Order Ordealed: Norms and Social Coherence in the Age of Law

Sverre Raffnsøe

Si l'on peut parler d'homme normal [...]
c'est parce qu'il existe des hommes normatifs,
pour qui il est normal de faire craquer les normes
et d'en instituer de nouvelles.
Canguilhem: Le normal et le pathologiquer

The Current Quest for Social Coherence

When and how is cohabitation sufficiently structured to become society? When is human intercourse shaped to such an extent that we may with justification say that the participants adhere to a coherent form of life? How is social coherence established? These are questions, which seem to impose themselves with particular urgency at the moment, pointing to the fact that society, and the very nature of society, is experienced as problematic.

Once we possessed, so the story goes, the objects of our quest without even having to search for them. Once unity was a matter of course, the unquestioned and inescapable background for individual actions; but as the traditional background of social coherence was questioned it dissolved, and disparity and diversity replaced social unity.[212] How to replace this original unity we do not know. We seemed to know the answers; but now that the questions have been raised we seem to have forgotten, we seem lost and cannot find our way. This is why we have to keep asking these questions, hoping to receive an answer.

This piece of romantico-nostalgic narrative is suggested and supported by the way we commonly tend to define and analyze social coherence. The sociologist immediately furnishes us with an obvious proposal: Social coherence is established when people subscribe to common norms, when certain common standards guide the intercourse along certain lines. The philosopher who considers philosophy to be essentially a therapeutic activity advances a related suggestion, at least implicitly. Confusion is dissolved, disputes are settled, and agreement brought about through

212 This story is told by both (neo) romanticists and postmodernists, by MacIntyre, Harold Bloom and Lyotard.

recollection of fundamental guided patterns of behavior.[213] Individual activity is embedded, it is claimed, in forms of life understood as existing rule-guided patterns of behavior. In both cases social coherence is conceptualized in terms of conformity and concurrence. The conception helps to clarify why the problems of social coherence present themselves urgently today, for we seem unable to state the existing and unquestionable standards, which constitute the basis of our intercourse; our society seems to be lacking an articulate and substantial *Grundnorm.*

This account of social coherence, however, contains a rather simple picture of the normative - of the guidelines, which direct our action and interaction. The picture does not account for or explain the fact that in order to be binding, norms have to be established; it simply takes the existence of norms for granted, presupposes that the normative is already there. The existence of norms is considered as constitutive for social coherence, and questions related to the constitution of norms and the normative are bracketed out. Similarly, the question of recognition and exercise of norms is analyzed in rather simple terms of acceptability and application. The existent norms are either recognized and "internalized" by individuals, or, in the last instance simply rejected; and norms are exercised as they are applied to specific situations. The picture interprets norms as existent imperative, "mailed" directives, which must be received or rejected, and either implemented or shown to be inapplicable. To put it bluntly: The picture confounds norms and the normative with the normal, or normality, and conceives of the normal as something which does not presuppose acts of normation per se, as an always already existent being, upheld and confirmed by its own inertia.

If one notes, however, that norms have to be asserted and accepted, and have to be (re) affirmed continually in these ways in order to "be"[214], if the normal appears to rest upon the existence of norms which in turn depends upon the fact that "normation" takes place[215], then it seems imperative to conceive of norms in a different way. Despite the etymology[216] we should stop picturing norms as concrete existing guide-lines or gauges and begin to consider the possibility that at the

213 The conception of philosophy as an activity that restores the sanity of a diseased civitas through an *Eingedenken* of fundamental practices guides *Sein und Zeit* and *Tractatus.* In the first part of *Philosophische Untersuchungen* Wittgenstein still conceives of forms of life as coherent existing standards of behaviour - Kripke states the implications of this view in *Wittgenstein on Rules and Private Language* -, although Wittgenstein seems to dissociate himself from this conception in part II.

214 "Objektivität des Sollens ist ... ein unentbehrliches Requisit der Erwartungsintegration im einzelnen Subjekt, ein notwendiges Darstellungselement der Norm - aber sie hat als solches zunächst nur subjektiven postulatorischen Charakter. Wieweit ihre Institutionalisierung gelingt, ist eine andere Frage" (Luhmann: "Normen in soziologischer Perspektive", p. 33).

215 "Par *normatif,* on entend en philosophie tout jugement qui apprécie ou qualifie un fait relativement à une norme, mais ce mode de jugement est au fond subordonné à celui qui institue des normes. Au sens plein du mot, normatif est ce qui institue des normes." (Canguilhem: *Le normal et le pathologique,* p. 77).

216 "Der einzige bekannt gebliebene Architekturtheoretiker der Antike, VITRUV verwendet 'Norma' terminologisch für das bei der baulichen Konstruktion rechter Winkel verwendete Werkzeug des Winkelmaˆ ßes. [...] Ferner heißt in der Antike auch die zur Errichtung gerader Bauwerke gezogene Richtschnur 'norma'; hier gehört sie zusammen mit libella (Setztwage) und perpendiculum (Senkblei) zum Werkzeug des Baumeisters." *(Historisches Wörterbuch der Philosophie).*

constitutive level norms do not exist at all[217]; that the normative does not constitute a parallel realm or "reality"[218], but is somewhat less palpable.

The received picture of the normative has misled our understanding of social coherence and, consequently, given rise to a misdirected and necessarily unfulfilled quest for social coherence. Social adherence is not necessarily reducible to conformity with a common denominator, and coherence is not, and was never, just a matter of conventionality.[219] If we conceptualize it in this way, however, we overlook other ways in which society coheres. We may tend to regard other ways of conceptualizing social coherence as signs of decadence and social dissolution; and we may overlook the fact that even if society seeks to state its own coherence in terms of explicit common norms or values, it may still cohere in other ways, too. While the former seems to be the case today, the latter seemed to be the case in our earlier history.

In order to shed light both on the received picture of social coherence and the normative, and on the historical narrative associated with the picture I shall go back in Western history to the establishment of a coherent society in the period I shall call the Age of Law. When the modern Western territorial states were established and replaced the Holy Roman Empire, societies were created which were united by general and unrestricted legislation. It seems that the current received picture conceives of social coherence and normativity within the terms established then, since it too defines social coherence as adherence to common norms understood as generally binding rules or laws. Because the contemporary adherents of the received picture adopt the vocabulary of the absolutist territorial states unconsciously, however, they tend to forget that society established on this basis and the corresponding vocabulary were particular and limited historical constructs. They overlook the fact that social coherence on the basis of law was established by an effort and that it had to be repeatedly re-established and maintained by a performative core expressing itself in terms of general legislation, that is the sovereign and its administration. Doing this and thus forgetting the genesis and the limitations of their own vocabulary the protagonists of the received picture re-naturalize it and tend to think they can only establish that coherence through adherence to general rules or law. Thus, they seem unable to grasp other ways in which society may cohere which have been developed since the establishment of the modern territorial states.

217 "En toute rigueur, une norme n'existe pas, elle joue son rôle qui est de dévaloriser l'existence pour en permettre la correction" (Canguilhem: *Le normal et le pathologique,* p. 41). Cf. also p. 86.

218 "Obwohl kontrafaktisch ausgerichtet, ist der Sinn des Sollens nicht weniger faktisch als der Sinn des Seins. Faktisch ist alles Erwarten, seine Erfüllung ebenso wie seine Nichterfüllung. Das Faktische umfaßt das Normative. Die übliche Entgegensetzung von Faktischem und Normativem sollte deshalb aufgegeben werden. Sie ist eine begriffliche Fehlkonstruktion, so als ob man Menschen und Frauen einander entgegensetzen wollte - ein Begriffsmanöver, das in diesem Falle zum Nachteil der Frauen, in jenem zum Nachteil des Sollens ausschlägt. Seinen adäkvaten Gegensatz hat das Normative nicht im Faktischen, sondern im Kognitiven. Nur zwischen diesen beiden Einstellungen zur Enttäuschungsverarbeitung, nicht zwischen faktisch und normativ, kann man sinnvoll wählen." (Luhmann: *Rechtssoziologie,* pp. 43-44).

219 It is almost needless to underline that this affects the way in which we understand tradition, or social coherence across time. The possibility of an unbroken tradition rests on explicit or implicit, continuous and repeated recognition.

In this paper I shall first illumine the genesis of the Age of Law, the period that is in which social coherence was established, represented, and criticized almost exclusively in terms of law; and when trying to do so I analyse the notion of law. Second, I shall discuss the notion of law in Hobbes in order to represent the central role of this notion at the beginning of the Age of Law. Third, I shall make it clear how Kant prefigures the closure of the Age of Law within the terms of its own vocabulary. Towards the end of my paper I suggest that society has begun to cohere in other ways since the closure of the Age of Law. The development forces us to reconsider our vocabulary and to conceive of social coherence and normativity in ways different from those employed hitherto.

Reconstituting Society as a Legal Order

If one cares to look closely at History, one discovers that social concord never seemed to be a matter of course in early Western history, as the received picture would have it. From the sagas, the Homeric epos, and Greek and Roman historiographers to De vulgari eloquentia, le Roman de la Rose, Decameron and Il Principe, canonical texts in the European tradition assert the witnessing of an actual decline in social order and propose ways in which to deal with a threatening dissolution of society. They are supported by other historical evidence testifying to the view that Western history from its early stages to the Middle Ages and Renaissance, is one long story of internal conflicts and contests between participants trying to cope with this state of dissolution. It is warranted to characterize rivalry between groups and personalities as *the* fundamental problem of early European history[220]. So social agreement never seemed to be present to a sufficient degree in early European history; individuals always felt lost in the bewildering Dantesque forest in the sense that social coherence could never rest assuredly on pure down-handed convention, but had to rely on social agreement they always hoped to (re)construct and (re)establish actively.

If social concord always overtly depended on a will to transcend the pure existing practice and an attempt to prescribe others that which was right[221], why does it today seem to us that they knew their way in former times? Because the questions we still struggle to answer were already raised, but they seemed to know how to shape the answers. The opposed rivaling groups all took an overtly and active normative stand as they framed their attempts to overcome the present dissolution in terms of law. They presented the activity through which they tried to transcend the present unjust state of things as acts of legislation commanding the establishment of an alleged just order, of the right distribution; and likewise their actions were generally understood and even opposed as attempts to legislate.

The notion of law was of primordial significance in early European history since it served as the common form of symbolic expression, the mould into which people would cast their expectations and claims in order to assert their normative character.

220 Cf. Luhmann: *Gesellschaftsstruktur und Semantik. Band 3* (p. 67).

221 One might say that social agreement contained an overt moral aspect, in the later modern Kantian sense.

Law was able to fulfil the function of creating and maintaining unanimity, precisely because it was not considered to be a mere human utterance. Human life as such was considered to rest upon a lawful order which humans had to adjust to, and human legislation was understood and criticized as attempts to give expression to these laws. Every human legislative act was an attempt to voice laws which were the foundations of human intercourse, of society, and of the universe.

In short, the notion of law was able to play a central and constituting role in voicing people's indispensable normative attitudes because it was considered the notion which expressed the fundamental nature of things. The law was a notion describing the constitution of the world in which we live, since it was thought to express itself in law-like terms, to emit prohibitions not to be transgressed and commands to be followed; and it was a notion describing the very constitution of society, the inevitable basis on which human intercourse had to rest. Human legislation alleged to be engaging to the extent it represented fundamental laws. The idea that law is the foundation of society, that basically and ideally society is a legal order, is expressed in the myths of the great founding legislators, of Dracon, Solon Kleisthenes, and of Moses. But the law was even foundational to the extent that every action was basically understood as an attempt to legislate. The normative implications of every action were unfolded and rationalized as attempts to (re) found and (re) install the right order.

Originally, law was considered to be embedded within a cosmo-theological framework; law was an important notion because law was the form in which a general teleological order made its appearance. The universe in which we live appeared as unconditional prohibitions and commands, stating the inevitable conditions of human life and action. In the course of history, however, the realization that law is primarily a human and social phenomenon dawned. A heightened awareness in late Roman jurisprudence that law not only *constitutes* the respublica, but that the latter also *constitutes* the former was a first rudimentary sign, pointing towards this possibility.[222] However, the development is really inaugurated in the late Middle Ages when Roman Law was resuscitated and refunctionalized in order to create a ius publicum which increasingly reintegrated the ius commune within the public law.[223] As public law became the common law, the "traditional" and disparate local common law, claiming to state what was already binding, was to an increasing extent replaced by a new coherent and centralized corpus of laws; the power to give laws was centralized and the possibilities of a renewal increased.[224]

The transition was accomplished with the introduction of absolute monarchy. Endless internal rivalry amongst the different layers in a stratified society which regarded itself as part of a teleological universe came to an end when a central power was established within different territorial states, a power claiming to be

222 We may consider it a significant fact that Roman myths tell us that the original divine law was lost when Rome was founded.

223 Confer Wyduckel: *Ius publicum. Grundlagen und Entwicklung des Öffentlichen Rechts und der deutschen Staatsrechtswissenschaft.*

224 In the very period when a separate ius publicum is created and the power to give law is centralized, a rudimentary notion of the state is developed - not without connections!

superior to any other power, defying all competition. Attempts to formulate a particular rationale of state in the 16th century provided the theoretical basis for the introduction of absolute monarchy, and a decisive turning point was reached when the last aristocratic insurrection (La Fronde) was suppressed in France between 1648 and 1650, at a time when France became the leading European power.[225]

It is important to note that this new kind of centralized power still presented itself in terms of law. The principles of absolute monarchy were expressed in the terse formula voiced by the Court chaplain of Louis IV, Jacques Bossouet: "Un roi, une foi, une loi". The importance of the law was likewise underlined by the fact that less than 6 months after the official proclamation of absolute monarchy in 1660 the Danish King Christian V initiated the formulation of the first legal code valid for the state of Denmark which was to replace the different provincial laws.

Detached from the teleological context in which it had been embedded the law stood forth in what appeared to be its purified form. When we behave as legislators we take a certain attitude towards the world. If events do not fulfill our expectations we may adopt learning or a "cognitive" attitude and try to modify them; but at other times we may adopt a different attitude in order to maintain our original expectations, in spite of the evidence that confutes them. Even though we recognize the disappointment and may expect future disappointments to come, we may still say to ourselves: "This simply cannot be true!" or "We won't allow this to happen!". In these cases we maintain a normative attitude, not a cognitive one.

When we behaved as legislators we took a resolute normative stand at the outset; we sought to avoid disappointments by demonstrating that we should not tolerate contradiction that our expectations were to be fulfilled. The law was a symbolic expression of a normative attitude, which gave voice to a resolute will to uphold the anticipations it expressed and in this way sought to avoid disappointments.[226]

Normative claims can be upheld symbolically in different ways, though. When determined normative expectations were voiced symbolically in terms of law, they were expressed as commands, as simple statements telling people straightforwardly that they were to do something. These imperatives or orders were to be obeyed, simply because they were emitted by someone in the position to do so rightly.[227] Law was perceived as a certain kind of command.

225 Confer Le Roy Ladurie: *L'ancien régime,* pp. 83-115.

226 The normativity we advocate does not necessarily have to be supported by sanction. As Nietzsche puts it, a really sovereign legislator may tolerate that laws are transgressed and continue as if nothing has happened, as if unaffected by the incident. If the transgression is symbolically neutralized with complete naturalness we may go on as if nothing really happened, without noting or classifying the incident as a simple error.

227 The emitter claimed to be "in the right position" to uphold his norms as mandatory, partly in so far as he declared himself to be willing to sanction and capable of sanctioning eventual transgression; the king was the *sword* of the Law because he was able to assert it by inflicting harm and exerting coercion. But in a more important sense the emitter upheld his claims as mandatory by claiming to occupy a pre-eminent position in society, which permitted him exactly to do so. Like the general of an army he claimed to occupy a warranted position of authority in society, and that this position gave him the right to sanction. But this position he upheld in his capacity of the giver of just laws, and in this sense, too, the king claimed to be the sword of the law. Later attempts to analyze law in terms of simple coercion (Austin) or to define law as a simple expression that a transgressor is to be sanctioned by others (Kelsen and Alf Ross) fail to

Furthermore the commands were not understood as commands limited in scope to the time and situation in which they were emitted and only regarding the persons to whom they were emitted, which would have restricted them to the co- and context of their emission. Laws were regarded as standing orders, as obligations not to be changed - at least until further notice - by those in the position to do so. Laws appeared to be orders which applied to a general class of persons, regardless of rank or fortune, and to a general class of situations prescribing a general type of conduct. Whether the imperatives dictated certain forms of action or their omission, they stipulated that which was forbidden and was allowed and excluded third possibilities. Law was intended to establish an exhaustive, clear-cut binary division of the world, as every kind of activity is either classified as transgression of the orders or the prohibitions of the law, or as lawful action which takes place within the limits prescribed by the law.[228] Laws in this new "purified" sense were sought integrated into a coherent code of laws; this was the beginning of the establishing of a "Rechtsdogmatik". Law was regarded as a coherent set of orders binding as general rules, to be accepted, applied, and carried out without delay as they stood because they were issued by those justified to do so.

Law in this "purified" formal sense had an even more central role to play than the notion of legislation voicing a teleological order. When monarchs succeeded in establishing themselves as absolute rulers, definitively superior to the rest of society, they did so by presenting themselves as guardians of the law; they legitimized and understood themselves as agents in order to avoid the dissolution of a fragile legal order. This is not to say that absolute monarchy was not criticized, but contemporary aristocratic or bourgeois opponents still understood themselves as criticizing absolutism in order to advocate another legal order.[229] The importance of the law did not diminish with the end of monarchy; on the contrary, when the French revolution tried to bring about a totally new basis for society, it immediately took the turn of constitutions voiced in terms of law.[230] That form of government which was later to become the common system of government, indirect or representative democracy, was from its very origin framed as a legal constitution, and in many respects we still conceive of society as an essentially legally constituted order.[231]

account for the claim that law gives expression to just authority, whatever this claim may amount to. H.L.A. Harth points this out pp. 18-21 in *The Concept of Law*.

228 In his lecture at the *Collège de France* January 11 1978 Foucault sees the distinctive mark of the "legal code" in the "partage binaire entre le permis et le defendu". This analysis is only pertinent when describing the denotation of the notion of law, the universe it establishes. With regard to the performative level laws may command to refrain from certain activities and to perform certain tasks; it is not only prohibitive.

229 This is evident in the religious insurrections of the 16th century and in the English revolution in the 17th century.

230 In 1789 the National Assembly immediately was declared a legislative assembly, which meant that its decisions were to be regarded as laws, and worked out the Déclaration des droits de l'homme; legal constitutions were ratified in 1795, 1795, 1799, and 1802. When in 1804 The Code Civil was created, a unified corps of laws revoked all legislation hitherto.

231 Cf. my paper "Reorganizing Society", forthcoming in *Archiv für Rechts- und Sozialphilosophie, No 59.*

Not only does the practical construction of social reality show us to what extent law appeared as the "backbone" of society, as Hobbes put it; the precise role and function that the notion of law played is reflected in social theory and philosophy. The question: "How do we constitute a just and enduring society?" is a problem of the utmost importance to social philosophers like Hobbes, Locke, Rousseau, Bentham, and John Austin, different as they may be.[232] The central role of the notion of law is stated with particular clarity in Hobbes.

Law as the Foundation of Society in Hobbes' *Community as an Artefact*

Defending absolute rule in *Leviathan,* Hobbes advocated the interests of a rudimentary state-like organization, and of a public sphere which began to be separated from and opposed to the rest of society[233], and in this way continued the literature of the reason of state and Bodins *Les six livres de la République.* But being a book about the "Common-Wealth" *Leviathan* also devoted itself to the much older question as to how the common good or the common health is brought about. In the introduction "Common-Wealth" is characterized as "artificial". The common good was not any more, as in the Aristotelian view, considered to be a natural preexistent, but maybe forgotten distribution, which had to be re-actualized, and which could only be realized within a community which had begun to appear as a human artifice. When community did not seem to be a natural presupposition any more, but on the contrary began to appear a human construct, the problem of social concord had to be treated as constitutional problem in a more radical sense than hitherto. There was no question of acknowledging forgotten fundamental conditions; community had to be constituted by an act of will that broke with forces threatening to dissolute it and which sustained itself in spite of its surroundings. A new kind of power in society trying to vindicate itself as the one and only public power despite the traditional forces in society, obviously tried to create such a non-pre-established social concord, but, more importantly, this power had to assert itself as creating a just order. Community was not pre-established, but established through the very act, which created it ex nihilo.[234] This act consisted in an issuing of enduring orders erecting a

232 Even at the beginning of our century Kelsen analyses the notion of the State as a hierarchical legal order. Cf. Kelsen: *Das Problem der Souveränität und die Theorie des Völkerrechts.*

233 In the 14th and 15th century "status" was still currently used denoting the common or general "state" of a total social corpus, but still more often it began to refer to a specific part of society which takes care of the state of society in general, which saw to it that the social corpus as a whole is well. You might say that a state within the state is beginning to occur! Likewise a distinction between a public and a private sphere began to appear, which was later to be crucial.

234 "Bereits die entschiedene monarkische Wendung der politischen Theorie, die sich aus Anlaß der Konzilbewegung im 15. Jahrhundert am Falle des Papsttums durchgesetzt hatte, dann aber von weltlichen Herrschern übernommen wurde, hatte zu eigentümlichen Auffassungen über den 'Ursprung', und damit die Legitimität der politischen Gewalt geführt, die nicht auf die Eigentumsordnung übertragen werden konnten. Das politische 'Imperium' wurde seitdem hierarchisch (und nicht mehr aus Begriffen wie universitas oder communitas) begründet. Hierarchie war nun nicht mehr einfach eine *Differenzierung nach Graden*, sondern zugleich eine *Ordnung von Weisungsbefugnissen.* [...] *Nicht die Gesellschaft begründet*

fundamental distinction between the forbidden and the permitted; it was the act of legislation.

The Rule of Law

To Hobbes the "skill of making and maintaining Common-wealths, consisted in certain Rules, as doth Arithmetique and Geometry; not (as Tennis-play) on Practice only" (*Leviathan*, p. 261). Law is exactly such a "Precept" or "Rule" (*Leviathan,* p. 189), that bind "to do or to forbeare" (*Leviathan* p. 189). The use of these "Laws (which are but Rules Authorised) is not to bind the people from voluntary actions; but to direct and keep them in such a motion, as not to hurt themselves by their own impetuous desires, rashnesse and indescretion, as Hedges are set, not to stop Travellers, but to keep them in the way" (*Leviathan,* p. 388).[235] The rules of Law are repeatedly described as "not Counsel, but Command" (p. 312) or simply as "Command" (p. 317).

Law was regarded as fundamental to the extent that it was considered the basis for the distinction between justice and injustice, not the inverse as was earlier the case: "CIVIL LAW, Is to every Subject, those *Rules* which the Common-wealth hath *Commanded* him [...] to make use of, for the *Distinction of Right, and Wrong*; that is to say, of what is contrary, and what is not contrary to the rules" (*Leviathan,* p. 312, italics are mine). The difference between justice and injustice appeared as a social distinction, which was established with the institution of Common-wealth and its fundamental rules, laws, and which was only valid within a coherent society. Injustice was not any more understood as a transgression of a cosmic order, but of the laws that constitute society. This is why Hobbes may assert as evident "that Lawes are the Rules of Just, and Unjust; nothing being reputed Unjust, that is not contrary to some Law" (*Leviathan,* p. 312).[236] Laws were fundamental to society and the social notion of justice even to the extent that "no Law can be unjust" (p. 388).[237]

die Hierarchie, sondern erst die Hierarchie begründet eine Gesellschaft, so hieß es. Dann hieß es aber konsequent, daß Ursprung und Grund der politischen Gewalt in der Spitze der Hierarchie zu suchen seien, die die Ordnung in sich enthält (continet) und aus sich entfaltet (explicat)." Luhmann: *Gesellschaftsstruktur und Semantik III,* pp. 12-13 (my italics).

235 Cf. also p. 315: "And Law was brought into the world for nothing else, [...] but to limit the natural liberty of particular men, in such manner, as they might not hurt, but assist one another, and join together against a common Enemy."

236 Cf. also "Justice, and Injustice are none of the Faculties neither of the Body, nor Mind. [...] They are Qualities, that relate to men in Society, not in Solitude" (*Leviathan,* p. 188).

237 Expressed and maintained through legislation the positive social order began to appear so fundamental that it seemed more important than even truth and moral truth: "The Interpretation of the Lawes of Nature, in a Common-wealth, dependeth not on the books of Morall Philosophy. The Authority of writers, without the Authority of the Common-wealth, maketh not their opinions Law, be they never so true. That which I have written in this treatise, concerning the Morall Vertues, and of their necessity, [...] is not therefore presently Law; but because in all Common-wealths in the world, it is part of the Civil Law" (*Leviathan* pp. 322-21).

The Theory of Sovereignty

However, if community was only established in the very moment of command, if order was only created through orders, an author of these orders was presupposed. As the peak of society and leadership appeared to be the origin and source of society, it seemed necessary to presuppose a determinate will issuing lasting order.[238] This will was termed the sovereign. The notion of sovereignty was the idea of an instigator of society, which was unlimited by community as it created society through the very commands it issued, and which only limited itself as it commanded society. The sovereign was a self-asserting and self-contained last legal competence or authority, to which no external limits were set, which could only limit itself in the very process of exercising itself.[239]

> The Legislator, is he that maketh the Law. And the Commonwealth only, praescribeth and commandeth the observation of those rules, which we call Law: Therefore the Commonwealth is no Person, nor has capacity to doe any thing, but by the Representative, (that is the Soveraign;) and therefore the Soveraign is the sole Legislator. For the same reason, none can abrogate a Law made, but the Soveraign; because a Law is not abrogated, but by another Law (*Leviathan,* p. 313).

That the sovereign was considered the owner and representative of the legal rules, which constitute society, did not imply that he might command at his own convenience or arbitrarily; it only meant that his actions were not legally bound. To Hobbes it seemed obvious that "they that have Sovereign power may commit Iniquity; but not Injustice, or Injury in the proper signification" (*Leviathan,* p. 232); and to this notion of equity "a Sovereign is as much subject, as any of the meanest of his people" (*Leviathan,* p. 385). Characteristically, these guidelines to the exertion of power and to legislation had to be figured in terms of laws, too, only of a higher order: as laws of nature. It seemed plain, however, that external limitations to the exertion of power could only appear as dictates and obligations from within a community constituted in legal terms; viewed outside society they seemed mere dispositions or propensities.

> For the Lawes of Nature, which consist in Equity, Justice, Gratitude, and other morall Vertues on these depending, in the condition of meer Nature [...] are

238 "Command consisteth in declaration, or manifestation of the will of him that commandeth." (*Leviathan,* p. 317).

239 In Hobbes the relationship between actors and actions in general was to be understood in terms of ownership: "For that which speaking of goods and possessions, is called an *Owner,* speaking of Actions, is called the AUTHOR" (*Leviathan,* p. 218). And likewise, the actions and commands of the sovereign conferring power and authority were analysed in terms of ownership. The sovereign is capable of distributing power and authority freely, and to take back the gifts if he wishes to do so, because, ultimately, power and authority are his possessions. When the paradoxical notion of sovereignty became central for the understanding of society, the problem of how to restrict an unrestrictable last competence replaced the problem of rivalry.

> not properly Lawes, but qualities that dispose men to peace, and to obedience. When a Common-wealth is once settled, then are they actually Lawes, and not before; as being then the commands of the Common-wealth; and therefore also Civill Lawes. (*Leviathan,* p. 314).

The sovereign was not at the outset a specific person, but rather a position or role within an established structure.[240] Hobbes conceived of this legal structure as constituted in his well-known state of nature by "Covenant of every man with every man" (*Leviathan,* p. 227) wherein men gave up the right to follow their natural propensities and interests.[241] But, properly speaking, the covenant, which constituted mans natural dispositions as rights in order to abolish them, was the original command which made all other legal orders possible: "the *Pacts* and *Covenants,* by which the parts of this Body Politique were at first made, set together, and unitied, resemble that *Fiat* [...] pronounced by God in the Creation (*Leviathan,* p. 82). And because compliance with any covenant, or contract to be fulfilled later (cf. *Leviathan,* p. 193), could only be assured by an established common power, the founding social contract could only be validated and binding from within the legal order established through the initiating command.[242] The theory of sovereignty attempted to show how a power could establish itself as a legitimate power by constituting itself as the fundamental law, which allowed all the different laws to function and in this way permitted society to exist. The aim of the theory of sovereignty was to establish the law to found all laws.

Peace and War

The result of the institution of commonwealth was the establishment of peace. People instigated a commonwealth ruled by one sovereign "person" "*to the end he may use the strength and means of them all, as he shall think expedient for their Peace and common Defence*" (*Leviathan,* p. 228), since it was "the first, and Fundamental Law of Nature" "to seek Peace, and follow it" (p. 190). Peace is a fundamental notion in *Leviathan.* It appears as the fundamental law of nature on which the validity of all other natural laws depends[243], and as the end which instigates community and which must be respected as the fundamental law in order

240 "The legislator in all Common-wealths, is only the Soveraign, be he one Man, as in Monarchy, or one Assembly of men, as in Democracy, or Aristocracy" (*Leviathan,* p. 312-3).

241 " as if every man should say to every man, *I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.* This done, the Mulittude so united in one Person, is called a COMMON-WEALTH" (*Leviathan,* p. 227).

242 "If a Covenant be made, wherein neither of the parties perform presently, but trust one another in the condition of meer nature [...] upon any reasonable suspicion, it is Voyd; But if there be a common Power set over them both, with right and force sufficient to compel performance; it is not Voyd" (*Leviathan,* p. 196). "the Validity of Covenants begins not but with the Constitution of a Civill Power, sufficient to compel men to keep them" (*Leviathan,* p. 203).

243 "all men agree on this that Peace is Good, and therefore also the way, or mens of Peace, which [...] are *Justice, Gratitude, Modesty, Equity, Mercy,* & the rest of the Laws of Nature are good" (*Leviathan,* p. 216).

to maintain society.[244] Being the end and law of community, peace is the very nature of society.

Peace, however, appeared as the fundamental injunction exactly because it was not in the nature of things any more[245], because it seemed imperative to avoid an ever-threatening fundamental state of war. This state was to be avoided at all costs, for in such a condition, there was "no place for industry; [...] no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death: And the life of man, solitary, poore, nasty, brutish, and short" (*Leviathan,* p. 186). The introduction even compares the civil war to the death of the commonwealth, whereas social concord is described as health. The threat of war did not simply belong to a surpassed state of nature, but was felt to be ever-present within society, "For WARRE, consisteth not in Battell only, or the act of fighting [...]: [...] the nature of War, consisteth [...] in the known disposition thereto, during all the time there is no assurance to the contrary" (*Leviathan,* pp. 185-6). And this disposition seemed present to everyone who regarded the existing community closely.

> Let him consider with himselfe, when taking a journey, he armes himselfe, and seeks to go well acompanied: when going to sleep, he locks his dores; when even in his house he locks his chests; and this when he knows there bee Lawes, and publike Officers, armed, to revenge all injuries shall be done to him; what opinion he has of his fellow Citizens, when he locks his dores; and of his children, and servants, when he locks his chests. (*Leviathan,* p. 187)

In Hobbes the state of war was considered inherent in established society, not only there as a possibility, a dissolution which might once break out; but as a dissolution which was always already there it was experienced as an actuality which we always had to fight.

Since the Greeks, law had been understood as a command, which transcended and neutralized the present social conflicts and ordered us to rise above them. But the command establishing peace in society no longer appeared to be a language spoken by a fundamental state of peaceful harmony, telling us that we could and should only rest assured by returning to its timeless womb; the idea and the experience of Nature as a deep and dense lawful order within which human beings might rest began to dissolve with the arrival of the Age of Law. In the Age of Law law appeared as a self-instituation and self-preserving act issued by no other author but the very state, which it establishes. The purified legal state was an absolute and shallow order.

The Age of Law

244 The observers of "the fundamentall Law of Nature, which commandeth *to seek Peace",* "may be called SOCIABLE" (*Leviathan,* p. 210).

245 "Frieden ist [...] nicht mehr die naturale Perfektion des menschlichen Zusammenlebens, sondern ein Resultat staatlicher Ordnung" (Luhmann: *Gesellschaftsstruktur und Semantik,* p. 85).

Hobbes' claim in *Leviathan* that legal order and peace was only possible in spite of and by transcending an original and natural state of war, testifies to the fact that this order was experienced as fragile and constantly threatened at the beginning of the Age of Law. Defying a generalized state of war legal order raised itself by its own bootstraps.

A similar fundamental shock was reflected and perpetuated in Descartes' first mediation where he regarded it as obvious that we could not trust our ideas of the received world. A solution parallel to that provided by Hobbes in *Leviathan* was sought by Descartes when he claimed that a coherent universe could only be rebuilt on the basis of a decision to adhere exclusively to that which showed itself to be "clear"and "distinct". This was a decision to be reiterated or reaffirmed at every moment throughout the itinerary, which the reader of the Méditations Métaphysiques was intended, to follow.[246] A universe of profound correspondences was replaced by a conception of the world as an exhaustive and completely clarified order, by a mathesis universalis[247], but this conception rested on a legislative act which established a clear and binary distinction between light and dark, day and night, being awake or dreaming, reason and folly, being and nothingness. The fundamental ontology of the Age of Law is this absolute distinction between light and dark, being and nothingness, which makes being and truth possible.[248]

The view that the absolute legislative distinction which precluded any possibility of reconciliation was meant to exorcise a radical challenge, viz. the threat that our world might dissolute (a fundamental "nihilism") is voiced even more clearly by the contemporary neo-classicist tragedy.

Racine's *Andromaque,* which was published in 1667, did not, unlike classical Greek tragedy, relate how *hybris* is haunted by destiny and punished in such a way that we may finally return to and find our place within a fundamental, timeless order. Through the unity of the stage, the unity of time, place, and action, everything was manifested in a clear, dazzling light which casted no shadows; but as the play developed the audience saw what they already knew, namely that everything was not what it seemed, that this was not the whole truth. The clear light of day on the stage was surrounded by a dark night of unspoken and unspeakable actions and desires - of treason, murder, sorrow, and rage - which limited and haunted it. The tragedy demonstrated this truth by throwing the doors to night wide open and gave the world of the Age of Law a sudden depth by letting the opaque density of the night reflect in the clear light of the day and vice versa, indefinitely. But only to conclude in antagonism; for the day is torn by the adventure of the night, and the dark gestures of the night cannot stand the light of day. Racine showed the Age of Law to be the expression of a tragic existence torn between two irreconciliable

246 Cf. Cavell: *In Quest of the Ordinary. Lines of Skepticism and Romanticism,* pp. 172-3.

247 Cf. Foucault: *Les Mots et les choses.*

248 In their debate concerning the *Méditations Métaphysiques* Foucault and Derrida implicitly agree that an absolute challenge is presented and an absolute decision is demanded at every point of the itinerary. They disagree when Derrida claims that this movement characterizes philosophy as such and criticizes Foucault for characterizing this as exclusion. Cf. Derrida: "Cogito et histoire de la folie" in *L'écriture et la Différence,* and "être juste avec Freud'. L'histoire de la folie à l'âge de la psychanalyse" in Roudinesco: *Penser la folie;* Foucault: "Mon corps, ce papier, ce feu" in the 1972-edition of *Histoire de la folie.*

realms. The neo-classicist tragedy told its contemporaries that the neo-classicist world and human existence as such were hubris or transgression.[249]

The hidden nihilism, which proclaimed the death of Nature, announced a hightened sensitivity for the uncanniness of our everyday life.[250] For the first time in history the experience that the world is always already falling apart, and that society is always already in the process of dissolving was experienced as such, as an existential and as a fatal problem. The problem was not any more the limited one as to how to rebuild society on a better basis if it should fall apart; it was rather the unlimited one that *if* human order goes into dissolution there is no order at all in the world, no foundation on which to rebuild it, only non-existence and the threat of death.

The experience of a crisis was heightened to such a degree and the danger to be conjured away was felt to be so lethal and radical that the very possibility of its becoming actual had to be avoided at all costs. Perfect certainty was sought in order to preclude it happening: Certainty as to our relation to the world, as to how we might know that, and to what extent, the world is the way we experience it. And certainty as to our relation to society, as to how we might rest assured in the knowledge that and to the extent which society will cohere.

In both cases the answer was sought in law understood as universally binding commands. And for some time the answer seemed pertinent and able to conjure away the threatening dangers and uncertainties. In the Age of Law social order was established on the basis of law, and society was conceived of as a legal order.

Law as a Fundamental Notion in Kant's Philosophy

In Kant's philosophy law was still a fundamental notion. Law, however, after Hume's criticism had to be formulated anew. The challenge from Hume that any absolute difference and coherence are postulated by human passions or habit had exposed the hidden nihilism. So the Age of Law had reached a critical turning point: Binding obligations were neither to be found in the order of nature nor in human life.

Squeezed between incredible and obsolete classical and Cartesian metaphysics on the one hand, and sceptical empiricism on the other, Kant was forced to seek a new foundation for personal and social liability. In this difficult situation Kant still had recourse to law as a central notion. Although, as Hegel later noticed in *Grundlinien der Philosophie des Rechts*, traditional morality (Sittlichkeit) had been divided into an exterior legal and and an interior moral order, both kinds of order are described in terms of law. Just as social order rested on laws (according to *Die Metaphysik der*

249 "ORESTE Pour qui coule le sang que je viens de répandre? Je suis, si je l'en crois, un Traistre, un Assasin. Est-ce Pyrrhus qui meurt? & suis-je Oreste enfin? Quoy? j'étouffe en mon coeur la raison qui m'éclaire. J'assasine un jour les droits des Souverains. Ceux des Ambassadeurs, & tous ceux des Humains; Ceux mesme des Autels, où ma fureur l'assiège. Je deviens Parricide, Assasin, Sacrilège. Pour qui? Pour une Ingrate, à qui je le promets, Qui mesme s'il ne meurt, ne me verra jamais, Dont j'épouse la rage. Et quand je l'ay servie, Elle me redemande & son sang & sa vie! Elle l'aime! & je suis un monstre furieux! Jean Racine: *Andromaque,* Geneva, 1977, p. 129.

250 There are contemporary historical and social reasons for this heightened sensitivity, too. The Thirthy Years' War and the English Civil War made "ordinary" life seem dissolute and approaching an actual chaotic state of war.

Sitten) moral obligation was expressed in terms of law (according to *Grundlegung zur Metaphysik der Sitten* and *Kritik der praktischen Vernunft).* And it was essential that neither of those kinds of order owed its existence to a higher or more fundamental order.

Kant shared this assumption with his contemporaries. As previously stated in Hobbes it was commonly assumed that society had to rest on law in order to exist at all. Law was the form in which any interest had to be incarnated in order to make itself heard and be able to claim common acceptance. Only in this way could it make itself legitimate and prevalent and thereby create community. In Kant law still appeared *the* "natural" solution to the ever-threatening dissolution of society, the only solution available.

This state of things was due to the fact that historically Kant found himself situated in the midst of a conflict. In disintegrating rationalist metaphysics several answers were given to the problem as to how reality and human recognition correspond; and while metaphysical positions were destroying each other's credibility, empiricism and scepticism from the outside made war on the claimed necessity of their assertions. So Kant's attention was drawn to the bone of contention, viz. the role of the human mind in constituting our reality and world. This role, as it appeared to Kant and not to his adversaries, was an active one. Receiving impressions through the intuitive forms of time and space, and categorizing them intellectually, however, we never reach things in themselves, but only their appearances, and this was also the case when the point was law. According to Kant law (Gesetz) was a fundamental phenomenon in nature, social and personal life, and morality - in short: in reality as it appeared to us.[251] But this meant that human subjectivity was moving towards a position of the highest authority. Man had left his safe position as a law-abiding part of cosmos and society in order to contribute to reality as a legislator.[252]

Simultaneously, rudimentary signs pointing towards a contesting of the notion of law began to show within the Kantian use of the notion of law. Law was an extremely fundamental notion, but on the other hand, law was founded only in itself or man. That law was self-constituting meant that to law there was no resting point behind itself, that the world of law threatened to appear groundless. And since human life seemed fundamentally constructed by and dependent on law, human existence itself threatened to become "bodenlos".

251 "Regeln, so fern sie objektiv sind [...] heißen Gesetze" (Kant: *Kritik der reinen Vernunft, Werkausgabe III,* s. 180).

252 "Es sind viele Gesetze der Natur, die wir nur vermittelst der Erfahrung wissen können, aber die Gesetzmäßigkeit in der Verknüpfung der Erscheinungen, d.i. die Natur überhaupt können wir durch keine Erfahrung kennen lernen, weil Erfahrung selbst solcher Gesetze bedarf, die ihrer Möglichkeit a priori zum Grunde liegen." "[...] *der Verstand schöpft seine Gesetze* (a priori) *nicht aus der Natur, sondern schreibt sie dieser vor"* (Kant: *Prolegomena, Werkausgabe V,* Frankfurt am Main 1978, pp. 187 & 189). "Es ist also der Verstand nicht bloß ein Vermögen, durch Vergleichung der Erscheinungen sich Regeln zu machen: er ist selbst die Gesetzgebung vor dei Natur, d.i. ohne Verstand würde es überall nicht Natur, d.i. synthetische Einheit des Mannigfaltigen der Erscheinungen nach Regeln geben." (Kant: *Kritik der reinen Vernunft, Werkausgabe III,* Frankfurt am Main , 1978, p. 180).

Law and Society

Kant's position on society must be understood as a consequence of his general view. His essay *Was is Aufklärung?*[253] confirms that Kant's point of embarkation was given with his era, the Age of Enlightenment. His point of view was that mankind was now moving from a self created incapacity into an authoritativeness compatible with its role as a legislator. Originally Kant was pleased by the French rebellion against l'ancien régime, but as the tyranny of Robespierre and the Jacobine movement took shape Kant turned to the enlightened monarchy of Frederic the Great of Prussia, coining the phrase: "Obey and criticize!". So he naturally attempted both to maintain an acceptable order and to consider human authoritativeness. A monarchy which did not respect criticism was unworthy of man; but neither was that tyranny which was established by ideological-minded usurpers of power. In enlightened monarchy, Kant thought it best warranted that universal human dignity could be preserved and so replace stratified feudal honour as the essential norm.

The fact that Kant remained an eager adherent of monarchy was without doubt due to his identification of law with command. Laws to Kant were general commands, and man to him was a being who obeyed and bound himself to absolute commands. Because the absolute or unconditional character of commands grows out of human reason, criticism has a necessary function. So human dignity was maintained where laws were able to found our social life and where a sovereign warranted their execution.[254] Only on this condition could society as Reich, Staat, civitas be a place where rational beings lived together subject to common laws and principles of justice. As enlightened monarchy, the state was a common life where principles of justice were guaranteed constitutionally.[255]

In opposition to this state of human cooperation based on law Kant imagined a revolution where the fundamental constitution was shaken and contested as a state of lawless horror. In this case a society emerged which had no fundamental justice and law. To Kant the sovereign was indispensable in his capacity as the executor of

253 Cf. Kant: *Beantwortung der Frage: Was ist Aufklärung?,* in *Werkausgabe Band XI,* Frankfurt am Main 1978.

254 The point of view is obvious in the following passages of *Grundlegung zur Metaphysik der Sitten* where Kant deals with "Gebote (Gesetze) der Sittlichkeit. Denn nur das *Gesetz* führt den Begriff einer *unbedingten* und zwar objektiven und mithin allgemein gültigen *Notwendigkeit* bei sich, und Gebote sind Gesetze denen gehorcht, d.i. auch wider Neigung Folge geleistet werden muß" *(Werkausgabe VII,* p. 46). Die Vorstellung eines objektiven Prinzips, sofern es für einen Willen nötigend ist, heißt ein Gebot (der Vernunft) und die Formel des Gebots heißt *Imperativ*" (Kant: *Grundlegung zur Metaphysik der Sitten, Werkausgabe VII,* p. 41).

255 "Ich verstehe [...] unter einem *Reiche* die systematische Verbindung versciedener vernünftiger Wesen durch gemeinschaftliche Gesetze" (Kant: *Grundlegung zur Metaphysik der Sitten, Werkausgabe VII,* p. 66). "Ein Staat (civitas) ist die Vereinigung einer Menge von Menschen unter Rechtsgesetzen. So fern diese als Gesetze a priori notwendig, d. i. aus Begriffen des äußeren Rechts überhaupt von selbst folgend [...] sind, ist seine Form die Form eines Staats überhaupt, d. i. der Staat *in der Idee,* wie er nach reinen Rechtsprinzipien sein soll, welche jeder wirklichen Vereinigung [...] zur Richtschnur (norma) dient (Kant: *Die Metaphysik der Sitten, Werkausgabe VIII,* p. 431). Page 437 in *Die Metaphysik der Sitten* Kant claims that "das Heil des Staats" does not consist in "das Wohl der Staatsbürger und ihre Glückseligkeit", but in "den Zustand der größten Übereinstimmung der Verfassung mit Rechtsprinzipien".

law's commands, and this was why no legal rebellion against him could be tolerated. Since the common legislative was incarnated in his will and guarded by his sword, the citizens had to submit themselves to it and were only subsequently given the opportunity to criticize. In this way wrong government could be reformed, but reformed only by the sovereign himself, not by the people or through revolution.[256] A state in which human intercourse did not rest upon a constitution expressed in legal terms was almost inconceivable to Kant and connected with feelings of upmost horror; it was mere anarchy, and not to be called a proper state of society. Lawlessness was an unacceptable state, which had to be avoided at all costs.

Law and Morals

Kant's idea of human dignity and autonomy concealed a tension. On one hand, man is - in a radical sense - a free and autonomous legislator to whose reason reality is submitted. Even if he is not the legislator of nature his recognition and intellect still form the concepts and laws of nature and reality as they appear to us; and through his practical reason he establishes what is morally right and wrong.[257] On the other hand, we see Kant submitting the citizen to the common will as expressed by the sovereign, and thus permitting only subsequent criticism. A tension is to be noted between exterior (social and political) and interior (personal and scrupulous) ethics, although the common denominator of both still precisely was law. This is an unsolved problem, which has to be understood in connection with Kant's historical situation. It indicates that he tried to find his way between monarchistic and anarchistic forms of tyranny. Not being able to solve the problem, he sacrificed personal human freedom and autonomy to community.

Kant is, however, above all famous for having formulated internal morality in terms of law. Morality was to be understood in terms of an internal self-produced law, which forced people to act and stated the principles for action.[258] The criterion of

256 "Wider das gesetzgebende Oberhaupt des Staats gibt es keinen rechtmäßigen Widerstand des Volks; denn nur durch Unterwerfung unter seinen allgemein-gesetzgebenden Willen ist ein rechtlicher Zustand möglich; also kein Recht des *Aufstandes* (seditio), noch weniger des *Aufruhrs* (rebellio), am allerwenigsten gegen ihn, als einzelne Person (Monarch), unter dem Vorwande des Mißbrauchs seiner Gewalt (tyrannis), Vergreifung an seiner Person, ja an seinem Leben (monarchomachismus sub specie tyrannicidii). Der geringste Versuch hiezu ist *Hochverrat* (proditio eminens), und der Verräter dieser Art kan als einer, der sein *Vaterland umzubringen* versucht (parricida), nicht minder als mit dem Tode bestraft werden (Kant: *Die Metaphysik der Sitten, Werkausgabe VIII,* pp. 439-440). "Eine Veränderung der (fehlerhaften) Staatsverfassung, die wohl bisweilen nötig sein mag - kann [...] nur vom Souverän selbst durch *Reform,* aber nicht vom Volk, mithin durch *Revolution* verrichtet werden, und, wenn sie geschieht, so kann jene nur die *ausübende Gewalt,* nicht die gesetzgebende, treffen" (ibid, p. 441).

257 "Die Gesetzgebung durch Naturbegriffe geschieht durch den Verstand, und ist theoretisch. Die Gesetzgebung durch den Freiheitsbegriff geschieht von der Vernunft, und ist bloß praktisch. Nur allein im Praktischen kann die Vernunft gesetzgebend sein; in Ansehung des theoretischen Erkenntnisses (der Natur) kann sie nur (als gesetzkundig, vermittelst des Verstandes) aus gegebenen Gesetzen durch Schlüsse Folgerungen ziehen." (Kant: *Kritik der Urteilskraft, Werkausgabe X,* p. 82).

258 "Der Wille wird als ein Vermögen gedacht, *der Vorstellung gewisser Gesetze gemäß* sich selbst zum Handeln zu bestimmen" (Kant: *Grundlegung zur Metaphysik der Sitten, Werkausgabe VII,* p. 59). "Das vernünftige Wesen muß sich jederzeit als gesetzgebend in einem durch Freiheit des Willens möglichen Reiche der Zwecke betrachten, es mag nun sein als Glied, oder als Oberhaupt. [...] Moralität besteht also in der Beziehung aller Handlung auf die Gesetzgebung, dadurch allein ein Reich der Zwecke möglich ist.

moral law however, was not a single material command, but a formal principle. This principle is the principle or "Maxim" of practical reason, the subjective principle of personal will, which transcends not only factual legality, but any legality. The intention of *Grundlegung zur Metaphysik der Sitten* was to establish the ultimate principle of morality, and hence to lay the foundations for the validity of law. This principle was formulated in the well-known sentences: "Act as if the principle of your own act according to your will should be common natural law"; "Never treat your fellow-men as means, always treat them as ends in themselves". The "Maxime" was defined as the subjective principle of will while "Gesetz" was the objective principle to be acted upon, common to all rational beings.[259] While "Maxime" points out conviction, "Gesetz" indicates command.

With regard to human autonomy and self-determination, Kant marked a turning point and perhaps a final position within the Age of Law. Even if he still talked in terms of law and self-legislation, his eagerness for human autonomy transcended this age and pointed towards another form of life. The end of the Age of Law was, as it were, prefigured within legislation.

Rehabilitating Kant within his Historical Setting

The seeming contradiction between Kant's will to promote order and law and his wish to encourage human autonomy and independence which had generated a tension in his works has also made him a preferred target of scorn in modern ethical theory. It is one of the central concerns of contemporary ethical theory to point out the "context-sensitivity" of moral judgments. Contemporary criticism emphazises that when we act morally and make ethical claims, we as human agents perceive a specific situation and imagine what to make of it and of other human beings. Only by attending to a particular context are we able to and motivated to do and claim that which it is objectively right to do. So contemporary ethical theory implies a trend towards what may be named "objective particularism". We can only be normative in a universally binding way by taking as both background and starting-point a definite, concrete, local or particular situation. Only within the actual situation and its circumstances are we able to assert what is objectively the right thing to do. Martha Nussbaum, Cora Diamond and Peter Winch maintain such an "objective particularism", among others.

Diese Gesetzgebung muß aber in jedem vernünftigen Wesen selbst angetroffen werden" (ibid, p. 67). "[...] eben darum weil die ethische Gesetzgebung die innere Triebfeder der Handlung (die Idee der Pflicht) in ihr Gesetz mit einschließt [...], so kann die ethische Gesetzgebung keine äußere (selbst nicht die eines göttlichen Willens) sein, ob sie zwar die Pflichten, die auf einer anderen, nämlich äußeren Gesetzgebung beruhen, *als Pflichten,* in ihre Gesetzgebung zu Triebfedern aufnimmt" (Kant: *Die Metaphysik der Sitten, Werkausgabe VIII,* pp. 324-5).

259 To the intention of *Grundlegung zur Metaphysik der Sitten* cf. ibid, p. 16. In *Grundlegung* you also find the following relevant passages: *"Handle so, als ob die Maxime deiner Handlung durch deinen Willen zum allgemeinen Naturgesetze werden sollte"* (p. 51). - Concerning the relationship cf. the note page 51: Maxime "enthält die praktische Regel, die die Vernunft den Bedingungen des Subjekts gemäß [...] bestimmt, und ist also der Grundsatz, nach welchem das Subjekt handelt; das Gesetz aber ist das objektive Prinzip, gültig für jedes vernünftige Wesen, und der Grundsatz, nach dem es handeln soll, d. i. ein Imperativ".

It is obvious that this "objective particularism" is hostile to the Kantian deontic notion of morality. In this, its critics assert, we do not only claim to do the right things by determining general rational principles and applying them to concrete situations; we also suppose that the principle of universality is the motivating force of moral action. To contemporary ethical theorists Kant appears to be an, or even *the,* instigator of the theoretical and abstract view in 20th century moral philosophy. This kind of philosophy inclines us to consider moral philosophy as a particular branch of philosophy establishing and questioning the existence of particular kinds of general principles. Since ethical theory is meant to discuss general normative problems, ethical problems eternally recurring in the debate, do not in the end appear as problems arising "phenomenologically" in their own right. Rather they figure as theoretical problems serving as illustrations and as touchstones of different general ethical theories.

In all this there is some truth. But the criticism mentioned also oversimplifies the case, insofar as it immediately assumes that Kant tried to solve the same problems as we are, attempting to solve timeless questions. The critics in this way unwillingly tend to re-establish the solemn theoretical debate between timeless and god-like participants which is criticized in 20th century moral philosophy and which the critics themselves accuse Kant of inaugurating. Since the purpose of the ongoing debate is to solve contemporary problems we hereby implicitly take it for granted that Kant tried to provide answers to *our* problems.

If we consider the matter a little more closely, however, and we consider Kant in his historical setting (the historical setting which I have tried to study in this paper, that is) it would appear that Kant did not conceive of the idea of general moral principles out of the blue. The idea of general principles was already prevalent in Kant's milieu as the guiding and most common suggestion as to how to structure human cohabitation and human intercourse in order to create society. And it was present as the mould into which people had to pour their concerns in order to affect and direct other people's actions in an acceptable way. In modern terms one might say that the normativity, which constituted human intercourse as a form of life and as society, was conceived of as adherence to general and non-contextually dependent principles.

Considering Kant in his historical context and his zealous underlining of human autonomy, one may reach a more accommodating understanding of his intention. Perhaps, after all, it seems more adequate to say that *within* his historical setting Kant tried to state a new principle. He began to elaborate a "principle" of self-determination, to create a possibility for the individual person to represent himself within society.[260] But in doing this within his particular historical setting, Kant is still forced to formulate his concern in terms of law as a principle of

260 Cf. *Grundlegung zur Metaphysik der Sitte*n pp. 59-60: "Gesetzt aber, es gäbe etwas, *dessen Dasein an sich selbst* einen absoluten Wert hat, was, *als Zweck an sich selbst,* ein Grund bestimmter Gesetze sein könnte, so würde in ihm, und nur in ihm allein, der Grund eines möglichen kategorischen Imperativs, d. i. praktischen Gesetzes, liegen. [...] Nun sage ich: der Mensch, und überhaupt jedes vernünftige Wesen *existiert* als Zweck an sich selbst, *nicht bloß als Mittel* zum beliebigen Gebrauche für diesen oder jenen Willen, sondern muß in allen seinen [...] Handlungen jederzeit *zugleich als Zweck* betrachtet werden".

selflegislation[261]. From this point of view the notions of self-determination and self-legislation point towards a potential break with, or even the beginning of the end of, the Age of Law. Since the days of Kant this possibility has been realized. Our society no longer coheres on the basis of general and unrestricted principles which command individual action uniformly. The fact that legislation today is but one option among others, which may establish society, indicates the transition made.

Law Versus Normativity and Mutual Normation

Feeling that *our* human intercourse is falling apart, that nothing binds *us* together, we tend to long for *another* state of society. We tend to think that society once rested upon and ideally consists in a state of natural and unquestioned accordance between its participants. The critical diagnosis of the present "society" and the nostalgic longing for another kind of society seem to be interdependent, to support and found each other.

In the present paper I have suggested that social order and coherence never were an uncontested presupposition on which people could rest in order to secure their preservation and continuity. Social coherence and social order never were matters of habit, but always seemed to be something that people were about to (re)establish in the correct manner. Social life stood forth as the result of an effort to transcend the present state of things, which was never a matter of course, but on the contrary an object of contest, which requested that the participants in society took a certain stand towards it. This matter of fact has not always been acknowledged, however, concealed as it has been in that metaphysics which sought to found social order by deriving it from human nature and/or the nature of the universe.

Law achieved its predominant role as a possible solution to the problem of how to construct and to maintain society. The arrival of absolutism brought out in the open and radicalized the dispute as to what the foundation of society must be, but the acute awareness of the fragility of human society was counter-balanced by the unanimous certainty that it had to be re-established on the basis of law. From Bodin, Hobbes, and onwards, law - in its purified form - understood as general commands drawing a sharp line which divided the inside and outside of society - was conceived of as the last and self-constituting basis of society. The very thought of human cohabitation or intercourse which did not rest upon law enforced by a sovereign able to issue commands and ensure that laws were followed gave rise to experiences of horror vacui, of the bottomless abyss of human existence.

The idea that society was tantamount to adherence to law, to shared principles guiding man's behaviour in the way commands do, was the unquestioned starting-point in what may be termed the Age of Law. It was the unquestioned basic assumption in social and political theory, and it was the unquestioned basis of practical political and social action. Not only was a centralized royal power erected on the basis of - and made prevalent in terms of - law and sovereignty. The

261 "Das Prinzip der Autonomi ist also: nicht anders zu wählen als so, daß die Maximen seiner Wahl in demselben wollen zugleich als allgemeines Gesetz mit begriffen sein". (Kant: *Grundlegung zur Metaphysik der Sitten,* pp. 74-75).

bourgeois leadership, who overtook power and erected itself on a constitutional base through the institution of representative democracy, stated itself in terms of law and sovereignty. This I have developed in some length elsewhere.[262] Between absolutism and early parliamentary democracy the issue was not whether a sovereign centre of authority should be established on a legal basis and express itself in terms of law understood as generally binding commands in order to constitute society in a proper way; the bone of contention was which procedures would permit the establishing of legitimate legal sovereignty, and whom they were to institute as author or owner of sovereign legislative power.

However, as the ancient Romans said, "tempora mutantur et nos mutamur in illis". The paper just referred to, "Reorganizing Society", demonstrates how during the past hundred years Western representative democracy has deviated from the original legal conception of legitimacy and social coherence. To an ever-increasing extent the territorial state has delegated power and authority from the original centre of authority, the King in Parliament, to other levels: "downwards" to different subsystems such as trade unions and employers' federations, local or municipal authorities, and independent boards or tribunals; "upwards" to international fora such as the EC and the UN. The paper claims that modern Western democracies have turned into societies which cohere less through generally binding legislation than through an ever-ongoing renegotiation between semi-autonomous social individuals created in the process of the development outlined. To an increasing extent negotiation games assure that the participating decision-making units are bound to each other within a complex network of give-and-take relations which are constantly readjusted by the game.[263]

In the present paper I suggest how the end of the Age of Law was to a certain extent prefigured in Kant's thought. Instead of a society cohering on the basis of law understood as general commands issued by a single authority, Kant prefigured a possible human cohabitation and intercourse in which each subject's judgment would appear as the instigator or creator of community. Absolutist rule was founded on autocratic principles of representation since one participant in society, the sovereign, claimed the right to formulate the legitimate interests of every participant in society and meet these demands, but autocratic principles still played a major role when the procedures of representative democracy were imagined and institutionalized. In contrast to what was the case in absolutism every subject now was given the right and possibility to represent his own interests and demands, but only by *giving* his vote, by surrendering and delegating the right to represent himself to a common elected sovereign representative. Kant's thought opened the possibility that the movement from autocratic heteronomy to subjective autonomy, which had been inaugurated, might be followed through in a more radical sense. Kant sketched a community in which each subject had the possibility to defend and represent himself, less by giving up the right of judgment to other authorities than by

262 Cf. Ove K. Pedersen & Sverre Raffnsøe: "Reorganizing Society", forthcoming in *Archiv für Rechts- und Sozialphilosophie No. 59.*

263 Durckheim's analysis in *De la division du travail social* makes it clear that solidarity can be created through a functional division of labour which may replace a substantial ideological agreement.

representing himself through his own ability to judge. Within the vocabulary of the Age of Law, the philosopher of Königsberg maintained the possibility of another world in which community cohered exactly because subjects, when representing themselves, judged in view of and in order to establish a larger whole of which they were part, and acted in order to be able to participate in it, not because they were *commanded* to submit themselves.[264] Individuals living in a society of negotiation experience the fact that participating in a community which to an increasing extent coheres through the autonomous judgement of parties trying to relate in a way which satisfies them all, did not in itself provide the best of all possible worlds, or an answer to the question, "Was darf ich hoffen?". Relating through autonomous judgement and mutual adjustment does not create utopia, but only provides an answer to the "simple" questions as to what the cement of society might be, and how one might allocate the ressources of a given territory. Formal relations may create strong interdependencies and establish unanimity concerning which procedures to follow in order to resolve disputes in an equitable way; they do not per se provide for justice as Kant seems to have imagined.

Despite the changes which have taken place, however, people still tend to imagine society as based upon common laws and rules, reflecting present common life in the mirror of the deceased Age of Law. But when people today conceive of society in this way they have lost sight of the fact that community based upon adherence to laws, understood as general commands, was a particular and limited historical construct based upon a common will to erect a centre of authority able to issue commands of this sort. Forgetting the very performative core which established and maintained the Western territorial states people tend to picture the rules generally followed as primitive, as already existing laws whose constitution cannot, and does not have to, be explained. The commands which, when followed, constitute the center of community are regarded as mere habits. Overlooking the genesis of this kind of community, people take it for granted that *any* kind of community consists in adherence to common norms, which bind the participants in the way general orders do. It seems a matter of course that all "primitive" societies cohere because the participants still follow traditional practices and values without questioning these habits; and it seems evident that contemporary community only exists to the extent that we are able to draw upon a common fund of still unquestioned practices and values which govern our lives in the way general commands do.

Despite our immediate impression, however, early or primitive societies do not rest on laws which command the behavior of the individuals in a pre-reflexive manner, laws they follow naturally without experiencing them as duties or obligations. Behavior in primitive societies is not directed by general unquestioned habits; primordial human intercourse is not characterized by the invariability or the inquestionability of its normativity, but rather its lack of differentiation. Basic human interaction does not rest on certain practices which are always followed; it distinguishes itself by the fact that it does not stipulate which line of action to take,

264 "Urteilskraft überhaupt ist das Vermögen, das Besondere unter dem Allgemeinen zu denken. Ist das Allgemeine (die Regel, das Prinzip, das Gesetz) gegeben, so ist die Urteilskraft [...] *bestimmend.* Ist aber nur das Besondere gegeben, wozu sie das Allgemeine finden soll, so ist die Urteilskraft bloß *reflektierend* (Kant: *Kritik der Urteilskraft, Werkausgabe X,* p. 87).

or how to react in the event expectations are not being met; it does not predetermine whether to ignore, to sanction, or to learn from disappointments.

To the extent that processes of negotiation and mutual adjustment spread within and across the boundaries of the Western territorial states, modern societies tend to return to a similar state of indecisiveness or indifferentiation concerning the way participants react when expectations are disappointed. This happens seemingly despite, but nevertheless on account of, their general differentiality - of the fact that a number of semi-autonomous subsystems have developed within and across the borders of the territorial states. In order to be able to profit from the negotiation processes the participating units or "persons" have to maintain an open attitude towards unforeseen events and the extent to which they will or will not accept them, or rather regarding the extent to which they will seek to transform them. Since judgment passed by the participants in the negotiations seems provisional, each judgment passed is also a suspension of judgment; a pure process of ever-ongoing (re)judging is not only a state of indecisiveness in general, but also a suspension of the difference between *Sein* and *Sollen.*

The fact that society is slowly re-turning to principles which in this respect resemble basic or "original" human conduct, may explain the widespread recognition received by a certain contemporary sociologist who feels that attempts to analyze social corpora uniquely in terms of general principles serve only to strip them of their essential characteristics.

> [...] if practices had as their principle the generative principle which has to be constructed in order to account for them, that is a set of independent and coherent axioms, then the practices produced according to perfectly conscious generative rules would be stripped of everything that defines them distinctively as practices, that is, the uncertainty and 'fuzziness' resulting from the fact that they have as their principle not a set of conscious, constant rules, but practical schemes, opaque to their possessors, varying acording to the logic of the situation, the almost invariably partial viewpoint which it imposes, etc. Thus, the procedures of practical logic are rarely entirely coherent and rarely entirely incoherent (Bourdieu: *The Logic of Practice,* p. 12)

When Kant prefigured the end of the Age of Law he inaugurated a development, which the dissemination of processes of negotiation has carried to one possible end, and which makes it plain that society may also cohere through norms in ways different from those described so far. An assembly gathered by a common obligation to negotiate for example, is not necessarily thereby united by a norm which may be stated in a positive way outside the social corpus it governs, as certain formalized uniform rules or values adhered to which specify certain actions as prohibited and others as permitted. Participants in the negotiation games are not able to stipulate in general exactly which types of action comply with the norm and which transgress it, but they are capable of identifying actions, which relate to the norm and of

specifying for each given action the extent to which it falls short of the norm. Norms of the category to which norms of negotiation belong are felt only privatively, and not positively. The fact that a norm of this category prevails is only stated by the fact that actions or categories of actions are characterized as events which deviate from the norm to a greater or lesser degree.[265] Norms of the category to which norms of negotiation belong should be characterized as norms of deviation or digression in order to discriminate them from prescriptive norms expressible in general codifiable prescriptive rules.[266] To the extent that other categories of norm have begun to replace law in its capacity as the cement of society deviation norms have begun to appear as the fundamental form of normativity, and prescripive normativity as derivative.[267]

The interplay between a norm and the field in which it exercises itself determines what is considered to be the normal.[268] With regard to norms of differentiation the normal is the compromise between the norms and the variety of being affected by them, between the norms and the behaviour on which it leaves its imprint. The normal is the standard of deviation. This notion of the normal should not be confused with the concept of averageness. Contrary to the normal in this statistical or descriptive sense which designates the non-existent point around which the actual behavior is centered, the normal in the former - therapeutic or correctional - sense retains an overtly normative aspect since it claims to be the right solution.[269] From the perspective of normality in the correctional sense the normal in the statistical sense appears derivative because the best solution or compromise tends to be the

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265 Speaking partly within the vocabulary of the Age of Law, one might say that the norms are only recognized as norms when transgressed.

266 Both kinds of norms differ from qualification norms. A qualification norm stipulates that an object x should be classified as an object belonging to the category F and thereby qualifies or characterizes the object in a certain way. Cf. Nils Kristian Sundby: *Om normer,* chap. 4.

267 "au début du XIX[e] siècle, il va arriver un singulier bouleversement dans les rapports de la règle et de la norme. Norme ne sera plus un autre nom pour règle, mais va désigner à la fois un certain type de règles, une manière de les produire, et peut-être surtout, un principe de valorisation. Certes, la norme désigne toujours une mesure servant à apprécier ce qui est conforme à la regle et ce qui s'en distingue, mais celle-ci n'est plus liée à l'idée de rectitude; sa référence n'est plus l'équerre" (Ewald: "Michel Foucault et la norme", p. 202). The propagation of norms of negotiation is described by Michel Foucault in *Surveiller et punir.*

268 "Le normal, [...] c'est la norme exhibée dans le fait" (Canguilhem: *Le normal et le pathologique,* p. 180).

269 "Un vivant est normal dans un milieu donné pour autant qu'il est la solution morphologique et fonctionelle trouvée par la vie pour répondre à tout les exigences du milieu. Relativement à toute une autre forme dont il s'écarte ce vivant est normal, même s'il est relativement rare, du fait quil est, par rapport à elle *normatif,* c'est-à-dire qu'il la dévalorise avant de l'éliminer. [...] L'anomalie ou la mutation ne sont pas en elles-mêmes pathologiques. Elles expriment d'autres normes de vie possibles. Si ces normes sont inférieures, quant à la stabilité, à la fécondité, à la variabilité de la vie, aux normes spécifiques antérieures, elles seront dites pathologiques. Si ces normes se révèlent, éventuellement, dans le même milieu équivalentes, ou dans un autre milieu supérieures, elles seront dites normales" (Canguilhem: *Le normal et le pathologique,* p. 91). Cf. also: "la norme est ce qui fixe le normal à partir d'une décision normative" (ibid, p. 182)

270 See, for instance, C. W. K. Mundle, "Punishment and Desert", in H. B. Acton (ed.), *The philosophy of Punishment,* St. Martin's Press, Great Britain, 1969; L. H. Davis, "They Deserve to Suffer", *Analysis,* vol. 32, 1971-2.

common solution in the long run, because the standard of deviation tends to become *the* standard.

If norms of deviation are essentially implicit and only "exist" to the extent that they leave their imprint on human practice, then that which was earlier referred to as the application of the norm and which within the vocabulary of the Age of Law was determined as a subsequent fix-fit relationship now appears to be an integral part of the norm and its performance. If norms of deviation exist only in so far as they make themselves felt as patterns to which individuals must adopt an attitude, they contain an openly deliberative moment. Norms exist to the extent that they make themselves prevalent as projections, which affect and guide individuals behavior, but this is only possible by affecting the projective attitude of the individuals when they perceive the world and deal with it. As norms are exercised they are mediated through the individuals perception and action, which should not be understood as its simple application since it implies a transformation of the norm considered as an already existing gauge. The transformative exertion and reception of norms is the prerequisite for the existence of norms. Norms exist as designs which affect the prescriptive activity of the participants in society which, on its part, relates to and transforms the patterns, thereby creating new designs.

This suggests that the existence and the acceptance of norms imply a reciprocal ability to prescribe on the part of the norm exerted and the recipient. Norms exist to the extent that they are able to pre-dispose individuals to perceive, to think, and to act in certain ways, but these dispositions do not condition the reactions in a mechanical way since they presuppose that individuals are capable of responding normatively. At a basic level the existence and the exertion of norms and their application and reception presuppose the fact that prescription, that "normation" takes place. Normativity presupposes the ability to question given conditions and to transcend given norms as they are transformed by an active ambition, which points out certain directions.

As procedures of negotiation spread, the circumstance that the existence of norms and normativity presupposes prescription or "normation" comes out into the open and assumes the shape of a fundamental fact. Not only do the participants relate to a common norm of negotiation within the negotiation game, but simultaneously they behave as active entrepreneurs who try to influence and direct each other. The prescriptive activity comes into public view as the participants act as persons who create their own normativity and try to persuade others to accept its legitimacy.

In so far as the social corpus increasingly coheres through a reciprocal, open, and manifestly prescriptive activity - through mutual normation - the nature of society seems to change and aspects of more "primitive" ways to associate seem to be re-actualized within a new setting. Society no longer seems a construction imagined by a social architect expressing himself in general and unrestricted legislation; instead it resembles an old house or a medieval town, successively rebuilt.

> The practices observed stand in relation to practices explicitly governed by the principles that the analyst has to produce in order to account for them - if indeed this were possible and desirable in practice, where perfect coherence is never an advantage - as old houses, with their successive annexes and all the objects, partially discordant but fundamentally in harmony with them, that have accumulated in them in the course of time, to apartments designed from end to end in accordance with an aesthetic concept imposed all at once and from outside by an interior designer. The coherence without apparent intention and the unity without an immediately visible unifying principle [...] are the product of the age-old application of the same schemes of action and perception which, never having been constituted as explicit principles, can only produce an unwilled necessity, which is therefore necessarily imperfect but also a little miraculous, and very close in this respect to a work of art. (Bourdieu: *The Logic of Practice,* p. 13)

From the viewpoint of this "piecemeal" society, law and even habit appear as much more limited parts of social behavior than commonly imagined; they appear as subclasses of prescription, as particular ways in which normative activity may be formalized in order to make it prevalent. When prescriptive activity is formalized as law it expresses itself in a symbolic form which displays its normative character and which contributes to make the prescriptive activity prevalent by voicing it as a determinate and indispensable will, which establishes identity between the normative and the normal. Habits, by contrast, appear to be prescriptive social activities, which *haves become* second nature. It must be analyzed as behavior which was originally prescribed and prescriptive, but which is no longer experienced as such, and which may perhaps be changed if required. From the perspective of social relations based on reciprocal normation, law and habit no longer appear to be original or natural ways to regulate social behavior and create community; they are cultural and derivative links.

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