston, *A History of Philosophy*, vol.2 Mediaeval Philosophy, (London: Search Press, 1966), p.186-188.

<sup>629</sup> See Butterworth's introduction in Mahdi, *Alfarabi and the Foundation of Islamic Political Philosophy*, (Chicago: University of Chicago Press, 2001), p.xvii.; Ibid, p.1.

<sup>630</sup> Ibn Abī Usaibi'ah, *Uyūn Al-anbā fī Tabaqāt al-atibbā*, Vol.II, Beirut: Maktabat al-Hayat, 1965, pp.135-140. See also Schmitt, *The Concept of the Political*, (Chicago: The University of Chicago Press, 2007), p.65.; Meier, *Leo Strauss And the Theologico-Political Problem*, (New York: Cambridge University Press, 2006).

<sup>631</sup> Gorder, *Christianity in Persia and the Status of non-Muslims in Iran*. (Lanham: Lexington Books, 2010), p.27.

<sup>632</sup> Al-Andalusī, *Tabaqat al-'Umam*, Beirut, 1913, p 49. See also Šā'id al-Andalusī, *Tabaqat al-'Umam*, translated and edited by Sema'an I. Salem and Alok Kumar, University of Texas Press, 1996.

<sup>633</sup> Arberry, "Some Plato in an Arabic Epitome", *Islamic Quarterly*, II (1955), p.86-99.

<sup>634</sup> Nasr and Leaman, *History Of Islamic Philosophy*, (London: Routledge, 1996), p.190.; See also Burnett, "Humanism and Orientalism in the Translations from Arabic into Latin in the Middle Ages", in *Wissen über Grenzen. Arabisches und lateinisches Mittelalter*, (Berlin: deGruyter, 2006), 22-31, p.22-24.

<sup>635</sup> See also Sigrid Hunke, *Allah's Sonne über dem Abendland*, (Frankfurt: Fischer-Taschenbuch-Verlag, 2001), p.187.

It is believed that Muslims neglected other works of Plato as well as most important parts of Aristotle's *Politics* – for instance, book III- because they could relate the concept of “Islamic state” better to the idea of hierarchical power structure which is sturdily presented in Plato's *Republic*. However, although theological elements would squarely fit the arguments in Plato's *Republic*, the arguments lack the Islamic elements. For instance, it can be seen that there is not any place for the concept of revelation in *Republic*.<sup>636</sup> Instead, in this work, Plato referred to a historical process. To understand why Plato's *Republic* was a famous and effective work in the realm of Islamic politics, we must look back to the age before the translation movement.

As the Alexandrian commentators had more concern for Neo-Platonism, it becomes clear that it was not that the ancient Greeks directly placed their works in the hands of Muslim philosophers, but it was the historical process of thinking began by the Alexandrian scholars, which planted the seed of the thought in a ground later became fertile.<sup>637</sup> The ideological rivalry that manifested in politics and society between power - *qua* power over - and rights in that time took place on the battlefield of philosophy.<sup>638</sup> Among all issues in philosophy, the relationship between intellect and revelation were at the center of debates among Christian scholars, long before that of Muslims.

Farabi did not go with the flow. He tried to introduce a new concept to address the theoretical problem in the Hierarchical-Islamic power structure. The problem, which is unpacked in the piece of research at hand, was how to justify the concept of hierarchical power structure with the existence of a religiously appointed, virtuous and powerful ruler. In other words, for Farabi, the problem of the state's power was not reduced to its usurpation, instead, as had always been implied by the political theorists, he wanted to address the constant challenge that power faces: justification and legitimacy of power. This was more tangible in his time, when power was facing new challenge with the presence of the Islam, and political Islam-, which introduced new criteria for claiming power. In this sense, Farabi tried to apply the elements of ancient Greek political theories to his own, and specifically, he took as much as he could from the ethical and political ideas of Plato.<sup>639</sup>

As the first step, Farabi used the hierarchical structure of *Republic*, which shaped the existence of philosopher-king and formed his theory of the different regimes and state. Yet, he could not escape from the obligation to justify the hierarchical power structure under the control of prophet law-makers, whom lacked challenge the existence of such a hierarchical structure, although it is presumed that religious power structure is an ideal one.<sup>640</sup> Farabi borrowed almost the same ideas that Plato's *Republic* presents on the structure of the state and the structure of power that the philosopher-king monopolizes.<sup>641</sup> According to both thinkers,

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<sup>636</sup> See also Mahdi, *Alfarabi and the Foundation of Islamic Political Philosophy*, (Chicago: University of Chicago Press, 2001), p.1.

<sup>637</sup> See Escobar, *Die Textgeschichte der aristotelischen Schrift Peri Enypnion: ein Beitrag zur Überlieferungsgeschichte der Parva Naturalia*, (Berlin: Free University of Berlin, 1990), p.26.

<sup>638</sup> See also Nasr and Leaman, *History Of Islamic Philosophy*, (London: Routledge, 1996), p.190-192.

<sup>639</sup> Shokri, "Strauss's Farabi." *Studia Humana* 2:2 (2013), p. 37.

<sup>640</sup> See Copleston, *A History of Philosophy*, vol.2 Mediaeval Philosophy, (London: Search Press, 1966), p.190.

<sup>641</sup> Shokri, "Strauss's Farabi," *Studia Humana* 2:2 (2013), p.37.

the glaring and the highest office is for the ruler and his mighty appearance of power secures the hierarchical order and can be apprehended from the natural structure. This approach assumes different levels of the universe and imitates this to shape restrictive and naturally separated classes in society.<sup>642</sup> Thus, Plato's theory of hierarchical power structures were the most appropriate model for Farabi's ideal state,<sup>643</sup> as a good student and follower, Farabi refuted the notion of democratic power relationships, if he did not ignore it, as he regarded the place of the Islamic God as the highest metaphysical authority and the prophet law-maker as the highest political authority.<sup>644</sup>

Although the foundation of his theory established and matched with the potentiality of a society to give birth to this power structure, the usurpation of power could not be prevented based on such a foundation. To address such challenge, he combined the foundation that he borrowed from Plato's *Republic* with what Aristotle presented in his ethical theories and *Politics*.

Indeed, it was a new method of thinking about the social-political situation of his time.<sup>645</sup> In Farabi's work, the source of power changed as did the name of ruler. "King" was replaced by "*prophet*". The place of the ruler and his dominant character as a religious man allowed political theorists of the time to move further away from the traditional concept of justification and legitimacy of power. The greatest challenge was the concept of admiration, which existed in all power relations before the concept of religion appeared. As the second step, Farabi put virtue at the center of his doctrine. However, he was left with the obligation to define virtue- as once Plato and Aristotle did- and to utilize it to justify the concept of supreme ruler.

Such critiques lead us to a new query: did Farabi refute democratic deliberation within the Islamic definition of the hierarchical system?<sup>646</sup> Democratic deliberation is a contentious question in any theocratic power structure state -*Religiöse Herrschaft*-, where the place of God and the religious man, are higher than any others.<sup>647</sup> If the answer to such an important question is positive (which is presumed here), the main question then, is why Farabi believed that the hierarchical power structure and concept of virtue, which he took from ancient Greece, found in religiously anointed rulers? Furthermore, why is this not only vital for the ideal state, but also justification for it? The task here is not to interpret or explain the political theory of Farabi, but to unpack the process through which political power gave birth to a new instrument for its justification.

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<sup>642</sup> See Farabi, *On the Perfect State*, (Oxford: Clarendon Press, 1985), p.57-143; ch.1 to 8; ch.15, p.233.

<sup>643</sup> See Nasr and Leaman, *History Of Islamic Philosophy*, (London: Routledge, 1996), p.190.; Shokri, "Strauss's Farabi." *Studia Humana* 2:2 (2013).

<sup>644</sup> Farabi, *Political Regime*, p.77-80.; See also Hammond, *The Philosophy of Alfarabi, and Its Influence on Medieval Thought*, (New York: The Hobson Book Press, 1947), p.50.

<sup>645</sup> Copleston, *A History of Philosophy*, vol.2 Mediaeval Philosophy, (London: Search Press, 1966), p.189. It is obvious that the ancient political theories were not the only important factors of Farabi's political thought. He also tried to analyze, interpret the political situation of his time under the Islamic states and introduce his own concept of Ideal state. See also Campagna, *Alfarabi: Denken Zwischen Orient und Okzident*, (Germany: Parodos Verlag, 2010), p.174.; Mahdi, *Alfarabi and the Foundation of Islamic Political Philosophy*, (Chicago: University of Chicago Press, 2001), p.31.

<sup>646</sup> See also Sadiki, *The Search for Arab Democracy: Discourses and Counter-Discourses*, (New York: Columbia University Press, 2004), p.209.; Hammond, *The Philosophy of Alfarabi, and Its Influence on Medieval Thought*, (New York: The Hobson Book Press, 1947), p.52.

<sup>647</sup> Farabi, 'On the Perfect State', Ch.15, in Walzer, *Al-farabi on the Perfect State*, p.233.

## 1.2. Authority and the Illegitimate Justification of Power

The Medieval translation movement was not the fundamental reason for a strong connection between the ancient Greek theory of the state and the Islamic Medieval one. The translation movement cannot explain the continuity of such theory in most today's Middle Eastern regimes, for example. We should investigate that the connection in modern authoritarian/ totalitarian power structures, such as Islamism and communism, to the political works of Plato and Aristotle.

The preliminary reasons such as the lack of resources and the events of the translation movement are no longer relevant. One reason is probably the fact that Plato's *Republic* was not the only resource accessible for the medieval thinkers. In fact, there is a common point for the thrive of the ancient Greek political works in the medieval Islamic world and the modern authoritarian/totalitarian world. As the reason is common, we must also ask, for what reason do authoritarian/totalitarian power structures still faithfully and relentlessly rely on, and refer to ancient Greek political thought and religious political theories of the medieval era, despite the uncommon social historical normative backgrounds and ideologies?

To analyze this inquiry, it might be best to initially discern the instruments that authority uses to justify power. By doing so, we can find the foundation that both ancient and modern authoritarian/totalitarian regimes rely on.

Ancient Greek theorists -Aristotle in *Politics*, and especially Plato in the *Republic*- tried to justify the hierarchical state as natural, and hence the best form among all power structures. The contentious point is that such hierarchical structures are propped against an authoritarian wall of a ruler/office in which civil and political rights of people, as well as the rights to power, fade away under the teleological-naturalness-holism theory of the state.<sup>648</sup>

Yet, neither "persuasion [n]or compulsion to unite all citizens",<sup>649</sup> nor the use of violence to shape a political community and to dictate and control the public's actions can permanently guarantee the preservation of a political structure and the power itself. More importantly, these factors cannot fully justify the authority of such power.

To justify political power, some modern<sup>650</sup> and ancient<sup>651</sup> theorists have relied on the concept of virtue, and justified authority on naturally-determined virtues. Although the definition of virtue is various, in the virtue politics the virtuous man must be admired. So the virtues man assumed as the ruler and the command of the ruler is assumed to be -normatively-sufficient to ratify any law.<sup>652</sup> Yet, they conflate the concept of virtue with the principle of natural rights, and thus, a vast engine of popular confusion can drop down without force. In this sense, it is easy to see that these theorists realized that no political power can be established in a community unless it is followed and supported by explicit or implicit admiration or belief

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<sup>648</sup> See also Nasr and Leaman, *History Of Islamic Philosophy*, (London: Routledge, 1996), p.191.; Filmer, as the same as Farabi, defend the naturalness of the universe and combined it with the religious idea to conclude that "God governed always by Monarchy". See Filmer, *Patriarchia: or the Natural Power of Kings*, (London, printed for R. Chiswel, W. Hensman, M. Gilliflower, and G. Wells, 1980), Ch.2: 9.

<sup>649</sup> Plato, *Republic* 519<sup>e</sup>

<sup>650</sup> Alexander Macintyre, Carl Schmitt, Leo Strauss,

<sup>651</sup> Here we concentrate on Plato, Aristotle and Farabi

<sup>652</sup> Avakov, *Plato's Dreams Realized: Surveillance and Citizen Rights from KGB to FBI*, (New York: Algora Publishing, 2006), p.150.

by the members of the state in a power structure. In this context, even a despotic authority and their position can be justified,<sup>653</sup> as there is direct or indirect consent of the individuals under this political power.

It is naïve to think that the concept of civil and political rights were absolutely obscure concepts for our ancient genius theorists. Sure enough, ancient political theorists also thought about power “from the bottom”, and over a wider scope than to say that the only way of politics was to admire one’s rulers and the highest offices in the power structure.

To deny the idea of reciprocal recognition of rights is to deny any definition of political authority and political power. Thus, the endeavors of theorists were not only centered around the question of “what is power?”, but also the question of, “how power can thrive?”. To do so, they had to answer the question of “how can power utilize its instruments to be justified or to be legitimate?”.

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<sup>653</sup> See also Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), pp.109-135

## 2. Instruments of Power: Miranda and Credenda

To ensure its own preservation or immunity, power adorns itself with impressive and particular characteristics in order to be trusted, admired and believed. The nature of power is beyond the concept of domination and coercion. Even in most dictatorship, power has always been accompanied by admiration and belief, “the credenda and miranda”.

Force and violence alone are not strong enough to preserve power, let alone to protect it from actions of discontent, instigated by its violations. This fact, more or less, is known by all types of political regimes. Yet, authoritarian/ totalitarian regimes have confounded the capacity to use power *qua* domination along with the capacity to justify it. They use coercion by means of violence, ignoring the simple but vital principle that “violence appears where power is in jeopardy.”<sup>654</sup>

To cover this hindrance *viz.* namely, their illegitimacy or “usurpation”, authoritarian/ totalitarian powers try to justify themselves based on emotions, embedded in feeling and desire, and using tribal, cultural, religious and national values. Power spurs folks not only by fear of preservation, but also by admiration and belief.<sup>655</sup> This has been the main cause and an arguably effective instrument of the –partial- maintenance of authoritarian/ totalitarian power structures.<sup>656</sup>

### 2.1. Negative Political Consciousness: The Miranda and the Ancient Justification of Political Power

To succor the idea of authoritarian/ totalitarian power, Aristotle and Plato tried to justify how folks that neither have the interest nor find agreement in politics should appreciate the claims of a philosopher-king to power? Is there anything for these folks in this structure of power relations to make them appreciate the authority of the authoritarian/ totalitarian regimes?

The position of power today shows different forms and figures that call on specific feeling of citizens. This phenomenon is one aspect of political consciousness theory. However, in the beginning of history of states, powers were gods and the sons of the gods. A primitive process of politicization changed power of gods and the sons of gods from an unknown and metaphysical authority to a perceptible worldly concept of authority. This was a turning point from an insecurity to a respect to the concept of creation and protection. Power emanated in the face of fathers,<sup>657</sup> mothers and uncles. Patriarchal and matriarchal position were the source

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<sup>654</sup> Arendt, “Communicative Power.” in *Power*, edited by Steven Lukes, (New York: New York University Press, 1986), p.71.

<sup>655</sup> Corbett, *Ideologies*, (London: Hutchinson, 1965), p.57; Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.109.

<sup>656</sup> see Sternberger, *Grund und Abgrund der Macht: Über Legitimität von Regierungen*, (Frankfurt am Main: Insel Verlag, 1986), p.23.

<sup>657</sup> Filmer, *Patriarchia: or the Natural Power of Kings*, (London, printed for R. Chiswel, W. Hensman, M. Gilliflower, and G. Wells, 1980), ch.1:8.

of justification of power in different personalities and offices.<sup>658</sup> Traditionally, the most common reason for obedience to such powers was no reason at all.<sup>659</sup> Powerful were grumpy, but not brutal or terrifying. Jove associates love and power,<sup>660</sup> exemplified by rulers adorned with garlands, smiles and jovialness. No other power relation has developed such moving imaginary for the human race as the one in which people enamored the patriarchal and matriarchal positions as god-like authorities. The main achievement of the ancient authority was to convey people of their power of creation.

Fatherhood was associated with kingship with infinite variety, as they both wrought notions of beauty and force, they held high authority. Common blood and family were the justification for an authority from which the essence of beauty emerged. Power is led by the gods, father or mother: the creator. “Some think that nature having established paternal authority, the most natural government was that of a single person.”<sup>661</sup> Authority seemed to be justified under the force of kinship and the beauty of fatherhood. This combination of force and beauty then created hereditary-king-patrimonial in which history became origin of a series of admiration or miranda in politics of states.<sup>662</sup> Since then, the miranda have been vital instrument to the justification of authoritarian/ totalitarian power.<sup>663</sup>

However, fathers and kings are mortal, and one after the other they drag their miranda of power into their tombs. This presented a challenge for brothers after the death of their father, and that of cousins-german after the decease of brothers. The challenge was “who should rule?”. Thus, the claimants to power confined by the idea of “share authority” between themselves; so the concept of power over people necessarily was the union of several families.<sup>664</sup> With the emergence of the notion of “royal family”, the paternal form of authority still stood on its but shaky establishment, although it lacked any notion of legitimate authority. People admired the concepts of “royal family” and “statehood” by which they carried the arbitrary characters of blood and breeding as the main and the only determining factors for the possession and utilization of power.<sup>665</sup> In the later ages, also we see that the justification of one’s “blue blood” and for the elections which were only led by royal families twisted with each other. More importantly, an unending admiration for the maintenance of power was established, which “agrees with the humor and disposition of the people in whose favor it is established”.<sup>666</sup> The concepts of heredity of authority and the miranda of power show an odd

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<sup>658</sup> See Filmer, *Patriarchia: or the Natural Power of Kings*, (London, printed for R. Chiswel, W. Hensman, M. Gilliflower, and G. Wells, 1980), ch.1: 1.

<sup>659</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.120

<sup>660</sup> See also Godwin, *The pantheon, or, Ancient history of the gods of Greece and Rome*, (London: Thomas Hodgkins, 1806),p.197.; Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.109.

<sup>661</sup> Montesquieu, *The spirit of laws*, trans. by Thomas Nugent, (Kitchener: Batoche Books, 2001, first pub. 1748), p.22.

<sup>662</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.114

<sup>663</sup> See Matossian, *Shattered dreams of revolution: from liberty to violence in the late Ottoman Empire*, (Stanford: Stanford University Press, 2014), p.40.

<sup>664</sup> See Hindley, *The Royal Families of Europe*, (New York: Carroll & Graf, 2000).

<sup>665</sup> See also Sternberger, *Grund und Abgrund der Macht: Über Legitimität von Regierungen*, (Frankfurt am Main: Insel Verlag, 1986), p.28.; Where Aristotle began *Politics* to explain the structure of state, the *Polis*, he refers to the family as one of the formative element of Polis and hence indirectly a starting point in shaping an initiative power structure. See Aristotle, *Pol.* 1253b

<sup>666</sup> Montesquieu, *The spirit of laws*, trans. by Thomas Nugent, (Kitchener: Batoche Books, 2001, first pub. 1748), p.22.

but historical process in which a primitive process of politicization took place over the period extending over hundreds of years. This process must be pragmatic in a capable society.

Today, though such a power structure and absolute authoritarian personalities are uncommon or even acrid, the symbolism and ceremonialism of these concepts still manifest themselves in the particular aspects of power relations. From this point, the miranda of power is not only related to the authoritarian/totalitarian regimes, but also to any power structure in which the sense of admiration towards the authority relies on the beauty and force of personalities which exercise power. Lincoln, Roosevelt, Mazzini, Briand, Stresemann, Churchill, Princess Diana or even Gandhi are the examples of generals, admirals, politicians, statesmen and charismatic figures with a great or less great accomplishments, but with great influence over people. In Solomon-like institutions, old and modern aristocracies or in democracies, one of the resource of influence of leader figures and their authority is the admiration of people or the miranda of power.

States and governments need a guard of prestige to gain the miranda of power either by living persons, or propaganda or history. The miranda of power reposed in leader figures who are the highlighted part of political associations. In any given situation, miranda of power, as one of the greatest achievement of political discourses, need to be recruited, or the strength of regime begins to decline.

The miranda of power is adorned with symbolism and ceremonialism. It associated with great arts, music, buildings, anthems and holidays.<sup>667</sup> For authoritarian/ totalitarian regimes, stories in the earliest age and history in the later are a wax that is molded to influence the political consciousness of people and consequently to support their system of miranda.<sup>668</sup> A great story would be a great assistance for the promotion of power. For if a story is really good, no one cares if it is completely true or not. The main point in the stories of Memnon,<sup>669</sup> King Yayati, Periphas (Attic king)<sup>670</sup> and all other alike stories, is to influence folks most likely not only to depict a community or a group, but also to express the ambitions, dreams and ideals thereof.

The nature of miranda, in the psychology of power, is represented by massive ceremonies in which the cause of such gain a strong sense of adoration. The adoration conjured can become oppressive and overwhelming in authoritarian/totalitarian regimes. No one can argue against an ongoing ritual in which numerous people bow their heads, bend over or bend the knees in a harmonized movement on mass.<sup>671</sup> It is easier for individuals to share their way of life than to resist it.

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<sup>667</sup> See Smith, *Ethno-symbolism and Nationalism: A Cultural Approach*, (New York: Routledge, 2009).; Leoussi and Grosby, *Nationalism and Ethnosymbolism: History, Culture and Ethnicity in the Formation of Nations*, (Edinburgh: Edinburgh University Press, 2007).

<sup>668</sup> Donald Wittman, "Theocracy and the Evolution of Morals". *The Political Economy of Theocracy*, Ferrero and Wintrobe (ed.), (New York: Palgrave Macmillan, 2009).

<sup>669</sup> See Herodotus, *The Histories*. London, (England: Penguin Books, 2003).

<sup>670</sup> See also Cook, *Zeus: A Study in Ancient Religion*, Volume 2, Part 2, (Cambridge: Cambridge University Press, 1925).

<sup>671</sup> See also Susanne Lüdemann, „Zusammenhanglose Bevölkerungshaufen, allerinneren Gliederung bar“. Die Masse als das Andereder Ordnung im Diskurs der Soziologie, BEHEMOTH A Journal on Civilisation, vol. 7, Issue No. 1, 2014.

One of the important tasks of authoritarian/totalitarian regimes is to take control of history through a system of miranda. They censure, re-interpret, or mix history through the scientific mask of historians. If we accept the postulate that the main function of historiography is to offer a narrative description or report of past events that contributes to the creation of a national history, and consequently, to a collective identity for a specific community.

The education system, then, has the primary task of diffusing this identity among the members of that community.<sup>672</sup> All authoritarian/totalitarian regimes control folks through the system of education, in which the textbooks do not represent facts, but more feelings and desires. What is presented as fall of the Berlin wall or the collapse of the Soviet Union, in Russia, China or North Korea is not the same as is understood in other parts of the world. Furthermore, what has been offered as the history of the Persian Empire and capitalism in Iran after Islamic Revolution of 1979 is not the same as presented in the previous kingship regime in the country. Someone from Japan or from the European Union will have a different view on the rise of terrorism or communism than people from China or North Korea. This is true for all authoritarian power structures and for their miranda of power. It is hard for a person or a group of people to resist picture of their community which is represented through admirable stories and historical narratives. Because, in such community, any resistance or criticism is defined as not intelligence or curious, and interpreted as evidence of an unpatriotic or disloyal attitude. The consequence of such infamies is not only the loss of social status, if there is any, but the loss of liberty and even lives.<sup>673</sup> For folks to remain immune to such infamies imposed by authoritarian/ totalitarian power structures, the options remain ignorance or escape. Individual rights are psychologically beaten down and debased by the miranda of authoritarian power.<sup>674</sup> They are even subjected to a sense of isolation and rightlessness and are stuck on an island of shattered dreams. In contrast, if there is not any advantage of taking counter action, at least taking part in what the miranda of authoritarian/totalitarian power dictates does not spur any urgent jeopardy.

A sense of harmonization perhaps alone justified the concept of state (*Staat*) *qua* authority,<sup>675</sup> as well as the power relations, and the prevailing concept of rights of state. *Machtsstaat* was a prevailing concept of the modernity for the European monarchies who represent their power under the flag of harmonization and nationalism. These factors

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<sup>672</sup> Venturoli, [*Massacres between Memory and History*], Bologna: Libreria Bonomo Editrice, 2007.; See also Hajek, "Teaching the history of terrorism in Italy: The political strategies of memory obstruction", *Behavioral Sciences of Terrorism and Political Aggression*, 2010, First Article, 1–19, p.3.

<sup>673</sup> MacIntyre's interpretation of human life as well as human is a substantially historical process. He discusses the specific "narrative unity of human life", which is the conception of life as a "quest" or "journey". MacIntyre argues that the concept of social circumstance and historical narrative is the main reason for personal identity. MacIntyre, *After Virtue: A Study in Moral Theory*, (London: Duckworth, 1981), p.220.; See also Mela, "MacIntyre on Personal Identity". *Public Reason*, 3 (1), (2011) 103-113, p.108-109.

<sup>674</sup> Geiger, *Die Masse und ihre Aktion*, (Wissenschaftliche Buchges, 1967). See also review by A. Meusel, *Zeitschrift für die gesamte Staatswissenschaft / Journal of Institutional and Theoretical Economics*, Bd. 83, H. 1. (Mohr Siebeck GmbH & Co. KG, 1927), pp. 176-178. Le Bon, *The Crowd*, (Kitchener: Batoche Books, 2001)

<sup>675</sup> See also Farabi, *The virtues City*, p.128.; Fakhry, *Al-Farabi: Founder of Islamic Neoplatonism*, (Oxford: Oneworld Publication, 2002), p.114.

unanimously stabilize the ideology (*Weltanschauung*) of a big entity,<sup>676</sup> such as a state.<sup>677</sup> The importance of the miranda of power, which produced within power relations, result in temporal conformity. In other words, because of the miranda of power, “power” *qua* “authority” does not need to rely on anything more than mere admiration by people. Mutually, people obtain their immunity and security, only if they accept whatever their authority rules or demands through a system of miranda of power. In this sense, the miranda of power is one step above the use of force through which justification of power fades away in the aesthetic dazzling of power relations.

The miranda of power is also an important factor to inform the political consciousness in which the world of political being and the world of appearance is not necessarily distinguishable.<sup>678</sup> Those who are subjects in power relations establish and fortify the miranda of power. Authorities, directly or indirectly, use the miranda of power not with blood and cruelty, but with beauty and force. This direct and –mostly- indirect admiration for power aims to create negative political consciousness, since mere admiration by folks for power is not based on rational or normative principles. Moreover, the miranda of an authority is the main way to distinguish the authority from its rivals.

Modern rational-normative principles cannot fully assess the shining, enthusiastic face of a crowd fueled by a sense of emotion and desire, and embedded in different religious, cultural, national and tribal traditions. These effects of the miranda of power provide external evidence for the justification of- authoritarian/totalitarian- powers.

### **2.1.1 The Miranda of Power and a Different Approach to the Concept of Rights**

The nature of the miranda of authoritarian/totalitarian power is arguably against the concept of people’s right to liberty defended in the western democracies, in capitalist and social market economies (*Soziale Marktwirtschaft*).<sup>679</sup> The reason is that the economic prosperity of folks shakes the foundation of miranda of authoritarian/totalitarian powers. As consequence, authoritarian/totalitarian regimes have always painted a zero-sum game in all social and economic spheres.<sup>680</sup>

Harsh and brutal coincidences of life are inevitable for any individual, yet the authoritarian/totalitarian ruling class will always have the largest, if not total, share of property and wealth. Economics is a vital instrument for authorities. Probably the first insistence of the possession of property and the regulation of the economy within and by the state is in book V of the *Republic*, in which Plato discusses the theory of the “common meal”, “common house”

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<sup>676</sup> Bevan, *Symbolism and Belief*, (New York, Routledge Revivals, 1938 & 2014), p.80

<sup>677</sup> Matossian, *Shattered dreams of revolution: from liberty to violence in the late Ottoman Empire*, (Stanford: Stanford University Press, 2014), p.40.

<sup>678</sup> See also Farabi, Book of Religion 57-58.; Galston, *Politics and excellence*, (Princeton: Princeton University Press, 1990), p.176.; See also Arendt, *The Life of the Mind*, (New York: Harcourt Brace Jovanovich, 1978).

<sup>679</sup> Nicholls, *Freedom with Responsibility: The Social Market Economy in Germany, 1918-1963*, (Oxford: Oxford University Press, 1994), p.72-74.

<sup>680</sup> Linz, *Totalitarian and Authoritarian Regimes*, (Colorado: Lynne Rienner Publishers, 2000), p.72.

and the abolition of the family<sup>681</sup> in the ideal state.<sup>682</sup> Of course, a communist economic system is different from a theocratic economic system, which in turn is different from an autocratic one, but these differences should not mask their similarities. Plato's theory of monopoly of the market,<sup>683</sup> as the oldest theory, is still true for communist and theocratic power structures - the state's priority is dictated by its own theory of "division of labor and class", and undermines the rights of individuals to labor and property.<sup>684</sup> The regulation of the economy by authoritarian/totalitarian power is an example of an excessive possession of authority or "the monopoly of authority", in which individuals' prosperity, property, and lives are controlled.

Nevertheless, a pure miranda of power creates a shiny picture of an idea/ideology of absolute authority. The monopoly of thirsty office-holders is black days for the folks. For a society whose misfortune is woven through their everyday lives, it never rains but it pours; whatever distracts them from this boredom is welcome. Authoritarian/totalitarian regimes use the opportunity for leadership to shift their instruments of power. They shift from force to their miranda of power. They produce sets of impulses, imaginations, and suggestions through political, tribal, religious,<sup>685</sup> or racial interests. As consequence, the negative miranda of power, i.e., the force and beauty of power, utilized by the authoritarian/ totalitarian regimes to impose their own interests on every aspect of the people lives.

We might not completely refute the miranda of power. The sense of admiration for power is found in all power structures; it develops in different forms and circumstances, and under any form of regime. Yet, the problem is the use of the miranda of power and its relation to the concept of justification. The mere reliance of an authority on the miranda of power means that the miranda of power is excessively utilized for the monopoly of power and for the justification of its further abuse. Regimes that merely justifies its authority with their miranda of power is, in fact, incapable of controlling it. These regimes forcefully inject their miranda of power into various strata of the society where the interests of individuals lie. Economics, politics, and education are among the long series of sectors that work under the sever effect of the miranda of power under which the admiring shadow of power darken the concepts of political and civil rights of people.

What is important is that the miranda of power is not limited to the list of material interests, but it is also about the psychological aspects that bond people. It is a fact that the combination of fear and the relative satisfaction, as the effects of the miranda of power, has always fortified the admiration of people "for" their authorities. Historical examples, such as Mussolini's

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<sup>681</sup> 457<sup>b</sup>-466<sup>d</sup>.; See Jayapalan, "Plato's Theory of Communism". *Comprehensive Study of Plato*, (New Delhi: Atlantic Publishers, 2002), p.57.

<sup>682</sup> Plato, *Republic* V 458<sup>d</sup>; Compare to utopian socialist pamphlet of Swiss social medical doctor Rudolf Sutermeister, and Marx and Engels, *Manifesto of the Communist Party*, authorized English translation edited by Friedrich Engels (New York: New York Labor News, 1888).

<sup>683</sup> See also Ree, *Boundaries of Utopia - Imagining Communism from Plato to Stalin*, (New York: Routledge, 2015).

<sup>684</sup> Wittman, "Theocracy and the Evolution of Morals". *The Political Economy of Theocracy*, Ferrero and Wintrobe (ed.), (New York: Palgrave Macmillan, 2009), p.175-177. See also Schofield, *Saving the City: Philosopher-Kings and Other Classical Paradigms*. (London & NY: Routledge,1999), p.67.; Medema and Samuels, *Historians of Economics and Economic Thought: The Construction of Disciplinary Memory*, (London & NY: Routledge, 2001), p. 170.

<sup>685</sup> The role of faith and religion under such circumstances is discussed in the following part, the credenda of power.

fascism against socialism, Hitler's opposition to Prussian democratic aristocracy in favor of pure nationalism and socialism, and Lenin's "White Army"<sup>686</sup> against the Bolsheviks and communism showing that all these regimes with their leading figures have a common point: they utilized the miranda in the political discourses of their time to monopolize power. They mixed the beauty of admiration – of superiority- with force and fear. In this sense, though their people frightened and concerned about their immunity endangered by unknown yet various enemies, they were proud of their devotion to a leviathan-like authority. Such authorities try to give people a picture of immunity and identity with which they can overcome simple barriers in life.<sup>687</sup> Sure enough, this is what authoritarian/totalitarian regimes strive for: justification of their power.

Yet, we must ask: given this historical evidence, why have power structures been so unstable? The ancient democratic movement of Athenian society was an important turning point from the traditional form of the miranda of power to a new one. So, we also must ask, why are the lights of admiration of an authority by people turned to twilight of the transition of power, coups, and rebellions where the hidden spring of powers is observed?

Traditionally, a regime or an authority loses its effectiveness every time that the miranda of power loses its credit. Whether the position of power or the offices of authority distance themselves from people or not, lack of miranda of power is deficit in justification for power. Consequently, the total loss of a miranda of power brings disaffection and disobedience, which jeopardizes the existence of regimes.

For example, what we have learned from the transition of power which took place in ancient Athenian society is a simple form in loss of the miranda of power, whatever the cause was. There was no sense of kingship-fatherhood to inspire beauty and admiration. What was left was the force qua *violence*. Thought force as an instrument always caused fear of authority, it constrained power. In the flame of a newfangled democracy against hierarchical or even authoritarian/totalitarian powers, Plato and Aristotle argued for the revocation of democracy and gave reasons to favor hierarchical regime.<sup>688</sup> Their aim was to convince folks to consent to the authority of a virtuous hierarchical power, though the concept of consent did not carry any political consequence in their ideal regime. The idea of consent was the idea of admiration. Yet, they insisted that this consent or admiration did not relate to the general concept of government or to a specific system of authority, but to the particular holders of power. In such system, Plato's philosopher-king and Aristotle's virtuous man are assumed to be entitled to authority, to pure political power - an entitlement which merely Natural Law or Divine Law justified. In this sense, monarch, king, and elite were the best rulers, yet without these, the office lost both the miranda of power and its authority, and thus the system could be turned upside down.

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<sup>686</sup> Dowling (ed.), *Russia at War*, (California: ABC-CLIO, LLC, 2015), p.937

<sup>687</sup> See also Stromberg, *Democracy: A Short, Analytical History*, (New York: Routledge, 2015), Ch.6.

<sup>688</sup> See also Cartledge, *Ancient Greek Political Thought in Practice*, (Cambridge: Cambridge University Press, 2009), p.78.

### 2.1.2 The Miranda in the Power Structures

In each form of political structure, the existence of a miranda of power is necessary. It functions through a mixture of force and admiration depending on the stability of the regime in which it feeds. Generally, office holders acquire and exercise authority according to three major sources of justification of power, besides the instruments of power: (i) Natural Law or Divine Law, (ii) the inheritance or tradition in different excellences, (iii) rational-normative principles.<sup>689</sup> These “power sources” introduce unique ground for each regime:

1. Political power that is based on “Natural Law and Divine Law”, that is ordained by nature, God, or gods.

2. Political power that originates in “traditional values” and “norms” is ordained by a transition of privilege from unseen power into “blue blooded men”, such as kings and elites, e.g. philosopher-kings and virtuous men.

3. Political power that is based on “rational-normative principles” is the highest expression of the appreciation of the rights of human beings as individuals, and it is ordained through the will or the consent of many different forms of government. In the preceding chapter, we concentrate on the first two origins of these, namely, the ancient Greek philosophers and Farabi’s theory of power and rights.

The divinity of power is fundamentally linked to (i) certain feelings of mankind toward the order of the cosmos, which presents a universal-divine force and (ii) an unlimited imaginary of the human mind that admires such beauty and begs for the mercy of such power. The power of creation, held by gods, as well as “fatherhood-kingships”, comprises one of the character of traditional political authority.

Divinity of power was unquestionable when an authority wields its power. However, in ancient Greece, this concept of power were challenged when the idea of democracy emerged. This idea threatened the traditional, and seemingly stable, monopoly of authority. However, the challenge also was for democracy where the power in the judicial branch took the life of Socrates, in which a plebiscite form of voting put the lives and liberty of others in danger. In this way, Plato argued in favor of the divinity of power. He tried to resuscitate this dying source of power with a new argument on its form of admiration through the fear- ends in authority- and beauty- *qua* philosophy- that leads to hierarchical harmonious of societies, into a contentious debate.

The power of authority, or the control of a man over others, was considered to be derived from the natural ability of a man. The combination of Natural Law or Divine Law and human wisdom gave it superior. This was the concept of beauty and order. Plato’s argument relied not on what everybody had, but on a vague element that, at least seemingly, no one else except the philosophers had: education. The man he had in mind was a philosopher - a just, wise one who regarded the rest as ignorant. The first violation of political consciousness theory occurred here, when Plato’s philosopher tried to avoid facing the turning point that took place throughout ancient Athenian society, and simultaneously, he ignored the minimum rights of individuals, including freedom and property. The presumption that power is merely a wisdom gave a new mask on the miranda of power used by the office holders of authoritarian/ totalitarian regimes. Plato argued that Folks must admire philosopher-kings. Yet, he also argues that philosopher-

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<sup>689</sup> See this work, chapter one, part one.

king is reluctant to take responsibility for their control over society. This is the central theme reflected in Plato's *Republic*.

Not so far back in history are examples of attempt to build Plato's ideal of a hierarchical – authoritarian/totalitarian - regime: monarchies from the sixteenth through nineteenth-centuries in Europe and in the Middle Eastern today. Plato took a strong position in favor of the rationalization of authority. Such an authority, he believed, can be found in the hands of the philosopher-king. He was right about the strong effects of merits. However, he did not address the essence of natural or divine laws, which imply an authoritarian/totalitarian power relationship, suppresses virtue politics and the concept of “rights”. The process of politicization of people, more or less, prompts the political consciousness.

Divine law lacks the political component to make an effect, so it tries to form the cultural or educational elements to compensate such weaknesses. It is in this sense that we can say, the real weakness of the miranda of authoritarian/totalitarian powers sometimes is their willingness to argue about the divine nature of their power structure and its unlimited authority.<sup>690</sup> Plato's philosopher-king encounters great restraint when Plato imposed Natural Law as the main reason for the authority of a philosopher to control over others in a hierarchical power structure.<sup>691</sup> Admiration for divinity, political divinity, was strongest when it was at least a subject of dispute.<sup>692</sup> In other words, open discussions of the valuation of divinity paved the way for unlimited questions of admiration, not open questions about virtues or merit.

At least we can argue that one of the prevailing concept of every democratic movement is the freedom of thought which is accepted as an inevitable part of the process of politicization. In ancient Greek society, the traditional concept of power *qua* admiration faced a deadly blow. Based on this process, Athenians introduced a form of democracy by opening a limited number of administrative positions to the public. Yet, the old theory of top-down, politically right-wing, masculine hierarchical power structure lived on, even stronger than before, as the authorities tried to fortify their miranda of power so that admiration of the authority in power is seen as rational.

Aristotle was the pioneer theorist of the authoritarian/totalitarian power structure with democratic elements. He understood that divine law is not something that authoritarian/totalitarian powers can hold in office. He also respected, or at least accepted, the process of politicization and developed the semi-democratic regime in which power can use more instruments than it could use as it was solely respected a authoritarian/totalitarian ones.

Aristotle's *Politics* argues for the authority of special leaders, aristocrats, and elites. These regimes ate assumed for the “free Athenian men”. Compare to Plato's political thought, Aristotle's theory of state, in this sense, is more democratic. What Aristotle basically recognized was some other figures besides political leaders: there are “the rest”, who are not all slaves, but citizens with money. Since these citizens had leisure and money, Aristotle assumed that they are entitled to participate at some level of social and political activity, such as deliberations in not so important public debates and court hearings. The power structure maintains its hierarchy. Following Plato, he had to adopt criterion which help justify this power

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<sup>690</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.119

<sup>691</sup> See Hart, *The Concept of Law*, (Oxford: Oxford University Press, 1961), p186.

<sup>692</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.119

structure. In *Politics*, the miranda of power is similarly shaped around virtue, but only with partial appreciation of political consciousness.

Since Aristotle period, virtue is not only a divine gift from the gods but a respected achievement and endeavor. What Aristotle did not address, however, was the incompatibility of virtues in the teleological view of authoritarian regimes and inevitable trend of political consciousness. He, just like Plato, insisted on hierarchical power relations and tried to protect positions in high political offices from folks.

In Aristotle period, political deliberations, plebiscites and public courts were neither important nor within the right to power or domination. In other words, politics of domination was not at this level. So why the authority of that time design a system to give some citizens to take parts in political deliberations, plebiscites and public courts? Authorities recognized the partial rights of the citizens which introduced a different step in promoting the miranda of authoritarian/totalitarian power. It helped to merge the sense of beauty of power with deceptive political satisfaction of some people.

We can see through history that the product of this form of authoritarian power was endless forms of aristocracy - for example, the elites in Italy and Russia before 1918, in France before 1789,<sup>693</sup> in England up to 1649, and in the United States of America before 1765.

It is difficult to name exact critical elements in the transition of power, whether it is from kingship to aristocracy or from communist regime to military or a police state. For folks, however, the power holders may change but the hierarchical power relations remain the same, in that those in office hold the highest and undivided authority and monopolize it.

However, authoritarian aristocratic powers certainly have an advantage that the monarchic authoritarian powers of philosopher-king lack. Aristotle proposed a pragmatic structure of power relations, in which the justification of authority hangs not only on divine law but also on their virtues; it did not merely emphasize one person, but the capacity of some free men. Pragmatically, aristocracy or the nobility of virtuous men, by itself, represents a better account of themselves than a kingship since, according to the theory of political consciousness, it respected partial concept of political and civil rights and provide a higher satisfaction in a political spectrum. This also helps the stability of a regime. The evidence is the invisible character of political consciousness in the process of politicization, because of the appearance of accountability and effectiveness; this implies at least two sides are involved in the power relation. This miranda of power was, and still is, one of the instruments of power which helps to justify and to maintain any form of regime.

In *Politics*, the unreachable "ideal state" made way for a mixed government, by simply replaced the philosopher-king to by virtuous men. Aristotle's theory of authority seems to have a more realistic aim and structure. Yet, given the miranda of power as an instrument of power, there is a two question. We should ask whether Aristotle helped the transition in power He allowed for authoritarian/totalitarian powers in semi-democracies to be more deceptive? Yet, without a doubt, such power transition was inevitable.

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<sup>693</sup> They raised the question of the "divine right" of kings by executing Louis XVI in 1793. See also Kupchan, Davidson, and Sucharov. *Power In Transition: the Peaceful Change of International Order*, (Tokyo: United Nations University Press, 2001), p.120.; For a discussion that clearly draws the links between the revolutionary threat and the reactionary nature of the European elites, see Mack Walker, "Introductory Essay," in Walker, ed., *Metternich's Europe* (New York: Walker, 1968), pp.1-22.

In any cases, authoritarian/totalitarian rulers were aided by miranda of power in a similar way as unquestionable loyalty did ask for unquestionable obedience of people.

## **2.2 Negative Political Consciousness: The Credenda and The Medieval Justification of Political Power**

### **2.2.1 Conceptualization: Ancient Greek and Farabi; The Politics of Miranda and Credenda**

The most perplexing system of authoritarian/totalitarian power relies on Divine Law and Natural Law. More interestingly, in the medieval period, as well as in recent times, even common local religious leaders challenged the ongoing authority of their time in order to establish a new power structure.<sup>694</sup> We can see that the result of most revolutions in the religious societies – especially in the Middle East - was different forms of theocracies. At least, this was the first step to establish authoritarian/totalitarian power structures. One argument in the favor of such transitions is Aristotle’s theory of mixed government or semi-democracy, in which authoritarian/totalitarian power structures are considered to depend on a limited number of virtuous.<sup>695</sup> Aristotle to some extent tried to argue for the right to participate in power. He argued not only in the case of Plato’s philosopher-king, but also for some free men who were admired for their arbitrary virtues. Such a change between the thoughts of Plato and Aristotle in terms of the distribution of power demonstrated some form of rational-normative politicization which helped to move from an absolute authoritarian/totalitarian regime toward a hybrid one.<sup>696</sup>

Admittedly, sometimes the study of the history of each state, its region and its prevailing tradition and political discourses can explain its criterion or concept of excellence more than looking at the process of rational patterns of politicization. For example, the communist takeover of 1949 in China or Islamist takeover after the so called “Arab Spring”<sup>697</sup> in the Middle East are not the revolution caused by – our theory of- the political consciousness but some form of movement which heavily effected by a continuation of the imperial or religious autocratic traditions.<sup>698</sup>

Researchers involved in forming collective opinions, judgments, and political decisions<sup>699</sup> have asserted that decisions made by human beings, especially authorities, in the process of politicization are heavily based on heuristics and are susceptible to memory biases that limit

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<sup>694</sup> Due to the broad concept of this debate, I follow the transition of thought from ancient Greek to Farabi, the most prominent political theorist of medieval Islamic period.

<sup>695</sup> Barker, *The Political Thought of Plato and Aristotle*, (Russell & Russell, New York.), p.12.

<sup>696</sup> Aristotle, Pol. III.; Svobik, *The Politics of Authoritarian Rule*. (Cambridge: Cambridge University Press, 2012), p.3.

<sup>697</sup> he revolutionary wave of demonstrations and protests occurring in the Middle East and in North Africa since 2010. The economic crisis led the population of several countries to defy their authoritarian governments.

<sup>698</sup> For the examination of the relationship between the politics and the tradition, see Fu. *Autocratic Tradition and Chinese Politics*, (Cambridge: Cambridge UP, 1993).

<sup>699</sup> [1] Ariely, D. (2008). *Predictably Irrational: The Hidden Forces That Shape Our Decisions*. (NY: Harper Collins, 2008). Kuklinski & Quirk, ‘Reconsidering the rational public: Cognition, heuristics and mass opinion’ In Lupia, et al. (eds.), *Elements of reason: Cognition, choice and the bounds of rationality* (New York: Cambridge University Press, 2000), pp.153-182.

the amount of information and experience that they are able to use.<sup>700</sup> Hence, after the governance of an absolute authoritarian/totalitarian regime, a healthy democracy is less likely than other forms of oligarchic and theocratic regimes, since the biases such as the use of ideology for political control, concentration of power in the hands of a few, states power over all aspects of life, religion and law as the tools wielded by the rule, and the subjection of the individual to the state still exist in the political tradition of the region. Yet, we ask how we can find a politically understandable pattern of power transition?

The process of transition to other power structures is slow and fragile, but revolutions and regime changes may be quick. We must differentiate between these two in order to understand that those people who come from the lower classes, often discriminated against, use different opportunity, whether in economic or political crisis, to claim power against the highest class. When the process of transition to other power is not compatible with the process of politicization, the result will be the political disaster.

The justification of these claims to power can be based either on traditional power relations, virtuous elements, religion or belief,<sup>701</sup> rational merits, or even on all of these sources. However, the miranda of power is one of the main instruments not only for authorities but also for those who make a claim to power by which the vicious nature of a leader's character and the rise of an authoritarian/totalitarian regime move in parallel. Abu Bakr in Saudi Arabia, Yogi Adityanath in India, Talat Pashas in Turkey, Hassan Nasrallah in Lebanon, Mao Zedong in China, and Adolf Hitler in Germany are among the leaders who used the opportunity of the claims of the lower classes for their own transition to power. They aimed to build an authoritarian/totalitarian power by using the prevailing autocratic tradition beneath the political discourses of their time. Thus, it can be argued that what seems to be the worst product of the authoritarian/totalitarian regimes is also the "accidental" byproduct, supported by the leaders.<sup>702</sup> Authoritarian/ totalitarianism regimes can thrive on this phenomenon.

Lacking in resources is, in fact, unquestionably relying on either force or on the miranda of power, and consequently, makes the claim to power autocratic. However, autocratic form of power mostly is unaccountable and dangerous for the immunity of regime. The solution to this problem was to change the traditional concept of miranda of power and to move it one step further - authorities mixed the beauty of miranda of power- admiration- with the force of religion- belief- in non-rational divine law. This partially compensated for what Plato's political thoughts suffered from, the concept of belief in divinity of power.

Plato discussed the justification of divine law and the authority of philosopher-kings, through a guise of rational principles. However, a direct connection between the concepts of divine law and political power were mainly found in the medieval era. In this period, a

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<sup>700</sup> Schacter, & Addis, The cognitive neuroscience of constructive memory: remembering the past and imagining the future. *Philosophical Transactions of the Royal Society of London*. (London,2007), 773–86.

<sup>701</sup> Taylor, "Alternative Future: Legitimacy, Identity, and Alienation in Late Twentieth Century Canada." in *Communitarianism: A New Public Ethic*, ed. M. Day, (Belmont: Wadsworth, 1994), p.54.; Taylor, "Alternative Future: Legitimacy, Identity, and Alienation in Late Twentieth Century Canada." In *Constitutionalism, Citizenship and Society in Canada*, edited by A. Cairns and C. Williams (Toronto: University of Toronto Press, 1985): 183-229 (reprinted in C. Taylor, "Alternative Future." In *Reconciling the Solitudes*, edited by G. Laforest (Montreal: McGill, Queen's University Press, 1993): 50-120.

<sup>702</sup> See also Hayek, *The Road to Serfdom*, (Chicago: University of Chicago, 1944), p.135.

systematic form of justification, based on the concept of “belief” began to cause serious theo-political questions on power. Inquiry started into the concepts of the household and the state, in which claims for adoration, obedience, and worship of divinity had once been the famous approaches for their numinous justification.<sup>703</sup> In Farabi’s theory of the state, the theo-political problem centered on the idea that, the traditional concept of admiration of power lost its position due to the prevailing concept of religious power. Thus, the traditional concept of admiration of power changed to the concept of belief – in divinity of power. In this sense, the miranda of power has remained excessively dependent on folks’ belief in the “divine law”, which is assumingly sent down by the God. Consequently, they also believed in the “divine power” that can only be exercised by religious men, “who [are] not subject to any higher person”.<sup>704</sup> The concept of the miranda of power, which was one of the important and traditional instruments used for the justification of authority for Plato’s philosopher-kings and Aristotle’s virtuous men, almost lost its role through the emergence of religion. The role of religion helps power to justifies themselves. Consequently, the credenda of power became a better alternative for power holder.

Farabi found that the credenda of power, the concept of religious belief, was one of the main instruments of an authority. He understood that since the emergence of political religions, the credenda of power had been the instrument used exclusively by the Prophet-lawgiver, religious man.<sup>705</sup> These authorities were represented themselves as divine and privilege by God, despite the fact that they were always members of the general public .

What has always been ignored by regimes, e.g. theocracies, that have relentlessly relied on the credenda of power as their only and most important instrument, is not only the historical process of interaction between folks and power, but also the fact that the pragmatic and primary transformation of the miranda of power into the credenda power was shaped by the hands of worldly leaders whose only concern was authority.<sup>706</sup> Whether power bestowed by God or the creation of their own imagination, at the end of the day, they were rulers and the rest were ruled by them. The only important thing for an authority that merely relies on the credenda of power is not whether God gave this power to them, but how they can maintain the status quo and control over folks. Even in today’s religiously anointed regimes, folks are asked to obey those in authority and warned to not ask them of anything.

However, the credenda of power, as an instrument of power does not only belong to the politics of medieval Islam- though Islam is hard to be separated from political Islam- but also to other civilizations in both the East and the West, from the Japanese to the Roman Empire.

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<sup>703</sup> Sternberger, *Grund und Abgrund der Macht: Über Legitimität von Regierungen*, (Frankfurt am Main: Insel Verlag, 1986), p.23.

<sup>704</sup> Fakhry, *Al-Farabi: Founder of Islamic Neoplatonism*, (Oxford: Oneworld Publication, 2002), p.103. See also Mahdi, *Alfarabi and the Foundation of Islamic Political Philosophy*, (Chicago: University of Chicago Press, 2001), p.17.

<sup>705</sup> Mahdi argues that “ The divine law comes equipped with certain underpinnings meant to ensure obedience by encouraging the formation of certain states of character, mind, and feeling commonly placed under the headings of piety and humility, fear and hope- the fear of God and divine punishment and retribution, and the hope for future rewards and divine mercy.” See Mahdi, *Alfarabi and the Foundation of Islamic Political Philosophy*, (Chicago: University of Chicago Press, 2001), p.19

<sup>706</sup> Simmons, *Justification and Legitimacy*, (Cambridge: Cambridge University Press, 2001), p.27.

In *Sociological and Legal Concept of State*, Hans Kelsen, a renowned German political and legal philosopher argues the emergence of the miranda and credenda of power was in different regimes and in the hand of a long list of various personalities. He elaborated that:

“the need for adoration, the need to subject oneself to a higher, a holy one, to sacrifice oneself, in short all of those human instincts toward self-diminution, abnegation and even self-destruction, find their satisfaction in any deification of the state, in any fetishism of the state that is pushed beyond rationality, and whose consequences we can state from close experience. On the other hand, there is the will to power of one person who does not content himself with a struggle with the victory of a special god on the path to the identification of a single individual with his God. For he is content only with the victory of his own personality and so, in view of the waning of the idea of God, seeks his mask in the state alone.”<sup>707</sup>

Seeing this argument also as a ground for the concept of credenda of power in a specific historical context, there is a brief span between utilization of religion in the Christian politics and in Islamic politics. Such utilization introduced the credenda of power. Evidence of the use of the credenda of power for justification of power in Christian politics may go back to Charles the Great (died in 814 AD), a medieval Christian king. In the history of Christian politics, the credenda of power in the hands of popes – the heard of medieval catholic church-positioned the state as a fortress of religion, and used religion for mass control and to justify its own political authority. Similarly, in the history of Islamic politics, the credenda of power in the hands of Caliphs and other religious men positioned their offices as a fortress of religion for mass control and to justify its own political authority.

The credenda of power plays a strong role in the justification of power based on the effectiveness of a religious belief on the people, as the miranda of power does it based on non-belief form of admiration.<sup>708</sup> Thus, we can see that either the miranda or the credenda of power is the instrument of power from time to time and from place to place that helps power to thrive.

In the era of medieval Islam, the concept of patriarchy within the concept of political power, i.e. the miranda of power, lost its strength and was manipulated by new innovative forms of justification based on the belief of folks. The waves of politicization and the emergence of political religion helped religious men to rise out of traditional hierarchical power structures. However, the claim of religious leaders to power was not equivalent to the claim of Plato’s philosopher-kings, who had the time and luxury for engaging in philosophical debates, nor was it based on the Aristotle’s argument on the rational virtues of rulers’ wisdom.<sup>709</sup> Thus, how could both groups, the religious leaders and the philosophers, claim power?

Farabi interpreted the ancient Greek concept of wisdom, which can be attained through philosophy, as similar to the concept of imitation that can be attained through religion.<sup>710</sup> The

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<sup>707</sup> Kelsen, *Sociological and Legal Concept of State: A Critical Inquiry into the Relationship between State and Law*, (Aalen: Scientia Verlag, 1981, 2nd edn., first pub 1928), pp. 249-250.

<sup>708</sup> see also Sternberger, *Grund und Abgrund der Macht: Über Legitimität von Regierungen*, (Frankfurt am Main: Insel Verlag, 1986), p.23-24.

<sup>709</sup> Plato, *Republic*, 508-9.

<sup>710</sup> See also Fakhry, *Al-Farabi: Founder of Islamic Neoplatonism*, (Oxford: Oneworld Publication, 2002), p.106. See also Mahdi, *Alfarabi and the Foundation of Islamic Political Philosophy*, (Chicago: University of Chicago Press, 2001), p.17. See also Shokri, "Strauss's Farabi." *Studia Humana* 2:2 (2013), p. 39.

claim of religious men to power relied on divine law and “dignity”<sup>711</sup> of such law, which was introduced in religion and followed by the virtues of imitation. Thus, the theocracies and other forms of regimes which excessively rely on the credenda of power set forth the frameworks in a shell of a legal order- in Islamic terminology it is called Sharia Law-<sup>712</sup> for people by which they should imitate Caliphs, or other similar religious rulers.

If a Caliph or a similar religious ruler claimed the support of such laws, then they politically supported their justification with the credenda of power. They used the religiously anointed laws and orders as an instrument- the credenda of power- to shape and to preserve the belief of the folks in a political regime through their religion. Yet, it is perplexing that Farabi stressed that “religion is an imitation of philosophy”.<sup>713</sup> This could be a starting point for other research on the relationship between the esoteric and exoteric teachings of Farabi. Here, we maintain our concern on power and its characteristics.

Transitions between authoritarian powers were only possible through a political invention which is introduced in the medieval era. The invention was the credenda of power. It is an instrument for controlling folks and thereby justifying power.<sup>714</sup> In this sense, we can see that a backward transition in argument of time over the power origin in philosophy to power origin in religion.<sup>715</sup> We can see that Farabi’s virtuous state is based on the assumption that philosophers, prophet-lawgivers or virtuous-religious men are the same and wise, yet aim to imitate the ideal, while they assume that the rest of people possess only unexamined, common opinions.<sup>716</sup> Based on this idea, the credenda of power was used when the political thinkers tried to justify the connection between an absolute authority and religiously anointed virtue.

In all modern theocratic regimes, symbolism in politics is seen as identical and important as imitation in religion, and both are critical instruments for creating and maintaining unity in a community and controlling folks. This can also be seen in a close examination of the second part of Farabi’s *The Political Regimes* as well as *The Perfect State*. Symbolism and imitation go hand in hand and are among a long list of different elements of the credenda of power. Symbolism and imitation, in the religious sense, are vital for producing an image that is similar to the concept of knowledge in political philosophy.<sup>717</sup>

Having said this, symbolism and imitation create a communitarian ideology in which “brothers” are made out of folks. In this sense, folks are not just considered members of a state, but as a result of the instruments of power, they are presented as a big family. The concepts of the miranda and credenda of power thus produce the concept of nationalism or even the concept of “*Bruderschaft*”,<sup>718</sup> by which the level of their intensity depend on the formers. This is how the historical-political process of a society shapes the instruments of power. In the case of the credenda of power, which was firstly introduced in the medieval politics and, based on the

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<sup>711</sup> Sternberger, *Grund und Abgrund der Macht: Über Legitimität von Regierungen*, (Frankfurt am Main: Insel Verlag, 1986), p.24.

<sup>712</sup> See Shokri, "Islam and Politics: The Case of the Islamic State." *Studia Humana* 5.2 (2016).

<sup>713</sup> Farabi, *The Attainment of Happiness* 40, p.44. See also Farabi, ‘On the Perfect State’, Ch.7, in Walzer, *Al-farabi on the Perfect State*, p.279.

<sup>714</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), ch.4.

<sup>715</sup> See also Nasr and Leaman, *History Of Islamic Philosophy*, (London: Routledge, 1996), p.190.

<sup>716</sup> See also Farabi, *The Attainment of Happiness*. See also Campagna, *Alfarabi: Denken Zwischen Orient und Okzident*, (Germany: Parodos Verlag, 2010), p.182.

<sup>717</sup> Farabi, ‘On the Perfect State’, Ch.7, in Walzer, *Al-farabi on the Perfect State*, p.279.

<sup>718</sup> Campagna, *Alfarabi: Denken Zwischen Orient und Okzident*, (Germany: Parodos Verlag, 2010), p.154

concept of belief in power, compensated the weakness that may be found in the miranda of power.

Farabi understood the problem of power in his time. He merged the power of philosophers and religious men, as if they are the same. They were not the same in existence, but from a pragmatic point of view, both used similar instruments of political power. So far, it is still unclear if he did this in favor of Plato's philosopher-king or in favor of religious *Imam*. Regardless, the attempt to change philosophy to religion and to justify a religious hierarchical state (*Religiöse Herrschaft*), may not have been among Farabi's main political goals, but it could not be escaped as a consequence of his ideas. The hierarchical virtuous state, which he called as "the perfect state", was instead a deceptive and authoritarian religious state, in which the miranda of power of the philosopher-king transformed to a credenda of power of a prophet-lawgiver or *Imam*. Yet, Farabi intended to argue for the same nature of power as Plato defended.

Farabi relentlessly relied on Plato's idea of the state in *Republic* by theorizing one very similar.<sup>719</sup> Nevertheless, he was certainly aware of the differences between his system of thought and that of Plato and Aristotle. At least Farabi's ideas of divine law and position of high intellect were shaped by the social context of medieval Islam, and were explicitly influenced by the idea of God's rule and Islamic theocracy. It is also true that exact Plato's ideas of divine law and "the ideal state" cannot be found in Farabi's ideal state. The genius move for Farabi was altering the concept of the authoritarian virtuous regime to the authoritarian/totalitarian and theocratic one.

Here, we must ask why Farabi insisted that "the idea of Philosopher, Supreme ruler, Prince, Legislature, and *Imam* is but a single idea"?<sup>720</sup> Maybe the answer is simple, and easier to find that expected: the form of power structure and power relationship that both philosopher-king and *Imam* (religious man or Prophet-lawgiver) require are, in fact, alike. All the same, they require different conceptualizations in different states. At least, it is clear that there was no fundamental difference in the practice of power in various forms of authoritarian regimes, whether they used divine or traditional law for justification, they excessively relied on either miranda of power or credenda of power. Similarly, the most common, and at the same time uncommon point, is the link and the difference between miranda in the ancient Greek concept of power, and the credenda of power in the medieval and modern concept of power. As for Plato and Farabi, this authoritarian hierarchical power structure was perfect and natural,<sup>721</sup> and the miranda and credenda of power were also deceptively assumed to be natural.

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<sup>719</sup> See *The Attainment of Happiness* 30, p.35; 44, p.48.; See also Hammond, *The Philosophy of Alfarabi, and Its Influence on Medieval Thought*, (New York: The Hobson Book Press, 1947), p.52.; Campagna, *Alfarabi: Denken Zwischen Orient und Okzident*, (Germany: Parodos Verlag, 2010), p.152.

<sup>720</sup> Farabi, *The Attainment of Happiness* 46, p.47.; See Nasr and Leaman, *History Of Islamic Philosophy*, (London: Routledge, 1996), p.190.

<sup>721</sup> Farabi, 'On the Perfect State', Ch.15, in Walzer, *Al-farabi on the Perfect State*, p.235

### ***2.2.1.1 The Justification of Farabi's Prophet-lawgiver: The Excessive reliance on the Credenda of Power***

It has been a long time in the world of politics that religion assesses the justification of power. As the result of such interaction, credenda of power became one of the main instruments of authorities.

Farabi stands in the tradition of such transaction between power and religion. The Prophet-lawgiver of his time recruits his followers from the mass. They require no particular hereditary, class, or economic background, but only the religious knowledge and ability to interpret divine law. As their masculine authority relies on the religious law and their interpretation of it, they present a credenda of power in which questioning it is regarded as the most serious crime. The claims to the power of prophet-lawgivers, are not debated, as they are already sanctioned by a direct and unimpeachable scale of divinity. Their claim to power, which Farabi identified as merely relying on the credenda of power, requires there “remain no room for intellect, consideration, deliberation, or reflection with respect to what he says”.<sup>722</sup> Farabi saw how ancient Greek divine law hid behind the guise of religion, but the hierarchical power structure remained the same. Such law has overrun Middle Eastern and African countries ever since. Through a close examination, it can be seen that in most parts of the Middle Eastern and African states, authorities are not only monopolized by the religious men, but also that the act of questioning their principles will be punished by the death penalty. Perhaps, the only way that decadent Kingdoms can be replaced as the center of Middle Eastern state authorities is either by punishments of death and through revolution. Although the price paid, and that is still being paid, for their achievement must still be considered.

In *The Attainment of Happiness*, following Plato, Farabi argued that “the prince occupies his place by nature” and by his virtues,<sup>723</sup> and that this occupation, in fact, surrounded a natural order.<sup>724</sup> Farabi and Plato proposed twin political structures and power relations; one lived in ancient Greece and the other in the Islamic Persian kingdom.

Moreover, Farabi, just like Aristotle, used the theory of naturalness and the comparison of the “head of a household” and the “head of a state” in order to bestow the idea of fatherhood onto the authority of his prophet-lawgiver and to secure its high place in the hierarchical power structure.<sup>725</sup> In this way, he tried to bridge the gap between the miranda and the credenda of power. Here, the authority of religious men and the authority of his lawgiver were the same through the combination of the miranda and the credenda of power so that folks, which he described as “vulgar” and “multitude”,<sup>726</sup> admired the splendid authority of his prophet-lawgiver and that they continuously believed in the naturalness and rightfulness of him. In this way, the prophet-lawgiver easily became the head of the state with the privilege of controlling individuals. The justification of the authority of the religious ruler is the ability to employ

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<sup>722</sup> Farabi, ‘Enumeration of Science’ 5 in *selected Aphorisms* 110, p.82.

<sup>723</sup> For the list of virtues see Fakhry, *Al-Farabi: Founder of Islamic Neoplatonism*, (Oxford: Oneworld Publication, 2002), p.103-104.

<sup>724</sup> Farabi, *The Attainment of Happiness* 29, p.34

<sup>725</sup> Farabi, *The Attainment of Happiness* 31, p.37. See also Steinschneider, *Alfarabi: Des Arabischen Philosophen Leben und Schriften*, (Amsterdam: Philo Press, 1966), p.66.

<sup>726</sup> See Farabi, *The Attainment of Happiness* 37 and 38, p42

“whoever and whatever”<sup>727</sup> he wants to reach the ultimate end of the state.<sup>728</sup> Farabi explicitly put the rights of prophet-lawgivers and his privilege above the rest, as he argued that he is the one “who does not need to be ruled by a human in anything at all”.<sup>729</sup> The traditional admiration of folks for authority then turned to be the belief thereof, which was controlled by the unquestionable force of divine law. Such an approach to the divine authority of a ruler goes beyond written manuscripts and law.<sup>730</sup>

Farabi’s approach to the credenda of power of prophet-lawgiver implies the same principle of leader with the arbitrary characters found in ancient Greek thoughts, who is entitled to control folks, based on his naturally divine superiority.<sup>731</sup> He is not selected by the fact of heredity, or because he is Aristotle’s virtuous man, i.e. the rich and white Greek upper class. For Farabi’s prophet-lawgiver, neither the indication of capability for high political office of state, nor the proof of traditional or biological descent is the decisive criterion for the justification of his claim. He is eligible to claim power and to deny the rights of others based on the arbitrary character of his divinity and his art of kingship. Yet, this art which the privilege of controlling the rest lies, is “equipped for them by nature: that is in those who possess superior natures with very great potentialities.”<sup>732</sup> The justification is not limited to the legality of a system or the rationalization of norms and values. The credenda of power works all the way to justify the power of the prophet-lawgiver. Even so, it makes the prophet-lawgiver an eligible competitor in the on-going miranda of power. This is seen in history through how the credenda of power of *Caliphates* or Prophet-lawgivers make their way to the high office of a political structure, despite the high cost for folks and the community. This emergence of an authority, which merely relies on the credenda of power, is not based on the rational-normative principles of folks, or deliberative participation, as Aristotle partially implies, but merely on the concept of belief - the belief of folks in the infallible power of their rulers.

Though “the right divine of kings to govern wrong[ly]”<sup>733</sup> is an unusual statement today, at least its sophisticated and aristocratic defenders do not deny that kings, philosopher-kings, and virtuous men could govern wrongly. This appears more in Aristotle’s *Politics* - that such fault is the sin and immorality of a man. However, some medieval and modern deifiers of the state practice a doctrine of Divine Right far more uncritically than Filmer and Hone. The character of credenda of power requires that the divine or religious law be infallible; their rulers as well as the Sovereign dedicated People, cannot do wrong, morally or intellectually.<sup>734</sup>

Farabi’s prophet-lawgiver also take a point from the authoritarian/totalitarian role of the philosopher-king and Aristotle’s mixed government, in the potential of mastering the people, who laid down his theory behind the lightning picture of divinity. Farabi’s ruler avoids the implication of rational dicta, while simultaneously discreetly avoiding rationalizing his

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<sup>727</sup> Farabi, *The Attainment of Happiness* 31, p.37

<sup>728</sup> Farabi, *The Attainment of Happiness* 32, p.37

<sup>729</sup> Farabi, *Ketāb al-sāsa*, pp. 78-79

<sup>730</sup> See Mahdi, *Alfarabi and the Foundation of Islamic Political Philosophy*, (Chicago: University of Chicago Press, 2001), p.17.

<sup>731</sup> Spearman, ‘The Psychological Background of Dictatorship’, *The Sociological Review*, vol.26, p.158.

<sup>732</sup> Farabi, *The Attainment of Happiness* 29, p.34

<sup>733</sup> Hone, *The Right Divine of Kings to Govern Wrong!*: Dedicated to the Holy Alliance. (London: Printed for William Hone, 1821).

<sup>734</sup> Jouvenel, *On Power, Its Nature and the History of Its Growth*, (New York: Viking, 1948), p.xvii.

credenda of power. Therefore, we can see that the firm and rationalized authoritarian/totalitarian structure of power remains the same in Farabi's political thoughts, in which the prophet-lawgiver occupies the highest office of the state;<sup>735</sup> individual rights are denied not by the hands of prophet-lawgiver, but by the command of the infallible divine law.<sup>736</sup> The credenda of power sells a brand of morality where the moral norms are the first victims of ignorance of political consciousness. The closest example of such an idea is authoritarian/totalitarian Islamic *Caliphates* in both the Medieval and modern periods and under the various form of regimes.<sup>737</sup>

However, the same historic experience raises further critiques of the validity or the credentials of prophet-lawgivers. Among these critiques are:

- How can one practice critique on a true prophet-lawgiver and distinguish them from those who are fraudulent?<sup>738</sup>
- How can we detect the negative political consciousness and apocryphal character of religious personalities that shape beliefs of people?

Here, we approach the penitralia of power, in which no one has mapped and few have ever attempted to explore. It is neither attempt of the work at hand to assess the quality of any religion or any of religious laws. The aim is to assess the concepts of the miranda and credenda of power in relation to authority and political rights. In this sense, to get back to the original arguments on these instruments of power, we see how Farabi's proposal for the ideal power structure and his concept of the prophet-lawgiver share similarities with the authoritarian/totalitarian power structures of Plato and Aristotle.<sup>739</sup> We are looking at how these two views attempt to justify power by using the miranda and credenda of power, and why, in practice, many have failed to justify it through an argument based on political conscious theory.

Among Farabi's various pieces of political writing, he focused on the *Attainment of Happiness* and *On The Perfect State*,<sup>740</sup> and discussed ideas of justification of (or criteria for) power, and the justification of hierarchical virtuous state. However, a slightly different idea from Farabi is his work called *The Aphorisms of the Statesman*.<sup>741</sup>

Indeed, some argue that the different approach of Farabi to the same matter is because that he was a political philosopher who stood between two worlds. Though the connection that Farabi felt, and the influence he gained, from the ancient Greek philosophers, one cannot ignore the historical and regional differences from which these men came. To this extent, another

<sup>735</sup> Farabi, *Selected Aphorisms of the Statesman*, Trans. Butterworth, 57-58, p37-38. Farabi, 'On the Perfect State', Ch.7, in Walzer, *Al-farabi on the Perfect State*, p.277.

<sup>736</sup> "<Faith> schützt unfehlbar gegen Schnupfen." Weber and Winckelmann, *Die Protestantische Ethik und der Geist des Kapitalismus*, (Hamburg; München: Siebenstern-Taschenbuch-Verl., 1969), p.299.

<sup>737</sup> See Shokri, "Islam and Politics: The Case of the Islamic State." *Studia Humana* 5.2 (2016), p.5.

<sup>738</sup> Nasr also emphasized being a true leader but he gave no answer to this question, See also Nasr and Leaman, *History of Islamic Philosophy*, (London: Routledge, 1996), p.192.

<sup>739</sup> See also Mayer, *A History of Ancient & Medieval Philosophy*, (New York: American Book Co.), 1950, p.392.

<sup>740</sup> *Rislah fi Ara' ahl al-Madnah al-Fadila* or *Mabādi' Arā' Ahl al-Madina al-fāzela*. The complete title is *Principles of the Opinions of the People of the Virtuous City or The Virtues City*.

<sup>741</sup> Farabi, *Aphorisms of the Statesman (Fusul al-Madani)*, trans. and Introd. by D.M. Dunlop, (Cambridge: Cambridge University Press, 1961), is the same as Farabi, 'Selected Aphorism' in *The political Writing*, trans. Charles Butterworth, (Cornell University Press, 2001).

study would be required to examine whether Farabi esoterically tried to increase the qualitative criteria on which a religious ruler should rely for the sake of his ideal philosopher-king, or in order to secure the place of religious rulers in the Islamic power structures. This is, unfortunately, not the main purpose of this small work.

Whatever the answer to this question, it does not affect our assessment of the power structure that Farabi praised. Whether or not he succumbed to the influence of his time and to the regime he served, any argument about power structures in which the rulers and their authority are justified by divine or religious law leaves no question that these regimes rely heavily on the credenda of power.

In summary, analysis of both medieval and modern hierarchical power relations must attentively consider the credenda of power. The power of those who try to justify themselves as authoritarian/totalitarian prophet-lawgivers merely hinges on the concept of the credenda.

Yet, for Farabi, the theo-political problem begins when the credenda of power, as one of the instruments of power utilized by the religious rulers comes to light. Farabi knew that the erosion of the credenda of power is inevitable due to the “translation movement” and the increasing influence of Greek political works in the medieval Islamic world.

In *On Political Government* and *Aphorisms of the Statesman* Farabi tried to address this theo-political problem. In his attempt to escape from the theo-political problem of his time and the erosion of the credenda of power, Farabi distanced his prophet-lawgiver from a purely religious picture. Instead he was described using certain personal categories. In part 29 of the *Aphorisms of the Statesman*, The manifestation of virtuous men is clear in which Farabi’s ruler (in line with Aristotle) was adorned with virtues<sup>742</sup> and art.<sup>743</sup> In fact, Farabi used the Platonic political structure of the ideal state and the logic of Aristotle’s virtues politics. Where the science of religious law and theology (*fiqh*) are ancillary to the science of politics in order to make a strong credenda for authority, religious men may be virtuous men, at the same time as lawmakers and kings.

Though the characters and elements of power may differ when we compare the matter of justification in Farabi’s political theory, it is more important to look at the power relationships and the power structure. Looking at a bigger picture, we realize that not the nature of power but the way power practices authority remains the same in both ancient Greek political theory and in that of Farabi. Philosopher-kings, virtuous men and religious rulers are regarded as the head of the state. The nature of their power and the political offices that they hold are more similar than the personality of rulers and their methods of claiming power.<sup>744</sup> Both Plato’s philosopher-king and Farabi’s religious ruler based their claims to power on the “naturalness” theory of state, and consequently, their natural privilege in the power structure.

The common point between Plato, Aristotle, and Farabi is the core essence of their arguments. Their arguments centered around what a state requires as a natural hierarchical power structure. What changed in medieval political theories from those in ancient Greece was the transformation of the miranda of power to the credenda of power. The excessive use of the

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<sup>742</sup> Desmond, *Philosopher-Kings of Antiquity*, (London: Continuum Intl Pub Group, 2011), p.158.

<sup>743</sup> See Farabi, *Aphorisms of the Statesman (Fusul al-Madani)*, Trans. and Introd. by D.M. Dunlop, (Cambridge: Cambridge University Press, 1961), p.106.

<sup>744</sup> See also Desmond, *Philosopher-Kings of Antiquity*, (London: Continuum Intl Pub Group, 2011), p.158.

instruments of power in Farabi's model of the state is as same as the ancient Greek model of hierarchical authoritarian/totalitarian state. Yet, the admiration of power changed into an excessive belief in political theology, revelation, faith, or all together: the credenda of power.<sup>745</sup>

Nonetheless, after the establishment of an authoritarian/totalitarian regime that merely relies on the credenda of power, the system begins to introduce new virtues. Since most of the time the credenda of power manifested in the figures and personalities, the level of acceptance of virtues promoted by the credenda of power merely depends on the level of the manipulation of the rulers and the personalities.<sup>746</sup> This is why personality cults are the hallmark – and primarily a consequence rather than the cause – of established autocracy.

In this sense, we can argue that the manipulation of the rulers whose rely on the credenda is the same characteristic which Farabi argued for. He named two admirable traits for wielding such power: persuasion and compulsion.<sup>747</sup> Thus, where the divinity of divine law supports persuasion, the justified authority supports compulsion. Moreover, there was the assumption that the responsibility of the prophet-lawgivers is secured through the presumed connection to God.<sup>748</sup> Folks felt a divine responsibility, which reached its maximum at this time when religious rulers decisively represented the almighty. The traditional inner and external compositions of beauty and force added up to belief to form the credenda of power. Though this instrument of power helps its justification, an excessive reliance on it prevented a community from moving further toward critical thinking. Hitherto, Farabi's method of justifying the power of religious ruler, which maintains today in modern theocracies, stuck strongly to the credenda of power. The mere reliance on the credenda of power by the rulers of Farabi's virtuous state or any authoritarian/totalitarian power is evidence that they do not appreciate any concept of political consciousness.

In sum, in Farabi's works, the doctrine of the virtuous state is placed at least one level below the theory of the authority of the prophet-lawgiver, religious ruler, or king, whose power is religious and fraternal. It may be assumed that the religious leader, which appears in the figure of the prophet-lawgiver is in a sense more virtuous than those justified to be in power by the ancient Greeks. This may be because this form of authority not only places his emphasis on religious rules, but also on the normative extension of the religious rules. However, even if such assertion is a considerable one, it leaves us to wonder whether this divine criterion also forces the authority to act in the same line of moral principles. Second, we can see that this special form of the hierarchical structures has always used the virtues and massive propaganda to build a trench against repudiations and critiques. Islamic regimes, even in Farabi's age, tried hard to change the literature, culture, symbols, and history that were used in previous or co-existing political systems; different laws, historical approaches, stories, textbooks, propaganda were used in the same manner. Therefore, the nature of different religious regimes means is that each has opposite principles, of which they see their own as virtuous and the others as vice.

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<sup>745</sup> See also Farabi, 'On the Perfect State', Ch.7, in Walzer, *Al-farabi on the Perfect State*, p.279.

<sup>746</sup> al-madina al—fadila and tehsil al-sa'ada.

<sup>747</sup> Farabi, *The Attainment of Happiness* 31, p.36; Farabi, *selected Aphorisms* 58, p.38.

<sup>748</sup> Desmond, *Philosopher-Kings of Antiquity*, (London: Continuum Intl Pub Group, 2011), p.158.

Let us look at the bigger picture. In French Revolution, there was a determined effort to change the French dialect, which was established by former, ancient regimes.<sup>749</sup> After the Turkish War of Independence in 1923, there were successful reforms in every aspect of social affairs.<sup>750</sup> What we learn from these examples is one simple but vital principle: there is a nuanced difference between the justifiable claim to power and unjustifiable claim. Justifiable claims may be based on the credenda of power, such as in Turkey's experience of modernization, but unjustifiable claims mostly and excessively rely on credenda of power.

Thus, when the power of a regime is analyzed, one element to be considered is to what extent it relies on the credenda of power. There are many historical examples of transitions to different political power structures, whether in Farabi's age, in which states shifted into Islamic form of power, or in contemporary times, when China and Russia became capitalist economy yet are *quasi* communist regimes,<sup>751</sup> and recently, in the Middle Eastern countries, which are transforming into different forms of autocracies. However, one common point between all of these regimes is their excessive reliance on their miranda and the credenda of power.

### **2.2.1.2. The Justifiable and Unjustifiable Credenda of Power**

Although the credenda of power and charismatic leaders are effective tools for creating and maintaining a harmonized state, they can also be used for justifying authority and thus increasing power. This list of leaders is by no means limited to the old or new aristocracies and theocracies; democratic power structures and Solomon-like institutions also come to force and add to the meaning of governmental miranda and credenda. The Lincolns, Churchills, Mazzinis, Anthonys, Gandhis, Roosevelts, and a long list of others, have enhanced the prestige of power.<sup>752</sup> The Lincolns, Churchills, Mazzinis, Anthonys, Gandhis, Roosevelts, and a long list of others, have enhanced the prestige of power.<sup>753</sup> This is important, as the pure credenda of power on its own is not democratically praiseworthy because it produces negative political consciousness.

Hitherto, the justification of credenda of power was directly related to the justification of the authority that it exercises. However, like authority, the credenda of power *per se* can also be assessed theologically. One important determining factor of whether the development of the credenda of power is justifiable or not, is that it is possible to distinguish the purpose for which means are employed. The second determining point is whether the credenda of power can be assessed with rational normative principles. An unjustified credenda of power is produced and defended merely by itself. These two important points are seen in various forms and under the different circumstances in the hierarchical authoritarian/totalitarian power structures of autocracies, theocracies and communists regimes. From time to time, autocrats, theocrats, and communists have proposed not only to destroy previous credenda of power structures, but also

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<sup>749</sup> See Emilio Gentile, *Politics as Religion*, trans. George Staunton, (Princeton University Press, 2006), p.9.

<sup>750</sup> Saikal and Schnabel, *Democratization in the Middle East: Experiences, Struggles, Challenges*, (United Nations University Press, 2003). See also Geoffrey Lewis, *The Turkish Language Reform: A Catastrophic Success* (Oxford: Oxford University Press, 1999) p.66.

<sup>751</sup> Harper, 'Foreign Governments and Politics: The Communist Party of the Soviet Union', in *The American Political Science Review*, Vol. 23, No. 4 (Nov., 1929), pp. 956-971.

<sup>752</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), P.111-12

<sup>753</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.111.

to destroy the identity of individuals or personalities who helped shape the previous credenda of power or those personalities who oppose the new one. Moreover, autocrats, theocrats and communists, in one way or another, do not tolerate freedom of speech, individualistic religion, private property and capitalism, as they must repress these concepts in order to build their own (unjustified) credenda of power, as their only instrument of authority.<sup>754</sup>

Before moving on to a discussion of transformation of the credenda of power to other instruments used for the justification of power, let us summarize. This section assessed two polygons of power- or two instruments of power- as they originated and were practiced in different regimes, in ancient Greece, as well as by medieval and modern authorities. Both the miranda and credenda of power are instruments that can be used to assess the claims to the justification of power, and they are used excessively by hierarchical or authoritarian/totalitarian power structures, such as semi-democracies, fascist states, theocracies, and communists regimes. These are the most important systems of competing in the miranda and the credenda of power.

In the history of traditional thoughts, Plato and Aristotle elaborate on the systematic interaction between miranda of power and the hierarchical regimes in their political works. However, Farabi later developed a unique theory that built on this approach to political power, since he found that if power is based on an individual's leadership, then the miranda of power as the only instrument of authority of personality -whether they are a king or a philosopher-king- is not enough. Indeed, Islam as a political religion challenged the traditional miranda of power as well as the modern ones. The Islamic Revolution of 1979 in Iran and emergence of Islamic political parties and movements after the Arab Spring in the Middle East are the example of the transformation of the miranda to the credenda of power.

The miranda of power may be critical for justifying an authority's claim to power, but it still lacks the fraternity, obedience, and unity of a political community. With the emergence of divine claims to power, political theorists began to notice that admiration – i.e. the miranda of power - was neither general nor natural, and that it was the opinion of a certain class and a product of meticulous training.<sup>755</sup> On the contrary, the political discourses of the age of Farabi show that if authorities use a combination of admiration and belief from the public -in other words, the credenda of power-, then it appears as if the folks justified the power themselves. For, the credenda of power requires that folks be self-generators of the belief in power. When an idea turns into common religious belief, which is sanctioned by leviathans, gods, and divine beings, no one can question it without the expectation of a militant reaction of believers.

Whether the credenda of power is used for good or bad depends on the power and the nature of the authority. For instance, in the United States of America, in voting for a presidential candidate or voting on a civil act, religion, and specifically Christianity, has always played an important role. One of the important arguments used against the slavery, for example, was that “it is a sin”.<sup>756</sup> Similarly, we see that the modern theocracies also rely on the credenda of power. However, an excessive reliance of these power structures on the credenda of power is possible only with oppression and monopolization of power. Thus as the result, an authority denies the

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<sup>754</sup> Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986).

<sup>755</sup> Jouvenel, *On Power, Its Nature and the History of Its Growth*, (New York: Viking, 1948), p.321.

<sup>756</sup> Danver, *Revolts, Protests, Demonstrations, and Rebellions in American History: An Encyclopedia.*, (Santa Barbara, CA: ABC-CLIO, 2011), p.425.

essential dignity of human nature, for the sake of a far-off natural theological community that controls the strong impression of divine religious law. Thus, contrary and paradox results are possible by the same usage of the credenda of power.

Looking at specific instruments of power invites us to focus on the process of the politicization of folks. The more critical analysis there is of the instruments of power, the better understanding there may be of the causes and effects in the political arena. So, we argue that the Hitler's seizure of power, and we can link it to a long list of similar cases of power transition, namely Mussolini's fascist uprising and Mao's revolutionary achievement are not merely legal walk overs.<sup>757</sup> We also argue that political uprisings in the recent years after the Arab Spring of 2011 in the Middle East are not the result of the process of politicization of society.

The spirit of communities, along with an extreme way to interpret the constitution produce the opportunity for the credenda of power to work with other instruments of power to support stronger authoritarian/totalitarian regimes in which manipulation in all strata of the socio-political lives of individuals are assumed to be justified.

### **3.The Modern States: The Credenda of Power and its Legality**

#### **3.1 Limitation of the Miranda and Credenda of Power**

Power is a complex concept and its complexity is related to the instruments it uses to justify its authority, to implement its rules, and to obtain its immunity. The miranda and credenda of power have always been critical instruments for authorities, yet they are not the only ones, even for authoritarian/totalitarian regimes that initially center their justification on them. History has shown from time to time that simply the miranda and credenda of power are not sufficient for a long and stable political situation for authorities. These instrument confide people that an authority, person, idea, or system can be admired and believed, and hence can be followed. Being obedient to those personalities who benefit miranda and credenda of power becomes habit. So long as these instruments are regularly exercised, the matter of obedience is not a serious question in people's minds; they may obey an authority, even though they may not have any opinion or knowledge of the righteousness of the authority's actions or their own rights.<sup>758</sup> However, if a regime merely relies on the miranda and credenda of power for a long time, its persistence and its continuity face great challenge over time.<sup>759</sup> Thus, those who want victory of their own personality and personal authority, "in view of the waning of the idea of God," seek this through the mask of the state.<sup>760</sup>

Personalities and rulers are presented as the state and state is presented in the hands of them. Under authoritarian/totalitarian regimes, the personalities and dictator's outward

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<sup>757</sup> Kai Hafez, *Radicalism and Political Reform in the Islamic and Western Worlds*, trans. Alex Skinner, (Cambridge University Press, 2010) p.117. It was first published in German as "Heiliger Krieg und Demokratie, Radikalismus und Politische Wandel im islamisch-westlichen Vergleich", 2009.

<sup>758</sup> Hart, *The Concept of Law*. Oxford: Oxford University Press, 2012[1961]), p.53.

<sup>759</sup> See also Hart, *The Concept of Law*. Oxford: Oxford University Press, 2012[1961]), p.51.

<sup>760</sup> Kelsen, *Sociological and Legal Concept of State: A Critical Inquiry into the Relationship between State and Law*, (Aalen: Scientia Verlag, 1981, 2nd edn., first pub 1928), p.250.

appearance of invincibility which helps the miranda of power is as important as his actual power. This is why personality cults are the hallmark – and primarily a consequence rather than the cause – of established autocracy. According to Ronald Suny<sup>761</sup> (1997, 38), Stalin – who was short in stature, a mediocre speaker, and the “ultimate man of the machine” – project an image of a leader through the miranda of power and regimes propaganda. Unlike regime propaganda, the purpose of which is to disseminate ideology, a personality cult aims to reinforce the dictator’s paramount political standing.

Thus Hafez al-Asad was the twentieth-century’s Saladin,<sup>762</sup> Saddam Hussein was the new Nebuchadnezzar,<sup>763</sup> and His Excellency, the Generalissimo, Doctor Rafael L’eonidas Trujillo Molina, Honorable President of the Republic, Benefactor of the Nation, Restorer of the Financial Independence of the Country, and Commander-in-Chief of the Armed Forces was, as commonsense dictated, stood right next to God when his regime ordered that even churches display the slogan “God in Heaven, Trujillo on Earth.”<sup>764</sup> Even more than that: The self-dubbed Light of Human Genius Kim Il Sung could control the weather with his mood.<sup>765</sup>

Moreover, challenge for authorities lies in various reasons such as a scandals of office holders or an economic crisis, or administrators who want to establish an independent power. In any case, when the admiration for an authority or the belief in it by people wanes, the obedience does not persist, neither by people nor by administrators nor by regime insiders. More critically, the habit of obedience does not provide strong ground against politicization based on political consciousness.

Such a state of affairs is not only possible but also inevitable – sure enough, this has been realized in the times of peace and war, crisis and trouble. Whether through political and economic crisis or the process of politicization, a shift between the instruments of power occurs when an authority tries to thrive or a new authority tries to rise.

Chronologically, the legal character of an authority comes after the decrepitude miranda and credenda of power, or moves along with it. Indeed, the characteristic of a legal system covers the insufficiencies of the miranda and credenda of power, in order to secure the uninterrupted continuity of an authority.

The link between these two instruments is the constituent reasoning for the establishment of secular and religious states. Yet, there is still difference in the relationship between the miranda and credenda of power and the legal system in democratic regimes and in the authoritarian/totalitarian regimes. In authoritarian/totalitarian regimes, the miranda and credenda of power play the main role in justifying power, and the legal system supports such a monopoly of power. “The road to totalitarian domination leads through many intermediate stages for which we can find numerous analogies and precedents. The extraordinary bloody

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<sup>761</sup> Suny, Ronald Grigor. 1997. “Stalin and His Stalinism: Power and Authority in the Soviet Union, 1930–53.” In Ian Kershaw and Moshe Lewin (Eds.), *Stalinism and Nazism: Dictatorships in Comparison*. (Cambridge: Cambridge University Press, pp. 26–52.), p.38.

<sup>762</sup> Wedeen, *Ambiguities of Domination: Politics, Rhetoric, and Symbols in Contemporary Syria*, (Chicago: University of Chicago Press, 1991), p.1.

<sup>763</sup> Karsh, *Saddam Hussein: A Political Biography*, (New York: Grove Press, 2002), pp.152-53.

<sup>764</sup> L’opez-Calvo, *God and Trujillo: Literary and Cultural Representations of the Dominican Dictator*, (Gainesville: University Press of Florida).

<sup>765</sup> Oh and Hassig, *North Korea through the Looking Glass*, Washington, DC: The Brookings Institution Press, 2000), p.4.

terror during the initial stage of totalitarian rule serves indeed the exclusive purpose of defeating the opponent and rendering all further opposite impossible.”<sup>766</sup> Such justification does not stop at this level. As Arendt argued, Major terrors imposed by authoritarian/totalitarian regimes can be “launched only after this initial state has been overcome”,<sup>767</sup> in the form of shaping negative political consciousness so that folks act in concrete, act in accordance with the will of authoritarian/totalitarian power. The real terror is in the sphere of the miranda and credenda of power.

The habit of obedience promoted by the miranda and credenda of power diverge from the concept of obedience in the legal system of different states. Indeed, obedience to the law, regardless of the regime that imposed it, contributes heavily to the predictability and continuity of authorities.<sup>768</sup>

### 3.2 The Role of the Credenda and the Monopoly of Legality

It is little surprise that the notion of authority and the legitimacy of power are the most controversial concepts found in legal normative debates, especially in western political philosophy. Legality, as a central trait of legitimate power structures, is confronted by a great challenge *per se*.<sup>769</sup> The immediate relevance of the problem of legal authority for the legitimacy of authorities is seen in different power structures. These problems warn us of the overlapping concepts of legality and legitimacy which are largely derived from the antinomical structure of originally metaphysical accounts of the relation between law and power.

The greatest conquest in justifying claims of power in the authoritarian/totalitarian regimes is the monopoly of legality.<sup>770</sup> It is, in fact, a monopoly of force to the system of rules that go by the name of ‘legality’. After the establishment of a strong credenda in a power structure, a great achievement is that the authority, relying on the negative political-consciousness of folks, enjoys the exclusive right to control the legal structure within its territory. This privilege of

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<sup>766</sup> Arendt, *The Origins of Totalitarianism*, (New York: A Harvest Book 1979), p.440; See also Arendt, *The Origins of Totalitarianism*, (New York: Schocken Books, 1948), p.567.

<sup>767</sup> Arendt, *The Origin of Totalitarianism*, (New York: Schocken Books, 1948), p.567.

<sup>768</sup> See also Hart, *The Concept of Law*. Oxford: Oxford University Press, 2012[1961]), p.61.

<sup>769</sup> Raz, *The Authority of Law: Essays on Law and Morality*, (Oxford: Oxford University Press, 2009), p.3

<sup>770</sup> Some may misunderstand the monopoly of legality with the rule of law as the following: “the strong conception of popular sovereignty employed in the German Federal Constitutional Court’s recent decision on the Treaty of Lisbon is incoherent and should not be used as the centerpiece of a democratic constitutional theory.” [Vinx 2013.] Yet, there is a rational normative difference between monopoly of legality in the sense of credenda and the legitimate rule of law. Where the case of the rule of law greatly appeals to refute such objection as justifiable, we must scrutinize the notion of illegitimate power relations through the monopoly of legality by the authority. According to Schmitt’s *Politische Theologie*, the state has the monopoly of the ultimate decision. This can be one interpretation of the role of state and monopoly of legality. See Schmitt, *Political Theology*, (Massachusetts: MIT, 1985), p.13. Morton argues how the monopoly of legality is secured by limiting the authority of participants and their understanding of law, its nature, instructor, language and its concept, See Peter, *An Institutional Theory of Law: Keeping Law in Its Place*, (Oxford and NY: Oxford University Press, 1998), p.113

authority in rights and in the monopoly of legality is called the “Political”.<sup>771</sup> The credenda of power, stained with the strong concept of the “Political”, is a pragmatic concept of *de facto* power in authoritarian/totalitarian regimes, in the hands of their personalities such as philosopher-kings, *Caliphates*, or any commonly assumed natural/arbitrary ruler<sup>772</sup> that eliminates any sign of democratization, but that cannot destroy an indispensable process toward political consciousness. In this sense, the aim of authoritarian/totalitarian regimes, is to produce strong negative political consciousness through a credenda of power in a way that no adversary can possess, ideologically and legally, similar rights as them. They usually defined laws - either transcendent or natural - as an immutable precondition of legitimacy.<sup>773</sup> These authorities simultaneously try to justify acting vigorously against any assertions of equality, freedom, or political-civil rights relying on the concept of legal order.<sup>774</sup>

Moreover, the punishment inflicted on the rebels who infringe on the monopoly of legality is framed as an act of punishment conducted by the whole community, not the state authority alone. The rebels regarded as outlaws by the state. For instance, in Soviet Russia, Mussolini’s Italy, in Germany in the 1920s, and in the recent years, in Cuba, Sudan, Somalia, Yemen, North Korea, in Iraq before 2003, the Maldives before 2008,<sup>775</sup> Syria before 2011, Saudi Arabia, and a long list of other countries,<sup>776</sup> powers present an absolute image of the “Political” using a miranda and credenda of power along with their legal orders that manifest as semi-democracies. One consequence of the monopoly of legality in these hierarchical authoritarian/totalitarian power structures is that the miranda and credenda of power relentlessly developed by the state.

Some may argue that through the presence of the credenda of power, philosopher-kings, or whoever occupies the highest offices of authoritarian/totalitarian regimes, and who use the “Political”, may or may not appear as the trustees of the power structure and the “representative of basic function of association”.<sup>777</sup> Be that as it may, authoritarian/totalitarian powers using the “Political” to avoid increase of the politicization of political communities, as they do not want a situation in which their claim to power can be questioned. For them, the “Political” has one function, and that is to secure their authoritarian/totalitarian power through a legal basis, not to justify their claim to power. In other words, the “Political”, explicitly and implicitly, effects the justification of power, but more importantly, it helps authoritarian/totalitarian powers hold a means for using force on its people. Here, beauty and belief, (i.e. the credenda),

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<sup>771</sup> See Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.131. Not to be misunderstood with the concept of “the Political” that Carl Schmitt professed as the basis for the distinction between “friend and enemy”. See also Schmitt, *The Concept of the Political*, (Chicago: The University of Chicago Press, 2007), p.26. Cartledge tried to demonstrate a new definition of “the political” “as the public sphere or space of collective debate and decision-taking”. Cartledge, *Ancient Greek Political Thought in Practice*, (Cambridge: Cambridge University Press, 2009), p.12.

<sup>772</sup> Lambton, *State And Government in Medieval Islam*, (Oxford: Oxford University Press, 1981)p.166

<sup>773</sup> Thornhill, Legality, legitimacy and the form of political power: on the construction of a false antinomy, *Journal of Power*, 3:3, (2010), p. 294.

<sup>774</sup> For instance, Farabi regards the democratic regime, in which the state secure the freedom of individuals, as a non-virtuous city. See Farabi, *Political Regimes*.; See Fakhry, *Al-Farabi: Founder of Islamic Neoplatonism*, (Oxford: Oneworld Publication, 2002), p.110.

<sup>775</sup> A third Constitution was ratified on 7 August 2008, which separated the judiciary from the head of state.

<sup>776</sup> *The World Factbook 2013-14*. (Washington, DC: Central Intelligence Agency, 2014).

<sup>777</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.131.

mix with the foundations of legality. Thus, the notion of representative trustees is absorbed into legally monopolized authoritarian/totalitarian power relations.

In the medieval age, theocracies contested the “Political”, the exclusive legal rights of a regime, although they all held the same form of the miranda and credenda of power through symbolism and religious rituals. Nowadays, the traditional reliance on the miranda and credenda of power are present in these regimes, so we see little differences in the rivals of powers. A theocratic power structure and its monopoly of legality, justified by divine law or its interpretations, is as good and valid as any other theocratic authority.

Whatever the stronger position in political theory is, pragmatically, a legal order is strongest when it is accompanied by the belief of the folks, or by the miranda and credenda of power. This combination of the instruments of power helps authorities not only to justify the concept of legality, but also its own version of the monopoly of legality. Hence, the realistic position is that the “Political” only succeeds when the credenda of power maximizes the capacity of negative political consciousness and influences the exercise of the will.

No single category or list can name all of the elements of a credenda of power. Political authorities use a wide range of beliefs and mix them with a long series of virtues to produce a fusion of credenda of power and monopoly of legality. Not only authoritarian/totalitarian regimes, but all political structures use the credenda of power. The ancient Persian Empire, ancient Greece, medieval Islamic states, the Turkish Ottoman Empire, and in recent times, Japan, France, Germany, Luxemburg, China, Iran and the United States, all present a body of miranda and credenda of power.<sup>778</sup> If all of these power structures produced the optimum conditions for the monopoly of power, then they naturally make a huge impact on the credenda of power.

However, what differentiates the states above are two vital elements in the nature of their power: rational-normative principles and the political consciousness. These two elements are the cornerstones of justification and legitimacy of their power and thus, its instruments. Not long ago, the common belief was that each nation possessed its own quality, skill, blood, virtue or heritage that marked it as *the* chosen, superior nation. However, this was but a mere fanatic idea of religion, nationalism, fascism or jingoism, which advertised through the credenda of power.<sup>779</sup> These naïve assertions that individuals, groups or nations have prioritized rights and power began through the guise of miranda in the elaboration dialectic approach of the Greeks,<sup>780</sup> and continued through the medieval age, and has been received by the today’s authoritarian/totalitarian powers. These authorities may abuse the tradition, culture, language, education, but the concept of religion must remain as their strongest asset. To have religion as the justifier of power is to regard the superiority of a nation relies on the hierarchical relationship in which the ruler enjoys the monopoly of legality.

In the modern times, as in Farabi’s, theocracies and the other similar authoritarian/totalitarian power structures abuse religion, culture, and law excessively, to produce a system of power in which education is an instrument for civic destruction. The result is negative political consciousness. This tactic of using education works not only informally

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<sup>778</sup>Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.120, 132.

<sup>779</sup>Paul B. Rich, *Sociology, Anthropology and Race, in Race and Empire in British Politics*, ch.5 (Cambridge University Press, 1990); See J. A. Hobson, *The Psychology of Jingoism*, (London: Grand Richards, 1901), p.1

<sup>780</sup>See also Charles E. Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.132

and through ceremonies, but also through the schooling system, which directs the eyes and ears of the young generation to a specific line of beliefs. Authoritarian and totalitarian brand of education kills critical thinking, and hence the negative consciousness cannot help; the habit of not thinking anything is wrong gives the superficial appearance of everything is right, and thus raises a formidable outcry in defense of custom. But any tumult soon subsides. Time makes more converts than reason.

This form of credenda of power establishes a system or produces a process which emphasizes its legality. In modern authoritarian, totalitarian and semi-democratic regimes, the credenda of power and the monopoly of legality are blended. In the long run, they produce emotional justification for authoritarian/totalitarian powers. This mixture of the excessive use of credenda of power and the monopoly of legality, apparent in both medieval and modern theocratic regimes, such as Saudi Arabia, Tunisia and Egypt, affects every aspect of the lives of individuals to maximize negative political consciousness. In the former Soviet Union, and in today's China and North Korea, the second task after the exhaustive use of the miranda and credenda of power is to replace the religion itself. The belief that the credenda of power relies on divine law loses its credit as the monopoly of legality reaches its peak. In other words, the state might be so powerful that it does not need use the traditional form of credenda of power, in which the belief of folks is based on religious terms. Authoritarian/totalitarian regimes may not rely on the divine law permanently, and the same is true for theocracies.

The remarkable molting of a theocracy is when that its credenda of power transform to the miranda. This is one of the inevitable results of holding the monopoly of power. Rulers use a credenda of power to come to power in theocratic regimes, and yet they add to the strictness of their regime's monopoly over legality. These rulers can take this step beyond religious law, as they possess the "Political". This point introduces an important instrument of power: the concept of legality. In part five of this chapter, we will assess this instrument.

### **3.3. Concluding Remarks for this Part**

Let us end this inquiry with a conclusion and a question. The miranda and credenda of power are the irresistible cornerstones of political power. Farabi was the first political theorist that mapped the transition of miranda of power to credenda. He also argued hierarchical power structures made more harmonious societies, as such power structures are more stable and effective than the ones promoted by his ancient Greek predecessors.

As the violent abuse of power generally results from calling an authority into question,<sup>781</sup> authorities use two instruments of power besides coercion, admiration and belief for countering such challenges. The miranda and credenda of power aim to make an authority's power be wanted or even justified. Authorities use miranda and credenda of power because they know that decimating their country with fire and sword, and declaring war against the natural rights of all mankind, causes them to lose their justification in the eyes of every man to whom nature has given the power of feeling and reason.<sup>782</sup> "The cliché says that power always corrupts."<sup>783</sup> This is due to the abuse of the powerful instruments of miranda and credenda.

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<sup>781</sup> Paine, *Common sense*, (Philadelphia: printed. And sold by W. and T. Bradford,1776).

<sup>782</sup> Paine, *Common sense*, (Philadelphia: printed. And sold by W. and T. Bradford,1776).

<sup>783</sup> Caro, *The Years of Lyndon Johnson: The Passage of Power*. (New York: Alfred A. Knopf, 2012.), p.26.

It would be naïve to think that the miranda and credenda of power are merely destructive. In democratic states, they are used in the process of increasing politicization by helping to increase political consciousness. What is seldom said parallel to the cliché, is that power also reveals itself. This largely happens because power projects itself in its miranda and credenda.

However, it is irresistible for political power not to use its great capacity for legality. How does this transition of power occur, and what specifically changes through this transition and by which means? These questions can be approached by numerous perspectives and research questions, yet they will always lead to a range of answers based on the different forms of politicization in different times and places. More importantly, is to assess how this transition leads to changes in the identity and legitimacy of power.

Yet, miranda and credenda of power are not the only instruments used to justify authorities. Rational-normative principles can also provide an explanation to justify authorities.<sup>784</sup> However, the rational-normative principles may help the political consciousness of folks parallel to the miranda or credenda of power while it increases or degrades.

Power can be both a beauty and force. Whether it defends democratic values or authoritarian/totalitarian principles, observes human rights or possesses the monopoly of legality, it cannot merely legitimize itself.

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<sup>784</sup> Kupchan, Davidson, and Sucharov. *Power In Transition: the Peaceful Change of International Order*, (Tokyo: United Nations University Press, 2001), p.73.

## **Part Five: Polygon of Political Power: Legality and Force**

Among all the other Roman institutions, [the dictatorship] truly deserves to be considered and numbered among those which were the source of the greatness of such an empire, because without a similar system cities survive extraordinary circumstances only with difficulty. The usual institutions in republics are slow to move . . . and, since time is wasted in coming to an agreement, the remedies for republics are very dangerous when they must find one for a problem that cannot wait. Republics must therefore have among their laws a procedure . . . [that] reserve[s] to a small number of citizens the authority to deliberate on matters of urgent need without consulting anyone else, if they are in complete agreement. When a republic lacks such a procedure, it must necessarily come to ruin by obeying its laws or break them in order to avoid its own ruin. But in a republic, it is not good for anything to happen which requires governing by extraordinary measures.

Niccolò Machiavelli<sup>785</sup>

### **1.Outlaw Laws and Illegitimate Legality**

The concepts of ‘power’ and ‘rights’ have always been mingled with the concept of ‘law’, since these concepts have the capacity of participating in the creation of law which must be imagined as an order and justice different from the mere ideal, and lie in experience. What are the ‘authority’ and ‘sovereignty’ as distinct from the ‘rights’?<sup>786</sup> For a legal order, the miranda and credenda of power is an instrument of authorities<sup>787</sup> through which they utilize law. In fact, power depends not only on force but on the institutionalization of will and authority, hence the rights - of collective agents - to mobilize performances and define them as the binding obligation in the form of legality.<sup>788</sup>

As law is such a critical means for political power, it can be seen as either a blessing or a curse. The inquiry is not only whether the claim of legality achieves its aim, but also whether or not it is true or it is validated. While the answer to the former question can build a regime on the ruins of the bowers of paradise, the answer to the latter question builds a heavenly land. Thus, the relationship between the legality of power and the legitimacy thereof is one of the most important interdisciplinary themes in politics, jurisprudence, history, and philosophy.<sup>789</sup> A mere juristic or a political approach cannot provide a sufficient analysis for examination of legitimacy beyond the boundaries of law. Only with the interdisciplinary approach of political,

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<sup>785</sup> Machiavelli, *Discourses on Livy* 95, trans. Julia Conaway Bondanella & Peter Bondanella, (Oxford: Oxford University Press, 1997) (1531).

<sup>786</sup> Hart, *The Concept of Law*. Oxford: Oxford University Press, 2012[1961], p.63.

<sup>787</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.11.

<sup>788</sup> See Parsons, ‘The Distribution of Power in American Society.’ *World Politics*, 10 (01) (1957): 123-43.

<sup>789</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.1.

historical, philosophical, and jurisdictional analysis, or close to what Berman and also Dyzenhaus called “the integrative jurisprudence approach”<sup>790</sup>, one can suspend the legality of a regime or power of a sovereign or any “manifestation and materialization of power”<sup>791</sup> with the conviction of its illegitimacy.

Transitions of powers between authorities are often an effect of the cultural associations, social needs, racial groups, tradition, religion, and propaganda. While a new regime is building up its own system, a system of power relation in which its authority is preserved and its rule is accountable, it tries to build up a legal structure which obtains the immunity of a specific notion of ‘rights’, whether or not the demand for the constitutionality and legality would be occasionally surfaced. An authority under law is valuable because it is taken for granted that the rule of law is better than the arbitrary rule of a man in an *Obrigkeitsstaat*.<sup>792</sup>

This idea of the rule of law has been around ever since it was thought appropriate that all of the political sovereign’s acts should have a legal warrant, that is, be in accordance with the law. At least, throughout western conceptual history, accounts of power and right are related to the legality and legitimacy. Such mutual account pervasively shapes theory’s ability to address questions of law and legitimate power. The tradition of this conceptualization, in general, can be divided into two groups: while some intellectuals insist on the normative and metaphysical primacy of law to argue the relation between power and rights and hence power’s legitimacy, other intellectuals argued on the factual relation between power and right, based the legitimacy of power on the positive and function aspects. In later medieval Europe, this polarization continued to define legitimacy of legal power either based on the invariable external principle of rights, or on the contrary, legitimacy of power based on the autonomous sphere of agency and their positive functions. This caused that the first group regards law as immutable and precondition of legitimacy<sup>793</sup> while the latter group regards it as the contingent which needs to assess legitimacy without external juridical foundations.<sup>794</sup> This polarization can be seen more clearly after the Enlightenment period – in fact after the later seventeenth and eighteenth century - through the work of, on the one hand, John Lock and Gottfried Wilhelm Leibniz, who inclined to the metaphysical analysis, and on the other hand, Thomas Hobbes and Samuel von Pufendorf, who inclined to the positive analysis. Despite this anatomy and polarization one thing is clear: Through Europe, legitimate power is power that is bound to observe laws that people, in their prior quality as human subjects, recognize as their own absolute laws, containing their own absolute rights.<sup>795</sup> It was throughout the twentieth century, that the tenacious theories of legality and legitimacy of power are formulated. Carl Schmitt,

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<sup>790</sup> Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, (Cambridge, MA: Harvard University Press, 1983).; Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997).

<sup>791</sup> See Arendt, “Communicative Power.” in *Power*, edited by Steven Lukes, (New York: New York University Press, 1986), pp.59-93.

<sup>792</sup> Dyzenhaus, David. “Rand’s Legal Republicanism.” *McGill Law Journal* 55, no. 3 (2010): 491.; Rösener, *Staat und Krieg. Vom Mittelalter bis zur Moderne*, (Göttingen: Vandenhoeck & Ruprecht, 2000), p.206,

<sup>793</sup> For this view see Giles of Rome, *On ecclesiastical power*, (Woodbridge: Boydell Press, 1986). And Viterbo, *On Christian Government*, (Woodbridge: Boydell Press, 1995).

<sup>794</sup> For this view see Ockham, *Opera politica*, (Manchester: Manchester University Press, 1974). And Marsilius of Padua, *Defensor Pacis* [Defender of the Peace], (New York: Columbia University Press, 1956), p.37.

<sup>795</sup> See Rousseau, *Du Contrat Social*. (Paris: Garnier-Flammarion 1966).

for instance, formulates his theory for the sake of power and against the right of the citizens, argued that political power stands exceptionally above the law and formal law cannot produce political legitimacy: he claimed that legitimacy depends on the exercise of a substantial, pre-legal will.<sup>796</sup> Hans Kelsen, on the contrary, argued that power is necessarily exercised in a form constructed by legal norms.<sup>797</sup>

Above this polarization between law and power, we can see through the modern period, that some thinkers like Hannah Arendt proposed a theory of legitimate political power – that is, of communicative power – that aimed to define power as a product of the common resource in society, arising from, and is formed as legitimate by, the mutual will and actions of free social agents.<sup>798</sup> As the consequence, such power is also a legislative functions of human reason, which exist prior to, and are invariably activated in, the particular formation of legitimate public order. Furthermore, Talcott Parsons, as a theorist of social functionalism, resisted both formal/normative and purely positive theories of power by arguing that power is a generalized symbolic medium of exchange, which in complexly differentiated societies cannot be reduced to any ‘intrinsic instrumentality.’<sup>799</sup>

From this history of legality and legitimacy, it is obvious that dichotomy of the norm/ fact legitimacy of legality is in fact a composition, when the claim to power emerges from the ‘rights’ and calls for law. In this sense, both the fact and actual mode of power and the social processes that form political power reflect a legal/normative composition of legitimate power. This composition contains the ‘moral significance’ of rights:<sup>800</sup> having the civil/political rights depends on the possibility of claiming them,<sup>801</sup> hence making the laws based on the political rights. In this sense, the political rights imply the capacity of the people of taking part in government in the formation of the ‘collective will’<sup>802</sup> of the state and its legal order of which the constitutive of legitimacy embodied in rights. It can be referred to as the ‘legislation’ in the most general form of the term, by which a normative analysis of democracy would be distinguished from other forms of the power relations.

## 1.1. Law among Outlaws

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<sup>796</sup> Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* [The Historical/Intellectual Situation of Contemporary Parliamentarianism], (Berlin, 1985, first pub. 1926), p.45.

<sup>797</sup> See Kelsen, *Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht* [The sociological and the legal concept of state. Inquiry into the relation between state and law]. (Tübingen: J.C.B. Mohr, 1922), p.93.

<sup>798</sup> Arendt, *On Violence*, [London: Penguin, 1970], p.44.

<sup>799</sup> Parsons, On the Concept of Political Power. *Proceedings of the American Philosophical Society*, 107 (3), (1963), p.250.

<sup>800</sup> Individual rights, such as right to life, liberty and pursuit of happiness, and political rights such as right to power in a power structure, right to give consent to an authority or to resist it. See UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 23 August 2015].; Locke, *Two Treatises of Government*, (Cambridge: Cambridge University Press, 1988) s.6, p.270-271.

<sup>801</sup> See Feinburg, “The Nature and Value of Rights”, *Rights, Justice, and the Bounds of Liberty*, (Princeton: Princeton University Press, 1980): 159-184, p. 151.; See also Darwall, Stephen L. *Morality, Authority, and Law: Essays in Second-Personal Ethics*, (Oxford: Oxford University Press, 2013), p.114.

<sup>802</sup> See Arendt, *On Violence*, [London: Penguin, 1970].

A general concept of legal system alone cannot justify the rule of law as the legitimate structure in its power relation. Some authorities use the law to single out an individual for domination, and some others use it for their own acrid material ends, yet they make sure, even by the law itself, that their power is beyond the law.<sup>803</sup> In other words, they ensure that if the executive, legislature, and the administration remained within the confines of the authority, they are delegated by the authority to have the possibility to act *ultra vires* – or beyond the powers.

An established legal system is an instrument for - a new - political power to justify its power relation. In this legal system, there may be the various rules and laws which provide a general understanding not only regarding the purpose and method of office holders and legislators, but also the nature thereof. The type of civic education, taxation, publicity, individual liberty, economic regulation, armed force, and civic liberty are among a long list of areas which an authority uses disciplines, sanctions, and laws.

No community can absolutely proscribe force which leads to the doctrine of absolute Anarchism. Moreover, authorities cannot rely merely on force.<sup>804</sup> They also cannot rely merely on the miranda and credenda of power to obtain their immunity and to harmonize society under their rules. No authoritarian/totalitarian regime can be wholly tyrannical and effective in power relation,<sup>805</sup> however many may desire to be so, without a set of rules and laws. Yet, law and force are neither identical nor absolutely at variance with one another.<sup>806</sup> Thus we have to ask whether the acts of the personalized authorities, authorized by the legal order, utilize the law to apply the coercive measure (sanction) and impose force - or what amount thereof - would be legitimate as well as legal.

In the transition of power, when a certain authoritarian/totalitarian or *quasi* authoritarian/totalitarian group seize power - hybrid regimes -, beyond the miranda and credenda of power for justification, they are hardly and desperately relying on their new legal order. They cannot establish a despotic power structure lawlessly. If they want to do that, they will be trapped in their own logic of Anarchism. An authoritarian/totalitarian regime will establish the legal system that repudiates the previous regimes – whether through compliance with a prior legal order has decisively prevailed or not -<sup>807</sup> and utterly promotes their justification: ‘law among outlaws’.<sup>808</sup> This helps the authoritarian/totalitarian regimes to overcome the problem of ‘authoritarian/totalitarian power-control.’<sup>809</sup> Hitler, Mussolini, Lenin, Saddam Hussein, and Kim Il Sung have worked through different forms of republic, socialist, fascist, communist, theocratic, and democratic power structures to seize and exercise power. This gives us a picture of the complexity of ‘outlaw laws’ power relation. “Law among outlaws” is the expression which is borrowed from *Political Power* where professor Charles

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<sup>803</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.94.

<sup>804</sup> Arendt, “Communicative Power.” in *Power*, edited by Steven Lukes, (New York: New York University Press, 1986), p.71.

<sup>805</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.21.

<sup>806</sup> Kelsen, *General Theory of Law and State*, (Cambridge: Harvard University Press, 1949), p.21.

<sup>807</sup> Thornhill, Legality, legitimacy and the form of political power: on the construction of a false antinomy, *Journal of Power*, 3:3, (2010), p. 297.

<sup>808</sup> See Merriam, *Political Power*, (New York: Collier Books, 1934),

<sup>809</sup> See this work, section 7.3.3. of part one. See also Gandhi, *Political Institutions under Dictatorship*, (New York: Cambridge University Press, 2008).; Gandhi and Przeworski, "Authoritarian Institutions and the Survival of Autocrats". *Comparative Political Studies* 40, (2007): pp.1279-1301.

E. Merriam<sup>810</sup> used it to illustrate “the survival of the political power situation when it has been formally repudiated”.<sup>811</sup> The term “outlaw laws”<sup>812</sup> is used to show the essence of the legal system, its brutality and illegitimacy for its subject, which is simultaneously irrelevant for the authority, in the authoritarian/totalitarian regimes.

The miranda and credenda of power produce a high sense of obedience which emancipate the authority and office holders from all conventions, rules, and laws. The office holders use the miranda and credenda of power to convince the people without force. However, their dictated concept of legality - the rules that have been written with the strokes of their pens - plunder the definition of ownership and possession, threatened the lives of the people, and imprisoned them for various reasons. The way that authoritarian power structures regulate their interaction with other institutions and people is hierarchical. They have always relied on the authority of their own laws where most likely merit and morality have no place, or if they do play a role it is merely as a deceptive element in their process of legislation. The law, in such states, is too powerful that it ignores any dimension in an interpretation of justice while justice is defined that they define legality. In this sense, the concept of legal order and rule of law merge together to create a deceptive concept of the legitimate law.<sup>813</sup>

Law is for the underdogs, the middle class, the women, the labor, the minorities, while at the basis of the authoritarian regimes there may be found in many instances the idea of other contracts and settlements, other values and other aims. Then, out of legality comes a form of illegality and out of morality a type of immorality.

Various essential qualities of legal order survive in the legal system of authoritarian/totalitarian regimes - laws among the outlaws. In every system of government, there is an implicit recognition of many of the basic characteristics of governmental order and laws. Thus for the outlaws and authoritarian/totalitarian regimes, the challenge is not that the foundation of the legal and political order exists, but it is the power in possession of privileges; in being the fittest for the office;<sup>814</sup> in decision-making out of the application of the order in some special situation or ‘state of emergency’;<sup>815</sup> in ‘the political’. The emphasis of authoritarian regimes on their laws is not due to the majesty of the law nor for the purpose of establishing a justice, nor to achieve a functional balance between the political community and order,<sup>816</sup> but to justify their actions in a way that obtains their immunity. The legal positivist – correctly - observe that the values and laws may be separated in a power structure,<sup>817</sup> yet if the law is corrupted and still valid, the weakness is the failure in legitimacy of a system in which the law is set, and “from each it derives its justification” in the social and behavioral-political sense of the term.<sup>818</sup>

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<sup>810</sup> Chicago School

<sup>811</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.94.

<sup>812</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), ch.3.

<sup>813</sup> See also Shotwell, “Democracy and Political Morality,” in *Political Science Quarterly*, (1921): 36:1.

<sup>814</sup> See Aristotle justification of power in “Part Two” of this work.

<sup>815</sup> Merriam, Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.101, See also Hobbes, *Leviathan.*; Schmitt, *The Concept of Political*, (Chicago: University of Chicago, 1996).

<sup>816</sup> See also Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.104

<sup>817</sup> Hart, *The Concept of Law*. Oxford: Oxford University Press, 2012[1961]), p.7-11.

<sup>818</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.104-105

If the miranda and credenda of power fail in hanging upon the loyalty of citizens, law will not be having room for the competing individuals and organization to resist. Surely, the constitution of authoritarian/totalitarian regimes, and the power relations which are affected by such constitutions, have more to do with the statutes of legality than other criteria for the justification and the legitimacy of power. Generally, the line between the legality and justification or legitimacy of power, especially in an age of swiftly changing economic, ritual and traditional norms, is more sharply ignored in the authoritarian/totalitarian power structures. The authoritarian/totalitarian regimes may indeed form a legal order that can manipulate all aspects of individual lives to avoid the unwelcome disasters for them. In such a legal system, the immorality, which is the great crime of the church; ignorance of the profit, which is the great crime of business; plundering the toil, which is the great crime of labor; or disloyalty, which is the great crime of the miranda and credenda of power, can be as important as breaking the law, which is the great crime of citizenship. Yet, in such legal system, the rule of law is irrelevant for the regime, as the notion of fraud, disloyalty, crime and illegal differs with regards to their actions and the acts of citizens. This is related to the notion of rights, where the rule of authoritarian/totalitarian law mostly results in the deprivation of individual rights or opprobrium of a social groups, such as a gender or a minority group - the group that is not in the circle of authority.

Interests in ‘corporation’ at one time or another have developed unions and communities against the monopoly of power. This monopoly of power could have had an internal source like the Federals of United States before their unification, or could have had an external source, which mostly have been recognized as foes, like the Ottoman Empire. The former caused the formation of the United State of America and the latter caused the formation of the European Union. Corporation is one form of mutual recognition of rights demands upon the moral obligation to the common interests. It is also the sign of our time that social groups, organizations, and countries gather together to shape a cooperative organization against the monopoly of legality by a specific power group, while simultaneously being free to enjoy their rights. Yet, the authoritarian/totalitarian groups, institutions, or regimes harshly avoid such cooperation with those who call for freedom and mutual recognition of rights, and build their own cooperative organization of legality. The creation of Western Union Defence Organization (WUDO in 1948) which it later turned to the Western European Union (WEU in 1954),<sup>819</sup> and the North Atlantic Treaty Organization (NATO in April 1949)<sup>820</sup> were in ‘corporation’ with common interests and values which stand against common foes. The Warsaw Pact (1955), on the other hand, elaborated and implemented a legal treaty to corroborate the monopoly of power.

With that said, the phenomenon of ‘outlaw laws’ of an authority within the scheme of legality of power is not merely a fixed form of legal system, but is flexible and changeable, or has no boundaries for the authorities. This is a critical means for ‘the political’. The ‘outlaws law’ seems like an inequity for a political power, which is unpardonable, yet in the shadow of legality, they put *indicia* of the legitimacy. This gives the possibility for an

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<sup>819</sup> European Union, "The history of the European Union - 1948", Last update: 19/10/2015: [https://www.europa.eu/about-eu/eu-history/1945-1959/1948/index\\_en.htm](https://www.europa.eu/about-eu/eu-history/1945-1959/1948/index_en.htm), [accessed: 25.10.2015].

<sup>820</sup> the North Atlantic Treaty Organization, "A short history of NATO", [www.nato.int/history/nato-history.html](http://www.nato.int/history/nato-history.html) [accessed: 25.10.2015]

authoritarian/totalitarian legal system to utilize with the miranda and credenda of power and provide a full function manipulative power in its utmost potentiality. It will be seen that the political consciousness is the critical element for emancipation from such a deceptive concept of legitimacy of a legality system. The transition of power from the authoritarian regime towards democracy, from which history is written,<sup>821</sup> has been always based on the moral obligation of rights to revise the distribution of power based on the mutual recognition of rights and power - political consciousness. It has been agreed that democracy is meant to be the abolition of all forms of political absolutism, and all forms of political privilege, and a setup for some sort of government that can merge the notion of political duty and political right.<sup>822</sup>

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<sup>821</sup> See also Sharp, *From Dictatorship to Democracy*, ( Boston: The Albert Einstein Institution, 2010).

<sup>822</sup> Merriam, *American Political Ideas*, (New York: The Macmillan Company, 1920), p.5

## 2. Instrument of Power: Legal Adherence

Any idea of law characterizes the definition of a legal order within a power structure in which (presumably) all different social groups, organizations and individuals should abide by the law. Law and society are assumed to be a single identity of a state, where the lawless society cannot exist.

In all regimes, in a democracy as much as in an absolute monarchy, the law-abiding organizations, law-abiding citizens, and law-abiding groups not only provisionally comply the need of the system to maintain its harmony, but also comply its need to obtain its immunity.<sup>823</sup>

However, two points are of special importance in order to hint the frontiers of criticism on the justification of authorities. (i) The miranda and credenda of power characterize an authority whose rules are bound by the habit of following its beauty and obedience of its force. In this way, the first point concerns the ‘habit of obedience’<sup>824</sup> that is caused by the miranda and credenda of power. This habit is the first and critical step on the part of those to whom the law which an authority introduces in a legal system is applied. Authoritarian/totalitarian regimes use these habits, mix them with the beauty and force, to form a systematic and stronger body of instruments to justify its authority: the legal system. Indeed, in every system of government, there is a legal system which introduces a new element for its justification. Yet, merely relying on a legal system, which at some point mixed by the miranda and credenda of power, to justify the power relation brings a great challenge after the miranda and credenda have perished. In authoritarian/totalitarian regimes, after the miranda and credenda of power have perished, nothing remains under the authoritarian legal system other than violence, hypocrisy, corruption and dissolution. These are all limitations that a legal system must face in justifying authority.

(ii) The second point concerns the relationship between this mixture of the miranda and credenda of power with the legal system and authority in a regime. Such authoritarian regimes find themselves in an odd position with ‘the rule of law’ where the law and moral significance, which implies the political consciousness, are moving parallel in a legal system. Thus, in an absolute authoritarian regime, rulers try to use the law in a way that they shape the legal system as an instrument to ensure that their authoritative sovereignty is binding for citizens. They ensure that people always obey them by the laws that they set,<sup>825</sup> yet they ensure too that their position legally be above the law. In such a legal system, authority or office holders create laws independent to their subject and their inalienable rights<sup>826</sup>, loquaciously reasoning with a long list of teleological and theological guises. The law is not regarded as the systematic control to establish justice and preventing crime of any kind, even it pretends to be, but as an instrument to justify the unlimited and illimitable authority of powers.<sup>827</sup> Authoritarian/totalitarian regimes rely on the legal system in which the law imposes the sovereignty of an authority above

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<sup>823</sup> Hart, *The Concept of Law*. Oxford: Oxford University Press, 2012[1961], p.51.

<sup>824</sup> Hart, *The Concept of Law*. Oxford: Oxford University Press, 2012[1961], p.50.

<sup>825</sup> Hobbes, *Leviathan*, chapter 26, (London: 1651; Cambridge: Cambridge University Press, 2007) p.162-3

<sup>826</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 23 August 2015]; Locke, *Two Treatises of Government*, (Cambridge: Cambridge University Press, 1988) s.6.

<sup>827</sup> Hart, *The Concept of Law*. Oxford: Oxford University Press, 2012[1961], p.51.

the rule of law. Such a legal system debases the notion of peoples' rights through the immoral use of law. While people cannot afford the disadvantage of such power relation, authoritarians escape from the boundaries of laws and mock any notion of respect, appreciation of human rights, and obedience to moral standards and rule of law, in a capricious manner due to their moral responsibility and the tied hands of their subjects. This latent character can be found beneath the various constitutional states of our time.

### 3. Limitation of Legal System for Legitimacy

#### 3.1 Perish of Miranda and Credenda of Power: Violence and Continuity of Validity

There are some repulsive characteristics of political power by which the legal system faces a great challenge to justify an authority relying on its own force and coercion. The shameful, but nonetheless, real side of some power structures can be observed in authoritarian/totalitarian power relations, which appear after the erosion of the typical miranda and credenda. These characteristics may be manifested in means-ends borders, moral principles borders, or in rational-legal principles borders, such as economic crisis, violence, hypocrisy, corruption, and dissolution. These among a long list of other elements are not only the antagonists of political power but also debilitate the effects of a legal system on the justification for an authority, hence deficiency in the legitimacy of power. These are the limitations of a legal system in an authoritarian/totalitarian regime that challenge the justification of an authority, driving people away from office holders, weakening the miranda and credenda, and putting an *incidia* of illegitimacy - 'usurpation' of power.<sup>828</sup> The outlaw laws are the obverse side of the miranda and credenda of power. The penetrating violence, invading with an "ugly stare of inquisitiveness",<sup>829</sup> inflexibility of acrid laws, stench of injustice, "silly adherence to the ways of past,"<sup>830</sup> and the tradition of an unquestionable theological guise for "the disgusting importance of authority"<sup>831</sup> are the reasons behind the lifelong rebellion of men against their legal but illegitimate state's authorities.

In the erosion of the miranda and credenda of authoritarian powers, their legal system appears as the instrument of surveillance and conviction to control individuals which leave no room for escape. People emigrate away from their homes to find peace in other places, yet for those who cannot, whichever way they turn, they find the legal threat of their authoritarian/totalitarian regime with its army, secret officials, employees, and menials.

Legality is the backbone of a power structure and a strong instrument for justification of its legitimacy. For a healthy political power, it is important to present a list of limitation of the concept of legality. These limitations have arisen from the lack of legitimacy of authorities and inspired the long historical challenges for political powers. These challenges may have called for extreme spectrums which, on the one hand advocate the use of absolute authority of the states where the *Leviathan* and Schmitt's *the Concept of the Political* stand, and on the other hand, the anarchist such as Godwin,<sup>832</sup> or call for delicate protests of the libertarian which introduce a unprecedented progressive level in the historical aspect of human experience. Recognition of such limitation have, at one time or another, raised the voices of the people, resulting in a long list of transitions in power, and the voices of theorists, resulting in in-depth scholarly works. The Iranian constitutional revision of 1906 and Moroccan constitutional

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<sup>828</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.116-117.

<sup>829</sup> Tagore, Rabindranath. *Nationalism*. (New York: The Macmillan Company, 1917), p.38.

<sup>830</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.136.

<sup>831</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.136.

<sup>832</sup> See Godwin, *Enquiry Concerning Political Justice*, (Harmondsworth: Penguin, 1976).

revision of 2011, or the voices of Gandhi and Martin Luther King, serve as examples of such transitions which develop along with the political consciousness of citizens. It might be said that most of the movements and transitions of powers have been inspired by invasion of rights of the individual's, family, church, labor, gender, and race.

### 3.1.1 Economic Crisis

Whether the citizens in each regime are equal or not in any way, in the legitimate democratic regimes, it has been taken for granted that the citizens are respected as equals, which means that an authority does not occupy any realm of public and private good, wealth, prestige and authority; an authority does not discriminate against individuals with regards to their civil and political rights for any reason. This trend is the other way around in the authoritarian/totalitarian regimes, in which state occupies all of these elements. Policy-making in politics, international relations, and economics are directly affected by the office holders in favor of their maximum benefit.

The economic prosperity of people puts the power of the authoritarian/totalitarian regimes in danger. However, the economic crisis - it has been known as the crisis since it is beyond people's endurance - jeopardizes the trust that authoritarian power sells along with the miranda and credenda of power, and their institutionalized responsibility.<sup>833</sup>

An economic crisis is the nightmare of any political power. When the economic crisis bursts under the pressure of an authoritarian power, the problem of food, shelter, basic needs and commodity, result in various forms of dissatisfaction of people from the once admired and beloved authority. The economic crisis effects all aspects of power - economic, moral and political. An authority is the final victim of the broken back of people and their disaffection. In this way, when it comes to economic, authoritarian power, just like other systems, they want to make sure that the efficient quantitative product and services protect the individuals from the dangers of death, yet they also ensure that people cannot pursue their happiness in such a way that they will be free from a routine of hard labor work and to start to think. A legal system may help in this matter, but it cannot control the psychological satisfaction or prevent disaffection of laborers in their social-economical entitlements.

### 3.1.2 Aggression: Violence

Some theorists have so confounded 'society with government', and authority with power as to leave little or no distinction between them.<sup>834</sup> Differences between them appear more clearly when we consider the two sides of the legitimacy spectrum: authoritarian/totalitarian power and legitimate power. Authority *qua* mere domination – power over – is produced by force and wickedness, and legitimate power by our rational autonomous will. The former may promote our happiness but 'negatively' by uniting our affection – namely fear -, the latter 'positively' by uniting our reason. The one creates distinction, the other encourages intercourse. Maybe

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<sup>833</sup> See "Dissolution of Power and Rights", p.30; "Polygon of Political Power: Beauty and Force", p.15-18.

<sup>834</sup> Paine, *Common sense*, (Philadelphia: printed. And sold by W. and T. Bradford,1776).; See Paine, and Philip Sheldon Foner. *The Complete Writings of Thomas Paine*. (New York: Citadel, 1945), P.4.

there is no obvious and ultimate common definition of authority and power of a state,<sup>835</sup> other than a definition of monopoly of justified or “legitimate use of physical force” or non-physical force<sup>836</sup> which a legal system implements.<sup>837</sup> In fact, the concept of authority and power shape one side of the idea of state, while implicitly emphasizing the individuals who are on the other side.<sup>838</sup>

In general, every authority constantly tries to make the state and their legal system as justified as possible. They try to make the legal system, if it is not admirable, validated. Yet, the monopoly of force is not only irresistible for authoritarian/totalitarian regimes, but also in a going legal system it is a symbol of their sovereignty. The legitimacy of force and coercion is not the trait of the state, but it is a symbol of its sovereignty and its independence.<sup>839</sup>

The hidden concept of authority makes the monopoly of force the most dangerous and controversial subject of debate. A legal system makes the most out of the force, and the love of its exercise. Where ‘force’ is a vital instrument of an authority, authoritarian/totalitarian regimes basically cannot bind this instrument to any “idealistic aspiration of man”<sup>840</sup>, but rather to a self-justified legal system of the authority. The legality of brutal unlimited raw force cannot cover the sadistic quality of an authority, or in any means legitimize the violence. The dark moments of history are filled with the description of legal instruments as mere pivots whirling oppressive power. If a legal force justifies the humiliation of majorities and minorities, official self-defined libel, isolation, hanging and threats their citizens – utilizes political fear -, it is tuned into an illegitimate device that from time to time is employed in the service of the state.<sup>841</sup> Moreover, the legal system may also move in the hands of military or other legally authorized groups, as the tool to make a military dictatorship or ‘state within a state’. Hitler’s ‘Private Army’<sup>842</sup>, the Muslim Brotherhood in Egypt, Pakistan, and Tunisia,<sup>843</sup> and the ‘Basij’<sup>844</sup> in Iran are the examples of such limitations of legality in its circle of illegitimacy.

In both cases, a legal system cannot provide a sufficient ground to legitimize the structural violence which emerged within the authoritative power structure, it may only justify it - as it is means no other solution to choose - for the particular society in a particular time due to the political, economic, racial, religious, or cultural crisis. Yet, any utilized violence is like the recoil of a rifle, it hurts and damages the both sides. Before the discussion proceeds to the next section, it may be required to explain what legitimate and illegitimate force is.

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<sup>835</sup> Weber define “state” what has been defined as ‘authority’.

<sup>836</sup> relying on Arendt argument on power and right against use of violent instruments. see, Arendt, “Communicative Power.” in *Power*, edited by Steven Lukes, (New York: New York University Press, 1986), p.71

<sup>837</sup> Weber, “Politics as a Vocation”, (1918).

<sup>838</sup> Treitschke, *Politics*, (New York, The Macmillan Company, 1916), p.3-4.

<sup>839</sup> Treitschke, *Politics*, (New York, The Macmillan Company, 1916), p.26.

<sup>840</sup> Treitschke, *Politics*, (New York, The Macmillan Company, 1916), p.24.

<sup>841</sup> Shokri, "Legitimacy and Theory of Political Consciousness." *Journal of Political Sciences & Public Affairs*, 04 (01) (2016).

<sup>842</sup> SA (Sturmabteilung) and then the SS (Schutzstaffel der NSDAP). See Hein, *Elite für Volk und Führer? Die Allgemeine SS und ihre Mitglieder 1925–1945* (Munich: Oldenbourg Verlag, 2012).; McDonoug, *Hitler and the Rise of the Nazi Party*, New York: Routledge, [2003] 2014), p.42.

<sup>843</sup> See Dalacoura, *Islamist Terrorism and Democracy in the Middle East*, (New York: Cambridge University Press, 2011), p.133.

<sup>844</sup> Golkar, *Captive Society: The Basij Militia and Social Control in Iran*, (Washington D.C.: Woodrow Wilson Center Press, 2015).

### 3.1.2.1 Legitimate Coercion: The Case of Legality and The Fallacy of Legitimization

Coercion or aggression is the capacity of political power to dictate its maximum will. Yet, the use of such an instrument highly depends on the form of political structure and a legal system. The comparison between the legitimacy and illegitimacy of coercion or political aggression raises the question about its origins. On the one hand, frustration, disappointment or avarice may explain political aggression, however, the rule of law, e.g. incentives for improvements using rational-normative principles,<sup>845</sup> can also help to explain the source of political aggression.<sup>846</sup> A concrete behavioral analysis of acrid greed for the comfort of lecherous power holders shows that the grounds for an “illegitimate act of aggression (ILAA),”<sup>847</sup> such as the violation of human rights, diverges from a legitimate act of aggression which is rooted in a rational-normative one.<sup>848</sup> If an ILAA continues, it creates oppression.<sup>849</sup>

Rational-normative principles can result in disappointment, which is thus closely linked to the rule of law. So from time to time rational disappointment, and law, which is here assumed to be rational, are justified origins of acts of aggression or coercion.<sup>850</sup> In other words, only rational-normative principles can sufficiently justify and legitimize, not only the existence and the implementation of law, but also legitimize political acts.

However, from time to time we face some legal systems which basically do not embrace the rational-normative principles as the ground of legal system, but their own positive rules disparaged from all moral values and moral significances. Take the faceless and right-less women who are suffering from a strict legal ban on their appearance, the law on the *hijab*, into account. Let us consider this case from the perspective of the state’s power, not from the point of view of the subjects’ beliefs. We may then ask, whether this law is legitimate or if it is a form of violation; is it respectful or disrespectful?.

In a legal system, such laws allow the state to maximize its capacity to justify coercion in gender power relations. Here, there is a constant violation of political power resulting in the oppression of the governed. Down to our present day, there have been various legal systems in which the ratified laws, with the inclination towards acts of violation of human rights, have increased the capacity of oppressive powers.

The difference between a justified and an unjustified act of coercion - or aggression – is genuine. While the former forced by the law and the legal system which is rooted in the

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<sup>845</sup> United Nation, “Human Rights”, Office of the High Commissioner for Human Rights, “*Universal Declaration of Human Rights*”, <http://www.ohchr.org/EN/UDHR/Documents/60UDHR/bookleten.pdf>

<sup>846</sup> Goldenberg, et al., “Gender-typical responses to sexual and emotional infidelity as a function of mortality salience induced self-esteem striving.” *Personality and Social Psychology Bulletin*, 29, 1585–1595, (2003).; Pyszczynski, et al., “Righteous violence: killing for God, country, freedom and justice.” *Behavioral Sciences of Terrorism and Political Aggression*, 1:1,12 -39, (2009), p.30.

<sup>847</sup> Shokri, "Legitimacy and Theory of Political Consciousness." *Journal of Political Sciences & Public Affairs*, 04 (01) (2016), p.2.

<sup>848</sup> Pizzigati, *Greed and Good: Understanding and Overcoming the Inequality That Limits Our Lives*, (New York: Rowman & Littlefield Publishers, 2004).

<sup>849</sup> Shokri, "Legitimacy and Theory of Political Consciousness." *Journal of Political Sciences & Public Affairs*, 04 (01) (2016), p.2. Harvey, *Civilized Oppression*, (England: Rowman and Littlefield Publisher, Inc.), p.2.

<sup>850</sup> Shokri, "Legitimacy and Theory of Political Consciousness." *Journal of Political Sciences & Public Affairs*, 04 (01) (2016), p.3.

rational-normative principles and the empowerment, the latter is rooted in racial, religious, tribal and ethnic prejudices. A legal system may more or less implement laws that result in the violation of human rights in a way that it may be assumed that such legality is the one and the only coercive instrument for an authority to perceive, regulate, and to enact.<sup>851</sup> However, legitimacy may only be applied on the laws which are relying on ‘rational-normative principles’. Violation of human rights, violation of civil and political rights, and other similar political acts which are devoid of logic and moral significances, are among a long list of coercive acts of a state that may be justified legally. However, these coerciveness is independent of the concept of legitimacy.<sup>852</sup>

In summary, the violation of human rights, whether implemented by law or incidental decisions of an authority, is on a long list of illegitimate acts of aggressions.<sup>853</sup> Yet, legitimate coercion can be based on rational-normative principles, arbitrary rule of man or rule of law. It would be naive, if the rule of law was considered to be legitimate, without considering the context of law. Since the context of law is separable from its notion, so is its legitimacy.

Even so, centralized oppressive powers and *quasi* powers, authoritarian/totalitarian regimes, do not comprehend that a violation-oriented ideology cannot, in any sense, legitimize their institutions through legalization. As a backward trend, a corrupt oppressive legal system produces a silent disaffection which literally disarms the rule of law. Disaffection for a society is like a pitcher broken into a thousand pieces. The oppressive legal system is a glue which can hold the pieces together, but the pitcher will never be the same, and does not perform the same function as it supposed to. The claim for legitimization through the oppressive justification of a legal system is pure oppression. It is not, in any sense, a means to justify state’s legitimacy, but a pure oppressive demand, - ‘the fallacy of legitimization’ of illegitimate political power - a demand from the outlaws. It appears in a different form and may be regarded not as a vital form of justification, but also as the most vulnerable point for critiques.

Oppressive political regimes have always ignored political consciousness, and in the hard times of crisis they may represent their legal system as a justified instrument to maximize repressing people and to reject the recognition of ‘others’.<sup>854</sup> Yet, authoritarian regimes may or may not realize that legitimization of their legal labels are pragmatically impossible. What an irony that authoritarian political powers are illegitimate due to the fallacy of legitimization itself. Fallacy of legitimization is an act of violation against the rights of people who are directly subjected to that political order, and it is political violation to the rest of the world, to those whose lives are subjected to the world order.<sup>855</sup>

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<sup>851</sup> Breen, *Understanding evil: an interdisciplinary approach*, (Amsterdam: Rodopi, 2003), p.168.; See also Felson, “Patterns Of Aggressive Social Interaction.” *Social Psychology of Aggression*, (1984): 107–126.

<sup>852</sup> In *Legitimacy: the Treasure of Politics* (2011), Kurtén and Hertzberg argues that legitimacy is “something primarily dependent, not upon the nature of governments, politicians or court judges, but upon the people subject to the actions of such authorities”.

<sup>853</sup> Shokri, "Legitimacy and Theory of Political Consciousness." *Journal of Political Sciences & Public Affairs*, 04 (01) (2016).

<sup>854</sup> Butler, *The Idea of a Right: A treatise on the concept of natural rights: The History and Philosophy of Rights, as Embodied in Our Culture and Laws*, (Waldwick, NJ: NewMedia Pub., (2001), p.135.

<sup>855</sup> Huntington, *The clash of civilizations and the remaking of world order*, (New York: Simon & Schuster, 1996), p.156, 164.

### 3.1.3 Hypocrisy

The road to power is paved with different materials. Hypocrisy, conspiracy and deception may be among some of the elements that help an authority in its “functional justification”<sup>856</sup>. In this case, the task would be to concentrate on power, its essence and its behaviour. One could ask: is the state being political or is it the word of religious man and businessman who runs it?; is the state a market for a better bargains or is it the foundation of common values?; is the state consisting of what it declares in difficult times, does it change its skin and identity?<sup>857</sup>

It may be assumed that in the ‘state of emergency’, in the dark days of a community, hypocrisy, and deception are the foundations of a progressive and effective policy of an authority. It may also be assumed that in the world of ‘broken promises’, hypocrisy and deceit are the main and inevitable instruments of a politician. Yet, what is the origin of this form of power and its utilized instrument? The long list of political figures in the days of turning points, such as, Stalins Mussolini, Napoleon, Hitler, or even Lincoln, Roosevelt, Mazzini, Marthin Luther King and Gandhi, did not only ask themselves on which ethical and ideological ground can their power be deducted, but also they asked themselves, more pragmatically, which instruments are the most probable to possess political power, and how.<sup>858</sup> They asked how political power can attain its immunity, push through different social-spatial, fortifies with different instruments and be respected with fear and dignity.

Let us refer to an example: It has been assumed that Marxism have exercised their greatest influence through their writings, and especially through their principal book,<sup>859</sup> published by Marx and Engels. At the time that Marx wrote the Communist Manifesto, the bourgeoisie, the labor, the middle class did not have their ideological demand for social communism.<sup>860</sup> These classes had a simple demand of justice for their service and their labor. Millions of workers across Europe scarcely knew what Marx wrote about class conflicts. The so-called followers of the communist movement who come from the lower classes did not even see the cover of the book. From the evaluation on the style of writing that I have done, this is not even written for the common people, for the bourgeoisie. What gave communism its manipulative fever of participation over the majorities was not that formal printed, classist work which was the promoter of the esoteric hierarchical power structure, but the tremendous oral propaganda in favor of imaginary ‘ideal city’ that has carried on for years among the illiterate generations.

Stalin decided his political journey, not only by advocating communism, but also by advocating communism as a way to seize and justify political power.<sup>861</sup> Political consciousness, even the negative one, is the most formative factor in establishing and maintaining political power. The politicians not only reflect the ideological principle, or reflect the demand of its community, but also direct a mixture of both in an elaborated sort of a power

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<sup>856</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.145.

<sup>857</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.142.

<sup>858</sup> See also Moore, *The Strength and Weaknesses of the Soviet System*, (Harvard, 1952).

<sup>859</sup> Marx and Engels, *Manifesto of the Communist Party*, authorized English translation edited by Friedrich Engels (New York: New York Labor News, 1888).

<sup>860</sup> Marx, “Adresse über den Bürgerkrieg in Frankreich 1871” in Hans-Joachim Lieber (ed.), *Politische Schriften*, Vol.II, (Stuttgart, 1990)

<sup>861</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.118.

position. In authoritarian/totalitarian regimes, power is not an instrument nor an element that can bring a positive impact on a community or humanity. Power in itself is ‘the ultimate end’ which is religiously or legally anointed. In this regard, there are three initial questions to ask: 1) What are the sources and the origins of power?<sup>862</sup> 2) what are the instruments of power? and 3) what are their potential functions of these instruments? By asking these questions, there is no way to ignore the priority of social condition, history, and the subject in shaping a power structure and function of its power relation.

### **3.1.3.1 Justification and Hypocrisy**

The politics of deception is an instrument, and it is being used inevitably in the political arena. The nature of politics, unlike the nature of physics, religion, and tradition, is the nature of flexibility. Politics is the world of compromises. That implies a high sense of integration, conciliation and compromise in a world of complex appetites and inevitable rivalries. This requires, sometimes, a way out of the perplexing situation, which ultimately calls for merciless war. To be out of the hazardous situation, threatening days of common interest, national interest, or human dignity, ambiguity in words and in acts, flexibility and compromises of any kind, and sometimes hypocrisy need to be utilized. The justification of an act may be relying mostly on its output measure. Nevertheless, the politics of deception, just like the politics of war or the politics of recession, is not negative in itself in ‘the state of emergency’. Sometimes, it can be positively utilized against the oppressive foes, an instrument like a vaccine that paralyzes the illness within itself, the enemy.

Yet, some point is missing. A question that does not need erudite premises to be marked: what happens, if the enemy of the power structure is one of its vital origins, the people? So this age old mystery comes back to us: on which ground can a power sell its version of justification against the concept of ‘power to’?; what are the foundations of its justification, when it ignores its empowerment origins and cuts off the hand of the people from their own rights? The origin of justification of power and its instruments are closely similar and related. The same principle for power relation is applicable for its instrument. If we can imagine hypocrisy as an instrument of political power, regardless of its attachments or detachments to the moral values, then it would be hard to think of it as an instrument that practices in a power structure, on the same origins of power. Hypocrisy would be the antagonist of the concept of ‘power to’. Thus, we shall ask: where do the politics of deception, deceit and hypocrisy, except war, recession, and ‘state of emergency’, reach their full pragmatic potential?

The authoritarian/totalitarian regimes cannot fully show their identity - the mere notion of their power. The clearer the face of oppressive power position, the increased emergence of the questions of the source, origin, usurpation and justification of power.<sup>863</sup> For such inevitable critical emergence, comes the pragmatic inquiry thereof, the malevolent instrument of power, violence, and hypocrisy. The politics of violence has been addressed, so we move on to the

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<sup>862</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.118-119.

<sup>863</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.119.

next part, the politics of deception. We have to ask, what are the circumstances and consequences of the politics of deception?

The politics of deception may run the power relation for a while, “however, hypocrisy can become a second nature, a skin or rind product under which the innate and original skin literally disappears.”<sup>864</sup> It changes the whole nature, essence and concepts of political power. Hypocrite authority develops its own version, its own stigmatic sickening story of justification. The new version of the concept of political power is a pure authority in which it claims absoluteness, loyalty, a new version of morality, and legality. Its concept of justification does not match any rational-normative ground, any universal definition of moral significance, and any universal definition of legality. The hypocrite authority is not anymore an instrument which is utilized in the hands of political power, it has a new identity in which hypocrisy and authority are inseparable. The convincing method for the justification of power burns the foundation of political power, strongly denying the concept of ‘power to’, and selling the deceptive concept of power in any possible sense. When such convincing methods do not work, an authority may rest its effort in the destructive acts of violence. Hypocrisy and violence, this time, is the main characteristic of an authority, the main essence of political power, and if they cannot provide the ground to justify it, the authority would die on its own ground.

So the question is: on which grounds do the authoritative/totalitarian regimes along with its version of power, with its delusion, and its miranda and credenda of power, run a long-term politics of deception? On one hand, the ethical inquiries of power structure and moral significance of power relation, and on the other hand, the justification of power, are not always and not necessarily relying on the common grounds. Has an authority utilized the politics of deception, it would have stepped beyond what is determined by the justification principles.

No boundaries will work for the regimes that stuck in the war, recession, and the ‘state of emergency’, and above all no boundaries would be recognized by the usurpation powers. In the state of ‘boundary-less-ness’, the existence of the regime is declined to any decision and situation. In this situation, the possibility of the collapse of the regime is high, so the level of politics of deception; the level of politics of deception is high, so the possibility of the collapse of the regime is high. Here, the power holders would ask about the instruments of power which are necessary for the preservation of the regime, and how they can provide an art and version of justification that relies on the legal system and the monopoly of power. “The domination of political party of the “Soviet-system”,<sup>865</sup> the Nazi regime, the Italian Social Republic, and today’s political systems of China, Cuba, and North Korea, present the combination of political deception that grows underneath of the monopoly of legality. The Ancient Egyptian emperor was, certainly, assumed to become a king by God for the people. This is a religiously anointed justification of a legal system which held the despotic power relation for a thousand years. Such monopoly of legality and the politics of deception is based on one concept of power and political system which runs a conflict with all other cultures, economic, and powers, and above of all with their own source of power.

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<sup>864</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.117.

<sup>865</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.120.

Since the emergence of the question of legitimacy is the question of the origins of power,<sup>866</sup> an authoritative/totalitarian power shapes the community, utilizing all of the instruments in a way that it shapes the negative political consciousness, to escape from the question of legitimacy. So how would we ask about the nature of power and its justification, when the concept of hypocrisy and political deception, in the process of denial and ignorance of legitimacy of the system, became the critical component of political power in a system which was already run by the Constitution and highly regulated in the division of labor and power? In such a system, the concept of power guides the power relation, the acts of power holders and political parties on two occasions: when a greedy person holding a power position wants to be preserved and expanded, or the political actors want to pave their way to such positions. When this occurs, actors need to shape a very acceptable public behaviour under the protection of law through the system that helps them with propaganda and hypocrisy.

In the constitutive political system, the only way out from the politics of deception is the law itself. The legal system should be elaborated in a way that respects the political consciousness on both sides of power relation. So the concept of ‘power to’ and ‘power of’ will not only manifest in the soul of political system, its public and political figures, but also in “the soul of the law”.<sup>867</sup>

### 3.1.4 Corruption and Privilege

It is assumed that unchecked political power is at its highest point unquestionable – by its subjects. This ‘unquestionability’ is an acrid quality. Since it is uncontrollable, it carries a high tendency to be escape from the bonds of morality.<sup>868</sup> This ‘escape’ mostly and practically manifests in the realm of the legal system. Law, in such regimes, either are carrying a double standard of morality, ambiguity, and dichotic consequences, in which the differentiated metes appear between the upper class that presents the picture of the will of majority, the wealthy, the famous, the manufacture, and the religious class, and on the other hand, the underdog that presents the picture of the will of minority, the poor, the infamous, the serf; or no morality at all in the face of patriotism, nationalism, racism, and communism. National interest may be the first on the long list of reasoning to ratify the laws that are carrying either a double standard of morality, or are utterly detached from it.<sup>869</sup> It would be a strong reason for breaking out any boundaries of rational-normative principles. The double standard of morality allows the authoritarian/totalitarian regimes to applaud some moral values in their international relations, where at home the same values are doomed and should be abandoned. Authoritarian/totalitarian regimes try relentlessly to thrive, to obtain immunity in their power position, and promote their own version of illegitimate power relation whenever they found the opportunity to do so. Here, we should ask: what is the politics of corruption that starts from the national interest but ended in satisfying the interest of individuals?

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<sup>866</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.121.

<sup>867</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.121.

<sup>868</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.144.

<sup>869</sup> See also Shotwell, “Democracy and Political Morality,” in *Political Science Quarterly*, (1921): 36:1

Corruption is an instrument to promote the rights and privilege of the minority to rule. It is also used to abuse any sort of resources. In the modern nation-states, corruption is commonly practiced under the shade of the legal system, which promotes the deceptive picture of justice. Corruption is a way for the usurpation of power, an illegitimate practice of authority selling a perfectly elaborated picture of law. The parallel characteristic of corruption is brutality and inflexibility, a ridiculous characteristic of a dried bureaucratic system, and the blind sword of their justice.<sup>870</sup> Such law and the legal system is flexible not to the moral values and to the goodwill compromises, but only to the stroke of pens of the privileged office holders, their sons, and their relatives. The legal system is shaped and reshaped, is bartered furtively in the sophisticated net-designed power circles of “favoritism”,<sup>871</sup> and the only victims of this transaction are the citizens, the innocent children, the working class, the people.<sup>872</sup>

Such unwelcome corruption in a power relation and hidden privilege of the individuals can be seen in our small world of politics, from the far Eastern Asia to Eastern Europe, from the North to the South of Africa, in China, in North Korea, and in some Middle Eastern regimes which not only brought decades of rivalries, international punishments, sanctions, and boycotts, but also the loss of their own international good will and efficiency. Oil is the last remedy for them to stay at the pyramids of power before everything turns into chaos.<sup>873</sup>

However, the death of the justification of a regime is the disclosure of its legal system, a sort of rational-normative decryption of its laws, its institution, and its offices. If the corrupted regime loses its meretricious legality and becomes a public shame of the community, its nature becomes its own enemy. No religiously anointed law can stand against the corrective wave of political consciousness. Corruption, in this sense, is a torque which works under the engine of the credenda of power, which puts the profitable politics of hidden privilege power holders on the fast track, but can utterly be destroyed along with it. However, there is no guarantee that a new power relation after the destruction of a corrupted one be legitimate. This is the case where we use the rational-normative principles as the cornerstone for evaluating the legal system and ‘the soul of its laws’.

### **3.1.5 The Persistence of Law and Force: Dissolution**

The unprogressive and uncreative regimes may suffer from the gaps between jurisdiction, the legal science, and social changes. In such regime, freedom would be the first victim of the government's legal system. This was the first lesson of Ancient Greek political thoughts, esoterically, where the legal system was refuted as the consequence of the gap between social changes and regimes in capabilities. This is the most common fate in the dissolution of a legal system and legal authority of the traditional political structure that are only able to see conservatism as an ideology of non-creative and backward jurisdiction, and a stoned legal system.

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<sup>870</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.148.

<sup>871</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934),p.153.

<sup>872</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.147.

<sup>873</sup> See also Worldwide Governance Indicators, "Country Data Reports", <http://www.nfo.worldbank.org/governance/wgi/index.aspx#countryReports> [accessed 07 Nov. 2015]; OECD, "Data", <https://data.oecd.org/government.htm> [accessed 07 Nov. 2015].

Religion is one of the main reasons for a regime to utilize the credenda of power. It also helps the face of legal system. In this sense, an authoritarian/totalitarian regime can rely heavily for long periods of time upon an unchangeable traditional legal system.<sup>874</sup> A legal system that highly depends on the persistence of law and force, and deeply resists any change in its law, power relation, and its notion of authority.

Yet, the growth of science and technology, development in cooperation, reshaping the political institutions and organization under new and internationally accepted norms, makes the process of political consciousness inevitable for any society that left any door open to the outside world. The modern administrative, industrial, scientific, and democratic societies would not suffer under the dissolution of the concepts of ‘power and rights’ in their legal system and legal authority of law. On the other hand, in the traditional legal system that is not flexible and even moves backward, the administrative, industrial, and scientific elements are all threats for the notion of authority of authoritarian/totalitarian regimes. The progressive society and flexible politics are the foundation of a strong legal system, where the traditional religiously anointed laws bring their own end to their existence, an unfortunate end for the oppressive regime in which the irrelevant legal system is not efficient for the new society. The illegitimate law and legal system of such a society has the only, and forever utilized-force for ignoring their weak and illegitimate authority: dissolution of power and right. The “backwardness”, “indecision and impotence”<sup>875</sup> are the causes of the disaffection. This disaffection against a regime is like the fire that furtively grows under the shade of the Ashes.

The very notion of modern political power is tied to the complex aspects of power relations. There is no process in government that is not to be threatened with the delay in a legal or bureaucratic system, but politics change without lag. The whole structure of a legal system is subjected to the newly shaped international politics and social changes, and is maneuvering through the compromises, adjustment to better understand ways of advancement. In such complex power relation, to balance between the concepts of power, to control the miranda and credenda of power, to legitimize the legal system and its laws in all concepts of legitimation requires especial deliberation in any division of power. Yet, the division of power not only guards the ‘rights’ of the people, but also guards the existence of a government or regimes by enhancing its throughput justification. Authoritarian/totalitarian regimes are moiling to gather and centralize their power and present it in legally in a hierarchical power structure. The consequence is the indecision and postponement of authority when the social and international changes take over.<sup>876</sup> The centralized power is paralyzed in its own incapability of keeping pace with the modern political changes. The dictators and despots are not relying on their ability to move along with the political changes because by changing, they lose power. So, they don't have a choice but only relying on their self-designed inflexible, and sometimes religious, legal system to reverse the whole process of politicization.

Nevertheless, the existence of the sluggish and, sometimes, religious rules in the modern notion of political power relations, especially when these rules regarded as laws, are working against the miranda and credenda of power, bringing an unfortunate limitation for the legal

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<sup>874</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), p.149.

<sup>875</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), pp.149-156.

<sup>876</sup> Merriam, *Political Power*, Ch.4, (New York: Collier Books, 1934), pp.151.

system and its respective laws, or bringing an unfortunate limitation or deprivation of miranda or credenda of power because of the religious rules as despotically-dictated laws.

However, there are different turning patterns in both the governments and the governed - the authority and the subjects - which makes the people cheerfully respect the rule of law or sullenly reform it. In the long-run, power relation is not the reflection of the limitation or capability of a legal system and other instruments of political power, but is the interrelation of the concept of rights and power within a community - the concept of 'legal capacity'<sup>877</sup> and moral significance. The constitutional struggle of a legal system is the reflection in the mutual capability of political consciousness of individuals as a community and the authority. The legal system would not reveal the secret characteristics of the ruler, but the demand, the psyche, and the deliberative capacity of the people.

### **3.2 Legally Limited Legitimacy**

In the previous chapter, the limitation of the legal system, law, and the concept of legality have been discussed. Yet, some aspects remain unclear regarding the normative limitation in which the legal system or any context values of the jurisdiction system limits the legitimacy of a regime. The complexity of such a theme is related to its variety in different areas. It can range from human rights, which is the concept of 'power to', to the exercise of power, which is related to the concept of 'power over', the concept of 'power of', and moral significance in a power relation. Among a long list of pragmatic instances of such concepts are, the 'harm principle', and election, respectively, the concept of right and the concept of power. What are common grounds in these two examples that can challenge the concept of legitimacy of regimes through the practice of law?

#### **3.2.1 Morality**

Let us commence with the very banal concepts of human rights, the concept of the preservation of life. Any individual whose life is in the hands of brutal authority can find a way out of such a hazardous situation by various ways for instance, disobeying the law and thus escaping from the 'legal responsibility'.<sup>878</sup> This disobedience sometimes yields harm toward others. However, an authority practices the same right by exercising its power in a collective, formed by individuals over the life of its subjects on the grounds of the same 'harm principle'. In his famous book, *On Liberty*, Mills argues that, "The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others."<sup>879</sup> Although the justification of such authoritative power is argued, the legitimacy of such law is highly controversial, thus escaping from the rational-normative responsibility.

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<sup>877</sup> See Bernhardt, et al. (1984) *Encyclopedia of Public International Law*, (Amsterdam: North-Holland Publ. Co., 1984), p.443.

<sup>878</sup> See also Hart, *The Concept of Law*. Oxford: Oxford University Press, 2012[1961]), p.178.

<sup>879</sup> Mill, John Stuart, *On Liberty*. Edward Alexander (ed.), (Peterborough: Broadview Press, 1999), ch. 1, para 9.

The discrepancy between the law and legitimacy in different forms such as the concept of legal violence, that has been already evaluated in the previous chapter, highlights the moral values that put a limitation on the concept of legitimacy of a regime by the implementation of the laws of a legal system. When we think more in the historical and international context, we realize that different nations and cultures are carrying different moral values. However, the concept of law does not essentially carry any concept of morality. Although the key terms of ‘essentially’ and ‘morality’ are the vague terms,<sup>880</sup> that is how the justification and legitimacy of a legal system and its law can be determined. The remedy for such detachment between the moral values and law is the two concepts of ‘primary rules of legitimacy’ and ‘secondary rules of legitimacy’.<sup>881</sup> As the primary rules of legitimacy refer to the universal moral obligation, the secondary rules of legitimacy are rules of a different kind. Both of the rules of legitimacy convert a group of rules into a systematic legal system of a regime in which the harmonized tone of the rules with rational-normative principles is a great assessment for the legally binding power relation. Where the primary rules of legitimacy are concerned with the basic moral values and their attachments to the basic justified action of legal authority to show to what extend the law is morally and normatively accountable, and to what extent the violation is conclusively determined - input and throughput justification -, the secondary rules of legitimacy are concerned with the primary rules of legitimacy to show that the specific laws in specific situations are ascertained, recognized, can be eliminated, or can be exercised within the boundary of the primary rules of legitimacy - output legitimacy. The ‘certainty’ of the primary rules of legitimacy is not related to any religious, cultural or traditional moral ground,<sup>882</sup> but it must be haloed with the two important elements: recognition and universality. Merging these two aspects provides the universally recognized moral values, which are related to rational evaluation, assesses the legitimacy of the legal system or refutes it.<sup>883</sup> Based on these checks a legitimate legal system not only gives validity to its laws, but also provok a great assessment for legal responsibility.

### 3.2.2 Violations of Law by Law

As there is no moral ground necessary to attach to the law and the legal system, there is no legal system in which the body and the law are necessarily limited in their sovereignty. In all power structures with a specific power relation, and at least certainly in the modern nation-states, the exercise of a legal system is limited to the capacity of legislative, executive and judicial branches. Yet, the legislative branch is playing a formative role to shape the input justification and legitimation of the legal system. In any case, that if we can imagine an authority without the rational-normative limitation of its legal sovereignty, there would be no elements of the primarily and secondary rules of legitimacy. For such authority incapable of legally limited sovereignty, there are esoteric laws behind and above of the positive laws which are being sold to its subjects within the unreal and legally adorned power relation, laws that violate the core essence of justice.

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<sup>880</sup> See also Hart, *The Concept of Law*. Oxford: Oxford University Press, 2012[1961]), p.156.

<sup>881</sup> See also Hart, *The Concept of Law*. Oxford: Oxford University Press, 2012[1961]), p.94.

<sup>882</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.24.

<sup>883</sup> See also Hart, *The Concept of Law*. Oxford: Oxford University Press, 2012[1961]), p.94.

In modern nation-states, the different concepts of the legitimacy of power are certainly relying on a concordant balance between the theoretical and pragmatic concepts of legality. So, what about the role of the law in both cases of the right to claim power based on the succession, and right to claim power base on the election? Where the first right is legally protected and implemented in modern monarchies and authorities, and the latter is legally protected almost in every democratic power relation, the question is concerned with the concept of ‘succession’ and ‘election’ in mutually recognized legal systems. The function of the legal system in both forms of ‘succession’ and ‘election’ is utterly for the sake of establishment of the unique order of the power structure, the succession of the same values, and continuity of the regime, the legal system, and its justification.<sup>884</sup> In a legal system with the right to power based on the ‘succession’, the justification of the authority is followed by the protection of the law that recognizes only the privileged rulers to vote - the legal usurpation of the power. The lack of the political consciousness in such power relation is the detachment of the law from its necessary borders to be legitimate, which promotes excessive delegations and imbalance the concepts of power: a broken-promise in the world of legality. Moreover, it needs the sovereign that protects the laws to protect the role of the sovereignty. Yet, the legally protected ‘election’ deserves the same critique unless the political consciousness plays a major role in the election which held for the poeple. As the concept of the political consciousness is necessarily related to the concept of ‘power to’ and ‘power of’, the legally protected election laws are the threat to the legally protected law of succession in an authoritative/totalitarian power relation.<sup>885</sup> Thus, the ratified democratic laws in a legal system are essentially against the ratified despotic laws of another legal system. The major strength of a despotic state is relying on the compatible despotic laws which are hinged upon the closed moral, geopolitical, and natural territories. However, these elements not only weaken the continuity of power relation but also threaten it. The strength of power is threatened by the non-progressive and invalid legal system among the subjects, the causes of the volatility of the usurpation.<sup>886</sup>

Yet, can we arcanely imagine two discrepant elements of legality in a legal system. The democratic process of ratifying the democratic laws in a despotic legal system, or in contrast, the ratification of a despotic law in a democratic legal system, would be the violence of law by law.

### **3.3. State of Emergency and Exceptionalism: A Positivist Analysis of the Concepts of Legality and Legitimacy vs. the Arcane Face of Executive and Legislative Power; a Lesson from the History of Germany 1919-1945**

The relationship between the concept of justification, legitimacy of law, on the one hand, and the concept of legitimacy of a regime and validity of law, on the other hand, is an abstruse interrelated theme in the legal, political, and philosophical branches of science. While some regimes, such as authoritarian/totalitarian regimes, designed on their self-justified legal system, ignoring any connection with the concept of legitimacy of regimes or their legal apparatus,

<sup>884</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.26.

<sup>885</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.27.

<sup>886</sup> See Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p.27.

others have built a strong link between their concept of legitimacy and the legitimacy of their legal system. Yet, the rational-normative principles illustrate that the accountable concept of 'rule of law', which connects the foundation of the legal system to the basis of legitimacy of a regime, strongly presupposes the justification of the legal system in relation to the legitimacy of it, although they are not completely the same thing. Where the ignorance of legitimacy of a regime and its legal system is making the legal practice of the authority worse, on the contrary, the assessments of the legitimacy in both helps the practice of law to move forward, be effective, and be accountable.

Is it the legal positivism that "discourages the sound legal practice"<sup>887</sup>, or is it the essence of power that spoils the law? Taking history into account, the era of Weimar Republic was initially the rivalry of democratic power and authoritarian/totalitarian power to be justified.<sup>888</sup> This rivalry took the Weimar Republic down to its knees. So, we shall ask: how the essence of legal positivism can end up in an authoritarian/totalitarian power structure which emerged from the hard days of a community, 'the state of emergency', the days that not only the legitimacy of a legal system and rule of law, but also the pragmatic interpretation in practice of law covered in the shades of grey.

We cannot place enough emphasis on the role of the concept of positivism in the great turning points in politics, and in the history of civilization. The period of World War II may be one of them in which the law plays a completely different role, shows its utter weaknesses and potentialities in constitutive measures. The Weimar Republic legal system, the legitimacy of the Weimar regime, and the characteristics of power and its power holders, is the key to the long discussion of the law, justification, and legitimacy in the state of emergency. Indeed, if a regime is a legitimate one, the most contentious concept, which is the concept of throughput legitimacy, must be appreciated. In this sense, in a legitimate regime, the concept of legality and the concept legitimacy are essentially integrated. An active legal theorist of that time, Carl Schmitt, used these interrelated concepts, but on the contrary to the characteristic of legitimacy which requires such integrated concepts of legitimacy and legality, he asserted the justification of legality over the concept of legitimacy by emphasizing the incapability of the wounded legal system of his time in the state of emergency. In "The Dictatorship of the Reich president according to Art 48 of the Reich constitution," he opens the article with the following interpretation of legal situation of his time:

"That Article 48, section 2 of the Reich constitution creates valid law is generally an uncontroversial position today. The powers of the Reich president contained there are not dependent on passage of the Reich law foreseen in section 5. The Reich president can therefore take any measures he considers necessary for the restoration of public safety and order when these are significantly endangered."<sup>889</sup>

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<sup>887</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.1.

<sup>888</sup> Sternberger, *Staatsfreundschaft*, (Frankfurt am Main: Insel Verlag: Insel Verlag, 1980), p.120.

<sup>889</sup> from here on 'Die Diktatur.'Schmitt, 'Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung' [The Dictatorship of the President according to Article 48 of the Constitution], 1924.; Schmitt, 'The Dictatorship of the Reich president according to Art 48 of the Reich constitution', *Constellations*, Volume 18, No 3, 2011, p. 292.

He underlined the executive power for its overwhelming capacity, rather than the normative context of the legal system itself.<sup>890</sup> Yet, the exceptionalism which is the arcane and permanent element of a state of emergency, unlike the democratic political situation, implies constantly ‘exempted political figures’ and instruments,<sup>891</sup> and its concept of ‘outlaws laws’,<sup>892</sup> while it insists on the concept of basic laws and merely on its validity, a basic norm that was only established by the logical analysis of the executive and legislative power.<sup>893</sup>

Within the years 1930 to 1932, Germany saw two annulments between legitimacy and the legal system. This was happening where the legal system was facing its limitation and was hung up on the executive offices of power. The society was beaten down by the economic crisis and acrid violence, as the government, which was in an uproar of corruption and disaffection, fueled the power hunger of the right and left. The pragmatic consequence of the annulment between legitimacy and the legal system occurred when Field Marshal Paul von Hindenburg, the *Reichspräsident* of the German Federal Government, or the Weimar Republic - of which the Prussian state consisted two thirds -, issued several decrees.<sup>894</sup> He presented himself as the paternal figure, who is perfectly an exception in both civil life and in his political party. One of his decrees was on the 20th of July 1932, “concerning the restoration of public safety and order in the area of the *Land* (State) of Prussia”<sup>895</sup>, which was caused by the instances of political parties ceasing to gain power and bursting into a civil war.

Furthermore, the race between the disaffection of the people, power of the political parties through the society and their private armies, caused the growth of power of the nationalist right wing. The democratic Constitution played a major role in this regressive transition in the hands of the miranda of power and legality. Hitler's answer to the question of if he wanted to oppose the Weimar government by force, a system that his party was nourished from and empowered by, was, “We have no need of other than legal methods”.<sup>896</sup> This would clearly illustrate the recondite emphasize on the constructive divorce between the firm and specific foundation of the concept of legitimacy from the concept of legality in practice.

How is a system based on a constitutional sovereign, and a legal system, developed as an authoritative/totalitarian regime? Following the emergency decree of the Prussian Government, an attempt to control the extremes was the emergency decree which was implemented by the Weimar regime on the Prussian Government. In fact, the executive aimed for usurpation of power through the endless delegation which was viewed as a cornerstone of traditional republican governance. And yet, even with such usurpations and delegations, the

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<sup>890</sup> See Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.1.; Fatovic, and Kleinerman. (ed.) *Extra-Legal Power and Legitimacy: Perspectives on Prerogative*, (Oxford: Oxford University Press, 2013), p.6.

<sup>891</sup> Laza, *States of Emergency in Liberal Democracies*, (Cambridge: Cambridge University Press, 2009) p.19.

<sup>892</sup> See also Merriam, *Political Power*, (New York: Collier Books, 1934), ch.4.

<sup>893</sup> Kelsen, *General Theory of Law and State*, (Cambridge: Harvard University Press, 1949), p.xv.

<sup>894</sup> The German title *Reichspräsident* literally means ‘President of the Reich’, the term ‘Reich’ referring to the federal nation state established in 1871 and the *Reichspräsident* was the German head of state under the Weimar constitution, which was officially in force from 1919 to 1945.

<sup>895</sup> RGBl. 1932 I, p.377. The citation "RGBl" refers to the *Reichsgesetzblatt*, official edition of statutes, published currently. See Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.2.

<sup>896</sup> Nagorski, Andrew. *Hitlerland: American Eyewitnesses to the Nazis Rise to Power*. New York: Simon & Schuster, 2012), p.68.

Weimar Republic was unable to achieve sufficient political stability to develop credible long-term solutions to the myriad of problems confronting it.<sup>897</sup> One of the main objectives, it appeared afterward, was to cripple the SPD (the main socialist party). The commitment to social democratic principles and legality of Prussian Government halted them from utilizing other means of resistance against the power hunter political parties and other factors. Ideologically, the democratic values of the Prussian Government, and pragmatically, its weakness in the political-military, left them with no choice but to challenge the validity of the decree over the *Land* (States) before the *Staatsgerichtshof für das Deutsche Reich* (State Supreme Court of German Empire), the case known as '*Preussen contra Reich*'. The main objective of the court was finding a legal solution for the dispute between the Federal Government of the Weimar Republic and the state of Prussia in the state of emergency.<sup>898</sup> At that time, July 1932, among the political theorists who attended before the court and turned the discussion, more than ever, into the battle between the concept of justification of different sources of power was Carl Schmitt. He presented a successful defence which paved the way for the subjective of the right-wing, and the emergence of the Nazi party.

Moreover, in the days that Germany has faced since the economic recession, lack of resources and presence of threats to its national security from communism and the U.S.S.R, the state of emergency was not only felt more than ever, but was also called as an inevitable instrument. The deficit in both the Constitution, and also in the implementation of democratic laws, provided the best opportunity for undemocratic delegation, and gave the power hungry ability to seize power. The annulment between legality and legitimacy has cost the lives of millions of people - a crime against humanity and her civilization. Can we assess 'the decree' of 1932 or brutal usage of political machinery by Franz von Papen,<sup>899</sup> the German federal election of July 1932, or the democratic election of the Nazis into power, without the assessment of their legitimacy, although they occurred through the state of emergency? Moreover, we have to ask that whether the legal protection of democracy is limited to the legitimacy of the foundation of law, or if it includes those who practice it, the executive and legislative branch.

### **3.3.1 Constitution Against Executive Power: Weimar Republic as the Historical Background of the Emergence of a Dictator**

Why the Weimar Republic was a failure is the question that may lead us to two points: on the one hand is the constitution, the legal system, the whole mighty apparatus of the legality, and on the other hand, is those who exercise the laws, those whose boundless judgments use the legal measurements.

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<sup>897</sup> Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.', *The Yale Law Journal*, (2004), p.1369.

<sup>898</sup> In terms of Article 19 of the Weimar Constitution, *Staatsgerichtshof* (the State Supreme Court or the Constitutional Court) was given the jurisdiction to decide on the constitutional debates which can be take place in three terms, the dispute within a state (*Land*), between the states (*Länder*), and between a state and central Government. see Weimar Constitution, (*Die Verfassung des Deutschen Reichs*, Leipzig: 1919), [http://www.zum.de/psm/weimar/weimar\\_vve.php](http://www.zum.de/psm/weimar/weimar_vve.php), [accessed 23 Nov. 2015].

<sup>899</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p. 2.

(1) To commence with the constitution, it may be assumed that the democratic constitutions and their power relation are doomed to fail, that they cannot succeed under the inevitable conditions of intense political conflicts.<sup>900</sup> The Weimar Republic political situation is one of them that shows the new immature and democratic constitution that tried to thrive under the intense conflicts between the social, cultural, and ethnical groups. Yet, this assumption neither appreciates the very nature of the democracy and its relation to its legitimacy, nor the historical facts. It is sure that if a constitution fails to appreciate the rational-normative principles, whether it appreciates democratic values or not, the legitimacy of the regime would be trampled.

(2) The other part of a power structure is those who exercise the laws. What has been said about the Constitution and its relation with legitimacy would be mutually true for the division of power in the hands of the office holders, with regards to the failure in appreciation of the rational-normative principles, in the measurement of power, and in the pragmatic hands of office-holders. This is where, as this contribution firmly holds the position, the focus is on the relation between the legitimacy of a democracy and the democrats. In other words, it is the matter of practicing the interrelated concepts of democratic legality and political consciousness in the political mechanism. These are invisible parts that must be assessed interrelatedly to see whether they carry the legitimate criterion for power and for the forms of delegations. Democracy is exposed to the extinction and legitimacy is highly vulnerable where the measurement of authority is not recognized by the values, by the rational-normative principles, and by the moral significance to shape a constituent power. The consequence of the annulment between the democracy and legitimacy, which were manifested in the respected legal system, were extensively remorseful.

In the case of the Weimar Republic and the era that followed, the repression which was on the German people, and the death of millions of people afterward is clear based on the historical facts. It is advisable to address the causes of it, which cannot be done without the historical, jurisprudential and political assessments.

The annulment between the concept of democracy and legitimacy in the Weimar Republic helped the anti-democrats in offices of the democratic regime to abuse the unfettered right to delegate legislative power to the executive, and to have the opportunity to subvert the democratic power relation to a pure authoritarian/totalitarian regime. The main rivalries took place, on the one hand, through the executive power between the Reich President, Hindenburg, and the potential chancellors, e.g. Papen, Kurt von Schleicher, and Hitler, and on the other hand, between the executive power and legislative power, the Reich Parliament- or simply Parliament. The battle ground also was constitutional. The historiography of the dissolution of the Weimar Republic correctly distinguishes between Brüning's extra-parliamentary governance under Article 48 in 1930-1932 and the more explicitly anti-parliamentary, authoritarian approaches of Papen and Schleicher in 1932 and 1933.<sup>901</sup> So, "what is this

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<sup>900</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p. 17.

<sup>901</sup> Brüning claimed "in later years that his resort to government by decree did not suspend parliamentary control but merely changed its form." See Patch, *Heinrich Brüning and the Dissolution of the Weimar Republic*, (Cambridge: Cambridge University Press, 1998), p

infamous Article 48 of Weimar Republic constitution?” we might ask, which written by so-called pro-democratic revolutionaries in 1919:

“Art. 48. If any state does not fulfill the duties imposed upon it by the Constitution or the laws of the Reich, the Reich President may enforce such duties with the aid of the armed forces.

In the event that the public order and security are seriously disturbed or endangered, the Reich President may take the measures necessary for their restoration, intervening, if necessary, with the aid of the armed forces. For this purpose, he may temporarily abrogate, wholly or in part, the fundamental principles laid down in Articles 114, 115, 117, 118, 123, 124, and 153.

The Reich President must, without delay, inform the *Reichstag* (the Parliament) of all measures taken under Paragraph 1 or Paragraph 2 of this Article. The *Reichstag* may vote to annul these measures.”<sup>902</sup>

What is interesting is that in the democratic state of Weimar Republic, the supposedly elected officials were in power by abuse of Article 48. For example, Wilhelm Carl Josef Cuno (Chancellor of Germany from 1922 to 1923) became the Chancellor (Reichskanzler) on 22 November 1922 by presidential decree and without a vote in the *Reichstag*. Immediate Chancellors of Germany before Rise of the German National Socialist Party (Nazi with the leadership of Hitler), including Heinrich Brüning (served as Chancellor of Germany during the Weimar Republic from 1930 to 1932) and Franz von Papen (served as Chancellor in 1932) or Kurt von Schleicher who was a political and military figure of that time were under Schmitt’s influence of political and jurisprudence theories. In the period of Weimar Republic, they excessively defending presidential creeds based on the Article 48.<sup>903</sup> We can see that the destruction of Weimar was the deliberative efforts of the anti-democrats who used the potential weaknesses of the Constitution to dissipate the legislative powers and to subvert the democratic institution, the institution from which they nourished.

Indeed, ‘democracy needs democrats’.<sup>904</sup> On the one hand, the democratic values which were divorced from the legitimacy principles, and on the other hand, the democratic exercise of authoritarian power, brought about the hastening of the state of emergency, in which the

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<sup>902</sup> The original German text comes as follow: “Art. 48. Wenn ein Land die ihm nach der Reichsverfassung oder den Reichsgesetzen obliegenden Pflichten nicht erfüllt, kann der Reichspräsident es dazu mit Hilfe der bewaffneten Macht anhalten.

Der Reichspräsident kann, wenn im Deutschen Reiche die öffentliche Sicherheit und Ordnung erheblich gestört oder gefährdet wird, die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung nötigen Maßnahmen treffen, erforderlichenfalls mit Hilfe der bewaffneten Macht einschreiten. Zu diesem Zwecke darf er vorübergehend die in den Artikeln 114, 115, 117, 118, 123, 124 und 153 festgesetzten Grundrechte ganz oder zum Teil außer Kraft setzen.

Von allen gemäß Abs. 1 oder Abs. 2 dieses Artikels getroffenen Maßnahmen hat der Reichspräsident unverzüglich dem Reichstag Kenntnis zu geben. Die Maßnahmen sind auf Verlangen des Reichstags außer Kraft zu setzen. Bei Gefahr im Verzuge kann die Landesregierung für ihr Gebiet einstweilige Maßnahmen der in Abs.2 bezeichneten Art treffen. Die Maßnahmen sind auf Verlangen des Reichspräsidenten oder des Reichstags außer Kraft zu setzen. Das Nähere bestimmt ein Reichsgesetz.“ Die Verfassung des Deutschen Reichs („Weimarer Reichsverfassung“) vom 11. August 1919 (Reichsgesetzblatt 1919, S. 1383)

<sup>903</sup> Bracher, *The German Dictatorship: The Origins, Structure, and Effects of National Socialism*, (New York: Praeger Publishers, 1970), p.174.; Bracher, *Die Auflösung der Weimarer Republik. Eine Studie zum Problem des Machtverfalls in der Demokratie*, (Stuttgart/Düsseldorf, 1955), p.115.

<sup>904</sup> one of the mottos of Konrad-Adenauer-Foundation, a German political think tank.

best scenario for executive power was to use the excessive measure, namely ruling by decree and suppression. In the Weimar case, this is indicated by the authoritarian solution that was adopted by the cabinets of the 1930s. Germany's slippage into a kind of presidential dictatorship under Article 48 after Brüning's fall in 1932 undoubtedly helped to pave the way for the Nazi seizure of power in 1933.<sup>905</sup> For those who advocate authoritarian/totalitarian delegated constitutional power as a resolution, they see the inevitable misfortunes for the democratic Constitutions in the political conflicts. They believe that the democratic resolutions are not only incapable, but also augment the problems.<sup>906</sup> Hence, some, like the cabinets of the early 1930s, which Schmitt defended, brought about the authoritarian solution. In *Die Diktatur*, Schmitt clearly proposed such solution as he emphasizes on the practical execution of delegated power:

“The practical implementation of Article 48, section 2 by the Reich president and the Reich government in reality, however, does indeed encroach upon articles beyond those enumerated in Article 48, section 2, sentence 2, and does not limit itself to the boundaries prescribed in the prevailing interpretation. Nor can it hold itself to them. For an effective state of emergency would be impossible if, except for those seven basic rights in the second sentence, every other article of the constitution were to pose an insuperable obstacle to the Reich president's actions.”<sup>907</sup>

In fact, such a solution was not a solution at all. The question on the annulment of legitimacy and democracy, and the rivalries between the power division, would assess the historical facts to see how such destruction of democracy by the same Constitution, and subversion of it to an authoritarian/totalitarian power relation took place. From this is a lesson which is not merely historical. The issue of that time, and what the political theorists such as Schmitt relentlessly argued about, is still a central issue of contemporary politics where the notion democracy, legitimacy, law, and division of power are the vital interrelated elements of the Western world.

### 3.3.2 A Short Background

Germany was entangled in a war which was seemingly intended will for world-security, yet consequently became a victim of it. The WWI already put the German Empire into a great danger of abolition of its sovereignty. The international political conflicts and social tension of that time helped the revolutionary left-wing to take the control of the situation in November 1918, after the collapse of the monarchy. Friedrich Ebert, the first SPD leader, had the task to handle the transition of the power relation from the monarchy into a parliamentary democracy,

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<sup>905</sup> Lindseth, The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s., *The Yale Law Journal*, (2004), p.1370.

<sup>906</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p. 17.

<sup>907</sup> Schmitt, *Die Diktatur: Von Den Anfängen Des Modernen Souveränitätsgedankens Bis Zum Proletarischen Klassenkampf*. [The Dictatorship from the Origins of the Modern Theory of Sovereignty to the Proletarian Class Struggle], (Berlin: Duncker & Humblot, 1989, first pub. 1922). From here on, *Die Diktatur*

and at the same time control the negotiation of peace between Germany and its opponents. It was the decisive start for the role of Germany in international relations.

At the international level, in the Treaty of Versailles,<sup>908</sup> Germany took the blame of the war and accepted, as it is said in Article 231, the responsibility for the losses and damages caused by the war "as a consequence of the ... aggression of Germany and her allies".<sup>909</sup> This was followed by a reparation cost equivalent to the 20 billion gold marks (\$5 billion) in gold, commodities, ships, securities or other forms. The decision that made based on blind justice later caused the economy of Germany to collapse, and also caused a sense of humiliation among the Germans within the borders. Such humiliation, based on psychological analysis of the power, gave the opportunity for the uprising of the right-wing by using the critical opposition of said treaty, or any step that has been taken for the sake of peace, dancing in the wind of miranda of power.<sup>910</sup>

The right-wing, and in particular, Hitler, later used the stab-in-the-back myth to say that the German Reich Army did not lose in WWI, but it was a planned betrayal of the Socialist and Communist party to seize power through the revolution of 1918-19 against the *Deutsches Kaiserreich*. Still, the stab-in-the-back myth is not the only myth that remains in the history. The entrance of the United States in the WWI, the betrayal of communist revolutionary workers and friendly theorists such as Rosa Luxemburg and Karl Liebknecht, which ended in *Kieler Matrosenaufstand*, (Kiel mutiny), unpredictable fire siege in 1919, and accepting the peace in a situation that German troops were progressive in the lands of foes, are still myths. Later, by the constantly increased propaganda of the Nazi Party, they denounced those who signed the Armistice treaty and ratified the Weimar Constitution as *Novemberverbrecher*, (November Criminals).<sup>911</sup>

At the domestic level, on the 28th of June 1919, the Assembly convened in the town called Weimar, and the democratic Constitution of the Republic of Reich or the Weimar Republic under the leadership of the Ebert, with SPD supervision, was ratified. The division of power, firstly, was in federal forms where the central government is placed next to the traditional government of each state recognized as *Länder*. Among the states was Prussia, as it contained two-thirds of the German population and German territories. Moreover, the seat of the newfangled Federal Government continued to be the Prussian capital, Berlin. Besides the division of population, territories, and parties, there was a convoluted government body. The Federal Government was comprised the government (the Reich president and cabinet, the executive branch), the *Reichstag* (the Parliament, the Upper house of the Parliament, one part of the legislative branch), the *Reichsrat* (the council of representatives, which was the other part of the legislative branch), the Federal Council, and the *Staatsgerichtshof* (the State

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<sup>908</sup> An international peace treaty which was signed on 28th of June 1919, followed the Armistice of 11th of November 1918 between Germany on the one side, and the Allied and associated power on the other side.

<sup>909</sup> Treaty of Versailles, Article 231.

<sup>910</sup> See also Treaty of Versailles, articles 232-5.; Martel, *A Companion to Europe 1900-1945*, (UK: Wiley-Blackwell, 2011).

<sup>911</sup> Kelly and Lace, *Modern World History for OCR Specification 1937*, (Oxford: Heinemann Educational Publisher, 2001), p.99.

Supreme Court or ‘the Constitutional Court’<sup>912</sup>, the judicial branch). The Parliament has been seen as the counterweight of the head of the state or the president’s absolute power to rule, a substitute for the emperor. Here, the Constitution openly reflected the idea of those who have written the Constitution, who wanted the Constitution to reflect their will as the will of the nation. It was a great possibility for the socialist of the time to influence the whole apparatus of the power structure and build an office with power which was strong enough to tackle problems. In other words, Hugo Preuss, and the other drafters of the Weimar Constitution wanted to avoid the “parliamentary absolutism” of the French Third Republic.<sup>913</sup> Thus, they elaborated a legal apparatus with the ‘dual’ system in which a popularly elected president would act as a counterweight to the Parliament. However, similar conceptions of unchecked parliamentary supremacy - the cornerstone of French republicanism since the adoption of the constitutional laws of 1875 - was implicitly emphasized. These ideas were manifested themselves in Weimar constitutional doctrine in the 1920s.<sup>914</sup>

The new Constitution extremely secured the office and power of the Reich president. Although some articles presented some clauses to balance power, the practical implementation worked differently. The Weimar Constitution guaranteed not only the seven years presidency period, but by Article 41-43 it guaranteed that there was no limit on re-election. It also secured the power of the Reich president. Not only could he represent the German will nationally and internationally, but also he was the “supreme commander of army”, or as we know, he was the commander-in-chief of the German army,<sup>915</sup> to use it in possible wars between Germany and other countries, and between the government and the state.<sup>916</sup>

This form of absolute authority is implied by the infamous and notorious Article 48. Article 48 gave the full potential authority to the office of presidency. The Constitution, in this sense, guaranteed that the president is entitled to the right to ‘take measures’, including the army, for the sake of public safety and order of the country. There are two parts that limited the power of the president thereof: paragraph three and four of the Article. The third paragraph binds the president to inform the *Reichstag* (Parliament) of his measure, and the Parliament could, if they dare, suspend it. However, such suspension is valid only if it is related to the violation of “the fundamental rights enumerated in Articles 114, 115, 117, 118, 123, 124 and 153”.<sup>917</sup> The fourth paragraph binds the countersignature of Parliament for the validity of the decision that the president has taken.<sup>918</sup>

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<sup>912</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p. 20.

<sup>913</sup> See Mommsen, *Max Weber and German Politics: 1890-1920*, (Chicago: University of Chicago Press, 1984), (citing Hugo Preuss, Heuss, and Else Preuss. *Staat, Recht Und Freiheit. Aus 40 Jahren Deutscher Politik Und Geschichte*, (Tübingen, 1926)). According to Mommsen, Preuss was heavily influenced in this regard by the seminal study of Redslob, *Die Parlamentarische Regierung in Ihrer Wahren Und Ihrer Unechten Form*, (Tübingen: J.C.B. Mohr (P. Siebeck, 1918).

<sup>914</sup> Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.*, *The Yale Law Journal*, (2004), p.1347.

<sup>915</sup> See Article 47. “Der Reichspräsident hat den Oberbefehl über die gesamte Wehrmacht des Reichs.”

<sup>916</sup> Article 48.

<sup>917</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p. 2.

<sup>918</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p. 3.

These are formal yet not practical limitations. Article 48, however, alone could not manifest the extreme elements of socialism. To achieve a pragmatic and potentially despotic authority, it should be made sure that the domestic or nationally-defined power was not limited to the army and the measures. Such potentiality can be seen in Article 25 of the Weimar Constitution, which gave the Reich president an absolute right over the parliament:

“The Reich president has the right to dissolve the Reichstag.”<sup>919</sup>

Like Article 48, to formally counter balance such authority, the clause that comes thereof implies that the Reich President can dissolve the *Reichstag* (Parliament) only once, and Parliament should be elected within the next sixty days. Yet, such a law implicitly implies that the Reich President, taken in terms of Article 48, can continually execute his judgment to dissolve the Reichstag. Such continual suspension of Parliament would simultaneously challenge the role of Constitutional amendments and the democratic legislative process of ratifying laws. Despite that, even one time of dissolution for the Parliament can centralize political power into the hands of one man. Furthermore, Article 53 of the Constitution gave the president one more decisive power to appoint and dismiss the chancellor and his cabinet:

“Art. 53. The Reich Chancellor and, on his recommendation, the Reich Ministers, are appointed and dismissed by the Reich President.”<sup>920</sup>

Indeed, the pragmatic weakness of the limitations was not appreciated at the time, and the first part of the Constitution which tried to compromise between the Parliamentary sovereignty and power of the presidential office failed. These trio articles, i.e. Article 25, 48, and 53, make it crystal clear that the division of power was not balanced, that the president has the upper hand over the legislative power in both decision making and its existence.<sup>921</sup> This was a political disaster throughout the times when a quasi *Rechtsstaat* yielded the seeds of a *Machtstaat* (dictatorship or tyranny ) and harvested the concept of authoritarianism/totalitarianism.<sup>922</sup>

The second part of the Constitution focuses on civil rights, emphasizing the inviolability of personal liberty, privacy, property, and rights for assembly. The second part tried to compromise between the socialist and pro-republican parties, provided for equality of all before the law.<sup>923</sup> Indeed, in this sense, the Constitution tried to appreciate the equal political rights, and somehow, address the political absolutism. Yet, beyond this issue was the problem

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<sup>919</sup> “Art. 25. Der Reichspräsident kann den Reichstag auflösen, jedoch nur einmal aus dem gleichen Anlaß. Die Neuwahl findet spätestens am sechzigsten Tage nach der Auflösung statt.” Die Verfassung des Deutschen Reichs („Weimarer Reichsverfassung“) vom 11. August 1919 (Reichsgesetzblatt 1919, S. 1383).

<sup>920</sup> “Art. 53. Der Reichskanzler und auf seinen Vorschlag die Reichsminister werden vom Reichspräsidenten ernannt und entlassen.”

<sup>921</sup> See Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p. 13-20; See also Mommsen, *Max Weber and German Politics: 1890-1920*, (Chicago: University of Chicago Press, 1984), Chapter 9.; Mommsen, ‘The Antinomian Structure of Max Weber’s Political Thought’, *Current Perspective in Social Theory*, 4 (1983), p.289.

<sup>922</sup> See also Merriam, *Political Power*, (New York: Collier Books, 1934), p.158.; see below part three: “Polygon of Political Power: Legality”; See also Baer: „Der Bürger“im Verwaltungsrecht. Subjektkonstruktion durch Leitbilder vom Staat. (Tübingen: Mohr-Siebeck, 2006), p. 95.

<sup>923</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.20.; Article 109.

of the significance of democratic power relation and democracy under the new social, industrial, and political conditions that sprung up into the hands of modern state leaders. In those days, no one asked: What was the pragmatic program for democracy to thrive and to be protected, after the popular sovereignty had been fully established?; What is the role of political rights in the implementation of legislative forces?; Should the democracy adopt the policy of indifference, an attitude that follows the *laissez-faire* toward the struggle of its citizens, its political parties, and its office holders, or should it give a strong consent of absolutism to fight against absolutism, an oppressive and complete definition of the commonwealth? Democracy has been challenged by the aristocrats - such as Plato, Aristotle, Nietzsche – Communist, Socialist, Syndicalists, and Anarchists.

Along with all theoretical challenges, however, the German democracy was born alone in the days of anti-democrats. It was born through the political machinery of government, not only influenced by the historical consciousness, but by the industrial and social questions, which were constantly thrust forward through social activities as well as by rivalries of political offices. The social and political situation of that time left no room for any legitimacy principle to be born with democracy. Radicalization was the political highlight of the emergency situation. Not only the radical right argued that the constitutional amendments weakened the power of Germany to achieve its national interests and, hence, they opposed the system of parliamentary democracy, the radical left regarded the compromises of the Constitution as fatally bourgeois - a slogan that they could sell for a high price in those days.

Both radical groups tried to hold the democratic process responsible for the unfavorable current situation, that in fact was the cooperation of all groups, and blame it for the hard days of the citizens. The concocted arguments of the right-wing were given attention after the situation was not improved by the implementation of the new Constitution. The right-wing accused both the peace process and the Constitution on the same grounds. On the one hand, they argued that the revolution of 1919, and then the peace was ‘shameful’, since the treaty of Versailles was the unnecessary work of the left - socialists and communist - which caused them the territorial lost, military weaknesses, and economic recession, On the other hand, they argued that the Constitution was the work of the radical left which caused the democratic Parliament to be weakened by nationalism in the unity of the people and military of the state, which strengthened the idea of class conflict and communism.<sup>924</sup>

Despite the relevant improvement in balancing political power by controlling the power of right and left, and the slight economic progress, the election of Field Marshal Paul Ludwig Hans Anton von Beneckendorff und von Hindenburg as the Reich President could not consolidate the state as the sovereign and the peoples’ will. This caused the right-wing power in the power structure to be partially consolidated, and the overwhelming nationalism propaganda to be seen more, which mostly relied on the political demands for increased state intervention into an economic system in apparent crises and for the process of delegation.<sup>925</sup> Besides that, the structure of political society remained distinctively aristocratic, and the theory of the time divided between the upholders of the old regime and its definition of power and

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<sup>924</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.22.

<sup>925</sup> Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.*, *The Yale Law Journal*, (2004), p.1347.

various new types of radical and moderate opponents in the new regime. The new competition was between the office holders. So it happened that both office holders and power branches fought, sometimes together and sometimes against each other, for the legal authority, for the legal justification of their position and their office, and for political institutions and parties expressing their ideas.<sup>926</sup> In those days, the disintegration between the Parliament and the Reich President is not easy to determine as Hindenburg appeared to be a responsible man to his constitutional duties. Yet, this is the irony in the legal game of that time that the disintegrations and the conflicts as its outcome were totally on the border of constitutional amendments. However, Hindenburg remained loyal to the idea of right where he implies that: "I have always belonged inwardly to the old conservative party, even seeking dutifully to behave in a non-partisan manner as Reich President."<sup>927</sup>

Pragmatically, the first sign appeared when Hindenburg refused his power to deal with the economic crisis under Article 48. This caused the resignation of the coalition cabinet of the Social Democrat Party (SPD) with the leadership of Hermann Müller. The free seats in the Cabinet allowed the right-wing to provide the substitute candidates what they wanted. Nevertheless, the Reich President had the right to choose his 'Presidential' cabinet reliance on Article 48. At the end of March 1930, Heinrich Brüning, a conservative catholic, was appointed to the head of presidential Cabinet as the Chancellor. The contradictions inherent in the relation between the Parliament and the government with the presidential backup had the result that, after the collapse of the Great Coalition in 1930, the formation of 'positive' majorities sufficient to support the establishment of cabinets with the traditional parliamentary support became impossible. In this situation, the government, which was formed under presidential decree, was at its own essence illegitimate.

Brüning and his cabinet, ruling on the basis of the President's Article 48 decree powers, began to tackle the economic crisis, which was at the highest point. On the 16th of July 1930, after the Parliament rejected a major part of his plans, Brüning merely relied on presidential emergency decree. Such decree was the product of using Article 48 of the Weimar Constitution. The Reichstag, by the initiative of SPD, suspended the decree from the force, which was during the time of drastic conflicts between executive and legislative branches. Brüning dissolved the Parliament legally. With the support of the Reich President and no real ties to the Parliament, Brüning was the first Chancellor that repressed the parliamentary constraints and dissolved it; an apparatus that is fundamental to the legitimate democratic structure of power. It was a sad image for the new-fangled democracy to lie down before its own laws, being stabbed in the back, but the dream of the radicals to shape an authoritarian/totalitarian power structure in which parliamentary constraints play no legal role, and dream of the right to get rid of the SPD influence in government prevailed. Today, It can be seen how the Parliaments are working in authoritarian/totalitarian power structures. They mostly are the products of the same regimes and if they dare to show their constraints, they are doomed to be vanished.

Yet, getting back to the German politics of that time, we can see a shift of radicalization in Hindenburg's attitude to choose a new Cabinet. In October 1931, Brüning took over the foreign

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<sup>926</sup> see also Merriam, *American Political Ideas*, (New York: The Macmillan Company, 1920), p.7.

<sup>927</sup> Hindenburg to Mackensen, 9.February.1932, BAP R601/1971, Vol.21, pp.6-7. Quoted in Patch, *Heinrich Brüning and the Dissolution of the Weimar Republic*, (Cambridge: Cambridge University Press, 1998), p.238.

ministry while retaining the chancellorship. At the same time, the Reich President and his entourage became enamored with the idea that “Germany could be saved only by a united front of conservatives, nationalists, and National Socialists”<sup>928</sup>, a nationalistic idea that can be led only by the right.

Brüning's intention was to attract the Reich President's attention and receive his favor. He helped President Hindenburg win reelection in the spring of 1932 despite the confrontation he had to make, on the one hand, to the Presidential entourage, and on the other hand to the coalition powers of Alfred Hugenberg and Hitler.<sup>929</sup> However, on May 30th of that year, Brüning resigned as a result of intrigues. The immediate cause of his dismissal was his project to address the bankrupt East Elbian estates by partitioning them and placing increased taxation on the landowners.<sup>930</sup> Hindenburg, himself an eastern landowner, considered this plan as Bolshevism. The economy was devastated, taxes were rising and attempts were made by the people to dissatisfy government's policies. One of the slogans against him was “Brüning verordnet Not” (Brüning decrees hardship).<sup>931</sup> Furthermore, he failed in his general attempt to make a pure rightist Cabinet.<sup>932</sup>

It is important to stress that, under the chancellorship of Brüning from 1930 to 1932, presidential government in Germany could at least claim to possess a ‘semi-parliamentary’ character that would persist until Franz von Papen's Chancellorship in 1932.<sup>933</sup> Thus, Hindenburg's withdrawal of confidence, personally and politically, from him, left Brüning with no choice but to resign. Finally, in May 1932, Hindenburg dismissed Brüning.

In this sense, it is clear why several dissolutions of the Parliament by Brüning and later by Papen and Schleicher, the intrigue of Brüning, and failures of Brüning, Papen, and Schleicher to satisfy the right-wing, nationalists, and the Reich President, coincided with the increased representation of the Nazis. Nationalism and socialism were the most significant factors of the time. Not only were Brüning, Papen and Schleicher struggling with the constitutional democracy, but also they used it in their own fights.

Vertically, the role of right-wing Reich President, and horizontally the interrelated support of right political parties helped to prompt the emergence of the Nazi party as a major political party. Toward the end of each cabinet, the aristocratic trend in the power relation that was protected with the democratic constitution, gathered its forces for a legal distribution of office and power. Carrying the putsch of 1923 and the experience of addressing the ban on the Nazi party - or NSDAP - in his resume, the Nazis were assured that Hitler was the right person to present their demands, to whip the nationalist vote, and win their fervor against the

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<sup>928</sup> Patch, *Heinrich Brüning and the Dissolution of the Weimar Republic*, (Cambridge: Cambridge University Press, 1998), p.220.

<sup>929</sup> Patch, *Heinrich Brüning and the Dissolution of the Weimar Republic*, (Cambridge: Cambridge University Press, 1998), p.220.

<sup>930</sup> Dwyer, *Modern Prussian History: 1830-1947*, (New York: Routledge, 2013), p.263

<sup>931</sup> Maye, *Skizzen aus dem Leben der Weimarer Republik: Berliner Erinnerungen*, (Berlin: Duncker & Humblot, 1962), p.199. See also Gräser, *Der blockierte Wohlfahrtsstaat: Unterschichtjugend und Jugendfürsorge in der Weimarer Republik*, (Göttingen: Vandenhoeck & Ruprecht), p.168.

<sup>932</sup> Patch, *Heinrich Brüning and the Dissolution of the Weimar Republic*, (Cambridge: Cambridge University Press, 1998), p.220.

<sup>933</sup> Lindseth, ‘The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.’, *The Yale Law Journal*, (2004), p.1363.

communists. Hitler and his party knew that the key to power is not the subversions against the government, which cause the loss of support of nationalist allies and military, but to use the limitation of legal legitimacy in a democratic machinery for their gains and win over the people's favor with their nationalistic propaganda - the sweet propaganda that everybody needed to hear in those bitter days. Law and propaganda were two instruments to catch the vote and the favor. This point can obviously be seen in Hitler's speech in 1930, where he was called as a witness for the trial of three army lieutenants who were accused of subversion:

“The National Socialist movement will try to achieve its aim with constitutional means in this state. The constitution prescribes only the methods, not the aim. In this constitutional way, we shall try to gain decisive majority in the legislative bodies so that the moment we succeed we can give the state the form that corresponds to our ideas.”<sup>934</sup>

The speech shows how the concept of law can be diverged from the concept of legitimacy and be used in the hands of the power hungry where the role of law is distinguished. On the one hand, is the law, a positive law, devoid from any notion of rational-normative principles and moral significance, and can be used as a mere instrument. This is the ignorance in the deficit in throughput legitimacy. On the other hand, is the vague concept of 'aim'. Ambiguity in 'aim' is based on the lack of rational-normative principles and moral significance. This is the ignorance in the deficit in the input legitimacy of a legal system which provides a way for the power hungry 'to give the state the form that corresponds to' their ideas. Thus, the Constitution failed to appreciate the rational-normative principles, whether it appreciated the democratic values or not, and as a consequence, the legitimacy of the regime was trampled.<sup>935</sup> In other words, Hitler and his Nazi party did not only ask themselves on which ethical and ideological grounds their power can be deducted, but also they asked themselves, more pragmatically, in which way, namely which 'decisive legislative bodies', which instruments, and which laws, are the most likely to possess political power without any consideration for moral significance.

The legal means gave Hitler a ground to stay and to fight. He continued to oppose Brüning and his growing ambitions for power threatened the office of President and his Cabinet. To address his constantly increasing activities, Hindenburg used the dismissal of Brüning for the 'taming strategy', a plan that originally Schleicher proposed.<sup>936</sup> The plan was to dismiss Brüning as if they had positively responded to the Hitler demand. As a further bribe, they would also lift the ban which was imposed on Hitler's private army - or paramilitary. In the shadow, they wanted to politically 'push Hitler so far into a corner that he will squeak'<sup>937</sup>; and at the

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<sup>934</sup> Quoted in Noakes and Pridham eds., *Nazism: 1919-1945: Volume 1: The Rise to Power 1919-1934*, (Exeter: University of Exeter Press, 1991), p.90.

<sup>935</sup> See part one of this work. See also Kennedy, *Constitutional Failure: Carl Schmitt in Weimar*, (Duke University Press, 2004.); Lee, *The Weimar Republic*, (New York: Routledge, 2010), p.46., Finn, *Constitutions in Crisis: Political Violence and the Rule of Law*, (Oxford: Oxford University Press, 1991), p.137.

<sup>936</sup> Bracher, *Die Auflösung der Weimarer Republik. Eine Studie zum Problem des Machtverfalls in der Demokratie*, (Stuttgart/Düsseldorf, 1955).

<sup>937</sup> Quoted in Bracher, *The German Dictatorship: The Origins, Structure, and Effects of National Socialism*, (New York: Praeger Publishers, 1970), p.248.; also see Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p. 27.

same time, they planned to offer a better position to the Nazis' private army leaders in the hope of dividing the Nazis.

The ban on Hitler's *Sturmabteilung* (SA)<sup>938</sup> and *Schutzstaffel* (SS)<sup>939</sup> were lifted along with the prohibition of the state government to impose their own ban on Nazi organizations, while a similar ban on communist Red Front organizations remained in force. This was the main reason to increase the inner conflicts between the two political parties and the brutal street fights.

In the election of July 1932, Nazis won two hundred and thirty seats out of six hundred and eight, along with the SPD with one hundred and thirty three seats and the Communist Party (KPD) with seventy seven seats. With the Papen Cabinet, Nazi Party, as it was not obviously predicted in taming strategy, remained the main and furious opponent which was dreaming for the majority and Hitler's chancellorship. Following the situation, the street battle and party battles became significant in number, while the SA and SS were legally protected. Of course, in Prussia, which was two thirds of German land and the location of Reich Capital, Berlin, such battles were seen more. The unrelenting violence was one of the reasons to accuse the Prussian government of incompetence for handling the matter. Finally, the *Altonaer Blutsonntag* - or 'Altona Bloody Sunday' - was a shootout between SA demonstrators and communists in Altona (Hamburg) on the 17th of July 1932, which claimed eighteen lives. This turmoil inflamed tensions across the board. Papen, as a conservative politician saw the government more on the right side of the political spectrum. Papen used the emergency decree from Hindenburg, which on the 20th July of 1932 permitted him to usurp the power of the Prussian government and, in particular, the SPD and Communists power, which is known as the *Coup d'Etat* of the 20th of July 1932. This was an imperceptible way to stand by Hitler. The result was the legal resistance, which at that time, was the only remedy of each part of the rivalry of power. In *Prelude to Silence*, Arnold Brecht describe the situation as follow:

"It was a triangular fight. The democratic parties fought Papen. But, first of all, they fought Hitler. Papen, first of all fought the Communists and Social Democrats. Yet he still fought Hitler's ambition to obtain unlimited power. In abstaining from street fights against Hindenburg and Papen and using only the constitutional remedy of an appeal to the court, the Prussian ministers were led by the desire to preserve the constitutional basis of governmental powers and to force Hindenburg back within constitutional bounds."<sup>940</sup>

The Social Democrats chose to challenge the constitutional validity of the government's decree and put the matter before the State Supreme Court. To resolve the legal dispute between the Federal Government and the state of Prussia, the State Supreme Court on the 25th of October 1932 gave the Reich government absolute authority over the internal affairs of the

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<sup>938</sup> Translated literally to Storm Detachment, functioned as the original paramilitary wing of the Nazi Party.

<sup>939</sup> Translated literally to Protection Squadron was a major paramilitary organization under Adolf Hitler and the National Socialist German Workers' Party (NSDAP; Nazi Party) in Nazi Germany created in 1923.

<sup>940</sup> Brecht, *Prelude to Silence: The End of the German Republic*, (New York: Howard Fertig, 1968; first published in 1944), pp.66-67.

Prussian State, by which time the SPD was a crippled political force.<sup>941</sup> The decision was highly influenced by the arguments which presented, on the one hand, by Schmitt, the legal theorist of the right and Schleicher's chief legal advisor, and on the other hand, by Heller, the legal theorist of the Prussian Social Democrats.<sup>942</sup>

In the term of the decision, not only did the Reich President have such authority over the government, but he could exercise power in all strata of the Weimar power structure. Even if the State Supreme Court had decided to stay neutral, in the best-case scenario, still the pragmatic implementation of the constitutional law would have had the same result: an oppression of democratic progress. Indeed, Papen and later Schleicher tried to use the extensive political power of the Reich President and the Miranda of power to break free from the parliamentary restraints and establish a new power structure by decree. They and Hindenburg used their legal authority to get rid of the political rights of the people that were entrenched in the Constitution, yet they anxiously wanted to be seen as the lawful office holders. Hitler's seizure of power may be more obvious, as he made use of the absolute exercise of power, which has later been known as an absolute illegitimate one.<sup>943</sup>

By that time, however, it was clearly perceptible that the restrictive intractable attitude of Papen over the matter of the states did not work in the *quasi* democratic power relation, and finally in September 1932, the Parliament carried a motion of no confidence in Papen's Government. Yet, Hindenburg chose to be on the side of Papen, in the conflict of Government as executive power, and Parliament as the main part of legislative power. After Brüning's fall in 1932, and during Papen's Chancellorship, the presidential government in Germany took a decidedly anti-parliamentary turn. This was the fourth dimension of fight that led to a decree which was invoked by Hindenburg's legal authority; the Reich President dismissed the Parliament. The anti-democratic Papen government, which was formed under Schleicher, ruled without pretence of parliamentary support, positive or negative, post hoc or otherwise. The claimed constitutional foundation for this anti-parliamentary and authoritarian rule was Schmitt's controversial theory of the president's inherent dictatorial powers as the "protector of the constitution" under Article 48, free from the need for parliamentary support of any kind.<sup>944</sup>

After a while, encountering the civil crisis Schleicher successfully persuaded Hindenburg that the state of emergency that Papen wanted, to handle both political fights and street fights, would lead to a civil war, and he that manage this situation with his continued insistence on the 'taming strategy' and his military instincts. Thus, Hindenburg appointed Schleicher, just like him, a man of the army, as the Chancellor to take control of the situation. Within his one-

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<sup>941</sup> The complete argument which was presented before the court and the final judgment see *Preussen Contra vor dem Staatsgerichtshof: Stenogrammerbericht der Verhandlungen vor dem Staatsgerichtshof in Leipzig vom 10. bis 14. und vom 17. Oktober 1932* [Prussian v. Reich before the State Supreme Court: Stenographic Report of the Proceedings before the Court in Leipzig from October 10 to 14 and from October 17, 1932], (Glashütten im Taunus: Verlag Deltlev Auvermann KG, 1976).

<sup>942</sup> Jacobson and Schlink, *Weimar: The Jurisprudence Crisis*, (California: California University Press, 2000), p.249.

<sup>943</sup> see Grint, *The Arts of Leadership*, (Oxford: Oxford University Press, 2000), p.19

<sup>944</sup> Schmitt, *Der Hüter der Verfassung* [The Guardian of the Constitution], (Berlin: Duncker & Humblot 1985, first pub.1931).; Patch, *Heinrich Brüning and the Dissolution of the Weimar Republic.* (Cambridge, UK: Cambridge University Press, 1998), pp.72-117.; Lindseth, The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s., *The Yale Law Journal*, (2004), p.1363.

month chancellorship, from 3rd of December 1932 through January 1933, his politics could not defeat the Nazi, and his iron policies were not liked by the right-wing, conservatives, or even Hindenburg. Hence, Hindenburg returned to Papen with a view that he could form a new government to address, on the one hand, Hitler activities, and on the other hand, those of Socialists and Communists. Yet, due to the Papen uncompromisable strategies, he could not be the head of government again. The result of the discussion was the resignation of Schleicher and as his substitute, the appointment of Hitler as the head of Cabinet, the Chancellor, with Papen as Vice-Chancellor. It seems that the ‘taming strategy’ began its second phase, although the first ridiculously failed.

Hindenburg’s appointment of Hitler as Chancellor in January 1933 was simply the culmination of this transformation of the Weimar regime into a presidential dictatorship under Article 48.<sup>945</sup> Indeed, Hitler was not the head of the Government, as the parliamentary coalition is presupposed. “He gained ‘legitimate’ control of the Government through the authoritarian loophole which was in the Weimar Constitution.”<sup>946</sup> What is important, however, is that the dominant interpretation of the constitutional disintegration of the Weimar Republic and its broad emphasis on Article 48 and the devolution of the regime into a presidential dictatorship in 1932 under Papen and Schleicher, is only part of one side of our critique. The second essential element that diverged the legality from the legitimacy in the Weimar Republic was the Nazis’ successful legality strategy: the *Ermächtigungsgesetz*, or Enabling Act, of March 24, 1933.<sup>947</sup> Hence, let us elaborate on this point.

Hitler was the head of the Cabinet and the rest of it was composed of nine conservatives and three Nazis. In February 1933, Hitler ran a massive election against the Communist Party (KPD), and the left-wing. As a prompt reaction, the communists attacked the Parliament on the 27th of February 1933. This helped Hitler to persuade Hindenburg that the communists were plotting to take over the government, and he had to not only sign the decree of the 28th of February, but also give Hitler full power to manage the state of emergency and detain people without trial to impede the potential communist revolution.<sup>948</sup> This was the first step of the Nazi’s dictatorship. It was likely to believe that, Hitler’s war against communists, and later against Russia, was initially not against the politics of the West, since otherwise Germany and then Europe would have gone towards communism. However, should the aim justify the means?

With the expansion of the Nazi’s power, the party won two hundred and eighty-eight seats out of six hundred and forty-eight in the German federal election of March 1933, but still they were not the majority. The main opponents, the SPD with one hundred and twenty, and the Communists with eighty-one seats were on the tail of Nazi. Yet the Central Party with seventy-four, and the Nationalist with fifty-two seats were close to the Nazis, with both their support

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<sup>945</sup> Bracher, *Die Auflösung der Weimarer Republik. Eine Studie zum Problem des Machtverfalls in der Demokratie*, (Stuttgart/Düsseldorf, 1955).

<sup>946</sup> Bracher, *The German Dictatorship; the Origins, Structure, and Effects of National Socialism*. (New York: Praeger Publishers, 1970), p.194.

<sup>947</sup> Gesetz zur Behebung der Not von Volk und Reich, v. 24.3.1933 (RGBl. I S.141).

<sup>948</sup> *Verordnung des Reichspräsidenten zum Schutz von Volk und Staat* (Reichstagsbrandverordnung) [Decree of the President for the Protection of People and State (Decree in regard to the Reichstag Fire)], 28 February 1933 (RGBl. I S.83), reproduced in *Deutsche Verfassungen* [German Constitutions], (Munich, 1992), 211-12.

of catholic church - as it is promised in the *Reichskonkordat* of twenty-third of July 1933 - and nationalistic, and anti-communistic interests respectively.

Where Article 48 does not surprise us in the handling of the rivalry between the office holders in the executive and legislative power, the Enabling Act of twenty-third of March 1933 does it resentfully, as the second step to the Nazi dictatorship. In other words, although the Enabling Act itself was a manifestation of a profound flaw in Weimar constitutional practice on par with the potential for presidential dictatorship under Article 48, it also helped in 'legalizing' the Nazi exercise of full dictatorial powers.

Germany saw a progressive trend in politics and economics between 1923 and 1929. However, the unwelcome resurrection of mass unemployment, the military's intervention in state affairs, police inability to control the political and social crimes, and the attempts of the communist for revolution, raised the fear of great economic recession, chaos, and xenophobia in Germany. Relying on this situation, Hitler made sure that the Parliament would agree to handle the constitutional and legislative power under him. Autonomy of all social trends were withdrawn from any notion of politicization and social interaction, and politics, economy, culture, education, military, and police were presented under the dictatorship plan of *Gleichschaltung* - or coordination -<sup>949</sup>. This was all part of Hitler's ambition to subvert the power relation that, as he believed, had been established by the stab-in-the-back strategy, which was the betrayal of civilians on the home front, the "*Werk der roten Novembervbrecher*".<sup>950</sup>

Here, we must ask: How was it that administrative officials and the courts could regard the Parliament's complete abdication of its constitutional functions in 1933 as "apparently unexceptional" legally? It should be recalled that the broader emphasis, merely on Article 48 as the "authoritarian loophole" could not ultimately destroy German democracy. In fact, according to Karl D. Bracher, a prominent German political scientist and historian of the Weimar Republic and Nazi Germany, the first instances of "the dismantling of parliamentary power" did not take place in "the end phase of the Weimar Republic."<sup>951</sup> Rather, "the Reichstag [Parliament] had never been able to occupy its position as the de facto legislative power," however much it was expected to do so "as the crystallization point of democracy" under the constitution.<sup>952</sup> Bracher alludes to a series of enabling acts of the early 1920s, suggesting that these pieces of legislation demonstrate how the parliament of the Weimar Republic saw its legislative powers dissipated, and its statutory rights ceded "bit by bit," long before Hitler exploited the well-established mechanism of the enabling act to legalize his dictatorship.<sup>953</sup> However, over the years, initiated with the Enabling Act of March 1933, Hitler used Article 48 to give his dictatorship the stamp of legality. Many of his decrees helped the German economy,

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<sup>949</sup> see Evans, *The Coming of the Third Reich: How the Nazis Destroyed Democracy and Seized Power in Germany*. (New York: Penguin, 2003).

<sup>950</sup> Niess, *Die Revolution von 1918/19 in der deutschen Geschichtsschreibung: Deutungen von der Weimarer Republik bis ins 21. Jahrhundert*, (Berlin & Boston: De Gruyter, 2013), p.125.

<sup>951</sup> Bracher, *Die Auflösung der Weimarer Republik. Eine Studie zum Problem des Machtverfalls in der Demokratie*, (Stuttgart/Düsseldorf, 1955), p.47.

<sup>952</sup> Bracher, *Die Auflösung der Weimarer Republik. Eine Studie zum Problem des Machtverfalls in der Demokratie*, (Stuttgart/Düsseldorf, 1955), p.47.

<sup>953</sup> Bracher, *Die Auflösung der Weimarer Republik. Eine Studie zum Problem des Machtverfalls in der Demokratie*, (Stuttgart/Düsseldorf, 1955), p.47.

specifically, addressing the dramatic decrease of the unemployment rate.<sup>954</sup> However, the decrees abolished all other political parties. Namely, Hitler's taking over the absolute power of Chancellor and the President in his hand were based explicitly on the Reichstag Fire Decree, and thus on Article 48. Hitler, for the next twelve years, ruled under what amounted to martial law.

However, we have to look beyond Article 48, beyond the hybrid and potentially contradictory parliamentary-presidential elements in the system, to an additional examination of the right of the Parliament to delegate legislative power to the executive one. This right was an essential implicit element of the Weimar constitution. Thus, it is important to recall that, in March 1933, the decisive legal foundation for Hitler's dictatorship was not only a presidential decree, but an enabling act adopted by the Parliament, in which the Nazis still did not hold a majority.<sup>955</sup>

The success of the Nazis' legality strategy depended not only on the legal potentiality of the authoritarian dictatorial elements in the Weimar Constitution under Article 48, but also on the absence of the effective constitutional controls over the parliament's abdication of its legislative role, and on the absence of democrats in the office.<sup>956</sup> While the two latter elements show the throughput legitimacy deficit, the first element shows the input legitimacy deficit. When we concern ourselves with the throughput legitimacy and the concept of legality, we have to allege that as a legal and constitutional matter at least, the enabling act was viewed as "apparently unexceptional" precisely because so many contemporaneous observers accepted, without examination or even reflection, such as Schmitt, the constitutional authority of the Parliament to refuse its most basic democratic function - the making of legislative norms - not only to the executive, but also beyond the constitutional definition of power.<sup>957</sup>

### 3.3.3 Article 48 and the Theory of Political Consciousness

Despite the civil and economic unrest, and political crises, the Weimarian new-fangled democracy suffered from a major legal uncertainty. The uncertainty worsened the outcomes of the power rivalries between the two major power branches: executive power with the highlighted role of the elected President, and the legislative power with the highlighted role of the Parliament. The idea was rooted in the mind of those who wrote the new Constitution. At the beginning, it was a merged idea of the social democrats and communists, a mixture of quasi *Rechtsstaat* and *Machtstaat*. They tried to merge the liberal idea of *Volksstaat* (citizens' state), where the federal government provides the constitutionally protected political rights of the people, and the system of checks and balances in the power relation, with the conservative idea

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<sup>954</sup> Temin, *Lessons from the Great Depression*, (Cambridge: The MIT Press, 1991), p.3.; see also Eichengreen, and Hatton, *Interwar Unemployment in International Perspective. Working Paper Series*, (California: Institute for Research on Labor and Employment, UC Berkeley, 1988)

<sup>955</sup> Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.', *The Yale Law Journal*, (2004), p.1371.

<sup>956</sup> See also Fromme, *Von Der Weimarer Verfassung Zum Bonner Grundgesetz; Die Verfassungspolitischen Folgerungen Des Parlamentarischen Rates Aus Weimarer Republik Und Nationalsozialistischer Diktatur*, (Tübingen: Mohr, 1960).

<sup>957</sup> See also Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.', *The Yale Law Journal*, (2004), p.1365.

of executive power, which hierarchically exercises its power - a substitute for the Reich emperor.<sup>958</sup> It seems that the transition was from a constitutional monarchy to a parliamentary democracy, yet with the unchecked power of the Reich President.<sup>959</sup> The social democrats, especially, designed such power so that it can tackle the problems of Reich in the state of emergency, and they were expecting the day that they could see the use of such power in the conflict with Russia - a lesson that they have learnt from WWI. The outcome of such a mixture was a regime in which the idea of checks and balances, in the hands of anti-democrats, was the conception of unlimited parliamentary authority, by which it could not abandon its constitutional function. This was the fault line of the Constitution of the Weimar Republic.

However, looking from a different angle, rather than focusing on the input legitimacy of the Constitution, is to look at the throughput legitimacy in the process of instrumenting legality and force for power, hence, an assessment on the legality and those who exercise the laws.<sup>960</sup> What has been said about the Constitution and its relation with legitimacy would be mutually true for the division of power in the hands of the office holders. This would result in the failure in appreciation of the rational-normative principles, and in the measurement of power, in the pragmatic hands of office-holders. This is where the focus is on the relation between the legitimacy of a democracy and the democrats. In other words, it is the matter of practicing the interrelated concepts of democratic legality and political consciousness in a political mechanism. The representative parliamentary democracy, which was overload with the unrelenting political rivalries, ended in a radical movement and centralization of power in a hierarchical power structure. The notion of parliamentary supremacy paradoxically provided the foundation, through its support for extreme delegations, for the degeneration of the parliamentary system into dictatorship.<sup>961</sup>

Article 48 gave the Reich President a broad and authoritative power to manage the emergency situation. To understand why such excessive power legally ratified in a democratic constitution, one should not ignore the historical consciousness of the German society which was shaped, particularly in that time, by the former power structure. At that time, the National Assembly could not see the potential political problem that later came into existence. The democratic power relation was a hope which was largely dependent on a shakable speculation: Hobbes argued for a certain positivist understanding of legal order to serve the individual values which are the initial inspiration of his Leviathan. However, Hobbes was not in agreement with the democratic values, and so “he merely placed his hope in the benevolence of the absolutist rulers whose law should be taken by legal subjects as definitive of their moral obligations.”<sup>962</sup> The Constitution of the Weimar Republic was also based on the idea that the

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<sup>958</sup> Sternberger, *Staatsfreundschaft*, (Frankfurt am Main: Insel Verlag: Insel Verlag, 1980), pp.120-121.

<sup>959</sup> Kolb, *The Weimar Republic*, (New York, Routledge, 2005), p.162.

<sup>960</sup> See also Shokri, "Legitimacy and Theory of Political Consciousness." *Journal of Political Sciences & Public Affairs*, 04 (01) (2016), p.4.

<sup>961</sup> Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.', *The Yale Law Journal*, (2004), p.1348.

<sup>962</sup> Dyzenhaus, "Hermann Heller and the Legitimacy of Legality." *Oxford Journal of Legal Studies* 16.4 (1996): 641-66.

Reich President would use his power democratically.<sup>963</sup> Maybe, they assumed that the social democratic Parliament and the social democratic president would be the permanent offices and the office holders of the regime, which they saw as the way to prevent the radicalization of the workforces and other groups.

The difference between the practical exercise of such extensive power, which was provided in Article 48, can be seen between the presidential period of Friedrich Ebert and Paul von Hindenburg. Ebert's presidency was between 1919 and 1925. In the first three years, he often resorted to Article 48 to stop the radicalization of politics from both the right and the left, and to deal with the economic and social problems.<sup>964</sup> Pragmatically, he had done much for the political stability, and to maintain constant balance between the executive and legislative power, in which a democratic power relation can be rooted and thrive. Yet, he also did much that shows that Article 48 is a good instrument for the power hungry. Between 1922 and 1924, there were the quantitative and qualitative changes in the application of presidential authority, as the constitutional basis was mostly used for the acceleration of the legislative process.<sup>965</sup> In fact, from the 1st of January, 1920 through December 1924, four hundred decrees passed in place of laws, yet none of them, even the decrees that were invoked afterward, helped to overcome the emergency situations.

In Ebert's presidency, the number of extensive presidential power based on Article 48 reached its climax. Yet, the character of power relation between the branches of power was in a way that the Parliament was almost on the same page as the President. This is not true for the Hindenburg presidential period. In other words, Ebert used the power of Article 48 based on the agreement between the Government, the President, and the Parliament. In this sense, the application of Article 48 mostly took place in the formal sittings of the Parliament. This process was quite contrary to the situation of 1929 onward. Moreover, in the Ebert presidential period the decrease was mostly passed as an acceleration in the process of passing intended government legislation. This means that Article 48, as an instrument, was used in a situation where the concepts of 'power to' and 'power of' have been not been beaten down and ignored.

The resurrection of the economic crisis after 1929 was as severe as the days when Ebert came into office. In this situation, the state demanded changes and implementation of new policies which would not have been possible "without an extension of the state's obligations to them."<sup>966</sup> Yet, the political stability lost its place to the unrelenting political rivalries between the right-wing and left-wing for the seizure of power.<sup>967</sup> The usage of Article 48 in the years after 1929 evidently implies that the presidential power helped the political radicalization as it used its potential extensive power. In these rivalries, Hindenburg and Hitler used Article 48 as

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<sup>963</sup> Bolt, 'Article 48 of the Weimar Constitution, its historical and political implications.' Anthony Nicholls and Erich Matthias eds., *German Democracy and the Triumph of Hitler: Essays in Recent German History*, (London: George Allen and Unwin Ltd., 1971), p.79.

<sup>964</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p. 29.

<sup>965</sup> Fehse, *Ermächtigung Gesetzgebung im Deutschen Reich 1914-1933*, (Pfaffenweiler 1985).

<sup>966</sup> Milward, *The European Rescue of the Nation-state*, Berkeley & Los Angeles: University of California Press, 1992, p.4.

<sup>967</sup> Kolb, *Friedrich Ebert als Reichspräsident: Amtsführung und Amtsverständnis*, (München and Wien: Oldenbourg, 1997).

a direct legal means to strengthen the position of presidency and to shape a *de facto* authoritarian/totalitarian power respectively.

Hindenburg and Hitler have broken the barriers inherent in the law and legal system on the state of emergency. Indeed, Hitler's policies to reach the utmost power, and turn the democracy into an authoritarian/totalitarian power structure, were played out by the democrats, yet it cannot be used as the reason to argue that the need of the time was to use an authoritarian measure to prevent him coming to power, which did not work. The failure of Weimar's constitutional regime was partly because of the fact that the anti-democrats persuasively killed the hope of the decent liberal parliamentary regime among the German people and misled them towards the authoritarian/totalitarian one.<sup>968</sup> This was the fault line that could not be seen in the time that the constitution was written, yet it is the theory that Schmitt advocated.

According to Schmitt's theory, it may be assumed that the nature of the presidential regime depends on the nature of the parties.<sup>969</sup> Where the parties and parliamentary power cannot manage to find majority for a 'decisive legislative force', the President may appear as both the legislator and 'the guardian of the Constitution'.<sup>970</sup> What an irony that both Schmitt and Hitler argued on the same ground that in the conflict of establishing a legal order, executive power has an upper hand over the legislative power.<sup>971</sup> They argued that only the President can recognize the state of emergency, as the Parliament fails to function in the state of emergency, hence, the president could have an unchecked power based on his own measure. In this sense, liberalism would be the victim of the pattern of a political decision.

In contrast, it may be assumed that the position of parties and the Parliament were weakened from the start of the Weimar Republic. On the one hand, the party members have had high incentives to join the Parliament, which was enough of a reason for them to wave their political and legal duties, and on the other hand, the president legally took over the Parliament not only as a supervisor but also as a despotic ruler in the state of emergency. In both cases, the political right is underestimated and the 'essentially integrated concepts' of power and rights are dissolved. Power was only about the location; the more the offices closer to the power center, the higher the properties were valued. In such a situation, the moral significance, which is the main element for the existence of the concept of 'power to' and 'power of', was demoralized and ignored. This way of ruling that appears to be authoritarian/totalitarian power relation, does not have any other way: it tries to turn its people from citizens to completely dependent creatures, and their dependence should not be passive, but to some extent active. They should not just obey an external command, but they should be actively available in their intentions, thoughts, and movements, thus there would be no contrast remaining between autonomy and heteronomy.<sup>972</sup>

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<sup>968</sup> Rawls, *Political Liberalism*, (New York, Columbia University Press, 1993).

<sup>969</sup> See Schmitt, *Legalität und Legitimität*, (Berlin: Drucker & Humblot, 1932).; Schmitt, *Legality and Legitimacy*, trans. by J. Seitzer, (Durham: Duke University Press, 2004).

<sup>970</sup> Schmitt, *Der Hüter der Verfassung* [The Guardian of the Constitution], (Berlin: Duncker & Humblot 1985, first pub.1931). see also Müller, *Hitler's Justice: The Court of the Third Reich* (Cambridge, Mass., 1991), pp.39-45.

<sup>971</sup> see also see Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.40.

<sup>972</sup> Sternberger, *Staatsfreundschaft*, (Frankfurt am Main: Insel Verlag: Insel Verlag, 1980), p.122.

However, the hegemony of autonomy and heteronomy would be the first victim of the weakness in legal legitimacy. It fortifies the rivalries between the power branches, instead of consolidating them, and is one of the main reason for the subversion of democracy. Thus, regarding the relation between the legitimacy of a democracy and the democrats, or in other words, the interrelated concepts of democratic legality and political consciousness in the political mechanism, two points are comprehensible. On the one hand, the Constitution failed to appreciate a balance between the concepts of power: 'power over', 'power of', and 'power to'. In this sense, it ignored the legitimacy of the legal justification which was the ground for one branch of power to decree endlessly. Moreover, it failed to provide effective constitutional controls over the Parliament's abdication of its legislative role, holding the constitutional authority of the Parliament to refuse its most basic democratic function - the making of legislative norms - not only to the executive, but also beyond the constitutional definition of power.

On the other hand, the Constitution gave the legal means for the usurpation of power. First, the democrats failed to be in the offices, so the vacancies were occupied with the anti-democrats, who had the aim of seizing power despotically. Hence, the deficiency of the throughput legitimacy was due to the presence of anti-democrats in the office, who could abuse such unbalanced power. Second, the deficiency of the input legitimacy in the Constitution not only caused the unchecked legal authority of executive power, but also the inability of the State Supreme Court to make a moral and legitimate decision on the 25th of October 1932.<sup>973</sup> This entailed the ignorance of rational-normative principles, and the moral significance, which are the major components of political consciousness. Without political consciousness, office holders would whirl power based on the concept of 'power over', thus, legitimacy would be an absurd term.

Based on this situation, still we have to ask whether the decrees which have been taken by the Weimerian executive power, especially in the presidential period of Hindenburg, and the decision of the State Supreme Court in the conflict of the Prussian State and the Weimar Republic, were justified or legitimate. As the most important public law theorists argued before the Court, such as Carl Schmitt and Hermann Heller, and as Hans Kelsen wrote a detailed analysis of the judgment,<sup>974</sup> we have a three major opinions regarding the legitimacy and justification of the decrees and the decision of the State Supreme Court. Kelsen saw the decision as the confused decision which was the result of the weakness in the Constitution. In this sense, he meets us halfway. Yet, for him, the decrees and the Supreme Court's judgment are merely the political decisions in a way that the analysis on the legitimacy of them cannot be a legal one. In this sense, he agreed with Schmitt that all legality is based on a decision.<sup>975</sup>

Heller argued for legal legitimacy. He believed that the decision of the Court was completely wrong, but to the contrary of Kelsen's idea, he argued that the wrong decision was

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<sup>973</sup> *Preussen Contra vor dem Staatsgerichtshof* [Prussian v. Reich before the State Supreme Court], (Glashütten im Taunus: Verlag Deltlev Auvermann KG, 1976), 516-517.

<sup>974</sup> Kelsen, 'Das Urteil des Staatsgerichtshof vom 25. Oktober 1932' [The Court's Judgment of 25 October 1932], *Die Justiz*, 8 (1932-33), 65-91.

<sup>975</sup> See Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.44.

made because the judges failed in their duty to uphold the Constitution.<sup>976</sup> For Schmitt the decision was correct. Yet, he also knew that the decision could not comprehend the full knowledge of its radical basis. Indeed, the weakness in the Constitution was one of the reasons for the illegitimacy of the decrees and the Court decision. Moreover, the capacity to comprehend the potential possibilities for the office holders to abuse the Constitution is another reason. However, such statements are possible to be made, only if the political and legal evaluation of the law, the decrees, and the judgment can be normatively provided. In the following parts, this evolution for legality and legitimacy take place in the analytical assessment on Schmitt, Heller, and Kelsen's theories of power, sovereignty, and legal legitimacy.

### 3.4 Legitimacy and Legality in the Final Clash for a Sovereign Decision

Over the course of the early twentieth century, nation-states throughout the industrialized world underwent a dramatic institutional, political, and economic transformation. These transformations brought important legal and constitutional consequences. Even in the countries with well-established bureaucratic and legal traditions, economic and political transformation and the emergence of the welfare state entailed a significant diffusion of normative power away from elected legislatures into an often fragmented and complex executive and administrative sphere. The political ambience in the 1920s and 1930s marked a breakdown of the concept of 'separation of powers' derived from the doctrine that Montesquieu, a prominent French political philosopher and lawyer, presented in the enlightenment age, which implies the initial model of the modern *trias politica* – or separation of powers.<sup>977</sup> In *The Spirit of Law*, he argued that:

“Political liberty in a citizen is that tranquillity of spirit which comes from the opinion each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen.

When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.

Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.”<sup>978</sup>

This concept, which at that time was assumed to be a radical doctrine, at least in theory, had made the popularly elected legislature (the Parliament) the principal legitimating

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<sup>976</sup> See Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.37.

<sup>977</sup> Montesquieu, *The Spirit of Law*, (Edinburgh: Donaldson and J. Reid, 1750).; See also Montesquieu, *The spirit of laws*, trans. by Thomas Nugent, (Batoche Books, 2001, first pub. 1748), ch.6, 7, and 19.

<sup>978</sup> Montesquieu, *The spirit of laws*, (Batoche Books, 2001, first pub. 1748), p.157.

mechanism of a state structure, which also included the executive and judicial branches. In the prevailing nineteenth and twentieth centuries' conception, the national parliament, as the cornerstone of representative government was believed to possess ultimate authority over the adoption of generally applicable legislative norms governing society.<sup>979</sup> By contrast, the primary role of the executive, and its administrative subordinates - government - was consistent with the prevailing political liberalism to serve as agents of the legislature with very limited normative autonomy or discretion - the so-called "transmission belt" theory of administration.<sup>980</sup> The principal function of judicial control in this scheme was to ensure that the executive and the legislative would remain within the confines of the authority and the legal constitution. Thus, the classical concern was with *ultra vires*.<sup>981</sup>

In this part, we will see how the three major legal theorists of the Weimar Republic assessed the problem of legality and legitimacy. It is crucial to differentiate between the theory and the practice to add an important measure of legal nuance to the prevailing historical interpretation of political and economic stabilization in the West from the 1920s on, and to face the challenges which have remained. We can see from this chapter the practical consequences of such theories. In short, it will be shown that neither can the problem of legality and legitimacy be reduced to a sort of specific theory nor can it be reduced to the practice. By following a linear historical path in the Weimar Republic legal predicaments, we see that the problem within the concept of legality and legitimacy is partly related to the constitution, to particular theoretical commitment, and to the legal theories grown within, and is partly related to the concept of power divisions, practical political commitments, and power holders in respect to their delegated power.

The importance of German politics for our starting point is clear. One reason is that Germany began from a unique institutional and doctrinal baseline - most notably, a much longer heritage of bureaucratic centralization stretching back to the absolute monarchies of Prussia and its preview era in the seventeenth, eighteenth, and nineteenth centuries<sup>982</sup> - as well as a cultural tradition that viewed the bureaucratic and monarchical class as a sort of *pouvoir neuter* (neutral power), but above social and political divisions in society.<sup>983</sup>

In the legal system of the Weimar Republic, efforts to strengthen executive power with traditional principles of parliamentary democracy – and through the unlimited power of legislature - have proven to be the most contentious ones, while also having the most disastrous outcome. The absence of an effective constitutional control over the Parliament's abdication of its legislative role in the well-settled Prussian constitutional law is directly related to the role of the Monarch. Such constitutional law is followed by the Weimar Republic and its legal

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<sup>979</sup> See Mill, *Considerations on Representative Government*, (Cambridge: Cambridge University Press, 1861), p.68.

<sup>980</sup> Richard Stewart has described the prevalence of this conception in the United States prior to the end of World War I. See Stewart, *The Reformation of American Administrative Law*. Cambridge, MA: Harvard Law Review Association, 1975), p.88.

<sup>981</sup> Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.', *The Yale Law Journal*, (2004), p.1343-1344.

<sup>982</sup> For a comparative summary, see Behrens, *Society, Government and the Enlightenment: The Experiences of Eighteenth-century France and Prussia*, (New York, NY: Harper & Row, 1985).

<sup>983</sup> In Prussian and German history this tradition received its most famous expression in Hegel's *Philosophie des Rechts*. See Sheehan, *German History, 1770-1866*. Oxford: Clarendon, 1989), pp.430-433.

system. The prevailing theory of legislation in late-nineteenth-century Germany, specifically in the Prussian Empire, was highly conventional, holding that only those normative acts in the form of a ‘statute’ (*Gesetz*) were “legislation,” whereas ‘regulatory ordinances’ (*Verordnungen*) that gave substantive content to that legislation were not. In this way, albeit ‘regulatory ordinances’ (*Verordnungen*) of the government established intended rules in the same manner as legislation classically conceived, they did not involve a delegation of “legislative” power.<sup>984</sup> Thus, “legislative” power was constitutionally unlimited, and its essence provided the legal force to normative rules, something that the executive could not autonomously provide without authorization of the legislature.

This approach, furthermore, is crucial since the political and legal philosophy are always best appreciated in a context that brings the issue at stake to life. The Weimar Republic, which was rooted in such an approach of legality, is the first tragic case in the modern Western politics that vividly illustrates the potential problems of the legality and legitimacy which can be found in the rivalries, on the one hand, between the three branches of power, and on the other hand, between the concepts of *pouvoir neutre* and *plein pouvoir*: neutral power and unfettered authority.<sup>985</sup> Nevertheless, it was under the Weimar Republic that the German scholarly and judicial discourses emerged. In this era, the recognizably modern conception of constitutional rights - which limited state power and implemented both legislative and executive power -, as well as an initial conception of judicial power and control to enforce those limitations are presented.<sup>986</sup> In section three of this part, it also has been shown that the rivalry between branches of power was rooted in the traditional struggle between the pretences of an imperial-monarchical executive and the claims of an elected assembly as the supreme constitutional representative of the nation. This shows us that the challenge of the modern states is to define a workable distinction between legislative and executive power.<sup>987</sup>

Yet, this approach is not merely historical because it comprises the vast normative and philosophical explanatory assessments to address the proposed problem. The issues which centered around the legality and legitimacy remain the central issues in the contemporary legal, philosophical, historical, and political debates. Particularly, the result of this work helps us to address the recent jurisprudence problems which have emerged from the concepts of sovereignty and legitimacy by which the modern defensible liberal democracies are challenged.

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<sup>984</sup> Laband, *Das Staatsrecht Des Deutschen Reiches*, (Tübingen: J.C.B. Mohr, 1911), p.96.

<sup>985</sup> In fact, the rivalries between branches of power could be also spotted in the politics of nineteenth-century’s in the United State, namely suspension of supreme court and dismissal of federalist judges which are related to the ‘Marbury vs. Madison’ case in 1803. See also Fisher, *On the Supreme Court: Without Illusion and Idolatry*, (New York: Routledge, 2014) pp.18-22.

<sup>986</sup> Poetzsch-Heffter, *Handkommentar Der Reichsverfassung, Vom 11. August 1919; Ein Handbuch Für Verfassungsrecht Und Verfassungspolitik*, (Berlin: O. Liebmann, 1928), pp.310-311.

<sup>987</sup> Heinrich Triepel and Fritz Poetzsch recognized such matter as highly irresistible. Poetzsch, *Verfassungsmässigkeit der vereinfachten Gesetzgebung. Archiv Des Öffentlichen Rechts*. (Tübingen: Mohr Siebeck, 1921), 40 (2): pp.156-172, p.156.; Triepel, *Der Weg der Gesetzgebung nach der neuen Reichsverfassung. Archiv Des Öffentlichen Rechts*, (1920) 39: 436, pp.534-35.

### 3.4.1 Schmitt and the Problem of Decisionism

At first glance, the main critique presented by Schmitt is on liberalism, and consequently is on the legal positivism that came to dominate German thinking in and after the twentieth century, at the core of which was the belief in the supremacy of statutory law as the ultimate expression of the state's will, and the role of monarch as its guardian.<sup>988</sup> Schmitt's legal critique provided a solemn path for the foundation of the theory of sovereignty, legitimacy, and political decisionism,<sup>989</sup> not compatible with the liberalism which tended to overcome the political predicaments of that time. In *The Concept of the Political*, Schmitt argues:

“Liberalism in one of its typical dilemmas ... of intellect and economics has attempted to transform the enemy from the viewpoint of economics into a competitor and from the intellectual point into a debating adversary. In the domain of economics there are no enemies, only competitors, and in a thoroughly moral and ethical world perhaps only debating adversaries.”<sup>990</sup>

Schmitt argued that liberalism was naturally crippled. By that, he meant that liberalism cannot defend itself because of its core value: the principles of neutrality, whether in the fights between the interest groups or in the fight against the outside enemies. From this approach, it is comprehensible that he implicitly wanted to express three points:

- First, only if the liberals grasp the political components, namely here the political components that are expressed in the Weimar Constitution, they can defend the liberal legal order against extremism. It is to say that the liberal legal interpretation rests on an expression of willful power.<sup>991</sup> As Schmitt's thoughts are unsystematic and there is not a continuity in his critique of liberalism from 1922 to 1938, the earlier approach of his does not match his latter approach to liberalism, by which he tried to cover up his earlier principles of opposition to Nazism.
- Second, liberalism and legal positivism are contradictory since in the moment of legal decision making, liberalism would be impossible. This point implies that liberalism cannot establish legal order based on the norms, but only the political decisions that can establish legal order.
- Third, the antithesis of liberalism is the decision for a new sovereign order and the concept of domination.

Here, Schmitt's argument paved the way for the foundation of his doctrine, the political: “The specific political distinction to which political actions and motives can be reduced is that between friend and enemy.”<sup>992</sup>

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<sup>988</sup> Schmitt, *The Concept of the Political*, (Chicago: The University of Chicago Press, 2007), pp.22-24. Lindseth, ‘The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.’, *The Yale Law Journal*, (2004), p.1365.

<sup>989</sup> See also Schmitt, *Gesetz Und Urteil: Eine Untersuchung Zum Problem Der Rechtspraxis*. (München: Beck, 1969).;

<sup>990</sup> Schmitt, *The Concept of the Political*, (Chicago: The University of Chicago Press, 2007), p.28.

<sup>991</sup> Scheuerman, *Carl Schmitt: The End of Law*, (Lanham, Maryland: Rowman & Littlefield, 1999), p.36.

<sup>992</sup> Schmitt, *The Concept of the Political*, (Chicago: The University of Chicago Press, 2007), p.26. Original text in German: “Die Spezifisch politische Unterscheidung, auf welche sich die politischen Handlungen und Motive zurückführen lassen, ist die Unterscheidung von Freund und Feind.“ Schmitt, *Der Begriff Des Politischen: Text Von 1932 Mit Einem Vorwort Und Drei Corollarien*, (Berlin: Duncker & Humblot, 1991.), p.26.

The main problem for Schmitt was the existential one. In *The Concept of the Political*, Schmitt argues that:

“For to the enemy concept belongs the ever present possibility of combat. ... War is armed combat between organized political entities; civil war is armed combat within an organized unit. A self-laceration endangers the survival of the latter. The essence of a weapon is that it is a means of physically killing human beings. Just as the term enemy, the word combat, too, is to be understood in its original existential sense.”<sup>993</sup>

His excessive reliance on the argument of ‘the political’ locked him in the cage of either/or argument. As he couldn't see any escape, he try to convey his reader, in a dispread sound that “nothing can escape this logical conclusion of the political”<sup>994</sup> in a collective form of living of human being:

“Every religious, moral, economic, ethical, or other antithesis transforms into a political one if it is sufficiently strong to group human beings effectively according to friend and enemy.”<sup>995</sup>

The concept of political is the core for the justification of the concept of ‘power over’ and Schmitt’s theory of state. For him, this singular concept of political power – i.e. power over - is the main and the only determining concept in politics:

“A world in which the possibility of war is utterly eliminated, a completely pacified globe, would be a world without the distinction of friend and enemy and hence a world without politics.”<sup>996</sup>

In this sense, the concept of ‘power over’ is not only the justified criterion of his theory of sovereignty, but it is exercise based on the link between his concept of ‘the political’ - the ability to “distinguish”<sup>997</sup> between ‘friend’ and ‘enemy’- and the ability to “determine”<sup>998</sup> as the definition of executive power.<sup>999</sup> More interestingly, is his proposed theory of sovereignty – i.e. “Sovereign is he who decides on the [state of] exception.”<sup>1000</sup>, which strongly emphasizes

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<sup>993</sup> Schmitt, *The Concept of the Political*, (Chicago: The University of Chicago Press, 2007), p.33.

<sup>994</sup> Schmitt, *The Concept of the Political*, (Chicago: The University of Chicago Press, 2007), p.36.

<sup>995</sup> Schmitt, *The Concept of the Political*, (Chicago: The University of Chicago Press, 2007), p.37.

<sup>996</sup> Schmitt, *The Concept of the Political*, (Chicago: The University of Chicago Press, 2007), p.35.

<sup>997</sup> Schmitt, *The Concept of the Political*, (Chicago: The University of Chicago Press, 2007), p.37.

<sup>998</sup> Schmitt, *The Concept of the Political*, (Chicago: The University of Chicago Press, 2007), p.37.

<sup>999</sup> The original German text: „Das Politische liegt nicht im Kampf selbst, der wiederum seine eigenen technischen, psychologischen und militärischen Gesetze hat, sondern wie gesagt, in einem von dieser realen Möglichkeit bestimmten Verhalten, in der klaren Erkenntnis der eigenen, dadurch bestimmten Situation und in der Aufgabe, Freund und Feind richtig zu unterscheiden.“ Schmitt, *Der Begriff Des Politischen: Text Von 1932 Mit Einem Vorwort Und Drei Corollarien*, (Berlin: Duncker & Humblot, 1991.), p.25. See also Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, (Cambridge: MIT Press, 1985); Schmitt, *The Concept of Political*, (Chicago: University of Chicago, 1996).

<sup>1000</sup> ‘Souverän ist, wer über den Ausnahmezustand entscheidet’: Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der souveränität*, (Berlin: Duncker & Humblot, 1922); Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, (Cambridge: MIT Press, 1985), p.5.

the link between ‘the concept of the political’ – i.e. friend and enemy - and the role of executive power – under the constitutional empowerment of Article 48 - which was fully met by Nazism.

At one point, Schmitt’s critique of liberalism is related to our discussion: he believed that the standard liberal answers to the questions of the legitimacy of law and the legitimacy of political action were not accountable. Yet, we see that the critique of liberalism in Schmitt’s legal approach is distinctive since he merely considered liberalism as if it is a particular solution committed to a particular problematic position. Schmitt believed that the political decision should be the basis of a legal order, not the other way around. He, in fact, upheld the thinking of Plato, Aristotle, and Hobbes about the proper locus of legislative power, demonstrating the superiority of these ancient and classical notions “over the concepts of legislation and of constitution peculiar to separation-of-powers regimes.” Schmitt thus suggested that this return to reputedly traditional forms of governance, which presupposed the concept of ‘power over’ as the only concept of power relation, was inevitable in the economic and political turmoil where one speaks of “collective of men.”<sup>1001</sup> Schmitt reasoned that when the state faces such challenging turmoil, insurmountable opposition - whether it emerged from the concept of legislation in a parliamentary regime and the evolution of public life over the course of the last decades or from the constitutional loophole -, it does not demand the long process of deliberation of legislators or public debates, but only the executive’s decisive action in concrete cases.<sup>1002</sup> In this sense, Schmitt argued for an irresistible need for decisive and concrete action that had required the increasingly broad delegation of legislative and adjudicative power to the executive and administrative spheres in the years since the end of World War I.<sup>1003</sup> Thus, the particularity of a decision, in a sense that it would be subjected to a judicial decision or a parliamentary decision, turns it into a decision over the nature of the legal order and nature of the sovereign. Furthermore, his theory obliged the concentration of legislative power in the executive hand.<sup>1004</sup>

To do so, first, Schmitt relied on the ultimate expression of the state’s will. He recognize the state as the only entity who “decide for itself the friend-enemy distinction,”<sup>1005</sup> and decide on such distinction: ‘distinguish’ and ‘determination’. So, what is so special about the conception of the theory of the political, state, and sovereignty? You may ask. The answer is lay down on the principle of power. He assumed the capacity of such decision can only be

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<sup>1001</sup> Schmitt, *The Concept of the Political*, (Chicago: The University of Chicago Press, 2007), p.28.

<sup>1002</sup> Schmitt, ‘Une étude de droit constitutionnel comparé: L’évolution récente du problème des délégations législatives.’, Paul Roubier et H. Mankiewicz, in *Recueil d’études en l’honneur d’Edouard Lambert*, (Paris, Sirey/L.G.D.J., 1938), p.204.

<sup>1003</sup> Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.*, *The Yale Law Journal*, (2004), p.1359.; Schmitt’s assertions in 1936 regarding the inevitable decline of parliamentary democracy extended the argument he had articulated a decade before, in *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*: “Even if Bolshevism is suppressed and Fascism held at bay, the crisis of contemporary parliamentarism would not be overcome in the least.” Schmitt believed that crisis “has not appeared as a result of the appearance of those two opponents; it was there before them and will persist after them.” Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* [The Historical/Intellectual Situation of Contemporary Parliamentarism], (Berlin, 1985, first pub. 1926), p.17.

<sup>1004</sup> Schmitt, ‘Une étude de droit constitutionnel comparé: L’évolution récente du problème des délégations législatives.’, Paul Roubier et H. Mankiewicz, in *Recueil d’études en l’honneur d’Edouard Lambert*, (Paris, Sirey/L.G.D.J., 1938), p.204.

<sup>1005</sup> Schmitt, *The Concept of the Political*, (Chicago: The University of Chicago Press, 2007), p.28.

manifested in executive power, and second, on the extent of permissible delegations, which pave the way for such statutory position. He used the unlimited but constitutional power of legislation against the legislation to fortify the decisionism character of the executive. The legal ground for such an illegitimate concept of ‘power over’ was based on the fact that the legislature was entirely free to define the substantive content of legislative rules directly in the statute itself, or to authorize the executive to do so by way of regulatory ordinance.<sup>1006</sup> In fact, in the construction of democratic constitution of Weimar Republic, there was no “reserve” of normative authority - or a *Vorbehalt des Gesetzes* - that could constrain the Parliament for its prospective delegation. Third, Schmitt relied on the idea that the “legislator” could be constrained in any way except by the requirements of the “concrete situation” which needs a concrete decision.<sup>1007</sup> Here, his theory of sovereignty prepared to be matched with the executive possessing full legislative powers.<sup>1008</sup> Furthermore, his theory of constitution and decisionism prepared to be matched to his claim that “the concepts of legislation and of constitution peculiar to separation of powers regimes.”<sup>1009</sup> Therefore, an extraordinary degree of autonomous regulatory power in the executive helped Schmitt in keeping with the views of the conservative interests, that the executive - and its possessed bureaucracy - inherently mandate the social and economic policy of the nation, by which their decision should generally be freed from parliamentary constraints.<sup>1010</sup>

Indeed, before 1945, Schmitt could not imagine that his legal theory was going to collapse within a decade after his major works and his claims were going to be proven wrong and contradictory. Sternberger detect such error in the works of Schmitt when he argues on the deliberative parliamentarism against Schmitt:

‘It is indeed an evil spirit of impatience that throws away what has not yet had a time limit to be tested and also to be improved.’<sup>1011</sup>

The Western European constitutionalists and the legal theorists learned from the past, and achieved what Schmitt had asserted was impossible, which was a balance between legality and legitimacy. Contrary to Schmitt’s legal theory, the major constitutional accomplishment in

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<sup>1006</sup> Schmitt, ‘Une étude de droit constitutionnel comparé: L’évolution récente du problème des délégations législatives.’, Paul Roubier et H. Mankiewicz, in *Recueil d’études en l’honneur d’Edouard Lambert*, (Paris, Sirey/L.G.D.J., 1938), p.206.; See also Paul Laband, *Das Staatsrecht des deutschen Reiches*, (Tübingen: J.C.B. Mohr, 1911), p.96.

<sup>1007</sup> Schmitt, ‘Une étude de droit constitutionnel comparé: L’évolution récente du problème des délégations législatives.’, Paul Roubier et H. Mankiewicz, in *Recueil d’études en l’honneur d’Edouard Lambert*, (Paris, Sirey/L.G.D.J., 1938), p.95-210.

<sup>1008</sup> Schmitt, ‘Une étude de droit constitutionnel comparé: L’évolution récente du problème des délégations législatives.’, Paul Roubier et H. Mankiewicz, in *Recueil d’études en l’honneur d’Edouard Lambert*, (Paris, Sirey/L.G.D.J., 1938), pp.208-209.

<sup>1009</sup> Schmitt, ‘Une étude de droit constitutionnel comparé: L’évolution récente du problème des délégations législatives.’, Paul Roubier et H. Mankiewicz, in *Recueil d’études en l’honneur d’Edouard Lambert*, (Paris, Sirey/L.G.D.J., 1938), p.210. See also Joerges and Dehousse, (eds.), *Good Governance in Europe's Integrated Market*, (Oxford: Oxford University Press, 2002).

<sup>1010</sup> It seems that the parliamentary constraints in Schmitt’s legal theory can be defined as parliamentary institutions served as mere formal and legal limitations to an elementary state power. Thus, executive power would remain firmly in their hands even if the Reich Parliament would not be completely dissolved by the executive.

<sup>1011</sup> Translated by the author. The Original German text: “Es ist in der Tat ein böser Geist der Ungeduld, der wegwirft, was noch keine Frist gehabt hat, erprobt und auch verbessert zu werden.” Sternberger, *Grund und Abgrund der Macht*, Schriften VII, (Frankfurt am Main: Insel Verlag, 1986), p. 284.

Western Europe after 1945 was improvements in both input and output legitimacy. The improvements comprise the development of effective judicial mechanisms for the protection of civil and political rights of people and the efficacious balance between the role of parliament and the broad displacement of legislative power out of the parliamentary realm and into the executive and technocratic spheres.<sup>1012</sup> After the collapse of the Third Reich, the discovery of this balance for West Germany required significant adjustments in the constitutional authority of Parliament to delegate normative power. This was a consequence of what has been experienced, since much of the West German constitutional theory has been designed to address the flaws in the traditional republican conceptions of the legislative and the executive in the 1920s and 30s.<sup>1013</sup> In this sense, they returned to the pioneers of Western practical legal politics to solve their problem such as James Madison, one of the founding fathers of the United State, who wrote in 1788:

“But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is, to divide the legislature into different branches; and to render them, by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.”<sup>1014</sup>

#### **3.4.1.1. Schmitt’s Theory of the Exceptionally Sovereign: Constitution vs. the Sovereign**

In the *Political Theology*, Schmitt began with a very fundamental and controversial assertion: “Sovereign is he who decides on the [state of] exception.”<sup>1015</sup> Such a strong and probably fairly crafted opening still lacks the concrete definitions of the concepts of ‘sovereignty’ and ‘state of exception’.

However, the opening sentence still is a fairly crafted statement since it implies that the state of exception does not match the fixed norms of liberalism, so the state of exception cannot be recognized in advance.<sup>1016</sup> In contrast, the statement implies that the state of exception should be first determined and then can be dealt with.<sup>1017</sup> This leads us to the second part of our claim that the Schmitt’s statement is not well-defined:

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<sup>1012</sup> Currie, David P. "Separation of Powers in the Federal Republic of Germany." *The American Journal of Comparative Law*, (1993), 41(2) : 201-260, p.217.

<sup>1013</sup> Lindseth, The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s., *The Yale Law Journal*, (2004), pp.1385-1386.

<sup>1014</sup> Madison, et al., *The Federalist*, (Indianapolis : Liberty Fund, 2001, first pub.1788), p.269.

<sup>1015</sup> ‘Souverän ist, wer über den Ausnahmezustand entscheidet’: Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der souveränität*, (Berlin: Duncker & Humblot, 1922); Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, (Cambridge: MIT Press, 1985), p.5.

<sup>1016</sup> Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, (Cambridge: MIT Press, 1985), p.6.

<sup>1017</sup> Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, (Cambridge: MIT Press, 1985), p.6.

“It will soon become clear that the exception is to be understood to refer to a general concept in the theory of the state, and not merely to a construct applied to any emergency decree or state of siege.”<sup>1018</sup>

We can detect an ambiguity in the definition of the state of exception and the sovereign offered by Schmitt. First, if the state of exception cannot be recognized in advance, and if it should be dealt with, it is better to say that the definition of *Ausnahmezustand* (State of exception)<sup>1019</sup> - the term that he used in his *Politische Theologie* - is more prone to the ‘state of emergency’ than to the ‘state of exception’. Hence, there are two ambiguities. The first ambiguity appears in the definition of the concepts of the state of emergency and the state of exception, and the second one appears when we ask how they are differentiated. According to Schmitt, the state of emergency cannot be defined, even partially, so there is no scale for its evaluation. He continued:

“It will soon become clear that the exception is to be understood to refer to a general concept in the theory of the state, and not merely to a construct applied to any emergency decree or state of siege.”<sup>1020</sup>

For him, sovereignty is “independent meaning of the decision”<sup>1021</sup> which recognized and exercised by the self-justified sovereign. Here, we have to pause and think whether Schmitt tried to prove his theory of sovereignty or to find it in the brutal sense of *plein pouvoir*, unfettered authority of power over? This would be more clear when he follows his line of reasoning:

“From a practical or a theoretical perspective, it really does not matter whether an abstract scheme advanced to define sovereignty (namely, that sovereignty is the highest power, not a derived power) is acceptable. About an abstract concept there will in general be no argument, least of all in the history of sovereignty. What is argued about is the concrete application, and that means who decides in a situation of conflict what constitutes the public interest or interest of the state, public safety and order, *le salut public*, and so on. The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law.”<sup>1022</sup>

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<sup>1018</sup> Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der souveränität*, (Berlin: Duncker & Humblot, 1922); Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, (Cambridge: MIT Press, 1985), p.5.

<sup>1019</sup> See Heuer, *Carl Schmitt: Die Dialektik Der Moderne: Von Der Europäischen Zur Welt-Moderne*, (Berlin: Duncker & Humblot, 2010), Ch.III. See also Benedikt and Pircher, *Gegen Den Ausnahmezustand: Zur Kritik an Carl Schmitt*, (Wien: Springer, 1999).

<sup>1020</sup> Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der souveränität*, (Berlin: Duncker & Humblot, 1922); Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, (Cambridge: MIT Press, 1985), p.6.

<sup>1021</sup> Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der souveränität*, (Berlin: Duncker & Humblot, 1922); Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, (Cambridge: MIT Press, 1985), p.6.

<sup>1022</sup> Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der souveränität*, (Berlin: Duncker & Humblot, 1922); Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, (Cambridge: MIT Press, 1985), p.6.

Taking the attention to another critique, it is necessary to know that: based on what Schmitt argued, even if there is a state of emergency, no one can prove it. In this sense, such a statement that ‘the Sovereign is he who decides on the [state of] exception’ would be absurd because the state of emergency means either nothing or everything: it either gives a concrete definition to the concept of sovereignty only in the exceptional occasions or it gives the sovereign absolute power to make every situation the state of emergency/exception in order to obtain the immunity for its authority.

Here, we have to ask a critical question: If the concept of the state of emergency, as Schmitt argued, is merely calculative and falls into the empirical calculation of the political sphere, or on the contrary, if this concept is merely evaluative, then how do we practice critique if there is no connection? Schmitt did not address this critique. Yet, part of the answer to this critique may be related to the existential aspect of the concept of sovereignty in Schmitt’s thought. Schmitt did not limit the definition of the state of emergency due to the basic principles of his theory, which implies that the sovereign does not belong to or share in any power branches, or does not bound to any definition of legality. For Schmitt, the sovereign stands above the legal order of the state. Indeed, we share the idea that the state of emergency is relevant to both the subject of relevancy and the question of sovereignty.<sup>1023</sup> Yet, on the contrary, we assert the idea that the question of sovereignty cannot be diverged from the question of political power.

Second, Schmitt claims that the sovereign decides on the state of exception, but neither did he explain that the sovereign is the one who gets to decide ‘in’ the state of exception nor did explain that sovereign is the one who is in the virtue of his position/office. Indeed, he could not address these vague points of his theory in 1922, where he experienced that the newborn parliamentary democracy came to power. In that time, Schmitt was mostly influenced by the legal theories of his time, hence, his idea of the state of emergency/exception was prone to the claim that the exception is law-governed. Observing the legal predicaments of the Weimar Republic between 1919 through 1924, in “Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung” he argued that “the powers of the Reich president contained there are not dependent on passage of the Reich law foreseen in section 5,”<sup>1024</sup> however, the Reich President could not violate the essential elements of the Weimar Constitution in exercising his power under Article 48.<sup>1025</sup> He presented this critique based on the distinction between the concepts of ‘sovereign dictatorship’ where a dictator is legally unbounded and ‘commissarial dictatorship’ where a dictator is legally bounded.<sup>1026</sup> In this sense, his concept of sovereignty has changed; a shift that determined a difference between the concept of sovereignty he held in 1922, when he wrote the *Political Theology*, and the one he held in 1928, when he wrote the

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<sup>1023</sup> Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, (Cambridge: MIT Press, 1985), p.6.

<sup>1024</sup> Schmitt, ‘Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung’ [The Dictatorship of the President according to Article 48 of the Constitution], 1924. Schmitt, ‘The Dictatorship of the Reich president according to Art 48 of the Reich constitution’, *Constellations*, Volume 18, No 3, 2011, p. 292.

<sup>1025</sup> Schmitt, ‘Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung’ [The Dictatorship of the President according to Article 48 of the Constitution], 1924.

<sup>1026</sup> Schmitt, *Die Diktatur: Von Den Anfängen Des Modernen Souveränitätsgedankens Bis Zum Proletarischen Klassenkampf*. [The Dictatorship from the Origins of the Modern Theory of Sovereignty to the Proletarian Class Struggle], (Berlin: Duncker & Humblot, 1989, first pub. 1922).

*Constitutional Theory (Verfassungslehre)*.<sup>1027</sup> Here, despite the shift in Schmitt's thought, we have to ask whether Schmitt's definition of sovereign is only reduced to the state of emergency.

The concept of 'sovereign' which Schmitt had provided is not accountable in the modern - at least the Western - legal orders. There are two main critiques regarding his theory of sovereign and legality. First, the argument about the extreme case implicitly acknowledges that legal norms presuppose the existence of a "normal" state of affairs and remain applicable as long as this state of affairs continues to exist.<sup>1028</sup> Yet, Schmitt's concept of sovereign is the sovereign in the state of exception which is recognized by the sovereign themselves. Accordingly, "the sovereign stands outside the normally valid juridical order and yet belongs to it, for he is competent to decide whether the constitution has to be suspended completely."<sup>1029</sup> His sovereign is neither part of the state nor the people, nor part of the power branches. Thus, we can see that he implicitly reduced the concept of sovereignty to the concept of *quasi* judicial power and degraded its function only to the state of emergency.

Second, Schmitt's concept of sovereign is the self-assertion of sovereignty by the sovereign. Based on such concept, to rule is always a state of emergency; if all you have is a hammer, everything looks like a nail. Schmitt's sovereign was the last resort for the crisis of legal and power theory. For him, only a sovereign is able to gain stability, security and validity. Basically, Schmitt's legal theory implies that the sovereign also challenges the concept of legitimacy of legality, where what passes for the legal meaning is simply what the sovereign determined since they are powerful enough to force their interpretation of legal materials on the political circumstances.<sup>1030</sup> Bilaterally, this concept implies that the sovereignty is resided in the personal authority who represents the identity of the state, people, and branches of power. In this sense, the concept of sovereignty and the concept of political decision are closely bounded to the concept of personalism.<sup>1031</sup>

In his book, *Die Diktatur*, Schmitt has developed a distinction between "commissar" and "sovereign" dictatorship.<sup>1032</sup> The former serves to secure the legal order with a temporary (partial) suspension of the constitution in a crisis case, the latter means the overcoming of the existing system and the establishment of a new constitutional order.<sup>1033</sup>

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<sup>1027</sup> Schmitt, *Verfassungslehre*. (Berlin: Duncker & Humblot, 1928).; see Cristi, *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy*, (Cardiff: University of Wales Press, 1998), pp.108-125.

<sup>1028</sup> Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, (Cambridge: MIT Press, 1985), p.13.

<sup>1029</sup> Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der souveränität*, (Berlin: Duncker & Humblot, 1922), 13.

<sup>1030</sup> Fish, *There's No Such Thing as Free Speech and It's a Good Thing, Too*, (New York: Oxford University Press, 1994), pp.141-179.

<sup>1031</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.44.

<sup>1032</sup> Schmitt, *Die Diktatur Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*. (Berlin: Duncker & Humblot, 1921), pp.25-41.

<sup>1033</sup> In the second edition of 1928 Schmitt has reproduced his position of 1924 on the 'Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung' [The Dictatorship of the President according to Article 48 of the Constitution]. Later, he declares that his position on Article 48 is entirely based on "historical and state theory Investigations" of his book, *Die Diktatur*.

Schmitt's concept of sovereignty is the mixture of Bodin's concept of sovereignty as "*jura imperii*"<sup>1034</sup> or 'rights/ legal prerogatives of power/of the state'<sup>1035</sup> and Hobbesian concept of decisionism as the power/right to decision of the state before law.<sup>1036</sup> Basically, Schmitt has merged these two concepts that each Bodin and Hobbes have presented to show that the concept of sovereignty merely incorporates with the political decision, and hence authority is not the authority of law or any sort of legal status. This approach implicitly sacrifices the role of constitution and legal order for the absolute power of the sovereign. It may be reasonable to agree with Schmitt to the extent that the sovereignty cannot merely be reduced to legal authority - to authority which is exhaustively constituted by law -, but we cannot agree with him that sovereignty is the necessary character for power. Here, the concept of sovereign and its definition in the legal order lacks two major elements for its legitimacy: on the one hand, the concept of 'rights' which also implies the concept of the moral significance of rights, and on the other hand, both the input and throughput legitimacy. What Schmitt presented as the definition of sovereign implies the concept of 'arbitrary power' which belongs to the authoritarian/totalitarian power relation. Here, a question arises: who should decide in a case of extreme conflict, when public order and security, even the rule of law, are in jeopardy?

It may be interesting to know that Schmitt, just like ancient Greek philosophers such as Plato and Aristotle, and their Medieval followers such as Farabi, referred to classical natural law which is based on the cosmological and hierarchical order to establish the theological-political concept of political sovereignty. He wrote in *Political Theology* that: "the general validity of a legal prescription has become identified with the lawfulness of nature, which applies without exception. The sovereign, who in the deistic view of the world, even if conceived as residing outside the world, had remained the engineer of the great machine."<sup>1037</sup> Thus, God as the ultimate architect of the universe determined the notion of sovereign.<sup>1038</sup> But, Schmitt followed Juan Donoso Cortes who found the crisis of the state's sovereignty. Donoso, in 1848, realized that the *miranda* and *credenda* of power -<sup>1039</sup> specifically he referred to royalism - were disappearing from the mighty apparatus of European monarchs, so the only thing left in this "state of emergency" is the command of the sovereign.

In this state of emergency, the commands of the sovereign mostly appeared in the guise of legality.<sup>1040</sup> Yet, Schmitt saw that there is a solemn link between the notion of sovereignty, legal justification and legal legitimacy. On the same matter, he claimed that: "royalism is no longer because there are no kings. Therefore, legitimacy no longer exists in the traditional

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<sup>1034</sup> Schmitt, *Die Diktatur Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*. (Berlin: Duncker & Humblot, 1921), p.16.

<sup>1035</sup> Schmitt, *Die Diktatur Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*. (Berlin: Duncker & Humblot, 1921), p.16.

<sup>1036</sup> Schmitt, *Die Diktatur Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*. (Berlin: Duncker & Humblot, 1921), p.21, 23.

<sup>1037</sup> Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, (Cambridge: MIT Press, 1985), p.48.

<sup>1038</sup> see also Cristi, *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy*, (Cardiff: University of Wales Press, 1998), p.112.

<sup>1039</sup> See Merriam, *Political Power*, (New York: Collier Books, 1934).

<sup>1040</sup> See Donoso, 'Discurso sobre la dictadura.' *Obras Completas*, vol.II, edit. by Carlos Valverde, (Madrid: Editorial Catolica)

sense.”<sup>1041</sup> Schmitt tried to follow Donoso, Bodin, and Hobbes to address the crisis of state sovereignty by the assumption that was based on the pure political decisionism, naturalism, personalist element, and exceptionalism. These assumptions left no room for any other result than for the emergence of an absolute ruler who is the only proper subject of sovereignty.<sup>1042</sup> When we consider Schmitt’s theory of sovereignty and legality, we have no wonder ‘why’ the *Political Theology* became unthinkable since today the merged concepts of democracy and rule of law are the dominant concepts of legitimacy. In this sense, Schmitt’s political theory can only be appreciated in the dictatorship power relations where the law is carrying the notion of command of personalities.

By Hobbes, Schmitt personalized the decision. In *Die Diktatur*, Schmitt wrote that “The decision contained in a law is, from a normative perspective, borne out of nothing. It is, by definition, ‘dictated’.”<sup>1043</sup> By Maistre, he destroyed any notion of tacit agreement of people on the notion of sovereignty and moved to a radical notion of sovereignty in which only the concept of ‘power over’ is the residue of politics.<sup>1044</sup> Thus, he saw no possible compromise with democratic parliamentarism. He, as a counter-revolutionary conservative theorist, saw the sovereign dictatorship as an effective substitute for the monarchy to save the state’s sovereignty, in particular to save Germany. The implicit problem of Schmitt’s theory of sovereignty, which paved the way for Hitler’s authoritarian/totalitarian seizure of power, is strongly rooted in the definition that he presented.

Although Schmitt’s *Verfassungslehre* (Constitutional Theory) did not directly discuss the notion of sovereignty, the whole argument in the work presupposed what he presented in his *Political Theology*. He recognized that the ‘rule of law’ is the common principle of liberalism and positivism and one of the vital elements of the Weimar Constitution. Thus, he argued that the political elements of the Constitution would be contrary to it. In other words, by implicitly having the Weimar Constitution in mind, he refuted the principles which imply the rule of law, such as eliminating sanctuary position in the power relation. On the contrary to the liberal constitution, he believed that the political elements of a constitution would dissolve the liberal elements by the recognition of the privileges of the personalities and offices and give them the unchecked power. The probable interpretation of Schmitt’s sovereign in a normal valid legal order referred to these personalities.

From his argument, two conclusions are crystal clear. First, a liberal constitution is not capable of providing any notion of sovereignty, and second, the sovereign as an essentially political entity should not give any recognition to the liberal constitution or the liberal principles in a constitution. Yet, Schmitt could not see in his theory of Either/Or that the Constitution neither descends from heaven nor comes from hell. In his earlier thoughts,

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<sup>1041</sup> Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, (Cambridge: MIT Press, 1985), p.51.

<sup>1042</sup> Cristi, *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy*, (Cardiff: University of Wales Press, 1998), p.112.

<sup>1043</sup> Schmitt, *Die Diktatur: Von Den Anfängen Des Modernen Souveränitätsgedankens Bis Zum Proletarischen Klassenkampf*. [The Dictatorship from the Origins of the Modern Theory of Sovereignty to the Proletarian Class Struggle], (Berlin: Duncker & Humblot, 1989, first pub. 1922), 23.

<sup>1044</sup> Cristi, *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy*, (Cardiff: University of Wales Press, 1998), p.113.

Schmitt's theory of sovereign can be ascribed to either the legal system or a ruler. In fact, Schmitt's concept of sovereignty cannot fully be ascribed to either of them.

In 1919, the idea of sovereign was controversial, since the monarch, who was the sole subject of sovereignty, perished, and the Weimar Constitution as the substitute was recognized as the sovereign, but since then it constantly was challenged by the President. This was rooted in the constitutional tradition of Germany. Since Germany mostly experienced the emergency legislation adopted during World War I, it served as a kind of constitutional model, and following this model, each successive enabling act- or Ermächtigungsgesetz - would transfer to the executive, in some degree or another, the necessary powers to address the perceived crisis of the moment, which mostly were inflation, currency stabilization and economic depression. In Germany, moreover, recourse to the "emergency" powers of the Reich President under Article 48 of the Weimar Constitution reinforced this process. Although this provision was originally understood as conferring extended, unfettered authority from any parliamentary constraint on the President only to address civil strife,<sup>1045</sup> it evolved into an excuse for the executive to exercise wide-ranging legislative powers. By the early 1930s, Article 48 in fact became the purported constitutional foundation for extra-parliamentary, and eventually unadulterated anti-parliamentary governments.<sup>1046</sup>

According to the crisis of sovereignty in Germany in *Political Theology*, Schmitt elaborates on an extreme concept of sovereignty which is based on the decisionism and naturalism approach. Two years later in 1923, Schmitt distinguished between the principle of liberalism and democracy in his book: *The Crisis of Parliamentary Democracy*,<sup>1047</sup> since he saw that the development of democracy and politicization of the community were inevitable. Part of the reason for his assumption arose from the fact that he witnessed the collapse of the Great Coalition. The Great Coalition was in November 1923, after the Enabling Act adopted by Stresemann, reflected the persistence of traditional parliamentarism over executive power, not only on the matter of normative legislation, but also on the understanding of the constitutional law.<sup>1048</sup> Yet, we should not let this point trick us. In fact, the core essence of Schmitt's theory of sovereignty remained the same, which was not the 'legislative majority', but the emergent forms of executive autonomy in the modern administrative state.<sup>1049</sup> The political situation of his time helped him to see that there is a potential possibility of compatibility between the democracy and his theory of sovereignty.

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<sup>1045</sup> The provision was assumed as "merely as a carryover" which was a similar one contained in the 1871 Imperial Constitution and the 1850 Prussian Constitution.; see also Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory & Practice of Weimar Constitutionalism*, (Durham, NC: Duke University Press, 1997), p.67.

<sup>1046</sup> See also Patch, *Heinrich Brüning and the Dissolution of the Weimar Republic*. Cambridge, (UK: Cambridge University Press, 1998), pp.72-117.; Heneman, *The Growth of Executive Power in Germany: A Study of the German Presidency*, (Minneapolis, The Voyageur press, 1934).

<sup>1047</sup> Schmitt, *The Crisis of Parliamentary Democracy*, trans. by Ellen Kennedy, (Cambridge, Mass: MIT Press, 1985).

<sup>1048</sup> Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.', *The Yale Law Journal*, (2004), p.1367.

<sup>1049</sup> Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.', *The Yale Law Journal*, (2004), p.1367.

### 3.4.1.2 Schmitt's Theory of Legal Sovereign and the Theory of Political Consciousness: Democracy and Non-Democratic Constituent Power

Schmitt was on the right path to the extent that he knew both the legal system and democracy are the instruments of political power. We can see the link that he made between democracy and his theory of sovereignty as he implies:

“What has suffered the most under this fiction and this method of avoidance is the concept of sovereignty. In practice, apocryphal acts of sovereignty are exercised, which are characteristically performed by non-sovereign state officials or bodies who, occasionally and with tacit tolerance, make sovereign decisions.”<sup>1050</sup>

In *Verfassungslehre*, Schmitt has modified his thoughts about liberalism and wanted to show the compromises that have been accrued through the rivalries between the branches of power: between the sovereignty of executive power with the President, and the sovereignty of the legislative power with the Constitution.<sup>1051</sup> Although he implied that the idea of the personalism and sovereignty and envisaged, and that hierarchical power structure with a ruler, namely monarch, was the possible embodiment of sovereignty in his early writings of the 20s.<sup>1052</sup> He did not base his argument merely on personalist aspects after then, but he merged the idea of decisionsim with the democratic element. It was in this sense, that he employed the notion of *verfassungsgebende Gewalt*<sup>1053</sup> or the constituent power.

By merging the concept of sovereignty that he presents in the *Political Theology* and the political notion of decision together, Schmitt presented a theory of ‘constitutionality.’<sup>1054</sup> His argument was that the real constitutional dispute are always a political dispute.<sup>1055</sup> Indeed, he knew that the legitimacy of the sovereign power was highly vulnerable, where the measurement of authority is not recognized by the values, by the rational-normative principles, and by the moral significance of rights. The lack of these elements, along with the presence of the democratic movements can shape a quasi constituent power, and justifies a new notion of sovereign and its role; that is the possibility of alternatives. He addressed this issue while he also could not ignore the political trend of his time. Consequently, his theory of sovereignty in *Verfassungslehre* concerns with the three vital elements: the people, the state, and the Constitution. In other words, the expanded form of Schmitt's theory of sovereignty is the theory of authoritarian/totalitarian regime. He implicitly presented the theory of sovereignty in his writings of the late 20s and early 30s, has the possibility for adoption of the democratic element through which the notion of constituent power adequately supplanted or substituted the notion of sovereignty as a political notion.<sup>1056</sup>

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<sup>1050</sup> Schmitt, *Verfassungslehre*. (Berlin: Duncker & Humblot, 1928), p.xii.

<sup>1051</sup> See Schmitt, *Verfassungslehre*. (Berlin: Duncker & Humblot, 1928), pp.20-36, 92.

<sup>1052</sup> Cristi, *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy*, (Cardiff: University of Wales Press, 1998), p.115.

<sup>1053</sup> Schmitt, *Verfassungslehre*. (Berlin: Duncker & Humblot, 1928), pp. 75-97.

<sup>1054</sup> Schmitt, *Verfassungslehre*. (Berlin: Duncker & Humblot, 1928), p.136-138. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.51.

<sup>1055</sup> Schmitt, *Verfassungslehre*. (Berlin: Duncker & Humblot, 1928), p.136.

<sup>1056</sup> Cristi, *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy*, (Cardiff: University of Wales Press, 1998), p.116.

In this case the Constitution would be interpreted as the manifestation of the will - of a ruler, the rulers, or the people - which is represented by the sovereign. In this sense, he re-articulated the political elements of his theory in *Verfassungslehre*, in which the authoritarian/totalitarian reading of liberalism is comprehensible. Moreover, as democracy is an instrument for political power, Schmitt brought the monarchy and democracy under his generic notion of sovereignty, where he implied that a constitution “is based either on the monarchical or on the democratic principles.”<sup>1057</sup>

It is easy to trace his theory back to the revolution of 1918, where a committee on behalf of the German people shaped the new form of constituent power.<sup>1058</sup> This constituent power manifested in the democratic election of a National Assembly. It basically deconstructed the Constitution of 1871 and presented its institutionalized expression of the state power and the legal power after the ratification of the Constitution of 1919, or the Weimar Constitution. Political consciousness was one of the main causes for the transition from the monarchical to the democratic regime. Yet, this trend is not always secured. On the contrary, a negative political consciousness, along with the illegitimate legal system are the causes for the transition of a regime from a democratic to an autocratic, fascist or a dictatorial one. One can understand an important lesson from Schmitt’s theory of constitution which links the concept of legality to the concept of political consciousness and to the concept of legitimacy: Schmitt tried to show that a written constitution is merely the expression of what is fundamental, which is the will of the constitutive power. Here, we shall ask three questions: what is the constituent power?; how did Schmitt interpret it?; and how are the concepts of political consciousness and constituent power are linked to the concept of sovereignty?

If we want to understand the legal theories emerged after the Weimar era, we cannot ignore the Weimar Constitution and its previous one: The German monarchical constitution which rules over the Prussian Empire. The monarchical constitution relativized the political notion of the monarchical power in the legal system, where the constitutional monarch still retained the real power. Pragmatically, the monarch’s personal will could not be traced back to the Parliament. In other words, till 1918, constitutional power was an instrument in the hands of the monarch.<sup>1059</sup> By ratifying the Weimar Constitution, by the power embodied in the National Assembly, Germany adopted the democratic legal doctrine of constituent power.<sup>1060</sup> Here, the input legitimacy is comprehensible. Yet, we have to ask whether it is enough.

The revolution seemed to be the first step in the transformation of power, however, Germany had to resolve the myriad of social and economic challenges confronting it, particularly with the onset of the Depression. Such a challenge was believed to call for the delegation of Parliamentary power of law-making, by which it could still pass the “kind of quantity of legislation which modern public opinion requires.”<sup>1061</sup> Simply, seeing the social, political, and economic crisis, most of the European countries, especially Germany, in the

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<sup>1057</sup> Schmitt, *Verfassungslehre*. (Berlin: Duncker & Humblot, 1928), p.54.

<sup>1058</sup> Schmitt, *Verfassungslehre*. (Berlin: Duncker & Humblot, 1928), p.339.

<sup>1059</sup> Schmitt, *Verfassungslehre*. (Berlin: Duncker & Humblot, 1928), p.56.

<sup>1060</sup> see also Schmitt, ‘Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung’ [The Dictatorship of the President according to Article 48 of the Constitution], (1924), p.237.

<sup>1061</sup> COMMITTEE ON MINISTERS’ POWERS REPORT, 1932, Cmd. 4060, at 23.

1920s and 30s, in one way or another, tried to centralize power. Their main question, thus, was whether the growth of subordinate legislation promulgated at the discretion of the executive violated the constitution and the rule of law.<sup>1062</sup>

Given the history of the transformation of the German monarchy to the Weimar Republic, we have learned that Schmitt admitted the three fundamental aspects of the concept of constitution. First, a constitution is a collective identity of a particular group of people. Second, a constitution shows a particular form of power relation. Third, a constitution forms the political identity by constituting the political entity in which it is the expression.<sup>1063</sup> Yet, he ignored three vital points in respect to these three aspects. Regarding the first aspect, he only bound a notion of collective identity to a legal identity, therefore must have had a political position against the so-called enemies. Regarding the second aspect, he degraded the notion of power relation, based on his Either/Or approach, merely to the concept of 'power over' in which the only essential aspect is domination. And regarding the third aspect, he ignored that the constitution is not the aim in itself nor is it an instrument of a particular office. In other words, it is important to know that a constitution, as both the existential and normative form, obtains its preservation only by its origin: that is the constituent power and the tacit consent of the people in conformity with the rational-normative principles.

Even if we accept the hypothesis that the Weimar Republic countered different crises which led to the general belief in the necessity of the delegation, still it is not easy to argue on this hypothesis without addressing a subsidiary question: How was it possible to reconcile the concentration of normative power in the executive with the traditional conceptions of parliamentary democracy inherited from the past?

Before this question was posed seriously, almost two centuries earlier, John Locke had defined the classical position in a famous passage in the *Second Treatise of Government*:

"The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands."<sup>1064</sup>

In this sense, Lock's legal theory was one of the predominant theories among the others which were presented by Montesquieu, Hobbes, and other eminent theorists. The predominant Lockean legal theory sees the delegation as fundamentally in conflict with the principles of parliamentary governance. Here, we have to ask two questions: First, whether Schmitt was aware of such an approach? and if yes, why did he ignore it in his theory of legality and legitimacy where he addressed the matter of democracy and parliamentarism as contradictory concepts? Furthermore, we have to ask why Schmitt argued that a sovereign dictatorship is incompatible with a constitutional rule of law and also with parliamentary democracy.

Schmitt had the negative view of parliamentary capabilities, and aimed to show that the liberal normative elements spread beneath the Weimar Constitution only help the democratic dictatorship; otherwise, the Parliament and the Constitution are not capable of addressing the conflict and constitutional emergencies. Yet, he has depended on euphemism to soften the

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<sup>1062</sup> Robson, *Justice and Administrative Law; a Study of the British Constitution*. London: Macmillan, 1928.

<sup>1063</sup> Schmitt, *Verfassungslehre*. (Berlin: Duncker & Humblot, 1928), pp.3-6.

<sup>1064</sup> Locke, *Two Treatises of Government*, (Cambridge: Cambridge University Press, 1988), § 141.

image of the Nazi dictatorship in Germany.<sup>1065</sup> For Schmitt, the traditional concept of the separation of powers, which was at the core of German constitutional tradition, simply could not be reconciled with the necessities of the emerged predicaments. Hence, he demanded the “total state” – an authoritarian/totalitarian regime - and, in some sense, the inevitability of an executive dictatorship in an age of administrative governance, even though he tried to rationalize this state of affairs as a return to a more traditional form of monarchical rule with a constitutional guise.<sup>1066</sup> Moreover, he wanted to resist the equitation of the notion of constitutionality and the notion of written constitution.

In this sense, we can admit that the Weimar Constitution did not appreciate the subject of constituent power and the political consciousness of the German people as its origin. On the contrary, however, it also served to re-articulate the concept of constituent power into the will of the Reich President, since it merged the notion of constitution and constitutional statute. Legislation procedures under the President’s decrees and under the enabling acts were only the gesture of a “safety valve”,<sup>1067</sup> an illusion to reinforce the concept of throughput legitimacy in the absence of genuine democratic outlets, which was formulated to the needs.

Schmitt had used this loophole for a complete elimination of any semblance of the ‘separation of powers,’ opting instead for a system of “governmental legislation”.<sup>1068</sup> The same medieval concept of *plenitudo potestatis* or ‘power over’ - , the concept of *Machtvollkommenheit* or omnipotence - , here, exercises its commissary role for the legally unlimited exercise of power that was entitled to intervene in the existing order of law and in the existing functions and acquired rights. We can also admit that no political, legal, and constitutional constraints could limit this theory of sovereign dictatorship.<sup>1069</sup> Thus, the concept of legality of the Weimar Constitution annulled from the concept of legitimacy, and the outcome was the emphasis on the concept of ‘power over’, in which the democratic and monarchical sovereign was only differentiated in the context of the pre-existing legislation process.

This is one important lesson that we can learn from the past, in order to avoid it in our modern constitutional and legal theories. Alas! What Schmitt advocated is a concrete critique of juridical normativism, to show that the concept of sovereignty only lay in the hands of a person and constitution which rests on a concrete sovereign will.<sup>1070</sup> In fact, Schmitt's proposal is based precisely on the exclusion of such normative juridical concepts from a legal analysis, so he ignored the very core essence of constituent power to show that the sovereign is the one

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<sup>1065</sup> Schmitt, ‘Une étude de droit constitutionnel comparé: L’évolution récente du problème des délégations législatives.’, Paul Roubier et H. Mankiewicz, in *Recueil d’études en l’honneur d’Edouard Lambert*, (Paris, Sirey/L.G.D.J., 1938), p.201.

<sup>1066</sup> Lindseth, The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.’, *The Yale Law Journal*, (2004), pp.1340-1341.; See also Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt*, (London: Verso, 2002), pp.150-152.

<sup>1067</sup> See also Lampué, Le développement historique du recours pour excès de pouvoir depuis ses origines jusqu’au début du XXe siècle. *Revue internationale des sciences administratives*, 1954, 2: 359-411, p.380.

<sup>1068</sup> Schmitt, ‘Une étude de droit constitutionnel comparé: L’évolution récente du problème des délégations législatives.’, Paul Roubier et H. Mankiewicz, in *Recueil d’études en l’honneur d’Edouard Lambert*, (Paris, Sirey/L.G.D.J., 1938).

<sup>1069</sup> Schmitt, ‘Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung’ [The Dictatorship of the President according to Article 48 of the Constitution], 1924, p.238.

<sup>1070</sup> Paulson, and Bonnie Litschewski Paulson. *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, (Oxford: Clarendon Press, 1998).

who grounded and protected the constituent power of the state, and therefore he could not be assimilated with it. The concept of the justification of power overshadows the concept of political consciousness and the concept of input legitimacy, hence, both the monarchical principle and the democratic principle are merely interpreted by the concept of ‘power over.’ In short, Schmitt’s theory of sovereignty is a force, which in the *Verfassungslehre* happens to be a constituent power, in conformity with the legal order. Yet, he ignored the concepts of moral values, moral significance, and political consciousness. Indeed, the constituent power cannot be reduced to a single aspect of an individual’s will. However, contrary to Schmitt’s theory, the constituent power is not only the matter of the political notion of a sovereign, but also it is the matter of collectiveness, legality, and normativity. It is the matter of a political act and legality since it can be recognized in the deed, and it is also the matter of legality and normativity since it is observed in the normative and logical evaluation.

On the contrary to the Schmitt’s theory of sovereignty, modern legitimate democratic regimes recognize the sovereign not only because of the theory of normativism, or because the sovereign decides on the state of emergency, but because the nature of sovereign is defined by all of the comprising elements: the state, people, norms, and legal system. Here, we can see that the constitution and its interpretation play the important roles in the matter of power division and the nature of power. Furthermore, It seems that the modern concept of sovereignty does not merely imply absolute liberalism or deny statehood, but now it recognizes the concept of state and its role in both internal and external dimensions along with the new notion of power and legitimacy.

The concept of sovereignty is not merely centered around the concept of ‘power over’. It is based on the integrity and autonomy of the state and the recognition of rights, in which the concept of rights are not being dismissed as illusory, but are enhanced and embedded in political decisions.<sup>1071</sup> In this sense, the sovereign is an intended force, and is in conformity to the legal order, moral values, and political consciousness, which is the intended collective will in a possible authority. Sovereignty is not equivalent to the property of the legal order. A true sovereignty can only be understood by the ‘essentially integrated concepts’ of power and rights, which involves a particular kind of recognition of a political identity as a whole ,whose legitimacy represents the political identity and political unity.<sup>1072</sup> Thus, based on the theory of the ‘essentially integrated concepts’ of power and right, and also based on the theory of political consciousness, Schmitt’s sovereign is nothing but a character of a despotic dictator. This character can be manifested in the legally bounded or legally unbounded sovereign. It can be a monarch or it can be a democratic dictator. These forms of power structures are the two sides

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<sup>1071</sup> Prokhovnik, 'The state of liberal sovereignty, *The British Journal of Politics and International Relations* 1.1 (1999): 63-83.

<sup>1072</sup> See, also Mill, *Considerations on Representative Government*, (Cambridge: Cambridge University Press, 1861), p.68: “The meaning of representative government is that the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves the ultimate controlling power . . .”. Mill’s conception of representative government indicates a fundamental political shift in the nineteenth century. Following him on the same matter, Robert Dahl has described, “the nation or the country” became “the ‘natural’ unit of sovereign government.”; see Dahl, *Democracy and Its Critics*, (New Haven: Yale University Press, 1989), p.214. In this way, nineteenth-century democratic theory broke from “the conventional wisdom of over two thousand years,” and its core principle “that self-government necessarily required a unit small enough for the whole body of citizens to assemble.”

of the same coin, which is in fact the hierarchical power relation. Nevertheless, throughout legitimacy is jeopardized in Schmitt's theory of sovereignty, where the notions of authority, legality and rationality-normative-principles annulled from each other.<sup>1073</sup> So for Schmitt, the authoritarian/totalitarian alternative to contemporary liberal democracies would be likely to prove capable of mastering the political and social predicaments. Yet, such mastering has not been addressed legally or normatively, but only based on his favorable hierarchical theory of sovereignty.

### **3.4.1.3 Schmitt's Concept of the Guardian of Constitution: The Conflict between Executive Power and Legislative Power**

Schmitt's intention, as he explained in *the Essay in Constitutional Law* and then in *Legality and Legitimacy*, was to save the Weimar Constitution through an attempt to save the presidential power. He took a side of the President, since he believed that the jurisprudence cannot ask who is the friend or enemy of the state and its constitution. He believed that the President, on the contrary, would adequately present the political unity and hence be able to make a legitimate and legal decision on the conflicts, and the state of emergency/exceptions.<sup>1074</sup> In the conclusion of *Legality and Legitimacy (Legalität und Legitimität)*, Schmitt states that: "Once one is made aware that the Weimar Constitution is two constitutions, and wants to choose between the two constitutions, so must the decision fall for the second [part of the] constitution and its attempt at a substantive order. The core of the second part of the Weimar Constitution deserves to be freed of inner contradictions and failed compromises and to be developed in accordance with its internal logic. If this is successful, the idea of a constitution as a German work is saved. If this is not the case, then the end is at hand for the fiction of a functionalism of the majority, which is neutral in regard to value and truth. Then truth will take its revenge."<sup>1075</sup>

It should be asked, here, whether Schmitt's intention in this passage is to preserve the liberal individualistic core of the Weimar Constitution or the role of the Reich President.

What Schmitt simply wanted to say is that the Weimar Constitution, with its seemingly contradictory parliamentary and presidential characteristics, and highlighted liberal elements was in many ways an example of the constitutional confusion for the political situation of his time.<sup>1076</sup> Indeed, the second part of the Weimar Constitution comprised the 'fundamental rights of the German people' including all the rights that made up the principle of liberalism. But, as Schmitt believed, the liberalism itself also contradicted its principles as soon as it made an attempt to establish and maintain its position in the legal and political sphere. So if we accept that Schmitt wanted to save the liberal elements of the constitution we have to address the

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<sup>1073</sup> see also Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), pp.57-58.

<sup>1074</sup> Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954: Materialien zu einer Verfassungslehre* [Essay in Constitutional Law from the Period 1924-1954: Materials Toward a Constitutional Theory], (Berlin: Duncker & Humblot, 1958), p.345.

<sup>1075</sup> Schmitt, *Legalität und Legitimität*, (Berlin: Drucker & Humblot, 1932), p.98.

<sup>1076</sup> Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.', *The Yale Law Journal*, (2004), p.1360.

contradictory aspect which was proposed by Schmitt. Yet, to believe that Schmitt chose the second part of the Constitution is to say that he chose it against the means that make liberalism, what it is. Clearly, Schmitt criticized the value-neutrality, so in the contradiction of the concept of ‘power’, which is presented in the first part, and the concept of ‘rights’, which is presented in the second part of the Constitution, Schmitt saw that the Constitution could obtain its immunity only in the hands of executive power. He assumed that only the presidential system was the capable authority to address the state of exception or emergency. In ‘The Dictatorship of the President according to Article 48 of the Constitution’ (1924), Schmitt provided a detailed analysis of Article 48. Let us, first, recall the three crucial paragraphs of Article 48:

“If any state does not fulfill the duties imposed upon it by the Constitution or the laws of the Reich, the Reich President may enforce such duties with the aid of the armed forces.

In the event that the public order and security are seriously disturbed or endangered, the Reich President may take the measures necessary for their restoration, intervening, if necessary, with the aid of the armed forces. For this purpose he may temporarily abrogate, wholly or in part, the fundamental principles laid down in Articles 114, 115, 117, 118, 123, 124, and 153.

The Reich President must, without delay, inform the Reichstag of all measures taken under Paragraph 1 or Paragraph 2 of this Article. The Reichstag may vote to annul these measures.”<sup>1077</sup>

Some may argue that the ‘measures’ that the President is entitled to take in order to restore public safety and order are limited to the ‘end’, and the ‘principles’ are outlined in the second sentence of paragraph 2 of Article 48. On the contrary to this interpretation, what is actually implied by Article 48 is two fundamental points.

1. First, as Schmitt argued, ‘to this end’ was not intended to limit activity under the statute to the enumerated items.<sup>1078</sup> In fact, the concept of ‘measures’ was optional, and included a vast sort of interpretations which overcame the concept of ‘to this end’ as the enumerated items. Thus, where the second sentence of paragraph 2 of Article 48 seems limited the authority of executive power, in reality, it had not limited the practice of the Reich President. The first sentences of paragraph 2 of Article 48 provides a general legal path for the Reich President to take all and any measure considered as ‘necessary’.

2. Second, so long as it is properly understood, Article 48 is comprised of the two parts, as it was from two different constitutions. The first and the second sentence of the Article 48 are different in kind. The second sentence attempted to cope with the need to limit the extraordinary power of the Reich President and of the executive branch,<sup>1079</sup> yet the first sentence of paragraph 2 of Article 48 revoked the second

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<sup>1077</sup> RGBl. 1932 I, p.377.

<sup>1078</sup> Schmitt, ‘Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung’ [The Dictatorship of the President according to Article 48 of the Constitution], 1924, pp.215-216.

<sup>1079</sup> Schmitt, ‘Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung’ [The Dictatorship of the President according to Article 48 of the Constitution], 1924, p216.

sentence in practice. In other words, the first sentence of Article 48 provided a legal justification of the monopoly of the state's coercion in the hand of the Reich President.

Schmitt showed this point in his statutory interpretation of Article 48. In his interpretation, he tried to refute the idea that the second sentences of paragraph 2 of Article 48 limited the power *qua* domination of the Reich President. He believed that the second sentence is a sort of institutionalized system of norms, but in the state of emergency the sovereignty transcends any system of normativity.<sup>1080</sup> Indeed, he recognizes sovereignty as the one who decides on the state of emergency. However, it is interesting to ask why Schmitt would ignore the limitations in which his sovereign can handle the state of emergency, and why his sovereign - or here the President - must submit himself to the vague limitations to restore the Constitution.

In "Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung" Schmitt wrote that, "despite all phrases like 'unfettered authority' and '*plein pouvoir*' which have been used at the discretion of the President under Article 48, paragraph 2, it would be impossible for him to exercise a sovereign dictatorship on the basis of this constitutional provision, even if this were only in combination with the countersignature of the government."<sup>1081</sup> Just like the Social Democrats of the time who wrote the Constitution, Schmitt, at the time of writing the "Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung" and also the *Verfassungslehre*, could not spot the ignorance of the 'integrated concepts of power' in Article 48, as well as the disadvantages of the normative unfamiliarity of the two parts of the Constitution. In this sense, we can see that the Weimar Constitution did not want to give room for the suspension of the particular fundamental rights as well as creating the hierarchical power relation, but it gave the legal means specifically to the Reich President - to the executive and its administrative subordinates - to create such room.<sup>1082</sup> However, these elements were ended when the delegation provided the legal mechanism, if not the political cause, for the collapse of the parliamentary system into a dictatorship.<sup>1083</sup>

Neither the Social Democrats nor Schmitt, at that time, could comprehend how autonomous from the Parliament, nor how dominant the Reich President and executive power would become.<sup>1084</sup> At the time, Schmitt followed his Either/Or theory to say that the system could be "either sovereign dictatorship or constitutional; the one excludes the other."<sup>1085</sup> He also realized that the Reich President could not match to his theory of sovereignty, since his theory was irreconcilable with the idea of the *Rechtsstaat*. Yet, to face this problem and also to refute liberalism, he advocated the possible extraordinary power of the President as a dictatorial

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<sup>1080</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.73.

<sup>1081</sup> Schmitt, 'Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung' [The Dictatorship of the President according to Article 48 of the Constitution], (1924), p.238.

<sup>1082</sup> See also Schmitt, 'Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung' [The Dictatorship of the President according to Article 48 of the Constitution], (1924), pp.218-221, 225-226.

<sup>1083</sup> Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.', *The Yale Law Journal*, (2004), p.1360.

<sup>1084</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.74.

<sup>1085</sup> Schmitt, 'Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung' [The Dictatorship of the President according to Article 48 of the Constitution], 1924, p.238. For the translation see Gopal, *The Enemy: An Intellectual Portrait of Carl Schmitt*, (London: Verso, 2000.) P.41

sovereign. As the political decision is inevitable, he concluded that at one point the President would face a challenge in which he must make a sovereign decision. He wanted to criticize liberalism through the realm of legal norms. However, he ignored the destruction of his own theory of legality, in which he implicitly presupposed violence on either the judicial function or the legislative function.<sup>1086</sup>

In *Der Hüter der Verfassung*, Schmitt argued that the Reich President was the sovereign only if he stayed dependent on the constitutional power, and that he swore an oath of allegiance (Article 42).<sup>1087</sup> Moreover, the Constitution “presupposed the whole German People as a unit which has an immediate capability for action.”<sup>1088</sup> It seems that this claim is also one of the main principles of Schmitt’s *Verfassungslehre*. Thus, it helps us to know that how Schmitt analyzed the conflict between executive power and legislative power in a parliamentary democracy of his time. By this claim, Schmitt did not imply on the concept of ‘power of’ and ‘power to’, which formed the concept of the sovereignty of the Reich President, but he used this line of argument to conclude that the President has more power than commissarial authority/dictatorship. In other words, he tried to fit his theory of sovereignty to the form of the Reich President.<sup>1089</sup>

Another reason that Schmitt gave an absolute right to claim ‘despotic power’ to the Reich President is rooted in his idea of decisionism. He found a weak point in the Constitution which he referred to as ‘fake promises’. By that, he meant that the Weimar Constitution compromised the parts which postpone and adjourn the political decisions that have to be made. He regarded this weakness as the result of liberalism’s inability in the political sphere.<sup>1090</sup> Yet, we would still ask why he could not see that such a theory of decisionism matches the characteristic of Parliament, or could be a function between the President and the Parliament. In contrast, he argued that the compromises between the bourgeois and socialist form of social order which aimed to establish a *Rechtsstaat* could not be fulfilled without political and organizational components, whether in a monarchic, aristocratic or democratic regime.<sup>1091</sup> So he argued that the establishment of the Weimar Republic and the regime thereof, was the decision of German people based on their constitutive power. Indeed, this point is evident in the Preamble to the Weimar Constitution:

“The German people, unified in its stock and inspired by its will, has given this Constitution to itself to renew and strengthen its reign in freedom and justice, to serve both inner and external peace and to call for social progress.”<sup>1092</sup>

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<sup>1086</sup> See Schmitt, *Legalität und Legitimität*, (Berlin: Duncker & Humblot, 1932).; Schmitt, *Der Hüter der Verfassung* [The Guardian of the Constitution], (Berlin: Duncker & Humblot 1985, first pub.1931).

<sup>1087</sup> Schmitt, *Der Hüter der Verfassung* [The Guardian of the Constitution], (Berlin: Duncker & Humblot 1985, first pub.1931), p.169.

<sup>1088</sup> Schmitt, *Der Hüter der Verfassung* [The Guardian of the Constitution], (Berlin: Duncker & Humblot 1985, first pub.1931), p.159.

<sup>1089</sup> see also Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.77.

<sup>1090</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.80.

<sup>1091</sup> Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954: Materialien zu einer Verfassungslehre* [Essay in Constitutional Law from the Period 1924-1954: Materials Toward a Constitutional Theory], (Berlin: Duncker & Humblot, 1958), p.30-41

<sup>1092</sup> “Das Deutsche Volk, einig in seinen Stämmen und von dem Willen beseelt, sein

The Weimar Republic was a *Rechtsstaat*, and it seems that it was also a democratic regime. However, Schmitt believed that the principle of parliamentarism was the subversive antithesis of democracy. Thus, the fake compromises could not be solved by the legislative power or by the Parliament, as he believed they were anti-democratic. ‘The will of the people’ or the people as the constitutive power of democracy, which manifested in the Constitution, could not be safe in the parliamentary regime, since he believed that such a system was neutral to the truth and the difference between ‘friend and foe’ - the concept of political - and incapable of making decisions due to its neutrality.<sup>1093</sup> Thus, what followed for Schmitt was a hope in the office of the President. He saw the office of the President not only as the true locus of authority in the Weimar Republic, but an office that is chosen by the ‘entire German people’ (Article 41). Hence, Schmitt believed that the power of the Reich President was legitimate since - based on his theory of decisionism - the President had the capacity to protect the Weimar Constitution, which is the will of the German people, and since he is chosen by the democratic will of the German people.

In this sense, Schmitt achieved in claiming that the concept of presidential power and the theory of sovereignty match. Yet, he ignored that both his theories lack a system of perpetual ‘check and balance’ which is rooted in the theory of ‘the integrated concepts’ of power and rights. Moreover, his theory of ‘the political’ which was centered around the ability to recognize ‘friend from foe’, lacks the notion of the state as well as the rational-normative principle. Basically, it excluded any group that can be a possible opponent of his authoritarian/totalitarian notion of power as the enemy. What Schmitt recognized as the legitimate and legal power can only be the minimum condition of justification. In this sense, Schmitt could not provide a concrete theory of the politicization of social life, as he only concentrated on a democratically elected, but a despotic power which provided stable authority and was capable of making political decision.<sup>1094</sup> It was only in this sense that he could elaborate on the theory of ‘total state’.<sup>1095</sup>

In the essay of 1933, Schmitt distinguished between a ‘qualitative total state’ and a ‘quantitative total state’. He regarded the Weimar Republic as the ‘qualitative total state’ since the authority had the capacity to interfere with every sphere of its citizens’ life. In contrast, he regarded the fascist states as being a ‘quantitative total state’, since the authority can make political decisions based on the idea that a group can be either friend or foe. In this sense, he could make his last strike not only against parliamentarism but also against democracy and

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Reich in Freiheit und Gerechtigkeit zu erneuern und zu festigen, dem inneren und dem äußeren Frieden zu dienen und den gesellschaftlichen Fortschritt zu fördern, hat sich diese Verfassung gegeben.” Die Verfassung des Deutschen Reichs („Weimarer Reichsverfassung“) vom 11. August 1919 (Reichsgesetzblatt 1919, S. 1383). See Huber, *Dokumente zur deutschen Verfassungsgeschichte, Band 4: Deutsche Verfassungsdokumente 1919-1933*, 3., (1992), pp. 151-179.

<sup>1093</sup> Schmitt, *Legalität und Legitimität*, (Berlin: Drucker & Humblot, 1932), p.98.; See also Schmitt, *The Concept of Political*, (Chicago: University of Chicago, 1996).

<sup>1094</sup> See also Schmitt, *Legalität und Legitimität*, (Berlin: Drucker & Humblot, 1932), pp.38-39, p.93.; Schmitt, *Der Hüter der Verfassung* [The Guardian of the Constitution], (Berlin: Duncker & Humblot 1985, first pub.1931),

<sup>1095</sup> Schmitt, ‘Une étude de droit constitutionnel comparé: L’évolution récente du problème des délégations législatives.’, Paul Roubier et H. Mankiewicz, in *Recueil d’études en l’honneur d’Edouard Lambert*, (Paris, Sirey/L.G.D.J., 1938).

the legitimacy of the legal system. Furthermore, this distinction helped him to provide a solution for the problems of his time: on the one hand, he saw the Bolshevism from Russia and fascism from Italy threatening the sovereignty of Germany, and on the other hand, he saw that both the Parliament and the political parties weakened the sovereignty of Germany. The origin of this unique approach is the result of his observation during the Weimar Republic, and the arguments which he presented before the State's Constitutional Court (*Staatsgerichtshof*) in 1932. His argument, regarding the problem of his time, was that political parties in general, and the Parliament in particular, pose a threat to state sovereignty. The result of such an approach was the dissolution of the Parliament, since for Schmitt, the parliamentary democracy "poisons" German politics.<sup>1096</sup>

In short, there is no doubt that Schmitt's theories of decisionism, sovereignty, and constitution have one general aim: he wanted to prove that an authoritarian government was the best solution for Germany and its process from a prevalent notion of unlimited parliamentary power. To reach this aim, he should have faced the inevitable challenge that arose from the link between legality and normativity: he should have elaborated a system in which legal force to normative rules, instead of legislative power, would be provided by autonomous executive power. The extraordinary power of the President's office - and then the fascist state - could match the most to his theory of sovereignty, in which it could overcome the unlimited parliamentary authority which allocated normative power within the state and left the Weimar Parliament vulnerable to its own growing propensity to abandon its constitutional function as the democratic representative of the people - the role that nineteenth-century constitutional doctrine had assigned to it. The constitutional apparatus, here, generated an implicit notion of *ultra vires*.

In the Weimar Republic, power of the legislature was, in principle, unlimited in a sense that the legislature was entirely free to define the substantive content of legislative rules directly in the statute itself, or to authorize the executive to do so by way of 'regulatory ordinance' (*Verordnungen*). If this did not occur, the contradiction of Article 48 would give the President the same extensive power. As a practical matter, therefore, there was in fact no normative authority - or a *Vorbehalt des Gesetzes* - that parliament could not delegate.<sup>1097</sup> Hence, Schmitt argued in favor of the extraordinary degree of autonomous regulatory power in the executive, in favor of the extreme delegations, and in favor of the degeneration of the parliamentary system into dictatorship.<sup>1098</sup> In fact, it was a legal order imposed by the ruler who was free from the constraints of parliamentarianism.<sup>1099</sup>

It is no wonder that his theory of state was the foundation of the Nazis' authority. Schmitt's '*Der Führer schützt das Recht*' provided a detailed theoretical analysis to show that Hitler's

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<sup>1096</sup> Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* [The Historical/Intellectual Situation of Contemporary Parliamentarianism], (Berlin, 1985, first pub. 1926), p.45.

<sup>1097</sup> Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.', *The Yale Law Journal*, (2004), p.1366.

<sup>1098</sup> Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.', *The Yale Law Journal*, (2004), p.1348.

<sup>1099</sup> Jacobson and Schlink, *Weimar: A Jurisprudence of Crisis*, (Berkeley: University of California, 2000). P.110, 112.

act of aggression and violation legally match Schmitt's theory of sovereignty.<sup>1100</sup> Moreover, the homogenous unity is the overwhelming principle in Schmitt's theory of justification of power merged the theory of sovereignty with the dictatorship of Hitler; it basically implies the democratic acclaim of the dictator. Consequently, Schmitt's theory of hierarchical authoritarian/totalitarian regime is no more than a radical democratic homogeneity.<sup>1101</sup> His aim, which was a fascist state combined with his theory of decision in a moral vacuum could not justify even such regime.<sup>1102</sup> Whether Schmitt intentionally or unintentionally welcomed Hitler to power is not important. What is important is that he had no philosophical and legal foundation to not welcome him.

Schmitt's political and legal theory is the conjunction of events. We can observe that he had a difficult time to establish a concrete idea of legitimate legal order for the German people under the plight between the idea of National Socialism, democracy, and his theory of sovereignty. It may be reasonable to partially agree with Schmitt's theory of constitutive power and democracy, as the authority cannot be reduced to a legal authority - to authority which is exhaustively constituted by law -, but undoubtedly we cannot agree with his theory of legality and legitimacy, in which there would be no legal limitation for the delegation, and with his theory of sovereignty in which sovereignty is the arbitrary power of a man.

From Schmitt's legal theory we can learn a very important lesson for the sake of Western, legitimate democracies: Schmitt argued for the legal dictator who is immune to the individual rights or any rational-normative values, and he showed the possibility of the transformation of democratic power relation into a hierarchical one in a democratic regime. Moreover, he showed that his theory of sovereignty, supported with the theory of democratic constitutive power, justified such dictatorship. We see that a dictator is possible when we imagine the notion, which Schmitt presented as a legal sovereign, embedded in one of the branches of power. The constitution alone cannot put a complete constraint on the dictatorship of one branch of power over the others. For instance, the Enabling Act of 1933 unified all executive and legislative power permanently in the hands of Adolf Hitler. Indeed, the loophole in the constitution, the anti-democrats, and the prevailing conception of permissible legislative delegation, was an important measure of complicity in setting the stage for the National Socialist dictatorship. More interestingly, the Nazis constantly used the extensions of the enabling act in 1937 and 1939.<sup>1103</sup> This is crucial as it shows that a dictatorship, such as Hitler's, had to scuffle for having an appearance of ongoing constitutional legality. Thus, there is a wider concept of legitimacy and legality which must be considered.

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<sup>1100</sup> Schmitt, 'Der Führer schützt das Recht.' *Positionen und Begriffe im Kampf mit Weimar, Geneva, Versailles, 1923-1939* [Positions and Concepts in the Fight against Weimar, Geneva, Versailles, 1923-1939], (Berlin: Duncker & Humblot, 1988, first pub, 1958), pp.199-203. See also Shokri, "Legitimacy and Theory of Political Consciousness." *Journal of Political Sciences & Public Affairs*, 04 (01) (2016), p.4.

<sup>1101</sup> Schmitt, *Verfassungslehre*. (Berlin: Duncker & Humblot, 1928), pp.227-232.; see also Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.84.

<sup>1102</sup> See Arendt, *The Origins of Totalitarianism*, (New York: A Harvest Book 1979).

<sup>1103</sup> See Gesetz zur Verlängerung des Gesetzes zur Behebung der Not von Volk und Reich, v. 30.1.1939 (RGBl. I S.95); Gesetz zur Verlängerung des Gesetzes zur Behebung der Not von Volk und Reich, v. 30.1.1937 (RGBl. I S.105).

More importantly, Schmitt's legal theory is contradictory with the concept of sovereignty as he presented it. In other words, even Schmitt's legal theory cannot remain immune to the destructive concept of Schmitt's sovereignty, in which the delegation of the Parliament's legislative power and its normative authority with the executive undermines the autonomous, self-asserted, and unfettered concept of sovereign. After almost three decades, Schmitt himself came to realize the contradictions in his legal theory and his faults in judging the German solution to the problem of delegation, legality, and legitimacy. As a compensation, he proposed a necessity for "a sense for the logic and consistency of concepts and institutions" and "the minimum of an orderly procedure, due process, without which there can be no law."<sup>1104</sup> He even wrote of the need for "a recognition of the individual based on mutual respect."<sup>1105</sup> In this way, we can claim that even Schmitt admitted the theory of political consciousness as the cornerstone of the concept of power and legality.

Indeed, as Schmitt quite rightly understood, we can admit that the social and economic conditions of modern life required broader forms of legislative delegation. As we can see that the modern *Rechtsstaat* does not want to abandon delegation as a form of governance altogether. Yet, the general challenge has been in the realm of legality and legitimacy: to find a way to make delegation work within the context of liberal democratic institutions, to legitimate the practice of legal system. Even in the state of emergency, rather than indulge in melodramatic invocations of existential threats, modern legitimate democratic constitutionalists and politicians should not only view the state of emergency as a crucial tool enabling public reassurance in the short run, but also ensure that the foundational commitments to freedom, political consciousness, and the link between the rule of law and legitimacy would not be damaged.<sup>1106</sup>

The political and legal situation of Weimar raised some challenges for the period following the rise of National Socialist Party of Germany invites us to assess the debate on legality and legitimacy. The first challenge is with the constitutional text itself. Indeed, the new Constitution must guarantee both the fundamental rights of individuals and the core normative responsibilities that the legislative branch could not lawfully delegate to the executive or administrative sphere. In this sense, Germany could establish a body external to the legislature - the Federal Constitutional Court in West Germany which was similar to the Constitutional Council in France - to enforce delegation constraints against the legislature itself, thereby concretely signifying the abandonment of the unchecked parliamentary supremacy, or abandonment of any power branch to lawfully delegate a monopoly of authority and legality

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<sup>1104</sup>Schmitt, 'The Plight of European Jurisprudence.' *Telos*, 1990.83 (1990): 35-70, p.35.

<sup>1105</sup>Schmitt, 'The Plight of European Jurisprudence.' *Telos*, 1990.83 (1990): 35-70, p.67.

<sup>1106</sup> Ackerman, The Emergency Constitution. *The Yale Law Journal*, 2004, p.1044

to the executive branch that had been a cornerstone of German politics in 1920s and 30s.<sup>1107</sup> This recalls James Madison's legal theory of 'check and balances' in the government:

"But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others."<sup>1108</sup>

The second challenge after Schmitt's legal theory, and historically speaking after the terrible constitutional history of Germany and World War II, was to establish a system of governance that could sustain the welfare state bureaucracy within its legal apparatus while also remaining true to the ideal of parliamentary or presidential democracy and developing notions of human rights.

This lesson will be complete and the movement will progress to the next level of the inquiry by discussing, thereunder, Schmitt's opponents, Kelsen and Heller.

### **3.4.2 Kelsen as an Opponent: The Historical Approach**

In order to understand the modern and the Western legal theory, at least according to our approach, we need to refer to Hans Kelsen. Kelsen was one of the eminent German political and legal theorists of the twentieth century. Kelsen, after Schmitt, remains as one of the dominant political figures of the era, therefore it is necessary to examine his theory in order to have a proper understanding of the modern legal and political explanation of political power and the concepts of legality and legitimacy.

The relation between Kelsen and Schmitt is not only historically chronological but also theoretically juxtaposed. Kelsen and Schmitt adopted different, or possibly even contrary legal and political approaches to the series of political phenomenon which began before the Weimar era and lasted for more than five decades afterwards. While Schmitt began to establish his career in the Commercial College in Berlin, Kelsen was a renowned constitutional lawyer, a theoretician of democracy, and a positivist. The adherents of natural law at that time were the conservatives and monarchists whom Schmitt chose to follow. Kelsen, on the contrary, opposed such a concept which was rooted long before Schmitt started his career. Yet, in the comparative approach, Kelsen and Schmitt were opponents with regard to the theory of law, the concept of legality, the concept of sovereignty, and the theory of the state.<sup>1109</sup>

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<sup>1107</sup> The Italian experience is similar. Part I of the postwar Italian Constitution sets out an extensive list of protected civil, political, and social rights, whereas Articles 134-37 also provide for the establishment of a Constitutional Court. Finally, in Articles 76-77, the postwar Italian Constitution also restricts the legislature's delegation of power to the executive. In particular, Article 76 states: "The exercise of the legislative function may not be delegated to the government if the principles and guiding criteria have not been established and then only for a limited time and for specified ends." Costituzione Art.76, translated in Camera Dei Deputati, *Costituzione Della Repubblica Italiana: Deutsch, English, Espanol, Francais, Italiano*, (Roma: Segreteria generale, 1990).; See also Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-state*, (Oxford: Oxford University Press, 2010).

<sup>1108</sup> Madison, et al., *The Federalist*, (Indianapolis: Liberty Fund, 2001, first pub.1788), Nr.51, p. 268.

<sup>1109</sup> Diner and Stolleis (eds.), *Hans Kelsen and Carl Schmitt: A Juxtaposition*, (Gerlingen: Bleicher, 1999), p.116

The prevailing character of academics in the 1920s and 1930s diverged just like Schmitt and Kelsen diverged from each other. Before the Nazi seizure of power, the number of faculties who actively supported National Socialism tended to be small, while the body of students strongly expressed their support. The young generation was open to borrow the support of anti-democrats to fire the criticisms on the Republic and Versailles. They were intimidated by the idea of racial purity and the new powerful expanded Reich.<sup>1110</sup> It was through the 1920s that the 'Deutsche Huchshulring' (DHR) has grown, which gave them a legally appointed chairman in 1932 by the National Socialists. The terror was not only on the streets but also against any undesirable democrats or non-Aryan university lecturer at the German universities. Hitler proudly and enthusiastically welcomed such diversion among German academics in the summer of 1930 that nothing gives him more cause to believe in the victory of National-Socialism at the universities.

After the Nazi Seizure of power, or in general in the 1930s, the National Socialist of the time tried to change the academic trend that resisted their uprising to power. Hitler and his Nazi Party acquired the '*Gleichschaltung*' - Coordination - as a special measure to help the spear of support for the National Socialist regime among the faculties of the universities. They in fact replaced any political opponent from any academic position with their National-Socialist adherents. As the consequence, Kelsen as a prominent legal theorist with worldwide repudiation, who was a specialist in the pure theory of law and democracy, was included on the first target under the legally ratified '*Gleichschaltung*'. Moreover, Schmitt was among a long list of other academics who accommodated themselves to the new - authoritative/totalitarian - circumstances to fill a large number of seats which were free in a very short time.

When we consider such academic and political sequences in the final phase of the Weimar Republic, the merit of the spiritual and social situation seems to be clearer. It is interesting to know that the career of Kelsen and Schmitt converged in one point at the University of Cologne. What is interesting is that Kelsen's career started from 1925 when the Law Faculty of the University of Cologne tried to appoint him as a chair. However, it has been always mysteriously opposed by the Ministry of Science in Berlin. Finally, in 1930, with the support of Mayor Dr. Konrad Adenauer, who was the chairman of the governing body of the University of Cologne, from the very outset, appointed Kelsen as the chair. To make a balance and to answer the critics of the time which accused the University of Cologne that it took the side of a certain school of thought, Dr. Konrad Adenauer, Kelsen and the Faculty of Cologne - although Dr. Adenauer had some reservations - welcomed the appointment of Schmitt. On November 15, 1932, Kelsen wrote a sincere letter of welcome to Schmitt, and express his support for his position, although they were academically opponents.

After the Nazi seizure of power on April 1933, Kelsen was the target of the '*Gleichschaltung*' so he could not continue his teaching career. For the Faculty it resulted in a great loss of its reputation, and as for the German science, they opposed the decision by composing a petition of protest. They argued that they assisted the measure which has been taken in the '*Gleichschaltung*', and went on to point out that Kelsen had never been a member

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<sup>1110</sup> Diner and Stolleis (eds.), *Hans Kelsen and Carl Schmitt: A Juxtaposition*, (Gerlingen: Bleicher, 1999), p.117.

of the SPD. Seeing the support of Kelsen for his career development, Schmitt was the only one who did not sign the petition to defend Kelsen. However, the petition was successful and he continued his academic career till he retired in January 1934.<sup>1111</sup>

### 3.4.2.1 Kelsen and the Question of Legality, Validity, and Legitimacy

Kelsen tried to elaborate a scientific and positivist concept of legality that could match the concept of legitimacy of the modern parliamentary democracy, in which his theory, just like Schmitt's, interconnected different ways of making sense of the same social phenomenon of his time, which was shaped under the political consciousness of constituents. His vast legal, philosophical, and political works, *The Pure Theory of Law* and *General Theory of Law and State*, are strongly related to the question of sovereignty, political power, legitimacy and the concept of legality.

Kelsen relied on the concept of norm to examine whether the concept of the legality of a regime, and even further, if an act of a sovereign is validated, justifiable, and legitimate. Yet, normativity and morality are not identical for Kelsen. The first question is why or how the concept of norm, which is the basis of the concept of legality, is valid and is justified. He distinguished between the validity of legal norms and their justification. So, the question about the validity of the concept of legality and the legal norm in a state do not ultimately refer to the moral significance of rights in the legal system or the political justification of the concept of legality. In *Introduction to the Problems of Legal Theory*, Kelsen argues:

“If one goes on to ask about the basis of the validity of the constitution, one which rest all statutes and the legal acts stemming from those statutes, one may come across an earlier constitution, and finally the first constitution, historically speaking, established by a single usurper or a council, however assembled.”<sup>1112</sup>

However, Kelsen believed that the moral and political values, according to pure scientific inquiry, cannot be evaluated by experience.<sup>1113</sup> Thus, he continued his argument by stating that:

“What is to be valid as norm is whatever the framers of the first constitution have expressed as their will – this is the basic presupposition of all cognition of the legal system resting on this constitution.”<sup>1114</sup>

Kelsen diverged from the basis of ethical, theological, - ideological - and political elements - factual -, he introduced a hierarchical system of norms by which the practice of a law, an act of sovereignty, and the concept of legality are examined with the new concept of ‘purity’. In this sense, he continued to argued that:

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<sup>1111</sup> Mayer, *Ein Deutscher Auf Widerruf: Erinnerungen*, (Frankfurt Am Mai: Suhrkamp, 1984), p144.

<sup>1112</sup> Kelsen, *Introduction to the Problems of Legal Theory*, trans. by Bonnie Litschewski Paulson and Stanley L. Paulson, (Oxford: Clarendon Press, 1992), P.57

<sup>1113</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.107.

<sup>1114</sup> Kelsen, *Introduction to the Problems of Legal Theory*, trans. by Bonnie Litschewski Paulson and Stanley L. Paulson, (Oxford: Clarendon Press, 1992), p.57

“Coercion is to be applied under certain conditions and in a certain way, namely, as determinate by the framers of the first constitution or by the authorities to whom they have delegated appropriate power – this is schematic formulation of the basic norm of a legal system (a single state legal system, which is our sole concern is).”<sup>1115</sup>

The idea, following Adolf Julius Merkel’s *Stufenbaulehre*, was to elaborate a hierarchical structure of a dynamic character of law that validates itself.<sup>1116</sup> In other words, Kelsen tried to view the law as “governing its own creation”.<sup>1117</sup> In *General Theory of Law and State*, Kelsen introduces a new concept of law:

“If one looks upon the legal order from the dynamic point of view, as it has been expounded here, it seems possible to define the concept of law in a way quite different from that in which we have tried to defend it in this theory. It seems, especially, possible to ignore the element of coercion in defining the concept of law.”<sup>1118</sup>

So, Kelsen continues to argue that it is the Constitution that prescribes law for the creation of law to establish a link between the concept of legality, legal norms, and legislation. According to Kelsen’s approach, however, a legal norm, in particular, and a concept of legality, in general, will be valid only if they belong to a living and sovereign legal system. The question still remains as to how law can have a role in empowering norms.

For Kelsen, a norm or set of norms, which comprise a law, are justified and validated not because of their content but because they are stipulated and validated by some higher norms. At the very top of the hierarchical structure of his theory of normative hierarchy is *Grundnorm* (Basic norm). Yet, we have to ask whether the choices between an ‘understanding of law’ and ‘evaluating its justification’ are choices between values.

Figuratively, the validity of any norm must be grounded in a ‘higher’ norm in which it finds its system of procedures. This concept of justification and validation continues until the validity of any norm is traced back to the most basic norm or *Grundnorm*. In other words, a *Grundnorm*, for Kelsen, is presupposed and the highest norm, which stands at the apex of the norm hierarchy, and its validity is taken for granted.<sup>1119</sup> In other words, The validity of the basic or constitutional norm cannot, however, be traced to any other norm and, Kelsen asserts, its validity has therefore to be assumed.<sup>1120</sup> Such a *Grundnorm*, as Kelsen implied, contains nothing but “the determination of a norm-creating fact, the authorization of a norm-creating authority (which amount to the same) or a rule that stipulates how the general and individual norms of the order based on a basic norm (*Grundnorm*) ought to be created.”<sup>1121</sup>

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<sup>1115</sup> Kelsen, *Introduction to the Problems of Legal Theory*, trans. by Bonnie Litschewski Paulson and Stanley L. Paulson, (Oxford: Clarendon Press, 1992), p.57.

<sup>1116</sup> Paulson, How Merkl’s *Stufenbaulehre* Informs Kelsen’s Concept of Law. *Revus*, 21, 2013, 29–45.; See also Kelsen, *General Theory of Law and State*, (Cambridge: Harvard University Press, 1949), pp.122-123.

<sup>1117</sup> Kelsen, *Introduction to the Problems of Legal Theory*, trans. by Bonnie Litschewski Paulson and Stanley L. Paulson, (Oxford: Clarendon Press, 1992), p.91.

<sup>1118</sup> Kelsen, *General Theory of Law and State*, (Cambridge: Harvard University Press, 1949), p.122.

<sup>1119</sup> Bindreiter, *Why Grundnorm?: A Treatise on the Implications of Kelsen's Doctrine*, ( The Hague: Kluwer Law International, 2002), p.19.

<sup>1120</sup> Dyzenhaus, Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought, *Theoretical Inquiries in Law* 16 (2), (2015), p.341.

<sup>1121</sup> Kelsen, *Pure Theory of Law* (Berkeley: University of California, 1967), p.196.

Moreover, he asserted that the “function of the basic norm is to make possible the normative interpretation of a certain fact, and that means, the interpretation of facts as the creation and application of valid norms”.<sup>1122</sup> This assertion can only be accepted under the three conditions:

- (i) that there exists a realm of privileged normatively condensable agency
- (ii) that the agency is relatively invariable against the factual and evolving conditions of society;
- (iii) the agency is authorized to stipulate constant principles of political form.

In this sense, the *Grundnorm* formally justifies the concept of legality, law, and the constitution in a system relying on the ‘ought to’ approach. Thus, Kelsen reduced the question of ‘why a *Grundnorm* ought to be observed’ to the validity and a pure concept of obligation,<sup>1123</sup> in order to advocate the validity of a positive-law constitution, and the concept of legality of the state resting upon it.<sup>1124</sup> This ‘contradiction-free-(formally) justifying-system of norms’ not only is designed to explain a legal order, but also is a formative element of justifying the concept of sovereignty by constituting its logical source of validity, hence its efficiency without stabilizing *Grundnorm* as absolutely external to power’s positive/ emergent structure.<sup>1125</sup> For Kelsen, the legal order presents in fact a notion of sovereignty due to the high valued *Grundnorms* which is autonomous from any office, political process, belief, or a system of norms.

In this sense, Kelsen tried to show how a constitution can carry the notion of validity and hence the notion of sovereignty. The central point of his argument hinges upon the authorizing norm only. Kelsen referred to the existence of a certain norm which is in fact without necessarily willing that it be observed. Indeed, he had in mind the notion of the *Grundnorm* as efficiently valid.<sup>1126</sup> Hence, Kelsen merged the three functions of norm to justify the validity of constitution. First, he distinguished the notion of ‘posited’ norms and merely ‘presupposed’ norms. While the posited norms are in the realm of ‘will’, the presupposed norms are in the realm of ‘thought’.<sup>1127</sup> Second, he argued the function of *Grundnorm qua*, a unifying factor in a certain concept of legality and constitutionality.<sup>1128</sup> Third, he used the concept of *Grundnorm* as a formal justification basis by which one can distinguish between lawful and unlawful legal order and interpret objectives, especially the legal duties, commands, and powers.<sup>1129</sup> However, the hierarchical set of norms is projected into a challenge where the creation of

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<sup>1122</sup> Kelsen, *General Theory of Law and State*, (Cambridge: Harvard University Press, 1949), p.120.

<sup>1123</sup> Kelsen, *Pure Theory of Law* (Berkeley: University of California, 1967), p.212.

<sup>1124</sup> Bindreiter, *Why Grundnorm?: A Treatise on the Implications of Kelsen's Doctrine*, ( The Hague: Kluwer Law International, 2002.) p.15.

<sup>1125</sup> The Grundnorm has three distinction functions: epistemology function, formally justifying function, and unifying function. See Kelsen, Hans. *Pure Theory of Law* (Berkeley: University of California, 1967), pp.205-209.; See also Bindreiter, *Why Grundnorm?: A Treatise on the Implications of Kelsen's Doctrine*, ( The Hague: Kluwer Law International, 2002), p.16.; see Kelsen, *General Theory of Law and State*, (Cambridge: Harvard University Press, 1949), pp.121-123.

<sup>1126</sup> Kelsen, On the Basis of Legal Validity, *American Journal of Jurisprudence*, (1981), pp.180-181. [p.1418]

<sup>1127</sup> Kelsen, The Function of Constitution, In Richard Tur & William L. Twining (eds.), *Essays on Kelsen*, (Oxford: Clarendon Press, 1986), pp.109--119, p.116.

<sup>1128</sup> Kelsen, On the Basis of Legal Validity, *American Journal of Jurisprudence*, (1981), pp.185, [p.1423].

<sup>1129</sup> Kelsen, On the Basis of Legal Validity, *American Journal of Jurisprudence*, (1981), pp.185, [p.1423].

validity for another norm does in fact produce a concept of sanction-norm, whereby the concept of empowerment turns out to be a mere existential ‘condition’ in such system.

Although some legal philosophers, such as David Dyzenhaus, believe that Kelsen objected to the view that can be grounded only “in a religion and metaphysical hypothesis, which holds that there is a divine right of the people, something just as unbelievable as the claim that there is divine right of kings”, as Kelsen implicitly relied on the link between his theory of *Grundnorm* and natural law. Hence, the validity of the positive law is justified only by the *Grundnorm*, which is not part of the positive law. In this sense, the concept of sovereignty is an attribute of the concept of natural law, occurring when power fills the gap at the very apex of the legal system.<sup>1130</sup>

### **3.4.2.2 Kelsen’s Concept of the Guardian of Constitution: The Conflict between Executive Power and Legislative Power**

It has been believed that Kelsen was in favor of the weakness of the executive power. This can be based on two approaches that Kelsen used to criticize Schmitt's concept of sovereignty and constitutionality. The first approach is regarding the constitutional function, and the second approach is regarding the concept of justification of the judicial function. Here, we address these two concepts to see that whether Kelsen’s concepts of power, legality, and legitimacy are infallible.

#### **3.4.2.2.1 The Concept of Constitutional Function**

In ‘*Wer soll der Hüter der Verfassung sein?*’ (Who should be the Guardian of the Constitution?),<sup>1131</sup> Kelsen, as a response to the Schmitt’s *Der Hüter der Verfassung* (the guardian of constitution), tried to refute the concept of the sovereignty of the Reich President and to argue in favor of the power of the Constitutional State Court. Yet, we have to know that Kelsen never argued against the power of the President for the sake of other branches of power, but he argued against the vaguely defined boundaries in the Weimar Constitution, especially in Article 48.

Kelsen argued that the supremacy of the constitution is taken for granted. Against Schmitt, he said that if there is a political demand for the constitutional guarantee, then there should be a model of institutional power relation in which the best arrangements ensure that all branches of power act in conformity to the constitutional validity and justifiability. In *Wer soll der Hüter der Verfassung sein*, Kelsen states that:

“When it is generally the case that an institution should be created which will control the constitutionality of certain acts of a state that directly implicate the constitution, this control may not be allocated to one of those very organs whose act is to be controlled.”<sup>1132</sup>

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<sup>1130</sup> Kelsen, ‘*Wer soll der Hüter der Verfassung sein?*’ [Who should be the Guardian of the Constitution?], *Die Justiz*, 6 (1930/31), p.624.

<sup>1131</sup> Translated by author.

<sup>1132</sup> Kelsen, ‘*Wer soll der Hüter der Verfassung sein?*’ [Who should be the Guardian of the Constitution?], *Die Justiz*, 6 (1930/31), p.576.

Thus, Kelsen believed in the technical-legal requirement that can satisfy an inherently political demand of constitutionality. In this sense, he referred to the constitution itself as the origin of such guarantee:

“The political function of the Constitution is to set legal limits on the exercise of power. Constitutional guarantees ensure that these legal limits are not transgressed. And if there is anything that would be immune to doubt is that no other body is less suited to such a function than one to which the constitution allocates the exercise of power, whether this would be in whole or in part, and which is therefore best placed in virtue of legal opportunity and the political process to harm the constitution. For there is no other fundamental legal technical proposition that attacks so much consensus that no one should be judge in his own cause.”<sup>1133</sup>

Thus, where we argued that the political consciousness is the guarantee of the justification of a Constitution which provides the input legitimacy for the legality of the state, we also agree with Kelsen who argued that the legal constraints on the power of the branches of power would guarantee the Constitution, which provides the throughput legitimacy. Indeed, Kelsen’s argument is designed to refute Schmitt’s *Der Hüter der Verfassung* along with the traditional monarchical German ideology. This ideology relied on the power of the monarch as a legal and justified power, as the only guardian of the constitution against the greatest threat to the constitution which was the monarch himself. In this sense, Kelsen argues that:

“And it is even more astonishing that this essay presents as its main thesis the oldest set piece from the junk room of the constitutional theatre: namely, that the head of state and no other organ is the appointed guardian of the Constitution, so that this altogether dusty piece of equipment is brought into employment for the democratic republic in general and the Weimar Constitution in particular. But most astonishing of all is that this essay has the aim of renewing Benjamin Constant’s theory of the *pouvoir neutre* [neutral power] of the monarchy, and of allocating this role to the head of state without any limitation...”<sup>1134</sup>

Yet, is it not true that we can use this argument against any organ or individual who possesses the privilege of being the guardian of the Constitution, since any authority can also be at the same time the greatest threat to the Constitution, whether it is the monarch, the people, or any one of the branches of power. Moreover, the monarchical power, for Schmitt, was not as neutral as Kelsen imagined. For Kelsen, the monarch was also supposed to be a neutral third party who would ensure that the exercise of power does not overstep the legal limitations, and hence the usurpation of power. For Schmitt, the monarch or the President, as they are the sovereigns, stand above the legal order and the constitution, and always make the political decisions which are based on their own idea of the ‘political’.

Probably Kelsen realized that Schmitt tried to justify the idea of the monopoly of legality of the Reich President in a way that it fits to the role of the head of the state of a democracy. Yet, Kelsen built his own concept of sovereignty within the boundaries of the Constitution. He

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<sup>1133</sup> Kelsen, ‘*Wer soll der Hüter der Verfassung sein?*’ [Who should be the Guardian of the Constitution?], *Die Justiz*, 6 (1930/31), p.576.

<sup>1134</sup> Kelsen, ‘*Wer soll der Hüter der Verfassung sein?*’ [Who should be the Guardian of the Constitution?], *Die Justiz*, 6 (1930/31), p.579-580.

continued to illustrate the problem in his contemporary situation by arguing for the protection of the Constitution driven within the boundaries of Article 48. Yet, the boundaries are too narrow to be in danger of being overstepped.<sup>1135</sup>

#### 3.4.2.2.2 The Concept of Judicial Function

Kelsen, contrary to Schmitt, held that the judiciary is not only bounded to norm but also to the political elements by which it gains a legitimate legal and political power. Thus, against Schmitt, he argued that there was no contradiction between the judiciary function and political function since there would be a political element in every judicial decision.<sup>1136</sup> The judicial function, as Kelsen argued, examines both the normative and political elements of controversies. In this sense, the concept of legality and constitutionality would be manifested in the decisions which are stuck between the two magnets of authority and the concept of legality.<sup>1137</sup> For if a decision is an attempt to favor any interest, then there is a legal exercise of power, in a wide concept of authority, in every judgment. Kelsen despised the idea that the judiciary function is not political. Yet, what makes this idea quite controversial is that that Kelsen questioned whether the transferred legislature to the judiciary is a political empowerment of the judges in a qualitative sense. Kelsen did not address the question completely, although he believed that the judiciary function and political element in it comprise a legislative quality.<sup>1138</sup>

Kelsen believed that Schmitt was stuck in the contradiction between the concepts of constitution and law.<sup>1139</sup> He believed that Schmitt was wrong in holding that the justification of judicial decision is based on what is already contained in the statute, since Schmitt could not merge his idea of decisionism with the independent judiciary, but he could only merge his concept with an organ which can overstep the concept of legality. Thus, Schmitt, according to Kelsen, ignored what the Constitution implies on the function of judiciary power.<sup>1140</sup> For Kelsen, the court can be as political as the President and the limitation on both would be legitimate, yet the importance of the functions of both organs would be at stake.<sup>1141</sup>

Moreover, Kelsen believed in the legislative function within the judicial function by distinguishing between the function of constitutional court and the function of other courts. He argued that while the latter produce the single norm, the constitutional court could overturn a law and invalidate a general norm, thus it would produce a general norm as a 'negative

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<sup>1135</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.110.

<sup>1136</sup> Coutinho, Torre, Steven Smith, *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences*, (New York: Springer, 2015), p.89.

<sup>1137</sup> Kelsen, 'Wer soll der Hüter der Verfassung sein?' [Who should be the Guardian of the Constitution?], *Die Justiz*, 6 (1930/31), pp.583-585.

<sup>1138</sup> Kelsen, 'Wer soll der Hüter der Verfassung sein?' [Who should be the Guardian of the Constitution?], *Die Justiz*, 6 (1930/31), pp.585-589.

<sup>1139</sup> Kelsen, 'Wer soll der Hüter der Verfassung sein?' [Who should be the Guardian of the Constitution?], *Die Justiz*, 6 (1930/31), p.45.

<sup>1140</sup> Kelsen, 'Wer soll der Hüter der Verfassung sein?' [Who should be the Guardian of the Constitution?], *Die Justiz*, 6 (1930/31), p.593.

<sup>1141</sup> Kelsen, 'Wer soll der Hüter der Verfassung sein?' [Who should be the Guardian of the Constitution?], *Die Justiz*, 6 (1930/31), p.595.

legislator'.<sup>1142</sup> For Kelsen, however, the 'negative legislator' is different from the positive one. In fact, the positive legislation is not reduced to the constitutional judgment but it is a 'free creation' which is confined in the judiciary function.

In this sense, Kelsen tried to fit the idea of legality to the idea of democracy as he believed that the legislative power - the power of producing norm, are not separated but they are shared between the branches of power. More importantly, he wanted to merge the idea of democratic power into the theory of an independent constitutional court which has the power of legislature in a way that it can invalidate the legislation norm - compared to the legislative branch - or governmental act - compared to the executive branch. Kelsen affirmed that the judicial function of the constitutional court is the 'constitutional review'<sup>1143</sup> which was not stemmed from the jurisdictional but from the legislative function, and must be interpreted as "a division of the legislative power between two organs."<sup>1144</sup> However, for the idea of a parliament to be the representative of the people, who in fact are entitled to claim political power, how could Kelsen answer the question regarding the parliamentary supremacy?

This was Kelsen's main problem as it was for Schmitt. Schmitt tried to answer this question in the *Verfassungslehre*. Kelsen chose another way. He argued that if we talk about the democratic state, we cannot imagine that sovereignty resided in one of the branches of power. He believed that sovereignty is an attribute of a legal order and a state as a whole is not merely an attribute of a certain concept of power or a certain institution in a power structure. Moreover, he argued for the interdisciplinary function of legislation, adjudication, and administration which enable him to say that constitutionality of legislation is no different from the requirement of legality.<sup>1145</sup> In this sense, the main principle that Kelsen has relied on his argument is the principle of legality, yet he did not provide any legitimate factor. Here, Kelsen's argument can be interpreted as an approach to the validity of the concept of legality rather than for its legitimacy. He argued that all branches of power must abide by the principle of legality and their act must be constitutionally valid. Therefore, the Constitution remained the only source of the justification of the concept of legality by which the legislative sovereignty is reconcilable with all constitutionally validated acts of state, especially with the constitutional adjudication. However, a serious problem arises when we want to understand how Kelsen can hold the idea that judicial function is political function while, as he believed, the judicial role involves determination by the higher norms. It is also problematic to contemplate how Kelsen can hold the idea that in every judicial function there is a legislative function, and thus an exercise of political power, while as he believed, Judicial function must be independent so that the legality of exercise of political power can be tested by a branch of power which is not involved in that exercise.<sup>1146</sup>

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<sup>1142</sup> Kelsen, 'Wer soll der Hüter der Verfassung sein?' [Who should be the Guardian of the Constitution?], *Die Justiz*, 6 (1930/31), pp.598-599.; See also Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.115.

<sup>1143</sup> Compare it to the idea of 'judicial review' in American politics.

<sup>1144</sup> Kelsen, *La Garantie juridictionnelle de la constitution* (Paris : Marcel Giard, 1928), cited in Diner and Stolleis (eds.), *Hans Kelsen and Carl Schmitt: A Juxtaposition*, (Gerlingen: Bleicher, 1999), p.90.

<sup>1145</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.116.

<sup>1146</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), pp.116-117.

In ‘*Wer soll der Hüter der Verfassung sein?*’ Kelsen argued that:

“But there is an enormous difference between giving another organ just this power which it has to have in order to fulfill the function of constitutional control and strengthening even more the power of one of the chief bearers of power by giving him that function. It is the chief advantage of the constitutional court that, because it is not involved in the outset with the exercise of power, it does not stand in any necessary antithesis to parliament and government. For the theory of the ‘total state’ there is no antithesis between parliament and government. The consequence which does not need to be expressly stated and which Schmitt does not expressly state, is that when the head of state in concert with the minister emerges as the guardian of the constitution to protect it against unconstitutional law, the constitutional control is allocated to a body who by definition is not a party to a conflict.”<sup>1147</sup>

Here, Kelsen, emphasizes the justification of power of a constitutional court as the ‘third party’ which is independent of the exercise of political power. Hence, as the line of Kelsen’s argument shows, the constitutional court is in fact neither the judicial power nor an element of that power.<sup>1148</sup> Yet, the contradiction is inevitable when the a constitutional court must be a part of a system of the exercise of power to fulfill its judicial function. He may be already aware of this contradiction since he did not deny the legality of the act of President in the boundaries of Article 48. He basically tried to highlight the input and throughput deficits in the Weimar Constitution and in its power relation respectively. First, he argued that boundaries of Article 48 are narrow and vague. Second, he argued against an exclusive guardianship role allocated to one organ. This theory along with the legislative and political element in each branch of power led him to believe in the ‘share of power’ instead of ‘separation of power’. The President, hence, could not be the single symbol for the German people, for the democracy must have a plurality of representatives.<sup>1149</sup> Thus, he argued against the actual rivalries between the legislative and executive power and against that fact that the Parliament is the threat to the concept of sovereignty.

Kelsen basically took the exact argument which Schmitt and the Nazi’s ideology was relying on. However, Kelsen, like Schmitt, merely relied on the content of the Constitution, so he overlooked the fact that the two other vital points, namely the concept of delegation and the concept of democrats, would be crucial to precisely remark the legitimacy deficits in the concept of legality in the Weimar Republic. Based on the idea of ‘share of power’, he emphasized that: “This constitutional interpretation must peak in an apotheosis of Article 48,”<sup>1150</sup> which leads to the paradoxical conclusion that application of Article 48 presupposed

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<sup>1147</sup> Kelsen, ‘*Wer soll der Hüter der Verfassung sein?*’ [Who should be the Guardian of the Constitution?], *Die Justiz*, 6 (1930/31), p.609.

<sup>1148</sup> See Diner and Stolleis (eds.), *Hans Kelsen and Carl Schmitt: A Juxtaposition*, (Gerlingen: Bleicher, 1999), p.90.

<sup>1149</sup> Kelsen, ‘*Wer soll der Hüter der Verfassung sein?*’ [Who should be the Guardian of the Constitution?], *Die Justiz*, 6 (1930/31), pp.609-624.; See also Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.119.

<sup>1150</sup> Kelsen, ‘*Wer soll der Hüter der Verfassung sein?*’ [Who should be the Guardian of the Constitution?], *Die Justiz*, 6 (1930/31), pp.623.; See also Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997).

the existential threat of the Parliament.<sup>1151</sup> We can agree with Kelsen to the extent that the apotheosis on Article 48 leads to a contradiction in which:

“Of the two bearers of state power set out by the constitution, [Schmitt] makes one an enemy, who wants to destroy its unity, and the other a friend, who wants to defend that unity; the violator and the guardian of the Constitution. This has nothing more to do with a legal positivist interpretation of the Constitution. It is the mythology of Ormuzd and Ahriman dressed in garments of a philosophy of state and law.”<sup>1152</sup>

In sum, maybe the fault line of *Der Hüter der Verfassung*, as Kelsen highlighted, was that Schmitt overlooked the legal and political role of the Parliament. In fact, a Parliament as much as the office of President could claim power borrowed from the concept of legality and constitutionality. For both of these branches of power are subservient to the Constitution as are courts to the law, and under these conditions legal control over them are legitimate. Kelsen’s approach, however, did not make sense of the proper distinction between politics, legality, and legitimacy. Dyzenhaus recalls that “Kelsen’s strategy was an instance of liberal recognition of the reality of politics and the way that decision breaks through the normative, at the same time as it is a futile and purely formal attempt to contain that breakthrough”.<sup>1153</sup> Thus, he went on to adhere to the idea that politics under the norm is merely based on the validity of the legislation in the court. Schmitt, on the contrary, tried to refute the courts from any relevant role in the application of constitutional norm and put the Constitution in the hands of authoritarian/totalitarian sovereigns.<sup>1154</sup> Yet, both Kelsen and Schmitt refused to justify the parliamentarianism which is the idea of representation by the concept of moral significance of the right and political consciousness. In this way, we cannot find a concrete critique that Kelsen held against the political objective of expanding the power of the President. Yet, for Kelsen, finally, the Constitutional Court is the real guardian of the Constitution. However, the question is whether the concept of legality and legitimacy can be located in Kelsen’s concepts of power and sovereignty.

### 3.4.2.3 Kelsen’s Concept of Justified Sovereign: The Constitution and Coherency

Kelsen once said that the concept of sovereignty must radically be suppressed.<sup>1155</sup> He, just like Schmitt, tried to develop one side of the theory of sovereignty to the exclusion of the other. It

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<sup>1151</sup> Kelsen, ‘*Wer soll der Hüter der Verfassung sein?*’ [Who should be the Guardian of the Constitution?], *Die Justiz*, 6 (1930/31), pp.622-623.

<sup>1152</sup> Kelsen, ‘*Wer soll der Hüter der Verfassung sein?*’ [Who should be the Guardian of the Constitution?], *Die Justiz*, 6 (1930/31), pp.627.

<sup>1153</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.122.

<sup>1154</sup> See also Renan, ‘Was ist ein Nation?’, Tran. (into German) Henning Ritter, (Hamburg: Europäische Verlagsanstalt, 1996), p.241.

<sup>1155</sup> Kelsen, *Das Problem Der Souveränität Und Die Theorie Des Völkerrechts Beitrag Zu Einer Reinen Rechtslehre* [The Problem of Sovereignty and the Theory of International Law: Contribution to a Pure Theory of Law], (Tübingen: J.C.B. Mohr, Paul Siebeck, 1928). This book in which Kelsen systematically exposes the critique of sovereignty, was published in 1921, the same year in which Walter Benjamin published his famous essay *Critique of Violence*, a text that praises divine, sovereign violence against the existing corrupt and rotten legal order. This text was highly acclaimed by Carl Schmitt. See Walter Benjamin, “*Critique of Violence*,” in

seems that his theory of sovereignty represents one of the most sophisticated attempts to re-conceptualize the concept of sovereignty and authority in fact, in order to catalyze the “monistic” theory of a legal system and international law.<sup>1156</sup> That being said, Kelsen’s concept of autonomy and dynamic law-making challenges such presumptions in which we see no coherency. Yet, we shall ask whether Kelsen was successful in eliminating the notion of sovereignty from any of his legal and political theory. To do so, we might be skeptical based on these two presumptions. Thus, we need to find and highlight any point that shows he either relied on the concept of sovereignty or re-conceptualized it.

Kelsen was one of the theorist of the twentieth century who tried to show that the legal and political theory must enter into a new phase, a ‘post-sovereign’ era. If only for this reason, he could have neglected the conflict between the utter elimination of the concept of sovereignty and the concept of legality in a democracy.<sup>1157</sup>

It has been believed that Kelsen’s attempt to eliminate the concept of sovereignty is due to the epistemological project of a pure scientific concept of legality which specifies law as a unique phenomenon purified of pragmatic, theological, political or moral phenomena. Yet, Kelsen’s theory of legality in fact is to separate the concept of law from any concept of sovereignty in which the validity of law refers to the action of a ‘personalized’ sovereign. He in fact tried to oppose the idea in which the concept of legality is reduced to the arbitrary rule of men.

Would it be fair if we believe that Kelsen’s ultimate source of validity of the concept of legality in a regime requires no such concept as sovereignty? We cannot rely on the interpretations regarding the “pure” theories of law to answer such a question since most of them are projected with the absolute neo-Kantian idea. Indeed, Kelsen relied on the normative principle to refute the concept of sovereignty. Moreover, the concept of legality for Kelsen may be adopted by something between the concept of state’s sovereignty and constitutional sovereignty. For, as in this work it has been show ‘what the legitimate concept of sovereignty is’ and that it cannot be eliminated from the legal and political realm, we may allege to the idea that Kelsen, if he did not ignore these principles, tried to refute the concept of ‘power over’, which is taken as one of the main components of the concept of sovereignty. In other words, it can be believed that Kelsen tried to refute the concept of sovereignty presented by Schmitt which makes room for the uncontrollable exercise of political authority, relying merely on the concept of ‘power over’. For Kelsen, the traditional and prevailing concept of sovereignty, which hurt the validity of Weimar Republic’s legality, the concept that Schmitt defended, represents a relic of absolutism and a disguised autocratic claim to power which can justify

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*Selected Writings*, Vol. 1 (Cambridge: The Belknap Press, 1997), 236–252.

;Dyzenhaus, Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought, *Theoretical Inquiries in Law* 16 (2), (2015), p.341.

<sup>1156</sup> Kelsen, *Das Problem Der Souveränität Und Die Theorie Des Völkerrechts Beitrag Zu Einer Reinen Rechtslehre* [The Problem of Sovereignty and the Theory of International Law: Contribution to a Pure Theory of Law], (Tübingen: J.C.B. Mohr, Paul Siebeck, 1928), p.320.

<sup>1157</sup> See also Kelsen, *Law and Peace in International Relations*, (Cambridge, MA: Harvard University Press, 1942), p.12.; An exception in the research on Kelsen represents a recently published book which extensively elaborates on what has also been my intuition about Kelsen’s work, namely that it is deeply committed to the ideal of rule of law and constitutional democracy. See Vinx, *Hans Kelsen’s Pure Theory of Law: Legality and Legitimacy*, (Oxford: Oxford University Press, 2008).

disrespect for existing positive law. The pure theory of law is designed deliberately to bypass the concept of arbitrary sovereignty, and thus to conceptualize it as its validity is merely empowered by legal and political development of the formal concept of legality, which finally displaces subjectivity from political governance and confines arbitrariness of personal authority in a system of objective legal norms.<sup>1158</sup>

Kelsen's theory of legality is unique and tempting. It is unique since he established his concept of legality - and also to some point the concept of sovereignty - on a strictly normativist approach to law. It is also tempting, due to his endeavor, to reinforce the authority of the rule of law. He tried to renew the formalist, proceduralist, and pacifist legal discourse in the midst of the hopeless distrust in the rule of law and contentious concept of legality expressed on one hand in the anti-democrats' acts, and on the other hand in the works of academics. In his time, the critical theories of law either denounced law as the utmost expression of the destructive instrumental rationality, or regarded law as the mere expression of the personalized sovereigns/office holders. These critiques mostly are represented in the work of Schmitt, who fiercely attacked formalism and normativism of liberal jurisprudence and endorsed the indeterminacy and un-limitedness of a sovereign political decision.

However, in reality one may find a fundamental problem inherent in Kelsen's theory and the concept of 'power over'. In fact, this problem is related to the concept of sovereignty which inherently carries the concept of 'power over'. What Kelsen believed was that the concept of sovereignty was the purely political concept referring to the "absolute and unlimited state power".<sup>1159</sup> He understood the concept of sovereignty as 'parallel' to the concept of legality, yet the sovereign provides the ultimate source of the validity and compulsoriness of the concept of legality.<sup>1160</sup> Hobbes was the founder of the paradigm of sovereignty, thus Kelsen's aim was to offer a radical response to this ambiguous legacy of legal and absolute concept of 'power over'. In this sense, he proposed a complete separation of the concept of sovereignty from legal validity, as he held the legal validity dear. The traditional Hobbesian concept of sovereignty, which relies on the concept of 'power over' should be, as he believed, radically suppressed since not only it gives the sovereign the capacity to act without legal authorization but also it considers the sovereign as the only element of statehood.

From Kelsen's legal approach, the concept of sovereignty, as the concept of 'power over' above the law, is jurisprudentially inconceivable in the first place. However, the concept of sovereignty, in general, cannot be eliminated from Kelsen's theory of legality because of three reasons.

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<sup>1158</sup> See also Henry Janzen, "Kelsen's Theory of Law," *The American Political Science Review* 31:2 (1937): p.205

<sup>1159</sup> Kelsen, *Das Problem Der Souveränität Und Die Theorie Des Völkerrechts Beitrag Zu Einer Reinen Rechtslehre* [The Problem of Sovereignty and the Theory of International Law: Contribution to a Pure Theory of Law], (Tübingen: J.C.B. Mohr, Paul Siebeck, 1928), p.3.

<sup>1160</sup> Kelsen, *Das Problem Der Souveränität Und Die Theorie Des Völkerrechts Beitrag Zu Einer Reinen Rechtslehre* [The Problem of Sovereignty and the Theory of International Law: Contribution to a Pure Theory of Law], (Tübingen: J.C.B. Mohr, Paul Siebeck, 1928), p.3.

First, the validity of legal order based on the basic norm inherently expresses a unique form of sovereignty.<sup>1161</sup> In this sense, Kelsen stuck in a repetitive argument in which the validity of a legal norm is thus established by procedural appeal to the higher-level norm, and the validity of a higher norm is established by procedural appeal to some kind of natural law.<sup>1162</sup>

Second, As H.L.A. Hart has argued, the membership of a norm in a legal system can only be determined through the practice of identification that characterizes the process of applying law, not the procedural appeal to its origin.<sup>1163</sup> Exactly as Kelsen moved beyond the idea that all law originates from a single power source like the command of the sovereign, he needs to admit that not all norms of a given legal system originate in one basic norm.

Third, the explanation of coercive character based on the concept of legal efficiency compels to social conduct through the threat of sanctions.

In fact, Kelsen saw nothing sovereign *qua* domination to this approach.<sup>1164</sup> For him to defend this point, he relied on the dualism of sanction and peace which are based on the normative principle. Thus, he also stuck in an argument which implies that insofar as law is the condition of monopoly of force, it is the state of peace. However, we must ask whether basic norm as the ultimate ‘theoretical’ source of validity of all legal norms in a system ensures that ‘pragmatic’ coercive force is applied in accordance with the norms authorized by it.<sup>1165</sup>

However, what Kelsen was really trying to do was to criticize the concept of sovereignty *qua* domination, which was free from any concept of legal sovereignty, and which was free of any legal authorization. For the concept of sovereignty emerged from a political decision is as inevitable as the concept of power over in any political notion of state, Kelsen, merely invites us to conceive sovereignty on its own terms, that is, legally.<sup>1166</sup> Thus, he came up with the idea that the sovereign is the legal order. Yet, based on this concept, sovereign *qua* legal order turned out to be the instruments of political power. Hence, the line between the ‘ought’ and ‘is’ - between the realm of legal science and the realm of ideology or of moral inquiry - is not clear, hence it is the real limitation on the concept of legitimacy. Yet we have to ask: why is the sovereign both the highest authority and yet subject to law?

For Kelsen, the concept of sovereignty cannot stand above the law, since it is dangerous as it makes room for the sovereign - which is a personalized concept of power - without the control by law, or by ignoring existing law whenever it does not suit the state’s interests. We may

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<sup>1161</sup> See Kelsen, *Das Problem Der Souveränität Und Die Theorie Des Völkerrechts Beitrag Zu Einer Reinen Rechtslehre* [The Problem of Sovereignty and the Theory of International Law: Contribution to a Pure Theory of Law], (Tübingen: J.C.B. Mohr, Paul Siebeck, 1928), p.57.; Kelsen, *Law and Peace in International Relations*, (Cambridge, MA: Harvard University Press, 1942), pp.68-69.

<sup>1162</sup> For Kelsen, the basic norm is a hypothetical condition of possibility of legal science without which it would not be possible to interpret law as normative. Discussing this ambiguous definition which clearly places the basic norm outside of the positive law is one of the favorite topics in Kelsen’s scholarship. See for instance Stanley L. Paulson, “On the Puzzle surrounding Hans Kelsen’s Basic Norm”, *Ratio Juris* 13, no. 3 (2000): 279–293.

<sup>1163</sup> Hart, “Kelsen’s Doctrine of the Unity of Law,” in *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), 309-342. p.319.

<sup>1164</sup> Kelsen, *General Theory of Law and State*, (Cambridge: Harvard University Press, 1949), p.30.; Kelsen, *Das Problem Der Souveränität Und Die Theorie Des Völkerrechts Beitrag Zu Einer Reinen Rechtslehre* [The Problem of Sovereignty and the Theory of International Law: Contribution to a Pure Theory of Law], (Tübingen: J.C.B. Mohr, Paul Siebeck, 1928), p.17.

<sup>1165</sup> Kelsen, *General Theory of Law and State*, (Cambridge: Harvard University Press, 1949), pp.21-22.; Kelsen, *Law and Peace in International Relations*, (Cambridge, MA: Harvard University Press, 1942), p.1, 12.

<sup>1166</sup> Dyzenhaus, Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought, *Theoretical Inquiries in Law* 16 (2), (2015), p.342.

disagree with Kelsen on this point as it is important to refer to the concept of sovereignty in the first place. What Kelsen criticized is not what we know as the concept of legitimate sovereignty. He criticized the traditional concept of sovereignty *qua* domination which was the personalized and legalized concept of ‘power over’ in an arbitrary hand of a man. To be radically opposed to such concept, Kelsen demonstrates that law is an autonomous, self-sustaining normative phenomenon which neither requires any extra legal notion for the explanation of its origin, its efficacy and its operation, nor does it require any notion of sovereign authority for its creation and sustenance. Hence, Kelsen rejected all exercise of power outside of the concept of legality. Yet, he turned to a constitutional norm as the valid norm to argue against the concept of sovereignty above the law. He argued that if the state is considered to have the power to override constitutional norms on the basis of an appeal to its sovereign authority, then these norms lack legal force. Conversely, governmental actions that violate those norms cannot qualify as justified/legitimate exercises of power. Here, some notions are misrepresented and should be pointed at before we proceed. First, the concept of sovereignty is realized as the state power, and second, the concept of constitutional norm is assumed to be equal to a law.

In this sense, Kelsen’s theory of legality and sovereignty was the revolutionary one. Before Kelsen, the tension between the legal order and the state’s political authority was always resolved by most thinkers in favor of the state’s superiority to positive law. Kelsen turned the tables around. He argued that the *Rechtsstaat* is literally the pure concept of law bounded by its own concept of norm, and validates its own concept of legality, which is not only able to restrict the concept of ‘power over’ in strict accordance with law, but it is itself a purely juristic entity, reducible completely to its legal order as a total concept of ‘power over’. Kelsen turned the notion of a personalized sovereign who stands above the law into a notion of the theoretical sovereign which may have been the law itself.<sup>1167</sup> However, the validity of law derived from the procedural appeal to a higher-level norm is insufficient to provide the basis of the legitimacy of law. What the procedural concept of legal validity does not answer is whether or not law duly made according to authorizing procedures can be reasonably accepted as legitimate by those who are its addressees.

Moreover, it is the biggest paradox of Kelsen’s theory that the project of reinforcing the concept of legality did not compel Kelsen to abandon the concept of sovereignty entirely. In fact, Kelsen accepted the concept of sovereignty as meaningful provided that this concept is understood as a property of the legal order. Thus, two points are missing in his approach: Kelsen’s theory of legality is missing the notion of proper sovereignty along with the notion of political consciousness, and his theory of democracy is missing legitimate dimension of

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<sup>1167</sup> See also Kelsen, *Das Problem Der Souveränität Und Die Theorie Des Völkerrechts Beitrag Zu Einer Reinen Rechtslehre* [The Problem of Sovereignty and the Theory of International Law: Contribution to a Pure Theory of Law], (Tübingen: J.C.B. Mohr, Paul Siebeck, 1928), pp. 12, 14, 36-38.

sovereignty necessary for understanding his concept of democratic ‘legality’- or “Utopia of legality”<sup>1168</sup> as a normative political ideal.

We agree with Kelsen to the extent that the unitary and absolutist model of sovereignty has been made implausible with the advent of constitutionalism and democracy. Yet, we do not agree where Kelsen transformed the theory of sovereignty into the theory of the identity of the legal system derived from the basic norm. Moreover, for Kelsen, The claim to the ultimate political authority included in the notion of sovereignty was the concept of sovereignty in terms of the singularity of its source and unlimitedness of its exercise. Which set the location of the supreme authority elaborated for the purpose of defending the absolute monarchy or the nineteenth-century *Rechtsstaat*. However, the core idea of sovereignty is re-interpretable for modern constitutional democracy. Here, we can allege to the idea that legitimate sovereignty is an intended force which is in conformity to the legal order, moral values, and political consciousness, which is the intended collective will in a possible authority. In this sense, sovereignty can be dispersed in various state offices and governmental institutions and limited by the rule of law. However, Kelsen only shifts from one misleading monocular conception to another.

The idea of democratic power relation plays a prominent role in Kelsen’s legal theory. For his theory to thrive, Kelsen relied on the democratic and constitutional mechanism which somehow supplies his concept of legal legitimacy.<sup>1169</sup>

Given the failures of legality to provide protection from the abuses of power in the twentieth century, especially in Middle Eastern and African countries, and the concept of legality that played an official role in these abuses, the skepticism toward the conception of pure legality to become the sole basis of legitimacy of the political power - just like the pure concept of traditional sovereignty - is justified. It also turned our argument to its basis that the concept of legality cannot be justified without considering the concept of legitimacy of state, which is supplied with ethical-political principles, namely the concept of rights and moral significance to rights, and the concept of legitimate office holders, namely democrats, who bound themselves to the constitutional supremacy of legitimate legal order.

However, one point remains regarding our discussion on Kelsen’s theory of legality, legitimacy and sovereignty. Recalling that sovereignty is the legal order, we have to ask whether Kelsen’s concept of autonomy and dynamic law-making are compatible with his concept of legal sovereignty. Basically, Kelsen’s idea of democracy came to play a role where the *locus* of authority in making the norm seemed to be important to justify the concept of legality. For Kelsen, democracy is participation in the process of lawmaking wherein the people can consider themselves the authors of the norms that coercively regulate their behavior.

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<sup>1168</sup> “Utopia of legality” is Vinx’s description of Kelsen’s project. He shows convincingly that the legal order portrayed in Kelsen’s paradigm of pure legality does not make a claim to legitimacy based on the absolute justification of the basic norm, but on behalf of all norms that have membership in it. In Kelsen’s “utopia of legality”, the state’s decision has legitimate authority only if they are taken in full compliance with all relevant higher order legal norms, including all applicable higher-order material norms. The principles and institutions of constitutional democracy substantially enhance the degree to which the legality-based claim to legitimacy can be achieved. Vinx, *Hans Kelsen’s Pure Theory of Law: Legality and Legitimacy*, (Oxford: Oxford University Press, 2008), p.25, 66–67, 83.

<sup>1169</sup> Vinx, *Hans Kelsen’s Pure Theory of Law: Legality and Legitimacy*, (Oxford: Oxford University Press, 2008), p.26, 66.

The regulation, for Kelsen, establishes an autonomous social order. Moreover, he based his theory of democracy on the normative distinction between autonomy and heteronomy.

First, is the concept of heteronomy. Kelsen - unlike Rousseau -<sup>1170</sup> does not believe in the absolute reconciliation of the individual will and the general will. His political theory is based on the idea that there is an irreconcilable opposition between individual freedom and the social (ergo legal-political) order which is compulsive *per se*. The inherent possibility of conflict between social order that regulates human social conduct through coercive rules and subjective individual will thus inevitably lead to what Kelsen calls “uneasiness of heteronomy”.<sup>1171</sup>

But then, is the autonomy which is in fact the reconciliation of individual interest with the legal - and political - order. Such freedom, for Kelsen, is to participate in the determination of the content of legal norms. We can see here how Kelsen came close to Aristotle’s theory of the multitude of political power. Kelsen, obviously, tried to consider the concept of sovereign legality as the legitimate one, under the principle of participation in a democracy in which it may address the interests of the largest possible number of the people, and the freedom of those people to remain as distinct autonomous individuals. Thus, Kelsen’s concept of democracy *qua* autonomy not only remains in the realm of popular sovereignty but also essentially emphasized on the legal process of taking the legislative decisions through majority vote. Kelsen diverged from the liberal democracy based on both democratic autonomy and heteronomy. He looked beyond the liberal theory of democracy. The natural alternative for him was an account of democratic sovereignty, according to which democratic politics causes citizens to take authorship of collective decisions, including those that they privately opposed.

We can agree with Kelsen that only government on the basis of majority rule can claim legitimacy derived from its origin - it originates in those over whom its authority is exercised. Since such a presumption requires admitting that legislative power must be subject to such conditions of legality that constrain its exercise in a way which ensures that the content of laws is more than “the tyranny of the majority”.<sup>1172</sup> In other words, the exercise of legislative power must be in accordance with basic political rights, civil liberties and democratic rights of political participation. However, we cannot agree with Kelsen that sovereignty in the constitutional democracy - which belongs to the people - is not a political notion which arguably stands above the law. Admitting what Kelsen regarded as the absolute sovereignty of legal order based on its own principle - not based on the recognition of rights - automatically denounces the concept of political rights, which are the inherent rights of the people to claim power and to claim their rights of participation in legislature. Nevertheless, Kelsen did not address the differences that cause contradiction between popular sovereignty -as democratic majoritarianism - and constitutionalism, which sometimes may imply the practice of entrenching rights. Even as such democratic inertia fosters the political engagements on which democratic authority depends, it necessarily, on occasion, entrenches public policies against democratic reevaluation and therefore creates democratic deficits.<sup>1173</sup>

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<sup>1170</sup> Kelsen’s conception of democracy is inspired by Rousseau’s vision of a political order in which an individual submits to a unifying general will and yet remains as free as in the state of nature.

<sup>1171</sup> Kelsen, “Foundations of Democracy,” *Ethics*, Vol. LXVI, No. 1. Part II (1955), p.18.

<sup>1172</sup> Kelsen, “Foundations of Democracy,” *Ethics*, Vol. LXVI, No. 1. Part II (1955), p.19, 27, 28.

<sup>1173</sup> See also Markovits, *Democratic Disobedience*, *The Yale Law Journal*, (2005), p.1549.

For Kelsen, the principle of legality which carries the concept of supremacy of the principle of constitutionality, is at the most fundamental preserves, the concept of sovereignty. It is in this sense that Kelsen could argue about the value of a sovereign legal order. Yet, neither the mere majority procedure of legislation, nor the constitutional supremacy can overcome the limitation of legitimacy. Kelsen rejected any constraints, either legal or political, which legal order and power may face in their interaction. If Kelsen wanted to bind the positive law and legitimate political power, he should have captured the interaction of law and politics. In other words, he should have addressed the co-originality and interdependence of notion of power and rights as a dynamic process of mutual constitution and mutual containment which is fundamentally rooted in the integrated concept of power and rights and in the principle of political consciousness.

To compete the modern concept of legality and the limitation of its legitimacy, we shall move on to Heller's concept of legality, sovereignty and political power.

### **3.4.3 Heller's Theory of the State, A Remedy for the Limitation of Legality and Legitimacy**

The early twentieth-century's state theory and the concept of power, which emerged partly from German politics, both are affected by the juxtaposition of unbalanced political ideologies and political phenomenon. The authoritarian tendencies of the state's power, and the lack of development of an efficient legitimacy doctrine, have been seen in the Anglo-Saxon world once before - and they can be seen in the Middle Eastern and African government today, although these two worlds completely have different natures and histories. The early twentieth-century Germans politics, especially those of the Weimar Republic, was the battlefield in which the state wanted to control the controversial trends of political phenomena manifested in different shapes, in the sovereignty, development of democracy, parliamentarism and legal supremacy. The optimism of social-liberals in countering the economic and political crisis of that time faced an abrupt end when the Weimar Republic turned to an authoritarian/totalitarian regime - an end partially attributed to the anti-democrat socialists. The *Coup d'Etat* of the 20th of July 1932, and enabling acts which were the corporation of anti-democrats and unlimited delegations, in fact were rooted in the long prevailing 'state's theory' of the time.

Herman Heller was one of the legal scholars of that time who tried to oppose the authoritarian trend and the pure scientific trend simultaneously. He basically wanted to find a balance between Schmitt's legal and political theory and Kelsen's pure theory of state and law. Heller's legal theory, against Schmitt, aimed to reconstruct the theory of state and law, not to destroy it from within. His theory, against Kelsen, aims to defend democracy and the question of legal legitimacy. Thus, in some sense, he shares with Schmitt in criticizing Kelsen and shares with Kelsen in criticizing Schmitt. He shared Schmitt's concept of sovereignty to the extent that it stands above the law, but he also argued for the legal constraints on it. He shared also with Schmitt a critique of legal positivism to the extent that it may end in nothing, as long as the Weimar President was concerned. However, he agreed with Kelsen that this does not mean that there is no politics to be found. Heller shared with Schmitt the critique of the *Rechtsstaat*, but did not support the theory of destroying it from within. He wanted to show that the Kelsen

account of positivism, which is an “arbitrary constructed concept of . . . pure forms”,<sup>1174</sup> granted the title of *Rechtsstaat* to any state and that would be the “best peacemaker for dictatorship”.<sup>1175</sup> Yet, Heller shared with Kelsen the concept of the legitimacy of the law more strongly to the concept of legality, yet unlike Kelsen, for Heller they are not identical. Although Kelsen tried to escape this argument as long as it was possible, Heller pointed out that Kelsen in his whole works indirectly tried to answer a question about the legitimacy of law. However, this question can only be answered if it is recognized as such.<sup>1176</sup>

Heller, in fact, proposed his theory of state and law, his legal theory, as the response to the crisis of legality, the crisis of legitimacy, and the crisis of state sovereignty. Heller, against Schmitt and Kelsen, argued that the ethical foundation is the certain or secure foundation that helps us in our understanding of law, legality and legitimacy.<sup>1177</sup> To elaborate on his point, especially to bind the critical ethical and legal conscience, he differentiated between positive law and the fundamental principle of law, arguing that the idea of law has to be established by “relativizing the positive law to the suprapositive, logical and ethical, fundamental principle of law.”<sup>1178</sup> Furthermore, he insisted on the idea of the *Rechtsstaat*, which must be one appropriate for the time and actual practice of the state. Hence, he relied on the concept of natural law, but defined natural law in his theory as something different to the classic one. He differentiated between the Enlightenment natural law and classical natural law.

His argument begins with the idea that state theory was part of the theology in the Middle Ages. This theo-political approach explains political power and its justification with resort to the idea of a single, unitary God. Along with this theological ideology, he argued that there is an idea of a modern state, as developed in a historical path, which is derived from the will of the member of a group, constructed by a moral and political world independent of theology. This idea the theory based on the natural order - or *ordre naturel* -, an order already immanent in society discoverable by human reason. This may seem to go against Plato’s idea of the naturalness of the state, the idea which is based on the order of being - *ordo essendi*. Yet, both are somehow relying on the natural law as the foundation of their theory. Heller moved on with the assumption that Enlightenment, particularly Hobbes’ theory of the state and Bodin’s theory of sovereignty, introduced a new theory of natural law which was bound to the idea of state contract as the supreme law of the state, to some extent of the empirical description. He believed that Schmitt could not realize that Hobbes’ and Bodin’s concepts of state and power were against the classic natural law justification for an absolutist hierarchical regime. Heller believed that they looked for a rational justification<sup>1179</sup> since they have replaced the idea of a personal God with the idea of human nature.<sup>1180</sup> Hence, Heller merged Hobbes’ and Bodin’s

<sup>1174</sup> Heller, *Gesammelte Schriften* (Leiden: Sijthoff, 1971), p.204.

<sup>1175</sup> Heller, *Europa und Faschismus* [Europe and Fascism], (Berlin: Walter De Gruyter, 1929), ii. P.435, 529.

<sup>1176</sup> Heller, *Gesammelte Schriften* (Leiden: Sijthoff, 1971), pp.203-204.; Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.162.

<sup>1177</sup> Heller,

<sup>1178</sup> Heller, *Gesammelte Schriften* (Leiden: Sijthoff, 1971), 275.

<sup>1179</sup> Heller, *Die Souveränität: Ein Beitrag Zur Theorie Des Staats- Und Völkerrechts*. [Sovereignty: A Contribution toward the Theory of State and International Law], (Berlin: Walter De Gruyter, 1927).

<sup>1180</sup> Heller, *Die politischen Ideenkreise der Gegenwart* [Contemporary Political Theories] (Breslau: Ferdinand Hirt, 1926). ; See Heller, *Gesammelte Schriften* (Leiden: Sijthoff, 1971), i, p.287.

thoughts in the hope of coming up with some solution regarding the limitation of legality. In this sense, he needed to admit two elements. The first element is that the immanent - and seemingly rational - justification is necessary for the ultimate concept of legality and authority. The second element is that the idea that the sovereign is subject to some higher authority, and his law, is the positivization of such authority.<sup>1181</sup>

Heller also fought against the appeal to transcend the principle of justification, say principles embedded in our ethical practices, so he insisted on ‘practice’ and particular ‘culture’. Such an approach, all together, seems controversial. However, for Heller, it was crucial to form his legal practice, and therefore, the constitutive elements of power of the state and its justification/legitimacy.<sup>1182</sup> In *Staatstheorie*, Heller states that:

“This path had soon to end in seeing the state as a mere instrument of class or race domination. In any case, the state had to be defined exclusively in terms of power, power, and yet more power, the questions about the purpose of power are ethical or metaphysical questions excluded from legal science because they are unscientific. Legal science, then, abandons the determination of power relations to power itself, to the realm of the irrationals.”<sup>1183</sup>

One of Heller’s main arguments was against what Kelsen believed: that there is nothing to the state apart from its legal order. He criticized Kelsen since he constructed an idea of legal order in which all power is necessarily subject to law.<sup>1184</sup> Thus, he shared with Schmitt two points. First, the importance of the idea of a politically decisive unit. Second, the idea of natural law. Yet, contrary to Schmitt, he also believed that an unlimited power in a decisive unit - or a dictatorship - can only resolve real problems by using a decree to ignore and postpone them.

We can agree with Heller with regards to his views on the limitation on the legitimacy of power, as long as the pure theory of Kelsen and the absolutism theory of Schmitt were concerned. Yet, we cannot agree to the reconstruction of the state law, once again just like the Ancient Greek philosophers - on the natural law to provide an immanent justification of state and power. Furthermore, We see a close argument on ‘the purpose of power’ which, rooted in the controversial approach of the Ancient political theorist to the justification of power, is merely based on its ‘ultimate end’.

Heller found his problem in the heart of legal philosophy where he wanted to defend - somehow realistically and unlike ancient political theorists - the political theory of legality and democracy in which the rule of law and individuals’ rights play a central role in the justification of power and state. In his *Theory of the State*, Heller emphasized:

“Both moralizing law and stripping law of morality fails to recognize the reciprocal determination of law-formation by power and power-formation by law. Both strive for an

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<sup>1181</sup> Heller, *Die Souveränität: Ein Beitrag Zur Theorie Des Staats- Und Völkerrechts*. [Sovereignty: A Contribution toward the Theory of State and International Law], (Berlin: Walter De Gruyter, 1927), pp.34-38.

<sup>1182</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.166.

<sup>1183</sup> Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), iii, p.303.

<sup>1184</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.173.

unfulfillable and false harmonization of justice and law, legitimacy and legality, normativity and positivity.”<sup>1185</sup>

We cannot agree with Heller more when he claims that the normative and moral principles are among the main elements of legitimacy and the formation of power itself. We see that Heller did not draw a distinctive line between positive legality and the principle of legitimacy.<sup>1186</sup> He used the ethical foundation as a tool to show an inherent connection between legality and legitimacy. Yet, he tried to find the foundation of the moral and ethical principle in the theory of natural law. Furthermore, Heller’s ethical and political principles, which are grounded in social practice, are not the sorts that provide the absolute notion of certainty. It is a foundation which shifts and evolves bit by bit with the times and society. Thus, he wanted the theory of political and ethical principle to be the basis for law and state which would provide a theory of legitimacy, yet he could not make sure that such a theory remains immanent. Based on Heller’s account, it may be assumed that the principle of justification, with all its shifting and evolving, is nothing more than a way to stop the search for justification, or an irrational reliance on some divine source or in some irrational rationality that transcends practice. Heller’s approach to this problem, indeed, lacks a substance to defend the concept of legal order, hence, the limitation of the legitimacy of legality.

### 3.4.3.1 Heller’s Concept of Legitimacy of Legality

The first lines of Heller’s *Wesen und Aufbau des Staates*, which appears in the third part of his *Staatslehre* show that the search for the justification and legitimacy of state is nothing but looking at its legal system:

“No justification of the state is possible without separating just from unjust. This separation can be accomplished only on the basis of a standard of law that must be accepted as standing above the state.”<sup>1187</sup>

Before any attempt to go into details, one obvious point should be in mind as both a critique and an alarm: Heller did not distinguish between the principle of justification and the principle of legitimacy, however, they are not the same.

He did masterfully elaborate on two points. First, he noticed that ‘coercion’ cannot be a reliable instrument for power, and ‘state of emergency’ cannot be the safe haven thereof<sup>1188</sup> if power wants to obtain its immunity. It seems that he was aware of the idea that coercion can be the symbol of sovereignty and independence of power<sup>1189</sup> while, as he admitted, it can be

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<sup>1185</sup> Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), iii, p.303.

<sup>1186</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.165.

<sup>1187</sup> Heller, *Wesen und Aufbau des Staates*, part 3 of the *Staatslehre* (Leiden: A. W. Sijthoff 's Uigeversmaatschappij, 1934). Reprinted in Hermann Heller, *Gesammelte Schriften, II: Staatslehre als Politische Wissenschaft*, 2nd ed., edited by Christoph Müller (Tübingen: Mohr, 1992), pp. 327, 331–39, 354–56, 358–59, 359–61, 390–95. Translated by David Dyzenhaus. pp.265-266.

<sup>1188</sup> Arendt, “Communicative Power.” in *Power*, edited by Steven Lukes, (New York: New York University Press, 1986), p.71.

<sup>1189</sup> See also Treitschke, *Politics*, (New York, The Macmillan Company, 1916), p.26.

appeared in a normative form: “what appears from above as political power presents itself always from below as normative order.”<sup>1190</sup> He basically emphasized the ideas of the normalizing force of the normative, and practicing the prescriptive ideas to strive for the justification/legitimacy of power. He tried to point out that his theory of normative order is the foundation of his concept of justification of legality, hence, political power. To avoid the arbitrariness of the concept of legality, he continued that “no organized political power can ever rely solely on its coercive apparatus to ensure its power and order”<sup>1191</sup>, hence the concept of justification/legitimacy is necessary for power to obtain its immunity. For Heller, this concept could be merely found in the legal apparatus and the concept of legality of a regime. Yet, his approach needs to be more closely assessed.

The first hallmark of Heller’s concept of justification/legitimacy is strongly related to the concept of just legality. Yet, to not go down the road which Kelsen has gone, Heller assumed that the concept of justification/legitimacy is identical with the legal concept of ‘justice’. His account of justice was so strong that he saw a tension between the democratic principles of legality and justice, which seem to be related to the experience of his time and the idea of unlimited parliamentary power. It was in this sense that he truly refuted Weber’s concept of legitimacy, which is nothing more than “belief in legality”.<sup>1192</sup> He explicitly criticized Weber’s theory of legitimacy as “it does not merely unintentionally detect a degeneration in contemporary legal consciousness”.<sup>1193</sup> Yet, he does not stop there. He continued to assert that the concept of legitimacy should not only be based on the idea of the rule of law, but also should be based on the extent that it implies the idea of justice, of which the division of powers - *gewaltenteilenden Rechtsstaat* - is one of the principal and technical instruments.<sup>1194</sup> Heller believed that without standing in the service of justice, one cannot assure the legitimacy of the state in the struggle against absolutist arbitrary power merely by having the people themselves decide on the statutes to which they are subject, and by bringing the remaining activity of the state into compliance with these statutes. Hence, he refuted the concept of ‘legality *qua* legitimacy’, as he believed that “the legality of the state based on the rule of law is not in a position to replace legitimacy.”<sup>1195</sup>

The second hallmark of Heller’s concept of justification/legitimacy is related to the fundamental and ethical principles of law. These principles, for Heller, secure the law in a form

<sup>1190</sup> Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), iii, p.181.

<sup>1191</sup> Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), iii, pp.181-182.

<sup>1192</sup> Weber, *Wirtschaft und Gesellschaft*, 2nd ed., vol. 1 (Tübingen: Mohr, 1925), p.19.

<sup>1193</sup> Heller, *Wesen und Aufbau des Staates*, part 3 of the *Staatslehre* (Leiden: A. W. Sijthoff 's Uitgeverij, 1934). Reprinted in Hermann Heller, *Gesammelte Schriften*, II: *Staatslehre als Politische Wissenschaft*, 2nd ed., edited by Christoph Müller (Tübingen: Mohr, 1992), Translated by David Dyzenhaus.p. 266.

<sup>1194</sup> Heller, *Wesen und Aufbau des Staates*, part 3 of the *Staatslehre* (Leiden: A. W. Sijthoff 's Uitgeverij, 1934). Reprinted in Hermann Heller, *Gesammelte Schriften*, II: *Staatslehre als Politische Wissenschaft*, 2nd ed., edited by Christoph Müller (Tübingen: Mohr, 1992), Translated by David Dyzenhaus.p. 266.; See also Hermann Heller, “Der Begriff des Gesetzes in der Reichsverfassung,” in *Gesammelte Schriften*, 2:210.; Heller. *Der Begriff Des Gesetzes in Der Reichsverfassung*, (Berlin, Etc.: Walter De Gruyter, 1928).

<sup>1195</sup> Heller, *Wesen und Aufbau des Staates*, part 3 of the *Staatslehre* (Leiden: A. W. Sijthoff 's Uitgeverij, 1934). Reprinted in Hermann Heller, *Gesammelte Schriften*, II: *Staatslehre als Politische Wissenschaft*, 2nd ed., edited by Christoph Müller (Tübingen: Mohr, 1992), Translated by David Dyzenhaus.p. 266.

of established power and its organization. In this sense, for Heller, the “state is justified in so far as it exhibits, at a particular level of development, the organization necessary to secure the law.”<sup>1196</sup> This statement, although is close to Kelsen’s concept of validation of legality, or a dynamic character of law validating itself,<sup>1197</sup> it originated in the act of sovereign power, not law. Getting close to Schmitt’s legal theory, Heller felt that this might qualify his theory of justification of power as an authoritarian claim to legality. At this point, Heller had to address the limitation of legitimacy of legality in his approach to the matters of power, sovereignty and legitimacy. Hence, to elaborate on his point and find a reasonable answer, he tried to bind the critical ethical and legal conscience, he differentiated between positive law and the fundamental principle of law, arguing that the idea of law has to be established by “relativizing the positive law to a suprapositive, logical and ethical, fundamental principle of law.”<sup>1198</sup> More importantly, he continued by saying that: “In the first place we understand by law here the fundamental principle of law which is foundational of positive law.... The individual law receives all its obligatory force only from the superior, ethical, fundamental principle of law.”<sup>1199</sup> Hence, Heller did not only say that a state’s power is justified when it is presented under the concept of legality by an effective organization, but also that it should “strive for legitimacy”<sup>1200</sup> primarily in terms of the ethical fundamental principle of law.<sup>1201</sup> He in fact regarded validity *qua* legitimacy of the legal order, but the one which originated in the ethical fundamental principle of law.

To escape from being a mere natural law theorist and save the positivist merit of his theory, Heller believed that the ethical fundamental principle of law should be recognized by a legal authority which “pronounces upon and implements that which is supposed to be right in a concrete situation.”<sup>1202</sup> Here, we have to ask how a state as a legitimate organization can manage to be a sovereign, efficacious, political unit, In other words, how Heller could try to solve the contradiction in his theory which is manifested between the natural function/purpose of a state and its legitimate, positive concept of legality?

Indeed, for Heller, a state’s power is equipped with the capacity to make final and necessary decisions established on his common framework. This common framework is the coordination to solve any problems. However, he sought for a further element: cooperation. Cooperation is a counter concept to answer ‘the fact of pluralism’.<sup>1203</sup> For Heller, the social cooperation between all the inhabitants within a state’s territory is one of the functions of sovereignty and a reason for its inevitability.<sup>1204</sup> Moreover, both of these elements are necessary for a legal order to obtain its immunity. In order to fulfill these two roles, a state’s power needs to be regarded as sovereign, and that means to be superior to any power. In this sense, the concept of sovereignty, in Heller’s legal theory, is but a sibling to the concept of Schmitt’s decisionism

<sup>1196</sup> Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), iii, p.332.

<sup>1197</sup> See Kelsen, *General Theory of Law and State*, (Cambridge: Harvard University Press, 1949), pp.122-123.

<sup>1198</sup> Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), p.332.

<sup>1199</sup> Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), iii, p.332.

<sup>1200</sup> Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), iii, p.181.

<sup>1201</sup> Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.182.

<sup>1202</sup> Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), iii, pp.332-333.

<sup>1203</sup> See Rawls, *Political Liberalism*, (New York: Columbia University Press, 1993).

<sup>1204</sup> Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), iii, p.358.

and the domination theory of sovereignty, due to the prevalence of coordination securing the compliance of legal subjects with the commands of powerful - or the sovereign decision - and cooperation securing the compliance of all subjects as they are bound to the legal order. Here, the ignorance of the concept of 'power of' in the concept of sovereignty raises more urgently the problem of legitimacy.

Heller, unlike Schmitt, moved in a rational direction regarding the notion of power and legality. He thought that neither does the nature of politics merely rely on the conflicts, nor does it reduce mostly to some form of state of emergency. If there is any politics, for him, it is for the renunciation of physical force, for departure from such an acrid approach.<sup>1205</sup> Politics, as Heller asserted, also comprises of conflicts in the term of dispute between political parties to determine or reform the terms of social cooperation.<sup>1206</sup> To back up his argument with the principle of justification, Heller turned to the concept of legality, and asserted that the conflicts and the decisions have to be expressed in legal form. It seems that his reliance on the concept of legality to imply the concept of justification is because of his presumption that legal order presupposes the ability to make a distinction between the just and the unjust.<sup>1207</sup> However, one important question has remained ever since: how is the distinction of the just and the unjust, regarding its positive character which should be matched with the ideal concept of just, part of the concept of legality itself such that it makes a difference to the exercise of power through the legal system?

The third hallmark of Heller's concept of justification/legitimacy is related to the concept of division of powers, hence democracy. This concept may be related, somehow, to the question just proposed. We, cheerfully, agree with Heller that power cannot be merely reduced to the concept of 'power over'. In 'Politische Demokratie und Soziale Homogenität' which is part of *Probleme der Demokratie*, he argued that the state's power should be more than the projection of will from the powerful, citing Spinoza's maxim: "obedience makes the ruler" - or *oboedientia facit imperantem*.<sup>1208</sup> Thus, one thing is clear: for Heller, the mere concept of 'power over', whether it is supported by legal order or not, is some sort of usurpation of power. This is also logical if we, based on these presumptions, allege to the idea that, for him, the concept of monopoly of legality is the usurpation of power, hence illegitimate. In this sense, political power, for him, must consist of other concepts rather than a mere domination. Even by definition political power won, and was exercised 'within' the state organization.<sup>1209</sup> Here, the concept of 'power of' is emerged as the political actors can be seen as individuals and different organizations. Heller, furthermore, called his concept of 'power of' the 'polemical principle' of democracy.<sup>1210</sup> Basically, he argued that power should go from bottom to top - all

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<sup>1205</sup> Schmitt, *The Concept of Political*, (Chicago: University of Chicago, 1996).; See the counter argument in Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), iii, pp.313-314.

<sup>1206</sup> Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), iii, pp.313-314.

<sup>1207</sup> Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), iii, pp.325-339.

<sup>1208</sup> Heller, *Probleme der Demokratie*, (Berlin: Walter Rothschild, 1928), pp.35-47.; Heller, *Probleme der Demokratie*, in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), ii.

<sup>1209</sup> Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), iii, p.351.

<sup>1210</sup> Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), iii, pp.360-361., See also Dyzenhaus, Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought, *Theoretical Inquiries in Law* 16 (2), (2015), p.350.

power should reside in the people. Hence, he matched his general theory of justification/legitimacy with the concept of ‘the sovereignty of people’.<sup>1211</sup>

We also agree with Heller that the concept of legality - and law - is the means of power. Such a concept, for Heller, is not far from the concept of politics as “transforming social tendencies into legal form.”<sup>1212</sup> In this sense, he realized the distinction between the concept of legality and its legitimacy by the concept of the origin of law. This idea catalyzed the further element of his legal theory that authoritarian/totalitarian will can also promulgate the concept of legality and laws. So, the title of *Rechtsstaat* is missing a wider concept which is related strongly to the concept of legitimacy.

In summary, Heller relied on the concept of the division of powers as an element to defend the justifiable concept of the *Rechtsstaat*. What distinguishes the justifiable *Rechtsstaat* from an authoritarian/totalitarian form of state/government is not only the division of power between legislature, executive, and judiciary, as Heller believed, but also, as we believe, the possibility of the claim to rights, and the moral significance of rights through both processes of legislation and the exercise of power. Such an approach helps us to understand how important is to see a bond between ruler and ruled in a justified and legitimate concept of legality.

### **Conclusion for this chapter**

In this part we argued that for a legal order, the miranda and credenda of power is an instrument of authorities through which they utilize law. Moreover, power depends not only on coercion but on the institutionalization of will and authority, hence the rights - of collective agents - to mobilize performances and define them as the binding obligation in the form of legality.

In the transition of power, when a certain authoritarian/totalitarian or *quasi* authoritarian/totalitarian group seize power - hybrid regimes -, beyond the miranda and credenda of power for justification, they are hardly and desperately relying on their new legal order. They cannot establish a despotic power structure lawlessly. If they want to do that, they will be trapped in their own logic of Anarchism. An authoritarian/totalitarian regime will establish the legal system that repudiates the previous ones and utterly promotes their justification: ‘law among outlaws’. This helps the authoritarian/totalitarian regimes to overcome the problem of ‘authoritarian/totalitarian power-control.’

Thus for the outlaws and authoritarian/totalitarian regimes, the challenge is not that the foundation of the legal and political order exists, but it is the power in possession of privileges; in being the fittest for the office; in decision-making out of the application of the order in some special situation or ‘state of emergency’; in ‘the political’.

The hidden concept of authority makes the monopoly of force the most dangerous and controversial subject of debate. A legal system makes the most out of the force, and the love of its exercise. Where ‘force’ is a vital instrument of an authority, authoritarian/totalitarian regimes basically cannot bind this instrument to any “idealistic aspiration of man”, but rather to a self-justified legal system of the authority.

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<sup>1211</sup> Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), iii, p.360.; Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, (Oxford & New York: Oxford University Press, 1997), p.185.

<sup>1212</sup> Heller, *Staatstheorie* [Theory of the State], in *Gesammelte Schriften* (Leiden: Sijthoff, 1971), iii, p.313.

We have argued in section three of this part that the legalism of authoritarian/totalitarian regimes are mixed with economic crisis, violation, hypocrisy, corruption, privilege, and the law qua force.

Furthermore, the lack of the political consciousness in power relation of authoritarian/totalitarian regimes is the detachment of the law from its necessary borders to be legitimate, which promotes the excessive delegations and imbalance the concepts of power: a broken-promise in the world of legality.

As the concept of the political consciousness is necessarily related to the concept of ‘power to’ and ‘power of’, the legally protected election laws are the threat to the legally protected law of succession in an authoritative/totalitarian power relation. As an example, we used the transition of power and the discussion on the legitimacy of legality in Germany between 1914 and 1945. Within the years 1930 to 1932, Germany saw two annulments between legitimacy and the legal system. Having reviewed the three legal theories of the Weimar Republic, we tried to assess the concept of legality, as a means for political power, to see how it helps or limits the concept of justification and the legitimacy of a regime.

In this part, I argued practicing the interrelated concepts of democratic legality and political consciousness in the political mechanism. I also showed that the continual suspension of Parliament was the product of illegitimate concept of legality. Moreover, as this work firmly holds the position, I argued the relation between the legitimacy of a democracy and the democrats. Thus, the ambiguity in legal ‘aim’ and legal practice is based on the lack of rational-normative principles and moral significance to right. It causes an unbalanced – concepts of power which formed an authoritarian/totalitarian - signature of power in favor of authoritarian/totalitarian authority. In the case of Germany between 1919 and 1945, the Weimar Constitution failed to appreciate the rational-normative principles, whether it appreciated the democratic values or not, and as a consequence, the legitimacy of the regime was trampled. Furthermore, the Weimar Constitution failed to appreciate a balance between the concepts of power: ‘power over’, ‘power of’, and ‘power to’: unbalanced signature of power. In this sense, it ignored the legitimacy of the legal justification which was the ground for one branch of power to decree endlessly.

The importance of German politics for our starting point is clear. One reason is that Germany began from a unique institutional and doctrinal baseline - most notably, a much longer heritage of bureaucratic centralization stretching back to the absolute monarchies of Prussia and its preview era in the seventeenth, eighteenth, and nineteenth centuries<sup>1213</sup> - as well as a cultural tradition that viewed the bureaucratic and monarchical class as a sort of *pouvoir neutre*, but above social and political divisions in society.<sup>1214</sup>

In the legal system of the Weimar Republic, efforts to strengthen executive power with traditional principles of parliamentary democracy have proven to be the most contentious ones, while also having the most disastrous outcome. The strength of executive power was due to the unlimited power of the legislature : the legislature was entirely free to define the substantive content of legislative rules directly in the statute itself, or to authorize the executive to do so

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<sup>1213</sup> For an comparative summary, see Behrens, *Society, Government and the Enlightenment: The Experiences of Eighteenth-century France and Prussia*, (New York, NY: Harper & Row, 1985).

<sup>1214</sup> In Prussian and German history this tradition received its most famous expression in Hegel’s *Philosophie des Rechts*. See Sheehan, *German History, 1770-1866*. Oxford: Clarendon, 1989), pp.430-433.

by way of ‘regulatory ordinance’ (*Verordnungen*). I have shown that three legal theorists of that time, Schmitt, Kelsen, and Heller, argued this matter. Schmitt was in favor of this form of power signature while Kelsen and Heller were not.

Schmitt, in fact, upheld the thinking of Plato, Aristotle, and Hobbes about the proper locus of legislative power, demonstrating the superiority of these ancient and classical notions “over the concepts of legislation and of constitution peculiar to separation-of-powers regimes.”<sup>1215</sup> Schmitt thus suggested that this return to reputedly traditional forms of governance, which presupposed the concept of ‘power over’ as the only concept of power relation, was inevitable in the economic and political turmoil. Schmitt reasoned that when the state faces such challenging turmoil, insurmountable opposition - whether it emerged from the concept of legislation in a parliamentary regime and the evolution of public life over the course of the last decades or from the constitutional loophole -, it does not demand the long process of deliberation of legislators, but only the executive’s decisive action in concrete cases.<sup>1216</sup> In this sense, Schmitt argued for an irresistible need for decisive and concrete action that had required the increasingly broad delegation of legislative and adjudicative power to the executive and administrative spheres in the years since the end of World War.<sup>1217</sup>

Here, when we tried put the Schmitt theory into practice, we realized that Germany mostly experienced the emergency legislation adopted during World War I, it served as a kind of constitutional model, and following this model, each successive *Ermächtigungsgesetz* - enabling act - would transfer to the executive, in some degree or another, the necessary powers to address the perceived crisis of the moment, which mostly were inflation, currency stabilization and economic depression. In Germany, moreover, recourse to the “emergency” powers of the Reich President under Article 48 of the Weimar Constitution reinforced this process. Although this provision was originally understood as conferring extended, unfettered authority from any parliamentary constraint on the President only to address civil strife,<sup>1218</sup> it evolved into an excuse for the executive to exercise wide-ranging legislative powers. By the early 1930s, Article 48 in fact became the purported constitutional foundation for extra-parliamentary, and eventually unadulterated anti-parliamentary governments. Simply, seeing the social, political, and economic crisis, most of the European countries, including Germany,

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<sup>1215</sup> See also Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt*, (London: Verso, 2002), pp.150-152.

<sup>1216</sup> Schmitt, ‘Une étude de droit constitutionnel comparé: L’évolution récente du problème des délégations législatives.’, Paul Roubier et H. Mankiewicz, in *Recueil d’études en l’honneur d’Edouard Lambert*, (Paris, Sirey/L.G.D.J., 1938), p.204.

<sup>1217</sup> Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s.*, *The Yale Law Journal*, (2004), p.1359.; Schmitt’s assertions in 1936 regarding the inevitable decline of parliamentary democracy extended the argument he had articulated a decade before, in *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*: “Even if Bolshevism is suppressed and Fascism held at bay, the crisis of contemporary parliamentarism would not be overcome in the least.” Schmitt believed that crisis “has not appeared as a result of the appearance of those two opponents; it was there before them and will persist after them.” Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* [The Historical/Intellectual Situation of Contemporary Parliamentarianism], (Berlin, 1985, first pub. 1926), p.17.

<sup>1218</sup> The provision was assumed as “merely as a carryover” which was a similar one contained in the 1871 Imperial Constitution and the 1850 Prussian Constitution.; see also Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory & Practice of Weimar Constitutionalism*, (Durham, NC: Duke University Press, 1997), p.67.

in the 1920s and 30s, in one way or another, tried to centralize power. Their main question, thus, was whether the growth of subordinate legislation promulgated at the discretion of the executive violated the constitution and the rule of law.<sup>1219</sup>

In this sense, For Schmitt, the traditional concept of the separation of powers, which was at the core of German constitutional tradition, simply could not be reconciled with the necessities of the emerged predicaments. Hence, he demanded the “total state” – an authoritarian/totalitarian regime - and, in some sense, the inevitability of an executive dictatorship in an age of administrative governance, even though he tried to rationalize this state of affairs as a return to a more traditional form of monarchical rule with a constitutional guise.<sup>1220</sup>

On the contrary to Schmitt’ theory of state and legality was Kelsen. We showed that Kelsen realized that Schmitt tried to justify the idea of the monopoly of legality of the Reich President in a way that it fits to the role of the head of the state of a democracy. Kelsen was really trying to do was to criticize the concept of sovereignty *qua* domination, which was free from any concept of legal sovereignty, and which was free of any legal authorization. For the concept of sovereignty emerged from a political decision is as inevitable as the concept of power over in any political notion of state, Kelsen, merely invites us to conceive sovereignty on its own terms, that is, legally.<sup>1221</sup> So against Schmitt, he argued that a Parliament as much as the office of President could claim power borrowed from the concept of legality and constitutionality.

Schmitt and Kelsen were standing on opposing sides regarding the limitation of legitimacy of the concept of legality, whereas Heller tried to take a middle ground for his legal theory.

We can agree with Heller that law is carrying the authority originating which is imposing itself upon the citizen,' However, if this authority carry the notion of legitimacy, then this authority of law was of the 'product of an interplay of purposive orientations between citizens and government.' and the product of the political consciousness in the power spectrum. Namely such quality can be seen between the legislative branch empowered by people and executive branched empowered by law and the state. Hence, obedience to law is not just something that has to be secured for a legal order to be effective obedience is constitutive of such order. Law has to secure obedience by appearing to those subject to it not just as an order, but as a norm, as a prescription with a justified claim to be legitimate.<sup>1222</sup>

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<sup>1219</sup> Robson, *Justice and Administrative Law; a Study of the British Constitution*. London: Macmillan, 1928.

<sup>1220</sup> Lindseth, The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s., *The Yale Law Journal*, (2004), pp.1340-1341.; See also Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt*, (London: Verso, 2002), pp.150-152.

<sup>1221</sup> Dyzenhaus, Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought, *Theoretical Inquiries in Law* 16 (2), (2015), p.342.

<sup>1222</sup> Heller Staatslehre in Christoph Miler (ed.) *Gesammelte Schriften*, 3vols, vol. 3 (Tübingen: J.C.B. Mohr (Paul Siebeck) 1992). See also my introduction to Heller together with translations of substantial extracts from his work in Arthur J. Jacobson and Bernhard Schlink (eds) *Weimar: Jurisprudence of Crisis* (Berkeley: University of California Press, forthcoming).

**Chapter Three: The Conclusion**  
**Justification and Legitimacy: Legality and Political Power**

## **Part Six: Legitimate Legal system**

“... Man muß das Wahre immer wiederholen, weil auch der Irrtum um uns her immer wieder gepredigt wird, und zwar nicht von einzelnen, sondern von der Masse. In Zeitungen und Enzyklopädien, auf Schulen und Universitäten, überall ist der Irrtum oben auf, und es ist ihm wohl und behaglich, im Gefühl der Majorität, die auf seiner Seite ist.”

- Johann Wolfgang von Goethe, ‘Gespräche. Mit Peter Eckermann’, 16. Dezember 1828

### **Prologue to the Conclusion: Final Remarks On the Concepts of Power and the Concept of Legitimacy**

Until now, we have assessed the most important instruments of power to see how it justifies and legitimizes authority. So far, we have seen the necessity of the assessment of the justification and legitimacy of power. Thus, the arguments presented in the following pages do not repudiate the entire work, but rather mention caveats and sum up the debate on power and its legitimacy.

As Dolf Sternberger argued, “legitimacy is the foundation of such governmental power as it is exercised both with a consciousness on the government's part, that it has a right to govern, and with some recognition of that right by the governed”.<sup>1223</sup> This combination embraces all concepts of political power in a form of essentially concepts of power and rights, which is a reciprocal constitutive parts of political power. In other words, the legitimacy of political power is the effect of a developing capacity or ability in a power relation which is based on rational and historically intended wills. We called once such phenomenon as ‘*consciousness of rights*’ or ‘*political consciousness*’, which engage with both sides of the government and the governed to recognize both their rights and the rights of other side. This produces confidence and allows the system to function.<sup>1224</sup> We already know that ‘political consciousness’ is as a mutual recognition, observation, justification, and appreciation of rights that belong to the nature of legitimate- democratic- governments; in which the concept of mutual knowledge supports a healthy, confident, and reciprocal constitutive character of political power and political rights, and builds the concept of 'state' as a unified identity of leaders and followers.<sup>1225</sup>

Moreover, our current understanding of the political rights is inseparable from our understanding of political power. Power is not only the capacity and rights of the citizens who

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<sup>1223</sup> Sternberger, ‘Legitimacy’ in *International Encyclopedia of the Social Sciences* (ed. D.L. Sills) Vol. 9 (New York: Macmillan, 1968), p.244.

<sup>1224</sup> See Sternberger, ‘Legitimacy’ in *International Encyclopedia of the Social Sciences* (ed. D.L. Sills) Vol. 9 (New York: Macmillan, 1968), p.244.

<sup>1225</sup> The theory of political consciousness explains the capacity of legitimation of power structure based on rational normative principle. in this sense, Berger and Lockmann argue that “Legitimation ‘explains’ the institutional order by ascribing cognitive validity to its objectivated meaning.” and “Knowledge proceed values in the legitimation of institutions.” See Berger and Luckmann, *The Social Construction of Reality; a Treatise in the Sociology of Knowledge*. (England: Penguin Group, 1966), p.111.; Kelsen, *Vom Wesen und Werten der Demokratie* [The Nature and Value of Democracy], (Aalen: Scientia Verlag, 1928), pp.8-9.

take part in the government- and whose life and liberty are immune to violation by the state but power also concerns the formation of the ‘will’ of the state, of the right to govern.<sup>1226</sup>

### 1. Legitimacy: Legality and Constitution

From what we have learned from the unlimited power of the Parliament in the Weimar Republic and the limitation of the legitimacy of legality, we can arm our argument with the knowledge of the foundation of legitimacy of regime, especially its legal order, the constitution, and the obligation to obey the law. Basically, our investigation enthusiastically called on an inquiry to see how a notion of legality is legitimate and how its constitution should obey the command of the constitutionally-valid law. A regime and especially its ‘law making system’ - the legislative power - may be justified and valid with myriad social, legal and political factors. Yet, a validly-enacted law may be unjust even within a legitimate legal system. Nor does ‘legitimacy’ refers to whether a particular law is ‘valid’ because it was enacted according to the accepted legal process. However, legitimacy is like a wire that goes through the concept of validity and the constitution; it is spread out throughout the regime and power structure.

The concept of legality of a regime and its constitution can be legitimate only (i) if there is a democratic consent to the power, its legislation, and to the jurisdiction process, or (ii) if the legal order, the concept of legality, the constitution, and the law assure that they are just. This is what Randy E. Barnett, a law professor at Georgetown University, argues in his two prominent works, ‘Constitutional Legitimacy’<sup>1227</sup> and *Restoring the Lost Constitution*,<sup>1228</sup> in order to safeguard the notion of political and civil rights of people within the modern constitutional theory. To do so, he uses the theories of natural rights and liberalism. Indeed, without changing much in Barnett’s account, it is possible to convert his theory from one that supports the conservative goal of limiting the power of government, restricting it to the narrow task of facilitating or preserving property and contract rights, into one that justifies a far more capacious and progressive view. It can be argued that the concepts of legality, constitution, and law are legitimate not because they are based on the limitation of government power, but because basically they uphold and appreciate the principles of the political consciousness.

In fact, the concept of legitimacy also implies the concept of a legitimate legal order and a legitimate constitution in which both the rights of the authority and the rights of the people- the governors and the governed or the ruler and the ruled - are recognized and respected. The reason is based on what as Barnett argue. The legal and constitutional legitimacy does not only come from conformity with justice which entails the negative constraints protecting the individual from certain forms of state coercion, but also obligations to the community as well as affirmative entitlements held by state organizations. So we can argue that a constitution may be deficit in legitimacy if it merely constrains particular state actions and does not empower, or at times even require, the state to enforce those obligations and satisfy those entitlements.<sup>1229</sup> In a sense, a legitimate legal order and a constitutional constrain on the power of government

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<sup>1226</sup> Kelsen, *General Theory of Law and State*, (Cambridge: Harvard University Press, 1949), p.87.

<sup>1227</sup> Barnett, ‘Constitutional Legitimacy’, *Columbia Law Review*, (2003), 103 (111), pp.111-148.

<sup>1228</sup> Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, (Princeton: Princeton UP, 2004).

<sup>1229</sup> See also Peñalver, ‘Restoring the Right Constitution?’, *The Yale Law Journal* 116 (101), (2007):.

- for the sake of the rights of the people – at the same time empower the power of government to the extent that it can defend such rights and the constitution.

Moreover, such legitimacy is unlikely to be based on unanimous consent since it is impossible in practice, at least in the modern national states. To the extent the notion of legality emerged from the constitution of a regime, establishes a notion of constitutive power that adequately assures the claim to the political rights of both the governors and the governed, which agrees with the rational and pragmatic notion of justice. Such a power could not be the gift of a wise person, neither can any power, which needs checking, be from God; yet the provision, which the constitution and the legislative process make, supposes such a power exists on both sides. Furthermore, this account of the legitimacy of legality does not assume any particular theory of justice, but rather is an intermediate between the concept of appreciation of political rights and the concept of legality. So let us commence with the question of legitimacy.

### **1.1. Why Legitimacy of Legality Matters?**

The literature is replete with the written works on the subject of the validity of law or respect for a constitution; a long history of why people should respect the valid law of where they live. These struggles are between scholars, politicians and constitutional theorists. But few have ever addressed whether the concept of legality of a regime and its constitution are legitimate. This is the real struggle in the world of politics; in the polar world of the West and the East. Perhaps for many, a concept of legality of a regime or its constitution, as long as they are valid and possess power, are sacred. Moreover, for them, any treatment around the question of legitimacy would have to admit the possibility that it does not pass muster. Obviously, such accounts have been seen in authoritarian/totalitarian regimes. For others, the discussion of legitimacy is at the heart of any discussion on the validity of a legal order or a regime's power. Contrary to the first account, the latter account can be seen in most works by Western scholars. Yet, let us commence not with references to complicated scholarly questions or verbiage explanations of theories, but rather ask a simple Why: why should the people from a constituent power, recognize a sovereign as legitimate and consequently follow it?

To answer this question, we may progress systematically. First, it must be clear that why the theory of the 'popular sovereignty' as the tradition of Parsons, Arendt and Habermas, aims to account for power as obtaining legitimacy through an internally normative structure and rejects the analysis of political power as an invariably mere coercive resource. This tradition of thought emphasizes solely on power of the people cannot compel us sufficiently to explain our account of legitimate legality and the obligation to obey the legitimate statute. Simply relying on the account of 'popular sovereignty' not only requires a condition that no regime and legal order can meet but also leads to the unlimited delegated power to the government. Furthermore, it cannot be adequately confirming with our theory of 'political consciousness', which emphasizes the mutual constitutive concept of power and rights on both sides of the power spectrum- the governors and the governed. Second, we must move on by showing that the concept of legitimacy, besides the awareness of the people, requires two other approaches. It is the normative approach to both the concept of legality and the regime. In other words, it is a normative nexus between right, law and power. While the first concept deals with the

nature of the concept of legality and constitution, the latter deals with the nature of the regime as well as the office holders. While the first emphasizes the assessment of the rational-normative principles and human rights – including the civil and political rights of people - in the nature of legality, the latter emphasizes the assessment of the legitimate empowerment of state's power, government, or authority. The aim is to show that the legitimating structure of political power, depends both on the concept of rights and power, as it is a reserve within political power which is reflexively generated by power itself and which responds to clear internal functional motives within power.

To be specific and follow the historical-functionalist the evolution of power and the path of the concept of legitimacy, I draw my idea of the legitimate form of legality from the Constitution of the United States and the Constitution of Germany- the *Grundgesetz* or Basic law. To find out the legitimate elements in these two legal systems and to argue whether they bind their citizens to obey the law, is also to argue against those legal systems, constitutions, and regimes that do not meet such elements. To argue about the binding and the legitimacy of these two Constitutions, we need to refer not only to the consent of the people as a static phenomenon but also, and more importantly, to the normative characteristic of the legality and the nature of the regime and its power holders as a medium of exchange that has gradually adjusted itself to its contemporary societal functions. In other words, besides the consent of power, they need to carry an adequate procedure as a quality that objectively arises from and accompanies power's historically varied functional construction and that internally reflects and intensifies power's socio-structural adaptivity. This ensure that the statute passed by the legislative branch and implemented by the executive branch, can meet the required conditions set by the rational-normative principles and the moral significance of rights. Such procedures, if they meet the required conditions, I will content, are just and legitimate. Such a concept of legality implies that if the consented concept of legality and constitution as the production of power's legitimacy as a functional operation is concerned, the notion of consent, consciousness and awareness of people is part of the concept of legitimacy, the other part is the nature of the legal order and constitution. For a legal order to be illegitimate, it does not only rely on the disaffection of the people but also on the unjust criteria that are rooted in the nature of its authority.

By assessing the legitimacy of legality and answering the question which we proposed, we can see why the constitutions of the United States of America and Germany are not only legitimate but also carry the obligation for their people – as well as power holders - to obey the law and such obligation in accordance with a legitimate constitutional authority as a legal-judicial form. In other words, although they are self-restricted accordance to the relation of rights, law and power, they bind their citizens in conscience- that is, create a moral duty of obedience. Such an argument can be also used against the illegitimate legal orders and constitutions. In this sense, it is also the assessment that why some constitution, namely in the Middle Eastern regimes, whether or not it is accompanied by the consent and – negative - consciousness of people, neither are legitimate nor can obligate the people to obey the law.

However, the discussion concerning legitimacy does depend on the claim 'justice' and it is independent of government fiat. It depends both the normative and factual approach. It is co-originated in rights - human rights, inalienable rights, and the rational-normative principles -

and active democratic participation which are the formative elements of legitimate power.<sup>1230</sup> Hence, it is not the preparation of the concept of justice for any usurpation of power but a concrete and pragmatic, and not ideal, idea of legitimacy. The narrow thesis defended, here, concerns only the proper conception of legal and constitutional legitimacy, not all the conditions that may lead to the conclusion that a particular- constitutional - regime is or is not legitimate.

It is the requirement of the assessment of the legitimacy of any given legal system that urges us to assess the adequacy of lawmaking procedures and the nature of regime that thrives. Such assessment would require the procedural and factual conception of legitimacy, the concept of political consciousness, and a conception of justice bound by the essentially integrated concept of power and right and moral obligation of rights. Furthermore, such assessment is a normative one, which must be distinguished from the sociological or descriptive ones, they concern whether a constitution, lawmaking process, or government is perceived to be legitimate. So, how do we gain the advantages of such a cooperative the procedural and factual conception of legitimacy and the normative one?

## **1.2 Normative Approach to the Legality and Constitutional Theory**

What are the emerging trends in which a legality of power is legitimate and is the source of binding law? Some of these trends have already been argued in the previous pages but will be drawn into the summary of the legality and power situation as it is developing in our time. The core argument consists of three pillars: (i) the empowerment of the people, which theoretically causes the unanimous consent of the folks, (ii) the procedural assurance of the justice based on the rational-normative principles, and the moral significance of rights, and (iii) the empowerment of the authority in the total conformity with the other two pillars.

### **1.2.1 The First Pillar: The Concept of ‘Power to’ and the Unanimous Consent**

The Constitution of United States of America- or U.S. Constitution- begins with:

“WE THE PEOPLE of the United State in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”<sup>1231</sup>

The Basic Law for the Federal Republic of Germany- or the *Grundgesetz*, German Constitution- followed by U.S. Constitution begins with the same approach:

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<sup>1230</sup> For very early examples of rights in state constitutions, see the Petition of Right in England in 1628, confirmed under the terms of the Bill of Rights in 1689, and the Charter of January 1612 and the *Rikstag* ordinance of 1617 in Sweden. For later examples, see therevolutionary constitutions in France, German’s Weimar Republic and the USA.

<sup>1231</sup> U.S. Constitution, The Preamble

“Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, THE GERMAN PEOPLE, in the exercise of their constituent power, have adopted this Basic Law.”<sup>1232</sup>

“We the People” as the words chose by the State’s delegates in 1787 for the U.S Constitution and “the German people” (*das Deutsche Volk*) by the Parliamentary Council (*Parlamentarischer Rat*) in 1949 for the German *Grundgesetz* were not placed there accidentally nor were they verbiage compliments. The motive was to reason the supremacy of legality and the constitution encompasses and defend the people's rights. In this sense, the founders of U.S. Constitution and German *Grundgesetz*, contrary to the assumption of the divine rights of any kind of authoritarian/totalitarian regime, tried to enhance the concept of legitimacy of legality. Such an approach is necessary for those who recognize the notion of legitimacy, which significantly relies on the people's civil and political rights as the great facilitation for power’s inclusive transfusion through society as a collective whole.

Words such “We the People” and “the German people” emphasize the political and civil rights of the people along with the idea of power’s legitimacy. In particular, preserved civil and political rights of people in the constitution bring a distinctive resource of legal legitimacy to political power, and they construct political power as a medium that could internally pre-determine the social terrains to which it was applied. Consequently, that can presuppose a high degree of non-coercive inclusivity for each act of power’s application.<sup>1233</sup> Power, in this sense, regarded as the general will of the citizens and the constituent power.

However, assessing the source of power as legitimate to the extent that it acquires the sources to inclusively generalized civil and political rights of people is important. Words such “We the People” and “the German people” also emphasize that the people – tacitly or officially - gave consent to be ruled by the institutions ‘constituted’ by this document within a particular territory of the state. Yet, the challenge appears where we merely rely on the theory of ‘popular sovereignty’ as if only the consent of people can legitimize a constitution and the concept of legality of a regime. So, we have to ask whether the ‘unanimous consent’, which consists of actual consent of each individual, is possible? And whether a unanimous consent sufficiently legitimizes a constitution or a legal order?

The short answer to the first question is to say that the condition to have a unanimous consent in the modern nation-states can never be pragmatically achieved since the unanimous consent is different from the majoritarian one. Any consent that is less than unanimous is not just and legitimate in this sense, at least for the nonconsenting persons. This is the core essence of the belief in the absolute account of ‘popular sovereignty’ based on the theory of consent. The illegitimacy of the legal order or a constitution, in any sense, may cause the counterproductive trend of obligation to obey the law.

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<sup>1232</sup> Basic Law for the Federal Republic of Germany [Grundgesetz], (Language Service of the German Bundestag, 2014). The original text appears as follows: ”Im Bewußtsein seiner Verantwortung vor Gott und den Menschen, von dem Willen beseelt, als gleichberechtigtes Glied in einem vereinten Europa dem Frieden der Welt zu dienen, hat sich das Deutsche Volk kraft seiner verfassungsgebenden Gewalt dieses Grundgesetz gegeben.”

<sup>1233</sup> Thornhill, Legality, legitimacy and the form of political power: on the construction of a false antinomy, *Journal of Power*, 3:3, (2010), p. 306.

The short answer to the second question is to say that the unanimous consent, although it is impossible, not only is unable to sufficiently legitimize a legal order and a constitution but also if it is taken for granted, it can be dangerous in practice for the nature of the legitimate democratic regime. Let us elaborate on these two assertions.

### 1.2.1.1 Obeying the Law *Contra* Obeying the Constitution

For the most part of the constitutional history, the common-sense dictates that the constitution is for the people in a sense that a constitution is binding on the citizenry. This claim is only partly true since it ignores the other side of the power spectrum, the governor. The power of a legitimate legal system and its constitution is not only to bind the governed, the folks, or the citizens but also, and most importantly, the state's power. The U.S. Constitution as well as German *Grundgesetz* are structured in a way that defines a similar legitimate power structure, a division of power, "in order to prevent misconstruction or abuse of its powers"<sup>1234</sup> and assures "the exercise of their constituent power."<sup>1235</sup> As Rufus King, delegate from Massachusetts, stated to the Constitutional Convention: "In the establishmt [sic] of Societies the Constitution was to the Legislature what the laws were to individuals."<sup>1236</sup>

However, this is not possible without the protection of state's power. In both 'The Preamble to The Bill of Rights' of the U.S. Constitution and the '*Grundrechte*' of the German *Grundgesetz*, a set of inviolable rights are mentioned which bind the U.S. government as well as the German government to secure these rights. In this sense, the constitutions not only restrict the possibility or emergence of illegitimate power but also empower the legitimate power to protect these rights. It is in this sense that our eyes not only should stare at the glamorous articles of the Bill of Rights and the *Grundrechte*, but also our attention must be redirected to the empowerment of the state's power within the boundaries set by the rational-normative principles and the moral significance of the rights of the people. Article 1 of the *Grundgesetz* explicitly implies that 'to respect and protect' the rights of the people "shall be the duty of all state authority."<sup>1237</sup> Now by determining the difference between binding and obeying the boundaries of the concept of legality on each side of the power spectrum- the governors and the governed- we should ask whether a "law" is validly enacted according to the Constitution mean that binds one in conscience? In other words, is the one morally obligated to obey the law where it matches the constitutional procedure?

Some believe that the reason to obey the law is the fear of punishment should one be caught for disobedience. Others believe that when a command is called a 'law' one should obey it due to the moral obligation it carries. Yet, these ideas assert both half of a fact, one is the obligation and the other is the punishment. What is important is that both fear and moral obligation also can be attributed to the nature of the state and government, yet if a state is an authoritarian/totalitarian regime, it can do nothing but to force their citizens to obey the law

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<sup>1234</sup> U.S. Constitution, The Preamble to The Bill of Rights.

<sup>1235</sup> Basic Law for the Federal Republic of Germany [Grundgesetz], (Language Service of the German Bundestag, 2014), The Preamble.

<sup>1236</sup> James Madison, Notes of Debates in the Federal Convention of 1787, (Ohio University Press, 1984, first pub. 1840), p.231.

<sup>1237</sup> Basic Law for the Federal Republic of Germany [Grundgesetz], (Language Service of the German Bundestag, 2014), Article 1.

mostly by the fear of punishment. On the contrary, a justified and legitimate power, beyond the concept of coercion which is distinguishable from force, morally obligate its people to obey the law. In the more democratic states, the nature of government is similar to the nature of law in the sense that although disobedience is followed by the punishment, the citizens feel a sense of moral obligation more than fear, a sense of cohesion more than repression.

In Western Europe, for the most part, Germany and the United States, states have power of coercion but most importantly the role of coercion in domestic politics and governance has become indirect and attenuated, and the institution that manage coercion are under the control of legitimate governments.<sup>1238</sup> Yet what is dangerous for the democratic power relation, which we have to be aware of, is when the authority takes for granted that their citizens obey the law merely as a moral obligation. When this is the common perception of ‘the law,’ and if the system that produces these legal commands lacks the requisite institutional quality - whatever it may be - to justify this favorable presumption, lawmakers in such a society will get a powerful benefit of the doubt or ‘halo-effect’ to which they are not entitled.

Here, we have to ask what the others are afraid to ask: We ask about the legitimacy or power and its legal order. This question leads us to other subsidiary questions such as: What quality or element makes a constitution legitimate? What really makes the citizens obey the law?

In fact, if the term "law" is to carry the implication that there is a moral duty to obey, then the requisite binding quality must go in before the name "law" goes on. A legitimate legal order bound by a legitimate constitution can create legal commands – or laws - which the citizens have a moral duty to obey, since these legal commands already thrives for legitimacy. Yet, the legitimacy of legality is taken as the consent of the folks; a consent of the governed to the authority of legal order. In fact, it has been assumed that this is the only important factor.<sup>1239</sup> In his Farewell Address of 1796, George Washington said:

“The basis of our political systems is the right of the people to make and to alter their constitutions of government .... The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government.”<sup>1240</sup>

Thus, it might be assumed that this also places limits on the authority, as Michael McConnell argued, is noticeable only “to the constitutional pre-commitments of the people themselves...”<sup>1241</sup> In this sense, the general sense is that the people, whether it is “We the People”, “the German people”, or any other folks are an entity who are capable of binding themselves, however completely, by their – common - wills. However, one important criticism, which is the base argument of this part, is that the constitutional and legal legitimacy of a

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<sup>1238</sup> Alagappa, (ed.) *Coercion and Governance: The Declining Political Role of the Military in Asia*, (Stanford: Stanford University Press, 2001),P.8.

<sup>1239</sup> See Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America*, (New York: Norton, 1988).

<sup>1240</sup> George Washington, Washington's Farewell Address in Sept. 17, 1796, reprinted in Documents of American History 169, 172 (Henry Steele Commager ed., 9th ed. 1973).; See also Washington, *Washington's Farewell Address: The Proclamation of Jackson Against Nullification; and The Declaration of Independence*, (Washington: Government Printing Office, 1862).

<sup>1241</sup> Michael W. McConnell, The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution, *Fordham Law Review*, 65 (4), (1997), p.1291.

regime cannot merely rely on clauses such as “We the People” and “the German people”. This is because the idea of the ‘consent of the governed’ is not one, but a series of different commonly-made arguments. So, they must be distinguished and considered separately to see that people’s consent partly provide an account of the origin of the legitimate power and legitimate law, but not every occasion of the exercise of political power and every realm affected by its laws. Thus, “We the People” and “the German people” are only one part of the argument in the power spectrum and based on the theory of political consciousness.

Here, it is important to have our presumption set forth to our path: Though genuine consent, were it to exist, could give rise to a duty of obedience, the conditions necessary for “We the People” and “the German people” actually to consent to anything like the Constitution or amendments thereto have never existed and could never exist in the full sense of its words.

### **1.2.1.2 Impossibility of a Unanimous Consent**

Some argue that both the legitimacy of the legality and the constitution and the obligation to obey the law emerged from consent. However, they are referring to a ‘necessary’ quality or factor of the legitimacy and moral obligation, they ignore the fact of their ‘sufficiency’ for legitimacy and moral obligation. Their argument mostly relies on the direct consent and the tacit consent. The plebiscite or any other forms of voting, nationality and the place of birth and residency, the failure of revolt against the government, receiving benefits from the legal system such as security or money are the reasons for the defender of the consent theory as the only grounds of the legitimacy and moral obligation to obey the law. Now, let us see what is behind the curtains.

1. The first approach is the relation between the act of voting - of any kind - and the legitimacy of the regime as well as the obligation to obey the law. Since no modern national states are designed so that plebiscite voting on every law is possible, the argument is simply redirected to the act of consent that is interpreted from the act of voting for the elected officials to enact the law. It is true to some sense that this empowers an agent to both represent a voter and also bind the voter to his/her decision by which the right is ceded. Most of the time this is so, yet, suppose the candidate we voted for was defeated. In this sense, not only did we not choose to be presented by her opponent, we in fact voted against it. Well, one counter argument relies on the act of voting instead of mentioning for whom the vote is casted: choosing to vote, we have consented to the outcome of the election, whatever it may be. While this may be true in some parts, it may also be true that the individual voters hope, or expect, others will accept the result if their candidate wins. Furthermore, they could still be voting simply to minimize the threat to their interests posed by the lawmaking process. Voting with this motivation in no way implies consent to any outcome that may result. Therefore, the simple act of voting does not tell us whether the voter consents to the outcome of the election (and all that follows from it) or whether he or she is voting for different motives entirely. Also, such an argument is not true for those who abstain from voting altogether. The whole argument, in short, is that if consent is an expression of a ‘willingness’ to go along with something, then this presupposes it is possible to express ‘unwillingness’. Yet, voting also does not confer the pure act of willingness nor cannot voting be an act of ‘unwillingness’. Voting, as it is interpreted as

consent, is one layer of the legitimacy of legality and one factor to – morally - obligate the voters to obey the law.

2. The second approach is the relation between the residence and the legitimacy of the regime as well as the obligation to obey the law. One may argue that to be born and to stay in a territory of a state is tacitly to accept the legal order as the legitimate one and is to accept and obey the law. It is always hard to explain why a circular argument is circular. So it is also hard to explain why this argument is partially wrong. It is true that to stay in a territory of the state often means you must consent to the law of the land, but it is also true that those who disagree with the law of the land are often not able to immigrate. In 2016, 95% of 420 Million people lives repressively under the authority of 21 states in the Middle East and North Africa which has historically been the least free region in the world.<sup>1242</sup> Hence, the residency, unlike the assertion of ‘I consent’, is ambiguous.

Furthermore, if we truly believe that to be a resident is equal to giving your consent to the law of the land and that is the right of the authority over you, so we should believe in the following argument as well: Suppose I come to you and demand that you sign an oath to respect my commands just because everyone else has done that, and you refuse. Upon your refusal, I claim a right to your house and order you to leave the country. In that sense, whether taking an oath is to give the lawmakers authority by your consent, then unless they first have authority, they cannot demand that we take an oath. But if they already have the authority to demand we take an oath or obligate us to obey the law, then the oath- whether it helps the implementation of the legal statute - or not - is not necessary to establish that authority, recognize it as legitimate, then morally be obligated to obey it. Here, we can see that the authority cannot be justified based on the mere consent of people. That is just because before the people consent to an authority, the authority demanded such compliance; It demanded that the individuals cede their political and civil rights to them. Hence, the next decision made by the governed, the folks, cannot be the source of their authority. And their authority, if it exists, does not rest on the folks’ consent.

3. The third approach is the relationship between the failure to revolt and the legitimacy of the regime as well as the obligation to obey the law. The critique, here, is clear and the answer is simple. It has been the case of many pure spirits – or young people - who did not follow their authority. What we have seen in most of the authoritarian/totalitarian regimes in the Middle East, Africa or Asia is that one cannot afford the physical resistance against the threat of violence for their noncompliance. Moreover, the failure of enough people to band together to overthrow a government tells us nothing about the consent of the individual to be bound by the commands of the government, and therefore, tells us nothing about why laws are binding on individuals. Most importantly, the failure tells us nothing about the nature of legal order. This point leads us to the next approach: rule of recognition.

4. The fourth approach is the relationship between the acquiescence and the legitimacy of the regime as well as the obligation to obey the law. It is the presumption of every regime that everyone, to some extent, accepts the current government. This presumption is due to the

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<sup>1242</sup> The Freedom House, <<https://freedomhouse.org/regions/middle-east-and-north-africa/>>

empirical stability and running authority that a regime enjoys. Here, the nature of the argument is based on the tacit and empirical consent. Thus, we have to ask that if general acquiescence to the existing legal regime is an empirical fact, and one that if it is essential to its functioning existence, can the regime not also claim the tacit consent of the population and the legitimacy that flows from such consent? Some argue on the tacit consent based on the general acquiescence, hence misunderstanding the difference between the ‘rule of recognition’ and ‘constitutional-legal legitimacy’. While a rule of recognition is the way the population can identify the existence of an operating legal regime, legitimacy is the combination of empirical consent of the governed and normative efficiency to be legitimate. Hence, knowing that the legal system enacts the laws and knows the laws, neither helps the legality and the constitution be legitimate nor does it binding the conscience. Indeed, a rule of recognition, just like consent is necessary to establish a command as positive law and for both legitimacy of regime and its legality be binding in conscience, but this alone is not sufficient. We can detect such concept in both German and American history. In the history of Germany, this was the obvious case of the Enabling Acts as well as the concept of legality during the third Reich. Moreover, in the history of the United States, in 1784, James Madison spotted the same problem in both legitimacy and moral obligation in the unratified Virginia Constitution. He argued that this problem was rested “on acquiescence” alone, which was a “dangerous basis.”<sup>1243</sup>

What is remained is only the actual consent by an individual to argue for the obligation to fulfill a moral duty. However, neither one individual can consent for another, nor a unanimous consent, all concede, can and has existed at the level of the national state.

5. The fifth approach is the relationship between the act of predecessors and the legitimacy of the regime as well as the obligation to obey the law. Some argue that the “We the People” and “the German people” are the people’s representative not for a specific time but for a specific place, which at the time predates all the folks and demands not only for them to obey the law, but also recognize the government as legitimate since it is the running authority. This is clearly not a compelling argument since merely deciding to follow the predecessor or any tradition cannot carry the moral obligation of obeying the law, let alone its legitimacy. However, it is important since it shows a shift in argument from our consent to the consent of “We the People” or “the German people” at the time of its founding. This requires us to ask who exactly were “the people” who consented to the creation of these governments and what it was that gave them the power to not only bind themselves but also their posterity. Yet, this specific inquiry is beyond the framework of this part of the work. So we, here, move on with our investigation on the legitimacy of political power and its legal order.

### **1.2.1.3 The Dangerous of the Unanimous Consent**

Before we argue why the absolute or unanimous consent to the government is dangerous, we have to mention the motives which led to the emergence of such an idea. The idea of consent

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<sup>1243</sup> Madison, Notes for a Speech Favoring Revision of the Virginia Constitution of 1776. In *The Papers of James Madison*, Robert A. Rutland et al. eds., (Chicago: The University of Chicago Press, 1962), pp. 75-78.

which is one of the main principals of the popular sovereignty originated as an antidote to the fiction of the divine right of the king. If the king obtained his authority from God, the commons gained its authority from the people.

However, those who drafted and adopted the U.S. Constitution as well as the German *Grundgesetz* did not merely intend to put the constitutional constraints on the government to avoid the authoritarian/totalitarian tyranny of a man, but they also intended to put constitutional constraints on the people's empowerment and their legislative to avoid the disaster of tyranny of majority, the one that in the English politics manifested under the English Kings and their poppet Parliaments and the one that Germany has seen with the emergence the Nazi party, and the ruling of the so-called the third Reich. In other words, they knew that the reality of rule by legislative majorities combined with the fiction of unanimous and unlimited power to the government and its legislation, shouting “We the People” or we “the German people’ can be a dangerous mixture for the legitimacy of both states. Despite the rhetoric supremacy of “We the People” and we “the German people”, both the U.S. delegates and the Parliamentary council of Germany were pretty well conceived, so that a pure majority rule or absolute delegated power to the body of government would not be a good idea for either to have a healthy democracy and to have a legitimate constitution/legal system. In this sense, we can see that both the U.S. Constitution and the German *Grundgesetz* assured that the majority not only ruled but also the governors not misrule nor abuse power; they also assured the majority can pursuit of its interest – liberty - but they can do that in a way that the governors cannot get credit for the liberty of individuals and gain privilege through the statutes.

James Madison, as one of the prominent federalists of the time and advocator of the U.S. constitution, saw the problem of legitimacy was a lack of one sided political consciousness under the unlimited and delegated majority power. In the *Federalist*, he wrote :

“I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”<sup>1244</sup>

Madison understood and predicted what has been seen as the crisis of the constitution of Germany. This crisis happened after more than two centuries. In the Letter to Thomas Jefferson, he wrote:

“Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.”<sup>1245</sup>

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<sup>1244</sup> Madison, et al., *The Federalist*, (Indianapolis: Liberty Fund, 2001, first pub.1788), p.43.

<sup>1245</sup> Letter from James Madison to Thomas Jefferson in Oct. 17, 1788, in *Letters and Other Writings of James Madison* (Philadelphia: J.B. Lippincott & Co. 1867).; Also *The Papers of James Madison*. Edited by William T. Hutchinson et al., (Chicago and London: University of Chicago Press, 1962), p.77.

The real danger is interpreting the major power as a unanimous power of the people and believing that the constituent will of the people is completely delegated to the body of legislation. This dangerous assumption is more obvious when we consider that the people's inalienable rights are not immune to the decisions of legislator body. This unlimited delegation of people and power destroy the welfare of the state because it will corrupt the power from within and, as a result, build an authoritarian/totalitarian power in the shape of democracy. The idea of 'check and balance' which appears in both U.S. Constitution and German *Grundgesetz* is the remedy for the threat of both tyrannical forms of government. Particularly, in the U.S. politics, the founders devised a new scheme in which an electorate of 'the People,' by voting in elections, would exercise not a law-making power, but the power to "check" the lawmakers. "We the People" is not the unanimous consent for the absolute delegation of power to the body of government, and it would also not rule directly, but an electorate reflecting the rights and interests of the people would be effective in checking those who would issue commands to the people. In the same way, state governments would have the power to "check" federal legislation through Senators chosen by state legislatures. The representatives in the House of Representatives, the other organ of the state legislative body, are elected directly by 'the People'. The bicameral legislature of the United States, the House of Senate together with the House of Representatives, make up the U.S. Congress, which has its authority protected by Article 1 of the U.S. Constitution. More interestingly is the power of 'judicial review' which gives the supreme court the ability to check the power of legislative and executive branches according to the U.S. Constitution. Although this power is not mentioned in the U.S. Constitution, it became a virtue of the Supreme Court after 1803, viz. after the case of 'Marbury v. Madison',<sup>1246</sup> for the better system of check and balance in power. Their novel, and even ingenious scheme, of multiple checks and balances were positioned against rule by an absolute democratic majority, or rule by some privileged individuals, who carry some form of the consent of "We the People".

In Germany, the *Grundgesetz* secures the system of check and balance along with a delicate bicameral system. Although this practice was also popular during the Weimar Republic, the *Grundgesetz* initiated the framework for a system of check and balance. On one hand, just like the U.S. Constitution, it protects the inviolable rights of the 'German people' by putting constraints on the state's power, but it also empowers and protects the state's power by separation and share of the duties and distribution of power. Elections are the direct influence of 'the German people' on the political parties and their seats in the *Reichstag* - the Parliament. The counterbalance of the *Reichstag* is the *Bundesrat*- Federal Council. The member of *Bundesrat* are selected by the state or government and they have effective position in the process of legislature. The Judiciary is an independent organ and it is protected by section IX of the *Grundgesetz*. The Federal Constitutional Court not only empirically checks all federal and state actions, but also normatively the meaning and "the interpretation of this Basic Law in the event of disputes..."<sup>1247</sup>

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<sup>1246</sup> Lively and Weaver, *Contemporary Supreme Court Cases: Landmark Decisions since Roe v. Wade*. (Westport, CT: Greenwood, 2006), ch.1.

<sup>1247</sup> Basic Law for the Federal Republic of Germany [Grundgesetz], (Language Service of the German Bundestag, 2014), Section IX, Article 93, part 1.

After all, it is important to differentiate between the theory of popular sovereignty as the awareness of the people and their political participation, relying on the concept of ‘power to and ‘power of’, and the theory of popular sovereignty as the absolute majority rule, whether by the unlimited delegation or by the claim of a delegated power. Neither the *Reichstag* of Germany or the Congress of the United States are ‘the People’ themselves. They are the representatives of the people who are not carrying the absolute consent of people and whose power must be checked by other state's branches of power. So the simple idea is that, as we observed in both the U.S. Constitution and the German *Grundgesetz*, the inalienable rights of the people are not and cannot be ceded to states’ power, however, the states’ power are both constrained and protected.

Against this idea, stands not only what we see in the long list of the regimes which are ruled by despotic personalities and dictators, but also the idea of enormous executive or legislative power, which today are represented under the idea of popular sovereignty as a literal surrogate of ‘we the people’ in most Middle Eastern, Asian and African countries; the countries that represent the fallacy democracy: hybrid regimes. This perception is partly because the people can ‘consent to alienate any particular political rights, though not their more abstract inalienable rights, to the legislatures or their president, as the people's surrogate, who, in this way, can restrict almost any liberty and justify it in the name of popular consent. In this sense, in semi-democratic regimes – hybrid regime - the idea that legislative or executive present the rule of ‘the people’, is an attempt of justification. It is to overcome the problem of ‘authoritarian/totalitarian power control’ - the credibility of that threat which emerged with the process of politicization – through the ‘contested power-control.’<sup>1248</sup> Thus, such method allows a legislature or executive to justifiably do almost anything they wish. And this, in turn, allows majority and minority factions of the electorate to gain control and wield the power of the legislative or executive branch at the expense of the inalienable rights of their fellow citizens.

Here, we must recall that neither the U.S. Constitution nor the German *Grundgesetz* approved of a unanimous vote since such consent is impossible in both countries. The U.S. Constitution approved of a majority of delegates to conventions in each state. These delegates were elected by a majority of those who voted for delegates. The German *Grundgesetz* also approved of the Parliamentary Council which is comprised of delegates from the German states. Thus we have to ask again, how the commands of an existing legal system bind the citizenry in conscience? And more importantly, to what extent is a concept of legality legitimate, and where exactly is the concept of consent?

### **1.2.2 The Second Pillar: The Concept of ‘Power of’ and the Procedural Assurance of the Justice**

Once we realize that ‘We the People’ or we “the German people,” or any similar claim, is not the same as the body of government, and once we recognize the politician as the representatives of the people, we also realize that the people as a whole never speak and never fully and sufficiently validate anything. So, the legitimacy of the legality as well as duty to obey the law cannot be merely grounded on the consent of the governed - when there has been anything less

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<sup>1248</sup> See this work, Chapter one, Part three, 1.3.3.

than unanimous consent - and that, quite obviously, no government legal system can claim this degree of consent nor the absolute obedience of the citizens based on this argument.

It is important to have in mind that the core of this argument, here, is not to revoke any notion of consent for the concept of the legitimacy of legality. On the contrary, it has been argued that such political consciousness is necessary. Moreover, such adoption procedures may effectively secure the general acquiescence which is a requirement of any functioning legal order, whether or not it is legitimate. Having said this, the consent of people to the government and their recognition of authority, comprise one of the principles of the legitimacy. Namely, the recognition of right to claim to power in a power spectrum.<sup>1249</sup> Yet they are not sufficient. Thus, the challenge is understanding that legitimacy cannot merely be reduce to the consent of a majority of legislators who are elected by a majority of those who vote in an election, although they are necessary, legitimacy relies on other principles too.

The impracticability of unanimous consent and the insufficiency of any form of consent-whether it is possible or not- is to doubt that such jurisdiction can ever be legitimate. Robert Nozick relied on the presumption that “[i]ndividuals have rights, and there are things no person or group may do to them (without violating their rights).”<sup>1250</sup> The problem is that we have to practice critiquing to see whether it is a presumption at all. Furthermore, merely relying on such an approach is to say that legitimacy is the matter of consent, and that is to be trapped in the argument which ends in either “more consent, less freedom’ or ‘less consent, more freedom’. However, neither the empowered governing board can authorize unlimited restrictions on behavior within the community nor can it emphasize that "effective freedom depends on an alternative open to the non-conforming individual of leaving the group without suffering loss or damage.”<sup>1251</sup> From a different approach, the existence of individual rights is an appropriate conclusion- not a mere presumption- from not only the nature of human beings but the rational perception of political power and state, the principle of authority and its existential principal, and the society itself. This conclusion was accepted by the founders of both the U.S. Constitution and the German *Grundgesetz* and is manifested in The Bill of Rights and *Grundrechte*.

The core essence, here, is not the formulation of the nature of rights, but to advance the theory of legitimate legality, and for the present, it is not important that we agree on the ground of human rights. The endeavor, here, is to account for the co-originality of rights and active/democratic participation in the formation of legitimate power. It is important that we agree that both consent and freedom to withdraw the consent are necessary parts of the concept of legitimate legality. Yet, it is crucial to know that the notion of political rights is not the question of the time: whether first come rights and then the law, or first come rights and then

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<sup>1249</sup> See this work chapter one, par one, 2.1. Sternberger, ‘Legitimacy’ in *International Encyclopedia of the Social Sciences* (ed. D.L. Sills) Vol. 9 (New York: Macmillan, 1968), p.244. See this work, chapter one, part one, 4.2.1. and compare it to 4.2.3. See also Simmons, *Justification and Legitimacy*, (Cambridge: Cambridge University Press, 2001), p. 130.; Beetham, *The legitimation of power*, (London: Macmillan, 1991); Coicaud and Curtis, *Legitimacy and politics*, (Cambridge: Cambridge University Press, 2002); see also Tankebe, *Policing and Legitimacy in a Post-Colonial Democracy: A Theoretical and Empirical Study of Ghana*. Ph.D. Thesis (Unpublished), University of Cambridge.

<sup>1250</sup> Nozick, *Anarchy, State, and Utopia*, (NY: Basic Books, 1974), p. ix.

<sup>1251</sup> Knight, *Freedom and Reform; Essays in Economics and Social Philosophy*, (New York: Harper & Brothers, 1947), p.416.

government. Whatever the answer may be, one thing is crystal clear, without rights that can be claimed, no authority could ever exist, and without the notion of power or authority, no rights could ever be recognized. It is in the mutual recognition of notions of power and rights, that one can define the legitimacy of legality in the link between the normative evaluation of nature of power, or the normative evaluation of political rights. While the latter is related to the concept of ‘power of’ and ‘power to’, on the procedural occurrence of justice, the first one is related to the concept of ‘power over’ and the legitimate empowerment of authority. Though we already argued on the concept of ‘power of’ and ‘power to’, there are a few more points that should be discussed. For example, the empowerment of a legitimate authority.

The concept of political rights presupposes that the concept of the legitimacy of legality carries two notions of ‘necessary’ and ‘proper’, according to the normative evaluation of its nature. A legal order must be (i) necessary to protect the rights of others, and (ii) proper insofar as they do not violate the political rights of the persons on whom they were imposed. In this sense, the concept of ‘power of’ and ‘power to’ are secured not only based on the consent, or any source of power that comes from the folks, but also on the nature of the procedural assurance of justice.

Procedural assurance of justice is not only one of the necessary factors of legal legitimacy but it also justifies a duty of nonconsenting persons to obey the law. However, this particular rationale extends only so far and no further. Hitherto, the legitimacy of the U.S. constitution and the German *Grundgesetz* do not merely rely on political rights, which is one of the baselines by which to assess legitimacy,<sup>1252</sup> but contrary - to the illegitimate legal orders of Middle Eastern, Asian, and African regime, - its nature implies a procedural assurance of justice which baseline is the rational-normative principle and moral significance of rights on both sides of the political spectrum, which goes beyond the liberty-restricting commands.<sup>1253</sup>

On this account, there are two sources of binding law and their combination legitimizes the concept of legality: laws that are produced by- unanimous- consent regimes, and laws that are produced by regimes whose legitimacy rests solely on procedural assurances where the rights of the nonconsenting persons on whom they are imposed have been protected. Lacking each of these factors causes a deficiency in legitimacy because its degree depends on specific cases.

In sum, the legitimacy of legality is not the one-way concept of the political rights of the folks who consent. The importance of the discussion, here, is to draw our attention to one of the important pillars that the concept of legitimacy of legality stands on: the procedural assurance of justice. This is the second pillar for the concept of the legitimacy of legality. The other is the political rights of the folks. The second pillar is important to the extent that we can be in agreement that, when consent is lacking, a constitution is or can carry a notion of legitimacy- not the mere justification, even though its deficiency is due to the lack of consent-

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<sup>1252</sup> See this work chapter one, par one, 2.1. Sternberger, ‘Legitimacy’ in *International Encyclopedia of the Social Sciences* (ed. D.L. Sills) Vol. 9 (New York: Macmillan, 1968), p.244.

<sup>1253</sup> See this work, chapter two, part five

when it provides sufficient procedures to assure that the laws enacted pursuant to its procedures are just.<sup>1254</sup>

Consequently, hitherto, we can claim not only that (i) anything in the form of unanimous consent is not pragmatically possible; (ii) but also that both the U.S. Constitution and the German *Grundgesetz* are legitimated neither by actual and unanimous consent of the governed nor ‘merely’ by the concept of consent; (iii) consent to the constitution and law-making is both possible and necessary; but (iv) in the absence of actual and unanimous consent, to be legitimate, a constitution must provide sufficient procedural assurances of justice based on the rational and normative principles of whatever quality makes a law just, necessary and proper and therefore, binding in conscience.

### **1.2.3 The Third Pillar: The Concept of ‘Power Over’ and the Empowerment of Authority/Sovereign**

The past centuries have witnessed the dramatic shifts of interests between the different theories of justification and legitimized the concept of legality of a regime and its constitution in the era of modern nation-states. The theorists based their schools on either the traditional natural right of the king, the modern natural right of the people, or the positive law. The theories of constitutional legitimacy are infused with language drawn from the broader natural law framework. For example, Locke viewed private ownership as a natural institution preexisting the state, and he regarded the state’s principal function as safeguarding those private ownership rights.<sup>1255</sup> In contrast, Thomas Aquinas understood property as socially constructed and subject to a great deal of communal control and redistribution.<sup>1256</sup> But natural rights framework, which in itself is divided into two parts, is not the only approach. The theories of constitutional legitimacy are also infused with language drawn from the broader positive law framework. It is easy to take one of the sides of the argument, as most of the scholars do, and follow a pre-constructed model to argue why one absolute school of thought is correct. And I am sure that one can find a myriad of works on whether the natural rights or positive rights say the last word. However, we aim not to do so. The aim, here, is to argue for the legitimacy of the constitution based on something beyond the common scholarly scuffles; something based on the rational pragmatism: if legal and constitutional legitimacy not only comes from conformity with justice, which entails negative constraints protecting the individual from certain forms of state coercion, but also comes from the obligations to the community as well as affirmative entitlements held by state organizations, then a constitution may well be illegitimate if it merely constrains particular state actions and does not empower, or at times even require, the state to enforce those obligations and satisfy those entitlements. Thus, in short, whether the concept of legality relies on either the traditional or the modern natural law or on the positive law, it should

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<sup>1254</sup> See also Rawls: “[I]n the constitutional convention the aim of the parties is to find among the just constitutions ... the one most likely to lead to just and effective legislation in view of the general facts about the society in question. The constitution is regarded as a just but imperfect procedure framed as far as the circumstances permit to insure a just outcome. Rawls, *A Theory of Justice*, (Cambridge, MA: Harvard University Press. Revised edition, 1999), p.353.

<sup>1255</sup> Locke, *Two Treatises of Government*, (Cambridge: Cambridge University Press, 1988).

<sup>1256</sup> Aquinas. *Summa Theologica*, (New York: Benziger Bros., 1947), 66.

be legitimate. This legal legitimacy must be consistent with respect for a robust sphere of individual autonomy and active state regulation to the extent of the principle of legitimacy.

### **1.2.3.1 Constraint and Empowerment**

It has been assumed that the unanimous consent of the people to the government is the only reasons that the state's authorities – personalities - can use such ‘signature of power’ and utilize maximum capacity to exercise power. Yet, those who believe solely in individual rights are extremely suspicious of the state and state’s power. Consequently, the libertarians favor dramatically limiting the power of virtually all territorially defined governments that intrude upon individual liberty. Drawing on Lockean political theory, one can argue that the principal purpose of government must be limited to the protection of a constellation of negative individual liberties, such as private property and freedom of contract; the operation of which helps to preserve the individual liberty present in the pre-political state of nature. This account is the implicit normative account of individuals as un-coerced persons, free from constraints of involuntary social life or any form of organization.

However, the normative reliance on only the concept of – hypothetically - isolated, autonomous, and self-preserving individuals, only helps natural theorist who want to construct their political philosophy upon an atomized conception of human nature. Besides, the fact that it carries a concept of anti-social-political existence and that some theorists believed in the actual existence of the state of nature, causes that it falls into the stereotypical scuffle between the scholars on what human nature is. However, we do not intend to get in such a scuffle.

Whether individuals are free and autonomous, or by contrast, already embedded in and shaped by the community,<sup>1257</sup> we have to emphasize on both the political rights of individuals and the value of society as a collective entity. Without this approach, we are not able to balance the legitimate demands of the community with the interests and dignity of the individuals. A caveat here, is that we must not neglect goods associated with, preparation for, or facilitation and empowerment of, social interaction—a focus more aligned with a conception of rights broad enough to encompass both defense and obligation, along with the concept of knowledge, interest, and power.

Moreover, a step beyond the stereotypical scuffle is to consider the mutual recognition of rights between the concept of individual and the concept of society. An adequate account of the opportunities under the concept of rights is necessary for the social participation essential to human flourishing will also consider the background conditions within which individuals come together to interact. Human beings live a richer and freer life in a legitimate legal order, where neither the state nor large private actors, can arrogate enough power to monopolize opportunities for social, political and economic expression.

However, an adequate account of the protection under the concept of rights is necessary for the maintenance of such a legitimate system. For such an account, the state carries the obligation. In this sense, a general matter is the considerations applied with equal force to state. It effects efforts to implement the rational-normative principles as well as the moral significance to right not only for a better distributive justice but also for the state’s immunity

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<sup>1257</sup> See also Taylor, “Atomism”. In *Power, Possession, and Freedom*, Alkis Kontos ed., (Toronto, University of Toronto Press, 1979).

of power. Yet, how much should the state's power push, in attempting to enforce the rational-normative principles and protect the civil and political rights of people in each empirical case, is not as complicated as it seems to be, unless one is unfamiliar with the principles of legitimacy.

Drawing the appropriate limits around permissible 'legal' state's power in all sphere ultimately depends, not only upon the consideration of a complex calculus regarding the effectiveness of legal norms in particular contexts, as well as the development of an adequate account of individuals political rights, and the role of human freedom within that account, but it also depends on the rational and normative values of the 'legal' state's power in the formation of a protection for the legitimate legal order, by which constraints and empowerment are the same. Freedom from excessive government's intrusion and protection to obtain such freedom are the important components necessary to completely understand 'the integrated concept of power and rights', without which the legitimacy of legality is impossible. In other words, the third pillar, the constraints and empowerment of the state's power, is necessary for the legitimacy of the concept of legality of a regime. This is how the state's power can appear as a legitimate sovereign. Thus, legitimate powers for their general legal sovereignty based on a general sovereign will and for their legal power as uniform rights-holders, legitimate constitutions eliminate particular bearers of authority from their own structure, to separate political power from private agents and private social milieux, yet also to fabricate for themselves an external societal environment (an environment of legal rights-holders), to which their power could be applied in easily reproducible and simplified manner. However, to such restraint is an empowerment.

Hitherto, we argued the three pillars of legitimacy. Each of them is necessary, but not sufficient on their own, for the legitimacy of legality. Besides the unanimous consent of the governed or 'merely' by the concept of consent, to be legitimate, a constitution must provide sufficient procedural assurances of justice based on the rational and normative principles of qualities that make a law just, necessary and proper, and therefore, binding in conscience. To be legitimate is to also recognize the right of governors. In particular, power assumed legitimating integrity with the legal-normative institution of constitutional rights because rights helped to construct power as a societal commodity. In this sense, the legal and constitutional legitimacy not only comes from conformity with justice, but also obligations to the community as well as affirmative entitlements held by state organizations. A legitimacy of legality also implies, besides the constraints on authority *qua* 'power over', the recognition of authority which empower the right of the governor to govern. Furthermore, this empowerment, gives the right to the state to enforce those obligations and satisfy those entitlements to the extent that it is recognized by the rational-normative principles that are depicted by the theory of political consciousness. Legitimate legal power is neither without legislative procedure in which the political and civil rights of people are preserved nor externally constrained only by people: legitimate power, in fact, produces an articulated legal apparatus as it is societally produced as political power.

After all, as long as our concern is legitimacy within the context of legality, the concept of officials aligns with that of the written constitution. This is where the connection between the legitimate legal system, legitimate power, and the democrats are interrelated. Here, one of the favorable ideas would be related to the empowerment of the competing bodies of government

in the hopes that they would limit one other. Confronted with an expansionist executive branch, a weak legislative or judicial branch not only endangers liberty but also the normative legitimacy of legality; consequently, its immunity. In this sense, a radical empowerment of one branch of the federal government—the federal judiciary—through the presumption of political right, implicitly causes the loss of the concept of constitutional legitimacy.

Furthermore, the challenge for the study of legitimacy of power and legitimacy of legal apparatus may be to renounce the totalistic approach of, on the one hand, the legality and legitimacy and, on the other hand, the legality and the state. To analyze power's need for legitimacy is not always negative. One should see the self-limitation of power as the condition of its empowerment. In this sense, this analysis of legality and legitimacy of power might still preserve a certain normative dimension, and the inquiry into the normative/legitimizing status of law and rights might retain utility as a means of observing the inner structures of power's adaptation and evolution. Indeed, based on the normative analysis we might observe the fusion of 'power over' and 'power to' in a more functional foundation, in the exercise of power. However, analysis of legitimacy of power needs to be reconstructed as both internal/ external or normative/ functional observation of power to examine its objects – laws, civil and political rights and legitimacy– as produced by collective will.

## **Part Seven: Power and System Structure**

## 1. Normative Approach to the Nature of Regime: Separation of Power

Sovereignty is the state's constitutive power as the whole which comprises the concept of legality and the constitution.<sup>1258</sup> However, the division of power is one of the elements that is not a necessary presumption but is crucial in reality to see whether the state's power is legitimate. Though this has arguably gone through the whole current work by mentioning Montesquieu as the founder of the idea in 1748, in most of the western democratic world today, the implementation of such an idea is still young. For instance, Canada and England, two prominent democratic regimes who have a mixture of constitutional monarchy with parliamentary democracy. In Canada, prior to 1949, most of the appointees to the Supreme Court of Canada, which already had not enough authority compared to other branches or power, owed their position to political patronage; each judge had strong ties to the party in power at the time of their appointment. In England, the power of the judiciary branch has been always neglected; it wasn't until 2009 that it gains a bit of power through the recognition and establishment of the 'Supreme Court of the United Kingdom'. Today we see that even if it seems that the whole structure of a monarchy relies on the King's power, such as Canada, in reality it strives for legitimacy by the separation of powers with various approaches; such as legitimacy of legality and its representative form of democracy, legitimacy of separation of power and party politics and so forth. Yet, it seems that semi-democratic, authoritarian/totalitarian powers in the Middle East, Africa, and Asia persistently ignore the necessity for changing their system.

### 1.1 Power and the Theory of Separation: The Vertical and Horizontal Approach to the Nature of Power

It has been argued that the concept of legitimacy is the foundation of governmental power. In fact, political power "is exercised both with a consciousness on the government's part, that it has a right to govern, and with some recognition of that right by the governed".<sup>1259</sup> This combination embraces all concepts of political powers and rights which are the reciprocal constitutive parts of political power. In other words, the legitimacy of political power is the effects of a developing capacity or ability in a power relation which is based on the rational and historically intended wills, the 'political consciousness', which engage with both sides of the governors and the governed recognizes both their rights and the rights of other side and to produce confidence.<sup>1260</sup>

Thus, one of the important parts of the legitimacy comprises the recognition of rights of others in a way that it implicitly implies a notion against a monopoly of power lodged in the hands of one man or in the hands of one organization. The mutual recognition of rights does not only count vertical but also horizontal. Distinguishing between the vertical and horizontal approach, and the concept of recognition of rights, from the concept of political consciousness,

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<sup>1258</sup> See this work chapter one, part one, 2.2. and chapter two, part five, 3.2.

<sup>1259</sup> Sternberger, 'Legitimacy' in *International Encyclopedia of the Social Sciences* (ed. D.L. Sills) Vol. 9 (New York: Macmillan, 1968), p.244.

<sup>1260</sup> See Sternberger, 'Legitimacy' in *International Encyclopedia of the Social Sciences* (ed. D.L. Sills) Vol. 9 (New York: Macmillan, 1968), p.244.

is crucial in understanding the concept of separation of power as one of the elements of the concept of legitimacy. So let us elaborate on this theory to see how it helps us to understand the legitimacy of power.

In the vertical approach, the relationship between the governors and the governed is the main issue. We argued that the recognition of rights is a characteristic on both sides of the political spectrum. Yet, we mainly emphasized the recognition of rights of themselves in a way that each side of the political spectrum also recognizes the right of the other side. For if power is legitimate, it is necessary for the people to recognize the right of the authority to claim power, therefore they recognize their political rights, and for the governors to recognize the rights of the people, thus their rights to govern. However, this approach is one of the two approaches in the argument, so it is the vertical approach – namely, the complete approach emphasizes on the both sides of political spectrum.

The other approach to the legitimacy of power is the horizontal approach. In this approach, if the power is legitimate, it must also be legitimate in its own nature. The own nature of legitimate power comprises of two essentially integrated concepts of ‘power’ and ‘right. Power cannot being comprise from the mere concept of ‘power over.’ If it is so, then it is force and in political sense, an authority, but not political power.<sup>1261</sup> So, without the recognition and participation of people, since one of the political rights of the people is their participation in politics. When this right is recognized by the authority, sovereign or power, its nature is capable of comprehending its own constraints and rights. On the contrary, if an authority fails to recognize that, it -in its own nature- carries a legitimacy deficit. More importantly, authority or power itself is nothing more than ‘power over’ *qua* force if it is monopolized in the hands of one man or one organization. The recognition of such a constraint is not related to the people, but to the nature of power itself as the essentially integrated concept of power and rights - not merely power.

In this sense, the horizontal approach is the assessment of the legitimacy of power based on the nature of power in which the concept of mutual knowledge supports a healthy, confident, and reciprocal constitutive character of political power and political rights and builds the concept of the 'state' as a ‘unified identity’ of leaders and followers, the governors and the governed.<sup>1262</sup> The horizontal approach looks for the political rights, which are not only the recognition of the capacity and rights of the citizens for taking part in the government, but also the recognition of the right to govern- beyond the perception of the right of the governed, the people- based on its own concept of the moral significance of the rights to govern.<sup>1263</sup>

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<sup>1261</sup> See the definition of political power in this work, chapter one, part one, 3.4.

<sup>1262</sup> The theory of political consciousness explains the capacity of legitimation of power structure based on rational normative principle. in this sense, Berger and Luckmann argue that “Legitimation ‘explains’ the institutional order by ascribing cognitive validity to its objectivated meaning.” and “Knowledge proceed values in the legitimation of institutions.” See Berger and Luckmann, *The Social Construction of Reality; a Treatise in the Sociology of Knowledge*. (England: Penguin Group, 1966), p.111.; Kelsen, *Vom Wesen und Werten der Demokratie* [The Nature and Value of Democracy], (Aalen: Scientia Verlag, 1928), pp.8-9.

<sup>1263</sup> Kelsen, *General Theory of Law and State*, (Cambridge: Harvard University Press, 1949), p.87.

## 1.2 Legitimate Separation of Power

The role of the polygons of power (the instruments of power), especially those which are the most effective in the process of the throughput legitimacy, are part of the nature of power. The political institutions and organizations cannot be different from, or be in conflict with, the very core essence of power unless the state and its power are designed to collapse. The framework, role, and operation of the governing institution, in the modern nation-states, are basically introduced through the constitution of the state. In the West constitutions, at least in the U.S. Constitution and German *Grundgesetz*, are designed to prevent the consolidation of power in any single person or organization. On the contrary, what we see in most of the rest of the world, in the Middle Eastern, African, and Asian governments, is that there is no definition of division of power, these state structures are designed on either the authoritarian/totalitarian module or on the semi-democratic module. Even if there are different organizations in a state, the division of power is still impractical or symbolic.

Decentralized power- as the consequence of the separation of the branches of power- does not mean isolating the branches of power from one other. Hence, we can see the same character diffusion of power by these two Constitutions. This leads us to the other side of the coin, the share of the powers in a way that is not unilateral for any one branch; instead the branches overlap. This diffusion of power, somehow, provides a legal mechanism which is based not only on the 'separate bases of authority', but also on the 'different bases of authority' in order to prevent the conflict between the branches of power.

### 2.2.1 Nature, Instrument, and Principle of Power

Having examined both the principles and instruments of power, the nature of power must not contradict with the first two. While the instruments and principles of power are related to the procedure, the exercise of power is mostly related to the throughput legitimacy; the nature of power is that by which it is constituted, hence it is related to the input legitimacy.

### 2.2.2. Enlightenment Thoughts of Legitimate Power

The modern concept of separation of power presented by a long list of prominent political thinkers and rooted in the works of the seventeenth and eighteenth century, among whom are Locke and Montesquieu. Both tried to philosophically articulate legitimate power and the separation of power was one of the crucial elements. In the *Second Treatise on Government*, Locke elaborated on the theory of separation of power, especially the division between the executive and legislative power, to safeguard the liberty of the people. For tyranny is nothing more than the monopoly of these two function in the hands of a man or an organization.<sup>1264</sup> Montesquieu, familiar with both the Aristotle and Locke theory of power and state, masterfully elaborated on the idea of law as an instrument of power and the nature of power. His theory effects the concept of separation of power which became the framework for both the U.S. Constitution and the German *Grundgesetz*. In our modern western politics, at least in the United States and Germany, what we have is the healthy reciprocal relation between the legislative, executive, and judiciary, Montesquieu identified in *The Spirit of Laws*:

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<sup>1264</sup> John Locke, *Two Treatises of Government*, (New York: Mentor Books, 1965).

“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power is not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would also be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything,<sup>1265</sup> were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”<sup>1266</sup>

Thus, the idea behind this conceptualization is that the right of people is recognized and there is an attempt to form a new power relation which replaces the traditional possession of power, the concept of an absolute form of ‘power over’, in which a man or a political organization possesses the whole concept of power. In his time, Italy and Turkey were the examples of the monopoly of power in one hand. The new concept of power is an attempt to conceptualize a political power based on its own nature which is neither monopolized nor absolute, rather, it is balanced and reciprocal, not belonging to the same body and it does not constitute the one and the same power.

The unique character of such separation of power is its constraining role. As Montesquieu implies:

“The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative.”<sup>1267</sup>

This is what we see in the United States and Germany. In the United States, the Congress, the legislative body of the government, composed of the Upper House, which is the Senate, and the Lower House, which is the House of Representative. Similarly, in Germany, the *Reichstag* and the *Bundesrat* are two parts of the legislative body. The executive, in both countries, do not have the same framework, but share the same nature in the concept of the separation of power.

This political separation of power is at the very heart of the normative and philosophical analysis of the nature of the state, political power, authority and sovereignty, which James Madison highlighted. He connected this aspect with the theory of separation of powers. He argues, “The interest of the man, must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary.”

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<sup>1265</sup> Here means the beginning of authoritarian/totalitarian rule.

<sup>1266</sup> Montesquieu, *The spirit of laws*, trans. by Thomas Nugent, (Kitchener: Batoche Books, 2001, first pub. 1748), pp.173-174.

<sup>1267</sup> Montesquieu, *The spirit of laws*, trans. by Thomas Nugent, (Kitchener: Batoche Books, 2001, first pub. 1748), p.181.

## 2. Legitimacy: Power and the Nature of Authority

Indeed, the account of legitimacy presented in this work is enough that there is no need for it to be repeated. Thus, here, there are a few caveats and a final perspective which must be mentioned.

The thriving for legitimacy came far before the conceptualization, long before the beginning of the Ancient Greek political theories. Yet, in theory, it begins with the Isocrates, Socrates, Plato, and Aristotle. In that time, the ruling class was the main concept for the legitimacy of power and their divine rights to rule. They wielded the power with both the *miranda* and *credenda* of power. Meanwhile, throughout the Middle Ages, the *credenda* of power took over any concept of justification and legitimacy of power, and became the unique instrument of power. Meanwhile, Locke's ingenious work, *The Two Treatises of Government*, introduced a new era to the theoretical, and consequently, to the practical realms of politics in which the instruments of power were not sufficient to cover the justification or legitimacy of power. The concept of legitimacy became more complicated, especially throughout the last decades. It states, that without the proper understanding of legitimacy, one can neither understand the political organization nor society.

About a century ago, Max Weber presented a seminal concept of legitimacy which was the pure, but extreme, concept of popular sovereignty. His three ideal types of legitimacy account became classic. However, looking closely, we see that the rational, legal, bureaucratic legitimacy, are so detached that it cannot design a system that can correspond to a wide range of phenomena and to an amalgamation of many types of legitimacy. Furthermore, our own thoughts are so trained that we cannot think beyond the concept of the dichotomy of legitimacy and illegitimacy. However, in reality, there is a much more complex concept of legitimacy which indicates the degrees as well as the instruments of power.

In fact, the concept of legitimacy, although it can be born with a regime, is not intrinsically in the system; it constantly thrives in the system to maintain its legitimacy. Neither a system can be legitimate forever, nor can legitimacy be a decorated element of a regime or its officials.<sup>1268</sup> If power is the old stone building that stands for centuries, justification and legitimacy are not the painting on the building, which is applied after the building is completed, and leaves the building essentially unchanged. They are more like the cement that permeates the concrete and makes the building what it is.<sup>1269</sup> Furthermore, legitimacy can neither merely rely on the unanimous consent nor on the procedural assurance of power nor on the nature of

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<sup>1268</sup> Linz, "Legitimacy of democracy and the socioeconomic system". In M. Dogan, ed. *Comparing pluralist democracies*, (Boulder, CO: Westview Press, 1988), pp. 65–113.

<sup>1269</sup> See also Plato, *Republic*; Aristotle, *Politics*; Farabi, *The Virtues State*. (1962); Locke, *Two Treatises of Government*, (Cambridge: Cambridge University Press, 1988); Weber, *Economy and Society: an outline of Interpretive Sociology*. (California: University of California Press, 1978); Beetham, *The Legitimation of Power*, (Palgrave Macmillan, 1991); Merriam, *Political Power*, (New York: Collier Books, 1934); Strauss, *Natural Rights and History*, (Chicago: The University of Chicago Press, 1953). Sharp, *From Dictatorship to Democracy*, (Boston: The Albert Einstein Institution, 2010).

power; it cannot be merely conceived nor merely gained. In recognizing legitimacy, a long list of factors and principles must be in consideration; from a normative approach to the instruments of power; from the nature of power and its procedures to the character of office holders and officials; from dissident movements of folks in a completely empirical way, the frequency of violent acts in concrete forms or not in concrete forms, to the elements of popular support.<sup>1270</sup>

To be legitimate, somehow, is to implement the balance between the integrated concepts of power and rights. On one hand, it is the recognition of the political rights on both sides of the power spectrum- that is, the governors and the governed- and on the other it, is the exercise of such rights by both sides of the power spectrum to the extent of the rational normative principles based on the moral significance of rights. In this sense, the concept of legitimacy would be operational in a power relation if certain criteria are imposed, such as freedom of speech, freedom of association, freedom to demonstrate, degree of military intervention in the political sphere, truly democratic elections, freedom of religious institutions, judicial independence and open competition among the political parties. Furthermore, the concept of legitimacy would thrive in a system that assures legislative procedures and provides justice. The concept of legitimacy, as important as the other elements, would be immune if the system recognizes both the legitimate sovereign as well as the right of the sovereign to protect the system to the extent that the rational-normative principles and political consciousness would approve its authority.

### **2.1. Legitimacy from the Other Side of the Political Spectrum: Anti-Anachronistic Approach to The Governors**

As implied by the theory of political consciousness, a legitimate political power consists of mutual recognition. The deficit in the legitimacy of political power is not only due to the lack of consent, disaffection, or the negative political consciousness, or a long list of other elements that we have gone through, but also due to the lack of the moral significance of the rights by the authority for itself. This can be seen mostly in the pre-modern European democratic societies. After WWI, the democratic or semi-democratic regimes, which were around 14, were collapsed almost by themselves. They were weak and could easily be occupied. Before WWII, Europe was the cemetery of the collapsed democratic regimes.

Myriad essays were written on this concept which suggests two main interpretations of the causes involved in the de-legitimation of these democracies: First is the problem of the people in office, the officials; the second is the procedural principles, especially of the electorate. However, it can also be seen in the details that illegitimacy may have been caused by the excessive power of the parliament, which led to government fragility and institutional imbalance, or the polarization of the political system and the electorate, or the short-sightedness of the political class, or the lack of the social conditions necessary for democracy to work well, or the role of militias and active minorities, or the consequences of the financial catastrophe,

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<sup>1270</sup> See also Easton, *A systems analysis of political life*, (New York: Wiley, 1965).

or the electoral systems based on proportional representation, which lead to the fragmentation of the electorate.

More importantly, which is our concern here regarding the concept of legitimacy, is the failure of the power and also the failure of the officials to recognize their political rights.<sup>1271</sup> They lost their legitimacy as well as their immunity due to the loss of rational-normative principles in their system, in the notion of legality, and in their legislative procedural. Consequently, lack of legitimacy either causes the collapse of a regime into chaos or into the hand of an authoritarian/totalitarian power.

The last king of Iran, Mohammad Reza Shah Pahlavi, is one of the contemporary example of lack of recognition of the process of politicization and inevitable outcome as the political consciousness. In the post-World War II, Shah confronted the tensions that each new political system should face as well as the new dynamic of the Cold War inside Iran. He could overcome the problem of authoritarian/totalitarian power-control by balancing the competing pressure. Yet, from 1951 to 1953, the shah briefly lost that balance when Prime Minister of Iran, Mohammad Mossadeq ruled as de facto dictator from a position shored up by nationalizing the Anglo-Iranian oil company (AIOC).<sup>1272</sup> As Mossadeq step into the realm of authority, his support in the *Majlis* (Iranian Parliament) eroded. Thus, he relied on the street violence through demonstrations to keep his agenda moving forward. Ultimately Mossadeq dissolved the Majlis. By 1953, Shah left the country. However, he was able to return to Iran some months later, by August of 1953, when an army coup anti-Mossadeq won; Shah returned to his throne by help of army as well as U.S. central intelligence (CIA) and British Intelligence.<sup>1273</sup> One of the key obstacles to successful power-sharing, beside what we mentioned in section 1.3.3. part three of chapter one in this work, is any allies desire and opportunity to acquire more power at the expense of the ruler or the regime. Shah did not recognize the constraints of its authority, not only concerning the moral significance of the rights claimed by the people, but concerning the nature of his power. Both the people and the ruling coalition of the regimes insider, who are the claimant of power, threaten the dictators of Shah: the problem of authoritarian totalitarian power control/sharing. The ignorance of the process of politicization and the problem of authoritarian/totalitarian power control/sharing, these caused his being overthrown by the people and army together in 1979. This is still the main factor in the transitions of power and instability in South America, the Middle East, Africa, and Asia politics.<sup>1274</sup>

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<sup>1271</sup> See also Rothschild. Political legitimacy in contemporary Europe. *Political science quarterly*, (1977), 92 (3), 487–501.

<sup>1272</sup> Johnson and Kartchner, and Jeffrey Arthur Larsen. *Strategic Culture and Weapons of Mass Destruction: Culturally Based Insights into Comparative National Security Policymaking*. New York: Palgrave Macmillan, 2009.

<sup>1273</sup> Johnson, Jeannie L., Kerry M. Kartchner, and Jeffrey Arthur Larsen. *Strategic Culture and Weapons of Mass Destruction: Culturally Based Insights into Comparative National Security Policymaking*. New York: Palgrave Macmillan, 2009.

<sup>1274</sup> See Svobik, *The Politics of Authoritarian Rule*. (Cambridge: Cambridge University Press, 2012), Magaloni, *Voting for Autocracy: Hegemonic Party Survival and Its Demise in Mexico*. (New York: Cambridge University Press, 2006) on South America, Russia, and Africa. George, "Revolutions and Coups d'Etat in the Middle East: A Comparative Study", *Die Welt des Islams*, 10 (1/2) (1965): pp. 17-32, p.20.; Snyder, *Bloodlands: Europe between Hitler and Stalin*, (New York: Basic Books, 2010) on Middle East. Oh and Hassig, *North Korea through the Looking Glass*, Washington, DC: The Brookings Institution Press, 2000) on Asia.

Thus, looking at the history of the United States at the time of the Washington's administration, the history of Europe in the 19th and 20th-centuries, at the whole history of Middle East, we realize that we cannot put the pressure only on the people's consciousness; the legitimacy of power is also a project, it is a changing social phenomenon along with the nature of power, the power holders, and power relations. Legitimacy is some form of the characteristic of a power relation. It is the act of recognition of rights, the political consciousness, which must be considered in both aspects: it is the folk's consciousness or awareness of their rights as well as the officials'. Legitimacy is also a character which must be present in the procedural assurance of justice. We can see that this is also related to the nature of power. To this extent, the moral significance of rights is not only implied by the people but in most pragmatically way, it is implied by the regime and its legal system, which are both constrained and empowered by the same rational-normative principles. Going through every aspect of power relation and social interaction, we realize that the political consciousness is the omnipresence of a legitimate and democratic power relation.

## **2.2. Legitimacy and Confidence**

Too often, confusion arises between the legitimacy, confidence and the authority *qua* 'power over'. In democratic power relation, or a democratic regime, confidence placed in the power holders is considered to be legitimate partly because there are formal rules and regulations that match with the political consciousness of both the governors and the governed. Even the political and economic predicaments cannot challenge the legitimacy of the regime based on the confidence. This is mutual in the political spectrum of legitimate democratic regimes.<sup>1275</sup>

Whether or not a president or a chancellor of the legitimate democratic power relation is challenged by the specific methods and policies, the nature of such power relations remain the same. Thus, an important distinction must be made between the legitimacy of a regime and the confidence in particular institutions or office-holders. Here, confidence does not refer to the governed or the people, but to the power holders, the officials, the governors who have confidence in their authority, not only because of the recognition and consent of the people but also, and more importantly, because of the nature of their legitimate power, which is set forth by the rational-normative principles and moral significance of rights claimed by the governors. In this sense, we can see how the legitimacy and democracy match when the rights are not only bestowed by the people, but claimed by the people. Here, the relationship between the concept of 'power over', 'power to', and 'power of' cannot be anachronistic.

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<sup>1275</sup> Dogan, *Political mistrust and the discrediting of politicians*, (Leiden: Brill, 2005)

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## **Anhang 1**

### **Abstract of the Ph.D. dissertation under the title of “A THEORY OF POLITICAL POWER AND RIGHTS: A SECRET EXCHANGE FOR LEGITIMACY”**

#### **Abstract**

As of today, debates over political power are divided between theorists who see empowerment as a shrewd ruse of power, leading to domination (Nietzsche, Foucault 1983) and theorists who consider empowerment as the key to overcoming domination in more or less sophisticated forms (Kant 1781, Lukes 1974). This opposition dictates that power in our understanding of modern society is a domain of apparent antinomies (Gallie 1956; Dean 2012; Forst 2013a). However, it seems that the deeper study of modern society shows that both positions have some truth to it. The main question of this work is “What is legitimate political power?”

In my Ph.D. dissertation, I have investigated the concepts of political power and rights. I tried to transcend the notion of political power and distinguished it from mere exercise, domination, or subject dispositions. I aimed to criticize authoritarian and totalitarian regimes – monarchies and polyarchies -, their instruments of power: Natural Law, the miranda, and credenda of power (Merriam 1934) and their legal order.

I elaborated on the legitimacy of power and principle of democratization to show that it is the right of people to question political power and its instruments to the extent that such critique helps to reach a political equilibrium –in procedural and effectual consequence- in which there is mutual recognition of the right and the authority between those who govern and those who are governed. More importantly, I investigated in the nature of power. This mean, how power restricted itself or empowered itself and with which instruments. This is one of the main theories proposed in my investigation which I called “political consciousness”. I will argue that “a consciousness on the government's part that it has a right to govern and with some recognition of that right by the governed” (Ibid) would be one of the essential characters of a legitimate power.

The result of this research is to show that the theory of ‘political consciousness is one of the important social-political empowerment’ and cornerstone of a legitimate power. It is also to show that political power is an ‘essentially integrated concepts of ‘power’ and ‘right’: it comprises the concept of political ‘power’ - qua authority - and political ‘rights. In this sense, the obligation and empowerment are two sides of political power: it gives the right of justification to an authority –power over- and give the right of political participation to the people- power to/of.

Furthermore, the result of this research shows that power is a Janus-Faced. The combination of ‘power as domination’ and ‘power as right’ would be determining aspect to assess whether to see power as the reason for domination or power as the reason for empowerment. In any case, this work shows how a power can be legitimate or illegitimate.

**Key Words:**

Political Power; Legitimacy; Democracy; Political Rights; Political Consciousness

### **Kurzfassungen (Deutsch)**

Bis heute sind die Debatten über die politische Macht zwischen Theoretikern gespalten, die Ermächtigung als geschicktes Machtmissbrauch, das zur Herrschaft führt (Nietzsche, Foucault 1983) sehen, und Theoretikern, die Ermächtigung als Schlüssel zur Überwindung von Herrschaft in mehr oder weniger entwickelten Formen betrachten (Kant 1781, Lukes 1974). Diese Opposition schreibt vor, dass Macht im Verständnis der modernen Gesellschaft eine Domäne scheinbarer Antinomien ist (Gallie 1956; Dean 2012; Forst 2013a). Jedoch zeigt eine vertiefte Studie der modernen Gesellschaft, dass es in beiden Ansichten eine gewisse Wahrheit gibt. Die Hauptfrage dieser Arbeit ist "Was ist legitime politische Macht?"

Ich habe in meiner Doktorarbeit das Konzept der politischen Macht und das Konzept der politischen Rechte untersucht. Ich habe versucht, den Begriff der politischen Macht zu transzendieren und ihn von bloßer Ausübung, Dominanz und Subjektdisposition zu unterscheiden. Ich zielte darauf ab, autoritäre und totalitäre Regime - Monarchien und Polyarchies -, ihre Machtmittel: Naturgesetz, „The Miranda and the Credenda of power“ (Merriam 1934) und ihre Rechtsordnung zu kritisieren.

Ich habe die Legitimität der Macht und das Prinzip der Demokratisierung herausgearbeitet, um zu zeigen, dass es das Recht der Menschen ist, die politische Macht und ihre Instrumente in dem Maße in Frage zu stellen, in dem diese Kritik zu einem politischen Gleichgewicht in prozeduraler und wirksamer Konsequenz führt. In diesem Gleichgewicht der politischen Verhältnisse wird die gegenseitige Anerkennung des Rechts und der Macht zwischen denen bestehen, die regieren, und denen, die regiert werden. Was noch wichtiger ist, ist die Untersuchung der Natur der Macht. Das bedeutet, wie und mit welchen Instrumenten sich die Macht selbst einschränkte oder selbst befähigte. Dies ist eine der Haupttheorien, die ich in dieser Arbeit vorschlage und welche ich "politisches Bewusstsein" nenne. Ich werde argumentieren, dass das Bewusstsein der Regierung über Ihr Recht zu regieren und die Anerkennung dieses Rechts seitens der Regierten einige der wesentlichen Charaktermerkmale der legitimierten Macht sind.

Das Ziel dieser Forschung ist es zu zeigen, dass die Theorie des "politischen Bewusstseins eine der wichtigsten sozialpolitischen Befähigungen" und Eckpfeiler einer legitimen Macht ist. Es soll auch gezeigt werden, dass politische Macht ein "im Wesentlichen integriertes Konzept von" Macht "und" Recht "ist: sie umfasst das Konzept der politischen" Macht "- qua Autorität - und der politischen" Rechte. In diesem Sinne sind die Verpflichtung und die Ermächtigung als zwei Gesichter der politischen Macht zu betrachten: Sie geben einer Machtbefugnis das Recht der Rechtfertigung und verleihen dem Volk das Recht zur politischen Teilnahme.

Darüber hinaus zeigt das Ergebnis dieser Untersuchung, dass Macht eine „Janus-Faced“ oder ein Doppel-Gesicht ist. Die Kombination von "Macht als Herrschaft" und "Macht als Recht" wäre ein entscheidender Aspekt, um zu beurteilen, ob die Macht der Grund für eine Herrschaft oder der Grund für eine Ermächtigung ist. In jedem Fall zeigt diese Arbeit, wie eine Macht legitimiert und wie sie nicht legitimiert sein kann.

## **Anhang 2**

**Erklärung zu meiner Dissertation mit dem Titel:**

**„A THEORY OF POLITICAL POWER AND RIGHTS: A SECRET EXCHANGE FOR  
LEGITIMACY“**

Sehr geehrte Damen und Herren,

hiermit erkläre ich, dass ich die beigefügte Dissertation selbstständig verfasst und keine anderen als die angegebenen Hilfsmittel genutzt habe. Alle wörtlich oder inhaltlich übernommenen Stellen habe ich als solche gekennzeichnet.

Ich versichere außerdem, dass ich die beigefügte Dissertation nur in diesem und keinem anderen Promotionsverfahren eingereicht habe und, dass diesem Promotionsverfahren keine endgültig gescheiterten Promotionsverfahren vorausgegangen sind.

\_\_\_\_\_  
Berlin, den 28. Februar 2018

Ort, Datum

\_\_\_\_\_  
Unterschrift

### Anhang 3

#### Veröffentlichungen Liste

The context of some parts of the dissertation under the title of “A THEORY OF POLITICAL POWER AND RIGHTS: A SECRET EXCHANGE FOR LEGITIMACY” have similarity of the context of papers which I published in the following academic journals:

Theory of Negative Political Consciousness: The Case of Reliance on the Credenda and the Medieval Justification of Political Power, *Journal of Scientific Research*, 10.4236/jss.2017.59015.

What is Political Power? (Theory of Political Consciousness and Integrated Concept of Power), *Arts and Social Sciences Journal*, (2017). DOI: 10.4172/2151-6200.1000268.

Legitimacy and Theory of Political Consciousness: Evaluating Political Act of Aggression. *The Journal of Political Sciences & Public Affairs*. Volume 4:1. doi:10.4172/2332-0761.1000191

The Tradition of Rhetoric and Democracy: Isocrates’ Role in Ancient Greek Political Idea. Start Point of Western Political Philosophy. *Studia Humana*. Volume 4:1.

Hereby, I declare that I have written the attached dissertation and the above published paper on my own and have used no other than the specified aids. I have designated all literally or substantively accepted passages as such.

Mehdi Shokri

\_\_\_\_\_  
Berlin, den 28. Februar 2018

Ort, Datum

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Unterschrift