ENGAGING Vulnerability

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CAN A PERSON BE ILLEGAL?

Refugees, Migrants and Citizenship in Europe

Emanuele Profumi

Philosophy Facing The European Crisis Of Migrants

Alexander Stagnell, Louise Schou Therkildsen, Mats Rosengren [eds]

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When Does Violence Become A Rule Of Law?

The recent European migrant crisis is first of all a humanitarian crisis. The International Organization for Migration (IOM) estimates that more than one million migrants and refugees arrived by sea to Europe in 2015, sparking a crisis as countries struggled to cope with the influx, and creating divisions in the EU on the best way to deal with resettling people. In 2015, EU countries offered asylum to 292,540 refugees. In the same year, more than a million migrants applied for asylum – although applying for asylum can be a lengthy procedure since so many of those given a refugee status may have applied in previous years. Over 5,400 people are estimated to have lost their lives on migration routes around the world in 2015, and the Mediterranean alone witnessed a record number of at least 3,770 deaths in 2015 (with numbers rising in 2016).[1] The IOM estimates that over the last two decades, more than 60,000 migrants died trying to reach their destinations.[2]

In addition to the tragedy of loss of life, the majority of those who die are never identified. Their bodies may never be recovered, and even among those whose bodies that are found, most are buried with at best a number – not a name. Each unidentified migrant represents a missing person for a family. Left without certainty as to the fate of their loved one, families may search for years or a lifetime, never being fully able to grieve their loss. This is why the Mediterranean Missing Migrants Project states that "Underpinning the Treaty obligations is the European Convention for Human Rights, which includes a positive duty to prevent the loss of life, and a positive obligation to investigate suspicious deaths".[3] So, why was the EU not willing to take on this fundamental responsibility?

The humanitarian crisis points to another deeper crisis: the political crisis of the EU which, as an institution common to the

various member countries, was nevertheless unable to respect and concretely defend the basic human right of the refugees to reach the coasts of the Southern European countries where they were hoping to find protection. Moreover, the disputes within European countries regarding the assignment of refugees deepened the political problem, adding to the apathy in the face of the hecatomb of migrants on their journey towards Europe, an apathy that created a distance from the principle of the obligation of reception on which the refugees's rights are based. The European system of quotas seems indeed a bad compromise between people who want to reject migrants, mainly refugees, and the ones who want to accept them. The now widespread practice in Europe of rejecting migrants regarded as "irregular" seems to indicate that consideration for rights has been overridden by political needs that are mostly selfish and less than respectful of human rights. This double European crisis (both humanitarian and political) raises a general problem, and poses a basic question: how is it possible that International Law did not succeed in forcing the EU to act effectively and make the reception of refugees, and generally of migrants, easier so as to avoid the massive amount of deaths that still occur in the Mediterranean?

The question entails yet another, deeper question: why is the EU acting so cruelly towards the refugees and, above all, towards the migrants?

We can answer this question from many points of view, and also from a philosophical one, which will be adopted here. But if we assume such a point of view we have to put the matter on a more essential ground, as it were. The double European crisis proves that the political sphere is bending international law towards aims that seem to alter its very nature. Thus, the general question becomes to understand how the legal sphere can assimilate principles that are alien to it. As in other similar cases, in this circumstance the lack of respect for international law causes outright violence (death, forced repatriation in a state of utmost indigence, refusal of reception). Therefore, from a philosophical point of view, the question is set on an ontological ground: when does a legal rule become violent?[4] A contemporary political philosopher, Etienne Balibar, answered the question indirectly: he maintains that the political sphere maintains within itself "a system of cruelty" to which it has to relate continuously. This affects the juridical sphere too.[5]

If we want to answer this crucial question, Balibar also suggests that we have to understand how the relationship between the political and the juridical sphere develops. Is violence intrinsic to "the political" (as some important contemporary political philosophers such as Ernesto Laclau maintain)?[6] And, if so, do we consequently have to consider rule of law as a possible antidote to this kind of violence? Or have we to reconsider the relationship between the juridical sphere and "the political" before making it clear how a legal rule becomes violent?

To answer this dilemma, we need to refer to the considerable body of thought generated by contemporary philosophy of law on the matter and specifically to the work of one its most important representatives, Alain Supiot, for whom law in itself, and the juridical sphere in general, are antidotes to political and social violence.

This article will argue the following points:

1) Supiot's idea is probably a specific product of a certain conceptual genealogy that goes back to Kant;

2) Kant maintains that moral and legal rules can solve the problem of war (and, consequently, of social violence): he does not distinguish correctly between the political and the juridical sphere, this one absorbs characteristics of politics and this is the reason why

he affirms the respect of law itself can solve the war problem.

3) Among Contemporary neo-Kantian philosophers of law, only Norberto Bobbio tries to reintroduce the distinction and the proper relationship between the juridical sphere and the political one, but without proposing a convincing explanation. Norberto Bobbio's explanation does not hold if we consider the political side of the juridical sphere.

4) Only if we relinquish Kant's point of view, are we actually able to make clear that the dilemma we have just expressed is apparent, finding a new point of view that is capable of answering the deep philosophical question deriving from the recent European refugee crisis.

The function of Law in Alain Supiot's work.

In his re-elaboration of some of the ideas of the Greek-French political philosopher and psychoanalyst Cornelius Castoriadis,[7] Alain Supiot formulates two critical theses that are of great importance for the critics of contemporary society (often known as the era of "neoliberal globalization"): 1) The anthropological function of the Law represents the basis for the domain of "the Political"; 2) The law is our way of *sublimating* social violence and avoiding civil war or the dissolution of society.

In his most recent works,[8] Supiot decries the establishment of a new kind of global regime, called "Total Market", which has organized most societies of the world around the imperative of the maximization of utility, replacing the principle of "pacta sunt servanda" which had been the basis for the old juridical system.

According to Supiot the new regime is the expression of our era since it is common to capitalist and to communist societies: the "Chicago School" as well as "Scientific Socialism" share the idea that Law is only a tool to achieve the "real economic order of society".

Through data processing and the digital revolution, and also the cybernetic imaginary that contributes to their realization, one can find everywhere "The Market Paradigm", the decline of "The Kingdom of Law" and the establishment of a new concept of work, which is entirely oriented by the logic of the calculating interests (either individual or collective) and dependent on the implicit rules of planning (implying the total submission of the worker to hierarchical orders and to quantitative reasoning).

Supiot also argues that the Market Paradigm is imposing itself as a new global "Grundnorme" and that the calculation of utility is now considered as the foundation of the legitimacy of the law as such. The new Totalitarianism and its "Ideology of the absence of limits" are suppressing the anthropological aspect of Law, that is human obligation as such, which is the basis for the law.[9]

In other words, we are living in a society that is conscious of the double elimination of the law as such:

1) on the level of the juridical form, since society is subjected to both an external logic and an external goal with respect to the juridical form itself;

2) on the level of the foundation of Law, through the achievement of "the Governance by numbers".

> Contrasting a right depends on the calculation of utility, which is external to the legal order and is imposing onto it. The guarantees of Law will vanish whenever they are contradicted by this calculation (…). The governance by numbers goes further when dismissing the kingdom of law. In the same way as planning approaches, it replaces the law with calculus, as the foundation of the legitimacy of the law.

> The latter manages from inside, like a biological norm or a computer software through a simple game of calculating the individual utility.[10]

This is the reason why Supiot thinks that the double function of the Law, necessary for every society in order to be preserved, must be recovered in view of two specific considerations:

1) the logic of prohibition within juridical normativity, that is, the only form of human normativity which imposes the obligation as such by virtue of the dogmatic nature of the Law; according to Supiot, this characteristic of the norm and of the Law would allow us "to fix our constitutive beliefs";

2) the place of "Justice" as constituting the ultimate reference of the Law and its privileged space is the result of the juridical function that allows us to share the same "ought-to-be" in order to arrive at a common representation, that is at a common sense, necessary for individual and collective action.[11]

Because of that, juridical normativity lends reason and legitimacy to collective power: the reason generated by Law allows our beliefs to establish the legitimacy of the power which governs us. Without this legitimacy of the power generated by law each kind of power would turn into violence and war: the law does not only provide reasons for the distinct forms of political power, but it also generates a powerful antidote to civil war, by permitting the sharing of the same "ought to be" within a specific community.

The Law provides the opportunity to internalize the social prohibition by retracing political power to an origin which legitimises and limits itself at the same time. This is why the Law comes to internalize violence.[12]

The Italian legal scholar Stefano Rodotà recently stated the same thing, but from a historical point of view: though the juridical domain was born as a result of "the Political", nowadays fundamental rights are the new source able to recreate the Political domain.[13] Rodotà maintains the thesis of a new subordination of the political to the juridical, whereas Supiot does not make reference to the domain of "the Political", which instead disappears from his perspective. Consequently, could one argue, without any other justification, that the function of the Law constitutes the domain of "the Political"?

Kant: "Politics" within the juridical domain.

When referring to the history of Philosophy of Law Supiot's position is close to that of Immanuel Kant and several contemporary neo-Kantian philosophers of law which are dominating the philosophical landscape.[14] Indeed, what had been considered by Kant as constitutive of the "transcendental dimension" of the Law, represents, in Supiot's thought, its anthropological consistence. Before Supiot, Kant had asserted the autonomy of the juridical domain in relation to the political domain; therefore, one could say that his negation of the domain of "the Political" has its main root in Kant's approach to the autonomy of the juridical sphere.

Kant's position directly influences that of Hans Kelsen, who in turn, determines Norberto Bobbio's vision of the Law. Consequently, we should consider Bobbio as the first legal scholar who tries to review, from a neo-Kantian perspective, the influence of politics on a legal sphere.

As I am going to explain later, Bobbio's position is not sufficient to provide a credible answer to the main question of this article.

For this reason, it will be necessary to look for the answer outside the neo-Kantian tradition.

Towards the end of his life, after producing the "*Critique of Practical*

Reason", Kant wrote "*Metaphysics of Morals*" in order to explain the basic principles of the concept of "Law", to reflect on a "science of duties" and to help "anthropology" understand the phenomena of the Law (of the rights and of the moral). After developing his "Critiques" he feels obliged to clarify the role of Reason in the forming of the human being's duties and rules, that is, a first step to clarify the chances for a *perpetual peace* and the supremacy of the Law over politics.[15] According to Kant, "Practical Reason" inevitably imposes on us the rules and the duties we have towards others, through a moral obligation which takes the forms of imperatives and maxims – natural rules of mankind. The Law, i.e. the power to oblige others, is "the formal condition of external freedom", that is, the realization of duty on the level of an interpersonal relationship, and its idea derives from the moral imperative.[16] Within that framework – but also under the influence of Rousseau's thought – he argues that "Political Constitution" is the result of an absolute imperative of Practical Reason. Consequently, the popular will, expressed by the collective will of all, when there is harmony between all people and each person's decisions, must be submitted to the sovereign will, that is, to a Superior Legal Power. This "a priori principle" is the result of Practical Reason itself, which generally relates it to the State Constitution. And yet, Reason leads Kant to affirm that the only permanent Constitution is the Constitution in which the Law is sovereign, that is, it is not subordinate to a particular person. That also leads Kant to claim that, when there is a revolution, even if an illegal act is produced, the act itself must impose on citizens the obligation of respecting the new legal order it institutes.[17]

Therefore, well before Supiot, Kant wrote that, at the roots of political power, we can find the source of superior legitimation, which is the obligation of duty as such (the same which is at the basis of law). For the same reason, he is convinced that if the people use force against the Constitution, whose role is to regulate the relationship between the sovereign and his people, force will take the place of the superior Legislation and, as a consequence, the people's superior will itself be destroyed. The destruction of Legal Constitution, that is people's Resistance, does not only demand a new "Social Contract", but imposes violence, above all, as a superior principle of every law.[18] For that reason, Kant also believes – as Supiot does later – that even the possibility of a State based on the rule of law maintaining the concept of law as such opposes the principle of force, which eliminates the value of the concept of law: this situation occurs when the Law gives itself up to force by legitimate means. In other words, Kant argues that violence and the tendency to self-destruction oppose duty as such. In fact, according to him, a true State of peace – the union of different States thanks to cosmopolitan law – is founded upon duty and stands on the rational idea of an everlasting and peaceful community to be considered as a real juridical principle (and the ultimate goal of every juridical doctrine).

> The morally practically reason utters within us its irrevocable veto: there shall be no war. So there ought to be no war, neither between me and you in the condition of Nature, nor between us as members of States which, although internally in a condition of law, are still externally in their relation to each other in a condition of lawlessness; for this is not the way by which any one should prosecute his Right.[19]

Nevertheless, differently from Supiot, in Kant the two ideas are clearly grounded on some aspects that one can easily find in what is called "political creation".[20] They come from various forms of historical collective creations and not from the transcendental

dimension of the moral duty and law: the modern concept of universality, affirmed by the French Revolution and the ancient concept of autonomy related to Greek creation are historical products of new revolutionary political practice in human history. For instance, according to Kant, Public Right, the Constitution, as well as maxims and moral imperatives are, or ought to be, the expression of a universal legislation.[21] The people's will, together with moral sense and cosmopolitan Right, integrate the universal aspect of duty.

In order to understand what the two political aspects which are within the law consist of in Kant's theory, we need to take into account the internal characteristics of the law according to him.

In Kant's opinion, Will is the basis of Law and, at the same time, it is by virtue of the source of the law that we consider duty and obligation as moral imperatives. For that reason, freedom takes the form of an internal obligation that we cannot avoid, and the law, as such, takes the form of an obligation exercised with regard to freedom. Thus, the latter is a sovereign decision of Reason, which makes the freedom visible in our actions through what Kant calls categorical imperative, that is obligation as such.[22] Our conscience, as a primary, intellectual and moral disposition of Reason, judges all our free actions and impose on us this kind of judgement in a universal way. However, Kant specifies that, in order to realize what the law imposes on us through an absolute form, it is necessary to make ourselves free from the natural impulses that could prevent the realization of duty. Hence, the Right is the result of an a priori condition of the Law and represents the mutual and general obligation which is connected to every person's freedom according to the principle of universal freedom. That means that liberty, in general terms, is not a simple 'product' of duty, but that it can coexist only if it is in relation to everybody's freedom by virtue of a universal law.[23]

As a matter of fact, and above all, in Kant's philosophy Reason is the faculty for determining the will thanks to the pure idea of adapting maxims to the universality of a "practical law"; for that reason, the categorical imperative imposes respect of the maxim that could take the form of a universal law. That means, in particular, that the supreme principle of moral doctrine and the supreme principle of the doctrine of virtue oblige us to follow a maxim which has the value of a universal law. According to Kant, the maxim which plays the role of universal legislation is the formal principle of human actions submitted to the formal principle of duty. In other words, the concept of duty is tied to the expression of a universal law which steers Right and Justice.[24]

On the other hand, the ideas of "person" and " natural laws" could not be well understood without taking into account human autonomy as the expression of general, collective and individual will: the person and the common will cannot be submitted to any laws which are not made in an autonomous manner.[25] Kant actually goes even further in affirming that the common creation of society is tied, through equality, to what can be regarded as social autonomy: a society cannot be considered as such if there is a relation of subordination between governor and governed, that is when there is no egalitarian coordination between all components, and no respect for common laws.[26] Moreover, not only the dimension of human autonomy, but also and at the same time, the reference to universality, can be found in the Kantian concept of person, since personality is the expression of the humanity we all carry within ourselves, independently of every physical determination.[27] Furthermore, crimes against nature are crimes against the humanity we all have within us and in relation to which we have a clear moral and juridical responsibility.[28] Finally, according to Kant, humanity

corresponds to human dignity and our duty is to recognize it within every individual by virtue of the famous moral imperative which obliges us to consider the other individuals as ends in themselves and not as a means by which to realize other ends.[29] Regarding juridical relations too, Kant claims that the person has to be considered exclusively from the point of view of humanity.

Thus, it should be clear by now why Kant considers universality and autonomy as part of Law and Duty and not as a product of the heritage of the creation of politics in our history. These characteristics are crucial to understand how the respect of law and duty can protect us from social violence and war.

The political roots of the Law

The Kantian perspective on the Right and its nature opposing war and violence found its first coherent reformulation by the philosopher of law Hans Kelsen in his "Pure doctrine of the Law". His idea of *Grundnorme* is a concept that not only is useful for criticizing the rightwing legal theorist Carl Schmitt's position but, above all, for re-elaborating the idea that the Law is the basis of political power; at the same time, the idea that the legal system's goal is to organize force, refers directly to the Kantian conviction that the law maintains "another" nature in relation to violence.[30]

On the basis of this position, Norberto Bobbio derives, later, the two central ideas mentioned above (universality and autonomy), but, unlike Kelsen and Kant, he worries about justifying the relationship between the juridical and the political sphere.

He is still convinced of the supremacy of the law over politics and of the "non-violent" nature of the Law. However, he agrees to consider that the *Grundnorme* has no autonomous basis with regard to the constituting power, which founds a new juridical system. He claims that, on the contrary, this fundamental norm is to obey the primary power, that is, the whole body of political forces that express this power. This norm allows the founding power to provide laws, that is, to admit that the new constitution can create good norms and oblige everybody to accept them and, finally, to recognize the "constituting power" itself.[31]

> The fundamental norm that imposes on the holders of primary power to obey is that which legalizes primary power to the use of force, (...) the fundamental norm conceived as such is really at the core of juridical system.[32]

It could be said that Bobbio establishes a sort of conceptual circle between "sovereign power" and the "fundamental norm" which is the basis of juridical system, where the first cannot exist without the second, which is, in turn, at the service of the first.[33] Moreover, Bobbio not only admits that political power needs some force, but also that the same thing can be said about juridical power. Even if force is essential to exercise power, it neither constitutes its basics nor can it justify this power.

According to the Italian philosopher, the relation between Right and force is complex. Law uses force to be respected and it is fundamental to political order when this one wants to legitimize the use of force to justify its actions. Force is necessary to allow the new political order to be effective for the future too.

This is the typical case of a Revolution, when an illegal act destroys the existing juridical system and affirms itself as the legitimacy of a new juridical organization.[34] Therefore, according to Bobbio, the main problem is neither to incorporate political principles into the

specific nature of the Law, as Kant does, nor to maintain the ontological separation between the "juridical" and the "political", as Kelsen suggests, but it is to understand the correct relation between politics and law is.

In this framework, he thinks that violence is a kind of force produced when there is an inversion of the constitutive relation of juridical law, that is, the dynamics between right and duty: violence is not the result of the elimination of the juridical relation, but it is the perversion of the manner in which law and duty protect everybody's freedom. The duty to be respectful of the other's freedom is abandoned for the right to not respect it, and the duty to accept that the other impedes us to choose takes the place of the right to choose our own freedom. Thus, once more, violence is unconnected with the true nature of juridical law.[35]

Can we accept this conclusion? Evidently we can't. Bobbio's problem is that his interpretation is in relation to the idea that the Right keeps its supremacy over political sphere and that juridical dimension maintains its ontological autonomy, as also Kant claims.

If we take into account the political nature of the law, and how Law depends on the sphere of political power, we have to reconsider the relation between "the juridical" and "the political" from a perspective which would be different from the Kantian tradition dominating contemporary philosophy of Law (as we have seen in Supiot's position).

Notably, it is not only normative acts that are the main sources of juridical system. There are also many situations where it is the judge who ought to create legal rules through a decision which should produce a new Right, that is, where the Law acquires a clear political function.[36] Obviously, the major activity of the political function is interpretation, which is the basis for the application of a legal norm. The most evident case of this producing activity is when in a judgement the judge recognizes the norm in question by the same standards as a "principle" and puts it into a hierarchical position determining the final result. Implicit principles can be drawn from single norms, or from a group of norms, or from the whole of the juridical system, but in all these cases the jurisprudential creation of the Law cannot be disguised, as it cannot be disguised in the case when Constitutional Courts decide about constitutional dispositions (where new norms are introduced) and when it is necessary to fill juridical gaps or to resolve some antinomy of the law. A juridical norm is usually a result of interpretative activity, since the signification of a norm is an independent variable with respect to the judge's interpretation, and its language is intrinsically undetermined (vague and ambiguous).[37]

If the political sphere is the main source of the Law, as well as the fundamental paradigm of its functioning, then we have to claim, without any doubt and before outlining its autonomy, that the sphere of "the juridical" depends upon that of "the political". Therefore, on the basis of this dependence, we need to put the question again about the separation between violence/war and the juridical dimension.

Politics and violence

Understanding exactly what the subordination of the law and the legal sphere to the political consists in allows us to verify whether the non-violent aspect attributed by Kant, Kelsen, Bobbio and Supiot is linked to the autonomy of the law, or whether it is the result of the correlation with the political sphere. We can elaborate a first different response from the Kantian tradition and ask decisive

questions to advance the understanding of the problem, by making reference to Supiot main anthropological source, that is, to Castoriadis's philosophical reflections.

For Castoriadis, the *Grundnorme*, as such, does not exist because, if we are to think of an act that is at the basis of a new organization of society, we should think of an instituting movement and the creation of a political body, namely, a form of self-definition and self-legitimization of the collective power. The law finds its legitimacy thanks to the creation of politics, and not the reverse. One could therefore say, following Castoriadis, that the subordination of the law to the instituting act constitutes, in itself, its legitimization.

If we also share Castoriadis' distinction between an instituting act which creates "politics" as a form of democratization of the sphere of "the political", and an instituting act that does not,[38] it could be added that there is a specific kind of political legitimization of the law and the juridical sphere based on characteristics and presuppositions of "politics" (autonomy and active solidarity). Thanks to Castoriadis we can affirm that the law can have a double political source: "politics" and "the political".

Considering this distinction, it is important to return to the philosophical problem I addressed at the beginning: in which sense can we argue about the autonomy of the "juridical sphere"? Castoriadis does not provide an answer. However, he refers to an essential dimension of the law itself: the "all of the norm"[39] – as if there were a supposed internal character of the law as such, attested by the universal reference to everyone (to society).

The norm says "all," implying something that transcends the "individual". (…). That anonymous, indefinite "all" is neither a specific individual nor a concrete collection of specific individuals, but rather, the "abstract" possibility of continuing social life as such.[40]

Moreover, does he really refer to a particular legal norm – or to any kind of norm at all?

According to what can be inferred from juridical norms it is necessary to distinguish between norms that have universal pretensions, commonly considered as moral, and norms that express the characteristics of "generality" and "abstraction" without necessarily being universal.[41] Only the first kind of norms respect the characteristic of the norm indicated by Castoriadis. It may therefore be surmised that this aspect of the legal norm is related to how the "sphere of politics" relates to it. That is to say, one could argue the hypothesis of a "political morality" as expressed by this concept ("all of the norm") and, more generally, assume that the political sphere relates to the juridical one owing to a moral pretension (the obligation to universality). One might also add that the concept of "all of the norm" is really accomplished only when it is the product of the relation of the sphere of "politics", as the only dimension of "the political" which is supported by the participation in the "power of all",[42] with the creation of the explicit social norm (the political law). This is simply because, in the case of "the political", there is no real obligation to extend to everyone the power to create the norm, nor to respect its collective source, as in the case of "politics".

On the basis of the latter consideration, we must return to our main question: when does a legal norm become violent?

In general, if the law is not violent or non-violent, in itself, then it is necessary to ask whether its violence is the product of an imposition of the morality diffused by "the political" or whether this violence happens *a posteriori*, when the impact or consequences of the law in relation to specific circumstances can be established.

If one rejects, as I have just done, the idea that the law through its autonomy is the expression of an "essence" other than that of

violence, then we must seek an answer in the relation between the moral pretension that is imposed on the sphere of the political and the legal dimension that absorbs it. We should ask ourselves: does the same dynamic occur in the case of the correlation between "politics" and the "juridical and legal spheres"?

First of all, one could answer that in the case of the relationship between "politics" and the law, which is the most interesting for us, there is a first form of internal violence of the law that must be detected, that is the violation of the legitimacy of the "power of all". For this reason, one should ask, finally, whether the violence expressed in general by the law is the result of this violation and, at the same time if its "non-violent dimension" is not, in reality, the expression of respect for the principle of "all of the norm".

The next question becomes inescapable: does the law become non-violent when it assumes the principle of "all of the norm"?

If the answer is yes, then we can better understand why Kant, when attributing to the law characteristics of "politics", also considers that it opposes the violence of war. At the same time, we can understand why the European refugee crisis is the consequence of a loss of the principle of the "all of the norm" in the political sphere, and we can explain it without referring to the Kantian tradition which wrongly considers law in itself as an antidote to violence.

Finally, this different philosophical tradition helps us to better understand this crisis because we can find a possible solution to it only if we consider the deep political roots on which it is based. It is not sufficient to claim human rights or the respect of law in itself: on the contrary, we have to consider in which way the EU as an institution loses the political principle that can protect these rights. So, if we want to have some possibilities to solve this crisis it would be necessary to answer the following question: how have EU institutions eliminated the principle of "all of the norm" in the political sphere?

Bibliography

Balibar, Etienne. 2010. *Violence et civilité. Wellek Library Lectures et autres essais de philosophie politique*. Paris: Ed. Galilée.

Bobbio, Norberto. 1993. *Teoria generale del diritto.* Torino: Giappichelli editore.

Bobbio, Norberto. 2012. *Studi per una teoria generale del diritto*. Torino: Giappichelli editore.

Capitini, Aldo. 1989. *Il potere di tutti*. Firenze: Guerra Edizioni.

Castoriadis, Cornelius. 1975. *L'institution imaginaire de la société.* Paris: Editions du Seuil.

Castoriadis, Cornelius. 1990. *Le Monde morcelé. Les carrefours du labyrinthe III.* Paris: Editions du Seuil.

Castoriadis, Cornelius. 1996. *La Montée de l'insignifiance. Les carrefours du labyrinthe IV.* Paris: Editions du Seuil.

Castoriadis, Cornelius. 1997. *Fait et à faire. Les carrefours du labyrinthe V.* Paris: Editions du Seuil.

Castoriadis, Cornelius. 1999. *Figures du pensable. Les carrefours du labyrinthe VI*. Paris: Editions du Seuil.

Castoriadis, Cornelius. 2009. *Histoire et création. Textes philosophiques inédits (1945–1967).* Paris: Editions du Seuil.

Castoriadis, Cornelius. 2011. *Thucydide, la force et le droit. Ce qui fait la Grèce, 3*. Paris: Editions du Seuil.

Council of Europe. 1950. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950. Strasbourg: CdE.

Grijalva, Augustin. 2015. *Nuevo constitucionalismo, democracia e independencia judicial*, in "Calamo. Revista de estudios juridicos", n.3, Julio 2015, pp. 27–37, Quito: Universidad de las Americas.

Guastini, Riccardo. 1993. *Le fonti del diritto e l'interpretazione*. Milano: Giuffrè.

IOM. 2016. *Fatal Journeys Volume 2. Identification and Tracing of Dead and Missing Migrants*. Geneva: IOM's Global Migration Data Analysis Centre.

Kant, Immanuel. 1970. *La metafisica dei costumi*. Bari: Editori Laterza.

Kant, Immanuel. 1998. *Sobre la paz perpetua*. Madrid: Ed. Tecnos.

Kelsen, Hans. 2000. *Lineamenti di dottrina pura del diritto*. Torino: Einaudi.

Ernesto Laclau, 2000. *Nuevas reflexiones sobre la revolución de nuestro tiempo*. Buenos aires: Nueva visión.

Ernesto Laclau. 2008. *La ragione populista*. Bari-Roma: Ed. Laterza.

Ernesto Laclau e Chantal Mouffe. 2001. *Egemonia e strategia socialista. Verso una politica democratica radicale*. Genova: Il Melangolo.

Mediterranean Missing Report. 2016. *Missing Migrants in the Mediterranean: Addressing the Humanitarian Crisis*. Geneva: IOM's Global Migration Data Analysis Centre.

Portinaro, P.P. 1999. *Il realismo politico*. Roma: Laterza. Profumi, Emanuele. 2013. *Sulla creazione politica. Critica filosofica e rivoluzione*. Roma: Editori Riuniti internazionali.

Rodotà, Stefano. 2012. *Il diritto di avere diritti*. Roma-Bari: E. Laterza.

Supiot, Alain. 2005. *Homo juridicus. Essai sur la fonction anthropologique du Droit*. Paris: Editions du Seuil.

Supiot, Alain. 2015. *La Gouvernance par le nombres*. Paris: Fayard.

Waltz, K.N. 2000. *Structural Realism after the Cold War*, in "International Security", Vol. 25, No. 1, pp. 5–41;

Endnotes

1 See also http://www.mediterraneanmissing.eu/wp-content/uploads/2015/10/Mediterranean-Missing-Legal-Memo-290816.pdf; and also, Council of Europe. 1950. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950. Strasbourg: CdE.

2 IOM. 2016. *Fatal Journeys Volume 2. Identification and Tracing of Dead and Missing Migrants*. Geneva: IOM's Global Migration Data Analysis Centre. https://publications.iom.int/system/files/fataljourneys_vol2.pdf.

3 Mediterranean Missing Report. 2016. *Missing Migrants in the Mediterranean: Addressing the Humanitarian Crisis*. Geneva: IOM's Global Migration Data Analysis Centre. p. 3. http://www.mediterraneanmissing.eu/wp-content/uploads/2015/10/Mediterranean-Missing-Summary-report-290816.pdf.

4 As one can see in reading this article, I do not agree with the Hobbesian motto "Bellum omnium contra omnes", which is very common to international studies and realist theories within this field of research. For the understanding of this kind of contemporary Realism, read for example: Waltz K.N. (2000), *Structural Realism after the Cold War*, in "International Security", Vol. 25, No. 1, pp. 5–41; Portinaro P.P. (1999), *Il realismo politico*, Roma, Laterza.

5 Balibar 2010, pp. 17–38. Balibar maintains that the political sphere is based on a peculiarity that destroys it, namely that it rises through the comparison with its "impossibility", that is violence. When he refers to Spinoza, Balibar thinks that on an anthropological level we have to consider "a remainder of violence impossible to eradicate". He calls it "utmost violence" and in the political sphere it would become a "system of cruelty". Lenin's revolutionary counter-violence, Gandhi's non-violence as well as Hegel's thesis adopted by Marx about the conversion of violence into civilization and historical rationality, would not enable us to understand and overcome the problem of a "residual violence external to politics" but nevertheless still intrinsic to the political sphere. Therefore, the only effective way of a political emancipation from violence is what Balibar calls "civilization" or "anti-violence", that is, the everlasting struggle of politics against the exceeding violence that is part of it. According to Balibar this is the only attempt that can prevent the residual violence from influencing the making of law in social institutions.

6 According to Ernesto Laclau the principle of "exclusion of the

other", as an assertion of my identity, is inside the setting of opponent borders during the hegemonic social practice that establishes another society and another political sphere (Laclau and Mouffe 2000, Laclau 2001 and 2008).

7 Supiot elaborates several of Castoriadis's ideas: the ideology of non-limitation and the power of "technoscience" in contemporary society, permeated by the deep self-alienation resulting from the working system; the centrality of the conceptual opposition "autonomy-heteronomy" in order to understand social change and to think about a form of human emancipation ; the importance of the internalization of institutions and of the organization of social rules, thanks to the "social imaginary" conceived as a system of beliefs. The anthropological basis of his thought and the idea of "metaphysical being", treated in *Homo juridicus,* are connected to the fundamental exploitation of the concepts of "Imaginary" and "Institution", which are at the core of Castoriadis's perspective: they are fundamental to Supiot, who uses them in order to claim that reason and justice- as anthropological functions- are two institutions that allow our existence to make sense and to clarify everybody's place in society.

8 Supiot 2005; Supiot 2015

9 Supiot has already dealt with some of these topics in *Homo juridicus* (firstly in the *Prologue* and at pages 167–171; 221–227; 300) but he has developed them mostly in chapters 6-7-8 of the first part of the *Gouvernance par les nombres* and in chapter 10 and 13 of the text).

10 Supiot 2015, cap 6, pp. 9; 20. The numbering refers to the e-book text. The translation is mine.

11 Supiot 2005, pp. 8–10; 17; 21; 24–5 and Supiot 2015, chap 11, p. 8.

12 Supiot 2005, pp. 23–5; 31; 223–4; 300.

13 Rodotà 2012, pp. 7; 11; 60; 66; 104; 207; 352; 356; 375; 389; 413; 416; 424–5.

14 The reference alludes particularly to Hans Kelsen, Norberto Bobbio, Carlos Nino, Ronald Dworkin.

15 Kant 1998, pp. 50–1; 57–60; 68.

16 Kant 1970, pp. 14–5; 19/22–5; 34; 227; 234; 239.

17 Kant 1970, pp. 153; 176–7, 217

18 Kant 1970, pp. 134–5; 143; 149–53; 174–5; 184; 187; 191; 216–7; 227–8; 241; 252; 304. In "Perpetual Peace" Kant refines and articulates this idea, being convinced that a Revolution, able to institute a legal permanent Constitution, is possible.

19 Translated by William Hastie. Kant, Immanuel. 1797. *The Metaphysics of Morals* – Part II- Public Right- Conclusion- 229: http://oll.libertyfund.org/titles/kant-the-philosophy-of-law. Also Kant 1970, pp. 193–4.

20 See Profumi 2013.

21 Kant 1970, pp. 36–7; 44; 139–143.

22 Kant 1970, pp. 10–11; 17-20; 22–5; 28–30.

23 Kant, 1970, p. 44

24 For example, Kant maintains that "*the formal Principle of the possibility of actually participating in such Right* (juridical state r.n.)*, viewed in accordance with the Idea of a universally legislative Will, is Public Justice.*" (Kant 1970, 132). Translated by William Hastie. Kant, Immanuel. 1797. *The Metaphysics of Morals* -Part I- Chapter III-Private Right- 155–57: http://oll.libertyfund.org/titles/kant-the-philosophy-of-law

25 See Kant 1970, pp. 26; 143-4; 150; 157; 160. Kant affirms explicitly that: "*whatever sort of positive laws the citizens might vote for, these laws must still not be contrary to the natural laws of freedom and of the equality of everyone in the people corresponding to this freedom, namely that anyone can work their way up from this passive condition to an active one.*" (Kant 1970, 144).

26 Kant 1970, p. 133

27 For this reason, Kant can say that the law which is within human beings imposes on them self-respect, and he can also affirm that the feeling of respect constitutes the basis for some duties.

28 Kant 1970, pp. 86; 311; 333–4.

29 In fact, he says that in his juridical relations with the others he considers all persons from the point of view of the humanity they have within themselves and that every person is an end for themselves and for the others. According to him, it is necessary for mankind to consider every human being in general as an end: that is their duty (Kant 1970, 118/247). That is why Kant thinks that philanthropy – love for humanity

– is a duty bearing on the practical maxim of benevolence: we must love all others because we must respect the principle of universal legislation according to which we live (Kant 1970, 316–7/318–20/369–70).

30 Kelsen 2000, p. 95–116.

31 See Bobbio 1993, p. 184; 189–199.

32 Bobbio 1993, p. 196–7. The translation to English is mine.

33 Bobbio 2012, p. 71–4.

34 See Bobbio 1993, pp. 195–9; 286–7 and Bobbio 2012, pp. 101–118.

35 Bobbio 1993, p. 250–1.

36 This is a huge and interesting contemporary debate in the field of Philosophy of Law. Many authors share the idea that juridical sphere has a political nature. See for example Augustin Grijalva, Nuevo constitucionalismo, democracia e independencia judicial, "Calamo. Revista de estudios juridicos", n.3, Julio 2015, pp. 27–37.

37 Guastini 1993, pp. 1–89; 101; 122; 236; 293–8; 302–3; 308; 311; 317–8; 323–58; 368; 377; 400; 420–4; 429–40; 452–5.

38 See Castoriadis 1990, pp. 134/139 and Castoriadis 1996, p. 16 and Castoriadis 1997, p. 72)

39 See Castoriadis 1975 pp. 367; 381; 395; 536–7 and Castoriadis 1999 pp. 119; 165 and Castoriadis 2009 p. 203 and Castoriadis 2011, pp. 95–6; 100.

40 Castoriadis 1999, p. 165. English translation by the Board of Trustees of the Leland Stanford Junior University; Castoriadis, Cornelius. 2007. *Figures of thinkable*. California: Stanford University press, p. 163.

41 Kant provides this distinction in his meditation on the Perpetual Peace. Kant, Immanuel. 1998. *Sobre la paz perpetua*. Madrid: Ed. Tecnos, pp. 12–3.

42 Capitini 1989.